

Burns v Fleetwood, Lenahan & McMullan, LLC

2011 NY Slip Op 30638(U)

March 14, 2011

Sup Ct, NY County

Docket Number: 602249/2008

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla

PART 19

Index Number : 602249/2008
BURNS, ROBERT
vs.
FLEETWOOD LENAHAN & MCMULLAN
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

FILED

MAR 17 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/14/11

Saliann Scarpulla
SALIANN SCARPULLA ^{S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
ROBERT BURNS AND JANICE BURNS,

Plaintiffs,
-against-

Index No.: 602249/2008
Submission Date: 12/15/10

FLEETWOOD, LENAHAN & MCMULLAN, LLC,

DECISION AND ORDER

Defendant.

-----X

For Plaintiffs:
Hartman & Craven LLP
488 Madison Avenue
New York, NY 10002

For Defendant:
Margolin & Pierce, LLP
111 West 57th Street
New York, NY 10019

FILED

MAR 17 2011

NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion for summary judgment and sanctions:

Notice of Motion 1
Affs in Opp 2,3,4,5,6
Reply 7

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for breach of contract and unjust enrichment, defendant Fleetwood, Lenahan & McMullan, LLC ("FLM") moves for summary judgment dismissing the complaint and for sanctions.

On February 9, 2007, plaintiffs Robert Burns and Janice Burns ("the Burnses") entered into a contract with FLM whereby FLM was to provide architectural services to the Burnses to build a house in Southampton ("AIA Agreement"). Pursuant to the AIA Agreement, FLM would collect 15% of the total construction cost of the house as its fee. The project was divided into several phases: the Schematic Design Phase, the Design Development Phase, the Construction Documents Phase, the Bidding or Negotiation Phase

and the Construction Phase. The Burnses also retained BAMO to design the interior architecture of the house.

In or about February 2008, the Burnses hired a project manager Joe Tuana. After his review of the project, the Burnses discovered that the construction cost of the house would be substantially higher than FLM originally estimated. Accordingly, the Burnses terminated the AIA Agreement. On February 27, 2008, FLM sent a final bill to the Burnses in the amount of \$438,875.25. The final bill indicated that 100% of the Schematic Design Phase was complete, that 100% of the Design Development Phase was complete, and that 40% of the Construction Documents Phase was complete.

In or about August 2008, the Burnses commenced this action seeking to recover damages for breach of contract and unjust enrichment. According to the allegations of the complaint, (1) FLM gave the Burnses an inaccurate estimated construction cost; and (2) FLM missed deadlines and provided work so substandard that the Burnses had to pay BAMO to redo FLM's work. The Burnses sought to recover \$190,000 already paid to FLM for its services, \$40,000 given to FLM for payment to the Town of Southampton for a building permit which was allegedly returned to FLM but never returned to the Burnses, and \$150,000 paid to BAMO to perform work which was FLM's obligation to perform.

FLM answered the complaint and interposed a counterclaim seeking to recover \$438,875.25 in unpaid bills.

FLM now moves for summary judgment dismissing the complaint and for sanctions. FLM argues that in February 2008, when the Burnses put the project on hold and terminated the AIA Agreement, certain services had been performed which had not yet been paid for. FLM refers to Section 8.6 of the AIA Agreement, which provides that “in the event of termination not the fault of the Architect, the Architect shall be compensated for services performed prior to its termination, together with reimbursable expenses.” FLM principal Jim McMullan (“McMullan”) submits an affidavit setting forth the work performed during certain phases of the project, and indicating that the final bill that FLM sent to the Burnses itemizing the work completed and calculating the amounts still due at \$438,875.25 was accurate.¹

With regard to the allegation that FLM performed substandard work and missed deadlines, FLM refers to Robert Burns’ examination before trial testimony that FLM did not perform poorly, that FLM’s drawings were not unsatisfactory, and that estimate was not inaccurate, rather, the original estimate given in 2007 was for a simpler house. FLM maintains that according to Robert Burns’ testimony, the project was put on hold not because of any delays or the quality of the work, rather, it was put on hold because the Burnses realized that the project was too expensive for them to pursue.

FLM further argues that the unjust enrichment cause of action must be dismissed because it arises solely from and in connection to the contract.

¹ FLM has since lowered its final bill amount to \$398,375.25, which credits the Burnses for the return of the \$40,000 building permit fee paid to the Town of Southampton.

Finally, FLM maintains that based on Robert Burns' testimony, he did not even know that he was a plaintiff in this action and therefore, the allegations in the complaint are baseless and fabricated. Therefore, sanctions should be imposed.

In opposition, the Burnses' counsel submits an affirmation arguing that the motion for sanctions must be denied because the lawsuit was commenced in good faith and was not frivolous. Counsel maintains that he spent nearly two months consulting with Janice Burns and gathering information from non-parties before the complaint was drafted.

The Burnses next argue that issues of fact exist as to whether (1) FLM fulfilled its obligations under the AIA Agreement; (2) the FLM final bill was proper under the AIA Agreement; (3) the final bill properly reflected the work performed by FLM; and (4) the work performed by FLM was substandard and needed to be routinely corrected by BAMO, thus resulting in excess costs.

Janice Burns submits an affidavit indicating that she executed the AIA Agreement and was involved with the filing of the complaint in this action, and her husband was not. She explained that the Southampton house was to be designed by FLM and BAMO in concert, FLM responsible for the exterior architectural design and BAMO responsible for the interior architectural design. As the project went forward and FLM failed to produce architectural floor plans and an exterior design to her specifications, BAMO became increasingly involved with the floor plans and exterior design. She explained that the directions and specifications given to FLM by her, her husband or BAMO were often

ignored, work was not being completed on time and drawings created by FLM were undated and/or confusing. FLM's work, therefore, frequently needed to be redone either by BAMO or by FLM under the direction of BAMO, and the costs associated with that work increased.

She further explained that FLM failed to keep her informed of changes to the construction costs as the design progressed, despite repeated requests from her or her husband. It was not until February 2008, that they were notified that the construction cost estimate would be \$8 million. Prior to that time, the only written construction cost estimate received was a \$4 million dollar estimate that appeared on a November 15, 2007 building permit application submitted by FLM to the village of Southampton. She maintains that because of the increase in the cost of construction, she and her husband terminated the project. She further explains that many of the services that FLM was responsible for performing were never completed and others were never commenced.

The Burnses further submit an affidavit from BAMO principal David Moulton ("Moulton"). He indicates that as the project went forward, FLM failed to produce architectural floor plans and an exterior design to the specifications of the Burnses, and therefore, BAMO became increasingly involved with the floor plans and exterior design. He indicated that as the project progressed, BAMO's duties evolved. It became the liaison between FLM and the Burnses due to FLM's failure to timely provide designs that met the Burnses specifications. As a result, the Burnses increasingly came to rely on BAMO for

architectural floor plans as well as exterior design suggestions and concepts. BAMO would then convey these concepts to FLM and request that FLM alter or redo its drawings. This resulted in construction delays and increases in BAMO's billing because it was forced to devote substantial time to correcting FLM's errors. FLM also failed to provide dated drawings, making it confusing, difficult or impossible to determine what was the latest set of drawings or what stage the project was in at any particular time. He further explained, in detail, that contrary to FLM's contention, FLM did not complete many aspects of the phases of the project as set forth in the AIA Agreement.

Finally, counsel refers to FLM principal Francis Fleetwood's ("Fleetwood") examination before trial testimony in which he maintained that many of the clauses in the AIA Agreement did not apply to the subject project and thus were not complied with.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, based on the evidence presented, including the testimony of Robert Burns, Janice Burns, McMullan, Moulton and Fleetwood, issues of fact exist as to the extent of

FLM's obligations under the AIA contract and the extent to which FLM performed under the AIA contract. Accordingly, FLM's motion for summary judgment dismissing the breach of contract cause of action is denied.

However, where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded. *See IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132 (2009); *Hoeffner v. Orrick*, 61 A.D.3d 614 (1st Dept. 2009). Here, the Burnses' unjust enrichment cause of action is duplicative of its breach of contract cause of action and is thus dismissed. *See generally Unclaimed Prop. Recovery Serv., Inc. v. UBS PaineWebber Inc.*, 58 A.D.3d 526 (1st Dept. 2009).

Finally, pursuant to 22 NYCRR §130-1.1, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct. *See also Llantín v. Doe*, 30 A.D.3d 292 (1st Dept. 2006). Here, no such showing was made and therefore, FLM's motion seeking sanctions is denied.

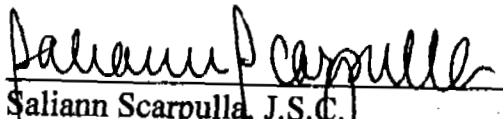
In accordance with the foregoing, it is

ORDERED that defendant Fleetwood, Lenahan & McMullan, LLC's motion for summary judgment dismissing the complaint and for sanctions is granted only to the extent that plaintiffs Robert Burns and Janice Burns' second cause of action for unjust enrichment is dismissed and the action shall continue as to the first cause of action for breach of contract.

This constitutes the decision and order of the Court.

Dated: New York, New York
March 14, 2011

ENTER:


Saliann Scarpulla, J.S.C.

FILED

MAR 17 2011

**NEW YORK
COUNTY CLERK'S OFFICE**