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Nandlal v Al-Pros Constr., Inc.
2017 NY Slip Op 50620(U)
Decided on April 7, 2017
Supreme Court, Queens County
Dufficy, J.
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Decided on April 7, 2017

Supreme Court, Queens County

Vishnu Nandlal AND DULARIE NANDLAL, Plaintiff,

against

Al-Pros Construction, Inc., AL-PROS DELAWARE, AL-PROS DELEWARE CONSTRUCTION, INC., YUSSUF ALI A/K/A YUSSUF AU, Defendants.

16256/12

For plaintiff: James L. Iannone, P.C.

Williston Park, NY 11596

For defendant: Karl Silverberg, P.C.

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Timothy J. Dufficy, J.

A trial was held before this Court, on September 5, 2016, September 6, 2016, and September 12, 2016. The parties' submitted proposed Findings of Fact and Conclusions of Law. Since this was a bench trial, the Court was both the finder of facts and the determiner of questions of law. The Court considered the testimony of the witnesses, gave weight to that testimony, and generally determined the reliability of the witnesses' testimony *(See Horsford v Bacott*, 32 AD3d 310, 312 [1st Dept. 2006]). The Court also considered the interest or lack of interest in the case and the bias or prejudice of the witnesses (*See People v Ferguson*, 178 AD2d 149 [1st Dept. 1991). The Court declined to apply the maxim of *falsus in uno, falsus in omnibus.* Accordingly, the Court made credibility determinations on a case by case basis, wherever necessary and appropriate to do so (*see Noryb Ventures, Inc. v Mankovsky*, 47 Misc 3d 1220(A), 1220A [Sup. Ct. NY Co. 2015]). Having reviewed the parties' submissions and having reflected upon the evidence submitted at trial, the Court renders the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The plaintiffs entered into a contract with defendant Al-Pros Construction, Inc. (Al-Pros) for the renovation of their home, on June 13, 2011. Pursuant to the contract, defendant Al-Pros agreed to substantially renovate the premises. The contract specified [*2]that time was of the essence. Work was to commence, on or before June 23, 2011, and all of the work was to be completed within six months of the commencement of construction, on or about December 23, 2011.

Defendants did not commence work on the project until July 7, 2011. Defendants removed the roof of the premises, but failed to place a protective tarp over the open structure of the premises, causing the premises to sustain extensive damage from rain and the elements. This was clearly depicted in the photographs that were entered into evidence by the plaintiffs. Defendants failed to remove construction debris from the premises. Defendants failed to provide workers that were able to perform the renovation in a good and workmanlike manner, as evidenced by the many deficiencies in the quality of the work. These included the fact that the rafters were not properly aligned, and the flitch beams [FN1] were not properly installed. The contract provided that in the event that any work that was found to be of poor quality, there would be immediate remediation to the satisfaction of the owner at no additional cost. Plaintiffs sent letters to the defendants, on October 12, 2011 and October 25, 2011, complaining of the poor work quality and substandard workmanship, and requesting that these conditions be corrected immediately.

Defendants refused to correct any of these issues, instead ceased work on the project. When the defendants failed to complete the project, on or before December 23, 2011, which was the time of the essence completion date set forth in the contract, the plaintiffs exercised their option to terminate the contract.

At trial, the plaintiffs introduced the testimony of a structural engineer. The engineer testified that there were serious deficiencies in the defendants' work, including that the rafters were not properly aligned, and that the flitch beams were not properly installed. In the opinion of the engineer, these conditions would affect the structural integrity of the premises, and would not pass inspection by the New York City Department of Buildings. The engineer also observed mold on the wood

beams as well as subflooring that was decayed and warped. He testified that the wood beams and the subflooring would have to be replaced to avoid compromising the structural integrity of the premises.

Defendants did not have a structural engineer testify at trial. Instead, they provided the testimony of Yusuf Ali (Ali), the president of defendant Al-Pros. He admitted that he is not an engineer, and has no specific knowledge of how to install flitch beams or other items which were required by the contract. He also admitted that the defendants did not complete the contract. He could not produce any written change orders signed by the plaintiffs to substantiate his contention that extra work was [*3]performed. In addition, Ali admitted that Al-Pros had been barred from performing work within the State of New York. As a result, he formed a new corporation with a different spelling of the corporate name, to wit, he changed the spelling of the word "Delaware" to "Deleware." Similarly, the defendants' home-improvement license expired on June 30, 2011, prior to the defendants' commencement of any work on the project. As a result thereof, Al-Pros would be barred from obtaining any permits from governmental agencies to perform renovation work.

Plaintiffs testified that due to the inferior workmanship and departure of Al-Pros from the work site, they spent an additional $113,749.99 to remediate the deficiencies in the work performed by Al-Pros. Plaintiffs also paid Di Sano Demolition Company Inc. the sum of $3375 to remove the construction debris that the defendants left behind. Plaintiff Vishnu Nandlal spent $4,016.99 himself purchasing supplies at Home Depot and Richmond Hill Lumber and Supply Corp. to complete the project. Because the plaintiffs were not able to inhabit their home, they were forced to spend $48,000 in additional rent until the construction project was finally completed and they could move back into their home. Plaintiffs also spent $11,268 in storage fees to store their belongings during the time period in question. The contract provided for the recovery of attorneys' fees,

costs and expenses to the prevailing party. Plaintiffs testified that they have expended $15,000 in attorneys fees and legal expenses.

In sum, the plaintiffs' testimony indicates that they were due the amount of $128,659, with statutory interest, from December 23, 2011, due to the defendants' breach of contract.

CONCLUSIONS OF LAW

Contract

Contracts are to be construed as the parties intended. When the contract is in writing, the best evidence of what the parties intended is what they said in that writing (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see Arthur Cab Leasing Corp. v Sice Mois Hacking Corp.*, 137 AD3d 828, 830 [2d Dept. 2016]).

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damages (*see Kausal v Educational Prods. Info. Exch. Inst.*, 105 AD3d 909, 910 [2d Dept. 2013]).

The Court finds that the plaintiffs have established convincingly all the elements of the defendants' breach of contract in this matter. Their testimony demonstrated that the defendants failed to perform the renovation work in a good and workmanlike manner. Neither the individual defendant, nor the workers employed by his company, possessed the requisite knowledge and skill necessary to perform this renovation. As testified by the [*4]plaintiffs' engineer, the structural integrity of the structure was seriously compromised by the defendants' deficient construction methods. Defendants' simple failure to cover the structure during the construction period with a house-tarpaulin resulted in water infiltration, causing damage and mold. As a result, the plaintiffs were forced to hire and pay another entity $47,000 to properly perform the work, $4,016.99, for supplies,

$3,375 to remove debris, and were delayed in their ability to retake physical possession of the premises resulting additional rent of $48,000 and storage fees of $11, 268. When called upon to rectify the situation, the defendants left, in derogation of the guarantees given in the parties' agreement.

As a result of the foregoing, the plaintiffs are entitled to recover their out-of-pocket expenses, in the amount of $128,659, with statutory interest, from December 23, 2011, due to the defendants' breach of contract.

Unjust Enrichment

A party asserting a claim for unjust enrichment must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*Wallace v BSD-M Realty, LLC*, 142 AD3d 701, 704 [2d Dept. 2016]). Plaintiffs may recover based on *quantum meruit*, if the contract for its services is unenforceable *(see Ellis v Abbey & Ellis*, 294 AD2d 168, 170 [1st Dept. 2002]).

Here, the plaintiffs are being awarded the total cost of curing the deficiencies in the defendants' work. Hence, there is no need to make any further award, which would result in a double-recovery.

Improper Use of Corporate Forum

Having been barred from performing home-improvement work in the State of New York, the individual defendant, Yussuf Ali a/k/a Yussuf Au, formed a new corporation with a slightly different spelling to its name. His intention was clearly to circumvent the proscription on performing home-improvement work. The corporate form will be disregarded when it has been used to achieve fraud or where the corporation has been so dominated by an individual or another corporation (usually

a parent corporation), and its separate identity so disregarded, that it primarily transacted the dominator's business, rather than its own, and can, therefore, be considered the other's alter ego.

(see Morningside Fuel Corp. v Lanius, 244 AD2d 198 [lst Dept.]; *see also Bernacchia v Cytodyne Techs*., 2003 NYLJ LEXIS 1862 [Sup. Ct. Nassau Co. 2003]). The Court finds that the corporate entity was misused by Ali, for his own personal ends, to commit a fraud or wrongdoing or avoid his obligations (*see TNS Holdings Inc. v. MKI Sec. Corp.*,

92 NY2d 335 [1998]). Since the new corporation was formed with a fraudulent purpose, Ali cannot avail himself of the protection of the corporate forum. Hence, the individual defendant shall be jointly and severally liable for the amount awarded in this trial.

Attorneys Fees

The parties' agreement clearly provides for an award of attorneys' fees. The Court [*5]finds that $15,000 is a reasonable amount for attorneys' fees, and awards that sum to the plaintiffs.

CONCLUSION

By reason of the foregoing, the Court renders its decision in favor of the plaintiffs, in the amount of $128,659, broken down as $47,000 for remediation, $4,016.99 for supplies purchased by Vishnu Nandlal, $3,375 to remove construction debris, $48,000 in additional rent of $48,000 and $11, 268 for storage fees, plus attorneys' fees, in the sum of $15,000, all with statutory interest, from December 23, 2011.

The defendants performed their work in an extremely unworkmanlike manner, and then, when asked to return to remediate the conditions, abandoned the job. As a result, the plaintiffs had to extend significant monies to rectify the

conditions, and to obtain a residence to live until the work was completed. Despite apparently being unlicensed, and barred from performing this type of work, the defendants manipulated the corporate forum to allow them to engage in shoddy work while insulating themselves from the consequences. The latter properly prevents the individual from using the corporate forum as a shield.

Accordingly, based upon the foregoing, it is,

ORDERED, that the plaintiffs are awarded the amount of $128,659, against all of the defendants, jointly and severally, with statutory interest. from December 23, 2011; and it is further

ORDERED, that the plaintiffs are awarded the sum of $15,000, as reasonable attorneys' fees.

Dated: April 7, 2017

TIMOTHY J. DUFFICY, J.S.C.

Footnotes

Footnote 1:A flitch beam (or flitched beam) is a compound beam used in the construction of houses, decks, and other primarily wood-frame structures. Typically, the flitch beam is made up of a steel plate sandwiched between two wood beams, the three layers being held together with bolts (*see* http://www.dictionaryofconstruction.com/definition/flitch-beam.html).

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