SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

TIAGO HOLDINGS, LLC,

Plaintiff,

-against-

PETROCELLI ELECTRIC CO., INC.,

Defendant.

Decision and Order
After trial

INDEX NO. 002279-10

In this action to recover damages for breach of contract, etc., the court conducted a trial on March 5, 6, 7, 8, 11 and 12, 2013. At trial, the Plaintiff presented the testimony of Robert Sanna and Gregory Lowe. The Defendant presented the testimony of David Ferguson and Norman Fidelman. Thereafter, the parties submitted post-trial memoranda.

In awarding judgment as follows, the court makes the following findings and conclusions:

In March 2007, the Defendant bid for electrical work at the East River Plaza Project ("Project"), which was being owned/developed by the Plaintiff. The Defendant's bid of $14,172,994 was reduced by Defendant to $14,000,000 "in exchange for a $700,000 up-front 'mobilization' payment". According to the Plaintiff, "mobilization" is a construction industry term used to describe the practice of providing money to contractors in advance of work.

On July 6, 2007, the Defendant and Plaintiff executed a letter of intent with respect to the Project. The Letter of Intent set forth the following:

> This letter shall confirm the intention of Petrocelli Electric Co. Inc. ("Contractor") to enter into an agreement ("Contract") with Tiago Holdings, LLC ("Owner") to

perform Electrical Work ("The Work") for the monetary amount, including all applicable sales tax and insurance, of Fourteen Million dollars ($14,000,000) (the "Contract Price") in accordance with the requirements of Rider A, General Addendum East River Plaza, New York, New York, dated May 8, 2007, and Rider B dated March 27, 2007, the drawings and specifications referenced therein, Rider C, Alternates and Unit Prices, East River Plaza New York, New York, dated June 6, 2007, Rider D, Temporary Services for Construction, East River Plaza, New York, New York dated November 16, 2006 and subject to mutual acceptance of the terms and conditions (and full execution) of the Contract. The Contract Price includes the base contract work for Retail A and the Garage, including all revisions through Bulletin #5, the mock up of 4 LED fixtures for two set-ups, and the electrical work for the smoke purge system. Also included is an allowance of one thousand (1000) additional journeyman overtime hours, alternates for lighting and maintenance thereof for sidewalk bridges at 116th, 117th, 118th and 119th streets, a red light at the site Siamese connection, all work on drawings C-109 "Signal Plan @ Pleasant Ave. & East 117th Street" and C-112 "Buildiners Pavement Street Lighting Plan" not including Con Ed costs. The deletion of the furnishing of all light fixtures (installation remains included), the incorporation of the G2 fixture detail and the pre-cast column PVC add alternate. All other add or deduct alternates are not included.

No waiver, modification or amendment of any term, condition or provision of this Letter of Intent shall be valid or of any force or affect, unless specifically accepted in writing by Owner and identified as being a waiver, modification or amendment.

An executed copy of this Letter of Intent must be returned via facsimile to the attention of the undersigned with original signature by first class mail within 2 BUSINESS DAYS OF RECEIPT OF SAME as a pre-requisite to issuance of the Contract. Do not modify this Letter of Intent other than to execute same. Payment will not be due and owing or made until this Letter of Intent has been fully executed by both the Contractor and the Owner.

The Owner's Construction Manager is Tishman Construction Corporation of New York which has been advised of this award. All project-related correspondence shall be copied to Jeff Levy, Executive Vice President of Tishman.

You are to review the previously provided sample contract, together with all exhibits. The Owner's corporate counselor is John Hunt (718) 922-8433. Contact him with questions concerning the text of the agreement other than the Rider A, *General Addendum*.

> You are hereby notified that the Owner reserves all rights to terminate Contractor's services for any reason whatsoever, including its own convenience. In such event, the Owner shall reimburse Contractor for all work completed to date in accordance with the Contract Schedule of Values. In any event, Contractor shall not be entitled to recover anticipated profits on account of Work, unperformed or anticipated profits on account of material or equipment not incorporated in the project.

The mobilization check in the amount of $700,000, which was net of a 10% retainage fee, was issued by the Plaintiff on July 25, 2007. The Defendant performed electrical work at the Project from July 2007 through December 2007. During this six-month period, the Defendant submitted payment requisitions in the total amount of $246,650. Of the payments requisitioned, the Plaintiff paid to Defendant $201,150 (Exhibit 31), leaving two invoices unpaid and retainage of $24,650. In January 2008, after repeatedly asking for a written contract and not receiving it, the Defendant stopped performing electrical work at the Project. The Plaintiff thereafter retained two new electrical contractors to perform the electrical work at the Project for a total sum of $14,730,000.

On February 3, 2010, the Plaintiff commenced the instant action asserting causes of action for breach of contract, unjust enrichment, and monies had and received, which causes of action were tried by the court on the dates indicated above. The Defendant asserts counterclaims sounding in breach of contract and unjust enrichment[1] essentially to recover for monies it claims to be owed for work it performed and for retainage.

Initially, contrary to the contentions of the Plaintiff, the letter of intent is not an enforceable contract for the completion of electrical work in the sum of $14 million. In this regard, the letter is, by it's express terms, an "agreement to agree", a fact which is recited in the first sentence. Moreover, the court notes the following relevant factors which establish the intent of the parties fixing the limited nature of the letter: the letter of intent is explicitly denominated as such; in multiple places, it explicitly contemplates a formal contract; the letter of intent is explicitly made subject to mutual acceptance of the terms of the contemplated contract and "full execution" thereof; the letter infers the existence of an oral agreement regarding the payment of monies and performance of work in advance of a formal contract (*see* underlined words and last paragraph of letter); the intent of the parties that the letter of intent would not serve as a contract respecting the completion of a $14 million project is further evidenced by the repeated requests for a formal contract by the Defendant, subsequent to the letter of intent; the language in the letter in which the Plaintiff reserves the right to terminate the contractor's services for any

[1]The Defendant advances three counterclaims, however, the first and second appear to be duplicative.

reason, which apparently references the period of time after work has commenced and before a final contract was to be executed; the fact that the signatory on the letter of the intent for the Plaintiff was not authorized (sufficiently empowered) to sign the contemplated formal contract; that the issue of a formal contract and Defendant's comments to the sample contract were brought up at numerous meetings held by the Plaintiff; the Defendant performed work at the site for months prior to signing the letter of intent.[2]

The Plaintiff's attempt to "fit" the situation at bar and the subject letter of intent into cases wherein courts have found such letters to constitute binding [final] agreements completely ignores the operative language of the letter making it subject to the mutual acceptance and full execution of a final agreement (*Prospect Street Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213 [1st Dept 2005]). If this language were to be ignored, which in no event can it be ignored, then the Plaintiff's argument might have some validity. But to speculate and imagine the non-existence of the cited language would be absurd (*compare Bed Bath & Beyond Inc. v Ibex Construction*, LLC, 52 AD3d 413 [1st Dept 2008]; *T. Moriarty & Son, Inc. v Case Contracting Ltd.*, 287 AD2d 390 [1st Dept 2001]).[3]

Accordingly, the court concludes that the letter of intent was not a binding agreement obligating the contractor to complete the electrical work at the job site, and, therefore, there can be no breach of the letter of intent which would entitle the Plaintiff to recover the consequential damages it demands in it's complaint, to wit, the additional monies it claims to have paid electrical subcontractors to complete work commenced by the Defendant.

Regarding the issue of the mobilization payment, the court concludes that it was made in anticipation of completed electrical work and was consideration for the lower bid (which, as indicated, assumed execution of a formal contract). The mobilization payment constituted an advance against work done by the Defendant, with some part thereof earned as work progressed,

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[2]If anything, the Plaintiff breached the letter of intent by failing to provide a formal contract. However, Defendant does not seek damages based on this breach or an offset against any monies Plaintiff claims are owed to it but rather seeks damages based on Plaintiff's failure to pay outstanding invoices for completed work plus retainage.

[3]The court notes that any language contained in it's decision and order denying summary judgment concerning the letter of intent and it's possible validity was dicta. In this regard, the court denied the Defendant's motion because the papers submitted in support thereof were insufficient. In any event, additional facts adduced at the trial establish that the letter of intent was not an enforceable contract.

as testified to by Robert Sanna.[4] Had a written contract been entered into and the work completed, the mobilization payment would eventually have been "paid down". It would be inequitable, therefore, to allow the Defendant, under the circumstances, to retain monies which it did not earn (*see Whitman Realty Group, Inc. v Galano*, 41 AD3d 590 [2d Dept 2007]; *Citibank, N.A. v Walker*, 12 AD3d 480 [2d Dept 2004]; *Rock & Jeans, Inc. v Lakeview Auto Sales & Service, Inc.*, 184 AD2d 502 [2d Dept 1992]). Although precise calculation of the amount paid down by virtue of the work performed is not possible, given the testimony by Mr. Sanna, the deposition testimony of Mr. Sandy Petrocelli, and the total work completed in relation to the work anticipated, the Plaintiff is entitled to recover $687,680 ($700,000 - $12,320).[5] Contrary to the Plaintiff's contention, it is not entitled to pre-judgment interest.

Accordingly, Plaintiff is awarded judgment on the second and third causes of action in the amount indicated. The Defendant is awarded judgment on it's third counterclaim in the amount of $66,000 ($41,400 in unpaid invoices and retainage of $24,600).

It is further ordered that the complaint and counterclaims are otherwise dismissed.

This constitutes the decision and order of the court.

Dated: October 16, 2013

Hon. Vito M. DeStefano, J.S.C.

[4]The notations on the invoices submitted describing "total completed" [work], as with the invoice generated in connection with the $700,000, reflecting retainage of $77,778, were for convenience only.

[5]The figure $12,320 is a ratio of the total amount of work invoiced compared to the total amount bid for the job, i.e., 1.76% of $14 million.