

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

Ferro Fabricators, Inc. v. 1807-1811 Park Ave. Dev. Corp.

2018 NY Slip Op 07184 (N.Y. Ct. App. 2018) · No. 7465; 155201/12 · Decided October 25, 2018

SUMMARY

The Appellate Division, First Department, affirmed an order denying defendants summary judgment on counterclaims for breach of contract and willful exaggeration of a mechanic's lien. The court found issues of fact concerning the completion schedule, the extent of plaintiff's completed work, and whether plaintiff knowingly included unapproved change orders in the lien. The court also held that triable issues precluded summary judgment on plaintiff's lien foreclosure and breach of contract claims, while declining to address certain additional challenges.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, First Department
WRITING FOR THE COURT	Friedman, J.P.; Kapnick, J.; Webber, J.; Oing, J.; Moulton, J.
JURISDICTION	New York
DECIDED	October 25, 2018
DOCKET	7465; 155201/12
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order denying their cross motion for summary judgment on counterclaims for breach of contract and willful exaggeration of a mechanic's lien. The plaintiff also challenged the denial of summary judgment on its lien foreclosure and breach of contract claims, although it had not cross-appealed.
STANDARD OF REVIEW	Summary judgment is unavailable where the record raises triable issues of fact; the court determines whether the evidentiary submissions establish entitlement to judgment as a matter of law and whether material factual disputes remain.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	1807-1811 Park Avenue Development Corp., ESF Property, Inc. v. Ferro Fabricators, Inc., doing business as Greg's Iron Works, Inc.

TOPICS

construction law breach of contract commercial litigation appellate procedure standard of review

PRACTICE AREAS

construction law contracts commercial litigation appellate procedure mechanic's liens

QUESTIONS PRESENTED

1. Whether defendants were entitled to summary judgment on their breach-of-contract counterclaim based on Ferro's allegedly delayed completion of work.
2. Whether defendants were entitled to summary judgment on their counterclaim for willful exaggeration of a mechanic's lien.
3. Whether the record entitled Ferro to summary judgment on its lien foreclosure and breach-of-contract claims despite the absence of a cross-appeal.
4. Whether the court should address Ferro's challenge to the timeliness of defendants' cross motion and the dismissal of its quantum meruit and unjust enrichment claims.

HOLDINGS

1. Defendants were not entitled to summary judgment because the affidavits and deposition testimony raised issues of fact regarding whether Ferro had been provided a completion schedule and, if so, whether Ferro failed to comply with it.
2. Defendants were not entitled to summary judgment on their willful-exaggeration counterclaim because issues of fact existed concerning the true extent of work performed and whether Ferro knowingly included unapproved change orders in the lien.
3. Ferro was not entitled to summary judgment because triable issues remained concerning whether it breached the contract and the extent of unpaid work it performed.
4. The court could consider Ferro's challenge to the denial of summary judgment on its lien foreclosure and breach-of-contract claims even though Ferro did not cross-appeal.

KEY QUOTATIONS

“However, the affidavits and deposition testimony submitted by both sides raise issues of fact as to whether plaintiff was provided with a schedule of when the work was to be completed, and if so, whether plaintiff failed to comply with it.” ([*1])

“We find that the eighth requisition raises an issue of fact as to the true extent of work that plaintiff had performed.” ([*1])

FACTUAL BACKGROUND

Ferro Fabricators performed steel structural work for the defendants. Although any defective work had been remediated and the structural work satisfactorily completed, the parties disputed whether Ferro had been given a

completion schedule and whether it failed to meet that schedule. The parties also disputed the extent of work completed and whether Ferro knowingly included two unapproved change orders totaling \$32,970.47 in its mechanic's lien.

PROCEDURAL HISTORY

Supreme Court, New York County, denied defendants' cross motion for summary judgment on their breach-of-contract and willful-exaggeration counterclaims. The Appellate Division unanimously affirmed that order insofar as appealed from and, under *Merritt Hill Vineyards v. Windy Hgts. Vineyard*, considered plaintiff's challenge to the denial of summary judgment on its lien foreclosure and breach-of-contract claims despite the absence of a cross-appeal. The court declined to address plaintiff's challenge concerning the timeliness of defendants' cross motion and the dismissal of its quantum meruit and unjust enrichment claims.

DISPOSITION

affirmed

CASES CITED

- *Merritt Hill Vineyards v. Windy Hgts. Vineyard*, 61 N.Y.2d 106, 110-112 (1984)

OPINION

PER CURIAM.

Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp. (2018 NY Slip Op 07184) *Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.* 2018 NY Slip Op 07184 Decided on October 25, 2018 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on October 25, 2018 Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ. 7465 155201/12 [*1]*Ferro Fabricators, Inc., doing business as Greg's Iron Works, Inc., Plaintiff-Respondent, v1807-1811 Park Avenue Development Corp., et al., Defendants-Appellants, Country Bank, et al., Defendants. Sheats & Baily, PLLC, Liverpool (Edward J. Sheats of counsel), for appellant.*

Malvina Lin, P.C., Brooklyn (Malvina Lin of counsel), for respondents. Order, Supreme Court, New York County (Ellen M. Coin, J.), entered October 30, 2017, which, insofar as appealed from as limited by the briefs, denied the cross motion of defendants 1807-1811 Park Avenue Development Corp. and ESF Property, Inc. (collectively defendants) for summary judgment on their counterclaims for breach of contract and willful exaggeration of a mechanic's lien, unanimously affirmed, with costs.

Defendants are not entitled to summary judgment on their breach of contract counterclaim. The record establishes that any defective work performed by plaintiff had been remediated, and that plaintiff's steel structural work had been satisfactorily completed.

Thus, the dispositive issue is whether the contract was breached due to plaintiff's delayed completion of work. However, the affidavits and deposition testimony submitted by both sides raise issues of fact as to whether plaintiff was provided with a schedule of when the work was to be completed, and if so, whether plaintiff failed to comply with it. Defendants are also not entitled to summary judgment on their counterclaim for willful exaggeration of the mechanic's lien (see Lien Law §§ 39, 39-a).

Defendants rely on the seventh and most recent requisition that they received from plaintiff in arguing that only 78% of the work had been completed, and that plaintiff exaggerated the amount of the lien by \$274,305.47. Plaintiff, however, produced an eighth requisition that it never submitted to defendants showing that it had completed 97% of the work. It further claims that it subsequently completed the remaining balance of the work totaling \$27,810, and did not include that amount in the lien.

Defendants do not specifically dispute that plaintiff performed work after the submission of the seventh requisition, but argue that the work reflected in the eighth one should not be included because it was never submitted.

We find that the eighth requisition raises an issue of fact as to the true extent of work that plaintiff had performed. Further, the affidavits submitted by the parties raise an issue of fact as to whether plaintiff knowingly included two unapproved change work orders in the amounts of \$18,000 and \$14,970.47 in the lien.

Because the record raises triable issues as to whether plaintiff breached the contract, and the extent of unpaid work performed by plaintiff, plaintiff is not entitled to summary judgment on its lien foreclosure and breach of contract claims.

We may consider plaintiff's challenge to the court's denial of its motion for summary judgment on those claims, although plaintiff did not cross-appeal (see [*2] *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-112 [1984]).

However, we will not address its challenge to the court's denial of its request to reject defendants' cross motion as untimely and the dismissal of its quantum meruit and unjust enrichment claims. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: OCTOBER 25, 2018 CLERK