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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1261-10T2

C.H.S. CONSTRUCTION CO., INC.,

Plaintiff-Appellant,

v.

MAST CONSTRUCTION SERVICES, INC.,

Defendant-Respondent.

Submitted January 23, 2012 - Decided February 16, 2012

Before Judges Ashrafi and Newman.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-321-09.

Randy P. Davenport, attorney for appellant (Mr. Davenport, of counsel and on the brief).

Tesser & Cohen, attorneys for respondent (Lee M. Tesser and Jonathan Bernstein, on the brief).

PER CURIAM

Plaintiff C.H.S. Construction Co, Inc. (CHS) appeals from an order granting summary judgment to defendant Mast Construction Services, Inc. (Mast) dismissing plaintiff's complaint and entering a judgment for CHS in the amount of

$14,596 for payment of outstanding invoice number nine which was not in dispute. We now affirm.

Viewed in a light most favorable to plaintiff, see Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995), the background facts may be summarized as follows: CHS agreed to participate with Mast in providing work around the Prudential Center in Newark, New Jersey as part of the Downtown Core District Redevelopment Plan (DCDRP). Mast submitted proposals to do the work, but each of the first two proposals were rejected and the size of the work that was eventually awarded was substantially scaled down. Only the first proposal indicated that CHS was a thirty-five percent participant in the project. The second proposal had CHS as a twenty-percent participant. The third proposal which did not mention CHS as a participant was accepted and represented $1,160,590 in compensation to Mast, which was approximately one-third of the initial bid price.

A May 17, 2007 letter from Ted Domuracki, President of Mast, to Cecil Sanders, President of CHS, notes that a Teaming Agreement had been discussed between Sanders and Mast, but was unsigned. Sanders claimed that an earlier Teaming Agreement did not include the thirty-five percent participation as purportedly previously agreed to and, therefore, he did not execute the

agreement. Nonetheless, monthly payments were made and accepted pursuant to the Teaming Agreement in the amount of $7,096, of which $1,096 was a Construction Management Fee to CHS and purportedly reflected CHS's profit on each invoice. There was an hourly increase for CHS's project manager beginning in September 2007 which increased the monthly total to $14,596 as reflected in correspondence of September 25, 2007 and continued through December 2007. The monthly Construction Management Fee of $1,096 remained the same. While no agreement had been signed, the work was performed and payment was accepted by CHS in accordance with Ted Domuracki's correspondence of May 17, 2007 and September 25, 2007 to Cecil Sanders and the correspondence of October 30, 2007 from Cecil Sanders to Ted Domuracki.

CHS maintains that it was entitled to a thirty-five percent participation in the project, regardless of the scaled-down nature of the work, although there was no written agreement solidifying their position. In its complaint, CHS asserted that it was not able to participate to a thirty-five percent share because Mast did not permit CHS to employ the requisite number of employees so that the percentage of the work under the contract could be achieved. In seeking damages for Mast's alleged breach of the oral agreement, plaintiff also alleged in

its complaint equitable fraud, legal fraud, negligent misrepresentation, promissory estoppel, equitable estoppel and breach of implied covenant of good faith and fair dealing.

The trial court found that there were no facts to support any fraud. Even assuming, however, that there was a breach of contract despite debatable issues of material fact, the measure of damages would be a loss of profits. Stanley Co. of Am. v. Hercules Powder Co., 16 N.J. 295, 314. Plaintiff submitted nothing in opposition to the motion for summary judgment, enumerating what the loss of profits would be.

Plaintiff sought thirty-five percent of the gross amount of revenues (of $1,268,663.11) that Mast received from the project. CHS maintained that the thirty-five percent of the gross revenues equaled $444,032.08. Subtracting the $93,051 that CHS had been paid to that point, left a balance due of $350,981.08 according to CHS. The trial court pointed out that the total revenues on the project was the wrong measure of damages. The total revenues included the costs that CHS would have had to pay its employees, any benefits, cost of materials as well as any other added expenses. CHS had opportunities through discovery, depositions and by way of affidavit or certification in response to the summary judgment motion, to calculate its purported loss of profits, but did not do so. CHS provided no expert opinion

on a projected loss of profits. CHS took the position that it could present the testimony of its owner at trial. The trial court disagreed and granted summary judgment.

On appeal, CHS raises the following issue for our consideration:

POINT ONE

> THE MOTION COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED MAST'S MOTION FOR SUMMARY JUDGMENT BECAUSE C.H.S. COULD HAVE ESTABLISHED LOST PROFITS WITH A REASONABLE DEGREE OF CERTAINTY THROUGH TESTIMONY BEFORE THE FACT FINDER.

CHS argues that the trial court erroneously granted summary judgment by not allowing CHS to present testimony at trial with respect to the computation of loss of profits. CHS argues that its principal, Cecil Sanders, was not asked how he would do so during discovery nor when he was deposed. CHS asserts that if he were allowed to testify before a fact finder, Sanders would be in a position to provide an estimate within reasonable certainty of what his lost profits were.

To be sure, loss of profits is the measure of damages recoverable in a breach of contract action where such loss is established within a reasonable degree of certainty. Stanley Co. of Am., supra, 16 N.J. at 314; V.A.L. Floor v. Westminster Cmtys., Inc., 355 N.J. Super. 416, 424-25 (App. Div. 2002). Generally, loss of profits is the difference between the

contract price and the cost of performance or production. J.L. Davis & Assocs. v. Heindler, 263 N.J. Super. 264, 276 (App. Div. 1993).

It was clear from Sander's deposition testimony that he understood the difference between revenues and profits. However, despite knowing this difference, there was never any documentation to support a claim for loss of profits or, for that matter, any certification or affidavit in response to the summary judgment motion calculating what the loss of profits were determined to be. Indeed, Mast's interrogatory number seventeen asked CHS specifically: "Set forth an itemized calculation of any damages that allegedly are due Plaintiff and annex all documentation supporting such allegations." Mast was very specific about asking for a damage calculation and documentation in support of such figures. That interrogatory was purportedly responded to with an attachment that apparently was not part of the record and not provided to us on appeal. Thus, to the extent that CHS maintains that it was never asked to calculate such damages, CHS is mistaken.

We recognize CHS's position that it was entitled to perform thirty-five percent of the work on the project which was disputed. CHS acknowledges that it did not perform thirty-five percent of the work because of Mast's obstructionist tactics in

not permitting CHS to utilize additional employees. However, that dispute begs the question of what the loss of profits would be. CHS failed to present any evidence whatsoever on what its loss of profits would have been which is the proper measure of damages in this breach of contract action. See Stanley Co. of Am., supra, 16 N.J. at 314. Having not done so, the trial court properly dismissed plaintiff's complaint by granting summary judgment.

Affirmed.