SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1987-15T1

BEDROCK CONCRETE CORPORATION,

Plaintiff-Respondent/
Cross-Appellant,

v.

SICON CONTRACTORS, and 277 ROUTE 70, LLC,

Defendants-Appellants/
Cross-Respondents,

and

OCEAN UTILITY CONTRACTING, INC.,

Defendant.

Submitted January 10, 2017 – Decided September 25, 2017

Before Judges Messano and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-2628-13.

Mensching & Lucarini, PC, attorneys for appellants/cross-respondents (John J. Mensching, on the brief).

Richard A. Epstein, attorney for respondent/cross-appellant.

PER CURIAM

Defendants Sicon Contractors (Sicon) and 277 Route 70, LLC (Route 70), appeal from the December 3, 2015 judgment entered after a bench trial in favor of plaintiff Bedrock Concrete Corporation (Bedrock) in the amount of $77,915, together with attorney fees of $20,863.99, costs of $670.99, and prejudgment interest in the amount of 2.25% per annum. Sicon argues that the judge erred in enforcing Bedrock's construction lien and in awarding counsel fees, costs and prejudgment interest. Bedrock cross-appeals from the judge's refusal to award the contractually agreed upon rate of 18% for past due balances.

Route 70 is the owner of property located at 277 Route 70 in Toms River. Sicon was engaged as the general contractor to construct a commercial building on the property. Sicon hired Bedrock to provide labor, materials and equipment necessary to construct a concrete slab and steel shell for the building. The contract price was $668,435, which increased to $675,015 through subsequent change orders.

Bedrock was required to construct the concrete slab and shell in accordance with the project plans and specifications, as well as the plans prepared by the project engineer, East Coast Engineering, Inc. (East Coast). The contract called for installation of base stone prior to the installation of the

concrete slab. At Bedrock's request, East Coast placed stakes in the ground which were used by Bedrock to determine the location and elevation of the slab.

After the slab was completed, it was determined that the finished floor grade was approximately two inches below the grade specified in the project plans. It is not disputed that the differential affected drainage at the site. To address the grade discrepancy, Sicon engaged Ocean Utility Contracting, Inc. to remove curbing in the front of the building, reinstall it at a lower grade, and change the slope and grading of the parking lot.

Sicon paid Bedrock approximately $597,000 of the contract price but withheld final payment. In May 2013, Bedrock filed a construction lien for the amount due. In September 2013, Bedrock filed a complaint against defendants seeking enforcement of the lien and alleging unjust enrichment and breach of contract. Defendants filed a counter-claim also alleging breach of contract and seeking to discharge the lien.

On February 6, 2015, the trial judge granted partial summary judgment to Bedrock against Sicon in the amount of $26,604.08, "with entitlement to interest on said sum to be determined by the Court at a later date and subject to offsets,

if any, to be determined at a later date." Neither party appealed from that judgment.

Trial began on September 30, 2015 and continued for three days. On October 28, 2015, the trial judge issued a written decision enforcing Bedrock's lien. The judge based his decision on the credibility of the witnesses, concluding, the plaintiff's proofs were "more believable by a preponderance of the evidence" than defendant's.

Specifically, the judge noted that Bedrock's president, Lawrence Wilderotter, "answered questions while on the witness stand easily and straightforwardly." The judge was impressed by Wilderotter's candor in admitting "either the stakes [installed by East Coast] were wrong or his use of them [was] wrong." The judge also remarked that Wilderotter testified "in a manner and with an assured and serious air that made one confident of his position."

Similarly, the judge found Bedrock's project manager, Kevin McNaboe, testified "in a direct and confident manner" that the "final elevations were obtained from stakes set in the ground by the engineer."

By contrast, the judge found that Jason Marciano, an engineer employed by East Coast who was called by Sicon, "was not [as] effective as a witness as Mr. McNaboe." The judge

noted that Marciano admitted that another firm had established the original proposed elevations for the job and he was merely "on call" to perform the staking. Of significance, Marciano "acknowledged that he never spoke to Mr. McNaboe about the error" in the final elevation, and instead "resolved it with the company who installed the curbing."

The judge found the testimony of Sicon's construction manager, Jeffrey Crisalli even less persuasive:

> Mr. Crisalli initially insisted that he tried to reach Plaintiff [regarding the error], and eventually emailed and set up a meeting with Mr. McNaboe, but Mr. McNaboe failed to attend. . . . He admitted that the emails were general, and could not recall any single discussion about the issue with Mr. McNaboe, although he maintained rather vaguely that they must have discussed it. It would seem to this Court that on such an issue as this one, in which so much money was involved, there should have been a precise recollection of informing Plaintiff, and their subsequent conversation.

The judge observed that the contract required Sicon to "give prompt written notice" to Bedrock if it became aware of "any fault or defect in conformance of work with the plans and specifications." Although Crisalli initially testified he tried to contact Bedrock about the elevation issue, "under cross examination, he retreated from that assertion." The judge described Crisalli as "evasive" on the elevation issue and

accused him of attempting "to obfuscate the major issue of trial."

The judge concluded that when the elevation error was discovered, Bedrock was not notified or given an opportunity to review or investigate the issue. The judge entered an order on December 3, 2015 enforcing the lien.

On appeal, defendants argue the judge's findings are not supported by adequate, substantial, and credible evidence and the judge erred in enforcing the construction lien. We find these arguments so lacking in merit that they warrant no further discussion beyond our observation that the trial judge's thorough and extensive credibility determinations find abundant support in the record. R. 2:11-3(e)(1)(E).

We next address Bedrock's cross-appeal on the award of prejudgment interest. The contract provides for a "service charge" of 1.5% per month (18% per annum) for "all unpaid balances after 30 days." The trial judge observed that 18% was "onerous, and excessive," and reduced the prejudgment interest figure to 2.25%. Neither party accepts this decision. Bedrock argues the award should have been for the full 18%, as provided in the contract; Sicon claims that awarding prejudgment interest on the entire judgment of $77,915 was erroneous.

"Unlike prejudgment interest in tort actions, which is expressly governed by Rule 4:42-11(b), the award of prejudgment interest on contract and equitable claims is based on equitable principles." County of Essex v. First Union National Bank, 186 N.J. 46, 61 (2006). Generally, an award for prejudgment interest is addressed to the sound discretion of the trial judge. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 390 (2009). "Unless the allowance of prejudgment interest 'represents a manifest denial of justice, an appellate court should not interfere.'" Ibid. (quoting County of Essex, supra, 186 N.J. at 61).

Applying these principals, we note that Bedrock's cause of action seeking to enforce the construction lien is an equitable claim, "grounded in the theory that a wrongdoer should not profit from its wrongdoing regardless of whether the innocent party suffered any damages." County of Essex, supra, 186 N.J. at 61. From the time Bedrock completed its work on the project, Sicon had the benefit of the money the judge found Bedrock was entitled to.

The contract is captioned, "Standard Shell Building Agreement" and was negotiated by Wilderotter, who formed Bedrock in 1996, and Crisalli, who signed on behalf of Sicon, and has owned a construction consulting firm for twelve years.

Wilderotter and Crisalli also negotiated three subsequent change orders. During trial, Sicon contested the enforceability of the lien, but did not challenge Paragraph 9 of the contract which provides:

> Should it become necessary to place this account in the hands of an attorney for collections, the buyer agrees to pay for any and all costs of collections, including, but not limited to, reasonable attorney fees incurred by Bedrock Concrete. Service charges in the amount of 1.5% per month (18% per annum) will be added to all unpaid balances after 30 days.

We note that this section assesses a penalty for "unpaid balances" and does not specifically reference prejudgment interest. Whether it is called a service charge, as defined in the contract, or prejudgment interest, the award is "regarded by our courts as compensatory -- to indemnify the plaintiff for the loss of what the monies due him would presumably have earned if payment had not been refused." Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 506 (1974).

> The basic consideration is that the defendant has had the use, and the plaintiff has not, of the amount in question; and the interest factor simply covers the value of the sum awarded for the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled.
>
> [Ibid.]

Other than a conclusory finding that 18% was onerous and excessive, the trial judge gave no reason and cited no authority for reducing the agreed-upon contractual rate from 18% to 2.25%.[1] Sicon has presented no authority or any convincing argument as to why the service charge and attorney fee provisions in a contract entered into voluntarily by two experienced parties should not be enforced.

That portion of the December 3, 2015 order entering judgment in favor of Bedrock against Sicon in the sum of $77,915 is affirmed. The provision setting prejudgment interest at 2.25% is vacated and the matter is remanded to the trial judge to set an interest rate consistent with the factors identified in this opinion. We do not retain jurisdiction.

[1] In their brief, defendants assume the judge relied on Rule 4:42-11, which governs prejudgment interest, in arriving at 2.25%, but there is no proof of this in the record.