

1019-131-100
STATE OF ILLINOIS

SS

COUNTY OF COOK

ATTORNEY NO.: 39903

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

EMCO METALWORKS, INC.,

Plaintiff,

v.

SCHAEFGES BROTHERS, INC.,

Defendant.

No. 08 L 11104

FILED-2
2010 APR 13 PM 4:30
CIRCUIT COURT OF COOK
COUNTY ILLINOIS
LAW DIVISION
CLERK

**SCHAEFGES BROTHERS, INC. COMBINED
MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS**

NOW COMES Defendant, SCHAEFGES BROTHERS, INC., (hereinafter SBI),
by its counsel, SHIPLEY LAW GROUP, LTD. and for its 2-619.1 Combined Motion for
Summary Judgment and 2-619(a)(4) Motion to Dismiss Plaintiff's Verified Complaint,
states as follows:

I. INTRODUCTION

A. Present Litigation

This is an action for an alleged breach of contract arising from the April 5, 2006,
Sub-Contract Agreement executed between Emco and Schaeffges Brothers, Inc. (SBI).
Pursuant to the sub-contract Emco was to provide metal work for the Stearns Quarry Park
being developed by the Chicago Park District. The Verified Complaint seeks unspecified
damages in excess of \$150,000. (Exhibit 1) SBI has filed its Verified Answer and
Affirmative Defenses denying the material allegations, as well as a Counterclaim seeking
its own damages arising from Emco's breach of the sub-contract. (Exhibit 2)

B. Prior Litigation

The instant litigation is the second suit filed by Emco arising from the April 5, 2006, Sub-Contract Agreement. The original complaint, styled as a Complaint for Accounting and Foreclosure of Mechanics Lien and Other Relief, Case No. 07 CH 23015, was brought against the Chicago Park District and SBI. The allegations against SBI were pleaded in Count II and reflect the identical breach of contract claim as in the present litigation. The earlier case was resolved and the terms incorporated into a January 16, 2008, Memorandum of Agreement. The Dismissal Order was entered on February 20, 2008. Additionally, pursuant to and as part of the Settlement Agreement, a Change Order was executed between the parties reflecting the agreed upon work to be performed. (Exhibit 3, Deposition of Robert Pancoe, pp. 176-187, 272-273; Exhibit 10 to Deposition, Complaint for Accounting and Foreclosure of Mechanic Lien and Other Relief; Exhibit 11 to Deposition, January 16, 2008 Memorandum of Agreement; Exhibit 22 to Deposition, Change Order; Exhibit 4, Order of February 20, 2008)

II. FACTS

A. Relationship Between the Parties

Emco, founded in 1999, is a metal fabricator and installer. Emco's principal and President is Robert Pancoe. Mr. Pancoe has in excess of 50 years experience in the construction industry. Emco has been operated on a continuous basis since its founding. (Exhibit 3, pp. 6, 7, 13, 141)

SBI was founded 46 years ago and has operated continuously since that date. SBI is a general contracting firm which is typically involved in municipal related projects.

Ken Schaeffges is President of SBI. (Exhibit 5, Deposition of Ken Schaeffges, pp. 9-10, 14)

SBI submitted a bid for the Stearns Quarry Park which was being developed by the Chicago Park District (CPD). SBI was the low bidder and in the fall, 2005, was notified that CPD was intending to award the contract. The contract was then awarded.

(Exhibit 5, pp. 34, 39, 44-46)

Subsequent to being awarded the contract, SBI entered into a sub-contract with Emco for the metal fabrication and installation. Robert Pancoe was the individual that submitted the bid upon which the contract was awarded. (Exhibit 3, pp. 83, 98)

B. The SBI-Emco Sub-Contract Agreement

The subcontract agreement entered into between Schaeffges Brothers and Emco Metalworks, Inc. was executed by Robert Pancoe. Mr. Pancoe who also initialed each page of the sub-contact, confirmed that he read the entire agreement, understood its terms and intended that Emco be bound.

The subcontract agreement described the specific scope of work as well as enumerating the documents which became part of the sub-contract agreement. This included the requirement that all work must be fabricated and installed per complete plans and specifications. Mr. Pancoe was firm in his unequivocal statement he, on behalf of Emco, agreed to every provision of the contract.

The contract documents were identical to those provided to Emco during the bid phase, prior to the execution of the sub-contract agreement. These documents included the project manual, project drawings, bid addendum 1 and 2; documents deemed

sufficient at the time the bid was prepared which outlined the scope of work consistent with the scope described in the sub-contract agreement.

The sub-contact agreement required Emco to meet the full satisfaction of the owner and project architect. Emco was further required to furnish the required materials and perform the work with due diligence and without delay and will not in any manner delay or otherwise interfere with the work of the other contractors, which included the requirement that Emco properly provide staffing to fulfill its obligations.

Emco agreed to the penalty provisions which assessed damages and penalties relating to project delays for which it was responsible. Emco further agreed that any omissions not noted by the contractor, architect, engineer or owner when reviewing a submittal did not release the subcontractor from providing exactly what was specified in the project documents. No additional compensation would be paid unless it was for work that was pre-approved in writing by the contractor (SBI) or owner.

(Exhibit 3, pp. 139-154; Exhibit 8 to Deposition, Sub-Contract Agreement)

C. Emco's Admitted Breach of the Sub-Contract Agreement

Mr. Pancoe explained that if the contract documents are not clear then a request for information (RFI) is submitted. He agreed that when he received direction to prepare the shop drawings consistent with an RFI even if he thinks the RFI is insufficient he was obligated to prepare the drawings. Mr. Pancoe admitted that he received such direction from SBI but refused to comply. (Exhibit 3, pp. 27-29, 47-48, 54, 222-223)

Emco's own 213(f)(2) witnesses confirmed the obligation to comply with shop drawings once responses to RFI have been received. Jesse Barrera, a former Emco employee, testified it was the responsibility of the steel fabricator to prepare shop

drawings once the design professional has reviewed and responded to an RFI. (Exhibit 6, Deposition of Jesse Barrera, pp. 24 -41).

Mahajit Saluja, a structural engineer, and former Emco independent contractor, echoed the testimony of Mr. Barrera. Mr. Saluja confirmed he was able to prepare shop drawings based on the plans he was provided. He further confirmed that once the shop drawing is reviewed and approved by the design professional it was Emco's responsibility to fabricate the metal as described. (Exhibit 7, Deposition of Mahajit Saluja, pp. 76-86)

The sub-contract agreement remained in full force and effect prior to when CPD terminated the SBI contract. Mr. Pancoe agreed Emco did not perform its scope of work as described by the contract documents. Prior to execution of the sub-contract agreement no questions were raised concerning the sufficiency of the contract documents. Exhibit 3, pp. 161-162, 165-166, 190)

Only after Emco was required to perform did it avoid its obligations by starting to question the sufficiency of the documents. Further Emco failed to comply with the Change Order executed pursuant to the settlement of the original Breach of Contract claim. (Exhibit 3, pp. 161-162, 165-166, 190, 274-278)

D. CPD Termination of SBI Contract Due to Emco Failure to Perform

Emco's failure to perform was confirmed by two individuals intimately involved in the project. Observations of the project architect, Michele Inuoye and project manager, Claudine Malik, are consistent with Mr. Pancoe's admissions.

Ms. Inuoye noted Mr. Pancoe's attitude was detrimental to the completion of the metal fabrication work. Emco's failure to perform delayed the ultimate completion of the

project. Mr. Pancoe's hostile attitude was documented by Ms. Inuoye in a May 6, 2008, Memorandum reflecting events which occurred at a site meeting on that date. The Memorandum further documents identical behavior of Mr. Pancoe which had occurred at several earlier site meetings. (Exhibit 8, Deposition of Michele Inuoye, p. 52-57 and Exhibit 38 to deposition, May 6, 2008 Memorandum)

Ms. Malik confirmed that typical construction practices and procedures regarding questions raised by a contractor on a construction project would be the submission of an RFI. It is not unusual for a contractor to submit RFI during the course of a project. The design professional's response to the RFI is the directive that the contractor is to follow. SBI complied with its communication obligations by providing the RFI to Site Design and the correspondence response back to Emco. On Stearns Quarry, Emco failed to comply. As of June, 2008, Emco had failed to perform. Subsequent to June, 2008, even after SBI paid Site Design to prepare CAD drawings which incorporated the previous RFI responses, Emco continued in its failure to perform. (Exhibit 9, Deposition of Claudine Malik, pp. 47-55, 57, 64-69, 79, 87-88).

Ms. Malik confirmed that prior and subsequent to June, 2008, Mr. Pancoe attended site meetings at which SBI and CPD were present. During these meetings discussions were held which included Emco's non-performance. These discussions included direct conversations between Ms. Malik and Mr. Pancoe regarding Emco's failure to perform including that such failure was delaying the project. (Exhibit 9, pp. 55, 57-63, 71-73, 127-129)

Ms. Malik testimony confirmed that Emco had persisted in its failure to perform since as early as July, 2006. She confirmed that Emco exhibited a pattern of non-

performance which was purposeful and intentional. Emco's non-performance caused CPD termination of the SBI contract. Ms. Malik stated that but for Emco's failure to perform, the contract would not have been terminated. Emco's non-performance was the only reason the SBI contract was terminated. (Exhibit 9, Deposition of Claudine Malik, pp. 70, 74-76, 110, 114, 132, 137-140, 144-147; Exhibit 2 to Deposition, Termination Correspondence dated September 30, 2008; Exhibit 27 to Deposition, Correspondence dated June 12, 2007; Exhibit 30 to Deposition, Emails of October 24, 2007 and October 25, 2007)

E. Emco's Failure to Establish Damages

Emco claims a variety of damages which have not been established by the evidence. This includes claims for lost profits, additional overhead, and inventory. Emco does not keep records in the ordinary and regular course of business which can establish the alleged damages being claimed. Even the inventory claim was previously paid by CPD. (Exhibit 3, pp. 96-106, 135-137, 158-160)

Mr. Pancoe admitted he did not provide his counsel with any documents to support the claim of damages in excess of \$150, 000 as alleged in the Verified Complaint. Mr. Pancoe admitted that Emco does not have any records to support the alleged damages being claimed. (Exhibit 3, pp. 96-106, 135-137, 158-160)

III. MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment Standards

SBI is entitled to judgment as a matter of law if the evidence shows that no material issue of fact has been raised. **Wilmere v. Stibolt**, 152 Ill.App.3d 642, 646-47, 504 N.E.2d 916, 919 (1st Dist. 1987). Summary judgment should be rendered if the

pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. **Young v. Texas Eastern Transmission Corp.**, 137 Ill.App.3d 35, 38-39, 484 N.E.2d 325, 327 (5th Dist. 1985).

Summary judgment provides the benefit of avoiding needless time and expense of trial and should be encouraged as an aid in the expeditious disposition of lawsuits.

Holland v. Arthur Andersen & Co., 212 Ill.App.3d 645, 571 N.E.2d 777 (1st Dist. 1991); **Buczak v. Central Savings and Loan Association**, 230 Ill.App.3d 490, 594 N.E.2d 1291 (1st Dist. 1992).

As set forth in the Statement of Facts, Emco's principal Robert Pancoe, has admitted the failure to comply with its contractual obligations. Mr. Pancoe has further admitted that Emco cannot establish the monetary damages it alleges to be owed by SBI.

Accordingly, as a matter of law, the record demonstrates that SBI is entitled to Summary Judgment on Emco's Verified Complaint. For the same reasons SBI is entitled to Summary Judgment in its favor on the Counterclaim.

B. Argument

It is well settled that 'to succeed on a claim for breach of contract, a plaintiff must plead and prove the existence of a contract, the performance of its conditions by the plaintiff, a breach by the defendant, and damages as a result of the breach. **Associated Underwriters of America Agency, Inc. v. McCarthy**, 356 Ill.App.3d 1010, 1019, 826 N.E.2d 1160, 1168 (1st Dist. 2005); quoted with approval in **Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd.**, 376 Ill.App. 3d 1006, 876 N.E.2d 218 (1st Dist. 2007).

The interpretation of a contract ... is a question of law to which the court applies a *de novo* standard of review. **Smith v. West Suburban Medical Center**, 2010 WL 246145 (1st Dist. 2010) A party seeking to recover damages must establish that he sustained damages and must provide a reasonable basis for computing these damages. **Bockman Printing & Services, Inc. v. Baldwin-Gregg, Inc.**, 213 Ill.App.3d 516, 572 N.E.2d 1094, 1100 (1st Dist. 1991).

At bar the uncontroverted facts are that Emco failed to perform its contractual obligations. The independent observations of the project architect, Ms. Inuoye and project manager, Ms. Malik, reflect Emco's continued and deliberate refusal to perform its scope of work. Their testimony is consistent with the documents prepared in the ordinary and regular course of business.

Mr. Pancoe's admissions confirm this failure to perform. Significantly, Mr. Pancoe completely and fully acknowledged Emco's contractual obligations as well as the sufficiency of the documents upon which the original bid was prepared, which defined the identical scope of work.

The objective record reflects that at the time of execution of the Sub-Contract Agreement Emco was in possession of all material information needed to perform its scope of work. Notwithstanding answers being repeatedly provided to questions raised during the course of the project, whether said questions were deemed reasonable or not, Emco flatly refused to perform. Notwithstanding repeated promises made by Mr. Pancoe, Emco flatly refused to perform.

It is abundantly clear that Emco failed to comply with its obligations as defined by the contract documents. Additionally, Emco has failed to establish that it suffered any damages. As a matter of law SBI is entitled to Summary Judgment as to Emco's breach of contract claim. SBI is further entitled to Summary Judgment in its favor on its Verified Counterclaim.

IV. 2-619 MOTION TO DISMISS

Illinois recognizes that pursuant to 2-619(a)(4) a former adjudication can operate as a bar to a pending action. This section incorporates the doctrines of *res judicata* and collateral estoppels; **Illinois Non-Profit Risk Management Association v. Human Service Center of Southern Metro-East**, 378 Ill.App.3d 713, 884 N.E.2d 700 (4th Dist. 2008), citing **Yorulmazoglu v. Lake Forest Hospital**, 359 Ill.App.3d 554, 558, 834 N.E.2d 468, 471 (2005).

This requirement is satisfied if the following elements are satisfied: 1) final judgment rendered by a court of competent jurisdiction 2) an identity of a cause of action and 3) identity of parties. **Illinois Non-Profit** at 884 N.E.2d 707, citing **River Park, Inc. v. Highland Park**, 184 Ill.2d 290, 302, 703 N.E.2d 883, 889 (1998)

An examination of the record reflects the statutory requirements are applicable in the instant case. As noted in Section IB above, Emco had previously filed an identical suit for breach of contract arising from the same project and Sub-Contract Agreement at issue in the present case. This is a fact admitted by Mr. Pancoe. (Exhibit 3, pp.176-187, 272-273) That suit was settled and dismissed with prejudice which operates as an adjudication on the merits.

V. CONCLUSION

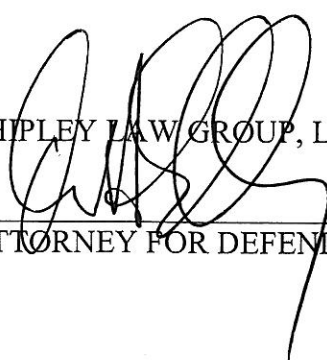
The uncontroverted record, through the deposition testimony and documents maintained in the ordinary and regular course of business, reflects Emco's failure to perform its scope of work. The failure to perform constitutes a breach of its Sub-Contract Agreement with SBI. The breach of contract further prevents Emco from recovering any damages, which in any event Emco has failed to establish. This same record establishes as a matter of law that SBI is entitled to Summary Judgment as to liability on its Verified Counterclaim for Breach of Contract.

As an additional and separate basis, pursuant to 2-619(a)(4) Emco's Verified Complaint should be dismissed with prejudice, as it asserts the identical cause of action as in Case No. 07 CH 23015 which was dismissed with prejudice.

WHEREFORE, SCHAEFGES BROTHERS, INC., prays this Honorable Court enter an Order granting its Combined Motion for Summary Judgment and Motion to Dismiss.

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