AMERICAN ARBITRATION ASSOCIATION
Construction Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 527 E 00971 11
Lunz Development Corp. ("Claimant")
and
Marjorie Dunn ("Respondent")

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated March 10, 2009, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, FIND, as follows:

The dispute between the parties relates to the construction/renovation/alteration of Respondent's property at 3360 Camp Mineola Road, Mattituck, New York, by Claimant.

On or about March 4, 2011, Respondent commenced an action in the New York Supreme Court as against Claimant for damages relating to breach of contract and for alleged improper filing of a mechanics lien.

Claimant, an Inactive New York Business Corporation[1], thereafter filed their Demand for Arbitration for $51,130.00 for breach of a construction contract on April 8, 2011, and on April 11, 2011 moved to dismiss the Supreme Court action and remove to arbitration due to a broad arbitration clause contained in the parties' Agreement.

Honorable William B. Rebolini, J.S.C., on August 18, 2011, dismissed without prejudice the complaint filed by Respondent, disagreeing with the contract based arguments of Respondent, finding such contract based arguments are the proper subject of arbitration between the parties, and further denying Respondent's additional requests to cancel and discharge the lien filed by Claimant on the subject property.

On or about September 16, 2011, Respondent filed their Demand asserting a counter claim as against Claimant for $75,000.00 for credits, repairs, deletions and attorneys fees.

The first preliminary determination to be made is the status of a dissolved corporation to pursue legal claims for debts owing to the dissolved corporation. It is well settled law in New York that a corporation, even after dissolution, is permitted to carry on business affairs for the winding up of its affairs, to fulfill or discharge its contracts, collect its assets, and other acts appropriate to liquidate its business. *See In the Matter of 172 East 122 Street Tenants Association et al., v. Fredrick A. O. Schwarz, Jr.,et al 73 N.Y.2d 340, 346.*

Claimant's damages are based on outstanding payment(s) for extra work completed at the request and direction of Respondent. While the contract in question does provide for change orders to be signed by Respondent, over the course of construction, however, Claimant produced such Change Orders towards completion of the work, having commenced such change(s) as needed for timely completion of work.

[1] Lunz Development Corporation was dissolved by Proclamation January 26, 2011

AWARD OF ARBITRATOR CONTINUED

Respondent asserts that these Change Orders, in large part, should not be Respondent's responsibility as i) they were not invoiced timely; ii) Respondent notified Claimant at the time that no additional change orders would be paid; iii) billings from Claimant improper; iv) Respondent's belief as to credits owed justify nonpayment; v) withholding of less than 10% of contract as a form of self-imposed retainage was reasonable to sort out credits; vi) that the contract between the parties was not a lump sum contract because line item charges were included.

With respect to the timing of issued Change Orders, while the contract does specifically provide for written change orders to be signed by the owner, the record is clear that in some capacity such changes were either required or requested by Respondent. Respondent provided no testimony or evidence to suggest otherwise. The record also supports the presumption that many of these items were originally requested by Respondent, that Respondent took part in making selections of materials required for such change work, and was also not available to Claimant during the course of construction for traveling out of the country at least some portion of the work.

It is common, for reasons of parties being unavailable, among others, for such written change order requirements in construction contracts to be waived and not dispositive of whether Respondent is responsible for such charges. *See* CGM Construction, Inc., v. Michael S. Miller, 263 A.D. 2D 831, 693 N.Y.S.2d 763 (3rd Dept. 1999). Therefore, Claimant's reducing said change orders to writing towards project completion and the failure to obtain Respondent's signature on change orders for extra work that is open, obvious, and with the participation of Respondent is not fatal to Claimant's claim(s).

In reviewing Respondent's defenses to these claimed change orders, the lack of timely publication of such change orders by Claimant is not a valid defense. The fact that Respondent informed Claimant that she would not pay any additional change orders does not remove Respondent for change orders, and extra work already brought about previously by her direction and not yet presented in writing by Claimant. Respondent also asserts many faults with the billings made by Claimant and questions as to Claimant's actual expenditures and costs incurred for specific portions of the work as established by line items in the contract.

The contract between the parties herein is not such a "cost plus" agreement. Rather, the contract states quite clearly, on page 1, entitled "Fixed Contract Amount". Further, nowhere in the contract does it provide Respondent with the right to unilaterally assert retainage of funds based on their belief of credits owed. Likewise, Respondent's remaining assertion that the contract is not a lump sum agreement does not conform with the agreement's bold title stating a Fixed Contract Amount, nor does that comply with the provision of Article 4.1 stating that the price of the project is set.

AWARD OF ARBITRATOR CONTINUED

not a lump sum agreement does not conform with the agreement's bold title stating a Fixed Contract Amount, nor does that comply with the provision of Article 4.1 stating that the price of the project is set.

For the claims I have determined as follows:

Of the submitted Change Orders, numbers 1 though 23, a total of $56,528.00 extra work is submitted, and credits are provided to Respondent in the amount of $13,363.92. Contractor is hereby provided with all requested change order relief with the exception of change order 11, which appears to cover many of the same items as change order 10. For change order 11, I award only $2,000.00. This amounts to total claimed extra work in the amount of $53,578.00, less $13,363.92 credits for a total amount of $51,215.00, which is reduced to conform to Claimant's claim amount of $51,130.00.

Both parties make claim for additional legal fees, and while both parties have an honest belief in their entitlement to legal fees, the bulk of time and fees incurred in this action stem from the parties voluntary involvement in the legal system by filing liens and by commencing actions instead of directly bringing their dispute to arbitration. Much of the hours involved in relation to court were brought about by the parties decisions themselves and could have been avoided by each party themselves. Each party will bear the expense of the legal actions they each caused in the Supreme Court action. Arbitration legal fees have also been considered but based on findings have not been awarded herein.

The counterclaim asserted by Respondent, seeks $75,000.00 from Claimant for credits, repairs, deletions and attorneys fees. With respect to the am claims for credits, the above deliberation of Claimants claim provides for credits of $13,363.92 to Respondent.

Claimant is responsible for making repairs to the subject property, for defects in its work, for a period of one year from the date of substantial completion of the work, upon being paid in full under the agreement.

Respondent has submitted an Extended Home Summary Report from WIN Home Inspection, which was apparently performed on or about June 3, 2010 which provides the results of an inspection. In large part this inspection report restates existing punch list items already known by the parties, and in large part responded to by Claimant in its March 15, 2010 letter to Respondent, acknowledging these punch list items and Claimant's intention of addressing same upon final payment. Further, most items are classified as maintenance items.

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AWARD OF ARBITRATOR CONTINUED

For Claimant to be financially responsible for the cost to correct items in this inspection report, in addition to being fully paid under its contract, Claimant must also be provided notice of the defects and an opportunity to cure the same before being liable for back charges.

The record does not support the finding that Claimant was provided the above. Therefore, the balance of Respondent's counterclaim is dismissed in its entirety.

Accordingly, I AWARD as follows:

Respondent shall pay to Claimant the sum of Fifty One Thousand One Hundred Thuirty Dollars and Zero Cents ($51,130.00).

The administrative fees of the American Arbitration Association totaling $2,550.00 and the compensation and expenses of the arbitrator totaling $1,259.96 shall be borne by Respondent. Therefore, Respondent shall reimburse Claimant the sum of $1,972.75, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Claimant.

The above sums are to be paid on or before 30 days from the date of this Award. Interest at the prevailing rate of Nine Percent (9%) shall be paid by Respondent on any unpaid balance remaining commencing on the 31st calendar day from the date of this award until paid in full.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

10/3/2011
Date

John J. Caravella