

**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. MELISSA ANNE CRANE PART IAS MOTION 60

Justice

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LEADER ELECTRIC CO., INC.

INDEX NO. 651354/2018

Plaintiff,

- v -

DECISION AFTER INQUEST

INTEGRITY CONTRACTING, INC.

Defendant.

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Melissa A. Crane, JSC

Plaintiff Leader Electric Co, Inc. (Leader), an electrical subcontractor, commenced this action in March 2018, seeking to recover for certain subcontracting work. Defendant Integrity Contracting, Inc. (Integrity) failed to appear or answer. Leader then moved for default. Integrity finally appeared and opposed the default motion. The opposition was woefully deficient. Accordingly, on February 4, 2019, this court granted plaintiff’s motion for a default and put the matter over for an inquest. The court held that inquest on February 22, 2019. Defendant failed to appear. On May 9, 2019, the court signed a judgment in favor of plaintiff and against Integrity Contracting.

On May 30, 2019, Integrity emerged to file an OSC to vacate the default judgment. This court declined to sign the OSC as there was no apparent emergency. It was not until August 28, 2019, that Integrity interposed a motion, by notice of motion, to vacate the default. Because Integrity failed to demonstrate a reasonable excuse for repeated failures to appear, and admitted it owed money to plaintiff, the court refused to vacate the motion for a default, but decided to allow a new inquest on the condition that Integrity reimburse plaintiff for its attorney’s fees from the first inquest. The basis for the court’s decision was the line of cases allowing a defaulting defendant to challenge damage calculations (see *Amusement Bus. Underwriters v Am. Int’l Group*, 66 NY2d 878, 880 [1985]).

The court held the second inquest, via Microsoft Teams, over several days: July 13-14, 2020, July 20, 2020, October 28, 2020, and November 9-10, 2020. The court commends the attorneys, both of whom did an excellent job under trying circumstances, given the measures to which we all must resort to keep the wheels of justice turning during this pandemic.

The court awards a total of \$109,492.08 to plaintiff. First, defendant admits that Leader is owed \$17,913.33 for the Tenth Avenue project for certain change orders (see Affidavit of Joseph Mosomillo, president of Integrity, EDOC 95, dated August 27, 2019, at para. 26). That Integrity may not have received payments from the owner is irrelevant (see *Nevco Contracting Inc. v R.P.Brennan Gen. Contractors and Builders Inc.*, 139 AD3d 515 [1st Dep’t 2016][pay when paid provision violates public policy]).

OTHER ORDER – NON-MOTION

Defendant also argues that plaintiff agreed to forego the \$17,913.33 in exchange for being hired on the Ludlow street project. However, defendant makes this argument for the first time post inquest. Defendant never raised the facts underlying this defense on the motion to vacate the default. Most important, this issue is noticeably absent from EDOC 95, the affidavit Mr. Mossimolo, Integrity's principal, interposed on the vacate motion to demonstrate a meritorious defense. Indeed, in discussing the Tenth Avenue Project on the motion to vacate, Mr. Mossimolo only states that the owner never paid. He makes no mention of some sort of trade off between projects. Therefore, defendant's position is unsupported and simply not credible.

The Ludlow contract does not require written authorization for change orders. Therefore, plaintiff could rely on defendant's verbal authorization. Consequently, with respect to the Ludlow Street project, defendant primarily argues that plaintiff failed to make a prima facie showing that plaintiff performed all the work plaintiff claims it performed. However, defendant has reversed the burden of proof on this issue. This court has already refused to vacate the default because defendant had no meritorious defense. Therefore, plaintiff has already proved it performed the work. It was defendant who had the burden to demonstrate the work was not performed in mitigation of amounts due. Defendant did not carry this burden. Defendant only baldly contended that the change orders were duplicative, or the work underlying them not performed, while failing to demonstrate to the court which change orders those were. Only at the post trial briefing on this matter did defendant raise the defense that Leader submitted change orders so late that it prejudiced Integrity's ability to collect from the owner and constituted a material breach of contract. This argument comes too little too late. Plaintiff should have made this argument at the motion to vacate stage. For the same reason (i.e. because this trial was only on damages only and defendant had the burden of proof), a missing witness charge for plaintiff's failure to call Mr. Theodopolous is unnecessary.

However, defendant did prove that plaintiff walked off the job leaving an electrical panel unfinished that necessitated another company, Einstein, to complete. Alexander Olchs from Metrograph testified credibly that plaintiff left the panel of 150 circuit breakers unfinished and that Einstein was paid \$23,554.00 to complete this work. Accordingly, the court deducts \$23,554 from the total amount due plaintiff on the Ludlow project (\$111,605.25).

Accordingly, the court awards judgment as follows:

\$17,913.33 with statutory interest from January 10, 2016, as calculated by the clerk of the court for the Avenue School Project;

\$88,051.25 with statutory interest from May 13, 2016 as calculated by the clerk of the court for the Ludlow project; and

\$3,527.50 to reimburse plaintiff for attorney's fees on the first inquest.

The Clerk is directed to enter judgment in the above amounts accordingly.


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DATE: 8/12/2021

MELISSA ANNE CRANE, JSC

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify _____)