

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION  
MORTGAGE FORECLOSURE / MECHANICS LIEN SECTION**

HIGGINS HEATING AND COOLING CORP.,	)	
an Illinois corporation,	)	
	)	
Plaintiff,	)	No. 06 CH 04975
	)	
vs.	)	Thomas R. Mulroy
	)	
WILLIAM MARKLE, LLC, DAVID MARKLE, LLC,	)	Judge
1225 W. MORSE, LLC, et al.,	)	
	)	
Defendants.	)	

**OPINION AND JUDGMENT ORDER**

This matter came before the court for trial on the complaint of Higgins Heating and Cooling Corp. (“Plaintiff”) against defendants William Markle, LLC, David Markle, LLC, and 1225 W. Morse LLC (“Defendants”) for Defendants’ alleged breach of a fixed-price contract. The complaint included three counts: count I for foreclosure of mechanic’s lien, count II for breach of contract, and count III, alleging joint liability under section 28 of the Mechanic’s Lien Act. Trial was held on count II of the complaint. The parties have agreed that the mechanic’s lien counts will be resolved following judgment on the contract dispute. For the reasons outlined below, Plaintiff is awarded \$24,638.

Background

On April 22, 2004, the parties entered into a fixed-price contract for \$475,000 whereby Plaintiff was to perform the heating, ventilation, and air conditioning installation for Defendants’ condominium project at 1225 West Morse Avenue in Chicago, Illinois. Compl. ¶6. The work was to be substantially completed by December 1, 2004. Pl. Ex. 2 at 3.2. The contract provided

that if Plaintiff intended to increase its fixed contract price, Plaintiff was contractually required to provide written notice of that increase to Defendants prior to doing the work at the added cost. Pl. Ex. 2, General Conditions, at 4.7.7. In addition, the contract provided that Plaintiff could not increase its fixed price for “extra time” spent on the project without providing written notice. *Id.* at 4.7.8.1.

In May 2004, prior to beginning work on the project, Donald Higgins sent a letter on behalf of Higgins Heating and Cooling to project manager Eva Gelfand seeking to increase his fixed price because of an increase in the cost of steel. Pl. Ex. 6. The letter stated in part:

As you are aware, steel industry prices continue to rise uncontrollably, which has been and further continues to affect pricing from our suppliers. Enclosed with this correspondence is the most recent announcement from our equipment distributor.

Please let us know if you would like to make the purchase now, to save on the additional price increase. We can warehouse the equipment at our shop, until needed at the job site, or, we can deliver it to the job site if you prefer. We will need to process a draw by 06-15-2004, in the amount of \$68,500.00 to pay for the purchase by 07-15-2004.

*Id.* This letter was the only advance written notification Plaintiff gave to Defendants prior to work being executed. The enclosure indicated that residential prices would rise three to five percent, effective July 1, 2004. D. Ex. 7.

Plaintiff began work in August of 2004. Pl. Ex. 4. On September 12, 2005, Plaintiff sent a letter to Defendants requesting an additional \$144,000 due on the project due to an increase in costs of materials and labor. *Id.* The work and labor referred to in the letter had been completed prior to September 12. Defendant never agreed to pay Plaintiff \$144,000.

During the course of the project, there were eleven change orders, of which Defendants signed one (number six) and paid five (numbers one, two, three, six, and seven), totaling \$44,581. Pl. Ex. 3. Plaintiff left the jobsite on November 17, 2005, alleging that it stopped

working because it had not been paid. Pl. Ex. 5. Plaintiff filed its three-count complaint on March 13, 2006, seeking \$168,878, which represents \$144,240 under Change Order No. 10 for increased labor and material costs, and \$24,638 that remains unpaid on the contract.

When Higgins left the jobsite in November 2005, Markle hired Forest Glen and A. A. to complete the project. D. Ex. 20. Defendants filed a counterclaim against Plaintiff on November 7, 2007 for breach of contract, contending that Plaintiff failed to honor its contract by not completing the project. Defendants sought \$111,347, which represented the cost to finish the work (\$96,824) plus employees' labor in negotiating the new contract and supervising the work (\$14,523). Counterclaim ¶¶8-9.

At trial, both parties introduced documents into evidence and three witnesses testified: Joseph Manzi, principal of J.E. Manzi & Associates, Inc., as an expert witness for Plaintiff, Donald Higgins, president of Higgins Heating and Cooling, and William Markle, who served as the site manager at the project.

### Judgment

At the outset, it should be noted that the parties entered into a fixed-price contract for the work to be performed on the condominium project at 1225 West Morse Avenue. In entering into this contract, Plaintiff took the risk that it could complete all of the heating, ventilation, and air conditioning work specified in the contract for under \$475,000, the agreed-upon contract sum, and thereby profit from its work on the project. As noted in *Watson Lumber Co. v. Gunnewig*, the contractor bears the risk in a fixed-price contract:

It is clear that the contractor does not have the right to extra compensation for every deviation from the original specification on items that may cost more than originally estimated. The written contract fixes the scope of his undertaking. It fixed the price he is to be paid for carrying it out. The hazards of the undertaking are ordinarily his.

*Watson Lumber Co. v. Guennewig*, 79 Ill. App. 2d 377, 393 (5th Dist. 1967). The contract allocated the risk to Plaintiff, and it provided a method by which Plaintiff could claim an increase, if necessary.

The parties do not dispute that their contract required written notice of any claim for increase in the contract sum. Pl. Ex. 2, General Conditions, at 4.7.7. As noted above, Higgins sent Markle a letter in May 2004 about the increase in the cost of steel. This letter did not provide Markle any specific information about the amount of the increase if Markle did not authorize the steel purchase soon thereafter. Furthermore, Change Order 10 covers “increased time and material costs,” which is much broader than steel, the only material mentioned in the May 2004 letter. Thus, for the purposes of payment on Change Order 10, the letter fails to satisfy provision 4.7.7’s requirement of written notice prior to starting the work.

Plaintiff argues nonetheless that Markle waived contract provision 4.7.7 by paying four unsigned change orders (numbers one, two, three, and seven), and due to this waiver, Plaintiff is entitled to compensation for Change Order 10. A contract provision requiring written change orders may be waived by the parties’ conduct if proven by clear and convincing evidence. *Watson*, 79 Ill. App. 2d at 396. However, even if the parties waived the writing requirement, Plaintiff still must establish that the parties agreed to the increase identified in Change Order 10.

The court was in a position to judge the credibility of the witnesses and reviewed the documents admitted into evidence. The only evidence regarding an agreement for the increase in costs at issue was Mr. Higgins’ testimony about a discussion around December 2004. In the course of this discussion, Mr. Higgins told Mr. Markle that Higgins was going to incur additional costs. According to Mr. Higgins, Mr. Markle told him, “We’ll take care of you.” Mr. Higgins’ testimony falls short of establishing an agreement between the parties that Markle would pay

Higgins \$144,000 for increased labor and material costs. The parties did not discuss the amount of the increase or otherwise define “additional costs.” As such, the terms of their discussion were too uncertain to establish that the parties agreed to a \$144,000 increase. The court finds Plaintiff failed to carry its burden of proof as to Change Order No. 10 and finds in favor of Defendant on that portion of Plaintiff’s breach of contract claim. Plaintiff is entitled to \$24,638 which Defendants admit they owe.

The court also finds for Plaintiff on Defendants’ counterclaim. Defendants failed to carry their burden of proof to distinguish between work the subsequent contractors performed that was covered by the original contract with Higgins and work that was outside of the original contract.

IT IS HEREBY ORDERED:

- (1) Plaintiff is awarded \$24,638.
- (2) The parties are to appear in Courtroom 2803 at 11:30 a.m. on October 21, 2009 for further proceedings.

ENTERED:

Date: October 14, 2009

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Judge Thomas R. Mulroy