

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

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CA CONSTRUCTION, INC. A&M
ELECTRICAL SERVICE INC and A&J
RAPAPORT PARTNERS d/b/a
J. RAPAPORT FLOORING

Index No. 112328/06

Plaintiffs

**Phase II Findings of Fact
and Conclusions of Law**

-against-

RAO'S CITY VIEWS, LLC, et al.,

Defendants
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RICHARD F. BRAUN, J.:

This is a consolidated action by trade contractors for work performed in connection with a construction project known as Rao's City Views, located at 114th Street and Pleasant Avenue, New York, New York. By this court's March 5, 2010 decision and order on a motion and cross motions for summary judgment, the motion and cross motions were granted in part. After the Phase I part of the nonjury trial in this action, on March 3, 2011 this court put its findings of fact and conclusions of law on the Record. The Phase II portion of the trial involved the various claims of the three plaintiff contractors CA Construction, Inc. (CA Construction), A&M Electrical Service Inc (A&M Electrical), and A&J Rapaport Partners d/b/a A&J Rapaport Flooring (Rapaport) seeking recovery against Rao's for breach of contract, foreclosure of a mechanic's lien, quantum meruit, and an account stated, and Rao's claims against Rapaport for allegedly defective flooring work.¹ The Phase II trial was conducted over four days: February 17, 2011, March 3, 2011, March 14, 2011, and June

¹ At one point Rao's sought leave to also present evidence of allegedly defective electrical work against A&M Electrical. A&M Electrical opposed same, and trial memorandum were requested by the court. Rao's apparently abandoned its effort to introduce such evidence, having failed to submit a trial memorandum thereon and resting its case without introducing any such evidence.

28, 2011. Post trial submissions were finally received on August 30, 2011.

Although the contracts with plaintiffs A&M Electrical and Rapaport were not fully executed, nevertheless they had contracts with Rao's (*see Flores v Lower East Side Service Center, Inc.*, 4 NY3d 363, 369 [2005]), and, even if they did not, the court would have allowed a quantum meruit recovery. The plaintiff contractors have offered credible evidence that the contract work and additional work were authorized and approved by Rao's agent, and Rao's failed to controvert that evidence. Rao's relied on the fact that the subcontracts required any modification thereto to be in signed writings.² However, the parties' course of dealing waived strict compliance with that requirement in connection with change orders (*see Joseph F. Egan, Inc. v City of New York*, 17 NY2d 90, 95-97 [1966]; *Barsotti's, Inc. v Consolidated Edison Co. of N.Y.*, 254 AD2d 211, 212 [1st Dept 1998]; *Howdy Jones Constr. Co. v Parklaw Realty*, 76 AD2d 1018, 1018-1019 [3rd Dept 1980], *affd for reasons stated* 53 NY2d 718 [1981]). Indeed, Rao's agent paid CA Construction more than would have been due solely on the subcontracts and the one signed change order, showing that Rao's had authorized additional work and waived any requirement that change orders be signed by Rao's or its agent. Likewise, A&M Electrical was paid for change order work reflected in invoices not signed by the owner's agent, and only part of A&M Electrical's claim is for work under unsigned change orders. Furthermore, Rao's and its agent acknowledged in documentation to Rao's bank owing money for the additional work to A&M Electrical and Rapaport.

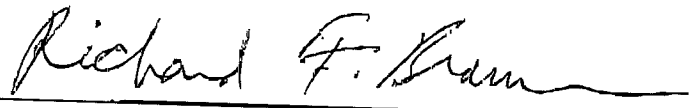
Rao's bears the burden of proof on the claim that Rapaport's work was defective. Rao's expert testified that the flooring failed in part because the building had not yet been sealed and was

² It is ironic, and inconsistent, that Rao's relied on the clause in the unsigned subcontracts with A&M Electrical and Rapaport requiring that all modifications be in writing.

not properly heated at the time the floors were installed. Allen Rapaport testified convincingly that Rao's agent insisted, over Mr. Rapaport's objection, that Rapaport install the flooring even though the building was not yet fully sealed to the elements or properly heated, and that Rao's agent threatened to pull Rapaport off the job and back charge Rapaport for the cost of installation by another contractor if Rapaport did not install the floors under those conditions. Mr. Rapaport also testified that Rao's agent claimed that he would run temporary heaters to maintain appropriate temperatures in the building but, based upon Mr. Rapaport's observation, that did not occur consistently. Rao's did not controvert that evidence. Consequently, Rao's, through its agent, must be deemed to have accepted the risk that the flooring would not hold due to those conditions and was responsible for problems with the flooring by failing to insure that a consistent temperature was maintained (*see M & M Management LLC v. Court Order Inc.*, 31 Misc3d 1242(A), 2011 N.Y. Slip Op. 51086(U) [County Court, Suffolk 2011]).

Accordingly, CA Construction has been awarded \$33,499, with interest from December 23, 2005. CA Construction has established the existence of a valid mechanic's lien in that amount, and CA Construction is entitled to foreclose thereon. A&M Electrical has been awarded \$74,024.20, with interest from February 9, 2006. A&M Electrical has a valid mechanic's lien in that amount, and A&M Electrical is entitled to foreclose thereon. Rapaport has been awarded \$46,666.40, with interest from November 8, 2005. Rapaport has established a valid mechanic's lien in that amount, and Rappaport is entitled to foreclose thereon. Rao's claim against Rapaport has been denied.

Dated: New York, New York
June 19, 2012


RICHARD F. BRAUN, J.S.C.