

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: June 20, 2019

526710

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KINGSLEY ARMS INC.,  
Appellant,

v

KIRCHHOFF-CONSIGLI CONSTRUCTION  
MANAGEMENT, LLC, et al.,  
Respondents.

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MEMORANDUM AND ORDER

Calendar Date: March 26, 2019

Before: Garry, P.J., Lynch, Clark, Mulvey and Rumsey, JJ.

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Mastropietro Law Group, PLLC, Saratoga Springs (Eric W. Gentino of counsel), for appellant.

Hinckley, Allen & Snyder LLP, Albany (James J. Barriere of counsel), for respondents.

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Lynch, J.

Appeal from a judgment of the Supreme Court (Platkin, J.), entered April 18, 2018 in Albany County, upon a decision of the court in favor of defendants.

Defendant Kirchhoff-Consigli Construction Management, LLC (hereinafter Consigli) served as the general contractor on a project to build a new school at the State University of New York at Albany (hereinafter the project). In 2011, plaintiff contracted with Consigli to, among other things, install approximately 920 feet of storm water drainage and sanitary sewage piping required for the project. In 2013, after the work

was completed, a building adjacent to the project site flooded. While investigating the cause of the flood, the project owner, the State University Construction Fund (hereinafter SUCF), determined that a section of the storm pipe had failed. At SUCF's direction, plaintiff replaced that section of pipe. During a routine inspection in 2014, SUCF discovered issues in different sections of pipe. SUCF directed plaintiff to replace these sections, plaintiff protested, and the parties agreed to excavate and inspect the pipe to discover the cause of the failure. The defective pipe was excavated under the observation of MJ Engineering and Land Surveying (hereinafter MJ Engineering), an entity retained by SUCF to determine the cause of the pipe failures. Ultimately, plaintiff replaced seven sections of pipe. After considering reports completed by MJ Engineering and its own architect, SUCF concluded that the damage was caused by plaintiff's failure to comply with the project's plans and specifications and refused to compensate plaintiff for the replacement work. Plaintiff commenced this breach of contract action, and, after a nonjury trial, Supreme Court dismissed the complaint and issued a judgment in defendants' favor. Plaintiff appeals.

The primary theory that plaintiff advanced during the trial was that the damage to the pipes was caused by a design flaw. In order to recover on its claim, plaintiff was obligated to establish that the pipe failure was caused by a defective design and that its installation of the pipe was done pursuant to contract specifications (see MacKnight Flintic Stone Co. v Mayor of City of N.Y., 160 NY 72, 86 [1899]; Northeastern Plate Glass Corp. v Murray Walter, Inc., 147 AD2d 786, 787 [1989]). When conducting our review of this nonjury trial verdict, "we independently review the probative weight of the evidence, together with the reasonable inferences that may be drawn therefrom, and grant the judgment warranted by the record while according due deference to the trial court's factual findings and credibility determinations" (Frontier Ins. Co. v Merritt & McKenzie, Inc., 159 AD3d 1156, 1159 [2018] [internal quotation marks, brackets and citations omitted]). Further, "[t]he admissibility and scope of expert testimony is addressed to the trial court's sound discretion and will not be disturbed on

appeal absent an abuse of that discretion or an error of law" (Gibbs v Porath, 145 AD3d 1221, 1222 [2016] [internal quotation marks and citation omitted], lv denied 29 NY3d 906 [2017]).

At trial, Thomas Bayly (hereinafter Bayly), plaintiff's owner and project superintendent, testified that plaintiff dug trenches, filled the trenches with stone bedding material, set 20-foot segments of pipe in the trenches and then filled in the trenches up to grade, all in accordance with the contract specifications. Bayly testified that using a laser, he inspected each pipe to confirm that it was set at the proper slope. During the initial installation, an existing storm water pipe was damaged by an excavator. Plaintiff cut out the damaged section of pipe – approximately 13 feet in length – and spliced a new section of pipe to the existing pipe and connected the end of the new section to the next 20-foot segment of pipe.

Jay Quackenbush, Consigli's former project manager, testified for plaintiff that he wrote the piping subcontract specifications and was at the project site daily. He did not know that plaintiff used a splice to repair the damaged pipe and, though he could not recall specifics, he was unable to recall observing anything "out of the ordinary" during plaintiff's installation of the storm water line. Quackenbush also could not recall specific inspection procedures but did testify that he believed that a third-party testing agency tested for compaction in the trench material below the pipe and that plaintiff was not required to do testing. Quackenbush confirmed that no deficiency reports were completed during the installation and that he believed plaintiff's work was performed in accord with the contract specifications. According to plaintiff's expert, Russ Reeves, the pipes failed because the system was overpressurized, causing the pipe joints to separate and water to leak into the surrounding bedding material, compromising the bed supporting the pipes. Reeves opined that the system was not designed properly because it failed to account for the amount of water runoff that would be generated after the entire project was completed. Consistent with this theory, plaintiff's superintendent, Michael Bayly, testified that prior to the first repair, he twice observed a two-foot

tall "geyser" of water coming from a manhole cover "downstream" from the project after heavy rain events.

For defendants' part, the project designer, Bradley Sendlak, testified that the first phase of the project included the installation of an underground system to divert surface water from the project site. Michael Panichelli, the president of MJ Engineering, testified about the report that MJ Engineering was retained to produce. Panichelli explained that, based on its investigation, none of the pipe joints had separated and the only evidence of pipe separation was found at the area of the field splice. Although the photo of the field splice appears to show that the splice was intact, Panichelli explained that debris was observed inside the pipe at the location of the splice, there was evidence that the ground above the splice had sagged and the pipe was deformed at the location of the splice. According to Panichelli, although the splice appeared to be installed "beyond the manufacturer's requirements," the location of the splice was "non-intended" as part of the design.

According Supreme Court the requisite deference, we find that it reasonably credited the testimony that plaintiff did not comply with the contract specifications. Insofar as it is relevant to this dispute, the contract required plaintiff to perform "field quality control," that is, "[i]nspect interior of piping to determine whether line displacement or other damage has occurred." Further, the contract specified that "[d]efects requiring correction" included "[c]rushed, broken, cracked, or otherwise damaged piping," and plaintiff was required to "[r]eplace defective piping using new materials, and repeat inspections until defects are within allowances specified." Plaintiff was also required to "[s]ubmit separate reports for each system inspection." Indisputably, plaintiff installed the field splice and there was evidence that the splice failed. The court's determination that plaintiff was contractually obligated to replace the pipe it damaged with a new 20-foot segment of pipe, and that it breached the contract by cutting the damaged section of existing pipe and splicing in a new section, was consistent with the subcontract and not against the weight of

the evidence. Similarly, although Bayly testified that he did perform the contractually required inspections for alignment in the field after placing sections of pipe, there is no evidence that the pipes were tested for leaks and defects and Bayly conceded that he did not complete contemporaneous reports as specified by the contract.

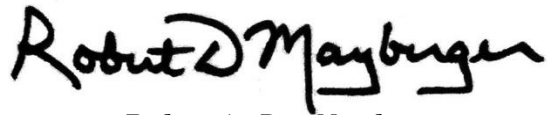
We do not agree with plaintiff that Supreme Court should have credited Reeves' testimony regarding the cause of the pipe failure. Reeves' opinion that the pipes were overpressurized due to excessive surface water did not account for the first phase of the project that Sendlak described. Further, although Reeves opined that the design was based on flawed assumptions, he conceded that he did not do any calculations to support his conclusion that the specified pipe was insufficient based on what he believed to be the correct soil composition and volume of water runoff (compare Village of Endicott v Parlor City Contr. Co., 51 AD2d 370, 371 [1976]). As the court noted, Reeves placed great emphasis on the evidence of "geysers" downstream from the project site during excessive rainstorms, but there was no evidence of similar incidents following the second repair. In sum, we find that the court did not abuse its discretion by discrediting plaintiff's expert (see Gibbs v Porath, 145 AD3d at 1223; Thomas J. Hayes & Assoc., LLC v Brodsky, 101 AD3d 1560, 1562 [2012], lv denied 21 NY3d 851 [2013]).

Given the foregoing, it is not necessary to consider defendants' alternative argument.

Garry, P.J., Clark, Mulvey and Rumsey, JJ., concur.

ORDERED that the judgment is affirmed, with costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court