

To commence the statutory time period for appeals as of right (CPLR 5513[a]) you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

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EASTFIELD GLASS CO., INC,

Plaintiff,

Index No. 54676/2015

-against-

**DECISION AFTER
TRIAL**

AVANTI SYSTEMS USA, INC.,

Defendant.

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WOOD, J.

This matter was assigned to this court on February 20, 2018 by the Trial Ready Part. A non-jury trial was held over two days, during which the court took testimony from several witnesses, and exhibits were admitted into evidence. The court reserved decision, pending receipt of the trial transcript, and post-trial briefs, which chambers received on or about May 1, 2018.

Plaintiff Eastfield Glass and defendant Avanti Systems USA contracted for defendant to design and provide a glass wall system for a project on which the plaintiff was a subcontractor. The purchase order contract was executed on or about October 22, 2014, and plaintiff's down payment of \$71,530 to defendant via Federal Express, arrived the morning of October 24, 2014. Jeffrey Jutkiewicz was the project manager for plaintiff. He testified that this was the first time that the parties had worked together in his over 20 years with plaintiff.

Jutkiewicz described having made it clear to defendant's representatives, that time was of the essence to begin and complete the project, as it was an integral part of the overall project. Most of the story is set forth in emails. Shop drawings were the first step, and Jutkiewicz was initially

told "5-7 days" (Exhibits 1, 3). By emails dated October 23, 2014, Jutkiewicz advised Scott Vore of defendant that the down payment check was on its way, and "please prepare the submittals, samples, and shop drawings." Vore advised, "I will start preparing all the required documents next week when I return" (Exhibit 5). On October 28, Jutkiewicz emailed "DL-Sales" at defendant, and Vore, expressing frustration that Vore's lack of responsiveness, and stating "I need to know when the shop drawings will be complete, and a schedule for when we can expect samples as required by the specification. The shop drawings are critical as these documents will be used by the framing contractor to build the openings so that field measurements would not be required." Vore responded immediately that he was away last week, and getting caught up, and that email communications had been had about the shop drawings. He acknowledged receipt of the down payment, said it takes a few days to clear, and stated that the shops (drawings) have gone to CAD to get started, and the turnaround time is 3-4 days (Exhibit 6).

The next day, Jutkiewicz checked on the status, and Vore responded that CAD was "a little behind schedule" but pushing to have the drawings ready by week's end (Exhibit 7). They were not ready. Monday, November 3, Vore sent an email saying that the CAD department was trying to complete the drawings "today", and that Vore believed pages were missing from the architectural drawings. Tuesday November 4, Jutkiewicz emailed a further request for the drawings, so the coordination meeting can be scheduled, and "this meeting is critical to keeping to the aggressive schedule that must be maintained for the first phase" (Exhibit 8). Later in the day, Jutkiewicz emailed "it is imperative that I get a response regarding the status of the shop drawings on this project before the end of business today," and reiterated the same themes from prior emails.

On Friday, November 7, Jutkiewicz send an email to 3 recipients at Avanti, expressing frustration and stating "I need to speak to the president/CEO of your company to see what the issue

is with Avanti not following through with the commitments that have been made and NEVER complied with. Both the architect and the construction manager are beyond disgusted with the lack of any contact from your company.” Vore responded “Your shops still have not been returned to me as I was told this would happen which is why I relayed that information to you. [T]hey have said within a few hours I should have Phase 1. I apologize for the delay on my end and please be sure I’m pushing hard to get these to you as fast as I can. Your project is at our front line and we are working to achieve the milestones which were set at your order time” (Exhibit 10). Immediately, Bill Aquadro, the vice president of Barr & Barr, the general contractor of the project, emailed Vore, thanking him for his response, asking him to keep the lines of communication open, and stating that there is a level of anxiety created when they are not. He reiterated, “[T]he success of this aggressively scheduled project depends on Avanti Glass. We don’t have walls (or doors) without you performing as expected.” He then asked about seeing glass samples shortly for review and approval (Exhibit 11).

Another weekend passed, and on Monday, November 10, 2014, at 8:53 A.M., Jutkiewicz emailed Vore: “Scott, I need to know when we will have the shop drawings. Your email indicated you would have them Friday afternoon.” Scott Cable from Avanti enters the picture, and emails at 10:01 A.M., “Jeff, I apologize, I was out of the office all day Friday. Is everything settled? Have you received everything you need? Please let me know.” Jutkiewicz responded at 10:08 A.M., “Nothing is settled. Vore emailed Friday afternoon that he would have the drawings in a few hours. I have not seen anything, and Scott’s voicemail is full and won’t accept messages. I am really dismayed at the lack of communication.” At 10:14 A.M., Cable immediately wrote back, “Going to get in touch with Vore now and find out what the hell is going on. This is very disappointing.” In an email at 10:33 A.M., he wrote “I have reached out to my CAD department.

The revised shops will be in my hands within the hour, and yours immediately after. Sorry again, Jeff. This is totally unacceptable” (Exhibits 13-14).

At 3:10 P.M, Jutkiewicz emailed Cable and Vore: “What is the hold up with the drawings? Please don’t keep making me send multiple emails following up on this.” At 3:16, Cable responded: “I still have no (sic) received the revised shops back from my CAD department. Two other emails were exchanged between Jutkiewicz and Cable, with Cable advising Jutkiewicz that he would address some changes in scope of work and their associated costs. As of 3:38 P.M., no shop drawings appear to have been provided (Exhibit 15).

Finally, on November 11, 2014, plaintiff received the shop drawings, and Jutkiewicz was less than pleased with them. He sent Cable a laundry list of issues to be corrected (Exhibit 16). He testified that they were too incomplete to submit to the architect.

Jutkiewicz and Cable spoke on Thursday, November 13, and their conversation was memorialized in emails between them the morning of Friday, November 14. Cable agreed to have the drawings released that day, changes were to be incorporated, cost implications were to be forwarded to plaintiff by Monday November 17. Cable raised the issue of a glass pricing mistake made by Forms and Surfaces, its supplier (Exhibit 17).

That evening, Vore sent an email to Jutkiewicz explaining that the mistake was actually his:

I did in fact have the incorrect glass sq/ft when I was quoting the project as per my discussion with forms and surfaces over the past 2 days. It seems as we were quoted for metal gradient panels during our pre estimate stage and to be honest when carrying it thru I just missed it. There will be a price increase for the specified glass but I’m working to minimize it as much as possible. I’m thinking roughly \$61k upcharge due to the new sq/ft cost provided. (Exhibit 18)

Next, on Monday, November 17, Vore wrote Jutkiewicz at 1 P.M., "The added cost for the glass will be \$63,737.00. I apologize for this error and only catching it at this point in the game. I can only say that I'm human and just over looked (sic) this detail" (Exhibit 19). Jutkiewicz responded: "I find it hard to believe that Avanti Systems/Forms + Surfaces are going to look for additional money for what was YOUR mistake to begin with. This has to stop. Eastfield Glass has a contract for an amount based on your proposal in which you specified the product was per plans and specs" (Exhibit 20).

At 7:38 A.M. on Wednesday, November 19, Jutkiewicz again inquired of Vore and Cable about the shop drawings that had been promised on Friday November 14: "Please let me know what the hold up is regarding the ship drawings. You are seriously affecting the successful completion of this project" (Exhibit 22).

At 12:56 P.M. on November 19, the other shoe dropped. Vore emailed plaintiff that the Forms and Surfaces pricing "is significantly higher than what we had originally presented. There was missing sq/ft cost, missing tempered panels for the sliding doors, etc. I understand that this was my responsibility to review and provide the appropriate information back at the start of the project and I'm not trying to hide from that at all. We need to understand that this is a specified vendor that Avanti has not used in the past and we had went (sic) on wrong information passed. Additional glass cost \$202,132.00 for Phase 1&2" (Exhibit 23). He followed that email with one at 4:28 P.M., attaching the shop drawings for review and approval, and advising "Glass cannot be placed on order until the cost variation is Approved and the glass sample Approved. Avanti needs to sign a contract with Forms and Surfaces for them to be able to release a sample. Once released, I will have it over nited (sic) to your shop" (Exhibit 24). On Friday, November 21, Jutkiewicz advised defendant that items were missing from the shop drawings submitted (Exhibit 25).

December 2, 2014 featured an email from Jutkiewicz to Cable, stating “At your suggestion we have contacted Forms + Surfaces regarding this project. According to their rep, no one from Avanti Systems contacted them regarding pricing until approximately 2 weeks ago.” He went on to cite another Vore pricing error, and to express that Vore needed to be replaced as project manager for Avanti (Exhibit 27). Cable responded that the new and correct glass cost for Phase 1 and 2 was \$158,926 (Exhibit 28). On December 3, Cable responded to another email, and stated that he was working on reassigning a replacement project manager for Vore, and would be the main point of contact in the interim (Exhibit 29).

Vore was replaced as project manager by Damian Pagano on or about December 4, and on December 5, Jutkiewicz sent an email to him and Cable stating that the Vore mistakes were Avanti’s liability, but that the owner of the project was willing to pay an additional \$120,000 to mitigate Avanti’s loss (Exhibit 30). A change order acknowledgment was sent by plaintiff on December 9, 2014, and plaintiff also sent back the shop drawings “approved as noted/make corrections as noted/resubmit for record” (Exhibits 31,32). Jutkiewicz then asked Pagano to call him about the schedule for installation. Pagano responded that installation can start after payments are received in accordance with previously agreed upon payment terms that were present at the start of the project. “Also, informing you that 35% of the change order will be due prior to glass order for the first phase as well” (Exhibit 33). Jutkiewicz responded, “At this stage of the project, Eastfield has paid Avanti more than \$71,000.00 For this amount we have received shop drawings that were delayed over 3 weeks from the lead time that we were told by Scott Vore. Additionally we have issued a change order for \$120k for mistakes made by Avanti in the quoting process. As a show of good faith, I believe that Avanti should begin to man the job, install channel and door frames and coordinate with the other trades on site prior to any additional payments from Eastfield

Glass. We spoke yesterday of meeting on site this week to begin the coordination portion. This has to happen. Please let me know when your schedule will allow you to meet with me, the GC and framing contractor.” Pagano restated his request for payment, and stated, “[If] you will agree to bring payments current to terms, I will be on-site tomorrow and start field verification, as per our discussion” (Exhibit 33). December 11, at 4:14 P.M., Pagano followed up with: Jeff, Where do we stand with this? I need to make my schedule for tomorrow” (Exhibit 34).

Jutkiewicz responded at 6:47 A.M. December 12: “Damian, We truly cannot believe that you are refusing to at the least meet on site to survey and layout the project without receiving additional payments. It is true that there were payment terms agreed upon prior to Avanti Systems beginning this project. If your company had followed through on your commitments regarding shop drawing lead times, pricing, etc Eastfield Glass would have no issues with issuing payments per the terms.” He went on to state “[w]e are concerned that having Avanti paid so much up front without any real proof that you will honor your commitments is troubling” (Exhibit 34).

The back and forth continued. A week later, Jutkiewicz asked for the payment terms to reflect the \$120,000 change order. “We need to have this spelled out so there are no surprises.” After multiple emails, on Friday, December 19, Jutkiewicz agreed that Eastfield would pay \$14,306.20 prior to setting the glass, and the same amount on completion of Phase #1, and the check would go out “Monday” (Exhibit 37).

The check was apparently not sent, because on Monday, December 29, Pagano sent: “Jeff, I am told we have not received the agreed upon payment from Eastfield Glass for the Guardian project. Not sure where we stand with this, but I cannot release any material until we see at least a copy of the check. My guy is ready to cut in to these door frames and fabricate for phase 1, but I can’t let him do that until the financials are in order. More importantly, we cannot commit to the

glass manufacture until this issue is resolved. The glass price (theirs) will increase by \$10 per square foot unless we resolve this soon. Please advise" (Exhibit 38).

On December 30, defendant, by Cable, send both plaintiff and Barr & Barr (the general contractor) a "48 Hour Notice to Cure," which stated that due to the failure of Eastfield to make timely payment, "Avanti is forced to increase its pricing schedule for materials." The notice also states that the suppliers increased their prices. A new schedule of payments was set forth, with the \$120,000 change order now stated as a \$200,00 change order. (Exhibit 39). Early the next day, Jutkiewicz responded that plaintiff was awaiting a requisition from the GC to provide the funds for the additional payment, and that since the contract was between Eastfield and Avanti, the GC should not be copied on future emails (Exhibit 40).

On Friday, January 2, 2015, Jutkiewicz emailed Pagano "I just spoke with the GC. They will be paying our 1st requisition and Eastfield Glass will be sending payment to Avanti. Please call me to discuss." Pagano responded "We are past that point. Unless revised payment structure is honored by close of business today, and this includes a very steep increase in glass price, Avanti intends to cancel the contract" (Exhibit 41). The day continued with Jutkiewicz writing "Please contact Forms & Surfaces and ask if there is any way for them to hold their pricing until Wednesday of next week. We will send payment via FedEx on Monday" (the office was closed). Pagano replied: "I will let you know what Forms and Surfaces tells me, but I doubt they will honor their existing quote. Their price is likely to increase by at least \$10 per square foot, as previously mentioned" (Exhibit 42). He followed that with another email: "Also it is not only Forms and Surfaces that increased its pricing. There is a lot of special-order hardware for this job and that cost has also increased. New Pricing is included in the 48 hour notice. Eastfield will have to agree to these increases by Monday 5 p.m. or Avanti intends to cancel the contract (Exhibit 43).

Monday, January 5, 2015, Jutkiewicz emailed Pagano, copying Cable, "Have you been able to contact Forms + Surfaces today to see if they can hold the pricing? We are ready to send out a check today and need to know if they can hold it until tomorrow when you will have the check for deposit" (Exhibit 44). Receiving no response, he sent another email on January 6, asking the same thing, and asking for documentation from the suppliers for the nearly \$150,000. Cable responded that Pagano was on a project with limited availability, and that he would touch base with him and get back to him (Exhibit 46). It appears that he never did.

On January 20, 2015, Eastfield finally cut bait, and by letter of Jutkiewicz, terminated the contract with Avanti, and advised that it was going to complete the project without it. The letter requested return of the deposit, less reasonable deductions for the submittals and manpower. It noted that all framing materials were in stock at Avanti's facility, and no custom hardware was ordered, so no restocking fees were expected. It closed with a request for the cost of the submittals and manpower (Exhibit 47). Interestingly, but not altogether surprisingly, nine days later, Avanti sent a letter that appears to be signed by Scott Vore or Scott Cable, stating that it considered any and all contracts between the parties to be null and void, and that the deposit paid by Eastfield was non-refundable, and "will suffice to cover shop drawing preparation, project management time, and time lost for material preparation and restocking" (Exhibit 48).

Avanti's view is that admittedly mistakes were made, and there were some issues with Avanti producing the shop drawings early on, but the parties worked through them, and these issues did not cause the project to be delayed more than minimally. The fact that they came to an amended agreement is proof that Avanti ultimately delivered shop drawings, and the parties had put the initial problems behind them. Avanti posits that Eastfield ultimately decided to save money and increase its profit by breaching the contract and doing the work itself, after becoming privy to

Avanti's proprietary system. Avanti further claims that all of its emails, from the first contacts before the contract, to the last email, contain a footer with reference to its terms and conditions on its web site, which states the fact that deposits are non-refundable.

The court also heard testimony from Matthew Gordon, CEO of Avanti. He was not involved in the purchase order, nor any of the early communications between Jutkiewicz and Vore and Cable, and did not go to the site. He testified that Vore is no longer working for Avanti. Gordon got involved in "towards the middle and the end" when it was clear that Avanti's people were becoming frustrated with Eastfield withholding payment (r. 230-231).

Finally, Rebecca Hawraneck, a licensed architect, testified for Avanti. She was an independent contractor that prepared shop drawings for Avanti, but was not involved in the shop drawings here, and had no other involvement with this case (r. 329). She was asked to look at the Avanti shop drawings and the Eastfield drawings, and whether a glass system could be installed without the Avanti shop drawings.

The court had the opportunity to observe the witnesses, and to evaluate their candor, truthfulness, and demeanor. Notably missing from Avanti's defense is any proof of the claimed price increases cited in its emails. Further, not one of the expenditures claimed by Avanti were even close to being in admissible form (r. 240-243). Avanti produced no paid invoices, cancelled checks, bank statements, or other proof of payment. This was not the first time that Avanti represented one thing with respect to Forms and Surfaces, then the truth appeared to be something else entirely (Exhibit 27). Further, Gordon's opinions about the timing of the shop drawings and whether the overall project was on time (r. 229) carries very little weight, as he admittedly had no involvement in the negotiations, the contract, or the project. His testimony reflected absolutely no direct knowledge or familiarity with the facts of this case. Finally, it is telling that none of the

Avanti personnel involved with the project testified. Plaintiff gave the court the person that was closest to the project (Jutkiewicz), even though he no longer works for plaintiff. Defendant produced absolutely no witness with actual knowledge of the project.

Finally, Avanti's contention that the inclusion of the footer in its emails with a reference to its website and terms and conditions, has any bearing on the contract itself is entirely without merit. The contract itself has no language that would give any notice that the 25% contract deposit was non-refundable, which falls far below the legal standard to have it incorporated by reference and binding upon the parties (Kenner v. Avis Rent A Car System, Inc., 254 AD2d 704 [4 Dept 1998]; Chiacchia v National Westminster Bank USA, 124 Ad2d 626 [2 Dept 1986]).

The court finds for the plaintiff.

Accordingly, it is hereby


ORDERED, that plaintiff have judgment against defendant in the amount of \$71,531.00, with interest from January 30, 2015, and shall have execution thereof.

ORDERED that plaintiff shall, upon notice to defendant, submit a copy of this Decision and judgment with a bill of costs to the Westchester County Clerk for entry.

The remaining contentions of the parties have been considered and are denied.

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: September 6, 2018
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: Parties via NYSCEF