

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D28414
H/prt

_____AD3d_____

Argued - September 7, 2010

MARK C. DILLON, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS, JJ.

2009-03004

DECISION & ORDER

Bana Electric Corporation, respondent-appellant, v
Bethpage Union Free School District, appellant-
respondent, et al., defendant.

(Index No. 4494/05)

Jaspan Schlesinger LLP, Garden City, N.Y. (Laurel R. Kretzing and Christopher E. Vatter of counsel), for appellant-respondent.

Bender Rotondo & Associates (Rivkin Radler LLP [Evan H. Krinick, Cheryl F. Korman, Merril S. Biscone, and Melissa M. Murphy], of counsel), for respondent-appellant.

In an action, inter alia, to recover damages for breach of contract, the defendants, Bethpage Union Free School District and School Construction Consultants, Inc., appeal from so much of an order of the Supreme Court, Nassau County (Austin, J.), entered March 9, 2009, as denied the motion of the defendant Bethpage Union Free School District for summary judgment dismissing the plaintiff's claim insofar as asserted against it for additional compensation in the sum of \$214,971.47 for the performance of certain work in connection with the subject contract, and the plaintiff cross-appeals, as limited by its brief, from so much of the same order as denied its cross motion for summary judgment on the same claim for additional compensation insofar as asserted against the defendant Bethpage Union Free School District.

ORDERED that the appeal by the defendant School Construction Consultants, Inc., is dismissed, without costs or disbursements, as abandoned (*see* 22 NYCRR 670.8[e]), and on the

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additional ground that the defendant School Construction Consultants, Inc., is not aggrieved by the order appealed from (*see* CPLR 5511); and it is further,

ORDERED that the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

“Whether or not a writing is ambiguous is a question of law to be resolved by the courts” (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162). A contract is ambiguous when “the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings” (*Geothermal Energy Corp. v Caithness Corp.*, 34 AD3d 420, 423, quoting *Feldman v National Westminster Bank*, 303 AD2d 271, 271 [internal quotation marks omitted]). In deciding whether the writing is ambiguous, the court “should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed” (*Kass v Kass*, 91 NY2d 554, 566, quoting *Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524). If the court concludes that the language in the contract is ambiguous, “the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact” (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671; *see Nappy v Nappy*, 40 AD3d 825, 826; *Geothermal Energy Corp. v Caithness Corp.*, 34 AD3d at 424; *Weiss v Weinreb & Weinreb*, 17 AD3d 353).

Here, an ambiguity exists as to whether the subject contract required the plaintiff to perform the work in question. Thus, the Supreme Court correctly determined that there are triable issues of fact which precluded an award of summary judgment to either party (*see Geothermal Energy Corp. v Caithness Corp.*, 34 AD3d at 424; *Pellot v Pellot*, 305 AD2d 478, 481; *Nappy v Nappy*, 40 AD3d at 826; *Siegel v Golub*, 286 AD2d 489, 490).

DILLON, J.P., FLORIO, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court