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Committee on Opinions (22 NYCRR 7300.1)**

proceed. On August 27, 1991, during a bid opening of a contract to install emergency lighting in nine schools in Brooklyn, Parker devised a bid rigging scheme. In opening the nine bids received for the contract, Parker observed that the first eight bidders had bids of \$370,000 or higher. The ninth bid which Parker opened was submitted by Christ Gatzonis Electrical Contractor, Inc. (hereinafter "Gatzonis Electrical") and was for \$218,000. Without consulting any representative of Gatzonis Electrical, Parker inflated its bid price to \$318,000 and announced that figure as the lowest bid price. When Parker returned to his office, there was a message from Robert Tucker, a representative of Gatzonis Electrical, whom he had come to know well during the previous year. Parker subsequently met with Tucker and told him that in return for the payment of \$18,000, the contract would be awarded to Gatzonis Electrical at the inflated figure of \$318,000. According to Parker, Tucker informed him that after discussing the matter with his superiors at Gatzonis Electrical, the proposal had been rejected by a vote of two to one. Parker claimed that Tucker told him that this rejection did not mean that there could not be a future relationship and that he should keep the company informed as to bids. Parker thereafter altered the sheet on which he recorded the bid to reflect Gatzonis Electrical's original bid of \$218,000.

Evangelos Gatzonis, the President of Gatzonis Electrical, at his deposition and in affidavit submitted herein asserts that he hired Robert Tucker as an independent consultant to act as a liaison between the corporation and all public agencies, and that

his duties included monitoring the status of upcoming agency projects and communicating with the personnel of such agencies. Mr. Tucker had the authority to act on behalf of Gatzonis Electrical, and held the title of General Manager. Mr. Gatzonis confirmed that Parker had made an offer to Gatzonis Electrical and that he, Tucker and Mary Andrikopoulos, the company's Secretary and Comptroller (and Gatzonis' sister-in-law) had a meeting and that they all declined to become involved in Parker's scheme and that Tucker so informed Parker. Mr. Gatzonis did not meet with Mr. Parker, and, therefore, does not have any personal knowledge as to what transpired between Parker and Tucker. While Mr. Gatzonis testified that he viewed Parker as a threat to his company, neither he nor anyone from Gatzonis Electrical reported Parker's attempt to solicit a bribe to the SCA or any other law enforcement agency.

On February 13, 1992, Parker opened bids for a contract for electrical work at several schools. These contracts are referred to by the SCA as the Various Brooklyn Schools contract. The SCA had estimated that this project would cost approximately \$575,000. Most of the bids opened by Parker were in the vicinity of \$650,000. Parker had arranged to open Gatzonis Electrical bid last and it had submitted a low bid of \$340,000. Instead of announcing Gatzonis Electrical's low bid, Parker, without consulting Gatzonis Electrical, announced that its bid was \$621,000, thereby inflating the bid and preserving its status as the lowest bidder. This contract was subsequently awarded to Gatzonis Electrical for \$621,000. Shortly after the bid was

announced, Parker was contacted by Tucker who had not been present at the bid opening, but was aware that Gatzonis Electrical had been awarded the bid via a voice mail system. Tucker suggested that they meet for lunch. Mr. Parker in his affidavit states that during the lunch meeting, Tucker told him that Gatzonis Electrical's bid contained an error and should have been materially larger, and that by increasing the bid, Parker had "saved" them. At the lunch meeting, Parker reiterated his bid rigging scheme and told Tucker that a new page two of the bid documents had to be submitted in order to reflect the increased bid amount. Mr. Parker stated that he received this document at his SCA office. Mr. Gatzonis stated that he had no personal knowledge of the contents of either the original bid documents or of the altered documents. However, the documentary evidence submitted established that the bid sheet, which Parker later turned over to law enforcement agents on January 27, 1993, was in the amount of \$340,000 and included a bid bond in that amount, and that the bid document on which the contract was awarded was for \$621,900 and included a bid bond in that amount. These bid documents were apparently filled out by the same person, and Mr. Gatzonis at his deposition testified that the handwriting was most likely that of Mary Andrikoupoulos. Mr. Gatzonis in his present affidavit now asserts, without any evidence, that Ms. Andrikoupoulos' handwriting may have been forged.

Mr. Parker in his affidavit states that between February 1992 and January 1993, he had lunch approximately five

times with Tucker, and that Tucker and Gatzonis were both present at least once. Mr. Parker stated that on these occasions, Tucker gave him sums of money totaling between \$2,000 and \$4,000. Mr. Parker stated that Gatzonis was present on at least one of these occasions. Mr. Gatzonis stated that he learned that Tucker had had lunch with Parker and that Tucker had given Parker "a couple of hundred dollars" "one or two times." Mr. Gatzonis also stated that he may have attended one of these lunches prior to February 1993, but denied having any prior knowledge that Tucker would be making payments to Parker. Ms. Andrikopolous, at her deposition invoked her rights under the Fifth Amendment and declined to answer any questions relating to the payments and bid rigging scheme.

In the Spring of 1992, Parker began to discuss the systematic rigging of SCA bids with John Dransfield, a senior project officer assigned to Brooklyn projects. Dransfield developed what they called the "Red Balloon" theory, by which they could inflate the amount at which the bidders would bid on the project, and permit them to inflate the low bid of a favorite contractor. Parker came under investigation in August 1992. On January 27, 1993, Parker was met at the escalator at the Port Authority by investigators and was told that the bid rigging scheme was known to several government agencies. Parker agreed to cooperate with the United States Attorney's Office for the Eastern District and was extensively debriefed on January 27 and 28, 1993. Parker disclosed his agreements with Gatzonis Electrical and turned

over several documents including the original bid sheet on the Various Brooklyn Schools contract and an informal record of the amounts owed to him by the contractors, including \$30,000 owed by Gatzonis Electrical. Over the next two months, as part of his cooperation with law enforcement, Parker tape recorded his conversations with Dransfield, Gatzonis, Tucker and other contractors and SCA employees. On February 1, 1993 Gatzonis, accompanied by Tucker, picked up Parker in a car. Tucker handed Parker an envelope which contained \$500 in cash. Mr. Parker asserts that they then drove to a restaurant where they discussed participating in the bid rigging scheme and the amount of the payoffs. Mr. Gatzonis asserted that he was unaware of the payment made to Parker while they were in the car. Mr. Gatzonis further stated that while Mr. Parker described the bid rigging scheme to him and he agreed to make a payment to Parker in the future, he refused to participate in the bid rigging scheme. On March 18, 1993 Gatzonis, accompanied by Tucker, picked Parker up in a car and gave him an envelope containing \$4,000 in cash. Mr. Parker stated that Gatzonis had agreed to give him \$5,000 and that he called Gatzonis on March 19, 1993 and Tucker on March 23, 1993 to ask about the shortfall. Mr. Gatzonis asserts that the \$4,000 he paid Parker was the result of extortion and that he felt that his company was vulnerable to Parker's manipulations of contract bids. Mr. Gatzonis, however, never reported to the SCA or law enforcement authorities that Parker was engaged in a bid rigging scheme and extortion or bribery.

On April 20, 1993 Gatzonis, Tucker and Dransfield, as well as 11 other individuals were arrested. Gatzonis was criminally charged by the United States District Attorney for the Eastern District of New York with rigging a bid for a contract with the SCA. Gatzonis was alleged to have operated the scheme to defraud through Gatzonis Electrical and another company. As part of the scheme, it was alleged that John Dransfield released false information concerning upcoming projects to Gatzonis' competitors. The information caused the competitors to unwittingly submit artificially high bids. At the same time, Dransfield gave Gatzonis confidential information which enabled Gatzonis to submit lower bids than other competitors. Upon receipt of Gatzonis' bids, Dransfield would inflate them to just under the next-lowest competitor. Gatzonis' company then paid Dransfield a portion of the difference between cost and the inflated bids. On the same day as Gatzonis was charged, the United States filed a civil forfeiture action to recover the proceeds of the scheme. As a result, the federal magistrate directed the clerk to issue a warrant in rem arresting, among others, the accounts of Gatzonis Electrical and another company owned by Mr. Gatzonis at Atlantic Bank and Interbank. The accounts contained progress payments that Gatzonis had received on various SCA contracts. On May 5, 1993, the United States entered into a stipulation with Gatzonis Electrical allowing it to establish a separate bank account. The new account allowed Gatzonis Electrical to continue to operate the firm and fulfill its obligations on 22 ongoing contracts. On July 27, 1993, the United

States entered into another stipulation with Gatzonis in return for dismissal of the civil forfeiture action. Gatzonis and his corporations agreed to the immediate forfeiture and condemnation of \$317,000 from their Interbank accounts and \$43,000 from the Atlantic accounts. Gatzonis also paid a lump sum of \$40,000. The forfeiture action was discontinued with prejudice and the arrest warrants were vacated on August 4, 1993. The indictment against Gatzonis was dismissed without prejudice in September 1995. (See, Colonia Insurance Company v United States of America, 1996 US Dist LEXIS 20290.)

Immediately following the arrest of Mr. Gatzonis, the SCA suspended all payments under nearly 30 contracts for work completed or substantially completed by Gatzonis Electrical. Gatzonis Electrical commenced an action on June 1, 1993 in federal court, pursuant to 42 USC § 1983, claiming that the SCA's failure to make payments promptly for work done on contracts other than the March 17, 1992 contract constitutes a deprivation of property without procedural or substantive due process. The United States District Court for the Eastern District of New York dismissed the complaint for failure to state a claim, and the Second Circuit affirmed. (See, Christ Gatzonis Elec. Contr., Inc. v New York City School Construction Auth., 23 F3d 636, affg Christ Gatzonis Electrical Contractor, Inc. v. New York City School Construction Authority, 1993 US Dist LEXIS 21066 [September 17, 1993, EDNY].)

Gatzonis Electrical's surety in two separate actions sought to recover sums which the SCA had refused to pay because of the

criminal charges then pending against Gatzonis. The Appellate Division, Second Department upheld the denial of summary judgment in both of these actions. (See, Avon Electrical Supplies, Inc. v Christ Gatzonis Electrical Contractor, Inc., 235 AD2d 380; Kennedy Electrical Supply Corp. v Christ Gatzonis Electrical Contractor, Inc., 235 AD2d 398.)

On April 21, 1994, plaintiff commenced the within action and seeks to recover the sum of \$1,325,376.23 in connection with 26 contracts between SCA and Gatzonis Electrical. At least three of these contracts are subcontracts in which the plaintiff was not in privity with the SCA. Plaintiff does not seek to recover on the Various Brooklyn Schools contracts. Plaintiff's first, second, third and sixth causes of action for breach of contract, violations of the Prompt Payment Act, breach of the implied covenant of good faith and fair dealing and unjust enrichment are all based upon the SCA's refusal to pay contract sums because of corruption. The fourth and fifth causes of action allege intentional interference with contractual relations and prospective economic advantage. The SCA served an answer on June 1, 1994 in which it asserted various counterclaims and seeks to recover the sum of \$4,710,331.60 which represents all sums paid by the SCA to Gatzonis Electrical after February 13, 1992, and includes the sum of \$571,939.91 which it paid to plaintiff on the Various Brooklyn Schools contract.

A motion for summary judgment must be supported by admissible evidence. (See generally, Zuckerman v City of New York, 49 NY2d 557.) The SCA, in support of its motion for summary

judgment, has submitted transcripts of taped conversations between Parker, Tucker and Evangelos Gatzonis. These transcripts are not sworn to and the actual tape recordings have not been authenticated. There is no evidence that the tapes or transcripts were previously admitted in any other court proceeding. While the tape transcripts may be admissible in a trial, they do not at present constitute admissible evidence and cannot be considered in support of the motion for summary judgment.

New York law provides that "where work is done pursuant to an illegal municipal contract, no recovery may be had by the vendor, either on the contract or in quantum meruit." (S.T. Grand, Inc. v City of New York, 32 NY2d 300, 305.) Mr. Parker, in his affidavit, stated that after he raised the Various Brooklyn Schools bid from \$340,000 to \$621,900, Tucker sent him new bid documents reflecting the higher bid amount and that he met with Tucker on numerous occasions between February 13, 1992 and February 1, 1993 and received sums of money from Tucker totaling between \$2,000 and \$4,000. Mr. Gatzonis asserts that he was unaware of the bid rigging scheme and payments made by Tucker and seeks to cast doubt on Parker's sworn statement. Plaintiff, however, has failed to offer any admissible evidence which contradicts Parker's statements as regards Tucker's conduct. The evidence presented establishes that Mr. Tucker, whether an employee or independent contractor, had actual authority to act on behalf of Gatzonis Electrical as regards the SCA bids and contracts, and that he entered into an illegal bid rigging scheme with Parker and paid bribes on behalf of the

corporate plaintiff in order to secure SCA contracts. The documentary evidence submitted herein establishes that plaintiff submitted two handwritten bid documents to the SCA which set forth two substantially different bid amounts for the February 13, 1992 contract. Mr. Gatzonis at his deposition identified the handwriting as most likely that of Ms. Andrikopolous. Mr. Gatzonis now asserts that he cannot verify the handwriting and suggests that it may have been forged by Mark Parker. Mr. Gatzonis' present assertions are purely speculative and are insufficient to raise a triable issue of fact.

The court finds that Mr. Gatzonis conceded, in his affidavit and at his deposition, that he paid the sum of \$4,000 to Mr. Parker, an employee of the SCA, and that he was aware of the fact that Tucker had paid sums of money to Parker. It is undisputed that this money was paid to an SCA employee for the purpose of securing his favor in the bidding process and the awarding of SCA contracts. In addition to the contracts awarded to Gatzonis Electrical by the SCA after February 13, 1992, the corporation also submitted Subcontractor Approval Applications to the SCA on March 16, 1992, March 20, 1992, April 1, 1992, and April 6, 1992. Each of these applications inquired as to whether the applicant "filed with a government office a written instrument which intentionally falsified business records, whether it has given, or offered to give, money or any other benefit to a labor official or to a public official with the intent to influence him/her with respect to his/her official acts, duties or decisions

or whether it has engaged in collusive bidding practices." Mr. Gatzonis asserts that he filled out these applications truthfully, and that neither he nor his company engaged in any inappropriate conduct. The evidence submitted herein, however, establishes that Gatzonis Electrical had submitted improper and false bid documents in connection with the February 13, 1992 contract, and that its agent, Tucker, made payments to an SCA employee with the intent to influence him in his official acts and duties prior to the submission of these documents to the SCA.

It is well settled that "[a] contract procured through fraudulent and collusive bidding is void as against public policy and recovery cannot be had on any theory * * * It is a * * * matter of grave public concern that there be absolute honesty in the procuring of a public contract * * * The nature of the wrong is such that it is not easily discovered, but when it is, we make it quite clear that the courts of this State will decline to lend their aid to the fraudulent bidder who seeks recovery." (Jared Construction Corp. v N.Y.C. Transit Authority, 22 NY2d 187, 193.) The court finds that Gatzonis Electrical's conduct in relationship to the Various Brooklyn Schools contract, the subsequent payments of money to Mark Parker in order to secure favorable treatment in bidding and the awarding of SCA contracts, and the statements made on the subcontractors' applications, voids the contracts and subcontracts entered into after the February 13, 1992 contract and bars Gatzonis Electrical from recovering payments under these contracts. (Prote Contracting Co., Inc., v New York City School

Construction Authority, 248 AD2d 693; Abco Bus Co. v Macchiarola, 75 AD2d 831, 833 [Hopkins, J., dissenting], revd for reasons stated in dissent at App Div, 52 NY2d 938; Matter of Citywide Factors v New York City School Constr. Auth., 228 AD2d 499; Matter of Positive Transp. v City of New York Dept. of Transp., 183 AD2d 660; Matter of Crescent Bus Corp. v Board of Educ., 95 AD2d 776.) In addition, as plaintiff was not in privity with the SCA on the contracts in which it was a subcontractor, it may not seek to recover on the three specified contracts on which it was a subcontractor. (See, Eastern States Electric Contractors, Inc. v Crow Construction Co., 153 AD2d 522; Delta Electrical Inc. v Ingram and Greene, Inc., 123 AD2d 369; Martirano Construction Corp. v Briar Contracting Corp., 104 AD2d 1028.) The court further finds that plaintiff may not maintain an action for breach of the implied covenant of good faith and fair dealing in the absence of a valid contract (Levine v Yokell, 258 AD2d 296) and may not maintain an action for unjust enrichment, as it is not entitled to compensation under the void contracts. (Bugarsky v Marcantonio, 254 AD2d 384.) In addition, as defendant had the authority to withdraw its approval of plaintiff as a contractor and subcontractor based on changed circumstances, i.e., the arrest of Gatzonis and Tucker for bid rigging and bribery, the causes of action for intentional interference with contractual relations and for intentional interference with prospective economic advantage must be dismissed. (See, Prote Contracting Co. v School Construction Authority, 248 AD2d 693; Wolff & Munier v New York City School Construction

Authority, 224 AD2d 683.) Plaintiff's claim under the Prompt Payment Act, is also dismissed as it is not entitled to recover any payments under these void contracts.

The court finds that the SCA is entitled to recover on its counterclaims against the plaintiff for all amounts it was paid under the void contracts. (See, D'Angelo v Cole, 67 NY2d 65; S.T. Grand v City of New York, 32 NY2d 300; Prote Contracting Co. v School Construction Authority, 248 AD2d 693; City of New York v Liberman, 232 AD2d 42.) These amounts total \$4,710,331.60.

In view of the foregoing, defendant's motion for summary judgment dismissing plaintiff's complaint and the request for summary judgment on the counterclaims to recoup all payments made to Gatzonis Electrical after February 13, 1992 is granted.

Settle order.

Dated: January 30, 2001

Justice John A. Milano