

**Welsbach Electric Corp. v Mastec North America,
Inc.**

2003 NY Slip Op 30057(U)

January 6, 2003

Supreme Court, Queens County

Docket Number:

Judge: William T. Glover

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE WILLIAM T. GLOVER IA Part 23
Justice

<u>WELSBACH ELECTRIC CORP.</u>	x	Index Number <u>231</u> 2002
-against-		Motion Date <u>November 5,</u> 2003
MASTEC NORTH AMERICA, INC.		Motion Cal. Number <u>48</u>
	<u>x</u>	

The following papers numbered 1 to 17 were submitted on this motion by the plaintiff Welsbach Electric Corp., pursuant to CPLR 3211 and 3212, for partial summary judgment on the issue of the liability of the defendant Mastec North America, Inc. on the first and third causes of action and to strike and dismiss the fifth and eleventh affirmative defenses interposed by that defendant; and, on cross motion by the defendant Mastec North America, Inc., pursuant to CPLR 3025[b], for leave to serve an amended answer interposing two counterclaims.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Notice of Cross Motion - Affidavits - Exhibits .	5 - 8
Answering Affidavits - Exhibits	9 - 14
Reply Affidavits	15 - 17

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

I. The Relevant Facts

A. The Subcontract Provisions

The defendant Mastec North America ("Mastec") is a Florida corporation authorized to transact business in New York. It entered into a written agreement with Telergy Metro, LLC ("Telergy") for the construction of a fiber optic telecommunications network in the City of New York and Westchester County.

Thereafter, Mastec and the plaintiff Welsbach Electric Corp. ("Welsbach"), a Delaware corporation licensed to conduct business in New York, entered into a subcontract for work related to that project. Pursuant to section 1 of the subcontract, the terms of the Telergy/Mastec contract were incorporated by reference into the subcontract to the extent not inconsistent therewith. Pursuant to paragraph 2 of the subcontract, all work performed by Welsbach was required to be to the satisfaction of Mastec and Telergy, whose determination would be final and binding on Welsbach.

Paragraphs 5, 8 and 16 of the subcontract provided, inter alia, that all materials supplied by Mastec to Welsbach were Mastec's sole property and were to be used solely for completing the work; in turn, Welsbach was responsible for the condition and safekeeping of such materials, and was to return unused materials to Mastec upon completion of the work or the conclusion of the subcontract.

Paragraph 11 of the Mastec/Welsbach subcontract provides, in pertinent part:

"Upon final acceptance of the Work by [Mastec] and [Telergy], [Mastec] will pay [Welsbach] for the Work at the prices and schedule and in the manner described in Schedule 1; provided that, all payments to [Welsbach] by [Mastec] are expressly contingent upon and subject to receipt of payment for the Work by [Mastec] from [Telergy], even if (a) [Mastec] has posted a payment bond with [Telergy] or (b) the Primary Contract is on a 'cost plus' or other reimbursement basis requiring [Mastec] to pay subcontractors prior to being reimbursed by [Telergy]. . . Any amounts retained by [Telergy] under a retainage provision in the Primary Contract will also be retained by [Mastec] from amounts due to [Welsbach]. . . [Mastec] may offset against amounts due to [Welsbach] under this Agreement or otherwise any amounts determined by [Mastec] to be due from [Welsbach] under this Agreement, the Primary Contract or otherwise."

Schedule 1 annexed to the subcontract contains a pricing sheet or ". . . Unit Price Cost Schedule," which sets forth the rate for labor and/or the cost for materials, as applicable.

Pursuant to paragraph 12, Welsbach waived any right to file materialman's, mechanic's or other statutory lien, and agreed to promptly discharge any such lien. Paragraph 19 of the subcontract contains a choice of law provision stating that the subcontract is governed by the laws of the State of Florida.

During the course of the subcontract, Welsbach sent numerous invoices to Mastec for the amounts due on the contract, only some

of which were paid. On or about November 27, 2001, Mastec provided Welsbach with a computer statement indicating the amounts due to Welsbach as of that date, including retainage.

Apparently the work under the contract was completed in or about August, 2001. In May and July, 2002, Mastec demanded that Welsbach return materials allegedly valued at \$2.5 million. Welsbach responded that it would not return such materials until breach of subcontract disputes were resolved. The parties' motion papers suggest that Telergy is no longer in business.

B. Complaint and Answer

In its first cause of action, Welsbach seeks damages for breach of contract, asserting that it furnished materials and rendered services for an agreed price and, considering certain payments made by Mastec, there is a balance due and owing in the amount of \$1,193,221.12. In its third cause of action, Welsbach seeks \$1,064,085.52 based upon an account stated theory.

In the fifth and eleventh affirmative defenses interposed in its answer, Mastec asserted that: (1) the agreement is governed by the laws of Florida and, as it never received payment for the work from Telergy, no sums were owed by it to Welsbach; and, (2) as the Telergy/Mastec contract was terminated, suspended or delayed, Welsbach is entitled to recover amounts only for work completed by Welsbach and paid for by Telergy.

II. **Motion and Cross Motion**

Welsbach moves for summary judgment on its first and third causes of action, and to dismiss Mastec's fifth and eleventh affirmative defenses, asserting, inter alia, that: (1) it was to be paid on a "time and materials" basis; (2) it has established an account stated; and, (3) the "pay-when-paid" provision contained in paragraph 11 of the subcontract violates the public policy of New York and the Lien Law, as the provision makes payment by Telergy to Mastec a condition precedent to payment by Mastec to it.

Mastec opposes the motion and cross-moves for leave to interpose two counterclaims, contending, inter alia, that: (1) Welsbach never produced witnesses for examinations before trial or responded to its discovery requests; (2) Welsbach's invoices were never approved by Telergy or Mastec, Welsbach was to be paid only for completed units, and Welsbach improperly billed twice, once for time and materials and again for completed units; (3) Welsbach failed to document its claims and either double-billed or billed for work that was never requested or authorized; (4) its affirmative defenses are valid and Florida law applies; (5) it should be granted leave to interpose counterclaims for set-off and conversion, as Welsbach failed to return materials which diminished

in value due to Welsbach's negligent care and/or a change in market conditions; and, (6) the value of its offset is \$2.5 million, which exceeds the amount claimed by Welsbach.

III. Decision

Although choice of law provisions are generally given effect, they will not be honored where the jurisdiction whose law is to be applied has no reasonable relation to the agreement or where enforcement of the provision violates the public policy of New York (see, Finucane v Interior Constr. Corp., 264 AD2d 618; Eastern Artificial Insemination Coop., Inc. v La Bare, 210 AD2d 609; Culbert v Rols Capital Co., 184 AD2d 612).

Here, although Florida law permits the enforcement of the "pay-when-paid" provision at issue in this action (see, e.g., DEC Elec., Inc. v Raphael Constr. Corp., 558 So.2d 427), the public policy of New York prohibits such enforcement, as the provision forces the subcontractor to assume the risk that the owner will fail to pay the general contractor and, thus, is contrary to Lien Law § 34 (see, West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co., 87 NY2d 148, 158; Minelli Constr. Co., Inc. v Arben Corp., __ AD2d __, 2003 NY App Div LEXIS 12487 [2d Dept, 11/24/03]; Certified Fence Corp. v Felix Indus., Inc., 260 AD2d 338; Armand Cerrone, Inc. v Sicoli & Massaro, Inc., 214 AD2d 968; see also, Radec Corp. v KMart Corp., 251 AD2d 1003).

As a result, Welsbach is entitled to the striking and dismissal of the fifth and eleventh affirmative defenses interposed by Mastec, which seek to enforce the "pay-when-paid" provision based upon Florida law.¹

Despite the inapplicability of those affirmative defenses, there are numerous issues of fact regarding alleged over-billing, double-billing and the propriety of the invoices submitted by Welsbach. As a result, Welsbach's motion for partial summary judgment based upon breach of contract or an account stated theory is denied (see, Erdman Anthony & Assocs., Inc. v Barkstrom, 298 AD2d 981, rearg denied, __ AD2d __, 751 NYS2d 430; Tru-Temp. Indus. Supply Co. v Flower City Asbestos, Inc., 283 AD2d 1003).

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In view of this determination, this court need not address Welsbach's alternate contention that the "pay-when-paid" provision also violates General Business Law § 757, which became effective on January 14, 2003. Generally, that statute applies to construction contracts, other than contracts with material suppliers, which are entered into on or after such date, and renders void any contractual provision making the contract subject to the laws of another state.

Finally, Mastec is granted leave to amend its answer to interpose its two counterclaims for set-off and conversion, as there has been no showing of prejudice or surprise resulting from the delay, or that the proposed amendment is palpably insufficient as a matter of law or totally devoid of merit (see, Hartford Cas. Ins. Co. v Vengrof Williams & Assocs., Inc., 306 AD2d 435). The proposed amended answer containing those counterclaims, which is annexed to Mastec's cross motion, is deemed served upon Welsbach.

Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is

ORDERED that the motion by the plaintiff Welsbach Electric Corp., for partial summary judgment on the issue of the liability of the defendant Master North America, Inc. on the first and third causes of action and to strike and dismiss the fifth and eleventh affirmative defenses interposed by that defendant is granted to the extent that the fifth and eleventh affirmative defenses interposed in the answer of Master North America, Inc. are stricken and dismissed and, otherwise, the motion is denied; and it is further

ORDERED that the cross motion by the defendant Mastec North America, Inc. for leave to serve an amended answer interposing two counterclaims is granted, and the amended answer annexed to the cross motion papers of that defendant is deemed served upon the plaintiff.

Dated: *January 6, 2003*



J.S.C.