

**Gordon Environmental & Mechanical, Corp. v New
York City Housing Authority**

2004 NY Slip Op 30222(U)

July 30, 2004

Supreme Court, New York County

Docket Number:

Judge: Herman Cahn

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SCANNED ON 8/5/2004
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HERMAN CAHN
Justice

PART 49

Gordon Environment &
- v -
NYCHA

INDEX NO. 603315/03
MOTION DATE 3/8/04
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED
AUG - 5 2004
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

Dated: July 30, 2004

Herman Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
GORDON ENVIRONMENTAL & MECHANICAL, CORP.,

Plaintiff,

- against -

Index No.: 603315/2003

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

-----X
HERMAN CAHN, J.:

In this breach of contract action, a contractor seeks to recover over \$6.6 million for dewatering operations, extra work, and the unpaid contract balance, in connection with a comprehensive modernization of a residential housing facility owned by defendant. Pursuant to CPLR 3211, defendant now moves to dismiss the complaint. Although issue has not been joined, the parties agree to treat the motion as one for summary judgment, CPLR 3211(c) and plaintiff submits a "cross-motion for partial summary judgment" in its favor.

BACKGROUND

Defendant's construction manager entered into a written agreement with plaintiff, dated September 30, 1993, for the removal and replacement of underground fuel oil storage tanks at Carcy Gardens, a public housing development that defendant owns and maintains. The construction manager subsequently assigned the Contract to defendant.

Defendant alleges that a dispute arose during the performance of the Contract, as far back as 2001, as to the compensation that plaintiff would receive for pumping and discharging groundwater from the fuel tank evacuation sites. By letter dated June 5, 2003, defendant advised

plaintiff that "removal and excavation of non-contaminated groundwater is to be included in the Base Bid and removal of contaminated groundwater shall be calculated under the Unit Price" (Plaintiff's Ex A; Defendant's Ex 5). Plaintiff allegedly removed 1,418,300 gallons of contaminated ground water.

On September 17, 2003, plaintiff served a Notice of Claim indicating its intent to sue defendant for, among other things, its failure to pay for dewatering operations on a unit price basis, that is, at \$4.50/gallon, in addition to the base price contained in the Contract.

DISCUSSION

Defendant argues that, under the express terms of the Contract, the cost of all dewatering operations, both contaminated and non-contaminated water, was included in the Contract's Base Bid of \$687,000. In addition, defendant contends that plaintiff did not submit a timely Notice of Claim. Finally, defendant argues that plaintiff's remaining claims for extra work and the contract balance are not ripe for adjudication.

The Notice of Claim

Defendant does not establish as a matter of law that plaintiff failed to submit a timely Notice of Claim, as required under section 25 of the Contract.¹ Defendant maintains that

¹Section 25 of the Contract's Instructions to Bidders provides, in relevant part:

"a. If the Contractor claims . . . compensation for any damages sustained by reason of any act or omissions of the CM [Construction Manager] or of any other persons, or for any other reason whatsoever, the Contractor shall, within twenty (20) days after such claim shall have arisen, file with the CM written notice of intention to make a claim for such extra cost or damages, stating in such notice the nature and amount of the extra cost or damages sustained and the basis of the claim against the CM

b. The filing by the Contractor of a notice of claim . . . within the time limits set

plaintiff's claim arose on June 5, 2003, when it received defendant's letter interpreting the Contract. That argument is unconvincing.

The June 5, 2003 letter is somewhat ambiguous as to the matter. It states, "removal and excavation of non-contaminated groundwater is to be included in the Base Bid and removal of contaminated groundwater shall be calculated under the Unit Price" (Plaintiff's Ex A; Defendant's Ex 5). Thus, at most it is a partial rejection. Defendant argues that the letter "formally rejected Gordon's interpretation," but the ambiguity in the letter on this point is telling. If it turns out, that the claim is for removal of non-contaminated ground water, then the letter effectively constitutes a rejection; if however, the claim was for removal of contaminated ground-water, it would not be a rejection. Here, the notice of claim was for both (lumped together in one item).

Finally, in opposition to plaintiff's cross motion, defendant argues that plaintiff must have considered the letter as a rejection, because it filed a notice of claim instead of a payment requisition. Defendant cites no authority or provision of the Contract requiring plaintiff to submit a payment requisition before a Notice of Claim.

Defendant also claims that the Notice of Claim is not itemized and lacks supporting documentation, but that issue was not raised as a ground for dismissal in defendant's

forth in subparagraph 25.a above, shall be a condition precedent to the settlement of any claim or to the Contractor's right to resort to any proceeding or action to recover thereon, and failure to do so shall be deemed a conclusive and binding determination on the Contractor's part that it has no claim against the CM for compensation for Extra Work or for compensation for damages as the case may be and shall be deemed a waiver by the Contractor of all claims for additional compensation or for damages."

(Defendant's Ex 3).

moving papers. In any event, the Notice of Claim would not be defective on that ground.

Section 25 lays out a procedure for the contractor to furnish additional data, within 20 days of a demand, if the defendant “deem[ed] it necessary in order to make decision” (*see* Defendant’s Ex 3).

Interpretation of the Contract

“It is well settled that [the court’s] role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract. If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further” (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]). “A written contract ‘will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.’ . . . The meaning of a writing may be distorted where undue force is given to single words or phrases” (*Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003][citations omitted]).

Defendant argues that section X.A. of the Contract’s Specifications limits plaintiff’s recovery for dewatering operations to the Base Bid. Section X states, in pertinent part:

X. DEWATERING OF EXCAVATION (UNIT PRICE WORK)

A. Base bid shall include all costs for dewatering of the excavation including the cost of equipment, mobilizing and demobilizing costs, fencing and permits.

B. Include in the Unit Price the cost of providing and installing a temporary oil/water separator, a well point system, pumps, piping, wiring, etc. as indicated in contract drawings, to treat groundwater should it be contaminated with fuel oil. . . . Should an oil/water separator not be required, provide credit as per the price specified in the Form of Proposal to the Construction Manager.

C. Apply to the NYC Department of Environmental [sic] for a permit to discharge water from the excavation or effluent from the Separator, to the NYC sewer. If the

quantity of effluent exceeds 40,000 liters per day, obtain a permit from DEP, Division of Sewer Regulation and Control. In addition, the contractor shall include in the base bid the cost of a holding tank should the discharge exceeds 40,000 liters per day. The Contractor shall apply to the NYCDEC where required for any permits related to site activities.

D. The Contractor shall assume the responsibility for the safe and proper removal of all waste materials and the disposal of such waste off the site at a licensed waste disposal facility. . . .

(see Contract, Specifications at 14 [emphasis in original]).² Section X.A. of the Specifications supports defendant’s interpretation of the contract. However, plaintiff argues that Section X.A. cannot be reconciled with Section X.B. It also cites other parts of the Contract that support a contrary interpretation. Indeed, Section II (Scope of Work) of the Specifications also states, in pertinent part:

“F. Removal and disposal of contaminated or clean groundwater and associated work if required (**Unit Price, see below**)

* * *

L. Unit Prices

1. Provide unit prices for the following items of work:

* * *

b. Dewatering of clean or contaminated ground water \$ __/Gallon And associated work in accordance with sub-section X. Price shall include oil/water separation if required.”

(Contract, Specifications at 2-3 [plaintiff’s emphasis]). When sections II and X of the Specifications are read together (as stated under section II.L.1.b), plaintiff’s interpretation of the Contract is equally reasonable.

In view of the ambiguity, the branch of the motion for summary judgment

²The Contract appears as Defendant’s Exhibit 2, further divided into five sub-exhibits: Exhibit A-Drawings; Exhibit B-Scope of Work; Exhibit D-Unit Prices; Exhibit F-Supplementary Terms & Conditions; and Specifications.

dismissing the claim for a recovery based on a unit price for dewatering, is denied.

“Where, as here, there are internal inconsistencies in a contract pointing to ambiguity, extrinsic evidence is admissible to determine the parties’ intent” (*Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 43 [1st Dept 1999]).

Plaintiff’s claims for recovery of extra work and the unpaid contract price, are dismissed without prejudice as premature. Plaintiff does not dispute that the extra work relates to pending change orders, the payment of which defendant has not yet approved or rejected (Gclba Aff. ¶ 19). Nor does plaintiff dispute that the defendant’s time to pay the unpaid contract balance has not expired. Under paragraph (a) of Section 7 of the Contract’s General Conditions, defendant has 30 days after issuance of the “Certificate of Final Acceptance” to pay any unpaid contract balance (*see* Defendant’s Ex 2 Specifications). At the time this motion was submitted, defendant had yet to issue such a certificate (Gleba Aff. ¶ 23). Therefore, defendant’s motion to dismiss the complaint, which was converted to a motion for summary judgment, is granted only to the extent of dismissing the premature claims without prejudice.

Plaintiff’s cross motion for summary judgment in its favor is denied, for the same reason the bulk of defendant’s motion is denied.

Accordingly, it is

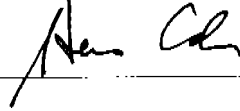
ORDERED that defendant’s motion to dismiss is granted only to the extent of dismissing, without prejudice, plaintiff’s claims related to extra work and the unpaid contract price, and the motion is otherwise denied; and it is further

ORDERED that plaintiff’s “cross motion for summary judgment” is denied; and it is further

ORDERED that defendant shall serve an answer to the complaint within 10 days of service of a copy of this order with notice of entry on its attorneys.

Dated: July 30, 2004

ENTER:



J.S.C.

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