

**Jordan Panel Systems Corp. v Turner Construction
Company**

2005 NY Slip Op 30122(U)

July 13, 2005

Supreme Court, New York County

Docket Number: 0602359/2004

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH Cahn Justice
0602359/2004

PART 49

JORDAN PANEL SYSTEMS, CORP.
VS
TURNER CONSTRUCTION CO.

SEQ 1
DISMISS

C

INDEX NO. _____
MOTION DATE 3/21/05
MOTION SEQ. NO. 001
MOTION CAL. NO. 17

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 15 2005
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/13/05 [Signature] J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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
JORDAN PANEL SYSTEMS CORP.,

Plaintiff,

Index No. 602359/04

-against-

TURNER CONSTRUCTION COMPANY and
HATCH MOTT MacDONALD GROUP,

Defendants.

-----X

CAHN, J.:

This action arises out of a contract to construct a hangar/technical operations facility at John F. Kennedy International Airport (JFK) for Jet Blue Airways Corporation (Jet Blue).

Plaintiff, Jordan Panel Systems Corp., is an architectural enclosure systems specialty contractor that was a bidder for the subcontract for the hangar portion of the project. Defendant Turner Construction Company was the project's general contractor and construction manager. Defendant Hatch Mott MacDonald Group is a design/engineering services company, and was Turner's joint venturer on the project.

Turner moves to dismiss the complaint as against it based upon documentary evidence and for failure to state a cause of action, CPLR 3211 (a) (1) and (a) (7).

FACTUAL ALLEGATIONS

During the summer of 2003, Jet Blue requested proposals for the construction of a pre-engineered steel building to be used as a hangar/technical operations facility at JFK. The contract to be awarded was a "design-build" project, which required the successful bidder to design and build the hangar. Turner pursued the general contract, and entered into a joint venture

arrangement with Hatch Mott, whereby Turner would perform the necessary general contracting services, and Hatch Mott would perform the necessary design and engineering work. Turner solicited bids from several subcontractors for the structure/cladding work, which was the largest portion of the general contract.

Plaintiff submitted a bid for the subcontract. It partnered with Bass Construction Company (Bass Construction), which was particularly experienced in the construction of pre-engineered buildings. Bass Construction sought out the services of USA Structures, a specialty manufacturer of buildings of this type. However, Hatch Mott had a different preferred vendor for the manufacture and installation of the structure/cladding scope of work: Butler Manufacturing Co. (Butler Manufacturing), one of USA Structures' competitors. Butler Manufacturing also submitted a bid for the structure/cladding subcontract. According to plaintiff, Butler Manufacturing submitted an inflated, noncompetitive price that was substantially higher than that of plaintiff, because it felt that it had the "inside track" as Hatch Mott's preferred vendor.

Turner began negotiations with plaintiff for the subcontract, since plaintiff had submitted a competitive price, and because Turner knew that plaintiff was a qualified subcontractor through prior dealings. On July 9, 2003, plaintiff and Turner met and agreed upon all the terms of a subcontract, except price. The terms were incorporated in draft proposals known as Turner's "3A Pages" and "Scope Buy Sheet" and plaintiff's "Revision 2" proposal.

On July 14, 2003, the subcontract was closed at \$3.9 million during a telephone conference call. Two Turner purchasing agents advised plaintiff that it had been awarded the structure/cladding subcontract. During the same telephone conversation, the purchasing agents directed plaintiff to proceed with its design development work to accommodate the project's

“fast track” schedule. Turner began to prepare a formal, written subcontract, which was to incorporate plaintiff’s exceptions and project-specific modifications to Turner’s standard form subcontract, in conformance with a prior course of dealings between Turner and plaintiff. As a result of plaintiff’s competitive subcontract price, Turner was awarded the general contract with Jet Blue.

Plaintiff complied with Turner’s instructions to commence the work. A “kickoff” meeting was held on July 22, 2003 at the Texas headquarters of USA Structures. Before the meeting, Turner’s design team communicated design changes to plaintiff’s partner, Bass Construction, and to USA Structures. During the meeting, the representatives accomplished a substantial amount of design development and coordination, including incorporation into the project design of a large “Megadoor” for the hangar. New specifications for the structure’s dimensions were also incorporated into the design.

Plaintiff, Bass Construction, and USA Structures left the meeting with the impression that the meeting had achieved its intended purpose. However, plaintiff’s principal, John Finamore, later learned that Hatch Mott reported that the meeting had gone poorly, and that plaintiff’s continued involvement in the project was in question. According to plaintiff, this report was made for the sole purpose of inducing Turner to breach its subcontract with plaintiff. On July 24, 2003, Finamore met with Farrell, one of the two Turner purchasing agents, and a project executive, Nick Walsh. Farrell acknowledged that, on July 14, 2003, he had awarded the subcontract to plaintiff, that plaintiff had relied upon that order, and that it had properly performed under the subcontract. Walsh admitted to plaintiff that, throughout the period of plaintiff’s contract performance, Hatch Mott and Turner had been secretly meeting with Butler

Manufacturing, and that Turner and Hatch Mott had delivered to Butler Manufacturing its price, scope of work, design development, and entire work-product, in order to induce Butler Manufacturing to take over the subcontract at the price and terms agreed to by plaintiff. Farrell also informed plaintiff that it was being terminated from the project, and that its subcontract was being transferred to Butler Manufacturing. Butler Manufacturing accepted Turner's offer to take over the subcontract for the same price and scope of work to which plaintiff had agreed.

Plaintiff has not been compensated for any work on the project, although it committed substantial managerial resources, consultant costs, home office overhead, and travel expenses to the project.

This action ensued. The complaint alleges five causes of action against Turner: (1) breach of contract; (2) promissory estoppel; (3) quasi-contract; (4) deceptive trade practices in violation of General Business Law § 349; and (5) conversion of plaintiff's work-product. Plaintiff seeks \$800,000 in damages on the first through fourth causes of action, and statutory damages in an amount of \$1,000 on its deceptive trade practices claim.

DISCUSSION

On a motion to dismiss for failure to state a cause of action, the court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory" (*Morone v Morone*, 50 NY2d 481, 484 [1980]; *DeMicco Bros., Inc. v Consolidated Edison Co. of New York, Inc.*, 8 AD3d 99 [1st Dept 2004]). However, allegations that are flatly contradicted by documentary evidence are not entitled to such consideration (*Herman v Greenberg*, 221 AD2d 251 [1st Dept 1995]). When affidavits are considered, the test becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one"

(*Leon v Martinez*, 84 NY2d 83, 88 [1994], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [internal quotation marks omitted]). On a motion to dismiss based on documentary evidence, pursuant to CPLR 3211 (a) (1), a dismissal is warranted only if “the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

Breach of Contract

A contract requires a mutual intent to be bound (*Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 316 [1st Dept 1987]). In determining whether the parties entered into a contractual agreement, the court must look to the objective manifestations of the intent of the parties as shown in their expressed words and deeds (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 368, *rearg denied* 2005 NY LEXIS 1182, *1 [2005]). The relevant considerations are the totality of the circumstances, the situations of the parties, and the objectives they were striving to attain (*Brown Bros. Elec. Contrs., Inc. v Beam Constr. Corp.*, 41 NY2d 397, 399-400 [1977]; *Lehrer McGovern Bovis, Inc. v New York Yankees*, 207 AD2d 256, 259 [1st Dept 1994]; *Four Seasons Hotels*, 127 AD2d at 317).

In this connection, “[i]t is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed” (*Scheck v Francis*, 26 NY2d 466, 469-470 [1970]; *see also LaRuffa v Fleet Bank, N.A.*, 260 AD2d 299 [1st Dept 1999]; *Wiscovitch Assocs., Ltd. v Philip Morris Cos., Inc.*, 193 AD2d 542 [1st Dept 1993]; *Brause v Goldman*, 10 AD2d 328, 332 [1st Dept 1960], *affd* 9 NY2d 620 [1961]).

Plaintiff submits the affidavit of its president, John Finamore, in which he avers that the

parties had agreed to all of the terms and conditions of the subcontract embodied in plaintiff's "Rev. 3" proposal, except for price (Finamore Aff., ¶ 4). Subsequently, on July 14, 2003, the parties negotiated the price term. When plaintiff and Turner agreed on the price, Turner awarded plaintiff the contract and directed plaintiff to immediately proceed to work to comply with the "fast track" schedule (*id.*). Plaintiff's president states that "[t]his is not to say that we contemplated a strictly verbal subcontract" (*id.*, ¶ 5). In addition, Finamore states that, following the termination of plaintiff's subcontract, Turner's purchasing agent admitted that the contract had been orally awarded to plaintiff, and that he was "visibly embarrassed" at the way his company had acted (*id.*, ¶ 3).

Nevertheless, plaintiff's allegation that a binding oral contract was entered into on July 14, 2003 is plainly contradicted by the draft proposals, which expressly conditioned any contract upon execution of the agreement in writing. The draft term sheets, dated June 24, 2003 and July 11, 2003, provide that:

Turner reserves the right to not execute this Subcontract pending an internal review and prior approval by the Owner where appropriate. Unless and until Turner Construction Co. executes this Subcontract, Turner shall not be bound by any of the terms or conditions herein. . . . In such an event [where the subcontract is not executed] neither Turner nor the Subcontractor shall have any liability to the other and Turner shall have no liability to make payments for Work performed by Subcontractor, if any, or for anticipated profits. . . . Subcontractor shall not be obligated to perform work until Turner executes the Subcontract.

(Shovlin Aff., Exhs. B, E, Art. III [1]). Moreover, common sense dictates that the parties would commit to writing a multi-million dollar subcontract for the construction of an aircraft hangar.

Since no subcontract was executed in writing, the breach of contract claim must be dismissed (*see Farzan v Cassini*, 299 AD2d 239, 239-240 [1st Dept 2002]; *Hollinger Digital, Inc. v LookSmart, Ltd.*, 267 AD2d 77 [1st Dept 1999]).

Promissory Estoppel and Quasi-Contract

To establish a promissory estoppel, the person claiming estoppel must identify a clear and unambiguous promise from the person to be estopped, on which the person claiming estoppel reasonably relied to his or her detriment (*Knight Secs., L.P. v Fiduciary Trust Co.*, 5 AD3d 172, 174-175 [1st Dept 2004]; *Chatterjee Fund Mgt., L.P. v Dimensional Media Assocs.*, 260 AD2d 159, 159-160 [1st Dept 1999]). As a general matter, an oral promise will not be enforced on this ground unless it would be unconscionable to deny enforcement (*Steele v Delverde S.R.L.*, 242 AD2d 414, 415 [1st Dept 1997]).

A cause of action under a quasi-contract theory “only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party’s unjust enrichment” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Claims in quantum meruit, meaning “as much as deserved,” require: (1) the performance of the services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services (*Lehrer*, 207 AD2d at 259; *Martin H. Bauman Assocs., Inc. v H & M Intl. Transp., Inc.*, 171 AD2d 479, 484 [1st Dept 1991]). Where the right to compensation depends upon the execution of a written contract, the plaintiff does not have any reasonable expectation of compensation, and may not be compensated for preparatory work (*see Metropolitan Steel Indus., Inc. v Citnalta Constr. Corp.*, 302 AD2d 233, 233-234 [1st Dept 2003]).

Plaintiff’s allegations that it reasonably relied upon Turner’s oral promise and that it had a reasonable expectation of compensation are flatly contradicted by the draft term sheets’ provisions that neither party had any liability to the other if a written subcontract was not

executed, and that “Subcontractor shall not be obligated to perform work until Turner executes the Subcontract.” Plaintiff also fails to allege facts to support that it suffered unconscionable injury for its promissory estoppel claim. Thus, these claims are dismissed.

Deceptive Trade Practices

Turner next contends that plaintiff’s deceptive trade practices claim must be dismissed because it fails to allege that it engaged in any consumer-oriented act or practice.

Section 349 (a), General Business Law, prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” A plaintiff must charge conduct that is consumer-oriented, meaning that the defendant’s acts or practices have a broader impact on consumers at large (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 344 [1999]; *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]; *Goldblatt v MetLife, Inc.*, 306 AD2d 217 [1st Dept 2003]; *Cruz v NYNEX Info. Resources*, 263 AD2d 285, 290 [1st Dept 2000]). The act or practice must be “directed to consumers” or “potentially affect similarly situated consumers,” but does not require a repetition or pattern of deceptive behavior (*Oswego*, 85 NY2d at 25, 27). Private contract disputes do not fall within the ambit of the statute (*id.* at 25; *see, e.g., Genesco Entertainment v Koch*, 593 F Supp 743, 752 [SD NY 1984]).

Here, plaintiff has failed to allege any deceptive act or practice that is consumer-oriented. This dispute is in essence a private contract dispute between plaintiff, on the one hand, and Turner and its partner, on the other hand. Plaintiff does not allege any act or practice that was “directed to consumers” or that “potentially affects consumers.” Plaintiff merely alleges that it was the victim of deception in a single transaction and that it was the only party affected by

Turner's alleged misrepresentations in that transaction. Therefore, plaintiff's cause of action for violation of General Business Law § 349 is dismissed.

Conversion

Finally, Turner argues that plaintiff has failed to state a cause of action for conversion because it does not plead ownership of any specific, tangible property. In order to state a cause of action for conversion, the plaintiff must plead legal ownership of a specific identifiable piece of property and the defendant's exercise of dominion over or interference with the property in defiance of the plaintiff's rights (*Batsidis v Batsidis*, 9 AD3d 342, 343 [2d Dept 2004]; *Gilman v Abagnale*, 235 AD2d 989, 991 [3d Dept 1997]; *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124 [1st Dept 1990], *lv denied* 77 NY2d 803 [1991]).

No cause of action lies for the conversion of intangible property or ideas (*Ippolito v Lennon*, 150 AD2d 300, 302-303 [1st Dept 1989]; *Matzan v Eastman Kodak Co.*, 134 AD2d 863, 864 [4th Dept 1987] [no protected property interest in idea, but only in tangible expression or implementation of idea]). Furthermore, the plaintiff must plead that the defendant demanded the return of the specifically identifiable property and that such demand was refused (*Matzan*, 134 AD2d at 864).

Turner's motion to dismiss plaintiff's conversion claim is granted. Plaintiff alleges that Turner misappropriated its work-product by turning it over to Butler Manufacturing, and by then incorporating it into the project. Nevertheless, plaintiff fails to allege any specifically identifiable property, such as design development documents, over which Turner exercised dominion. To the extent that plaintiff alleges that Turner misappropriated its ideas contained in its work-product, no conversion claim lies for such conduct. In addition, plaintiff does not allege that it requested

the return of its tangible work-product. As a result, plaintiff's conversion claim is dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint as against defendant Turner Construction Company is dismissed with costs and disbursements as taxed by the Clerk of the Court, and that the action in all other respects shall continue.

Dated: July 13, 2005

ENTER:



J.S.C.

FILED
JUL 15 2005
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NEW YORK