Metropolitan Steel Indus., Inc. v Perini Corp.
2005 NY Slip Op 30155(U)
January 6, 2005
Supreme Court, New York County
Docket Number: 0104341/2002
Judge: Herman Cahn

[*1]

SCANNED ON 1/11/2005

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

PRESENT: [redacted] PART 49

Justice

0104341/2002

METROPOLITAN STEEL INDUSTRIES
vs
PERINI

SEQ 8

RENEWAL

INDEX NO. _____

MOTION DATE 10/14/04

MOTION SEQ. NO. 08

MOTION CAL. NO. 25

The following papers, ... s motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 11 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION OR ORDER.....

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

Dated: 1/6/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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METROPOLITAN STEEL INDUSTRIES, INC. d/b/a STEELCO,

Plaintiff,

-against- Index No. 104341/02

PERINI CORPORATION, AMERICAN HOME ASSURANCE COMPANY, FIDELITY AND DEPOSIT COMPANY OF MARYLAND and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

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PERINI CORPORATION,

Plaintiff,

-against- Third Party Index No. 104341/02

STV, INCORPORATED,

Third Party Defendants.

----------X

CAHN, J.

This action and third-party action arise from the design and construction of a multi-storied bus depot located on 100th Street in New York City (the Project), owned and operated by the New York City Transit Authority (the NYCTA). Plaintiff Metropolitan Steel Industries, Inc. d/b/a Steelco (Steelco) initiated this action against defendant/third-party plaintiff Perini Corporation (Perini) and its sureties for breach of contract, seeking to recover the unpaid balance of its contract work, as well as for certain additional and extra work it rendered in connection with the Project. Perini then commenced a third-party action against third-party defendant STV, Incorporated, asserting six causes of action for indemnification and contribution,

and alleging in the seventh and eighth causes of action that information and design drawings purportedly provided to it by STV during both the pre-proposal phase and the design phase were erroneous and constituted a breach of the Professional Services Agreement, as well as a breach of the independent duty of care that STV owed Perini based upon STV's status as a professional engineer.

By decision dated June 14, 2004 (the Decision), this Court granted STV's cross motion, which sought dismissal of the portion of the seventh and eighth causes of action that sought damages based on STV's claimed deficient performance of pre-proposal services.

Perini now moves for (1) leave to renew STV's cross motion for summary judgment insofar as it sought dismissal of Perini's seventh and eighth causes of action, on the ground that the accompanying affidavit of Michael McKimmey provides dispositive information warranting the denial of summary judgment; and (2) granting leave to reargue the cross motion on the ground that, in the Decision, the Court overlooked relevant facts contained in STV's original pleading and in the affidavits of Joseph Ertle and John Moore, and misapplied legal principles relating to Perini's claims for breach of an oral contract and breach of a duty of care, CPLR 2221.

In the Decision, this Court held that the merger clause contained in the parties' written agreement precluded Perini from seeking to recover damages related to STV's alleged pre-proposal services. The Court further held that the merger clause prohibited Perini "from introducing parol evidence to change and enlarge STV's written contract" (Decision at 30). The Court also rejected Perini's attempt to circumvent the merger clause by alleging that the parties had entered into a prior independent oral contract, noting that Perini's amended complaint

contained no allegation of an independent oral agreement between the parties, and that the newly asserted claim could not survive summary judgment, because Perini failed to submit competent evidence of the alleged oral agreement, sufficient to raise an issue of fact (id. at 32).

The Court reviewed the documentary evidence that had been proffered by Perini, and deemed it equally insufficient to withstand summary dismissal because the memoranda that Perini relied upon were not signed by STV; contained no language indicating that the parties had a meeting of the minds; and were otherwise impermissibly vague (id.).

"It is well-settled that a motion for leave to renew must be supported by new or additional facts which, although in existence at the time of the prior motion, were not known to the party seeking renewal, and, consequently, not made known to the court" (Brooklyn Welding Corp. v Chin, 236 AD2d 392, 392 [2d Dept 1997], citing Foley v Roche, 68 AD2d 558 [1st Dept 1979]; see also Palmer v Toledo, 266 AD2d 268 [2d Dept 1999]; William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 [1st Dept], lv dismissed in part, denied in part 80 NY2d 1005 [1992]). Such new facts must be material to the outcome of the proceeding (see Cerro v Washington County Bd. Of Supervisors, 270 AD2d 679 [3d Dept], appeal dismissed 95 NY2d 887 [2000]; Town of Poestenkill v New York State Dept. of Environmental Conservation, 229 AD2d 650 [3d Dept 1996]).

The party seeking renewal must offer a valid explanation as to why an affidavit, submitted on a motion to renew, was not made available earlier (Pappas v Saatchi & Saatchi Co., 227 AD2d 109 [1st Dept] leave dismissed 88 NY2d 1016 [1996]; Riccio v DePeralta, 274 AD2d 384 [2d Dept], lv dismissed in part, denied in part 95 NY2d 957 [2000]). Where new or additional facts contained in a renewal motion were known to the movant at the time the original

motion was made, the renewal evidence must be accompanied by a valid explanation for failing to present those facts at that time (see Miller v Fein, 269 AD2d 371 [2d Dept], lv dismissed 95 NY2d 887 [2000]). The absence of a valid explanation for failing to present the renewal facts at the time of original motion is grounds for denial (see Natale v Jeffrey Samel & Assocs., 264 AD2d 384 [2d Dept 1999]).

Here, the documentary evidence demonstrates that the "new facts" were capable of being discovered at the time the original motion was made. As such, the renewal evidence must be rejected, and the motion denied.

Perini's motion to renew is based on the affidavit of Michael McKimmey, its former Vice-President for Business Operations. Perini asserts that McKimmey was the Perini employee directly involved with STV in deciding to collaborate jointly to formulate a proposal to the NYCTA for the design/build contract to construct the Project, and "supplies the very facts the Court found wanting in [the Decision]" (Perini Mem of Law, at 1). Perini contends that the renewal affidavit could not have been produced earlier, because it did not know of McKimmey's whereabouts until after it Perini submitted its opposition to STV's cross motion on January 12, 2004.

This explanation, however, is completely contradicted by documentary evidence which establishes that Perini's counsel had McKimmey's address and telephone number at his place of employment prior to January 12, 2004. STV produces an e-mail received by its counsel, on March 3, 2004, which establishes that on January 8, 2004, Peckar & Abramson, Perini's counsel, had McKimmey's current work address and telephone number:

From Seaman Jeffrey R. <Seamanpecklaw.com>
Subject: Mike McKimmey
Sent: January 8, 2004 1:25 p.m.
DIVISION OF CAPITAL ASSET MANAGEMENT
One Ashburton Place
Boston MA 02108
Main Number: 617-727-4050
Fax Number: 617-727-5363.

Aff. of Judith Held, Esq., Exh A. This e-mail demonstrates that, as of January 8, 2004, McKimmey's telephone number and address had been forwarded to Perini's counsel and establishes that Perini's claims that its excuse for its failure to include any affidavit from McKimmey in its January 12, 2004 submission was reasonable, must be rejected.

Thus, contrary to Perini's arguments, the McKimmey affidavit presents neither new nor additional facts not known to Perini at the time it responded to STV's cross motion. Accordingly, the motion to renew is denied, as the allegedly new evidence submitted by Perini was readily available on the original motion (see Guerrero v Dublin Up Corp. of New York, 260 AD2d 435 [2d Dept 1999]; Donnelly v Kurlander, 220 AD2d 716 [2d Dept 1995]).

Even if the Court were to overlook the fact that Perini had the ability to obtain the McKimmey affidavit at the time that it submitted its original opposition, the motion to renew would still be denied, because Perini offers no new facts that would change the prior decision. CPLR 2221 (e) (2) provides that the renewal evidence must "change the prior determination." However, the McKimmey affidavit does not constitute material facts or evidence which, had it been presented earlier, would have changed the outcome.

Fatal to Perini's renewal application is the fact that McKimmey's description of the terms of the oral agreement is at complete variance with Perini's prior submissions. Perini

has now proffered three inconsistent versions of STV's pre-proposal contract.

In its amended complaint, Perini alleged that all of STV's alleged pre-bid duties were encompassed in the parties' written contract. STV established in its cross motion that the parties' written agreement did not require STV's performance of any pre-bid duties, and that the merger clause in the agreement precluded Perini from seeking to vary and enlarge its terms. In response, Perini asserted, for the first time, that there was an independent, all-encompassing "oral Teaming Agreement" regarding STV's role during the pre-bid period, which was formed during the Project's November 3, 1999 kick-off meeting held at Perini's Massachusetts office, and which, in essence, required STV to guarantee the accuracy of the Transit Authority's RFP.

In support of its motion to renew, Perini now changes positions a third time, and asserts that the oral agreement was reached months earlier, in April 1999, during telephone conversations between McKimmey and STV's Brian Flaherty and Margarita Gagliardi. Not only does the renewal affidavit alter the date of the oral contract, the method of its formation (telephonic vs. face to face) and the identity of the STV employees with whom such agreement was allegedly reached, but its substantive terms have undergone a complete transformation as well. In McKimmey's version, STV orally agreed to guarantee the accuracy of Perini's $90 million dollar cost proposal, as well as provide all information required for Perini's bid.

Where, as here, a party advocates conflicting versions of the terms of an alleged oral agreement, such inconsistent descriptions establish that "the parties plainly did not enter into a contract" (Bergin v Century 21 Real Estate Corp., 2000 WL 223833, * 4 [SD NY], affd 234 F3d 1261 [2000] [conflict between allegations of terms of contract in complaint and those described during counsel's oral argument demonstrated that no contract existed because "plaintiff

himself is unclear about what the alleged agreement between the parties was"]). Accordingly, the three inconsistent versions of the parties' alleged oral agreement fail to establish that there was a binding agreement between the parties related to pre-bid duties.

Moreover, although Perini also claims that the renewal affidavit supplies details that were previously lacking, in fact, McKimmey's affidavit is vague. Rather than provide the missing details which warranted dismissal of Perini's claim of an oral contract, McKimmey's description of the alleged terms of the oral contract is filled with sweeping generalizations.

Although McKimmey identifies two STV employees with whom he spoke in April 1999, he does not attribute the terms of the alleged open-ended agreement to either such employee. Instead, he conclusorily asserts that, at some unspecified date and place, "in accordance with my conversations with STV," STV and Perini later reached an oral agreement pursuant to which STV was to: (1) provide Perini with "all of the necessary input required for preparation of the [$90 million] bid;" and (2) "prepare the design details and information necessary to enable Perini to make a take-off of quantities in order to estimate accurately the cost of the Project" (McKimmey Aff., ¶ 12). Given the magnitude of the project, his description of the terms of the alleged oral contract provides no facts or evidence by which anyone could determine what "input" or "information" was "necessary" for the bid or cost estimate.

Where, as here, the renewal affidavit is insufficient to cure the defects in a party's original submission, renewal must be denied (see Cuccia v City of New York, 306 AD2d 2 [1st Dept 2003] [conclusory statements in renewal affidavit insufficient to overcome order of summary judgment]; Abacus Real Estate Finance Co. v P.A.R. Constr. and Maintenance Corp., 115 AD2d 576 [2d Dept 1985] [same]).

Accordingly, Perini's motion for renewal is denied.

In a supplemental reply affirmation, Perini also asserts that, as result of depositions of STV employees taken on November 1, 2004, it has obtained new evidence that establishes the parties' alleged prior oral contract. However, the facts contained in the newly cited testimony which Perini deems "new evidence" can be readily gleaned from the record upon which the Court based the Decision.

Perini argues that the testimony of STV employees that, during the pre-bid period, STV "sized[d] the structural steel beams" and answered some "questions that Perini had" (Perini Supp Reply, ¶ 11) should be deemed "new evidence," warranting reinstatement of Perini's claims of oral contract. The cited testimony, however, is virtually indistinguishable from STV's description of its pre-bid role in its original submission to this Court upon which the Court granted summary judgment. In an STV reply affidavit included in STV's cross motion, STV explained – as did its employees during their respective depositions – that during the pre-bid period, STV was asked to size steel members and answer certain Perini questions:

> STV was asked to inspect the Project site, respond to questions from time to time and to provide Perini with the weights of steel members shown on the RFP.

½7/04 Reply Aff. of Joseph Lucca, ¶ 18.

The cited testimony thus duplicates evidence previously submitted by the parties in the original motion, and is therefore not "new evidence" required for a renewal motion (see ABS Partnership v Air Tran Airways, Inc., 1 AD3d 24 [1st Dept 2003]).

Perini further contends in its supplemental submission that the STV testimony "also provided further clarification regarding STV's participation at the November 3, 1999

meeting," thereby somehow evidencing an oral agreement. In the Decision, the Court held that the mere fact that STV attended a November 3, 1999 meeting during which the parties discussed various aspects of the Perini proposal, was insufficient to establish that an oral agreement was reached at that meeting because Perini had failed to provide competent evidence that either STV attendee was authorized to bind STV, or that the meeting was anything more than a preliminary discussion between the parties (Decision, at 32-33). The "new" testimony, however, still does not establish that either STV attendee at the November 3, 1999 meeting had authority to bind the company. Accordingly, because Perini's "new" evidence would not have changed the outcome, it is an insufficient basis for renewal (see Greene v New York City Housing Auth., 283 AD2d 458 [2d Dept 2001]).

Perini also moves for reargument on the ground that the Court did not address its assertion that an allegation in STV's superceded answer that the parties "collaborated" during the pre-bid period be deemed a binding admission of a collateral oral contract.

A motion for reargument is addressed to the sound discretion of the trial court, and may be granted upon a showing that the court overlooked or misapprehended facts or law, or misapplied any controlling principle of law (see McGill v Goldman, 261 AD2d 593 [2d Dept 1999]; Opton Handler Gottlieb Feiler Landau & Hirsch v Patel, 203 AD2d 72 [1st Dept 1994]). It is not designed to provide the unsuccessful party with successive opportunities to argue once again the very issues previously decided (see William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, supra; Bliss v Jaffin, 176 AD2d 106 [1st Dept 1991]; Foley v Roche, 68 AD2d 558, supra).

Perini's motion for reargument is denied. In arguing that an allegation in the superceded answer should be deemed an admission, Perini merely repeats and rehashes the same

argument that was originally presented and rejected on the prior motion (see Pro Brokerage, Inc. v Home Ins. Co., 99 AD2d 971 [1st Dept 1984]; Foley v Roche, supra). The fact that the Court did not specifically address this particular argument is irrelevant, as the Court stated at the end of the Decision "The Court has considered the remaining claims, and finds them to be without merit" (Decision at 34). In any event, Perini fails to demonstrate that the Court overlooked or misapplied any controlling principle of law in granting the cross motion for summary judgment (see McGill v Goldman, supra).

Perini also sets forth a new argument. It now contends, for the first time, that in the absence of a binding oral agreement, Perini is entitled to establish an implied agreement between the parties. This argument, however, is devoid of merit, as a motion for reargument is not a vehicle for parties to "advance arguments different from those tendered on the original application" and "may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion" (Foley v Roche, 68 AD2d, at 568; see also CPLR 2221[d]; 85-10 34th Avenue Apartment Corp v Nationwide Mut. Ins. Co., 283 AD2d 604 [2d Dept 2001]; Santoro v Schreiber, 263 AD2d 953 [4th Dept 1999]; Rubinstein v Goldman, 225 AD2d 328 [1st Dept 1996], lv denied 88 NY2d 815 [1996]). Moreover, Perini offers no reasons why this argument was not raised in its original motion papers (see Hua Nan Commercial Bank, Ltd. v Albicocco, 270 AD2d 625 [2d Dept 2000]). Thus, Perini's failure to assert the existence of an implied contract in its original submission precludes it from doing so now under the guise of reargument.

The Court has considered the remaining claims, and finds them to be without merit.

Accordingly, the motion for renewal and reargument is denied.

The foregoing constitutes the order and decision of this Court.

Dated: January 6, 2005

ENTER:

J.S.C.