

**Vanderbilt Group, LLC v Dormitory Authority of the
State of New York**

2006 NY Slip Op 30553(U)

November 21, 2006

Supreme Court, New York County

Docket Number: 115130/01

Judge: Richard B. Lowe

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

PART 56

PRESENT.

Index Number : 115130/2001

VANDERBILT GROUP, LLC,

vs

DORMITORY AUTHORITY

Sequence Number : 006

SUMMARY JUDGMENT

C

INDEX NO. 115130/2001

MOTION DATE 11/01/06

MOTION SEQ. NO. 006

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

Upon the foregoing papers, It is ordered that this motion

FILED
NOV 30 2006
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS GRANTED IN ACCORDANCE
WITH THE SUPREME COURT'S
DECISION

Dated: 11/21/06

RICHARD B. LOWE III

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 56

-----X

THE VANDERBILT GROUP, LLC

Index No: 115130/01

Plaintiff

DECISION AND ORDER

-against-

THE DORMITORY AUTHORITY OF THE
STATE OF NEW YORK

Defendant

-----X

RICHARD B. LOWE III, J:

The Vanderbilt Group, LLC (“Vanderbilt”) brings this action for breach of contract against The Dormitory Authority of New York (“DASNY”). In the instant motion, DASNY seeks summary judgment pursuant to CPLR 3212 on the grounds that Vanderbilt is collaterally estopped because of its prior criminal conviction in a related matter; that, as a matter of law, DASNY had a right to terminate the contract for cause; that Vanderbilt’s false-proposal submission deprives it of any right to enforce the contract; that there is no factual dispute that DASNY relied on Vanderbilt’s false proposal in entering into the contractual relationship.

BACKGROUND

DASNY is a statutorily-created public corporation in New York state. It is charged with, *inter alia*, entering into dormitory-construction contracts on behalf of the state for colleges under the jurisdiction of the State University of New York.

In 1998, DASNY began to plan the construction of a five-building residence hall complex located on the grounds of the State University of New York at Old Westbury ("the Old Westbury project"). On September 30, 1999, DASNY issued a Request for Design/Build Proposal ("RFP") to certain contractors selected as a result of a qualification process. The RFP invited proposals from design/builder contractors for all of the design and construction work for the planned residence hall.

The RFP listed the criteria used to determine the contract's successful bidder. This included the contractor's qualifications for the work involved, years of contracting experience, and completed projects of comparable scope and magnitude. A contractor submitting a bid was required to provide detailed information of at least three similar completed projects.

Vanderbilt is a limited liability company formed under the laws of New York. Its principal place of business is in New York County. Kenneth and Frank Stubbolo are two of the company's principals.

On November 17, 1999, Vanderbilt submitted a bid to DASNY for the Old Westbury project. In compliance with the RFP, it identified three projects that it claimed it previously worked on: "Aqueduct Homes", a two-story townhouse complex in the Bronx, NY; "The Bruckner Townhouses", a complex of three-story townhouses located in the Bronx, NY; and the "Houston Street Apartments, NYU", a construction designed to accommodate New

York University students.

Vanderbilt was selected as the Old Westbury project's contractor in December 1999. DASNY then commenced a background check on Vanderbilt.

Sea Crest Construction ("Sea Crest"), who also submitted a bid on the project, objected to DASNY granting Vanderbilt the contract. It contended that Vanderbilt did not possess the required skills to complete the project. Nevertheless, DASNY continued with Vanderbilt's background investigation.

Vanderbilt entered into a contract with DASNY on February 10, 2000. The contract price was \$27,900,000.00.

It subsequently came to DASNY's attention that Vanderbilt misrepresented their role in the projects named in their proposal. Vanderbilt was not the general contractor, nor was it involved in any capacity. Rather, an entity called Northwest Associates ("Northwest"), which the Vanderbilt owners were consultants for, was involved. Northwest's role was to perform "rough and finish carpentry and drywall work" as a subcontractor to the respective project's general contractor.

On December 4, 2000, DASNY notified Vanderbilt that it intended to terminate the contract due to the latter's misrepresentations. As required by the contract, DASNY gave Vanderbilt an opportunity to demonstrate reasons why the contract should not be terminated. Vanderbilt did not refute the fact that they misrepresented their professional experience in its proposal, nor did it provide any support for its contention that it should get credit for the work performed by Northwest. On February 9, 2001, DASNY informed Vanderbilt that the contract was terminated.

On or about August 8, 2001, Vanderbilt filed a lawsuit against DASNY for breach of contract. It alleged that DASNY wrongfully terminated the contract and breached the covenant of good faith and fair dealing.

Subsequently, the State of New York sought indictments against Vanderbilt, Kenneth Stubbolo, and Frank Stubbolo, for, *inter alia*, offering a false instrument to the state in violation of New York Penal Law Section 175.35 ("Section 175.35"). On or about February 8, 2002, in the third count of a seven-count indictment, a New York County Grand Jury indicted them for offering a false instrument for filing in the first degree. In a bill of particulars, the People disclosed that the basis of the indictment's Count 3 was that Vanderbilt's proposal "pertaining to the defendant's experience and qualifications was false" and that the defendants "made false statements regarding their prior work history."

Vanderbilt moved this Court for an order staying their breach of contract action pending the outcome of the criminal proceeding. This Court granted the stay on June 18, 2002.

Vanderbilt, Kenneth Stubbolo, and Frank Stubbolo were initially tried on a seven-count indictment between January 27, 2004 and March 4, 2004. Out of the seven counts, five went to the jury. The jury acquitted the defendants of four of the five counts. A mistrial occurred on the count charging the defendants with offering a false instrument for filing in the first degree. Afterward, on June 9, 2004, Kenneth Stubbolo pled guilty to this crime. He was convicted on June 30, 2004.

Vanderbilt and Frank Stubbolo were tried for a second time on this charge in July 2004. Frank Stubbolo was acquitted by a jury and Vanderbilt was convicted in a bench trial.

Vanderbilt asked this Court to lift the stay and allow their breach of contract claim against DASNY to commence. In the instant motion, DASNY seeks summary judgment on the grounds that, summarily, they were not required to honor the contract and that Vanderbilt is collaterally estopped from proceeding this action based on its prior criminal conviction.

DISCUSSION

To obtain summary judgment, the movant must establish its cause of action “sufficiently to warrant the court as a matter of law in directing judgment’ in its favor (*CPLR 3212 [b]*), and it must “set forth evidence that there is no factual issue” requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). To defeat a summary judgement motion, the opposing party must “show facts sufficient to require a trial of any issue of fact” (*CPLR 3212 [b]*). DASNY offers four arguments in support of their motion for summary judgment. Each of these arguments are addressed in turn.

I. Collateral Estoppel

DASNY argues that since Vanderbilt was convicted on the charge of filing a false instrument, they are collaterally estopped from bringing this lawsuit. Vanderbilt argues that the doctrine is inapplicable because the issues in the prior criminal case and the instant action are not identical.

“The doctrine of collateral estoppel prevents a party from re-litigating an issue that was raised, necessarily decided, and material in the first action, provided that the [opposing] party had a full and fair opportunity to litigate the issue.” (*Sam v Metro-North Commuter Railroad*, 287 AD 2d 378 [1st Dept 2001].) “Two requirements must be met before collateral estoppel can

be invoked: (1) there must be an identity of issue which was necessarily decided in the prior action and is decisive of the present action, and (2) there must have been a full and fair opportunity to contest the decision now said to be controlling.” (*Lumbermens Mut. Cas. Co v 606 Restaurant, Inc.*, 31 AD 3d 334 [1st Dept 2006].)

Here, Vanderbilt argues that the issues are not identical, which thereby renders the doctrine of collateral estoppel inapplicable. They aver that the issue was narrower in the criminal case, i.e. whether Vanderbilt submitted a false proposal to DASNY. In the instant action, Vanderbilt contends that the issue is broader: whether DASNY knew that there was a problem with these three projects, and with that knowledge did it go ahead and award the contract anyway.

This Court does not agree with Vanderbilt’s contentions. First, the issue in the criminal proceeding was whether Vanderbilt violated Section 175.3, and a decisive issue in the instant action is whether Vanderbilt submitted inaccuracies about its background in its proposal to DASNY. Indeed, Vanderbilt was convicted of violating Section 175.35 *because* of its submission of a false proposal to DASNY. Second, Vanderbilt had the full and fair opportunity in the prior criminal proceeding to litigate the issue of whether they violated Section 175.35. Accordingly, the issue of whether Vanderbilt misrepresented itself on its application is settled, and the doctrine of collateral estoppel is applicable.

II. DASNY’s Contractual Right to Terminate the Contract

DASNY contends that pursuant to their contract with Vanderbilt, they had a right to terminate the contract if Vanderbilt “submitted false records.” Vanderbilt avers that because the misrepresentations were not in the actual contract, DASNY was not entitled to terminate it.

“A contract must be interpreted in accordance with the intention of the parties and where their intention is unequivocally set forth in the agreement, the language used controls.” (*Kohman v Rochambeau Realty & Development Corp.*, 17 AD 3d 151 [1st Dept 2005].) This is to say that, where the parties have plainly expressed their intent in writing, the meaning of the writing is to be determined as a matter of law on the basis of the writing alone. (*Chimart Assoc. v Paul*, 66 NY2d 570, 572 [1986].) “Clear and complete writings should generally be enforced according to their terms. . .” (*Collins v E-Magine, LLC*, 291 AD 2d 350 [1st Dept 2002].)

Here, section 20.21 of the Vanderbilt-Authority contract provides that

“The Contractor [Vanderbilt] agrees that this contract may be cancelled. . . upon the Owner’s [DASNY] determination that the Contractor submitted false records to the Owner. . .” (*RFP General Conditions 20.21*)

Vanderbilt contends that the term “records” in the contract only refers to documents contained therein. Since the misstatements were in the “brochure”, a document furnished outside of the contract and before it was formed, DASNY’s right to terminate was therefore not triggered. This argument is without merit.

The contract contains no predication as to which records must be false in order for DASNY to exercise their right of termination. The contract simply refers to “records.” With no adjective describing the records, the phrase must be interpreted to mean any record in connection with the formation of this contract. Indeed, when commercial entities begin the negotiation

process for a contractual relationship, it is commonplace for documents and records to be submitted and representations made in order to obtain the business. Because this is a common business practice, it is reasonable to take the contract's words as written to mean the broad range of records exchanged in relation to the bid and subsequent contract for the Old Westbury project.

The writing is clear and must be enforced according to its terms. Since Vanderbilt misrepresented their professional experiences, DASNY had a contractual right to terminate the contract.

III. Vanderbilt's False Submission Deprives It of Enforcing the Contract

DASNY argues that under New York law, Vanderbilt cannot seek to enforce a contract it procured by violating the law. Furthermore, DASNY argues that Vanderbilt's criminal conduct of specifically intending to defraud DASNY bars it from enforcing the contract.

"A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement. . .and with the intent to defraud a public benefit corporation, he offers or presents it to a public. . .authority. . ." (*New York Penal Law Section 175.35*) "Contracts entered into in violation of a statutorily prescribed means may not be enforced against a public entity. . ." (*Nefesh v City of New York Department of Employment*, 254 A.D. 2d 76 [1st Dept 1998].) "It is settled law of this state. . .that a party to an illegal contract cannot ask a court of law to help him carry out his illegal object. . .(*Stone v Freeman*, 82 NE 2d 571 [Ct App 1948].)

Here, Kenneth Stubbolo and Vanderbilt were convicted of violating Section 175.35. Now Vanderbilt comes to this Court seeking to enforce a contract that it was found to have illegally

induced. And Vanderbilt's principal, Kenneth Stubbolo seeks to derivatively benefit from the enforcement of a contract that he admittedly obtained by fraudulent means. If this case were to proceed, Vanderbilt would be given an opportunity to enforce the contract against DASNY, a public corporation, which was procured dishonestly. Such a scenario would violate New York's well-settled law. Therefore, as a matter of law, this case cannot continue.

IV. DASNY's Reliance on the False Proposal

DASNY argues that Vanderbilt's false statements in the proposal was a central prerequisite for consideration for the contract. Accordingly, they contend that there is no factual dispute that they relied on the falsity of Vanderbilt's proposal in awarding it the contract. Vanderbilt alleges that since DASNY conducted a background investigation on it prior to awarding it the contract, they are prevented from terminating the contract.

Here, the RFP requires that contractors advancing a proposal must ". . .submit detailed information of at least three similar projects completed. . ." and that "Proposals which do not conform to the Request for Proposal requirements will be rejected." (*RFP Section 1.05*) It is clear from the face of the RFP that a proposal, which did not comply with the RFP's requirements, would not be considered. DASNY's contention that they relied on the Vanderbilt's proposal in granting them the contract is logical because of the criteria established for the proposals. However, Vanderbilt, contends that since DASNY investigated Vanderbilt's background and awarded the contract after said investigation, they should not be permitted to terminate the contract. This Court is not convinced.

Vanderbilt's contention is rooted in the fact that DASNY reviewed Vanderbilt's proposal, selected it for the project, conducted a nine-week background investigation, and ultimately entered into a contract with it. It points out that DASNY proceeded with the investigation despite Sea Crest's assertions to DASNY that Vanderbilt "failed to conform to the Request for Proposal." (*Mem in Opp'n Exhs. Q, I, & R*). At the same time, Vanderbilt acknowledges that DASNY disregarded Sea Crest's allegations and *relied* on Vanderbilt's proposal. (*Mem in Opp'n Exh. U*) In further support of its contention, Vanderbilt notes that during the course of this investigation, DASNY ". . . contacted collateral sources, including but not limited to those that previously hired Vanderbilt." (*Mem in Opp'n at 15-16*). In addition, ". . . personal references were contacted. . ." and "meetings between attorneys were held. . ." (*Id at 16*) Nevertheless, Vanderbilt concedes that DASNY believed that all of Vanderbilt's submissions related to the Old Westbury project were "accurate and trustworthy." (*Mem in Opp'n at 12-13*)

It *appears* that Vanderbilt is attempting to allege that DASNY discovered through their inspection that the proposal contained inaccuracies and nonetheless proceeded with the contract. But Vanderbilt never specifically alleges anything in its opposition papers through affidavits, testimony, or a Rule 19a statement that would convince this Court to deny DASNY's summary judgment motion. Rather, Vanderbilt proffers disjointed and whimsical allegations that this Court is expected to decipher in order to conclude that a question of material fact exists.

"Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient" to raise a question of material fact. (*A.H.A. Gen. Constr. v New York City House. Auth.*, 92 NY2d 20, 33 [1998].) Since Vanderbilt's allegations leave this Court to assume what it

is avering, it has failed to raise a question of material fact. Accordingly, because Vanderbilt concedes that DASNY believed the former's proposals were true, it is uncontested that DASNY relied on the assertions in the proposal when it granted it the contract.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment is granted.

This shall constitute the decision and order of the Court.

Dated: November 21, 2006

FILED
NOV 30 2006
NEW YORK
COUNTY CLERKS OFFICE

ENTER:

RICHARD B. LOWE III

RICHARD B. LOWE, III, J.S.C.