

**Bridge Public Relations & Consulting Inc. v Hylan
Elec. Contr. Inc.**

2007 NY Slip Op 31074(U)

May 7, 2007

Supreme Court, Richmond County

Docket Number: 0011397/2001

Judge: Robert J. Gigante

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF RICHMOND

BRIDGE PUBLIC RELATIONS AND CONSULTING
 INC.

Plaintiff(s)

- against -

HYLAN ELECTRICAL CONTRACTING INC.

Defendant(s)

Index No. 11397/01

Present:

Hon. Robert J. Gigante

Decision After Trial

Plaintiff Bridge Public Relations and Consulting Corp. (“Bridge”) seeks recovery of its share of certain profits gained by defendant Hylan Electrical Contracting Inc. (“Hylan”), in accordance with a written agreement between the parties dated September 15, 1995. A non-jury trial was conducted on October 31, 2006.

Plaintiff’s witness, John Cundari, described the agreement as one in which his firm Bridge was a consultant, soliciting work for contractors such as defendant, making introductions, and to “get them on the bid list to bid jobs and to do the electrical work.” (Tr. Trans, p. 3, Lines 5-6).

Paragraph 2 of the agreement provided:

“2. Each time a project is undertaken by Hylan as a result of the efforts of Bridge, then Bridge shall receive 50% of all profits realized as a result of said projects, and on all projects referred and/or procured by Bridge, after 10% overhead and all direct or indirect costs. *Any payments made pursuant to paragraph 3 and/or paragraph 4 as the case may be are understood to be part of the 10% overhead.* Bridge and Hylan shall supervise said projects. The provisions of this paragraph and of paragraph 7 shall remain in effect despite the expiration of this agreement.” (Emphasis added).

Paragraph 3 thereof provided:

“3. In addition to the compensation set forth in paragraph 2 hereof, Hylan shall pay to Bridge the sum of Two Thousand Five Hundred (\$2,500) Dollars per week and costed against each job as part of overhead and shall be paid weekly beginning the first Friday following the execution of this agreement. However, notwithstanding anything to the contrary contained herein, said compensation shall be paid regardless of what projects are actually pending.”

Seven projects were procured as a result of Bridge's efforts, variously referred to as the

Fresh Kills project, the Yeshiva project, the Metropolitan Hospital project, the CVS project, the United States Tennis Association project, the Wiz project, and the Local 1199 project.

Although testimony revealed minor discrepancies in the treatment of certain payments, in the court's view the prime issue for resolution is the defendant's method of accounting for three items: the \$2,500 weekly payments under paragraph 3, an additional 10% cost to overhead, and a certain check from defendant to plaintiff in the sum of \$15,263.00

Plaintiff Bridge's only witness was John Cundari, its principal. He conceded that the calculation of his claim is based on a certain breakdown of the profits and losses of the jobs Hylan procured as a result of Bridge's efforts. When asked if he accepts the numbers as they reflect the profits and losses, he said, "I guess I have to. This is all I have to go by. Never had access to any other records" (Tr. Trans. p. 10, lines 21-25).

John Pallarino, the superintendent of defendant Hylan, was more familiar with the accounting of the profits and losses. As part of his duties, he oversaw manpower, oversaw estimates, and made job site visits (Tr. Trans. p. 61, lines 22-24). He prepared and faxed the document (Plaintiff's Exh. 2), described above, upon which plaintiff relies.

The credible evidence adduced from this witness' testimony and the documents reveals his preliminary calculation of the profits (and losses) of the subject jobs:

Profit on all jobs	\$555,551.00
Less: loss (Metropolitan job)	<u>(4,767.89)</u>
Profit	550,783.11
Less: uncollected funds	<u>(122,313.26)</u>
Profit	428,469.85
Add: Defino funds later rec'd (TT p.74)	<u>66,000.85</u>
Total Profit	\$494,469.85

At this point, the witness Pallarino subtracted two sums to arrive at a net profit. First, he subtracted the sum of \$382,500.00 as "Pd John C" (i.e. Paid to John Cundari). This is the sum both parties concede was paid pursuant to paragraph 3 of the contract. When asked why he deducted the \$382,500.00 paid to Cundari (i.e. Bridge) from his "theoretical" profit of \$494,469.85, he said, "(w)ell that is what it (the agreement) says here but to us it was ambiguous and John (Cundari) knew the intent of the contract" (Tr. Trans. pp 76-77, lines 25, 01). He also made a further deduction of \$38,250.00, or 10% of the \$382,500 so paid, representing 10% overhead, for the same reason of "ambiguity." In light of his statement, it must be remembered that the "interpretation of an unambiguous contract provision is a function for the court, and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument" (*Teitelbaum Holdings v. Gold*, 48 N.Y. 2d 51,56; *Aivaloitis v. Continental Broker-Dealer Corp.*, 30 AD3d 446 (2d Dept.)).

In the view of the court, there is no ambiguity. Paragraph 3 required payment of the compensation of \$2,500.00 per week, independent of whether any actual projects were pending, but the payment was permitted to be “costed against each job as part of overhead.” . However, the same paragraph also specifically provided that “(a)ny payments made pursuant to paragraph 3 ...are understood to be part of the 10% overhead”.

With these facts in mind, any possible contradiction between paragraph 3 (permitting the full “costing” of the \$2,500.00 weekly payments against each job as part of overhead) and paragraph 2 (allocating those payments as a part of the 10% overhead), paragraph 2 must prevail. In contract construction, the principle of *ejusdem generis* provides that a specific clause takes precedence over any general clauses (Musak Corp. v. Hotel Taft Corp., 1 NY2d 42,46; Aguirre v. City of New York, 214 AD2d 692 (2d Dept.); Bank of Tokyo-Mitsubishi Ltd. v. Kvaernen, 243 AD2d 1; Isaacs v. Westchester Wood Works Inc., 278 AD2d 184)

Consequently, the deduction by defendant’s witness of the \$2,500.00 per week (\$382,500.00 total) as a cost (direct or indirect) was not authorized by the language of the contract, and was an inappropriate treatment of those payments off the profit figure. Thus, inasmuch as the witness Pallarino incorporated a 10% overhead figure in calculating the profits of each job, as indicated in plaintiff’s Exhibit 2, a further deduction of the entire \$382,500.00 was unwarranted. In the same vein, his further deduction of \$38,250.00, representing 10% overhead, was unwarranted, given the language of the contract and the conduct of defendant during the contract. On each project, 10% *of the contract price* was ultimately deducted as a cost, as and for overhead, but not an additional 10% of the \$2,500.00 weekly payments.

The final issue for resolution is the treatment of a certain check in the sum of \$15,263 paid by defendant to plaintiff on March 19, 1999. Plaintiff asserted that it was given to plaintiff Bridge for tolls, gas, and other expenses on the Yeshiva project (Tr. Trans. p. 58-59, lines 15-25 and 1-2). However, given the size of the check in relation to the items it purportedly represents (tolls, gas, & “other expenses”), and given the contemporaneous notation on the check itself as a “profit split partial”, the court must conclude that plaintiff’s receipt thereof should be credited to defendant toward its’ obligation to split profits 50% each.

At this point, the court will address the profits and/or losses to be divided, by project, adduced from the credible evidence.

- 1) The Fresh Kills project - This had a contract price of \$438,000, with costs of \$257,064 and 10% overhead of 43,800, for total costing of \$300,864 resulting in a net profit of \$137,136.
- 2) The Yeshiva project - This had a contract price of \$904,000, but with a “credit back” to the owner of \$15,000, for a net contract price of \$889,000. Costs were \$385,509, plus 10% overhead of \$90,990, for total costing of \$476,499; resulting in a net profit of \$412,501.
- 3) The Metropolitan Hospital project - This had a contract price of \$105,961, with costs of \$100,132.75 and 10% overhead of \$10,596.10 for total costing of \$121,324.99, resulting in a loss of \$11,192.24.
- 4) The CVS project - This had a contract price of \$11,397.57, with a credit back to the owner of \$2,140, for a net contract price of \$9,257.57. There were costs of \$6,684.59 plus 10% overhead

of \$1,139.75, for total costing of \$7,824.34, resulting in a net profit of \$1,433.23.

5) The United States Tennis Association project - This had a contract price of \$54,670. Costs were \$19,565.47, plus 10% overhead of \$5,467 for a total costing of \$25,032.47. This resulted in a net profit of \$29,637.53.

6) The Wiz project - The contract price was \$43,747.89, with costs of \$36,155.28 plus 10% overhead of \$4,374.78, for total costing of \$40,530.06. The result is a net profit of \$3,217.83.

7) The Local 1199 project - The contract price of this job was \$1,368,610, with a credit back to the owner of \$42,000 for a net contract price of \$1,326,610. Costs were \$1,258,987.08 with 10% overhead at \$136,861 for total costing of \$1,395,848.08. This results in a net loss of \$69,238.08.

Recap

Fresh Kills	137,136.00
Yeshiva	412,501.00
Metropolitan	(11,192.24)
CVS	1,433.23
USTA	29,637.53
Wiz	3,217.83
Local 1199	(69,238.08)
Net Profit:	\$503,495.27
Less write off of uncollectible funds from Metropolitan & Wiz jobs	<u>-90,061.15</u>
	\$413,434.12
50% of profit =	206,717.06
Less: Hylan ck#5088 rec'd	<u>-15,263.00</u>
Due Plaintiff	\$191,454.06

For these reasons, the proper figure under the language of the contract for a final profit to be divided is \$191,454.06. Plaintiff shall be entitled to judgment for said amount, plus interest at the legal rate from December 1, 1998, plus statutory costs.

Settle a judgment to the clerk on notice, in accordance herewith.

E N T E R

S/

Dated: May 7, 2007

Robert J. Gigante, J.S.C.