

FCI Group, Inc. v City of New York

2007 NY Slip Op 31433(U)

May 29, 2007

Supreme Court, New York County

Docket Number: 0109559/2006

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 52

Index Number : 109559/2006

FCI GROUP

vs

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO.

109559/2006

MOTION DATE

02/07/07

MOTION SEQ. NO.

001

MOTION CAL. NO.

4

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

55

PAPERS NUMBERED

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

1,2

Answering Affidavits — Exhibits _____

3,4

Replying Affidavits _____

5,6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross motion are*

decided in accordance with the annexed decision order.

FILED

JUN 04 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/29/07

PMF

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: CIVIL TERM: PART 52

-----X
FCI GROUP, INC.,

Plaintiff,

against

THE CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF CITYWIDE ADMINISTRATIVE
SERVICES,

Defendants.
-----X

Index Number 109559/2006
Submission Date Feb. 7, 2007
Mot. Seq. No. 001
Cal. No. 4

DECISION AND ORDER

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Papers considered in review of this motion for summary judgment and cross-motion for partial summary judgment:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Memorandum of Law in Support.....	<u>2</u>
Notice of Cross-Motion.....	<u>3</u>
Memorandum of Law in Opposition.....	<u>4</u>
Reply Affirmation & in Opposition to Cross-Mot... <u>5</u>	<u>5</u>
Reply Affirmation in Further Support.....	<u>6</u>

FILED

JUN 04 2007

**NEW YORK
COUNTY CLERK'S OFFICE**

PAUL G. FEINMAN, J.:

Defendants move pursuant to CPLR 3212 for summary judgment in their favor and dismissal of the complaint. Plaintiff cross-moves for partial summary judgment in its favor and dismissal of all but two of the affirmative defenses. For the reasons which follow, the motion and the cross-motion are each granted in part and otherwise denied.

Factual and Procedural Background

Plaintiff FCI Group, Inc. is a New York corporation engaged in construction work. At the time relevant to this action, the president and secretary of FCI was James W. Lee, and the

treasurer was Sioak Lee, both of whom live and work at the same address in Queens, New York (Def. Aff. in Reply to Pl. Opp. Ex A [Bid Form]).¹ Defendants are the City of New York and its administrative agency, the Department of Citywide Administrative Services (DCAS) which maintains and manages more than 50 city-owned buildings and is authorized to enter into contracts for the City in connection with capital projects and public improvement construction projects (Not. of Mot. Ex. N, Verified Compl. ¶¶ 3-5; Ver. Ans. ¶¶ 3-5).

In June 2004, FCI was awarded a contract by DCAS to perform general construction work connected with Brooklyn's Borough Hall (Not. of Mot. Pittell Aff. ¶ 6). According to the verified complaint, FCI's work was "substantially, if not totally complete" as of about November 30, 2005 (Ver. Compl. ¶ 10). However, FCI has never been paid the \$260,928.37 due (Ver. Compl. ¶ 12). On June 11, 2006, it commenced an action by filing the summons and verified complaint, asserting three causes of action: breach of contract, quasi-contract, and unjust enrichment.

Defendants served their verified answer dated September 11, 2006, denying the allegations and asserting eight defenses, including failure to state a cause of action, illegality, breach of contract, unclean hands, and that DCAS is not an entity which can be sued in its own right. According to the affidavit of Stacie Pittell, Deputy Inspector General of the New York City Department of Investigation (DOI), in December 2005 a Deputy Commissioner from DCAS notified DOI that on the morning of December 8, 2005, two DCAS employees who had

¹Plaintiff's cross-motion includes an affidavit from Sioak Lee, dated December 11, 2006, wherein it states that Sioak Lee is now president and majority shareholder of FCI (Not. of Cross-Mot., Sioak Lee Aff. ¶¶ 1-2).

oversight responsibility for FCI's contract, found envelopes on their desks containing cash, and one of which also contained change order request forms (Not. of Mot. Pittell Aff. ¶¶ 2, 4). Both envelopes contained \$3,000 and were personally addressed to the two DCAS employees, with "FCI Group" written on the outside (Pittell Aff. ¶¶7- 9). During the course of the investigation by DOI, Lee admitted that he left the envelopes for the two DCAS employees (Pittell Aff. ¶ 10).² He was then arrested and charged with having "knowingly conferred, offered, and agreed to confer a benefit upon a public servant for having engaged in official conduct which he was authorized to perform and for which he was not entitled to additional compensation" (Pittell Aff. ¶10, quoting P.L. § 200.30 [Giving Unlawful Gratuities]). Lee pled guilty on March 31, 2006, to the misdemeanor offense of Attempted Giving Unlawful Gratuities (P.L. § 110/200.30) and fined \$500 (Pittell Aff. ¶ 11; Ex. H [court transcript]). Thereafter, by letter dated April 19, 2006, DCAS's general counsel notified FCI that the Agency Chief Contracting Officer had been instructed "to take all necessary steps to rescind the contract and to stop any further payments from being made," based on Lee's guilty plea and the principal that a contract performed in an illegal manner will not be enforced (Not. of Mot. Ex. I).

The Contract

The contract is made up of several documents including Information for Bidders, The Agreement, and General Conditions (see Not. of Mot. Ex. J, K, L respectively). Defendants point to the provision under "General Conditions" which states that City employees are forbidden

²Plaintiff alleges that even after December 7, 2005, defendants requested FCI to finish "a few punch list items and clean up," and that the dumpster was removed in January 2006; defendants also requested FCI to remove four trees, work that was not within the scope of the contract (Not. of Cross-Mot. Sioak Lee Aff. ¶ 9).

to accept any gift of value from anyone known to have a direct interest in business dealings with the City, and that a violation of this provision can, “at the option of the Comptroller,” void the contract and provoke penalties against the donor as well as the recipient of the gift (Not. of Mot. Ex. L, General Conditions, p. 0100-3, ¶ K[1, 2]). Defendants also point to Article 71 of the Contract, entitled “Conflicts of Interest,” which states that certain particular sections of the City Charter, the Administrative Code, and the Penal Law are applicable in relation to conflicts of interest and gives notice that “under certain circumstances, penalties may be invoked against the donor as well as the recipient of any form of valuable gift.” (Contract p. 59, Art. 71.1). Defendants additionally point to the section of the contract concerning dispute resolution. That section states that disputes between the City and the contractor concerning the scope of work, the amount to be paid for extra work or disputed work performed in connection with the contract, the conformity of the contractor’s work to the contract, and the acceptability and quality of the contractor’s work – all of which arise “when the Engineer makes a determination with which the Contractor disagrees” -- are governed by Article 27, “Resolution of Disputes” (Not. of Mot. Ex. K, Contract, p. 26, Art. 27.1.2).³ Article 27 explicitly does not apply to “disputes concerning matters dealt with in other sections of the PPB Rules, or to disputes involving patents, copyrights,” and so forth (Contract, p. 26, Art. 27.1.1).⁴

³The Contract defines the term “Engineer” or “Architect” or “Project Manager” to mean “the person so designated in writing by the Commissioner to act as such in relation to this Contract.” (Not. of Mot. Ex. K, Contract p. 2, Art. 2.1.13). The “Commissioner” is defined as “the head of the Agency that has entered into this Contract, or his/her duly authorized representative.” (Not. of Mot. Ex. K, Contract p. 2, Art. 2.1.6).

⁴Article 27 sets forth an extensive review procedure to handle disputes. It provides that during the time a dispute is being presented and considered, the contract remains in force and the contractor continues to work (Contract, p. 27, Art. 27.3). Any termination or breach of the

The Parties' Contentions

Defendants' motion for summary judgment and dismissal of the complaint is based on several grounds. They argue that plaintiff is precluded from recovery based on its unlawful performance. They also argue that plaintiff is barred from making a claim of quasi contract because quasi contract is only applicable when there is no formal contract. They further argue that plaintiff has unclean hands and may not seek equitable relief. Finally, they argue that pursuant to the contract, plaintiff's sole remedy is through the alternative dispute resolution (ADR) procedures and the Procurement Policy Board Rules (PPB Rules) (9 RCNY § 4-09).

Plaintiff cross-moves for partial summary judgment and dismissal of the first six defenses. It argues that Lee acted in a personal capacity rather than on behalf of the corporation, and that he did not inform anyone at FCI of his intended actions (Not. of Cross-Mot. Sioak Lee Aff. ¶¶ 13, 16). It also argues that the contract itself was undertaken lawfully and the work substantially completed, and that it is unjust for the City to retain the full benefits of its performance without payment. It alleges that the City, in bad faith, allowed FCI to finish certain punch list items and requested that it do extra-contractual work, namely remove four trees, before

contract during the pendency of proceedings will not impair the ability of the fact finders to make a binding and final decision (Contract p. 30, Art. 27.8). When there is a dispute, the contractor is to make a written notice to the Commissioner of DCAS within 30 days of receiving written notice of the determination (Contract p. 27, Art. 27.4). The Commissioner conducts an inquiry and issues a decision which may be appealed to the Contract Dispute Resolution Board after the contractor presents its claim to the New York City Comptroller for review (Contract pp. 27-28, Art. 27.4.1; 27.4.3; 27.5). The Comptroller has a maximum of 90 days to investigate and compromise or adjust the claim (Contract p. 28, Art. 27.5.4). If the Comptroller has not settled or adjusted the claim within the time period, the contractor may petition the Contract Resolution Dispute Board to review the Commissioner's determination (Contract p. 28, Art. 27.7). The Board's decision is final and binding, although any party may seek judicial guidance by commencing a special proceeding pursuant to CPLR Article 78 (Contract p. 30, Art. 27.7.6).

rescinding the contract. It further argues that defendants suffered no actual damage, and that there was no actual conflict for the two DCAS employees as they were not asked to do anything in return for the money. It also argues that the City may not argue that the contract is rescinded and then assert because there was a contract, a claim of quasi-contract may not lie. Finally, it argues that the dispute is not governed by the procedure set forth in Article 27 of the contract, as it does not involve the quality of FCI's work, but is rather derived from the behavior of Lee which has caused the City to refuse to pay for work done. It also argues that once DCAS rescinded the contract, the contract's terms became null and there was no requirement to engage in alternate dispute resolution.

Legal Analysis

A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v Zeh*, 45 Misc 2d 93 [Sup. Ct., Albany County], *aff'd* 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1964]).

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor. (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

Contract Rescission and Unclean Hands

Although plaintiff argues that it substantially performed the terms the agreement prior to December 2005, defendants rely on *McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 470 (1960), and progeny, which hold that awards will be denied for the corrupt performance of contracts even where the contracts are legal. In *McConnell*, the plaintiff sued to recover a stated percentage of gross receipts from the distribution of certain motion pictures, and the defendant asserted defenses predicated upon the plaintiff's payment of a bribe to a representative of a motion picture producer in order to procure the distribution rights. The Court held that, "a party will be denied recovery even on a contract valid on its face, if it appears that he has resorted to gravely immoral and illegal conduct in accomplishing its performance." (*McConnell* at 471.) Similarly, in *Landau v Percacciolo*, 50 NY2d 430 (1980), where the plaintiffs colluded with their broker, an employee of the defendant county, to hide his interest in the sale of the plaintiffs' land to the county, and the county ultimately refused to buy the land, the Court denied specific performance based on the collusion. In *R.A.C. Group, Inc. v Board of Educ.*, 21 AD3d 243 (2d Dept.), *lv denied* 6 NY3d 702 (2005), an architect who was employed by the defendant Board of Education, approved a certain property for leasing and conversion to a school facility, and then resigned his position and thereafter became the project manager for the same project which ultimately soured; his contract with the landlord was found unenforceable as the architect did not have clean hands by virtue of his previous position with the Board. In *Prote Contracting Co. v Board of Educ.*, 230 AD2d 32 (1st Dept. 1997), *subsequent app.* 276 AD2d 309 (2000), a contractor who successfully sued the Board of Education for the balance due on a work contract despite the counterclaims of defective workmanship, was later found to have bribed a Board official to interpret favorably a contract specification at trial; accordingly a new trial was ordered

and the Court noted that the Board could be entitled to a dismissal of the complaint based on the contractor's wrongdoing.

Defendants argue that where a contracting party has breached the covenant of good faith and fair dealing by giving payments to the other party's employees, courts have sustained the unilateral termination of the contract and dismissed the offending party's actions for contract damages, citing *Black v MTV Networks, Inc.*, 172 AD2d 8, 9-11 (1st Dept. 1991), *lv denied*, 80 NY2d 757 (1992), and *American Assur. Underwriters Group, Inc. v MetLife Gen. Ins. Agency, Inc.*, 154 AD2d 206, 208-209 (1st Dept. 1990). In *Black v MTV*, where an independent contractor sued MTV after it terminated its agreement with the contractor, but during the course of discovery, the company learned that the independent contractor had secretly made gifts to its director of personnel, it successfully moved for summary judgment and dismissal of the complaint based on the plaintiff's fraud in obtaining the contract and breaching the implicit covenant of good faith and fair dealing by making the gifts. In *American Assur. Underwriters*, the complaint was dismissed where it was found that the plaintiff breached the covenant of fair dealing by making secret stock payments to defendant's employees which caused divided loyalties among the employees.

Plaintiff argues that Lee was acting individually rather than on behalf of the corporation, and was prosecuted individually, rather than the corporation, and that therefore the corporation should not now be held liable for the actions of the individual officer. Lee avers that he did not inform the majority shareholder, who lives with him, or anyone else associated with FCI of his decision to give a Christmas gift to two of the DCAS workers with whom he had "developed a personal relationship with," and that he had no intention to commit bribery (Not. of Cross-Mot.,

Lee Aff. ¶¶ 1,2,3,7). This argument, however, is unavailing.

Under New York law, a person whose criminal liability is premised upon the conduct of another may be held criminally liable whether or not the other person is prosecuted for the offense, or is found not guilty or acquitted (see Penal Law § 20.05[2]). Thus, an officer or agent of a corporation who commits a crime is individually liable without regard to whether the corporation is also liable (*People v Alrich Rest. Corp.*, 53 Misc.2d 574, 575 [Dist. Ct., Nassau County 1967]). Here, the fact that no criminal charges were brought against FCI but only against its president, does not mean that Lee was acting outside the scope of his authority and not for the presumed benefit of the corporation. Notably, although Lee avers he was acting individually, his statement is undermined by the fact that along with the money he “gave for Christmas,” he included several change order requests for work done by FCI (Not. of Mot. Ex. C). His statements to the contrary, the “gifts” can only be understood to seek a benefit for the corporation, as a gift would not normally include corporate paperwork representing monies owed.⁵ Therefore, his actions are properly imputed to the corporation.

In *McConnell* and the other cases cited by defendants, the fraud and breach of covenant of good faith and fair dealing was an integral part of the *procuring* or *performing* of the contracts at issue. Here, there is no allegation that the contract was entered into fraudulently or that the work was carried out in a fraudulent manner. Rather, it appears that when the work was nearly completed, plaintiff became impatient or perhaps greedy, and sought to hurry along the approval process for work done. While there is no question that plaintiff may not benefit from its

⁵Lee’s account is further undermined by his having pled guilty to Attempted Giving Unlawful Gratuities.

attempted bad acts, the court does not find that in this instance, the attempted bribery voids the entire prior year's work. Indeed, *McConnell* cautions that "not every minor wrongdoing in the course of contract performance [] will insulate the other party from liability for work done or goods furnished," and states that there "must at least be a direct connection between the illegal transaction and the obligation sued upon." (7 NY2d at 487). *McConnell* stands for the proposition that "a party will be denied recovery even on a contract valid on its face, if it appears that he has resorted to gravely immoral and illegal conduct in accomplishing its purpose." (7 NY2d at 487). Certainly, plaintiff is not entitled to the full amount it claims is due, as this would only send a message to be more discrete when attempting bad acts. Plaintiff does not come to the table with clean hands. This does not mean, however, that defendants need pay nothing for the year's work that was allegedly completed by plaintiff prior to Lee's attempted bribery. Moreover, plaintiff alleges that defendants continued to seek performance under the contract, even after the bribery incident was discovered, and requested out-of-contract work to be done, which could raise a question of unclean hands on the part of defendants.

Unjust Enrichment and Quasi Contract

The branch of defendants' motion seeking summary judgment and dismissal of the second and third causes of action which allege unjust enrichment and quasi contract is granted. The theory of unjust enrichment, which lies as a quasi contract claim, is an obligation the law creates in the absence of any agreement (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005], citing *State of New York v Barclays Bank of N.Y.*, 76 NY2d 533, 540 [1990]). Where the matter is controlled by a contract, there is no unjust enrichment (*Goldman*, at 572, citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] ["existence of a valid and

enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter”). Thus, damages may not be sought in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the scope of which clearly covers the dispute between the parties (*Clark-Fitzpatrick, Inc.* 70 NY2d at 389, citing *Soviero Bros. Contr. Corp. v City of New York*, 286 App Div 435 [1st Dept. 1955], *aff'd* 2 NY2d 924 [1957]; 12 Williston, Contracts § 1459, at 69 [3d ed]; 22 NY Jur 2d, Contracts, § 465, at 410). Here, where the parties entered into a valid agreement, plaintiff is barred from making a claim of quasi contract.

Alternative Dispute Resolution

Defendants seek dismissal of the complaint based on Article 27, arguing that plaintiff’s sole remedy is through the alternative dispute resolution (ADR) procedures and the Procurement Policy Board Rules (PPB Rules) (9 RCNY § 4-09), which would culminate in a special proceeding pursuant to Article 78 of the CPLR. However, Article 27 does not pertain to the dispute at issue. The dispute does not involve the quality of plaintiff’s work, but rather plaintiff’s attempt to influence the future course of the remaining work. Plaintiff was not informed by the “engineer” that a complaint had been made about the work, as required under Article 27, and therefore it was unable to seek a ruling from the Commissioner.⁶ Rather, plaintiff was informed by the legal office of DCAS, that the contract was rescinded, and commenced this plenary action.

Accordingly, defendants’ motion for summary judgment and dismissal the complaint is granted only to the extent of dismissing the second and third cause of action, and is denied as to

⁶Therefore, plaintiff’s suggestion that its action be converted to an Article 78 proceeding pursuant to CPLR 103(c) will not be considered.

the claim sounding in breach of contract.

Cross-Motion

Plaintiff seeks summary judgment and dismissal of six of the affirmative defenses.

Given the analysis and discussion above, its motion granted to the extent that the first affirmative defense of failure to state a cause of action, is dismissed. However, there remain questions of fact concerning the second through sixth affirmative defenses⁷ and summary judgment is not appropriate.

Therefore, it is

ORDERED that the motion for summary judgment is granted to the extent that the second and third cause of action are severed and dismissed; and it is further

ORDERED that the remainder of the action is severed and continued under this index number continues; and it is further

ORDERED that the cross-motion for summary judgment is granted to the extent that the first affirmative defense is stricken and is otherwise denied; and it is further

ORDERED that the Clerk of Part 52 shall schedule forthwith a preliminary conference or compliance conference, as may be warranted.

This constitutes the decision and order of the court.

Dated: May 29, 2007
New York, New York

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JUN 04 2007

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⁷Second defense: claim is barred based on illegality. Third defense: penalties accrue based on gift giving in violation of General Conditions, Art. 1, ¶ K. Fourth defense: penalties accrue based on gift giving in violation of Article 71.1 of the Contract Agreement. Fifth defense: equitable relief is barred because there is a contract. Second Fifth defense: unclean hands.