

Volt Mgt. Corp. v City of New York

2007 NY Slip Op 34040(U)

December 11, 2007

Supreme Court, New York County

Docket Number: 0101697/2007

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 52

John Magmt

INDEX NO. 101697/07

- v -

MOTION DATE 10-17-07

City of NY

MOTION SEQ. NO. 01

MOTION CAL. NO. 11

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

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

PAPERS NUMBERED
<u>1/2</u>
<u>3/4</u>
<u>5</u>

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ATTACHED DECISION AND ORDER.**

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

Dated: 12/11/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM : PART 52

-----X
VOLT MANAGEMENT CORP. AS ASSIGNEE OF
VOLT VIEWTECH, INC.,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE DEPARTMENT OF
ENVIRONMENTAL PROTECTION OF THE CITY OF
NEW YORK, AND THE CITY OF NEW YORK,
OFFICE OF THE COMPTROLLER,

Defendants.

-----X

PAUL G. FEINMAN, J.:

Defendants The City of New York, the Department of Environmental Protection of the City of New York (DEP) and the City of New York, Office of the Comptroller (collectively, the City) move to dismiss the complaint of plaintiff Volt Management Corp., as assignee of Volt Viewtech, Inc. For the reasons set forth below, the motion is granted *in toto*.

The complaint alleges that in November 1993, the predecessor in interest of Volt Viewtech (Volt) entered into a contract with DEP to administer the City's Toilet Rebate Program (TRP). Under that program, DEP agreed to pay a rebate to the owners of buildings who replaced their existing toilets with low-flush toilets. According to the complaint, during the course of the program, DEP paid building owners a total of more than \$300 million in rebates.

Under the contract, Volt was to provide various services, including accepting and processing rebate applications, scheduling and inspecting newly installed toilets, coordinating the collection of discarded toilets, and arranging for the payment of rebates for the installation of low-flush toilets.

According to the complaint, during the summer of 1997, Volt discovered that certain of

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the master licensed plumbers, along with the suppliers they worked with, had submitted applications to Volt for rebates for work which they knew, but Volt did not know, had not been done. Volt also discovered that certain of its administrative employees had received kickbacks for participating in the fraudulent conduct.

The complaint alleges that as a result of this discovery, the City refused to pay Volt for its then-outstanding invoices and for amounts retained and owed for certain work that had been completed. A total of \$1,441,242.00 was offset by the City against the amounts that DEP paid for fraudulent rebate applications. It is further alleged that the City was aware that Volt, as a company, was not involved in the wrongdoing.

The complaint alleges, on information and belief, that the City's loss as a result of the wrongdoing did not exceed the amount it withheld from Volt.

Certain of the plumbers and suppliers involved in the fraud were prosecuted by the federal government, pleaded guilty to having participated in the frauds and were ordered to pay restitution to DEP. The complaint alleges that as of October 6, 2005, the City had received restitution payments of at least \$344,943.00, and that to the extent that the City retained \$1,441,242.00, which was due to Volt on the complaint, and also received \$344,943.00 in restitution, it has received duplicate recovery and has been unjustly enriched.

In May 2003, Volt sued 41 defendants who were allegedly involved in the fraudulent conduct, resulting in a default judgment for damages amounting to \$1,584,250.00 against 31 of the 41 defendants. *Volt Viewtech, Inc., v D'Aprice*, Sup Ct, NY County, January 12, 2005, Lowe, J., Index No. 601653/03. Volt filed a separate civil action against the four Volt employees who were prosecuted for their participation in the fraud, resulting in another default judgment for

\$1,584,250.00. *Volt Viewtech v Senerchia*, Sup Ct, NY County, April 13, 2005, Lowe, J., Index No. 601652/03.

By letters dated November 2, 2005 and February 16, 2006, plaintiff's attorney wrote to the City making a demand for payment in the amounts the City received in restitution, claiming to be the only remaining "victim" of the fraud, but in a letter dated June 2, 2006, the City refused the demand. According to Volt, the City based its refusal on the fact that until the litigation in *Volt Viewtech, Inc. v D'Aprice* was completed, any payment of the restitution moneys to Volt would be premature. In addition, the letter stated that Volt bore responsibility for the fraud by its failure to supervise its employees and prevent their fraudulent activity; thus, the City continued, Volt was not a "victim" of the fraud. The City also took the position that it had not yet been made whole for its losses resulting from the fraudulent conduct because the amount retained by the City on Volt's contract did not cover approximately \$700,000 of the City's losses.

By letter dated November 13, 2006, plaintiff's attorney wrote to the City Comptroller making claim and demanding payment for adjusted payment of its claim, pursuant to section 7-201 (a) of the Administrative Code of the City of New York. No payment was made, and this litigation was initiated on February 5, 2007.

The City moves to dismiss the complaint, arguing first that plaintiff's claim is based upon the contract, which provides that any action based upon the agreement must be brought within six months after the date of the final payment under the contract, or the termination of the contract, or the accrual of the cause of action, whichever is earliest. *See* Supply and Service Agreement, § 14.3 (B), at 43. Thus, according to the City, the six-month limitations period under the contract began either during the summer of 1997, when the last payment was made to Volt, or

at least by October 27, 1997, when DEP wrote to Volt advising that the City would not make any further payments on the contract because of the improper payments that had resulted from the fraudulent conduct. *See* Letter from Lawrence Schatt to Nahed M. William. Therefore, according to the City, a lawsuit based upon the contract had to be brought at least by April 27, 1998, and the complaint should be dismissed as time-barred.

Citing *Goldman v Metropolitan Life Ins. Co.* (5 NY3d 561 [2005]) and *Clark-Fitzpatrick v Long Island R.R. Co.* (70 NY2d 382 [1987]), among others, the City further argues that a claim for unjust enrichment is also barred where the claim arises from events which arise from the same subject matter that is covered by a valid contract.

As plaintiff argues, however, this action is not a claim under the contract, which did not, and could not have addressed the question of which party would be entitled to restitution payments paid by the parties convicted of fraud; thus, it is not barred either by the six-month contractually based limitation on actions, or the body of law which precludes claims for quasi-contract where there is a valid contract covering the subject matter of the dispute.

In reply, the City argues first that even if plaintiff has a claim for unjust enrichment, it, too, would be time-barred, because a claim for unjust enrichment would start to run from the occurrence of the wrongful act, which the City defines as the withholding of Volt's payments under the contract which occurred in October 27, 2003. However, as plaintiff contends, here its claim is not that the original withholding was wrongful. If that were plaintiff's claim, it surely would be time-barred. Rather, plaintiff contends that, since the City was reimbursed for its damages by withholding the payments it did in 1997, the money it received through the orders of restitution constitutes double recovery and should properly be turned over to plaintiff, the only

remaining "victim" of the fraud.

The City contends that plaintiff is effectively asking this court to interfere with the sentencing order of the federal court, which ordered restitution to the City. Citing *Jamaica Hosp. v Blum* (68 AD2d 1, 6 [2d Dept 1979]), the City argues that this court does not have the power to second-guess the federal court's order. *Jamaica Hospital*, however, involves a rather different situation. There, Jamaica Hospital, a Medicaid provider, brought an action in federal court against the New York State Department of Social Services, challenging the State's Medicaid reimbursement rates. That litigation concluded with an order requiring the hospital to refund certain reimbursements to the State. The hospital then brought an action in state court, against the very same party it sued in federal court, seeking declaratory and injunctive relief, seeking to recoup sums paid to the State pursuant to the federal court judgment. The Appellate Division concluded that the state court did not have the power to enjoin enforcement of the federal court's order. That is not what is sought here. Rather, plaintiff is asking that once the federal court order has been effectuated, this court order that the City turn over the money it receives in the form of restitution to plaintiff.

Nonetheless, this court is not persuaded that this is the proper forum for plaintiff to seek the relief it requests. As the City contends, quoting the United States Supreme Court in *Kelly v Robinson* (479 US 36, 52,53 [1986]):

Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.

Because criminal proceedings focus on the [government's] interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate "for the benefit of" the [government]. Similarly, they are not assessed "for ... compensation" of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the [government].

Plaintiff contends that it, rather than the City, is the true "victim" here, and that the award of restitution to the City constitutes impermissible double recovery. Although "[r]estitution is not generally appropriate when it would represent double recovery by the victim" (*United States v Parsons*, 141 F3d 386, 393 [1st Cir 1998]), plaintiff could and should have raised its claims that it was a victim of the crime and should be the beneficiary of restitution payments in the federal court in the context of its sentencing proceedings. The federal court could then have considered plaintiff's arguments in deciding whether any victim remained uncompensated, and if so, to whom restitution should have been made. For whatever reason, plaintiff did not do so, and this court will not belatedly address claims that should properly have been made to the sentencing court.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court on submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 11, 2007
New York, New York



J.S.C.

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