

Horizon Contr., LLC v City of New York

2008 NY Slip Op 30558(U)

February 25, 2008

Supreme Court, New York County

Docket Number: 0603330/2005

Judge: Paul G. Feinman

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

HON. PAUL G. FEINMAN

PART 52

DECENT. Index Number : 603330/2005

HORIZON CONTRACTING

vs CITY OF NEW YORK

Sequence Number : 001

DISMISS

INDEX NO.

603330/2005

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

MOTION AND ORDER HEREBY RECORDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED

FEB 29 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: _____

2/25/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

ACTION STALLED

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

HORIZON CONTRACTING, LLC,
Plaintiff,

Index Number 603330/2005
Mot. Seq. No. 001

- against -

THE CITY OF NEW YORK, AMERICAN
WRECKING CORPORATION OF N.J.,
HARTFORD FIRE INSURANCE COMPANY and
"JOHN DOES" Nos. 1-10, the name John Doc
being Fictitious, the true names being unknown,
Defendants.

DECISION AND ORDER

-----X

For the Plaintiff:

McDonough Marcus Cohn
Tretter Heller & Kanca, LLP
By: K. Richard Marcus, Esq.
145 Huguenot St.
New Rochelle NY 10801

For Defendant City:

Michael A. Cardozo, Esq.
Corporation Counsel
By: Steven N. Blivess, Esq.
Carol J. Hsu, Esq.
100 Church St.
New York NY 10007

For Defendants Am.Wrecking & Hartford:

Becker Meisel LLC
By: Michael A. Oxman, Esq.
590 Madison Ave., 21st Fl.
New York NY 10022

Papers considered in review of this motion to dismiss and compel, and cross-motion for summary judgment:

Papers	Numbered
Notice of Motion, Affidavits, Brief Annexed.....	<u>1-4</u>
Cross-Motion, Affidavits, Memo of Law.....	<u>5- 6</u>
Opposition Affidavits and Brief.....	<u>7-10</u>
City's Affirmations	<u>11-12</u>
Plaintiff's Reply Affidavits to Defs. and City.....	<u>13-14</u>

FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

PAUL G. FEINMAN, J.:

The motion and cross-motion are consolidated for purposes of decision.

Defendants American Wrecking Corp. and Hartford Fire Insurance Co. move for an order dismissing the first cause of action, compelling plaintiff to enter mediation-arbitration, staying the second cause of action against Hartford Fire Insurance, and staying arbitration pending resolution of the issue of the assessment of liquid damages. Plaintiff Horizon Contracting cross-moves for summary judgment in its favor. Co-defendant City of New York takes no position on

the motion or cross-motion, but submits papers seeking to clarify certain payment issues. For the reasons which follow, the motion and cross-motion are denied.

Background

In about June 2001, the New York City Department of Sanitation (DOS) awarded defendant American Wrecking Corporation a \$1,999,000 lump-sum contract to perform certain demolition work at the Greenpoint Incinerator.¹ In July 2001, American Wrecking subcontracted with plaintiff Horizon who agreed to perform certain environmental remediation work at the incinerator for the consideration of \$820,000 “in current funds” and “subject to additions and deductions provided in the Subcontract Documents” (Cross-Mot. Ex. G [Subcontract] p. 11, ¶ 10.1). Co-defendant Hartford is a surety company that executed and filed a payment bond on behalf of American Wrecking with the City of New York through DOS (Not. of Cross-Mot. Perisa Aff. ¶¶ 7, 8).

The contract between DOS and American Wrecking allowed a total of 190 days for the completion of the work (Pollack Aff. in Opp. Ex. A [DOS Time Extension Approval Certif.]). It provides that DOS can assess a penalty of \$1,000 per day for each day it took to complete the project beyond the parties’ scheduled completion date (Answer ¶ 31). The City’s records show that the work was “substantially completed” on July 3, 2003 (Pollack Aff. in Opp. Ex. A [DOS Time Extension Approval Certif.]). After the commencement of this action, the City determined that there were 299 days for which liquidated damages would be assessed as against American

¹The project is described as the dismantlement and demolition of the pollution control equipment, expansion chambers and the stacks at the Greenpoint Incinerator (Not. of Cross-Mot. Perisa Aff. ¶ 5).

Wrecking (Id.).

Horizon completed its subcontracted work in May of 2002 (Cross-Mot. Perisa Aff. 10, 23). It alleges that it has received \$696,000 and is still owed \$124,000 (Cross-Mot. Perisa Aff. ¶ 22).² In addition to this sum, Horizon claims \$31,085.67 for work done in January and March 2002 pursuant to change orders approved by DOS, and \$160,772.22 for extra work pertaining to the removal of additional materials from four expansion chambers on the incinerator site (Cross-Mot. Perisa Aff. ¶¶ 25-26, 28-29, 54-56, 58-59).³

Horizon began seeking monies due it in about April 2004 (Pollack Aff. ¶ 5). The parties were unable to resolve the payment dispute and in June 2005, Horizon filed a mechanic's lien (Pollack Aff. ¶ 7). According to the Complaint, the June 28, 2005 lien is in the amount of \$367,699.07 (Cross-Mot. Ex. A, Complaint ¶ 23). In September 2005, Horizon commenced this action by filing and serving a summons and complaint, seeking to enforce the contract terms against American Wrecking and to collect under the Hartford payment bond, as well as to enforce the lien (Not. of Cross-Mot. Ex. A, Complaint). It alleges that is owed, *in toto*, \$483,857.89 (Complaint ¶ 12). The first two causes of action sound in breach of the subcontract and seek payment from American Wrecking and from Hartford as the surety who furnished a bond for payment. The third cause of action seeks to foreclose the June 28, 2005 lien (Complaint ¶ 23).

²This number differs from the invoice dated 5/13/02 claiming \$214,000 due (Cross-Mot. Ex I).

³The total for the \$124,000, the \$31,085.67 and the \$160,772.22, is \$315,857.89. However, the amount claimed in the Complaint apparently for the same work is \$359,857.89 (Cross-Mot. Ex. A, Complaint ¶ 10).

American Wrecking served its answer in about October 2005 (Pollack Aff. Ex. B), after requesting an extension of time to answer (Not. of Cross-Mot. Ex. B). The answer contains nine affirmative defenses including that the subcontract requires the parties to undertake mediation as a condition precedent to arbitration (Fifth Affirmative Defense), and that the subcontract requires arbitration (Sixth Affirmative Defense). Other defenses include that the subcontract provides that Horizon is only entitled to receive compensation from American Wrecking when the latter receives payment from the DOS (Fourth Affirmative Defense), that Horizon failed to pursue proper administrative remedies (Seventh Affirmative Defense), and failed to keep records in the fashion required by the subcontract (Eighth Affirmative Defense).

In February 2006, American Wrecking sought to postpone the then-scheduled production by the City of documents for inspection, arguing that it was premature because of the contractual mediation-arbitration provision (Oxman Aff. in Opp. to Cross-Mot. ¶ 7, Ex. 1 [letter of 2/15/06]). Apparently, however, the document production proceeded as scheduled at the DOS office with all parties attending (Cross-Mot. Perisa Aff. ¶ 17). Thereafter, Horizon's attorney contacted the attorney for American Wrecking to suggest a possible resolution to the lien, and suggested exploring whether the parties could mediate in state court as well as continue litigation (Oxman Aff. in Opp. to Cross-Mot. Ex. 2 [letter of 2/16/2006]). American Wrecking's attorney wrote to ask whether plaintiff intended to amend its complaint (Oxman Aff. in Opp. to Cross-Mot. Ex. 3 [letter of 2/16/2006]). In April 2006, American Wrecking's attorney wrote that he had been "working to establish, with supporting documentation," the amounts at issue and anticipated exchanging them with Horizon's attorney, and that "[a]t that time, the litigation should be stayed and the parties should pursue the mediation of this claim as contemplated by the

parties' subcontract." (Oxman Aff. in Opp. to Cross-Mot. Ex. 6 [letter of 4/12/2006]). In August 2006, American Wrecking's attorney wrote a "formal demand" to stay the lawsuit, including an upcoming court conference, and noted that as the parties had agreed to "put together a breakdown and accounting of their respective claims," he was offering figures he had gleaned from documents provided by the City and from his client (Oxman Aff. in Opp. to Cross-Mot. Ex. 8 [letter of 8/31/2006]). Horizon then proffered a settlement figure, which American Wrecking did not accept, and asked again whether Horizon wanted to "informally" confirm the amounts at issue "before our mediation and arbitration are scheduled" (Oxman Aff. in Opp. to Cross-Mot. Ex. 9 [letter of 9/1/2006]).

In September 2006, the parties attended a preliminary conference at the court house and generated an order addressing the scope of and time frame for discovery (Cross-Mot. Ex. F). The order, drafted by the parties, included as an "additional directive" that defendants were to file a motion to dismiss based on the contract's mediation/arbitration clauses (Cross-Mot. Ex. F). Defendants' motion was filed on November 1, 2006. Plaintiff filed its cross-motion seeking summary judgment on November 28, 2006.

The Parties' Contentions

According to the terms of the subcontract between American Wrecking and Horizon, the parties are to resolve disputes through the initial use of mediation and then arbitration or litigation (Pollack Aff. Ex. A, Subcontract Article 6). Mediation is a "condition precedent" to instituting any claims "arising out of or related to" the subcontract (Subcontract ¶ 6.1.1).

American Wrecking invokes the subcontract's mediation/arbitration provision and argues that the complaint should be dismissed and the parties directed to undertake mediation and

arbitration. It further argues that mediation/arbitration should be stayed until the City has completely paid what it owes, minus the liquidated damages ultimately assessed; this figure would be used to calculate what damages are owed by Horizon to American Wrecking, offsetting the amount due to Horizon. It argues further that the enforcement of the lien and the issue of the bond must be stayed until the arbitration is complete (Pollack Aff. ¶ 14). Finally, it argues that any liability owed to Horizon for which Hartford may be liable under its payment bond must be resolved through mediation or arbitration, and therefore the cause of action against Hartford must also be stayed pending resolution of the alternative dispute processes (Oxman Cert. ¶¶ 11-13).

Horizon argues that American Wrecking has waived its right to alternative dispute resolution by affirmatively litigating the case. It also argues that because neither Hartford nor the City, both necessary parties to the litigation, were parties to the subcontract or agreed to mediation or arbitration, litigation is the more suitable arena to resolve the issues.⁴ Finally, as concerns American Wrecking's liquidated damages claim, Horizon argues that this is between the City and American Wrecking and does not involve its contractual right to be paid.

As concerns Horizon's cross-motion for summary judgment, it argues that it is undisputed that it performed its obligations under the subcontract, as established by the certification signed by American Wrecking in September 2003 (Cross-Mot. Perisa Aff. Ex. K). It argues that it has not received payment for the two change orders approved by the City or the extra work undertaken pursuant to the contract. It also argues that it is not responsible for any of

⁴The City indicated it wanted to be informed of any mediation scheduled "at which the City's presence might be necessary." (Oxman Aff. in Opp. to Pl. Cross-Mot. Ex. 7 [Letter of 4/25/06, Blivess to Oxman]).

the delays in the project that have resulted in the City's assessing "late fees" against American Wrecking. In opposition, American Wrecking argues that the amount owed, if anything, remains in dispute and contends, for example, that Horizon was previously denied payment by the DOS for the "extra work," and thought the denial was appealed, the appeals process was ultimately abandoned by Horizon (Pollack Aff. in Opp. to Pl. Cross-Mot. ¶¶ 19-30; Ex. F,G,H). It further contends that Horizon agreed to complete its base work in 17 weeks, but took nearly 56 weeks longer than that, and in addition engaged in work practices such as leaving storage tanks and dumpsters onsite which limited the work space available to American Wrecking and caused the overall work to slow down (Pollack Aff. in Opp. to Pl. Cross-Mot. ¶¶ 12, 13).

Legal Analysis

A contractual right to arbitrate (or mediate) may be modified, waived or abandoned (*see Matter of City of Yonkers v Cassidy*, 44 NY2d 784, 785 [1978]). Although a party who commences an action is generally assumed to have waived its rights to submit the issues to an alternative dispute resolution forum, this is not true of a defendant (*De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974] [citation omitted]). When determining whether a defendant's motion to stay the proceeding so as to arbitrate, the "crucial question" is the defendant's degree of participation in the action and whether its actions created a waiver of a right to stay the action (*De Sapio v Kohlmeyer*, at 405). A manifestation of an affirmative acceptance of the judicial forum will void any claim of waiver (*De Sapio* at 405). Where the defendant's actions are "consistent with an assertion of the right to arbitrate," there will be no waiver unless there is "unreasonable delay" in its seeking (*De Sapio* at 405).

Most of the actions undertaken by American Wrecking after the filing of the summons

and complaint were “defensive” and not inconsistent, in and of themselves, with its demand for mediation-arbitration. Such actions include entering into a stipulation to extend the time to answer (*De Sapio* at 405), and interposing an answer (*Nagy v Arcas Brass and Iron Co. Inc.*, 242 N.Y. 97, 98 [1926]). It was under no obligation to seek alternative dispute resolution before the action was commenced, but once the action was commenced, it was required within a “reasonable time,” to present the arbitration agreement as a bar to further litigation (*Klein Coat Corp. v Peretz*, 4 Misc. 2d 341, 347 [Sup. Ct. NY County 1956] [citing *Matter of Haupt v Rose*, 265 N.Y. 108 [1934]). A defendant’s actions are normally “timely” where it asserts an arbitration claim as a defense in its answer or moves to compel arbitration (*Flores v Lower E. Side Serv. Ctr.*, 4 NY3d 363, 371 [2005]). Here, American Wrecking asserted its claim in its Answer and repeatedly raised it thereafter. It sought to postpone document production in February 2006 and later sought to adjourn the September 2006 preliminary conference both because of the contractual mediation clause. This is not a case where the defendant, once sued, did not seek to enforce the mediation/arbitration clause within a reasonable period of time. Thus, it cannot be said that American Wrecking waived its right to enforce this clause of the contract between it and Horizon.

Accordingly, American Wrecking’s motion seeking dismissal of the complaint as against it and an order compelling plaintiff to proceed with mediation and arbitration in conformance with Articles 6.1 and 6.2 of the contract between Horizon and American Wrecking is granted. The branch of the motion which seeks a stay of the action as co-defendant Hartford is granted.

The branch of the motion which seeks to stay alternative dispute resolution pending an

assessment of liquidated damages is denied. The City issued a finalized Certification for Estimate for Partial Payment 22 (Substantial Completion), in January 2007 (Hsu Aff. in Supp. of Def. City's Position Ex. 1). American Wrecking is thus advised of the amounts owed it by the City. The assessment of liquidated damages by the City against American Wrecking is separate from any right of Horizon's to be paid, even if the result necessitates bringing a future claim against Horizon for claimed damages.

Horizon's cross-motion for summary judgment in its favor is also denied. The parties dispute the amounts at issue. Horizon's papers and documentary evidence also show differing amounts claimed at issue. There is conflicting evidence as to what may even be claimed by Horizon. Summary judgment is only appropriate when there is no genuine issue as to any material fact and the disposition of the causes of action may be decided as a matter of law (*see, Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, *rearg denied* 80 NY2d 918 ([1992])).

It is

ORDERED that the branch of the motion by defendant American Wrecking Corporation of N.J. which seeks to dismiss the complaint as against it is granted to the extent that the complaint is dismissed as against it and it is further

ORDERED that the motion by defendant American Wrecking Corporation of N.J. to compel plaintiff Horizon Contracting, LLC to participate in mediation and arbitration in accordance with Articles 6.1 and 6.2 of the contract between them is granted; and it is further

ORDERED that the cross-motion by Horizon for summary judgment is denied; and it is further

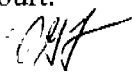
ORDERED that the remainder of the action is severed and continued and the branch of American Wrecking which seeks a stay of the action as between the remaining parties is granted pending completion of the alternative dispute resolution process; and it is further

ORDERED that the parties need not appear for their previously scheduled compliance conference on March 26, 2008 inasmuch as the action is stayed; and it is further

ORDERED that the Clerk of Court shall enter judgment in American Wrecking's favor in accordance with the foregoing.

This constitutes the decision and order of the court.

Dated: February 25, 2008
New York, New York



J.S.C.

HON. PAUL G. FEINMAN

FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE