

Amec Constr. Mgt., Inc. v City of N.Y.
2008 NY Slip Op 32797(U)
October 8, 2008
Supreme Court, New York County
Docket Number: 604391/04
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN A. RAKOWER
J.S.C.

PART 5

Index Number : 604391/2004
AMEC CONSTRUCTION MANAGEMENT
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
COMPEL

INDEX NO. 11/906/05
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1, 2, 3, 4
5, 6, 7
8, 9, 10

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
OCT 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/8/08

EILEEN A. RAKOWER J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
AMEC CONSTRUCTION MANAGEMENT, INC.,

Plaintiff,
- against -

Index No. 604391/04

Decision/Order
CITY OF NEW YORK and MAZZOCCHI WRECKING, INC.

Mot. Seq.: 002

Respondents.

-----X
MAZZOCCHI WRECKING, INC.,

Plaintiff,
- against -

Index No.: 111906/05

EVERGREEN RECYCLING OF CORONA and
CITY OF NEW YORK

Defendants.

FILED
OCT 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
TULLY ENVIRONMENTAL, INC. (named herein and
EVERGREEN RECYCLING OF CORONA),

Third-Party Plaintiff,
- against -

Third-Party
Index No.: 591292/05

AMEC CONSTRUCTION MANAGEMENT, INC.
and BOVIS LEND LEASE LMB, INC.

Third-Party Defendants.

-----X
HON. EILEEN A. RAKOWER, J.

Immediately after the attack of September 11, 2001, The City of New York ("City") engaged, among others, four construction firms to assist in the recovery and

debris removal efforts at the World Trade Center site. Plaintiff, Amec Construction Management, Inc. ("Amec"), was one of those firms, employed to oversee a portion of the debris removal during Phase I, a period from September 11, 2001 until January 2002. It is alleged that defendant Mazzocchi Wrecking, Inc. ("Mazzocchi") entered into a separate agreement with City, and was under Amec's oversight. Mazzocchi, in addition to work it performed during Phase I, performed work during Phase II as a "subcontractor" to Evergreen Recycling of Corona ("Evergreen"). Mazzocchi asserts that it had an oral agreement with City to do work during Phase II and that it was to submit its invoices to Evergreen for payment. Evergreen¹ alleges that it acted as a subcontractor to both Amec and Bovis Lend Lease LMB, Inc. ("Bovis").

Pursuant to an audit, City determined that Amec overpaid Mazzocchi by approximately 3,000,000 dollars. City withheld those funds, as a result, from Amec. Amec brings an action for breach of its agreement with City, seeking full reimbursement of the funds it paid out to Mazzocchi, or repayment by Mazzocchi. Mazzocchi brings its action as against Evergreen and City for payment for work it performed during Phase II. Evergreen brings its action against Amec and Bovis, seeking indemnification. All contracts are alleged to have been entered into with City through the Department of Design and Construction ("DDC"). Michael Burton was the First Deputy Commissioner of the DDC during the times relevant to the formation of the alleged agreements.

Initially, it appears that certain of the agreements between the parties to these actions are alleged to have been oral contracts with letters provided to evince the intent of the parties. Mr. Burton testified that he anticipated the contracts with the Construction Managers would be modeled on an existing contract for emergency repairs at Yankee Stadium. No single writing which purports to contain all of the terms of agreement between any of the respective parties is submitted.

During the course of discovery, on March 12, 2008, Michael Burton was produced for a deposition. His testimony included:

Q: You had testified just now about discussions and I'm talking about the first, the initial payment that would be made to the construction

¹ Evergreen is named in Mazzocchi's action but in its own action it calls itself "Tully Environmental, Inc. d/b/a Evergreen Recycling of Corona.

managers, was this as a result of those discussions?

A: Correct.

Q: And it indicates that there was a transmittal check for \$10 Million to Amec. Let me ask you, were similar sums transmitted to the other CMs, the other being Bovis - -

A: There were three other \$10 Million dollar checks.

Q: So do you know whether these funds reflected City funds that came from the City treasury?

A: Correct.

Q: And do you know who in the City approved the payment or the payment of this \$10 Million to each of the four construction mangers?

A: I made a request to the Mayor that we would need a check of this order of magnitude to each one of the four contractors sometime in the first week after September 11, and the office of Management and Budget participated in getting the check cut from the city to four construction managers.

Q: So the request went directly to the Mayor?

A: I made the request to the Mayor, yes.

Q: Did you have any discussions with the Mayor when you made the request?

A: Yes.

Q: Could you describe for the record the discussions you had with the Mayor in support of the requests for these four checks for \$10 million each? (Burton Deposition, Pages 139-140).

Counsel for City objected to Mr. Burton answering the last question posed, and directed the witness not to answer.

Amec now moves pursuant to CPLR 3124 to compel City witness, Michael Burton, to answer the question put to him at the deposition that was held on March 12, 2008. Bovis similarly cross-moves for an order compelling City to continue Mr. Burton's deposition and directing him to answer all questions propounded to him. Mazzocchi submits an affirmation in support of plaintiff's motion. City cross-moves to amend its answer pursuant to CPLR 3025(b) and for a protective order pursuant to CPLR §3103(a), limiting the areas of questioning in the ongoing deposition of Mr. Burton. Evergreen does not submit papers.

City claims that the testimony sought from Mr. Burton about conversations that he had with then Mayor Rudolph Giuliani regarding initial payments made to the construction managers in the amount of \$10 Million dollars each is privileged under the “public interest/deliberative process privilege.” Amec urges that the information is crucial to its ability to show the intent of the parties in its contract action, since the entire agreement between the parties is not contained in a written contract.

The public interest/pre-decisional privilege has its roots in the public policy theory that there should be complete candor in the governmental decision-making process regarding issues that effect the public interest. (*In re World Trade Center Bombing Litigation*, 93 NY2d 1[1999]). Specifically, the privilege pertains to “confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged.” (*Id.* at 8). The justification for the privilege is that the public may somehow be harmed if “extremely sensitive material were to lose this special shield of confidentiality.” (*Id.*) The inquiry involves a balancing and weighing of interests with the understanding that there is also a public interest in “redressing private wrongs” and in allowing for the “fair adjudication of private litigation.” A mere showing that disclosure would produce “useful testimony is not enough to override a demonstrated or manifest potential harm to the public good.” Further, “public interest is a flexible term and what constitutes sufficient potential harm to the public interest so as to render the privilege operable must of necessity be determined on the facts of each case.” (*Cirale v. 80 Pine St. Corp.*, 35 NY2d 113[1974]). It is incumbent upon the entity invoking the privilege to “demonstrate the specific public interest that would be jeopardized by an otherwise customary exchange of information.” (*World Trade Center* at 8).

City produces the affidavit of Mr. Burton, who explains how plans for dealing with the devastated world trade center site evolved. He describes how he enlisted the services of four construction management firms, Amec, Tully Construction (“Tully”), Bovis and Turner Construction (“Turner”). More specifically, he states:

Within a week after the WTC attack, we had the first discussions of how the costs of recovery and of debris removal would be paid for. These discussions included representatives of the four CM firms and Thornton,

as well as Commissioner Holden, General Counsel David Varoli and me from DDC, and Gary Geiersbach from the Mayor's Office of Construction.

...
Within the first week after the attack there were discussions between representatives of the City and the CM firms about the terms and conditions of the work. We decided that the general form of our agreement would resemble the CM Design-Build contract that was created for emergency repairs at Yankee Stadium after some structural steel collapsed there. These discussions included requests from [sic] the CM firms for advance payments to create a cash flow to them and to the contractors and suppliers that were working for them. Thus, on or about September 19 I met with Mayor Giuliani to request authority to make advance payments of \$10 million to each of the four CM firms and to Thornton. There was no discussion with the Mayor, during that meeting, of how the CM firms would process payment requests from the contractors and suppliers who were working at the WTC site, or about auditing those payment requests and payments later. Mayor Giuliani approved the request for the \$10 million advance payments and authorized the City's Office of Management and Budget to issue checks for that amount to the five entities.

...
At the time of the advance payments on September 20, the City had not yet reached an agreement on all of the terms and conditions under which the CM firms would perform the rescue, recovery and cleanup work at the WTC site. The first site assessment on the evening of September 11, the daily on-site meetings with representatives of the CM firms during the days that followed, my meeting with the Mayor on or about September 19, and the \$10 million advance payments issued to the CM firms on September 20, were merely early steps in the improvised process that we hoped would eventually lead to emergency contracts with each of the CM firms for the completion of all of the necessary work at the WTC site.

In *World Trade Center Bombing Litigation*, the court had to consider whether to compel disclosure of documents that were in the possession of the Port Authority to plaintiffs who had been injured in the 1993 WTC bombing incident. Those

documents consisted of, among other things, a report by the Office for Special Planning which was created prior to the bombing which "listed a series of possible methods of attacking the World Trade Center." The injured plaintiffs were interested in the report because the specifics of the actual bombing at the WTC were almost identical to those envisioned in the report. There, the Port Authority outlined the following public interests that would be harmed by disclosure of the materials sought:

- (1) the documents . . . contain confidential information concerning safety or security systems, methods, devices, practices, or vulnerabilities, the disclosure of which would endanger lives and property and adversely affect security at the WTC;
- (2) the disclosure would inhibit candor among persons engaged in efforts undertaken by government agencies to promote public safety; and
- (3) the disclosure would reveal confidential information regarding criminal activity obtained from law enforcement agencies under a pledge of confidentiality.

The Port Authority in *World Trade Center Bombing Litigation* was able to show that it was in possession of documents which, if disclosed, had a direct bearing on safety and security issues and the possibility of potential future terrorist threats. The Port Authority laid out specific reasons why the confidentiality of the requested documents was essential to protecting the public interests.

Here, City has the burden of showing that the particular conversation it seeks to shield would, if revealed, somehow jeopardize a public interest. City argues that there is a specific public interest in the ability of City officials to deliberate openly and candidly before reaching a momentous decision regarding public works projects, "particularly in the urgent circumstances that surround emergencies like the aftermath of the WTC attack." In support of its argument, City submits the affidavit of David Varoli, General Counsel for the DDC. Mr. Varoli states that during the relevant time period, officials of the DDC, the Mayor's Office for Construction, the Corporation Counsel's Office and the Mayor's Office participated in numerous discussions regarding the emergency clean-up work at the WTC site. Mr. Varoli also states in his affidavit that "when major public works projects are planned and developed by the City of New York, it is important that the internal discussions that lead to final determinations not be open to the public."

Amec counters that City is merely trying to maintain the secrecy surrounding the decisions and directions of the Mayor that resulted in how the clean-up was performed in order to shield the City from present and future liability. The pre-decisional privilege does not exist to shield the City from contract and/or tort liability. Although Amec concedes that City's "usual process for the formation of construction contracts for major public works" is protected by the pre-decisional privilege, Amec points out that the subject contract was not the result of the normal City contract formation process. Rather, the subject contract came about as the result of "an atypical interaction between the Mayor . . . and an Executive Deputy Commissioner, conducted totally outside of the City's normal contracting process." Thus, Amec argues, disclosure of those discussions will not have a chilling effect on contract negotiations for future public works projects. Further, Amec argues that as a result of the terrorist attacks, a National Emergency was declared and President Bush ordered that all funds necessary for damages suffered would be provided pursuant to the Stafford Act. Thus, there were no remaining policy decisions to be made when Burton met with Giuliani and discussed the terms and conditions of the clean-up contract. Those discussions concerned contractual/ministerial issues, not government policy.

City urges that the conversation, which did not involve any discussion related to how the general managers would pay contractors or suppliers or how they would justify such payments, is not relevant to the breach of contract claim. Mr. Burton avers that the conversation regarded only the disbursement of the \$10 million advance payments. However, Amec believes that Burton and Giuliani discussed the pace of the performance of work that Burton was to demand of the construction managers on the job.

Amec provides a series of eight letters, the first of which, dated September 20, 2001, is signed by Mr. Burton, and states in relevant part:

Enclosed please find a check in the amount of Ten Million Dollars (\$10,000,000) which is transmitted in recognition of the City's intent to enter into a contract with AMEC Construction Management, Inc.(Contractor) for emergency construction management and construction services related to the referenced project. This payment is to be considered an advance against future billings on this Project . . . Contractor is authorized to disburse these funds utilizing its best

judgment based on Project needs and reasonable accounting practices. The contractor must maintain complete and accurate records in order to prepare and submit invoices, subject to post audit, on a time and materials basis for all work performed in relation to the referenced Project.

Amec asserts that the discussion City seeks to shield is relevant to the ultimate issue of what was reasonably expected concerning Amec's payments made to contractors such as Mazzocchi. Indeed, Amec claims, that while each of these letters expressed an expectation that a more formal contract would result, no such formal agreement was ever reached, and these eight letters constitute the contract itself. Amec reasons that extrinsic evidence such as the Burton/Giuliani conversation will aid in proving the intention of the parties when they entered into the contract. Further, Amec points out that Burton's testimony about his conversations with Giuliani are especially relevant, because they immediately preceded the only written acknowledgment of an agreement between Amec and City. The one page letter memorializing the prepayment was the only written recognition of the City's intent to enter into a contract with plaintiff for the Phase I work, and that letter, Amec proposes, was the end result of the subject conversation.

Confidentiality in the pre-decisional process is essential to ensure full and frank exchanges regarding governmental decision making (*One Beekman Place, Inc. V. City of New York*, 169 AD2d 492[1st Dept.1991]). Burton points out that

[w]hen exigencies require DDC to procure a public works contract on an emergency basis, the City's Charter and Procurement Policy Board Rules provide for an expedited process that can be completed, with an executed contract, in a month or less. . . . The maximum success of the emergency procurement process depends on complete internal deliberations as the process unfolds. . . . When the two planes struck the towers . . . the City was forced to plan and implement an enormous and completely unprecedented capital project immediately. The planning and procurement processes described [above] had to be essentially completed in a few weeks. . . . Sometime within the first two weeks after September 11 Commissioner Holden asked me to put together an estimate of the overall costs of the work. Because so much of the work ahead was unknowable at that point, a reliable cost estimate was almost

impossible.

Uniquely, the chaos of the post attack situation here, resulted in contracts which were negotiated even as they were performed. City leaps to the conclusion that the urgent circumstances surrounding the aftermath of the WTC attacks made the need to maintain the integrity of internal deliberations even greater.

Burton suggests

There have been two successful terrorist attacks in New York City since 1993. There have been plots to commit other devastating attacks against the City. Lesser emergencies have arisen in the past and will arise again, requiring the City to undertake public works projects on an emergency or expedited basis. It is profoundly important to the effective operation of the City government during such emergencies that actions such as the planning and implementation of the World Trade Center rescue, recovery and cleanup project in September 2001 can be conducted with complete and candid internal deliberations.

Nevertheless, City, unlike the Port Authority in *World Trade Center Bombing Litigation*, does not reveal what specific public interest it seeks to protect. The Port Authority was able to articulate the security interests and public safety concerns which justified the veil of protection. Conversely, City makes sweeping statements regarding City's need to protect internal deliberations without divulging why the information is so sensitive as to jeopardize the public.

Burton states that City can foresee future emergencies which will require public works projects on an emergency or expedited basis. However, Burton falls short of suggesting that City be prepared for such occurrences by modifying the already expedited process provided for by the City's Charter and Procurement Policy Board Rules. Rather, he seeks to shield conversations which by their nature were necessitated because the Board Rules proved insufficient in this emergency. Broad conclusory assertions that confidentiality is necessary to protect the public is insufficient to warrant withholding information based on the privilege. (*Colgate Scaffolding & Equip Corp. V. York Hunter City Servs., Inc.*, 14 AD3d 345[1st Dept. 2005]).

CPLR §3103(a) can be used to create a protective order denying, limiting, conditioning or regulating the use of any disclosure device. CPLR §3101[b] states that “upon objection by a person entitled to assert a privilege, privileged matter shall not be obtainable.” The burden of establishing the right to this protection from disclosure is on the party asserting it and the protection claimed “must be narrowly construed; and its application must be consistent with the purposes underlying the immunity.” (*Spectrum Sys. Intl. Corp. v. Chem. Bank*, 78 NY2d 371[1991]).

Finally, pursuant to CPLR 3025(b), leave to amend shall be freely given and no party opposes that portion of City’s cross-motion to amend its answer. Thus, that portion of the cross-motion is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served.

Wherefore it is hereby

ORDERED that defendant the City of New York’s cross-motion for a protective order is denied; and it is further

ORDERED that the motion and cross-motion to compel answers to questions propounded upon oral deposition are granted, and the parties are directed to schedule the continued examination before trial of Michael Burton; and it is further

ORDERED that defendant the City of New York’s cross-motion to amend the answer is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry.

All other relief requested is denied.

This constitutes the decision and order of the court.

DATED: October 8, 2008



EILEEN A. RAKOWER, J.S.C.

FILED
OCT 10 2008
COUNTY CLERK'S OFFICE
NEW YORK