

**Meridian Mgt. Corp. v Cristi Cleaning
Serv. Corp.**

2008 NY Slip Op 32850(U)

October 10, 2008

Supreme Court, New York County

Docket Number: 110305/07

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK

PART 2

Index Number : 110305/2007
MERIDIAN MANAGEMENT CORP.
 VS.
CRISTI CLEANING SERVICE CORP.
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED BY ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
 OCT 20 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

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

Dated: 10/10/08

Loy
LOUIS B. YORK 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: IAS PART 55

-----X
MERIDIAN MANAGEMENT CORPORATION,

Plaintiff,

-against-

CRISTI CLEANING SERVICE CORP.,

Defendant.

-----X

LOUIS B. YORK, J.:

Index No.
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NEW YORK

This matter concerns taxes paid to non-party the New York State Department of Taxation and Finance (NYSDF) by plaintiff, Meridian Management Corporation (Meridian), for maintenance and janitorial services provided by defendant, Cristi Cleaning Service Corp. (Cristi). Meridian seeks summary judgment upon its complaint for breach of contract damages in the amount paid plus interest, and attorneys' fees. Cristi seeks summary judgment on its second counterclaim for amounts due and owing plus interest for services rendered, and attorneys' fees.

BACKGROUND

On or about October 1, 2003, Meridian entered into an agreement with the Port Authority of New York and New Jersey (PANYNJ) to provide maintenance and janitorial services at several PANYNJ facilities, including the Airtrain station in Jamaica, New York (Jamaica Site).

On December 4, 2003, Meridian subcontracted the Jamaica Site

services to Cristi (the Subcontract). The Subcontract provides that Cristi, for the period of December 11, 2003 through September 30, 2004, "agrees to perform all of the Work ... for the amount of \$87,384.50 per month[, and that the] price will include the cost of all labor, services, materials, and equipment necessary perform the [Work] and will also include all applicable taxes, including sales tax."

In addition, the Subcontract provides that Cristi "agrees to indemnify ... the Contractor ... against any and all claims or damages arising from the subcontractor's performance of this contract ..." and that "[t]he prevailing party in any litigation ... shall be entitled to reimbursement from the other for all legal expenses and court costs incurred in connection therewith."

As of May 2006, the NYSDFI completed an audit of Meridian for the work performed at PANYNJ sites for the period of March 1, 2001 through February 28, 2005. On May 22, 2006, the NYSDFI confirmed an audit assessment for sales tax (including interest and penalties) and "separated taxes due on Cristi Cleaning contracts" in the tabulations. See Notice of Motion, Exhibit E. The total sales tax due for Cristi services at the Jamaica Site, originally \$188,015.93, was subsequently reduced to \$132,017.88.

On June 21, 2006, Meridian made a written demand on Cristi for the assessment. Apparently not having a response, on July 27, 2006, Meridian paid the NYSDFI the agreed assessment of

\$132,017.88.

Upon further demand for payment of the assessment in December of 2006, Cristi, by letter of its attorney dated January 15, 2007, refused to make payment. Cristi refused to pay because it believes: (i) that a concurrent Audit Verification Letter to Cristi from the NYSDTF determined that all work performed by Cristi should not have been assessed any sales tax; (ii) it was the responsibility of Meridian to request a resale of services certificate from Cristi, which would have ensured that the services were not subject to sales tax; and (iii) Meridian should have appealed the assessment.

In addition, Cristi submits the affidavit of Howard Komendant, who explains that "[i]f Meridian is assessed sales tax for its sale [of services] to the [PANYNJ], that does not mean that Cristi was obligated to charge sales tax. Cristi's services to Meridian were for resale to the [PANYNJ, and] would not include sales tax"

On its counterclaim, Cristi maintains that it properly billed Meridian for services, and Meridian improperly took deductions from the amount due, disingenuously claiming that Cristi billed for services that it did not perform. Cristi seeks the balance due for its services of \$63,534.00.

ANALYSIS

Summary judgment is to be used sparingly, and should only be

granted if each party establishes that there are no triable issues of fact (Andre v Pomeroy, 35 NY2d 361 [1974]; Mosheyev v Pilevsky, 283 AD2d 469 [2nd Dept 2001]) and makes a prima facie showing of entitlement to judgment as a matter of law (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Only after the moving party has made such a showing is the other party then required to come forward with proof in evidentiary form establishing the existence of triable issues of fact, or an acceptable excuse for his failure to do so. Zuckerman, 49 NY2d at 557; Davenport v County of Nassau, 279 AD2d 497 (2nd Dept 2001). Finally, upon the motion and the cross motion for summary judgment, the nonmovant is entitled to the benefit of every favorable inference, and, in any event, the evidence shall be viewed in a light most favorable to the nonmovant. Louniakov v M.R.O.D. Realty Corp., 282 AD2d 657 (2nd Dept 2001).

Meridian's Motion for Summary Judgment

Meridian has submitted evidence that it was assessed tax for services performed by Cristi, proof that the services as priced in the Subcontract included sales tax, proof that the tax was paid to the NYSDTF, and proof that Cristi agreed to indemnify Meridian for "all claims and damages arising from [Cristi's] performance of [the Subcontract ...]."

Despite assurances from Cristi's expert that Meridian's being assessed for sales tax on Cristi's services does not mean that Cristi was obligated to charge sales tax, the Subcontract states clearly that the consideration includes sales tax. Schedule A to the Subcontract also makes reference to prices "per year including sales tax."

Thus, it does not matter whether Cristi or Meridian would be responsible for sales tax in the normal course of business. By the plain meaning of the Subcontract (Levine v Shell Oil Co., 28 NY2d 205, 211 [1971]), Cristi agreed to pay the sales tax, and also agreed to indemnify Meridian for claims and damages arising out of the Subcontract. At the very least, Meridian has demonstrated the right to be indemnified for the costs paid to the NYSDTF on behalf of Cristi. Ioscalzo v Lupinacci, 275 AD2d 349 (2nd Dept 2000) (action for indemnification accrues when the NYSDTF has been paid); see also McDermott v City of New York, 50 NY2d 211, 219 (1980); Weissman v Sinorm Deli, 88 NY2d 437 (1996) (indemnification is primary obligation).

In response to this demonstration, Cristi argues that a concurrent Audit Verification Letter to Cristi from the State of New York, covering the period of the Subcontract (September 1, 1998 through August 31, 2006) determined that all work performed by Cristi for Meridian was for resale and should not have been assessed any sales tax. The letter makes no such statement; the

letter is simply evidence that no taxes were due on that date. Indeed, it is unsurprising that there may have been no taxes due, as Meridian paid the assessment for Cristi's services a month (July 27, 2006) before the end of the audit period (August 31, 2006). Thus, the Audit Verification Letter does not prove that no sales taxes were payable, but only that all taxes have been paid - an assertion to which Meridian can attest.

Cristi also argues that it was the responsibility of Meridian to request a resale certificate from Cristi, before services were rendered, which would have ensured that the services were not subject to sales tax. This assertion is unsupported by evidence of any agreement or other obligation between the parties. In all events, the presumption of New York Tax Law is that "all receipts for ... service ... are subject to tax until the contrary is established." 20 NYCRR 532.4 (a) (1). Thus, the failure of Meridian, as a reseller of the services, to provide a resale certificate places at least a partial burden, unless refuted, upon Cristi to collect and pay the tax.

Cristi also maintains that the contract for services between Meridian and PANYNJ indicates that sales to the PANYNJ are exempt from local sales and compensating use taxes, and generally from federal taxation. This argument is unavailing. First, whether Meridian is entitled to charge the PANYNJ sales tax is not directly relevant to whether Cristi must charge sales tax to

Meridian. Second, the NYSDTF determined that the services were taxable. As such, both Meridian and Cristi are responsible for the tax unless they prove that the services were not taxable. See 20 NYCRR 532.4 (b) (1) ("burden of proving that any receipt ... is not taxable shall be upon the person required to collect the tax and the customer") (emphasis added).

Finally, Cristi, who failed to respond to demands for payment of the tax assessment until January of 2007, states that Meridian should have appealed the assessment since, again, work for the Port Authority of New York is non-taxable. The deadline for appeal would have been before October of 2006, some 120 days (30 days to respond, 90 days to file a protest before imposition of a statutory fixed assessment) after notice, which was on May 22, 2006. Cristi cannot suggest Meridian should have appealed when Cristi would not even acknowledge, or, indeed, even officially refute, the debt within the allowable window for appeal.

The court has considered Cristi's remaining arguments on: (i) taxation methodologies for Penn Station; (ii) whether taxes were regularly charged for services; and (iii) that the Subcontract should be reformed to reflect Cristi's understanding of the agreement. They are all without merit.

As Meridian has demonstrated entitlement to judgment as a matter of law, and Cristi has failed to raise any issues of fact

as to why trial by jury is necessary, summary judgment is granted. Nonetheless, although the Subcontract provides for reimbursement of legal expenses, Meridian's request for attorneys' fees is denied. Meridian has failed to submit any evidence of litigation expenses with their motion.

Cristi's Cross Motion for Summary Judgment

On its counterclaim, Cristi maintains that it properly billed Meridian for services, and Meridian disingenuously and improperly took a deduction from the amount due for services billed and not performed. Ricardo Lopez, Vice President of Cristi, has submitted an affidavit stating that Meridian uses a "Rejected Schedule" to demonstrate that Cristi was billing for services not performed, and that the evidence demonstrates that no amounts were billed for these services, and that Meridian is attempting to deceive the court.

In support of this assertion, Lopez submits a 2004 schedule showing that the entries next to the lines for the services in contention are blank, and refers to another 2004 schedule (with different calculations) submitted by Meridian. However, the schedule upon which Meridian bases its right to a deduction is a 2005 schedule. See Brownfield Affirmation, Exhibit A.

As such, the sketchy evidence patently fails to demonstrate entitlement to judgment as a matter of law. Summary judgment on the counterclaim is denied.

Accordingly, it is hereby

ORDERED that the motion of plaintiff, Meridian Management Corporation, for summary judgment on the complaint is granted, and the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against defendants, Cristi Cleaning Service Corp., in the amount of \$132,017.88, together with interest as prayed for allowable by law, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion of defendant Cristi Cleaning Service Corp. for summary judgment on its second counterclaim for amounts due and owing is denied; and it is further

ORDERED that plaintiff's claim for attorneys' fees and the counterclaims of defendant are hereby severed, and action on the claim and counterclaims shall continue.

Dated: 10/10/08

ENTER:

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J.S.C.

LOUIS B. YORK
J.S.C.

FILED
OCT 20 2008
COUNTY CLERK'S OFFICE
NEW YORK