Vista Eng'g Corp. v George Campbell Painting Corp.
2009 NY Slip Op 30760(U)
March 30, 2009
Supreme Court, New York County
Docket Number: 601015/06
Judge: Debra A. James
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SCANNED ON 4/6/2009

[* 1]

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

PRESENT: DEBRA A. JAMES PART 59
Justice

VISTA ENGINEERING CORPORATION,
Plaintiff,

- v -

GEORGE CAMPBELL PAINTING CORP. and FEDERAL INSURANCE COMPANY,
Defendants.

Index No.: 601015/06
Motion Date: 11/13/08
Motion Seq. No.: 01
Motion Cal. No.: 98

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5 - 7

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NEW YORK

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

The court shall deny the motion and cross-motion in this breach of contract action concerning payment under a subcontract to provide fencing for a bridge rehabilitation.

Plaintiff subcontractor claims that it was to be paid a "lump sum" amount for the entire portion of the subcontract for fencing the upper and lower levels of the bridge. The defendants including the general contractor argue that the contract provided for "unit pricing."

The court finds that neither party is entitled to summary judgment because there are issues of contested fact as set forth in the party affidavits and the terms of the subcontract and

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

master general contract are ambiguous as to the contested items.

It is conceded by all parties, and a review of the Subcontract terms reveals, that Schedule "A" to the Subcontract which lists the approximate amounts to be paid under the Subcontract does not provide a Unit Price or an "Extended Amount" estimate for the work encompassed in "Provide and Install Chain Link Fence System to Upper & Lower Level" stating instead "TBD" for these essential contract terms. Both parties also concede the amounts listed in Schedule "A" are estimates of the amount to be paid.

The dispute here arises because the Triborough Bridge and Tunnel Authority (TBTA) decided not to have the upper level fencing portion of the Master Contract performed sometime after the commencement of the project. The plaintiff claims that it is entitled to be paid for the work it performed in preparation for carrying out the cancelled portion of the project. Defendants argue that it was plaintiff's unilateral decision to order all the material up front and that such work constitutes a "means and method" of carrying out the contract that is plaintiff's responsibility because plaintiff was only to be reimbursed for the fencing that was actually installed rather than that specified by the contract.

Neither the Master Contract nor the Subcontract by their terms resolve the parties' dispute. The Master Contract between

TBTA and George Campbell provides in Section 01900.B.3 "Measurement and Payment: Bid Item 4 - Upper and Lower Level Chain Link Fence Systems" that "[t]he quantity to be paid for all fencing inclusive of fence gates will be the number of linear feet of chain link fencing and gates measured along the top of fencing, center to center, of end posts properly furnished and installed in accordance with specifications." Section 01580 of the Master Contract entitled "Upper and Lower Level Chain Link Fence Systems" states in "Part 1 - General, A. - Scope" that "1. The work of this Section is to: . . . (f) Fabricate, deliver and install new fencing for the entire upper and lower level walkways and accessories to be similar to the fences presently existing." Section X of the Subcontract provides that "[i]n the event the contract herein is upon a unit price, it is understood and agreed that any quantities and amounts mentioned are approximate only and may be more or less at the same unit price and subject to change as ordered and directed by the Contractor."

The court finds that there is an enforceable subcontract in this action as both parties agree that they reached an agreement for the work to be performed at the time the contract was entered into. See Gui's Lumber & Home Center, Inc. v Mader Const. Co., Inc., 13 AD3d 1096, 1097 (4th Dept 2004) (enforceable contract on the construction project created where parties subscribed to a detailed purchase order in accordance with the estimate).

Rather, the issue presented is one of contract interpretation because the terms of the contracts provide no clarity as to the amounts owed in the dispute between the parties based upon the facts alleged. As stated by the Court, "[t]he threshold issue in matters of contract interpretation is whether, on its face and without reference to extrinsic evidence, the contract is reasonably susceptible of more than one interpretation." Beltrone Const. Co., Inc. v State, 189 AD2d 963, 965 (3d Dept 1993). In contrast to Beltrone, the contracts in this case are subject to more than one interpretation on the facts presented because they contained no provision governing the severability of the work set forth in the contract and how allocation of payment was to be made where TBTA cancelled a portion of the Master Contract as occurred here. This includes the issue of whether there was any duty to mitigate damages on the part of the defendant George Campbell Painting Corporation upon the cancellation of a portion of the fencing contract by TBTA as evidenced by the directive of the TBTA's engineer that it turn over the unused fence material and submit a credit proposal.

Summary judgment is also inappropriate for the account stated claims alleged because "an account stated cannot be made an instrument to create liability when none otherwise exists but assumes . . . an express agreement to treat the statement in question as an account stated. . . [A] claim for an account

stated may not be utilized simply as another means to attempt to collect under a disputed contract." Martin H. Bauman Associates, Inc. v H & M Intern. Transport, Inc., 171 AD2d 479, 485 (1st Dept 1991). The submissions on this motion indicate that plaintiff rendered its own statement of account while defendant paid on a statement of account it generated from the invoices paid by the TBTA. As there are conflicting accounts stated, it cannot be said that either one was accepted by the other party. Nor does the court find that the deposition testimony of the defendant as to the amount owed to plaintiff constitutes an admission since it was based upon an offer to the plaintiff in settlement of the account that the plaintiff rejected.

Accordingly, it is

ORDERED that the motion and cross-motion are DENIED; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation conference in Part Mediation-1 and if the case is not settled thereat, the parties are to attend a pre-trial conference in IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on April 28, 2009 at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: March 30, 2009

ENTER:

HON. DEBRA A. JAMES J.S.C.

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