

Omni Contr. Co., Inc. v City of New York

2009 NY Slip Op 32708(U)

November 12, 2009

Supreme Court, New York County

Docket Number: 603812/08

Judge: Karen Smith

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

PRESENT: KAREN S. SMITH

PART 62

Index Number : 603812/2008

OMNI CONTRACTING COMPANY INC

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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 ^{city's} this motion is granted as provided in the accompanying memorandum decision.

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

FILED

NOV 18 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/13/09

K S S
Karen S. Smith 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 62

-----X
OMNI CONTRACTING COMPANY, INC.,

Plaintiff,
-against-

Index No.: 603812/08
Motion Seq.: 1
Motion Date: 11/12/09

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION
(Contract No. 20050042116, Project No. M069-102M),

Defendants.
-----X

DECISION AND ORDER

FILED
NOV 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

PRESENT: KAREN S. SMITH, J.S.C.:

Defendants the City of New York's and the New York City Department of Parks and Recreation's (collectively "the City") motion for summary judgment dismissing the Verified Complaint based on the affirmative defense of fraud in the inducement, declaring that the contract at issue is unenforceable, and granting summary judgment on a counterclaim for setoff and recoupment, is granted to the extent that the complaint is hereby dismissed, as discussed more fully below.

FACTS

The relevant facts are contained in the parties' motion papers and are not in material dispute, unless noted below. On or about June 20, 2005, Omni Contracting Company, Inc. (hereinafter referred to as "Omni") submitted a bid to contract for Project No. M069-102M, Reconstruction of Thompson Street (Vesuvio) Playground (the "Playground Contract"). On or about March 27, 2006, Omni entered into a contract with the New York City Department of Parks and Recreation (the "DPR") for work on the Playground Project. The price for the contract

was \$2,127,000. Operations commenced on or about August 3, 2006. Omni was originally required to complete its work within 270 consecutive calendar days, no later than December 28, 2006. Subsequently, Omni requested, and the City approved, six (6) time extensions, extending the completion date to July 17, 2007. The City paid Omni \$2,143,866.36 for its work under the Playground Contract. Thereafter, Omni commenced the underlying action, and alleged that it fully performed the contract, but that Omni's performance was delayed by acts of the Defendants or third parties, and that those delays caused Omni to incur \$319,386.62 in additional costs.

DEFENDANTS' AFFIRMATIVE DEFENSE AND COUNTERCLAIMS

By this motion, the City seeks an order for summary judgment based on: 1) the affirmative defense of fraudulent inducement of contract; 2) a counterclaim for declaratory judgment; and 3) a counterclaim for setoff and recoupment.

Affirmative Defense of Fraudulent Inducement

The City raises an affirmative defense of fraudulent inducement based on statements and omissions made in Omni's VENDEX (acronym for Vendor Information Exchange) form submissions.¹ The City claims that Omni made false statements or withheld information on its VENDEX form originally filed by Omni on April 15, 2004, and reaffirmed those same false statements on July 8, 2004, February 15, 2005, and April 13, 2005, which Omni executed and

¹VENDEX forms are forms completed by a contractor-applicant as part of a the bid process, which the City relies on in evaluating whether or not an applicant-contractor meets the "lowest responsible bidder" designation on a proposed project and therefore is eligible to receive the contract.

submitted to the City sworn VENDEX Certifications of No Change prior to its bid for the Playground Contract. Therefore, when Omni submitted its bid for the Playground Project on June 20, 2005, Omni failed to make required disclosure regarding failure to pay employees a prevailing wage in several of Omni's other projects and the City was thereby fraudulently induced into the contract.

General Municipal Law ("GML") § 103(1) requires municipalities to award contracts for public work and purchases of goods or commodities, over specified minimum amounts, through a competitive sealed bid after a public advertisement process, to the "lowest responsible bidder." In addition, § 2-08 of the New York City Procurement Policy Board (the "PPB") Rules reflect the mandate of GML § 103(1) by requiring that City agencies award contracts to "responsible prospective contractors only" (*see* PPB § 2-08[a][1]). A "responsible contractor" is defined in by the PPB Rules as "one which has the capability in all respects to perform fully the contract requirements and the business integrity to justify the award of public tax dollars." (PPB § 2-08[b][1]). In making its "responsible lowest bidder contract determination," city agencies are directed to use "information supplied by the prospective contractor including... VENDEX and prequalification questionnaire replies..."(PPB § 2-08[g][1][iv]). Notably, under the PPB Rules, the burden is on prospective contractors to "affirmatively demonstrate" their responsibility. (PPB § 2-08[a][2]) (*See also Gershow Recycling Corp. v. N.Y. City Dept of Sanitation*, 2004 NY Slip Op 50983U, 1 [N.Y. Sup. Ct. 2004] at 1). Section 2-08(b)(3) of the PPB Rules also provides that "[f]ailure of a firm to provide relevant information specifically requested by the Contracting Officer may be grounds for a determination of non-responsibility." In addition to being bound by these Rules in the application process, the contract itself included a signed

statement on the Information for Bidders (the “IFB”) portion, which confirms that, “materially false statements willfully or fraudulently made in connection with the bid or any forms completed or submitted with the bid may result in the termination of any Contract between the City and the Bidder .” (IFB § 7[B]).

The City points to Questions 18 and 20 of the VENDEX Business Entity Question (the “BEQ”) form to substantiate Omni’s failure to disclose. Question 18 asks, “[i]n the past five years, has this business and/or any of its owners and/or officers... been the subject of an investigation by any government agency, including but not limited to federal, state and local regulatory agencies?” Omni answered “No.” Notably, the Vendor’s Guide to VENDEX, referred to in the form instructions, defines the term “investigated” broadly, and includes receipt of a notice that the vendor has been the subject of “an inquiry by prosecutorial, investigative or regulatory agency,” in the definition of investigation. The same guide further defines “inquiry” to include “any investigation into compliance with prevailing wage laws or regulations.”

Question 20 of the BQE asks if the vendor has “any administrative charge pending?” Omni answered “No.” The Vendor’s Guide to VENDEX notes that an “administrative charge” is an instance where an agency “charges an entity with violating the agency’s regulations. These charges include, but are not limited to violations of prevailing wage violations,” among other violations.

The City has substantiated, and it is undisputed, that Omni was the subject of investigation for prevailing wage violations in 1999, 2001, 2004 and 2006. On May 19, 1999, the New York State Department of Labor, Bureau of Public Works, sent Omni a Payroll Records Notification directing Omni to provide payroll records in relation to an investigation of

prevailing wage violations in connection with a project to paint the Route 9A Viaduct (the “Rte. 9 Project”). On September 21, 2000, Omni executed a stipulation establishing liability and restitution of \$161,475.23 for unpaid wages, plus interest, against Omni for prevailing wage violations in connection with fulfilling the Rte. 9 Project contract.

Furthermore, Omni was subject to various other wage investigations on other projects within the five years preceeding the Playground Project bid.^{2,3} On August 20, 2008, subsequent to submission of the Playground Project bid, Mr. Haleem Zihenni (hereinafter, “Zihenni”), individually and as president for Omni, signed a stipulation paying restitution wages to workers on the three projects, and waiving judicial review in Broome County Bridge Project and Stony Brook Project. Zihenni also stipulated that Omni’s willfully violated Article 8 of the Labor Law (prevailing wage violations) in executing the contract on these projects, and agreed not to participate in any public works projects until December 11, 2011.

A claim of fraudulent inducement requires a knowing misrepresentation of material fact which is intended to deceive another party, intent to act, and an injury. (*New York University v. Continental Ins. Co.*, 87 N.Y.2d 308). There is no doubt that a prospective contractor’s record of compliance with the prevailing wage requirements of the Labor Law is an issue material to the

² These were the Broome County Bridge Project (Records Request Notice mailed to Omni on April 2, 2001), the Pilgrim State Psychiatric Project (Records Request Notice served on Omni on May 23, 2003, with a second Notice served on Omni January 19, 2006), and the State University of New York at Stony Brook Project (Records Request Notice served and mailed to Omni on or about April 15, 2004.)

³Defendants make additional allegations of Omni’s failed disclosure of prevailing wage claims in the Locust Avenue Firehouse (Rye, NY) Project (commenced on July 24, 2006) and the Public School 122 Project (commenced on April 19, 2006). However, these investigations were initiated after the last Certification of No Change alleged by the City as violating of the VENDEX disclosure rules, and therefore are not considered in this motion.

responsibility of the contractor. The City provides several DPR Non-Responsible Bidder determinations as exhibits to its motion. These determinations evidence that failure to pay prevailing wages indicates a lack of business integrity violative of Section 2-08(b)(1) of the PPB Rules, and would not meet the standard requiring that a responsible contractor “has the capability in all respects to perform fully the contract requirements and **the business integrity to justify the award of public tax dollars**” (emphasis added). The result in each of these example cases was a finding that the proposed contractor was not responsible, and therefore did not receive the contract. Thus, in this case, had the City know plaintiff was under investigation, it is presumed that the City would not have awarded Plaintiff the contract.

The question before this Court, therefore, is whether or not Omni knowingly made false statements in failing to disclose that it was under investigation when it submitted its application on the Playground Contract. Omni, through its officer Zihenni, contends that it did not consider requests for certain records sent to Omni to be “investigations,” and states that an examination of the Payroll Records Notification shows that the notice does not inform Omni that it is being investigated. To the contrary, the Department of Labor’s Payroll Records Notification on the Rte. 9 Project investigation is executed by, “Michael P. Gibbons, Sr. Public Work Wage **Investigator**”. Furthermore, the notices sent to Zihenni for the Rte. 9 Project, the Broome County Bridge Project, and the Stony Brook Project were from the Department of Labor (the “DOL”) and requested information such as the hourly rate of pay of workers, copies of all checks paid to employees, copies of all checks paid to union for employees benefits, and certified

payrolls for entire project, among other information.⁴

Plaintiff Omni states that if an issue of fact is fairly debatable a motion for summary judgment must be denied. The Vendor's Guide to VENDEX, *supra*, specifically put Omni on notice that "investigations" to be reported on the VENDEX forms included inquiries by regulatory agencies such as the DOL's Bureau of Public Works, naming "prevailing wage law violations" as one of the enumerated violations required to be disclosed on the forms. Therefore, there is no material issue of fact concerning whether or not Omni failed to make required disclosure, or possessed the requisite knowledge that the subject Payroll Request Notification and Record Request Notices were investigations required to be disclosed.

In its attempt to thwart Plaintiff's affirmative defense of fraudulent inducement, Omni argues that the City waived its right to claim fraud in the inducement by ratifying the subject contract through continued payments as late as March 11, 2009,⁵ since Omni was paid "almost in full for the work performed" but sustained damages due to delays caused by the City. The case relied on by plaintiff to support this proposition, *Vanderbilt Group LLC v. Dormitory Authority* (51 AD 3d 506 [1st Dept 2008]), is distinguishable from the instant case. In *Vanderbilt*, defendant sought to abrogate a contract based on plaintiff's criminal conviction for offering a false instrument for filing in connection with said contract. Defendant in *Vanderbilt* established that it was induced to enter into the contract by plaintiff's false statements. *Vanderbilt* at 507.

⁴ The Notice relating to the Pilgrim State Psychiatric Project was not annexed to the moving papers but was identified by the City in an attached exhibit, the affidavit of Michael Gibbons, who is an investigator for the Bureau of Public Works.

⁵ In the sum of \$81,450, with another requisition pending under the contract in the sum of \$33,663.01 and a requisition for Change Order #11 in the amount of \$11,111.68.

In that case, the Appellate Division, First Department, relied on the fact that the defendant had investigated the plaintiff's false representations prior to forming the contract, and therefore, "[i]f defendant was aware of and investigated plaintiff's false representations and chose nevertheless to execute the contract, it waived its defense of fraud and its contractual right to terminate the contract on the basis of the misrepresentations." In contrast, the City in this case did not investigate Omni's false statements on its VENDEX forms prior to executing the contract. Rather, the record is absent of evidence that the City knew of Omni's false statements prior to the contract execution. As discussed *supra*, knowledge of the violations required to be disclosed is not imputed to the City under the PPB Rules. Under those Rules, rather, the burden is on the prospective contractors to "affirmatively demonstrate" their responsibility under PPB § 2-08(a)(2) by completing VENDEX questionnaires which are designed to elicit background information relevant to responsibility determinations under PPB § 2-08(e)(2). *Gershow, supra*, at 2-3.

Contracts procured through fraudulent and collusive bidding are void as against public policy, and where work is done pursuant to such illegal municipal contracts, no recovery may be had by the vendor, either on the contract or in *quantum meruit*. (*Christ Gatzonis Electrical Contractor, Inc. v. New York City School Const. Authority*, 297 A.D.2d 272 [2d Dept 2002]). In such cases, public policy mandates that contracts fraudulently procured in violation of GML § 103 may not be enforced in either contract or equity, and the municipality can recover from the vendor all amounts paid under such contracts. (*Gerzof v. Sweeney*, 22 NY 2d 297 [1968]; *See also City of New York v. Liberman*, 232 A.D.2d 42 [1st Dept 1997]). The City, however, does not seek to recover the entire amount of the contract, but rather, only to set off that portion

outstanding which Omni seeks in their complaint.

The City's motion for summary judgment dismissing the complaint based on the City's affirmative defense of fraud in the inducement, and the request for a set off of damages in the amount of \$319,386.62, is thus hereby granted.

The remaining portions of the motion are the City's first counterclaim for declaratory judgment and the City's second counterclaim for setoff and recoupment. The first counterclaim, by virtue of the above reasoned decision, is redundant, since the City's motion for summary judgment is granted dismissing the complaint on fraud in the inducement. The second counterclaim for setoff and recoupment is likewise redundant, since it has been determined that Omni is not entitled to recover the sum decided and the complaint is dismissed.

Accordingly, it is

ORDERED that the motion is granted to the extent that the complaint is dismissed; and it is further


ORDERED that the first and second counterclaims interposed in the City's Answer are dismissed; it is further

ORDERED that the Clerk is to enter judgment accordingly.

The foregoing constitutes the decision and order of this court.

Dated: November 12, 2009

ENTER:


Hon. Karen S. Smith, J.S.C.

FILED
NOV 18 2009
NEW YORK
COUNTY CLERK'S OFFICE