

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

2010 NY Slip Op 30467(U)

March 5, 2010

Supreme Court, New York County

Docket Number: 105634/2007

Judge: Cynthia S. Kern

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

CYNTHIA S. KERN  
J.S.C.

PRESENT: \_\_\_\_\_

PART 52

*Justice*

Index Number : 105634/2007  
OMNI CONTRACTING CO., INC.  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

In 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 is decided in accordance with the attached decision.

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

**FILED**  
MAR 09 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/5/10

C9K  
CYNTHIA S. KERN 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 52

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

Plaintiff,

Index No. 105634/2007

-against-

CITY OF NEW YORK, acting on behalf of THE NEW YORK  
CITY DEPARTMENT OF DESIGN AND CONSTRUCTION,

Defendants.  
-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

**FILED**  
MAR 09 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff commenced the instant action to recover damages for additional costs incurred in the course of its performance of a Department of Design and Construction (DDC) contract for work on DDC's Project No. PV525-C, "Studio Museum in Harlem-Phase IIB" ("Studio Museum Contract") that it alleges were caused by delays due to acts of the City or third parties. Defendant City of New York (the City) counterclaimed for rescission of the contract as having been procured by fraud and for setoff and recoupment. The City moved for summary judgment dismissing the complaint based on its affirmative defense of fraud in the inducement of the contract and on its counterclaims for rescission and for setoff and recoupment. For the reasons set forth below, the City's motion for summary judgment dismissing the complaint is granted.

Because the City's motion to dismiss is granted, both counterclaims are redundant and are therefore dismissed.

The relevant facts are as follows. On April 1, 2003, plaintiff entered into a contract with DDC for work on the Studio Museum Contract at a price of \$1,642,000. The City has paid Plaintiff \$3,216,858.14 for its work under the Studio Museum Contract. The actual work took place between April 2003 and May 30, 2007. In its complaint, plaintiff alleges that it has fully performed under the contract, except as delayed by acts of the City or third parties, and that it incurred additional costs in the amount of \$990,858.87 due to such delays. Plaintiff has filed two other complaints against the City alleging similar facts, which were dismissed as a matter of law by Justice Kerrigan and Justice Smith in *Omni Contracting Company, Inc. v. The City of New York, New York City Department of Design and Construction*, New York Supreme Court - Queens County, Index No. 30640/08 (Sept. 25, 2009) and *Omni Contracting Company, Inc., v. The City of New York, New York City Department of Parks and Recreation*, New York Supreme Court - County of New York, Index No. 603812/08 (Nov. 18, 2009) respectively. Justices Kerrigan and Smith both dismissed plaintiff's complaints on the basis of fraud in the inducement of the contract, holding that plaintiff knowingly submitted false VENDEX forms stating that it was not the subject of any government investigations when it did in fact know that it was the subject of multiple investigations by the New York State Department of Labor. Justices Kerrigan and Smith also held that the City did not waive its right to argue that it was fraudulently induced into the contract by continuing to deal with the plaintiff after learning about the misrepresentations.

Plaintiff filed VENDEX forms in 2001 and 2002 (prior to the awarding of the bid) which stated that the company was not the subject of any government investigation. However, at the

time that plaintiff submitted its bid for the Studio Museum Contract on April 22, 2002, it was already the subject of two such investigations: one regarding the painting of the Route 9A viaduct, and another regarding the Broome County Bridge painting contract. On May 19, 1999, the New York State Department of Labor directed plaintiff to provide payroll records in relation to an investigation of prevailing wage violations in connection with the Route 9A viaduct project. On September 1, 2000, plaintiff executed a stipulation acknowledging that its subcontractor on that project, A&T General Construction, committed wage violations and agreeing to make restitutions for the underpayment. On April 1, 2001, the Department of Labor directed plaintiff to provide records in connection with an investigations regarding work on the Broome County Bridge. That investigation was finally resolved on August 20, 2008, when plaintiff executed a stipulation agreeing to comply with an administrative determination by the Department of Labor that plaintiff knowingly participated in violations of the Labor Law and ordering restitution. Despite these ongoing investigations, plaintiff filed VENDEX forms in 2001 and 2002 that stated that it was not the subject of any government investigations. In 2004 and 2005, plaintiff filed additional VENDEX forms that stated it was not the subject of any investigations, despite the fact that by 2005, plaintiff was the subject of five separate investigations based on five separate public works projects by the New York State Department of Labor.

In the present case, the Court finds that the City is entitled to summary judgment dismissing the complaint on the basis of fraud in the inducement of the contract. A claim of fraudulent inducement of a contract requires a knowing misrepresentation of material fact with the intention to deceive another party, intent to act, and an injury. *See NY Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 318 (1995). Further, "contracts procured through fraudulent...bidding are

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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 the present case, the City has established that plaintiff knowingly misrepresented material facts with the intent to deceive the City by filing VENDEX forms in 2001 and 2002 that falsely stated that it was not the subject of any wage law investigations despite the fact that it was fully aware of the investigations regarding the Route 9A viaduct contract and the Broome County Bridge contract. It is undisputed that the statements made by plaintiff in the 2001 and 2002 VENDEX forms that it was not the subject of any wage law investigations was false at the time it was made. Plaintiff’s argument that it did not intend to deceive the city because was not aware that it was the subject of the investigations is without merit. The City has provided numerous communications between plaintiff’s attorneys and officers and the Department of Labor that clearly apprised plaintiff of the investigations and the fact that it was the subject of the investigations. Moreover, the City has established that it was injured by this misrepresentation based on its loss of the ability to make a fully informed judgment regarding the bid. The VENDEX form specifically asks whether the bidder is under investigation for wage law violations and the New York City Procurement Policy Board Rules make clear that wage law violations are a factor in the contracting officer’s determination of responsibility or non-responsibility. *See* PPB Rules, §2-08(g)(iii). This is relevant information that the City should have had before making a decision about whether a contractor had “the business integrity to justify the award of public tax dollars.” *Id.* Based on the foregoing, the City has established that it was fraudulently induced to enter into the contract based on plaintiff’s knowing misrepresentation that it was not under any investigation for wage law violations.

Moreover, plaintiff is collaterally estopped from challenging the City's defense of fraud in the inducement based on the prior determination of Justice Kerrigan. "The doctrine of collateral estoppel...precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party." *Ryan v. New York Tel. Co.*, 62 N.Y. 2d 494, 500 (1984). For collateral estoppel to apply, "[i]t is required that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue." *Allied Chem. v. Niagara Mohawk*, 72 N.Y. 2d 271, 276 (1988). In the prior action before Justice Kerrigan, the court granted summary judgment dismissing Omni's complaint based on the City's affirmative defense of fraud in the inducement. *See Omni Contracting Company, Inc. v. The City of New York, New York City Department of Design and Construction*, New York Supreme Court - Queens County, Index No. 30640/08 (Sept. 25, 2009). The court there specifically held:

Since the City is required to award a public works contract to the lowest responsible bidder, pursuant to GML § 103, and since compliance with the prevailing wage laws is integral to the determination of a bidder's responsibility, [Omni President] Zihenni's knowing concealment of the multiple investigations of Omni for prevailing wage violations thwarted the City's ability to award the subject contract to the lowest responsible bidder and constituted fraud in the inducement. Therefore, Omni is not entitled to recover any damages pursuant to the contract.

The issue of fraudulent inducement before this court is identical to the issue of fraudulent inducement decided by Justice Kerrigan and plaintiff had a full and fair opportunity to contest the issue. Justice Kerrigan specifically found that Omni had been the subject of investigations of prevailing wage violations in the 1999 Route 9A viaduct contract and 2001 Broome County Bridge contract and that plaintiff was aware that it was the subject of these investigations. Plaintiff is therefore now estopped from arguing that it was not the subject of investigations of

prevailing wage violations prior to entering into the Studio Museum Contract and is estopped from arguing that it was not aware that it was the subject of these investigations.

Plaintiff's argument that the City waived its right to claim fraud because it continued to deal with the company after learning of the misrepresentation is also without merit. Plaintiff's position is based on *Vanderbilt Group LLC v. Dormitory Authority*, 51 AD 3d 506 (1<sup>st</sup> Dept. 2008), in which the Court held that the defendant waived its right to the affirmative defense of fraudulent inducement because it was aware of and investigated the plaintiff's false representations before the execution of the contract. Plaintiff argues that *Vanderbilt* extends to situations where a party learns about misrepresentations after the execution of the contract and continues to deal with the other party, contending that a waiver can be inferred because the City continued to pay plaintiff on the contract after learning about the misrepresentation after the bid was awarded. There is no legal basis for this argument. The City's knowledge and actions after the contract was entered into do not affect its ability to successfully argue that it was fraudulently induced into the contract.

Moreover, plaintiff is collaterally estopped from arguing waiver here because that identical issue has previously been decided and plaintiff had a full and fair opportunity to litigate that issue. Both Justice Kerrigan and Justice Smith fully heard plaintiff's arguments on that issue and held that they were without merit. Plaintiff is therefore estopped from asserting waiver again in the instant case.

Plaintiff's argument that it is entitled to discovery to determine when the City learned of the alleged misrepresentations is also without merit. Because plaintiff is collaterally estopped from raising the issue of the waiver of the right to claim fraudulent inducement and because there is no evidence that the City became aware of the false representations before rather than

