

Matter of Thompson v Bloomberg

2010 NY Slip Op 32082(U)

July 30, 2010

Supreme Court, New York County

Docket Number: 403126/09

Judge: Jane S. Solomon

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

PRESENT: Solomon
Justice

PART 55

WILLIAM THOMAS, JR

- v -

MICHAEL BLOOMBERG

INDEX NO. 403126/09

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-5

6-7, 8

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

petition is decided by the amended memorandum Decision and declaratory Judgment

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/30/10

J.S.
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
In the Matter of
WILLIAM C. THOMPSON, JR., as
Comptroller of the City of New York

DECISION AND
DECLARATORY JUDGMENT

Petitioner,

Index No.: 403126/09

-against-

MICHAEL R. BLOOMBERG, as Mayor
City of New York, and the City of
NEW YORK,

Respondents.

-----X
JANE S. SOLOMON, J.:

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and notice of entry cannot be served based thereon. To
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appear in person at the Judgment Clerk's Desk (Room
141B).

This Article 78 proceeding for mandamus relief and a
declaratory judgment was commenced by William C. Thompson, Jr.,
as Comptroller of the City of New York (Comptroller) and is
continued by his successor, John C. Liu. It was initiated by an
order to show cause seeking a preliminary injunction enjoining
respondents Michael R. Bloomberg, as Mayor of the City of New
York, and the City of New York (Respondents) from "taking any
further steps to change the terms of any security provided for
contracts entered into by the City of New York without first
obtaining the approval of the Comptroller."

BACKGROUND

Section 6-113 of the New York City Administrative Code
provides:

Each bidder [for a City contract] whose bid is accepted
shall give security for the faithful performance of his
or her contract in the manner prescribed in the

regulations of the board of estimate. The adequacy and sufficiency of such security . . . shall be subject to the approval of the comptroller.

Upon the elimination of the board of estimate, its responsibilities with respect to city contracts were delegated to the Procurement Policy Board which has adopted rules for security for performance and payment by contractors. In November 2009, the City revised its form of performance bond for contracts of less than \$5 million. The impetus for this change came from the reluctance of the United States Small Business Administration to provide bond guarantees under the terms of the prior bond form. The Comptroller was not consulted about the change in the form, nor was his approval sought.

The Comptroller complained to the Mayor and other participants in the process asserting that his approval is required for the terms of the City's bond form. Anticipating that changes will be made to the form of performance bond for contracts exceeding \$5 million, he commenced this proceeding to compel Respondents to consult with him, on the ground that the phrase in section 6-113 that he is to approve the "adequacy and sufficiency of such security" requires that he approve the text of the bond. His application for a preliminary injunction concerning the adoption of a new bond for the larger contracts without his participation was denied after oral argument on April

[* 4]

19, 2010 (see, Interim Order, dated April 19, 2010), and further submissions were made regarding the dispute over the statutory terms "security" and "adequacy and sufficiency."

DISCUSSION

The crux of this action is one of statutory interpretation. When a statute's language is clear and unambiguous, the court must enforce the statute in accordance with the plain meaning of its terms (*Matter of Comptroller of City of New York v. Mayor of City of New York*, 7 NY3d 256, 2643 [2006]). "When presented with a question of statutory interpretation, our primary consideration is to ascertain and give effect to the intention of the Legislature" (*Matter of DaimlerChrysler Corp. v. Spitzer*, 7 NY3d 653, 660 [2006] [internal quotation marks and citation omitted]). However, where the language is ambiguous a court may utilize other means of statutory interpretation, such as a review of the legislative history (*People v. Ballman*, 15 NY3d 68 [2010]).

There is no dispute that adequacy and sufficiency pertain to the financial standing of the surety or guarantor. The Comptroller argues that the word "security" can be interpreted to apply to the terms of the bond presented as the security for the contractor's performance. Respondents counter that the entire phrase means that the Comptroller's power is

limited to approval of the adequacy and sufficiency of the individual surety which issues the bond, and does not extend to the decision whether to require security, how much to require, or the text of the instrument. In response, the Comptroller argues that the Mayor is attempting to rewrite the statute, replacing the term "security" with "surety."

The Comptroller contends that had the legislature intended to use the word surety, it would have done so as it did in other Administrative Code provisions, such as section 3-205 (clerk's bond, "with one or more sureties, to be approved by the comptroller") and section 11-909(i) (bond, "with one or more sureties . . . [to be] approved as to amount and adequacy, by the comptroller"), and therefore, the use of the word security implicates a broader power.

Respondents counter that the Mayor's office has changed performance bond requirements without Comptroller approval in the past. Specifically, in 1993, the requirement for a performance bond was removed for contracts under \$250,000, and, in 2006, the performance bond was removed for contracts under \$500,000 (Cushman Affirmation, attached to Answer, ¶ 36). They argue that this is consistent with the Charter of the City of New York (Charter) which gives the corporation counsel, not the

Comptroller, the power over the form and legality of bonds and contracts. Section 394 of the Charter reads as relevant:

"Except as otherwise provided in this chapter or other law, the corporation counsel shall have charge and conduct of . . . the preparation of all . . . contracts, bonds, and other legal papers of the city . . . and the corporation counsel shall approve as to form all such deeds and bonds . . ."
(Charter, § 394[b]).

Respondents also look to the older history of section 6-113 in support of their argument that the only responsibility the Comptroller ever had was the responsibility he now has, namely "the power to determine that the assets of the person or entity providing the security were sufficient to guarantee the performance of the undertaking" (Cushman Affidavit, ¶ 55). Among the matters addressed is that the language of section 6-113 is nearly identical to the language found in the original Charter of 1857, Section 38 (Cushman Affirmation, Ex. E); the prevailing practice then was that security was provided by individuals, and not sureties (Sections 20-21, Ordinances of 1859, attached to Cushman Affirmation, Ex. J). Not until 1905 could security be provided by a surety company (Revised Ordinances of 1905, § 349), although the language was not changed. Finally, Respondents cite to a Corporation Counsel opinion from 1878 that "the amount of security required is left to the sound discretion of the head of the department making the contract . . ." (Opinions of the

Corporation Counsel, Vol. 7, p. 135, 137 [Dec. 27, 1878], attached to Cushman Affirmation, Ex. Q) as further support for their contention that the Comptroller does not have the power he seeks here. Notably, this opinion is consistent with the Procurement Policy Board Rules granting authority to the chief contracting officer of city agencies.

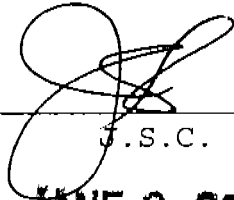
Considering the foregoing, Respondents' position is correct.

Accordingly, it hereby is

ADJUDGED and DECLARED that section 6-113 of the Administrative Code of City of New York § 6-113 does not require the Respondents to obtain the Comptroller's approval for changes in the form of performance bonds required under City contracts.

Dated: July 30, 2010

ENTER:



J.S.C.

JANE S. SOLOMON

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