

Epic Sec. Corp. v AMCC Corp.
2011 NY Slip Op 30992(U)
April 11, 2011
Supreme Court, New York County
Docket Number: 601519/2008
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DEBENT. EMILY JANE GOODMAN

PART 17

Index Number : 601519/2008

EPIC SECURITY

vs

AMCC

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided per attached*

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

FILED

APR 15 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/11/11

[Signature]
EMILY JANE GOODMAN 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 17

-----X

EPIC SECURITY CORP.,

Plaintiff,

Index No. 601519/08

-against-

FILED

AMCC CORP.,

Defendant.

APR 15 2011

-----X

Emily Jane Goodman, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

In this action disputing which party is responsible for paying New York State sales tax, the following two motions are consolidated: (1) plaintiff Epic Security Corp.'s (Epic) motion for summary judgment (mot. seq. no. 004), and (2) defendant AMCC Corp.'s (AMCC) motion for partial summary judgment (mot. seq. no. 005).

I. Background

In December 2006, AMCC contracted with Epic for Epic to provide uniformed security guard services to four construction sites, all allegedly New York City School Construction Authority (SCA) sites. The proposed contract (Proposal) was for services on an emergency basis, to replace another security guard company.

Epic's vice president of operations, Selwyn Falk (Falk), and its commander of field operations, Hector Hernandez (Hernandez), met with AMCC's vice president, David Perthold (Perthold), and

its controller, Shelly Braun (Braun), on December 15, 2006, to discuss arrangements. Falk maintains that AMCC was informed that Epic would be charging \$17 per hour per guard, plus applicable sales tax. Falk Aff., ¶ 8. Falk also states that "Mr. Perthold advised myself and Mr. Hernandez verbally that AMCC was acting as an agent for the SCA and that all of the SCA site jobs were tax exempt." *Id.*, ¶ 9. Epic claims that Falk advised Perthold and Braun that AMCC would have to issue tax exempt certificates to Epic. *Id.*, ¶ 12. Falk contends that Epic was experienced with working for SCA sites, where sales tax exemptions were the norm.

At the December 15, 2006 meeting, the parties executed the Proposal. Notice of Motion, Ex. A (Complaint), Proposal, Ex. A to Complaint. On that same day, the parties executed AMCC's Purchase Order Agreements (Purchase Orders) for each of the four sites. Notice of Motion, Ex. G. Epic began providing security services immediately.

On January 8, 2007, construction work on one of the SCA sites ended, as did the parties' agreement as to that site. On January 25, 2007, AMCC faxed three "New York State and Local Sales and Use Tax Contractor Exemption Certificates" (Certificates) (*id.*, Ex. I), for the remaining three sites. The Certificates state that Epic is exempt from sales tax because "[t]he tangible personal property will be used in the above project to create a building or structure or to improve real

property or to maintain, service, or repair a building or structure, or real property owned by an organization exempt under section 1116 (a) of the Tax Law" *Id.* at 1. New York State is designated therein as such an entity. This section concludes that "[t]he tangible personal property will become an integral component part of such building, structure, or real property." *Id.*

Epic allegedly commenced sending invoices to AMCC on a weekly basis. Epic has failed to attach copies of any invoices to its motion papers (or in opposition to defendant's motion), but claims that "each weekly invoice which Epic provided to AMCC for payment also stated 'EXMPT' and '0.000%' in place of the amount of Sales Tax charged." Falk Aff., at 4. Epic claims that each invoice was addressed to "AMCC Corp., As Agent For the NYC School Construction Auth." *Id.* AMCC does not deny getting these weekly invoices,¹ and, apparently, paid without protest for most of 2007.

AMCC failed to make its payment in December 2007. Later, Epic learned that AMCC had been audited by the State of New York, and that, as a result, "AMCC was notified that it was required to delineate sales tax." *Id.* at 5.

AMCC wrote to Epic on January 29, 2008, stating, "[i]n

¹Shelly Braun, AMCC's controller, admits to receiving the invoices in the form described by Epic. See Deposition of Braun, Notice of Motion, E, at 82-85.

accordance with your Purchase Order Agreement, please revise all your invoices, current and previous invoices, on all jobs, to properly reflect sales tax collected by you." Complaint, Ex. D. Epic responded that it would not alter its invoices, and would not be paying sales taxes, having been instructed by AMCC that the jobs were exempt from sales taxes, and having been presented with the Certificates.

The parties reached an impasse. Epic started invoicing AMCC to reflect sales taxes due, and AMCC refused to pay. Epic's counsel, by letter dated February 8, 2007, informed AMCC that it would pull its personnel off the three sites immediately, if payment was not made. Notice of Motion, Ex. J. Epic did, however, remain at the sites until AMCC could obtain replacement services.

AMCC sent Epic a check in the sum of \$18,485.39, as full payment due, which, apparently, reflected the subtraction of sales taxes due to the State in the sum of \$38,218.11. Epic rejected the check, claiming that it was not its responsibility to pay the sales taxes, or even to charge AMCC sales taxes, based on AMCC's representations at the time of contracting that the projects were sales tax exempt. Epic claims that it is due in excess of \$136,420.55 on the Proposal, along with contractual costs and fees, including attorneys' fees.

Epic brings causes of action for fraud, breach of contract,

account stated and unjust enrichment, along with its claim for attorneys' fees. AMCC's defense is, basically, that the Purchase Orders contractually obligate Epic to pay sales taxes, as does the Proposal, and that Epic breached these agreements by failing to pay the sales tax. AMCC invokes the parol evidence rule to stop Epic from attempting to bring in extrinsic evidence not found in the writings. It argues that Epic should have done "due diligence" to see to it that the projects were, in fact, tax exempt, and failed to do so.

II. Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

A. Fraud

A cause of action for fraud is established by a showing of "a representation of material fact, falsity, scienter, reliance

and injury." *Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 57 (1999). "To maintain an action based on fraudulent representations ... it is sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged.'" *RBE Northern Funding, Inc. v Stone Mountain Holdings, LLC*, 78 AD3d 807, 809 (2d Dept 2010), quoting *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-407 (1958).

In AMCC's Purchase Orders, it is stated that "Epic Security shall furnish uniforms and equipment including watchmen's cloak system with six (6) key stations without cost to AMCC Corp., and Epic Security shall pay social security benefits, sales, and unemployment taxes." Notice of Motion (mot. seq. no. 005), Ex. C, at unnumbered 1. However, the Purchase Orders also state that "AMCC Corp shall pay the sum of \$17.00 per hour per guard including all applicable tax." *Id.* Epic's Proposal states "[a]ny and all payment of wages, salaries and other expenses to said employees, and payment of any and all tax liabilities and all employer/employee liabilities shall be the sole responsibility of Epic." *Id.*, Ex. D, at unnumbered 3. Based on these provisions, AMCC argues that a strict reading of the agreements shows that Epic assumed the obligation to pay sales tax. AMCC argues that any pre-execution discussions concerning the issue of sales tax are unreachable, pursuant to the statute

of frauds. See *Cole v Macklowe*, 40 AD3d 396, 396 (1st Dept 2007) (“[t]he parol evidence rule bars admission of extrinsic evidence to contradict or vary the terms of a written contract intended to embody the agreement between the parties”); see also *Dong Won Kim v Frank H. Truck Corp.*, 81 AD3d 586 (2d Dept 2011).

Neither the Proposal nor the Purchase Orders contain merger clauses, purporting to limit these agreements to their contents. Even if they did, however, “where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud -- either in the inducement or in the execution” *Danann Realty Corp. v Harris*, 5 NY2d 317, 320 (1959); see also *Joseph v NRT Inc.*, 43 AD3d 312 (1st Dept 2007).

Epic contends that, at the meeting the parties held on December 15, 2006, Perthold told Epic’s representatives that Epic’s services were being sought for a tax-exempt SCA site. AMCC does not offer an affidavit from Perthold saying that he never said those words. However, in his deposition, Perthold did respond to the question “[a]s far as you know has AMCC ever held itself out as an agent of the School Construction Authority?” by saying “no.” Epic’s Notice of Motion, Ex. D, at 18. Similarly, Braun, in her affidavit, says that neither Falk nor Hernandez “were verbally advised by AMCC that AMCC was acting as agent for the School Construction Authority and that the SCA jobs were tax exempt.” Braun Aff., at 4. Bald as these rebuttals are, they

are sufficient to raise a question of fact as to whether AMCC misrepresented to Epic that Epic would not have to pay (or charge for) sales taxes, should there be any.

AMCC's argument, that Epic should have conducted "due diligence" by inquiring into the contract between AMCC and SCA to find out that AMCC was not an agent for SCA, is not persuasive. With regard to this line of argument, AMCC brings up tenets of apparent agency, to support Epic's alleged obligation to inquire into the relationship between AMCC and the SCA. However, apparent agency is a concept used to bring in a *principal*, through the acts of its agent, not to reach the agent's own liability. See *Standard Funding Corp. v Lewitt*, 89 NY2d 546, 551 (1997) (a principal can be bound if "words or conduct of the *principal*, communicated to a third party ... give rise to the appearance and belief that the agent possesses authority to enter into a transaction"); see also *Hallock v State of New York*, 64 NY2d 224 (1984). Epic is not attempting to create liability against the SCA. In any event, AMCC's argument regarding due diligence cannot invalidate a claim for fraud.

Epic may proceed with a cause of action for fraud, despite the parol evidence rule, but neither party may have summary judgment on this cause of action at this time.

B. Breach of Contract

Epic's causes of action for breach of contract and fraud are

interwoven in this matter, because, as shown above, admissible evidence of material misrepresentations made by AMCC to Epic serves to call into doubt the integrity of the agreement's terms. The alleged misrepresentations do not necessarily contradict or vary the terms of the Proposal and Purchase Orders.

As previously noted, AMCC's Purchase Orders state that "Epic Security shall pay social security benefits, sales, and unemployment taxes" and Epic has not explained how its interpretation can prevail, in light of this language. Yet, the same Purchase Orders also state that "AMCC Corp shall pay the sum of \$17.00 per hour per guard including all applicable tax." Notice of Motion (mot. seq. no. 005), Ex. C, at unnumbered 1 (emphasis added).² AMCC rewrites this provision to read: "AMCC Corp shall pay the sum of \$17.00 per hour per guard which includes all applicable tax." Yet, the words "which includes" is not in the agreement (*see Bailey v Fish & Neave*, 8 NY3d 523 (2007) (generally, a court may not by construction add or excise terms) and the provision can also be interpreted to read that AMCC shall pay the sum of \$17.00 per hour per guard, and, will also pay sales tax. Although Epic's Proposal states "[a]ny and

²The two potentially conflicting provisions could be harmonized, if for example, the agreement was for Epic to pay social security benefits, sales, and unemployment taxes to the appropriate agency (the first provision), but AMCC was to reimburse Epic for the amount paid, (the second provision) because it agreed to pay \$17.00 per hour per guard including all applicable sales tax.

all payment of wages, salaries and other expenses to said employees, and payment of any and all tax liabilities and all employer/employee liabilities shall be the sole responsibility of Epic" (*id.*, Ex. D, at unnumbered 3), the referenced "taxes" could relate only to taxes in connection with an employer/employee relationship. In the end, the court must harmonize these provisions (*see Bombay Realty Corp. v Magna Carta, Inc.*, 100 NY2d 124 (2003), even if they are seemingly conflicting (*see Long Island Lighting Co. v Allianz Underwriters Insurance Co.*, 301 AD2d 23 [1st Dept 2002])). However, given the ambiguities, the Court cannot do so at this time, and, therefore parol evidence may be admitted. Further, beyond the ambiguity in the language of the agreements, AMCC has not explained why it provided Tax Exempt Purchase Certificates to Epic. Although AMCC states that the Certificates provide a tax exemption only for tangible property, and the services at issue do not fall within the category of tangible property, that begs the question: why provide the Certificates in the first place, if they are of no use.³ AMCC has also not explained why it waited over one year to dispute the issue.

Epic also raises two unpersuasive arguments. First, Epic argues that under New York State Tax Law (Tax Law) § 1116 (a), it

³AMCC does not state that the Certificates could be used by Epic to obtain an exemption in some other respect.

is not required to pay sales tax, so that AMCC is improperly requesting that it do so. Tax Law § 1116 (a) states that:

any sale ... by or to any of the following ... or any use or occupancy by any of the following shall not be subject to sales ... taxes imposed under this article (1) the State of New York, or any of its agencies, instrumentalities, public corporations ... or political subdivisions where it is the purchaser, user or consumer"

Epic argues that, as the SCA is an agent of the State, Epic cannot owe sales tax on any services it performed for AMCC on the alleges SCA sites. However, this is not an argument that can be raised against AMCC, or defended by it, on a claim for breach of contract. It is an argument that must be addressed to the State of New York or to the SCA, and cannot be collaterally attacked here.

Epic also raises *Matter of MGK Constructors* (1992 WL 51154, NY Tax App Trib [March 5 1992]), as supporting its claim that it cannot owe sales tax on the services it performed for AMCC. In *MGK Constructors*, the State Tax Tribunal discussed the issue of whether a contractor was an agent of the City of New York, exempt from paying sales tax. *MGK Constructors*, an administrative proceeding, viewed in the present context, only shows that the issue is one which should be determined by the proper State authority. The issue herein is the parties' intent, at the time of contract, regarding who was obligated to pay the sales taxes (see *Evans v Famous Music Corp.*, 1 NY3d 452 [2004]), and not

whether or not the project was actually tax exempt or whether the State has the right to seek sales taxes.⁴

Accordingly, neither side is entitled to summary judgement.

C. Account Stated

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. An account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated [interior quotation marks and citations omitted]." *Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250-251 (1st Dept 2007). "An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account." *American Express Centurion Bank v Cutler*, 81 AD3d 761, 762 (2d Dept 2011) see also *Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51 (1st Dept 2004).

Epic correctly notes that AMCC cannot claim that the sales tax was included in the \$17 an hour price per guard set forth in the agreements. As stated in *Stuyvesant Fuel Service Corp. v Scola* (117 Misc 2d 944 [Civ Ct, Bronx 1982]), "a contract of sale

⁴Assuming that the agreements were intended to shift the responsibility from the customer (AMCC) to the seller (Epic), Epic has not shown that such an agreement would be illegal under the Tax Law or otherwise.

should not provide, either directly or indirectly, that the tax be absorbed in the sales price and will not be separately stated." *Id.* at 945.

Regardless, no account stated has been alleged here, because it is uncontroverted that AMCC paid the invoices which were presented to it, in the amount Epic asked, in a timely fashion. The invoices do not indicate any agreement to pay any more than was billed on their face, and AMCC paid all monies which Epic requested. AMCC did not refuse or fail to pay any part of the amount it was billed in the invoices. Therefore, the invoices did not show "the existence of some indebtedness between the parties" which was not paid. *See Ryan Graphics, Inc. v Bailin*, 39 AD3d at 251. AMCC promptly protested after it was audited, and the question of whether taxes were due arose. The cause of action must be dismissed.

D. Unjust Enrichment

Epic's cause of action for unjust enrichment is duplicative of its viable cause of action for breach of contract, and so, is dismissed. *See Benn v Benn*, ___AD3d___, 2011 NY Slip Op 01936 (1st Dept 2011); *Mark Bruce International, Inc. v Blank Rome, LLP*, 60 AD3d 550 (1st Dept 2009).

III. Conclusion

Questions of fact preclude summary disposal of Epic's claims for fraud and breach of contract, including its claim for

contractual attorneys' fees. However, Epic's claims for account stated and unjust enrichment must be dismissed.

Accordingly, it is

ORDERED that the motion for summary judgment brought by plaintiff Epic Security Corp. (mot. seq. no. 004) is denied; and it is further

ORDERED that the motion for partial summary judgment brought by defendant AMCC Corp. (mot. seq. no. 005) is granted solely as to the dismissal of the causes of action for account stated and unjust enrichment, and is otherwise denied.

This Constitutes the Decision and Order of the Court.

Dated: April 11, 2011

FILED

APR 15 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

ENTER:



J.S.C.

EMILY JANE GOODMAN