Daniju Certified Pub. Accountant, P.C. v City of New York Govt.
2011 NY Slip Op 32859(U)
October 20, 2011
Supreme Court, New York County
Docket Number: 116649/10
Judge: Cynthia S. Kern
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[* 1] SCANNED ON 10/24/2011

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

PRESENT: CYNTHIA S. KERN J.S.C. PART 52

Index Number : 116649/2010
DANIJU
vs
NEW YORK GOVERNMENT
Sequence Number : 002
DISM ACTION/ INCONVENIENT FORUM

INDEX NO. 116649/10
MOTION DATE
MOTION SEQ. NO. 02
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on 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 annexed decision.

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

FILED
OCT 24 2011
NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/20/11

CYNTHIA S. KERN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

(1) DANIJU CERTIFIED PUBLIC ACCOUNTANT, P.C., (2) ISKEEL DANIJU, CPA, (PRESIDENT OF DANIJU CPA, PC)

Plaintiffs,

Index No. 116649/10

-against-

DECISION/ORDER

(1) THE CITY OF NEW YORK GOVERNMENT, (2) THE CITY OF NEW YORK DEPARTMENT OF HEALTH AND MENTAL HYGIENE ("DOHMH"), (3) JEFFERY BEATTY (DIRECTOR OF AUDIT) OF DOHMH, (4) DINA RUBIN (ASSOCIATE STAFF ANALYST) OF DOHMH, (5) SARA PACKMAN (ASSISTANT COMMISSIONER) OF DOHMH,

Defendants.

FILED
OCT 24 2011
NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA S. 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	1
Notice of Cross Motion and Answering Affidavits	2
Affirmations in Opposition to the Cross-Motion	3
Replying Affidavits	4
Exhibits	5

Plaintiffs commenced the instant action to recover damages for breach of contract against the City of New York, the City of New York Department of Health and Mental Hygiene ("DOHMH'), Jeffrey Beatty, Director of Audit of DOHMH, Dina Rubin, Associate Staff Analyst of DOHMH and Sara Packman, Assistant Commissioner of DOHMH (collectively "the City"). The City moves to dismiss all claims against it on the grounds that a defense is founded upon

documentary evidence and that plaintiffs have failed to state a cause of action. *See* CPLR 3211(a)(1), (a)(7). Plaintiffs cross-move for leave to amend the complaint and to convert the second cause of action into an article 78 proceeding and to have the article 78 proceeding decided in favor of plaintiffs. Pursuant to CPLR 3211(c), the court will convert the City's motion to dismiss into a motion for summary judgment. In this regard, the parties have been given notice and an opportunity to submit additional papers. For the reasons set forth below, the City's motion for summary judgment is granted with respect to the first cause of action to the extent that the court finds that the termination of the contracts did not constitute a breach of contract. However, the court finds that plaintiffs can seek recovery for work performed prior to the termination of the contract. Plaintiff's motion to convert the second cause of action into an article 78 proceeding is granted. However, the court denies the article 78 relief requested by plaintiff-petitioners.

The relevant facts are as follows. DOHMH is a City agency charged with managing the Early Intervention Program ("EIP"). EIP is an inter-agency program designed to provide additional services to children with developmental disabilities or delays. The additional services are provided by independent service providers who have contracts with the City to provide EI services. In or about May of 2009, the City, by and through DOHMH, sought to award four to six contracts to certified public accounting firms to conduct audits of its EI Service Provider Agreements. In or about December 2009, the City awarded Daniju CPA two contracts, Nos. 09MA035401R0X00, Comptroller's Registration No. 2010-0021025 ("Contract 1") and 09MA035404R0X00, Comptroller's Registration No. 2010-0021012 ("Contract 2"). The two contracts pertained to different providers but the scope of services for each was the same. Both

Contracts contained a termination clause in Section 2.05, which stated that "the Department [DOHMH] reserves the right to postpone, delay, suspend or terminate this Agreement, or any part thereof, any time and for any reasons deemed to be in the interest of the Department, upon written notice to the Consultant. If this Agreement is terminated under this Section, the Department will pay the Consultant only for work actually performed under this Agreement up to the date of termination" According to the City, plaintiffs failed to satisfactorily perform these contracts. Accordingly, both Contracts were terminated under Section 2.05 of the Contracts.

In addition to Contracts 1 and 2, Daniju CPA was also the lowest bidding vendor to submit a proposal for another contract, RFP 10MA018700R0X00, for the audit of delegate agencies/hospitals ("Contract 3"). However, the Procurement Policy Board Rules (the "PPB Rules") require that "contracts shall be awarded to ... responsible prospective contractors only." PPB Rules § 2-08(a)(1). Based on its prior dealings with Daniju CPA with regard to Contracts 1 and 2, the City determined that Daniju did not meet the requirements (a "non-responsibility determination) and did not award it Contract 3. Plaintiff brought two separate causes of action, the first cause of action challenging the termination of Contracts 1 and 2 and the second cause of action challenging the City's non-responsibility determination against plaintiffs with regard to Contract 3.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter

of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

"It is a well-established principle of law that when a contract affords a party the unqualified right to limit its life by notice of termination that right is absolute and will be upheld in accordance with its clear and unambiguous terms." *See Red Apple Child Dev. Ctr. v Community Sch. Dists. Two*, 303 A.D.2d 156, 157-158 (1st Dept 2003).

> A standard 'termination for convenience' clause in a government contract provides the government with broad rights to terminate a contract whenever the government deems that termination is in its interest. These clauses limit a contractor's recovery to the costs incurred as a result of the termination, payment for work completed, and the cost of preparing a termination settlement proposal. They often preclude or fail to include recovery of punitive damages or anticipated profits, which is recoverable in a common-law breach of contract suit. Thus, a termination for convenience clause limits the government's liability for a termination action that would otherwise constitute a breach of contract. Nonetheless, despite recovery limitations contained in a termination for convenience clause, a contractor may recover full breach of contract damages if it can show that the government acted in bad faith or abused its discretion in invoking the termination clause .... Bad faith in the context of a termination for convenience clause has been defined as 'malicious intent' or 'animus' towards the contractor. *See A.J. Temple Marble & Tile v Long Is. R.R.*, 172 Misc.2d 422, 424-425 (Sup. Ct. Queens Cty. 1997)(internal citations omitted).

The court grants defendants' motion for summary judgment to dismiss plaintiffs' first cause of action for breach of contract solely to the extent that plaintiffs are not entitled to contractual damages. However, the court finds that plaintiffs may seek payment for work performed under the Contracts prior to the termination of the Contracts. The City has met its prima facie burden of demonstrating that the Contracts were properly terminated pursuant to the unambiguous termination clause contained in the Contracts which allowed the City to terminate the Contracts for any reason deemed to be in its interest. The City has made a prima facie

showing that it was in its interest to terminate the Contracts based on plaintiffs' performance under the Contracts.

Moreover, plaintiffs have failed to raise any material issues of fact to support their conclusory claim that the government acted in bad faith or abused its discretion in terminating the Contracts. The plaintiffs have not produced any evidence demonstrating that the City had any malicious intent or animus towards the plaintiffs when it terminated the Contracts. Therefore, the City properly terminated the Contracts pursuant to the termination clause contained in the Contracts. However, as per the terms set forth in Section 2.05, defendants are obligated to pay plaintiffs for the work performed under Contracts 1 and 2 up to the date of termination.

Plaintiffs' reliance on *Weider v Skala,* 80 N.Y.2d 628 (1992) for the proposition that their breach of contract claim should not be dismissed because the City directed plaintiff to engage in conduct that violated the rules required for auditors and CPAs is not persuasive. *Weider* involves an attorney who sued his former law firm employer on the ground that he was wrongfully fired as an associate because of his insistence that the firm comply with applicable ethical rules in reporting another associate's misconduct. The court held that the plaintiff employee stated a valid claim for breach of contract based on an implied-in-law obligation in his relationship with defendants to follow the ethical standards of the profession. This holding is not relevant to the instant action in that plaintiffs' contracts were not terminated because of their insistence that DOHMH follow ethical obligations that it was refusing to follow.

The court will now address plaintiffs' second cause of action. Plaintiff's motion to convert the second cause of action into an article 78 proceeding is granted. However, the court grants the City's motion to dismiss the petition for the reasons set forth below. The standard of

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review in an article 78 proceeding such as this is whether the administrative agency's determination was "arbitrary or capricious. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. *Pell v Board of Education*, 34 N.Y.2d 222, 231 (1974). The administrative agency has broad discretion in evaluating the evidence and drawing inferences therefrom and "its interpretation will be upheld so long as it is not irrational or unreasonable." *Wembly Mgmt. Co. v NYSDHCR*, 205 A.D.2d 319 (1st Dept 1994).

In the instant action, the court finds that the City's non-responsibility determination to deny plaintiffs Contract 3 was not arbitrary or capricious. The City determined, based on its past dealings with plaintiffs, that plaintiffs were not responsible prospective candidates to complete the contract. As this determination was based in reason and taken with regard to facts, the court denies plaintiffs' petition requesting that this court overturn the City's determination.

Accordingly, the City's motion to dismiss plaintiffs' claims are granted to the extent that the court finds that the City did not breach the terms of its Contracts with plaintiffs by terminating the Contracts pursuant to Section 2.05 of the Contracts. However, the Court finds that the City is obligated to pay plaintiffs for work performed under the Contracts up to the date of termination as outlined in the terms of the Contracts. The court will not address the disagreements between the parties as to the amount of money owed by the City to plaintiffs as such a determination is outside of the scope of this motion. The court denies plaintiffs' article 78 petition in its entirety. This constitutes the decision, order and judgment of the court.

Dated: 10/20/11

FILED

OCT 24 2011

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Enter: CK

CYNTHIA S. KERN
J.S.C.