

**New York State Urban Dev. Corp. v Graham, Miller,
Neandross, Mullin & Roonan, LLC**

2011 NY Slip Op 32976(U)

November 9, 2011

Supreme Court, New York County

Docket Number: 401387/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

NYS URBAN DEVELOPMENT

Plaintiff (s),

INDEX NO.

401387/09

- v -

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

Graham, Miller, Neandross
Defendant (s).

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, the court's decision on this (these) motion (s) is as follows:


Motion (s) decided in accordance with
the accompanying memorandum decision

FILED

NOV 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/9/11


Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER

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

FILED

NOV 10 2011

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
New York State Urban Development
Corporation d/b/a Empire State
Development Corporation,

Plaintiff (s),

-against-

Graham, Miller, Neandross,
Mullin & Roonan, LLC,

Defendant (s).
-----X

NEW YORK
COUNTY CLERK'S OFFICE
DECISION/ ORDER

Index No.: 401387/09
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's n/m [3212] w/ RV affid, exhibits	1
WM affid in opp.	2
RV reply affid.	3

-----X
Gische, J.

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for breach of contract. Plaintiff, New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC" or "plaintiff"), now seeks the entry of an order (a) striking the defendant's, Graham, Miller, Neandross, Mullin & Roonan, LLC ("Graham" or "defendant"), affirmative defenses; and (b) awarding plaintiff summary judgment against defendant, in the form of a money judgment in the sum of \$21,000.00, plus interest thereon, from September 7, 2005. Defendant opposes the motion. Issue has been joined and since the note of issue has

not yet been filed, the motion is properly before the court and will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

Facts and Arguments Presented

Plaintiff claims, through the sworn affidavits of its Asset Manager, Ralph Volcy, that defendant was the recipient of a grant, under the terms of the WTC Small Firm Attraction and Retention Grant Program ("SFARG Program"), in the aggregate sum of \$21,000.00. Plaintiff paid defendant \$12,250.00, on September 22, 2003, and \$8,750.00, on September 7, 2005. Plaintiff, a public benefit corporation and the administrator of the SFARG Program, now seeks to recover these monies based on its claim that Graham failed to fulfill the conditions of the grant.

Plaintiff formulated and adopted guidelines relative to an applicant's eligibility to receive and retain funds distributed under the SFARG Program ("SFARG Program Guidelines"). Specifically, the defendant was required, as an express condition of its grant eligibility, to either enter into a new five year lease or a five year renewal lease for an eligible premises. An eligible premises is defined within the SFARG Program Guidelines as a business premises (non-residential) located within the Eligible Area.¹ Pursuant to the SFARG Program Guidelines section entitled "Grant Recapture," in the event that (a) at any time, within a five year period from the date of commencement defendant relocated a substantial portion of its business operations from the Eligible

¹ "Eligible Area" is defined in the SFARG Program Guidelines as that area within the Borough of Manhattan bounded on the north by the centerline of Canal Street, from the Hudson River to Rutgers Street, then southeast along the centerline of Rutgers Street and continuing along the centerline of Rutgers Slip to the East River.

Premises, or if (b) at any time within a five year period commencing on the date of its application, defendant failed to file any documentation requested by ESDC, would be obligated to repay any grant monies it received under the SFARG Program.

On January 15, 2003 defendant completed, executed and filed the SFARG Program application, which included a certification. In the certification, located on page three of the application, the defendant agreed that

(v) The applicant has received and agrees to comply with the WTC Small Firm Attraction and Retention Grant Program Guidelines.

The defendant further agreed that

(vi) The applicant business will be obligated to repay any grant funds received under this program in the event (a) at any time within a five-year period commencing on the Commencement Date of the new lease, lease amendment or deed it has relocated a substantial portion of its business from the Eligible Premises; ... (c) if at any time within a five-year period commencing on the Application Date, the Eligible Business fails to file any documentation requested by ESDC or EDC...."

Defendant extended its lease at 32 Broadway, New York, New York, which was located within the Eligible Area. The new term ran from July 1, 2003 through August 1, 2008, thereby qualifying for the SFARG Program funding, as long as it did not relocate outside the Eligible Area, prior to July 1, 2008. Plaintiff maintains that defendant breached the terms and conditions of the SFARG Program Guidelines, on April 1, 2006, by relocating to 2350 Broadway, New York, New York, which was outside the Eligible Area. Plaintiff now claims that since defendant moved its business operations outside

the eligible area, within five years from the commencement of the lease upon which the grant was originally based, defendant must repay the grant amount.

In its opposition, the defendant does not deny that it breached the terms of the grant, rather it argues that because it suffered financial hardship as a result of events unfolding out of September 11, 2001, and it otherwise substantially performed its obligations, the court treat the grant as a conditional installment contract. Defendant argues that by making the second payment, plaintiff acknowledged that defendant has successfully fulfilled the terms and conditions of the grant for the first half of the five year period. By this formulation, defendant acquiesces to its liability for the \$8,750.00 paid to it on September 7, 2005, but argues that it is entitled to retain the \$12,250.00 paid to it on September 22, 2003 due, to substantial performance up to and until the second payment.

Discussion

Summary Judgment Determination.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for

summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957). When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2d Dept. 2003).

To establish a *prima facie* case of breach of contract, plaintiff must plead facts that show: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage, Furia v. Furia, 116 A.D.2d 694 (2d Dept. 1986); see Ascoli v. Lynch, 2 A.D.3d 553 (2d Dept. 2003) (citing PJI). In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based, Sud v. Sud, 211 AD2d 423 (1st Dept. 1995); Atkinson v. Mobil Oil Corp., 205 AD2d 719 (2d Dept. 1984). In this case, the parties entered into enforceable obligations in connection with the grant. The terms and conditions of the grant are contractual obligations. See Pine v. Coppola N.Y.C., Inc., 299 A.D.2d 227 (1st Dept. 2002); Miller v. Lou Halperin's Stations, Inc.,

284 A.D.2d 439 (2nd Dept. 2001); Benincasa v. Garrubbo, 141 A.D.2d 636 (2nd Dept. 1988).

Here, plaintiff, a public benefit corporation, has established that defendant received a \$21,000.00 grant from it. Plaintiff has further established that as part of defendant's eligibility to retain the grant, it had to maintain its business, during a specific five year period, within a particular geographic area. Plaintiff has also provided sufficient evidence to establish that defendant moved its business outside of the required area within the applicable five year period. Finally, plaintiff has established that the consequence of defendant's non-compliance with the terms of the grant, there is an express obligation to return the grant monies previously provided to it. Plaintiff has therefore established a *prima facie* case.

In opposition, defendant has not raised any issues requiring a trial. Defendant's argument that the court treat the monies as separate installments is contrary to the express terms of the grant, which requires that all monies be returned if plaintiff relocates out of the Eligible Area.

Therefore, plaintiff's motion for summary judgment against defendant, in the form of a money judgment in the sum of \$21,000.00, plus interest thereon, at the statutory rate, from September 7, 2005, is granted.

The Affirmative Defenses.

The first three affirmative defenses, one, that ESDC's claim "fails to state a cause of action," two, that the "plaintiff lacks jurisdiction over the defendant" and, three, that the plaintiff has "failed to perform its duties under any contract with the defendant," are

without merit. For the reasons stated above the courts finds that the plaintiff has, in fact, stated a cause of action and that it is the defendant, not the plaintiff, who failed to perform its duties under the contract. Furthermore, pursuant to the mandate of CPLR § 3211, defendant has not timely moved for dismissal within sixty days of the answer and has, therefore, waived affirmative defense two, lack of personal jurisdiction. Affirmative defenses, four, that the defendant contends it is not liable to ESDC "because of impossibility of performance" and, five, that the defendant has "substantially performed its obligation" are, for the reasons stated above, likewise without merit and are rejected.

Affirmative defense seven, that ESDC had allegedly "violated various statutes, laws, and ordinances" is dismissed because defendant subsequently admitted, in response to ESDC's interrogatories, that it is "unaware of any such violation (See Exhibit N, RV affid., answer to interrogatories, at item No.5).²

The eighth affirmative defense, that ESDC failed to provide defendant with "adequate warning, instruction, or otherwise advise defendant as to the terms and conditions of the agreement and obligations allegedly incurred by the defendant" is wholly refuted by the operative documents and evidence proffered in this case.

Based on the foregoing, the defendants affirmative defenses are stricken.

Conclusion

In accordance with the foregoing,

IT IS HEREBY:

² The defendant has not plead a "sixth affirmative defense." In numbering its eight alleged "affirmative defenses," it has skipped and has not plead a sixth "affirmative defense."

* 9]


Ordered that the clerk shall enter an money judgment in favor of plaintiff and against defendant in the sum of \$21,000.00, plus interest thereon, at the statutory rate, from September 7, 2005, and the costs and disbursements of this action as taxed by the clerk; and it is further

Ordered that any requested relief not expressly addressed is hereby denied, and it is further.

Ordered that this shall constitute the decision and order of the court.

Dated: New York, New York
November 9, 2011

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED

NOV 10 2011

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