

Sound Beyond Elec. Corp. v City of New York

2011 NY Slip Op 34307(U)

March 7, 2011

Supreme Court, New York County

Docket Number: 117803/09

Judge: Barbara R. Kapnick

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

BARBARA R. KAPNICK
J.S.C.

PRESENT: _____
Justice

PART 39

THE SOUND BEYOND

INDEX NO. 117803/09

- v -

CITY OF NY

MOTION DATE _____

MOTION SEQ. NO. 001

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

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

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

Dated: 3/7/11



BARBARA R. KAPNICK 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: IA PART 39**

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THE SOUND BEYOND ELECTRICAL CORP.,

Plaintiff,

-against-

DECISION/ORDER
Index No. 117803/09
Motion Seq. No. 001

THE CITY OF NEW YORK and JOHN J.
DOHERTY as COMMISSIONER OF THE
DEPARTMENT OF SANITATION OF THE CITY
OF NEW YORK,

Defendants.

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In this action, plaintiff The Sound Beyond Electrical Corp. ("TSBE") alleges that in 1999, defendant New York City Department of Sanitation ("DOS") solicited bids for the construction of two sanitation garages to be built on Varick Avenue in Brooklyn, New York (the "Project"). TSBE submitted a bid for the electrical work on the Project and was awarded the Contract in the amount of \$6,358,000.00.

Plaintiff alleges that DOS directed it to begin work on the Project on November 1, 2001, but that after mobilizing at the site, TSBE discovered that DOS could not provide access to the site because the prior occupant (Waste Management) had not yet vacated. TSBE was compelled to de-mobilize from the Project site, at significant cost, and then was ordered to re-mobilize 12 months later, after Waste Management had vacated the site, at which time

it was again prevented access to the site due to soil contamination. Following decontamination by a separate contractor, TSBE mobilized a third time but allegedly encountered further delays because the soil conditions would not support the garages as designed.

Plaintiff alleges that due to the 18-month delay in gaining access to the site, the Project timeline became compressed from 42 to 28 months. Due to the multiple design flaws, TSBE was forced to perform additional work outside the scope of the Contract. TSBE also contends that it faced delays and complications that increased the cost of work with respect to the original design. In an effort to make up for the delays, DOS forced TSBE to prepare an accelerated schedule, which involved significant additional costs to TSBE. The changes, modifications and additions to the Project effected by DOS were so extreme that the change orders eventually totaled nearly \$6 million. DOS purportedly insisted that TSBE perform \$5.7 million in work that was not part of the Contract and for which change orders were not yet issued.

In mid-2006, DOS allegedly demanded that TSBE have 36 workers on the site the following day or TSBE would be defaulted. On August 14, 2006, DOS faxed a letter to TSBE directing it to attend a "Notice of Default Meeting" on August 17, 2006. TSBE's president

Walter Stanzione and TSBE's counsel Frederick Levine, among others, attended the meeting. By letter dated August 21, 2006, DOS informed TSBE that it had "determined that [TSBE] is in default of its obligations under [the Contract]." The grounds for such determination were, *inter alia*, that TSBE did not provide an adequate work force, it abandoned the Project, it violated the Contract willfully, and the Project could not be completed within the time allowed.

TSBE claims that none of the alleged grounds for defaulting it were true, and that it was approximately 91% finished with its work on the Project, including change orders, when it was declared in default by DOS.

The Complaint alleges that at the time TSBE was terminated, it was owed \$66,976.28 for completed base contract work and completed approved change order work (first claim for relief); \$337,445.59 for retainage, which defendants had held back from the progress payments that were made to TSBE (second claim for relief); and \$5,725,320.96 for additional work which defendants ordered without agreeing to a change order (third claim for relief).

Plaintiff also seeks damages in an amount no less than \$3,200,00.00 for costs incurred by TSBE in connection with

demobilization and remobilization, idle work force, idle equipment, reduced productivity, additional labor hours to perform the work, additional office and field overhead costs, financing costs, and loss of profits (fourth claim for relief); damages in an amount no less than \$3,500,000.00 for additional costs including, but not limited to, uncompensated overtime and weekend work, additional labor, additional supervision, increased complexity and resulting lack of productivity (fifth claim for relief); damages in an amount no less than \$13,000,000.00 for breach of the covenant of good faith and fair dealing implicit in the Contract, in directing TSBE to perform extra work without agreeing to a change order and threatening TSBE with default and termination if TSBE refused to perform the extra work under such conditions (sixth claim for relief); and at least \$750,000.00 in lost profits for the work that TSBE was wrongfully deprived of completing after the defendants' termination, and attorneys' fees and disbursements in the amount of \$42,200.00 incurred in defending itself against the lawsuit brought for indemnification by Fidelity & Guaranty Insurance Company, the surety company which had issued TSBE a performance bond and which paid the full amount of the bond to the defendants (seventh claim for relief).

Defendants now move for an order pursuant to CPLR 3211(a)(1) and (a)(7), dismissing the Complaint based upon documentary

evidence and on the grounds that it fails to state a cause of action.

According to defendants, pursuant to the Contract, once TSBE was declared in default, it was precluded from commencing a plenary action for any damages relating to the Contract and was limited to commencing an Article 78 petition to challenge the determination that it was in default.

Article 49.2 of the Contract provides:

The Commissioner's determination that the Contractor is in default shall be conclusive, final and binding on the parties and such a finding shall preclude the Contractor from commencing a plenary action for any damages relating to the Contract. If the Contractor protests the determination of the Commissioner, the Contractor may commence a lawsuit in a court of competent jurisdiction of the State of New York under Article 78 of the New York Civil Practice Law and Rules.

In opposition, TSBE contends that, pursuant to the Contract, the only issue that the Commissioner is authorized to determine is whether or not the contractor was in default, which is also the only issue that is directed to Article 78 review. TSBE argues that at the August 17 meeting, the Commissioner determined only the issue of default, which relates solely to plaintiff's seventh claim for relief, and made no binding determination as to TSBE's claims for unpaid contract work (first claim for relief), unpaid retainage

(second claim for relief), work performed outside the contract (third claim for relief), delay damages (fourth claim for relief), acceleration damages (fifth claim for relief), or breach of the covenant of good faith and fair dealing (sixth claim for relief).

In addition TSBE argues that all work performed outside the scope of the Contract, or incurred through fraud, must be compensated under a new contract on a quantum meruit basis.

However, the clear language of the parties' Contract precludes plaintiff's claims for damages relating to it, and the specific Contract provision challenged by TSBE has already been reviewed and enforced by other Judges, both in this Court and the Appellate Division, First Department.

In *Cal-Tran Associates, Inc. v City of New York*, (Sup Ct, New York County, May 16, 2006, Shafer, J., Index No. 109354/05), the court examined an identical contract provision at great length in its decision granting dismissal of plaintiff's complaint. There, Justice Shafer treated Article 49.2 as a "contractual alternative dispute resolution mechanism" and found that, pursuant to *Westinghouse Electric Corp. v New York City Transit Authority* (82 NY2d 47 [1993]), the provision did not violate public policy because any determination by the Commissioner was subject to

judicial review should the Contractor dispute the result. Consequently, Justice Shafer granted the City of New York's motion to dismiss the complaint in its entirety, pursuant to CPLR 3211(a)(1) and (a)(7).

In affirming that decision at 43 AD3d 727 (2007), the Appellate Division, First Department held that:

The court properly dismissed the complaint as against the City. The construction contract entered into between plaintiff and the City unambiguously precluded plaintiff from commencing a plenary action for damages upon a determination by the City that plaintiff had defaulted under the contract. Plaintiff's remedy was to commence a CPLR article 78 proceeding challenging the determination of default, which it failed to do.

In addition, as recently as October 1, 2010, this contract provision was again declared valid and enforceable against a party contracting with an agency of the City of New York. In *Summit Mechanical Systems, Ltd. v City of New York and New York City Department of Parks and Recreation*, (Sup Ct, NY County, October 1, 2010, Kern, J., Index No. 102210/10, citing to *Cal-Tran*, supra), the court dismissed plaintiff's complaint, finding that "plaintiff is precluded from commencing a plenary action for damages relating to the Contract based on its failure to challenge the previous default determination."

TSBE, on the other hand, cites to *Abiele Contracting, Inc. v New York City School Construction Authority* (91 NY2d 1 [1997]), which involved a contract to renovate and modernize Samuel J. Tilden High School in Brooklyn, for the proposition that without express contractual authority to make a quasi-judicial determination, the Commissioner is powerless to determine TSBE's claims. Thus, plaintiff contends, without authorization to reach a final and binding determination, there is no administrative action to review under Article 78, and the contractor is free to exercise its First Amendment right to sue for damages in a plenary action.

Moreover, plaintiff argues that without statutory authority, the Commissioner is powerless to make administrative determinations reviewable under Article 78. According to TSBE, the only power granted the Commissioner under Article 49.2 is the authority to determine default. As a result, an Article 78 petition would not be appropriate to challenge breaches of contract or the other claims plaintiff asserts herein and defendants' reliance on that method of relief is unfounded. At best, TSBE argues, the provision is ambiguous.

However, the City's interpretation of the contract provision at issue is in accordance with the undisturbed case law of this

jurisdiction, to which this Court is bound (see *Cal-Tran*, supra). TSBE is correct that any special proceeding commenced to challenge the determination of the Commissioner is limited to a review of the finding of default; however, failure to challenge that finding, pursuant to the terms of Article 49.2, waives any right TSBE may have had to commence a plenary action seeking monetary damages related to the Contract.

Moreover, contrary to TSBE's contention, the mere fact that the Contract contains other provisions providing for a different set of procedures for resolving conflicts that may arise under it is irrelevant, since it is undisputed that the Commissioner did, in fact, find TSBE in default. Therefore, the relevant contractual provision to be applied is Article 49.2, as discussed above.

To the extent that TSBE attempts to challenge the procedure or substantive determination of the hearing or meeting held to determine default, these claims were required to be heard in the context of an Article 78 special proceeding (CPLR 217[1]), which plaintiff never commenced.

Nor can plaintiff prevail on its arguments that Article 49.2 of the Contract must be strictly construed against defendants and in favor of plaintiff because it purports to waive its


constitutional right "to redress contract and tort claims" or because the Contract is an adhesion contract drafted by defendants, as both of these contentions" require a determination that the Contract language is ambiguous, which this provision is not. It should further be noted that plaintiff did not waive its right to seek redress by entering into the Contract, but by failing to seek Article 78 review of the Commissioner's determination.

Finally, although plaintiff argues and has pled defendants' constructive abandonment of the Contract through its myriad changes and delays, as defendants rightly point out, these claims were also made by the plaintiff in *Cal-Tran*, supra, but did not survive the motion to dismiss based on Article 49.2 of the Contract.

Accordingly, this Court is constrained to grant this motion by defendants for an order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing the Complaint in its entirety.

This constitutes the decision and order of the Court.

Dated: *March 7*, 2011



Hon. Barbara R. Kapnick, J.S.C.

BARBARA R. KAPNICK
J.S.C.