

**West 44th St. Hotel, LLC v Sam Tell & Son, Inc.**

2013 NY Slip Op 32122(U)

September 4, 2013

Sup Ct, New York County

Docket Number: 651215/2012

Judge: Cynthia Kern

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

PRESENT: CYNTHIA S. KERN  
J.S.C. Justice

PART \_\_\_\_\_

Index Number : 651215/2012  
WEST 44TH STREET HOTEL, LLC  
vs  
SAM TELL & SON.  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**is decided in accordance with the annexed decision.**

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

Dated: 9/4/13

CYNTHIA S. KERN  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
WEST 44<sup>TH</sup> STREET HOTEL, LLC,

Plaintiff,

Index No. 651215/2012

-against-

**DECISION/ORDER**

SAM TELL & SON, INC. d/b/a SAM TELL  
COMPANIES,

Defendant.

-----X

**HON. CYNTHIA 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.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

This action pertains to a written construction contract between plaintiff and defendant. Plaintiff now moves pursuant to CPLR § 3212 for an order granting summary judgment against defendant on its claims for breach of contract and attorney’s fees and an entry of judgment in the amount of \$110,380.00, with interest. Additionally, plaintiff seeks an order dismissing defendant’s first, second and third affirmative defenses, which are predicated upon fraudulent misrepresentations. For the reasons set forth below, plaintiff’s motion is granted.

The relevant facts are as follows. The present case involves a contract for the construction of a hotel located at 306 West 44<sup>th</sup> Street, New York, NY (the “Project”). Plaintiff West 44<sup>th</sup> Street Hotel, LLC (“West 44”) is the owner of the hotel and non-party Tishman

Construction Corporation of Manhattan ("Tishman") was the construction manager and West 44's agent at the Project. Defendant Sam Tell & Son's, Inc. ("Sam Tell") is a restaurant and food service equipment dealer.

In October of 2008, Tishman issued a request for proposals to various potential bidders for the Project's kitchen equipment (the "Kitchen Equipment Contract"), which included Sam Tell. During the next several months, representatives from Tishman and Sam Tell met and discussed the scope and details of Sam Tell's bid. In or around March of 2009, the Kitchen Equipment Contract for the Project was awarded to Sam Tell in the amount of \$1,760,000.00 (the "Contract Price").

On or about April 7, 2009, Sam Tell officially entered into a trade contract with plaintiff, through its agent Tishman, to provide the kitchen equipment for the Project (the "Contract"). Pursuant to the Contract, Sam Tell acknowledged that the "Contract Price shall include all applicable taxes, overhead and profit." Additionally, pursuant to paragraph 33 of the Contract, the parties agreed that:

All sales and use taxes are included in the Contract Price and are to be paid by [Sam Tell]. In the event that any law is or has been passed, or any rule or regulation pursuant thereof is enacted, which requires the Construction Manager or Owner to pay, either directly or indirectly, the amount of any such tax, or should any such law, rule or regulation direct the Construction Manager or Owner to collect the same, or make the Construction Manager or Owner liable for the collection thereof; or make the Construction Manager or Owner responsible therefor, it is covenanted and agreed that [Sam Tell] shall fully and completely make all payments therefor; and shall fully and completely defend, indemnify and save the Construction Manager and Owner harmless from any and all such taxes. . . . If any Sales Tax provides any exemption from tax for capital improvements, Owner agrees to provide [Sam Tell] with the necessary certification and [Sam Tell] agrees not to charge tax with respect to the furnishing of labor and/or materials as long as said exemption provision is in effect.

Tishman provided a Certificate of Capital Improvement (the "Certificate") as part of the original

bid and that form was made part of the Contract. The Certificate explicitly noted that “a Contractor’s acceptance of this certificate does not relieve the contractor of the liability for sales tax.”

In 2010, after construction of the Project was substantially completed, the New York Department of Taxation and Finance (“DOT”) notified plaintiff that it owed \$332,209.03 in sales tax for the Project. Of that amount, \$95,180.75, was attributable to certain materials and equipment provided by Sam Tell. Thus, in September of 2011, plaintiff contacted Mark Gray, the controller for Sam Tell, regarding Sam Tell’s apparent failure to pay sales tax for the Contract. Sam Tell refused to pay the outstanding sales tax arguing that it was plaintiff’s responsibility. On or about November 6, 2011, plaintiff paid New York State \$110,380.00 (\$95,180.87 in sales tax, plus \$15,200 in interest). Thereafter, plaintiff commenced the instant action to recover the amount it paid to New York State for the outstanding sales tax. Plaintiff’s complaint asserts four causes of action: (1) breach of contract; (2) indemnification; (3) breach of fiduciary duty; and (4) a claim for attorney’s fees.

Plaintiff now moves for summary judgment on its second and fourth causes of action for breach of contract and attorney’s fees. Plaintiff argues that it is entitled to summary judgment as the Contract clearly provides that defendant was responsible for the payment of all sales tax and it is undisputed that defendant failed to pay such taxes thereby breaching the Contract. Additionally, plaintiff asserts that it is entitled to attorney’s fees incurred in this action pursuant to paragraph 7 of the Contract. Defendant does not dispute that it was responsible for the payment of sales tax in general. However, defendant argues that the Contract explicitly states that while Sam Tell is to pay all taxes, they must first be collected by Sam Tell from plaintiff so

that they can be remitted to New York State. Specifically, defendant argues that pursuant to the Contract, if plaintiff provided Sam Tell with a signed Certificate of Capital Improvement, which it did, Sam Tell was not to collect any sales tax which could then be paid by Sam Tell to the New York State. Thus, defendant contends that since Sam Tell did not collect the sales taxes herein at issue, it cannot be held liable for its payment. To support this contention, Sam Tell relies on the last sentence in paragraph 33 of the Contract, which states: "If any Sales Tax provides any exemption from tax for capital improvements, Owner agrees to provide [Sam Tell] with the necessary certification and [Sam Tell] agrees not to charge tax with respect to the furnishing of labor and/or materials as long as said exemption provision is in effect." Additionally, Sam Tell contends that during contract negotiations it was told that sales tax should not be collected.

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.*

To make out a *prima facie* claim for breach of contract the plaintiff must show: (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *Noise in Attic Prod., Inc. v. London Records*, 10 A.D.3d 303 (1<sup>st</sup> Dept 2004). Construction of a written contract is a question

of law, appropriately decided by the court on a motion for summary judgment as long as the contract is unambiguous and the intent of the parties can be determined from the face of the agreement. *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 291 (1973); see also *Time Warner Entertainment Co. v. Brustowsky*, 221 A.D.2d 268 (1<sup>st</sup> Dept 1995) (holding that resolution by a fact finder only required where “interpretation of a contract term is susceptible to varying reasonable interpretations”). A contract is unambiguous if “on its face [it] is reasonably susceptible of only one meaning.” *Greenfield v. Phillies Records, Inc.*, 98 N.Y.2d 562, 569 (2002). When a contract is unambiguous, the court must enforce it as written and may not look to extrinsic evidence to give meaning to its terms. *Id.* Moreover, when there is no ambiguity, extrinsic evidence can not be offered to create one. *R/S Assoc. v. New York Job Dev. Auth.*, 98 N.Y.2d 29, 33 (2002). Accordingly, if the court determines that the defendant breached a clear and unambiguous term of a written agreement between the parties, then the plaintiff is entitled to summary judgment on a breach of contract claim as a matter of law.

In the instant action, plaintiff is entitled to summary judgment as a matter of law on its breach of contract claim as the Contract between the parties unambiguously provides that defendant is responsible for the payment of all sales tax and it is undisputed that defendant failed to make such payments. Paragraph 33 of the Contract states in clear terms that “[a]ll sales and use taxes are included in the Contract Price and are to be paid by [Sam Tell].” Additionally, the last sentence in Section 8 of Rider A to the Contract states unequivocally that “[Sam Tell] is responsible for all taxes.” These provisions are not susceptible of any other meaning other than Sam Tell was to pay all applicable sales tax. To the extent that defendant argues that the last sentence of paragraph 33 limits its liability to pay only the sales tax it included in its bid price

and was collected from plaintiff, such argument is without merit. As an initial matter, contrary to defendant's contention, the last sentence in paragraph 33 does not state this. The last sentence only provides that plaintiff is to provide defendant with a Certificate of Capitol Improvement, which it did, and that if any of the materials provided by defendant were exempt from tax as a capital improvement, defendant agreed not to include such tax in its bid price. It does not in anyway state that defendant need not pay any sales tax it did not include in its bid price and for which plaintiff did not pay it, nor does defendant offer any authority for interpreting it in such a way. Indeed, this interpretation would conflict with paragraph 34 of the Contract, which provided that the Contract Price included "all increases in cost, foreseen or unforeseen, including . . . taxes . . . all of which is to be borne solely by [Sam Tell]." Moreover, as the Certificate of Capitol Improvement clearly stated that "[a] contractor's acceptance of this certificate does not relieve the contractor of the liability for sales tax," such interpretation is illogical.

Additionally, to the extent defendant's relies on alleged prior oral statements made by Tishman during contract negotiations to support its contention that it was not to include sales tax in its bid price, such evidence is irrelevant and inadmissable as a matter of law. As an initial matter, the contract is unambiguous and as such the court may not look to extrinsic evidence to give it meaning or to create ambiguity. Additionally, the Contract contains a merger clause wherein Sam Tell agreed that "only the statements, representations and promises expressly contained in [Contract] have been relied upon by [Sam Tell] and have induced it to enter into [the Contract]." Accordingly, any prior oral representation made by plaintiff or its agent is irrelevant.

Additionally, plaintiff has established it prima facie entitlement to summary judgment as

a matter of law on its fourth cause of action for attorney's fees. "It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule." *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597 (2004). Here, paragraph 7 provides that:

To the fullest extent permitted by law, [Sam Tell] shall indemnify, defend, and hold harmless the [plaintiff] . . . from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal and settlement costs and expenses (collectively, "Claims"), arising out of or resulting from the acts or omissions of [Sam Tell] . . . in Connection with the Contract Documents, the performance of or failure to perform, the Work, or [Sam Tell's] operations, including the performance of the obligations set forth in this clause.

As this action arises from Sam Tell's failure to indemnify plaintiff for the payment of the outstanding taxes, it falls within the ambit of paragraph 7 and plaintiff may recover attorney's fees from defendant as a matter of law. To the extent defendant argues that attorney's fees are limited to those incurred in resolving the sales tax issue with New York State, such contention is without merit as it contradicts the clear terms of the Contract.

Based on the foregoing, plaintiff's motion for summary judgment on its first and fourth cause of action is granted. The Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$110,380.00, with interest thereon at the statutory rate from November 6, 2011 until the date of this decision and order, and thereafter at the statutory rate until entry of judgment as calculated by the Clerk, together with costs and disbursements. The portion of plaintiff's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees plaintiff may recover against the defendant is referred to a Special Referee to hear and report. Within thirty (30) days from the date of this order, counsel for plaintiff shall serve a copy of this order with notice of entry, together with a completed

