SHORT FORM ORDER

INDEX NO.: 19315-13

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 5-20-14
SUBMITTED: 7-17-14
MOTION NO.: 001-MD
002-XMD; RPC

KARUNANITHI SRIRAM A/K/A SRI K. SRIRAM, D/B/A ASPEC ENGINEERING,

Plaintiff,

-against-

GCC ENTERPRISES, INC.,

Defendant.

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Upon the following papers numbered 1-29 read on this motion for summary judgment and cross-motion to dismiss ; Notice of Motion and supporting papers 1-16 ; Notice of Cross Motion and supporting papers 17-27 ; Answering Affidavits and supporting papers 28 ; Replying Affidavits and supporting papers ___; Other 29 ; it is,

ORDERED that the motion by the plaintiff for summary judgment is denied; and it is further

ORDERED that the cross motion by the defendant for an order dismissing the complaint pursuant to CPLR 3211 (a) (1) is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference, which shall be held on November 13, 2014, at 9:45 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

This is an action to recover monies purportedly due to the plaintiff, a subcontractor, from the defendant, a general contractor, pursuant to an agreement dated January 13, 2012, to perform renovation work at the histology laboratory at the VA hospital in Northport, New York. The plaintiff contends that the defendant owes it a final payment in the amount of

$84,892.90. The defendant contends that the plaintiff has failed to provide the documentation that is a precondition to final payment under the contract. Both parties also contend that the other has refused to submit the dispute to mediation in accordance with their agreement. The plaintiff moves for summary judgment, and the defendant cross moves to dismiss the complaint pursuant to CPLR 3211 (a) (1).

The plaintiff, relying on Article 7 of the parties' agreement, contends that the only precondition to final payment under the contract is the VA's acceptance of the final inspection, which has been obtained. Article 7 provides as follows:

> As full compensation for performance of this Agreement, Contractor agrees to pay Subcontractor in current funds for the satisfactory performance of the Subcontract Work subject to all applicable provisions of the Subcontract:
>
> (a) the fixed price of One Hundred Twenty Eight Thousand Ninety Four Dollars ($128,094.00) subject to additions and deductions as provided for in the Subcontract Documents ("Subcontract Amount").
>
> (b) 25% paid at the time the contract is issued
>
> (c) 25% additionally paid when 50% of work is completed
>
> (d) Remaining 60% paid [IAW Section 8.3 of this contract]: upon VA signature of acceptance at Final Inspection.[1]

Paragraph 8.3 of the agreement is entitled "FINAL PAYMENT." Subparagraph 8.3.1, entitled "APPLICATION," has been deleted and replaced with, "N/A See Article 7." The deleted subparagraph 8.3.1 provided as follows:

> Upon acceptance of the Subcontract Work by the Owner and the Contractor and receipt from the Subcontractor of evidence of fulfillment of the Subcontractor's obligation in accordance with the Subcontract Documents and Subparagraph 8.3.2, the Contractor shall incorporate the Subcontractor's application for final payment into the Contractor's next application for payment to the Owner, or notify the Subcontractor if there is a delay and the reasons therefore.

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[1]The words in brackets [] have been deleted and replaced with the underlined words. According to the plaintiff, "IAW" stands for "in accordance with."

Subparagraph 8.3.2 was not deleted, except for subparagraph 8.3.2.2, and provides as follows:

> 8.3.2. REQUIREMENTS. Before the Contractor shall be required to incorporate the Subcontractor's application for final payment into the Contractor's next application for payment, the Subcontractor shall submit to the Contractor:
>
> 8.3.2.1 An affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Subcontract Work for which the Owner or its property or the Contractor or the Contractor's surety might in any way be liable, have been paid or otherwise satisfied;
>
> 8.3.2.2 [Consent of surety to final payment, if required];
>
> 8.3.2.3 Satisfaction of required closeout procedures;
>
> 8.3.2.4 Other data, if required by the Contractor or Owner, such as receipts, releases, and waivers of liens to the extent in such form as may be required by the Subcontract Documents;
>
> 8.3.2.5 Written warranties, equipment manuals, startup and testing required by the Subcontract Documents or applicable law; and
>
> 8.3.2.6 As built drawings if required by the Subcontract Documents.

It is undisputed that the plaintiff has not satisfied any of the foregoing conditions. The plaintiff contends that, under the parties' agreement, as amended, Subparagraph 8.3.2 is not a precondition to final payment and that, pursuant to Article 7 and Paragraph 8.3, as amended, all that is required for final payment is the VA's acceptance of the final inspection, which has been obtained.

It is well settled that the court's role in interpreting contracts is to ascertain the intention of the parties at the time they entered into the contract. If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further, even if the contract is silent on the disputed issue (**Evans v Famous Music Corp.**, 1 NY3d 452, 458). Agreements should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases (**Rosenthal v Quadriga Art, Inc.**, 69 AD3d 504, 507; *see also*, **Carucci v Kaplan,** 92 AD3d 912) and to give full meaning and effect to its material provisions (**CNR Healthcare Network, Inc. v 86 Lefferts Corp.**, 59 AD3d 486, 489). The court's reading

of the contract should not render any portion thereof meaningless (**Id.**). Any interpretation that gives effect to all of the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation (**Ruttenberg v Davidge Data Systems Corp.**, 215 AD2d 191, 196).

The plaintiff has failed to establish, prima facie, its entitlement to judgment as a matter of law. The plaintiff's interpretation of the parties' agreement ignores subparagraph 8.3.2, which was not deleted except for subsection 8.3.2.2 thereof. Moreover, the plaintiff's remedy for the defendant's purported refusal to proceed with mediation pursuant to the contract is an application to compel mediation and not damages for breach of contract. Accordingly, the motion is denied.

The defendant cross moves to dismiss the complaint pursuant to CPLR 3211 (a) (1). A motion to dismiss a cause of action under CPLR 3211 (a) (1) must be made before service of the responsive pleading, i.e., before answering (*see*, CPLR 3211 [e]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:8). A motion for summary judgment, on the other hand, does not lie until after service of the responsive pleading. (**Id.**). Summary judgment is, therefore, a post-answer device (**Id.**). Any of the grounds on which a CPLR 3211 motion could have been made before service of the answer can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (*see*, CPLR 3211[e]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:20). The defendant has answered the complaint and raised the issues that it now raises as an affirmative defense. Thus, although the cross motion is denominated as a motion to dismiss pursuant to CPLR 3211(a) (1), it is, in effect, a motion for summary judgment on that ground.

CPLR 3211(c) empowers the court to treat a motion to dismiss as a motion for summary judgment after adequate notice to the parties when the proof submitted to the court is as complete as it usually is on a motion for summary judgment pursuant to CPLR 3212 (*see*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:44). Notice is not required if the parties have revealed their proof and clearly charted a summary judgment course (*see*, **Matter of Weiss v North Shore Towers Apartments Inc.**, 300 AD2d 596; *see also*, **Kavoukian v Kaletta**, 294 AD2d 646, 647). The court finds that the parties have charted a summary judgment course. Accordingly, the court will treat the cross motion as one for summary judgment without any further notice to the parties.

It is well settled that a contract is to be construed in accordance with the parties' intent (**MHR Capital Partners LP v Presstek, Inc.**, 12 NY3d 640, 645). When the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law, and the case is ripe for summary judgment (**American Express Bank v Uniroyal, Inc.**, 164 AD2d 275, 277). On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment

should be denied (**Id.**). The initial question is whether the agreement on its face is reasonably susceptible to more than one interpretation (**Chimart Assocs. v Paul**, 66 NY2d 570, 573).

The court finds that the parties' agreement is reasonably susceptible to more than one interpretation. In view of the amendments to Article 7 and Paragraph 8.3, it cannot be determined as a matter of law whether the parties intended to require compliance with Subparagraph 8.3.2 as a precondition to final payment under the contract. Moreover, contrary to the defendant's contentions, an agreement to submit a dispute to mediation or arbitration is not a defense to an action and may not be the basis of a motion to dismiss based on documentary evidence (*see*, **C & M 345 North Main Street, LLC v Nikko Constr. Corp.**, 96 AD3d 794, 795). Accordingly, the cross motion is denied.

If the parties wish to submit their dispute to mediation, they may raise that issue with the court at the preliminary conference.

Dated: **September 18, 2014**

HON. ELIZABETH HAZLITT EMERSON

J.S.C.