

Bedford-Carp Constr., Inc. v Brooklyn Union Gas Co.
2021 NY Slip Op 34312(U)
January 22, 2021
Supreme Court, Nassau County
Docket Number: Index No. 600752/2020
Judge: Vito M. DeStefano
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SUPREME COURT - NASSAU COUNTY

Present:

HON. VITO M. DESTEFANO

Justice

TRIAL IAS/PART 5
NASSAU COUNTY

BEDFORD-CARP CONSTRUCTION, INC.,

Plaintiff,

-against-

**THE BROOKLYN UNION GAS COMPANY D/B/A
NATIONAL GRID,**

Defendant.

Decision and Order

**MOTION SEQUENCE NO. 01
INDEX NO. 600752/2020**

The following papers and attachments and exhibits thereto have been read on this motion:

Notice of Motion

Affirmation in Support

Memorandum of Law in Support

Affirmation in Support

Memorandum of Law in Opposition

Affirmation in Opposition

Affidavit

Affirmation in Support

Memorandum of Law in Reply

In an action seeking damages and declaratory relief, the Defendant moves for an order pursuant to CPLR 3211(a)(1), (3), and (7) dismissing the complaint.

The Contract

On May 10, 2016, the New York City Department of Design and Construction (the "City") and Plaintiff Bedford-Carp Construction, Inc. ("Contractor" or "Bedford-Carp") entered into a contract concerning the installation of a box storm sewer in Brooklyn (the "job site"). Relevant terms of the Contract include (emphasis added):

I - NOTICE TO ALL BIDDERS; GAS COST SHARING WORK

All prospective bidders are hereby advised that, pursuant to the "Gas Facility Cost Allocation Act", ("the Act"), the City of New York has entered into an agreement ("the Agreement") with the gas companies (Con Edison or National Grid (formerly KeySpan Energy Delivery)) operating in their respective areas of the City to *"share" the cost of facility relocation and/or support and protection of facilities disturbed by proposed water and/or sewer and related City work specified in this contract.* Therefore, bid items, specifications and estimated quantities for the incremental costs of support and protection of certain gas facilities have been included in this contract. The low bid for this contract shall be determined by examining each bid for all work to be performed under this contract including any work of support and protection of gas facilities to be performed. *The Contractor shall not seek additional compensation from gas companies except as specifically set forth in its contract.*

II- GENERAL PROVISIONS; GAS COST SHARING WORK

I. General:

The Contractor shall perform City work with interferences from existing live and abandoned gas facilities. This shall be defined as utility work. Therefore, *this contract includes bid items, specifications and estimated quantities designed to fully compensate him/her for the incremental costs of supporting, protecting, providing accommodations and, avoiding disturbing gas facilities located in the streets shown on the contract drawings.* In the event that any other provisions of this contract related to gas facilities (or private utilities) conflict with these provisions, these provisions shall supersede and govern all work related to gas facilities owned by the companies operating in the project area. All utility work, as defined in these specifications, including changes and additions thereto shall be paid solely by the City except when specified otherwise in this contract. *Contractor hereby agrees that the facility operator shall not be liable to pay him/her for any work performed including extra utility work. Contractor agrees that its bid prices include all compensation for loss of productivity and efficiency, idle time, delays (including any delays occasioned by negotiation of a contract change), change in operations, mobilization, demobilization, remobilization, added cost or expense, lost of profit, other damages or impact costs that may be suffered by or because of utility work, or the presence of gas facilities in the proximity of City work and that it will not seek additional compensation for these items.* All disputes shall be resolved as specified in the contract.

* * *

2. Gas Interferences And Accommodations:

During the performance of sewer and water main work funded by the New York City Department of Environmental Protection (NYCDEP), as instructed by the Engineer, *the use of any applicable contract bid item is allowed in order to resolve and accommodate all gas facilities interferences with such City work, including the removal of contaminated soil in associated trench excavation.* This is in addition to the specified EP-7 bid items in the contract. Payment for such accommodation shall be funded by EP-7 bid item "UTL-GCS-2WS - GAS INTERFERENCES AND ACCOMMODATIONS" (F.S. Fixed Sum). The value of such accommodation shall be computed by multiplying the appropriate unit prices bid to the quantity of work performed, as determined by the Engineer, and applying the total amount thus to be paid to EP-7 bid item "UTL-GCS-2WS -GAS INTERFERENCES AND ACCOMMODATIONS". When EP-7 bid item "UTL-GCS-2WS - GAS INTERFERENCES AND ACCOMMODATIONS" does not exist, such additional accommodation work shall be at no cost to the City but shall be a matter of adjustment between gas facility operator and Contractor. Private facilities, other than gas, that become in interference due to gas interferences accommodations shall also be accommodated, if so directed by the Resident Engineer, at no additional cost to the City and, provided that its owner agrees to be responsible for all additional costs to Contractor, otherwise, such facility shall be ordered by the City to be maintained, shifted, relocated or replaced by its owner at his/her expenses.

III - TECHNICAL SECTION

* * *

SECTION 6.03 - Removal Of Abandoned Gas Facilities. All Sizes.

1. Description:

Under this section the Contractor shall provide all labor, materials, equipment, insurance and, incidentals required for the removal of abandoned gas mains, services, or appurtenances thereof, located within the street shown on the contract plans, owned by gas company operating in the project area (facility operator), used or to be used for or in connection with or to facilitate the conveying, transportation, distribution or furnishing of gas (natural or manufactured or mixture of both) for light, heat, or power, but does not include property used solely for or in connection with business of selling, distributing or furnishing of gas in enclosed containers. Such removal shall include only abandoned gas facilities that interfere with (i.e. cause additional work) City work.

* * *

3. Restrictions:

The facility operator shall be solely responsible for its contaminated gas facilities, surrounding contaminated soil and their disposal and abatement procedures, unless contract bid items are applicable and provided for such work. In such cases, the quantity removed shall be charged to EP-7 bid item "UTLGCS-2WS - GAS INTERFERENCES AND ACCOMMODATIONS" at the City bid prices (Contract at A3-3 to A3-11).

The Contract includes Addendum No. 5 titled "Specifications for Handling, Transportation and Disposal of Non-Hazardous And Potentially Hazardous Contaminated Materials" which incorporates into the Contractor's bid the guidance, procedure, cost, etc. relating to contaminated soil found at the job site (Contract at A5-1 to A5-32).

Bedford-Carp's Bid Schedule Forms included as part of the Contract and submitted to the City included line items totaling \$280,000 for Bedford-Carp to sample, handle, transport, and dispose of the contaminated soil:

- Bid 216 - 8.01 C1: Handling, transporting and disposal of non-hazardous contaminated soil - 8,000 tons at \$25.00/tons for a total Bid of \$200,000.00.
- Bid 217 - 8.01 C2: Sampling and testing of contaminated/potentially hazardous soil for disposal purposes -- 20 sets at \$2,500.00/set for a total Bid of \$50,000.
- Bid 218 - 8.01 H: Handling, transporting and disposal of hazardous soil -- 400 tons at \$75.00/ton for a total Bid of \$30,000.00 (Contract at B-40 to B-41).

The Instant Action

During the course of the work, Bedford-Carp discovered suspected soil and subsoil contamination at the job site. An environmental consultant confirmed widespread contamination of the site in the approximate amount of 45,000 tons of soil and subsoil allegedly caused by nearby gas facilities of the Defendant The Brooklyn Union Gas Company d/b/a National Grid ("National Grid"). As a result of the contamination, Bedford-Carp had to stop the work until the contamination was removed and remediated.

National Grid was notified that the contamination was caused by its gas facilities and that the contamination was interfering with Bedford-Carp's performance of its work for the City. National Grid was asked, but refused, to undertake any action to remove and remediate the contamination. Accordingly, Bedford-Carp removed and remediated the contamination in order to proceed with its job.

Bedford-Carp has demanded that National Grid compensate it for the removal and

remediation costs of the contamination but National Grid has refused to do so.

On January 16, 2020, Bedford-Carp commenced the instant action asserting causes of action for breach of contract, declaratory judgment, and unjust enrichment.

National Grid moves to dismiss the complaint on two grounds. First, according to National Grid, Bedford-Carp does not have standing to assert any of the causes of action in the complaint. And second, Bedford-Carp's bid for the job contemplated and provided for Bedford-Carp, as contractor, being compensated for removal of the contamination.

For the reasons that follow, the motion is granted.

The Court's Determination

Breach of Contract

In its first cause of action, the Contractor alleges:

National grid has a common-law duty to resolve interference with City work on city-owned land that is caused by its facilities.

Under the New York City administrative code, National Grid has a duty to resolve interference with City work on city-owned land that is caused by its facilities.

Pursuant to its agreement with New York City, National Grid has a duty to resolve interference with City work on city-owned land that is caused by its facilities.

The Agreement between NYCDDC and Bedford Carp provides Bedford Carp with the right to hold National Grid liable for interference of its performance of City Work that is caused by National Grid's "contaminated gas facilities, surrounding contaminated soil and their disposal and abatement procedures," *where such contamination is not within the scope of work of the Agreement between NYCDDC and Bedford Carp.*

Removal and remediation of the Contamination is not within the scope of work of the Agreement between NYCDDC and Bedford Carp.

Bedford Carp's performance of City Work has been interfered with as a result of the Contamination.

The Contamination has been caused by National Grid's contaminated gas facilities.

* * *

After National Grid was notified of the Contamination, and further notified that the Contamination was caused by its contaminated gas facilities, National Grid refused to undertake any action to remove and remediate the Contamination.

In order to proceed with certain City Work, Bedford Carp removed and remediated the Contamination.

Bedford Carp has demanded that National Grid compensate it for the removal and remediation costs of the Contamination.

In breach of its obligation to do so, National Grid has refused to compensate Bedford Carp for the removal and remediation of the Contamination.

As a result of National Grid's failure to compensate Bedford Carp for the removal and remediation costs of the Contaminated Soil, Bedford Carp has been damaged in an amount to be determined at trial, but not less than forty million five hundred thousand dollars (\$40,500,000) (Complaint at ¶¶ 31-45) (emphasis added).

In order to plead a cause of action for breach of contract, a plaintiff must allege: 1) the existence of a contract between plaintiff and defendant; 2) performance by the plaintiff; 3) defendant's failure to perform; and 4) damages resulting from such failure to perform (*Furia v Furia*, 116 AD2d 694 [2d Dept 1986]).

National Grid argues that Bedford-Carp's breach of contract claim must be dismissed given the absence of a contractual relationship between it and Bedford-Carp. In this regard, the Contract is between the City and Bedford-Carp. The law is clear that "[l]iability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties" (*Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 104 [2d Dept 2009]; *CDJ Builders Corp. v Hudson Group Const. Corp.*, 67 AD3d 720 [2d Dept 2009]).

In opposition, the Contractor argues that, contrary to National Grid's contention, it has standing to pursue claims against National Grid for the interference which National Grid has caused pursuant to the common law, NYC Administrative Code 24-251(b), and the Contract. Specifically,

It is undisputed that private utility companies serving the City and its residents have a practical and historic statutory and common-law obligation to pay all costs associated with protecting their facilities during street repair projects; these obligations include the removal, protection and relocation of their utility equipment. The Court of Appeals has explained, "this unique obligation is a precondition to the 'privilege' to use City streets for the purpose of installing and maintaining utility equipment." The Court of Appeals has further explained that because utility interference with municipal work projects "involves the property of private entities,"

resolution of utility interference is “privately negotiated between the utilities and contractors” and “contractors are directly paid by utility companies, with whom they directly negotiate, for the utility interference portion of the project. Moreover, the utility interference work is not incorporated into the bid.”

In addition, Plaintiff has standing to pursue claims against National Grid for the interference which National Grid has caused pursuant to National Grid’s statutory obligations. “[G]iven the unique common-law and statutory duties imposed on BUG with respect to utility interference work, BUG assumed an obligation to pay [plaintiff-contractor] when it failed to perform the work itself or arrange for the work to be performed on its behalf.” NYC Administrative Code §24-251(b) provides that “[p]ublic service corporations whose pipes, mains or conduits are about to be disturbed by the constructing, altering or repairing of any sewer, culvert, water main or pipe, shall . . . remove or otherwise protect and replace their pipes, mains and conduits, and all fixtures and appliances connected therewith or attached thereto, where necessary” A utility’s failure to resolve interferences pursuant to NYC Administrative Code §24-251(b) renders the utility liable to a contractor for the reasonable value of the contract’s performance of such work. Plaintiff therefore has standing to seek recovery directly from National Grid for the interference caused by its contamination (Memorandum of Law in Opposition at pp 3-4 [internal citations omitted]).

Bedford-Carp’s contention that it has standing based upon common law and statutory duty (above) is, under the circumstances presented, unpersuasive.

National Grid’s duty relates to the costs associated with National Grid “protecting their facilities”, not costs associated with purportedly contaminated soil on City property, as in the matter herein. In this regard, the duty of the utility company is “to see that its facilities are moved and/or protected and to pay for the task” when its equipment interferes with municipal work projects (*Perfetto Contracting Co. v Brooklyn Union Gas Co.*, 984 NYS2d 634 [Sup Ct Kings County 2014] citing *City of New York v Verizon New York, Inc.*, 4 NY3d 255, 258 [2005] [a “contractor on a City project may recover for utility interference work directly from the utility and need not rely on the City to obtain payment on its behalf”]; see also *Paterno & Sons v Jamaica Water Supply Co.*, 52 AD2d 595 [2d Dept 1976] [utility company “was obligated both by the common law, as well as by statute . . . to remove, relocate and protect its pipelines, and appurtenances,” and that, in accord with that duty, utility company was required to pay sewer construction contractor the reasonable value of the performance of such work if contractor “necessarily had to relocate and protect [utility company’s] facilities”]).

Moreover, the remediation work for the gas contamination was expressly included in Bedford-Carp’s bid (*Lizza Indus. v Long Is. Light. Co.*, 44 AD2d 681 [2d Dept 1974]. In *Lizza Indus. v Long Is. Light. Co.*, the court barred a contractor’s claim against a utility company because the utility interference work was specifically included in the contractor’s contract with

the municipality which placed upon the contractor the duty of maintaining any utility facilities that infringed upon the areas in which it was to construct sewers and required it to hold the utility company harmless for any damage caused by the construction (*compare City of New York v Verizon New York, Inc.*, 4 NY3d at 258, *supra* [where the utility interference work was not incorporated into the bid]).

Bedford-Carp further argues that it has standing to pursue claims against, and is in privity with, National Grid by virtue of the Gas Facility Cost Allocation Act (the "GFCAA") (Memorandum of Law in Opposition at pp 4-6), which "authorized the City to enter into agreements with gas utilities to share the costs of gas line interference work necessary to perform water and sewer projects" (*Diamond Asphalt Corp. v Sander*, 92 NY2d 244 [1998]).

The fact that the GFCAA "authorized the City to enter into complex agreements with gas utilities for the purpose of sharing the costs of gas line interference work necessary to perform City water and sewer projects" (*Id.* at fn 1), does not confer upon Bedford-Carp standing to recover from National Grid. Assuming *arguendo* that National Grid is responsible for the cost of the "interference work", the proper party to recover under the GFCAA would be the City with whom National Grid has an agreement.

Nor do sections I and III of Addendum 3 to the Contract provide Bedford-Carp with standing. Section I of the Contract expressly sets forth that the "*Contractor shall not seek additional compensation from gas companies except as specifically set forth in its contract*". Pursuant to paragraph 3, titled "Restrictions" of Section III, section 6.03, the "facility operator shall be solely responsible for its contaminated gas facilities, surrounding contaminated soil and their disposal and abatement procedures, *unless contract bid items are applicable and provided for such work*". Here, Bedford-Carp's bid submitted to the City did provide for such work and included line items totaling \$280,000 for the sampling, handling, transporting, and disposing of the contaminated soil.

Inasmuch as the Contractor does not have standing to bring a claim for breach of contract, the first cause of action is dismissed.

Declaratory Judgment

In the complaint, the Contractor alleges:

Bedford Carp's ongoing performance of City Work continues to be interfered with by the Contamination.

In order to proceed with certain ongoing City Work, additional Contamination needs to be removed and remediated.

In order to proceed with certain ongoing City Work, additional work needs to be

undertaken to abate the effects of the Contamination.

An actual, present and justiciable controversy has arisen between Bedford Carp as to whether National Grid is responsible for the costs of the removal, remediation and abatement of the Contamination.

Bedford Carp seeks a declaratory judgment that National Grid must compensate it for the removal, remediation and abatement costs of the Contamination (Complaint at ¶¶ 50-54).

The second cause of action for declaratory judgment is dismissed inasmuch as Bedford-Carp lacks standing to maintain the action.

“This essential requirement of standing to sue precludes a plaintiff from seeking a declaratory judgment to interpret a contract as to which it may have some theoretical interest, but as to which, under traditional principles of contract law, it is neither a party nor a third-party beneficiary” (*Arrow Louver and Damper Division v New York City Transit Authority*, 106 AD2d 533, 535 [2d Dept 1984] [“as a stranger to the contracts, plaintiff lacks standing to sue for the enforcement of their provisions, or for a declaration as to their meaning”]; *Cutting Room Appliances Corp. v Finkelstein*, 33 AD2d 674 [1st Dept 1969] [“Not being parties to the agreement, the plaintiffs are not real parties in interest and fail to establish jurisdiction to entertain this action” for a declaratory judgment regarding an “agreement between the defendants”]).

Unjust Enrichment

In the last cause of action, a claim for unjust enrichment, Bedford-Carp pleads:

National Grid's contaminated gas facilities has caused Contamination.

National Grid is obligated to remove and remediate the Contamination pursuant to its common law duties.

National Grid is obligated to remove and remediate the Contamination pursuant to the New York City administrative Code.

National Grid is obligated to remove and remediate the Contamination pursuant to its agreement with New York City.

In order for City Work to proceed, the Contamination had to be removed and remediated.

National Grid refused to remove and remediate the Contamination.

Bedford Carp has removed and remediated the Contamination.

It would be against equity and good conscience to permit National Grid to avoid its obligation to remove and remediate the Contamination (Complaint at ¶¶ 56-63).

To sufficiently plead a claim for unjust enrichment, a plaintiff must allege that 1) defendant was enriched, 2) at the plaintiff's expense, and 3) that it is against equity and good conscience to permit defendant to retain the enrichment (*Main Omni Realty Corp. v Matus*, 124 AD3d 604, 605 [2d Dept 2015]).¹

However, in pleading unjust enrichment, the facts alleged must "indicate a relationship between the parties that could have caused reliance or inducement" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Here, as National Grid argues, Bedford-Carp has failed to plead the existence of a relationship between it and National Grid that could have caused some type of reliance or inducement or the bestowal of a benefit (*see id.*).

The unjust enrichment claim is, therefore, dismissed.

Conclusion

Based on the foregoing, it is hereby

Ordered that the Defendant's motion for an order dismissing the complaint is granted and the complaint is dismissed.

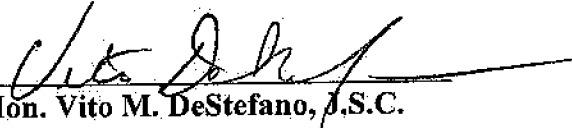
This constitutes the decision and order of the court.

Dated: January 22, 2021

ENTERED

Jan 27 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE


Hon. Vito M. DeStefano, J.S.C.

¹ Arguably, National Grid's receipt of some benefit, standing alone, is not sufficient to support an unjust enrichment claim (*Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013]). There must have been a transaction between the parties that the court determines is unjust (*Id.*).