Impact Envt. Consulting, Inc. v T. Moriarty & Son, Inc.
2013 NY Slip Op 32080(U)
August 6, 2013
Supreme Court, New York County
Docket Number: 111804/10
Judge: Andrea Masley

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART 43
Justice

Index Number : 111804/2010
IMPACT ENVIRONMENTAL
vs.
T. MORIARTY
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

decided pursuant to the annexed decision.

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

Dated: 8/6/13

HON. ANDREA MASLEY, 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

Index No.: 111804/10

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

DECISION/ORDER

IMPACT ENVIRONMENTAL CONSULTING, INC.,
Plaintiff,

HON. ANDREA MASLEY
Judge, Supreme Court

-against-

T. MORIARTY & SON, INC.,
Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Exhibits	1
Affirmation in Opposition	2
Memo of Law	3
Memo of Law	4
Reply	5
Reply Memo of Law	6

In this action for breach of contract, account stated, and quantum meruit, plaintiff subcontractor Impact Environmental Consulting, Inc. ("IEC") moves for summary judgment pursuant to CPLR 3212. Plaintiff seeks a judgment for $59,167 with interest from August 26, 2008 against defendant general contractor T. Moriarty & Son, Inc., ("TMS") for performance under a contract from June through August, 2008.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). The opponent of a motion for summary judgment "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *Zuckerrman v City of New York*, 49 NY2d 557, 562 (1980). "The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned." *Glick*

& Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439 (1968).

In dispute is whether TMS breached an oral agreement to pay $68 per ton for disposal of highly contaminated soil or whether the parties agreed to a lower price of $53 per ton. IEC admits knowledge of toxicity, but alleges an unknown higher level of toxicity. IEC avers that deposition testimony and documentary evidence establish the existence of an agreement to transport and dispose of the highly contaminated soil at the higher rate; and that TMS refused payment at that rate solely on the basis of an unenforceable pay-if-paid provision to which IEC did not consent. TMS denies the agreement to pay $68 per ton.

In an action for breach of contract, it is plaintiff's burden to prove "(1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." *WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021, 1023 (Sup Ct, NY County 1999). Before a court will impose an obligation based on an oral contract, the proponent must show that a contract was made "and that its terms are definite." *Muhlstock v Cole*, 245 AD2d 55, 58 (1st Dept 1997).

Here, summary judgment is denied because an issue of fact exists as to whether IEC was aware when it made its agreement with TMS that the soil at issue was highly contaminated. IEC asserts it was not aware until after the agreement when it was on-site and smelled the noxious odor of highly toxic petroleum. TMS insists that IEC was aware of the toxicity when it submitted its bid for the job.

The following facts are undisputed. TMS entered a contract dated January 24, 2008 with Port Authority of New York and New Jersey ("PA"), to install a water storage and pump station at Laguardia Airport. Thereafter, at a precise time that remains

unclear,[1] the parties entered an unwritten agreement in which plaintiff would remove and transport contaminated soil from the construction site to a waste treatment facility known as Total Recycling, Corp. ("TRC"). IEC paid for another soil test which revealed that a portion of the construction site measuring 70' by 90' contained highly toxic levels of petroleum-type contaminants including benzene and toluene that would bar disposal at TRC. As a result, IEC delivered soil from the 70' by 90'area to a more distant facility known as Clean Earth of Philadelphia ("CE"), equipped to treat toxic and highly volatile waste. On June 23, 2008, IEC sent a quote to TMS for the cost of the inspection and testing and increased per ton charge. TMS denied payment of the higher-cost cleanup through CE after PA denied payment of the higher cost to TMS.

IEC submits two letters from TMS to PA signed by Francois Bachaalany, TMS's project manager. In the first letter, dated October 6, 2008, TMS states that it is submitting to PA an additional cost proposal for a difference of $15 per ton plus lab fees, pursuant to an attached letter from IEC to TMS stating that the high toxicity was a changed condition over the prior agreement. The second letter, dated October 17, 2008, states

> We hereby submit our price in the amount of $68 per ton plus loading for trucking off site and disposing the unsuitable soil at an authorized disposal facilities. A higher contamination detected for attached disposed material as per Impact Environmental invoices and back up documents.

IEC maintains that the proposed arrangement between TMS and PA for payment of "our price" confirms an understanding between IEC and TMS.

IEC also submits deposition testimony of James Allen, its project manager. Mr.

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[1]According to Mr. Bachaalany, it was sometime after March 4, 2008, when a prior company reneged on its contract with TMS to dispose of "Non-hazardous Petroleum contaminated soil" for $53 per ton when it could not procure insurance.

Allen states that IEC was in the practice, as it was in this case, of agreeing provisionally to a unit price based on data provided, but that soil analysis data may differ over the course of excavation. According to Mr. Allen, the soil analysis data initially provided by TMS was not complete, giving rise to a later and higher cost for removal of the highly contaminated soil that was discovered only after IEC began work on the project. Mr. Allen also swears that the parties agreed that IEC would be paid after a "change order" took effect and that IEC accepted a unit price of $53 for the highly contaminated soil to "stop the bleeding" until they were paid the increase of $15 per ton.

IEC also relies on Mr. Bachaalany who states in deposition testimony that he was unable to read or understand the soil sample lab report indicating a high level of soil contamination; that he did not know whether the 70 by 90 foot area in dispute was contaminated; and that he relied on PA for data on soil contamination. According to Mr. Bachaalany, on June 5, 2008, PA informed defendant that the soil was "very contaminated." Mr. Bachaalany does not state that this result was communicated to IEC. Further, he fails to explain why PA was conducting yet another soil sample when it was already allegedly known that the soil was highly contaminated.

TMS opposes judgment on three grounds. First, TMS denies that it consented to $68 and argues that an agreement between the parties is memorialized in an invoice of September 12, 2008 stating a unit price of $53 per ton which it paid timely. There is no dispute that TMS prepared a proposal for payment by PA on consent and in consultation with IEC. However, TMS contends that in so doing it acted as little more than a go-between and, as Mr. Bachaalany states in his affidavit,

> [a]s Impact did not have a direct contract with Port Authority . . . TMS agreed that it would submit Impact's claim to the Port Authority on its own behalf and that in the event the Port Authority approved Impact's claim, TMS would promptly forward the additional compensation to Impact.

TMS additionally argues that IEC has failed to submit an affidavit from a person with knowledge of the facts. Lastly, TMS complains that IEC has not adequately explained how it arrived at the cost of $68 per ton for removal of the highly contaminated soil.

TMS insists that IEC was well aware of the soil toxicity before the agreement for $53 per tone was finalized. First, TMS relies on the contract bid documents which reveal the hazardous nature of the soil at issue and which were provided to IEC before its bid of $53 per ton. The bid documents provide: "EXCAVATION LIMIT OF SOILS EXHIBITING PETROLEUM SATURATED CONDITIONS" and "ASSUME EXCAVATED SOILS CAN BE CLASSIFIED AS PETROLEUM-CONTAMINATED NON-HAZARDOUS" and TRANSPORT MATERIAL IN TRUCKS WITH VALID PETROLEUM-CONTAMINATED SOILS IN ALL STATES THAT TRUCKS SHALL TRAVERSE." The bid documents also included a soil report. Finally, TMS asserts that prior to this project, IEC worked at the site disposing of contaminated soil.

Mr. Bachaalany states that Mr. Allen agreed to honor IEC's oral agreement of $53 per ton. Mr. Allen denies making such a statement. Therefore, an issue of credibility exists.

TMS's second argument for denial, on grounds that IEC fails to attach an affidavit from a party with knowledge, is rejected. While an affirmation by counsel alone does not satisfy the requirement on a motion for summary judgment, an affirmation may serve as a vehicle for the submission of acceptable attachments such as documents or transcripts. *Zuckerman v City of New York*, 49 NY 2d 557 (1980). TMS's objection that plaintiff does not explain adequately how it arrived at $68 per ton is also rejected. An explanation for how a merchant arrived at a price is not an element of a claim for breach of contract.

On this record, the court cannot determine the price term of the contract. If after a trial it is determined that there is a contract for $68 per ton then, TMS is liable. A pay-when-paid provision, which "forces the subcontractor to assume the risk that the owner will fail to pay the general contractor is void and unenforceable as contrary to public policy set forth in the Lien Law §34." *West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY 2d 148, 158 (1995). "As a matter of contract law, the owner and the general contractor are liable to plaintiff for the work plaintiff has been authorized to perform, and performed, under the subcontract agreement." *Id.*

Although Mr. Bachaalany's recollection often failed him and his answers were generally vague over the course of his deposition, he was unambiguous in his statement that TMS refused to pay the $68 unit price to IEC because PA refused to pay the difference to TMS. Mr. Bachaalany admitted that an invoice from IEC to TMS for the $15 differential in the unit price, dated October 14, 2008, bore a handwritten notation reading "please don't pay until we receive the money from PA under net cost for both invoices," and that the handwritten notation was his. Mr. Bachaalany also conceded in sworn testimony that

> Q: The reason why you didn't pay the full $68 on that per ton – on that invoice –
> A: Fifteen.
> Q: It was fifteen, sorry.
> A: That's the reason.
> Q: It had not yet been approved by the owner.
> A: Correct.
> Q: That's the sole reason they weren't paid, is approval by the owner?
> A: Correct.

TMS argues that it refused to pay the higher price and merely offered to submit a claim to the owner "setting forth its position as to why it should be entitled to an additional $15 per ton." Mr. Bachaalany's affidavit and sworn testimony establish that TMS's payment to IEC was conditioned on approval by PA, a condition that constitutes

a pay-when-paid provision that impermissibly forces the subcontractor to assume the risk that the owner would fail to pay the general contractor. Such provisions are "violative of public policy to the extent that they transfer the risk of the owner's default from the general contractor to the subcontractors." *Blandford Land Clearing Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 260 AD 2d 86 (1st Dept 1999).

As to IEC's claim for account stated, summary judgment is also denied. It is undisputed that IEC sent TMS its invoices. Mr. Bachaalany states that he wrote on the fax "Send Jim Allen an email for back-up. for extra ...[illegible] in price." He claims this constitutes a rejection.

Plaintiff's claim for quantum meruit is dismissed under CPLR 3212(b). It is undisputed that the parties have an agreement. A cause of action under a quasi-contract theory applies only in the absence of an express agreement, and is not really a contract, but rather "a legal obligation imposed in order to prevent a party's unjust enrichment." *Bauman Assoc. V H & M Int'l Transp.*, 171 AD 2d 479 (1st Dept 1991).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied except that the third cause of action is dismissed. The parties shall appear for trial on October ~~15~~ 15 am 9/4/13 2013, room 307 at 80 Centre St. The trial shall continue until concluded.

Dated: 8/6/13

Andrea Masley, Supreme Court Justice

FILED

SEP 06 2013

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