Lipco Elec. Corp. v ASG Consulting Corp.
2012 NY Slip Op 30370(U)
January 26, 2012
Supreme Court, Nassau County
Docket Number: 008775-01
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

LIPCO ELECTRICAL CORP. and ACTION ELECTRICAL CONTRACTING CO. INC., J.V.,

Plaintiffs,

- against -

ASG CONSULTING CORP., ANTHONY CARDILLO, TAP ELECTRICAL CONTRACTING SERVICE INC. and PHILIP P. GULIZIO,

Defendants.

Action No. 1

Index No. 008775-01
Motion Seq. No. 6
Submitted 11/15/11

ASG CONSULTING CORP., TAP ELECTRICAL CONTRACTING SERVICE INC., ANTHONY CARDILLO and PHILIP P. GULIZIO,

Plaintiffs,

- against -

ACTION ELECTRICAL CONT. CO. INC. a/k/a/ ACTION ELECTRICAL CONTRACTING COMPANY, INC., LIPCO ELECTRICAL CORP., LIPCO ELECTRICAL CORP. and ACTION ELECTRICAL CONTRACTING CO. INC., J. V.,

Defendants.

Action No. 2

Index No. 013379-01

Papers Read on this Motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Amended Affirmation in Opposition.....x
Appendix Exhibits to Amended Affirmation in Opposition - Vol. 1 and Affidavit in Opposition.....x
Appendix Exhibits to Amended Affirmation in Opposition - Vol. 2....x
Deposition Testimony of Anthony Spina pages 1-275.....x
Deposition Testimony of Anthony Spina pages 276-545.....x

Papers Read (cont.)

Deposition Testimony of Anthony Spina pages 546-806.....x
Memorandum of Law in Opposition.....x
Amended Memorandum of Law in Opposition.....x
Reply Affirmation and Exhibits.....x
Reply Memorandum of Law.....x
Correspondence date November 11, 2011 with Exhibit KK.....x
1993 and 1997 Documentation discussed at Oral Argument.....x

This matter is before the court on the motion by Lipco Electrical Corp. and Action Electrical Contracting Co., Inc., J.V., the Plaintiffs in Action No. 1 (Index Number 8775-01) and Action Electrical Cont. Co. Inc. a/k/a Action Electrical Contracting Company, Inc., Lipco Electrical Corp., Lipco Electrical Corp. and Action Electrical Contracting Co., Inc., J.V., Gaspare ("Sal") Lipari and Anthony Spina, the Defendants in Action No. 2 (Index No. 013379-01) (collectively "Lipco/Action") filed on May 10, 2011 and submitted on November 15, 2011, following oral argument before the Court. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Lipco/Action move for an Order striking the Answer of the Defendants in Action No. 1 and dismissing the Complaint of the Plaintiffs in Action No. 2, 1) pursuant to CPLR § 3212 on the grounds of an illegal agreement, and 2) pursuant to CPLR § 3126, based on spoliation of evidence, for which movants also seek an Order sanctioning Defendants with all costs of electronic discovery.

ASG Consulting Corporation, Anthony Cardillo, Tap Electrical Contracting Service, Inc. and Philip P. Gulizio, the Defendants in the above-captioned matter designated Action No. 1 (Index Number 8775-01), and the Plaintiffs in the above-captioned matter designated Action No. 2 (Index Number 13379-01) ("ASG/Tap") oppose the motion.

B. The Parties' History

The corporate entities involved, with the exception of ASG, are electrical contractors. Lipco Electrical Corp. and Action Electrical Contracting Co., Inc. entered into a joint venture relationship for the purposes of bidding on various public works projects. The written agreement

formalizing the parties' relationship designated the name of the joint venture as Lipco Electrical Corporation and Action Electrical Contracting Co., Inc., A Joint Venture (Lipco/Action), the Plaintiffs in Action No. 1.

By letter dated November 9, 1989, Tap was notified by the Deputy Commissioner of Labor that pursuant to Labor Law § 220-b(3)(b), it was debarred, until November 8, 1994, from bidding on, or being awarded, any public work contracts with the state, any municipal corporation or public body. The debarment was based on two final determinations of willful failure to pay prevailing wages or to pay or provide prevailing supplements. The debarment provision applicable to Tap provided, in relevant part, as follows:

> When final determinations have been rendered against a contractor or subcontractor and/or its successor in two instances within any consecutive six-year period determining that such contractor or subcontractor and/or its successor has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, such contractor or subcontractor and/or its successor shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years, from the second final determination.
>
> Nodell Aff. in Opp. at p. 3.

Although Tap contested the debarment decision in a series of court challenges, the debarment order was ultimately confirmed insofar as it had been determined that Tap had violated Labor Law § 220 and was debarred from bidding on, or being awarded, any public work contract for a period of five years.

Subsequent to Tap's debarment, the corporation's principals allege, they were advised by counsel that, although the corporate entity was debarred, Tap's principals were not prohibited from performing consulting services for other companies engaged in public work contracts. Thereafter, ASG was formed in or about March 12, 1990, for the purpose of providing administrative consulting services to contractors performing electrical work on public contracts.

The actions at bar arise from a series of consulting agreements between ASG and either Lipco Action, J.V. or Action executed in 1990, 1991, 1992, 1993 and 1995, pursuant to which ASG was to provide consulting services[1] *vis-a-vis* six public work contracts to be performed for

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[1]The agreements provided, *inter alia*, that ASG was the contractor's professional consultant for electrical and communications work; was responsible for methods/means used in performing consultant services; and was not a joint venturer with the contractor.

and/or on behalf of the New York City Transit Authority. Pursuant to documents entitled "Revisions to Modification Agreement," one undated and one dated February 6, 1995 respectively, the parties agreed that ASG was to be a partner with respect to certain specified contracts with Lipco/Action (undated) and with Action (February 6, 1995). The modification agreements provided that each corporation would share in any profits or loss on a ⅓-⅓ or ½-½ basis, respectively.

In Action No. 1, Lipco/Action assert claims against ASG, which controlled and maintained the books and records for specified projects, in accordance with the consulting agreements, and its president, Anthony Cardillo ("Cardillo"), for breach of contract and fiduciary duty, predicated on numerous acts of alleged fraud based on overbilling for labor charges, worthless equipment, automobiles owned by ASG and/or Tap, as well as miscellaneous insurance charges, and for wrongful conversion of project supplies. Lipco/Action seek, *inter alia*, 1) an accounting of all income and payments ASG received by virtue of the consulting agreements, and expenses it paid out on account of the various projects, 2) restitution with respect to payments made to ASG by Lipco/Action on account of the projects, and 3) the return of project supplies wrongfully converted.

In the amended complaint in Action No. 2,[2] ASG/ Tap, and their principals, Cardillo and Philip P. Gulizio ("Gulizio"), seek an accounting of partnership assets and monetary damages against Lipco/Action and Gaspare "Sal" Lipari ("Lipari") and Anthony Spina ("Spina") predicated on allegations of breach of fiduciary duty, conversion, breach of contract, tortious interference with prospective business relations and fraud.

B. The Parties' Positions

Lipco/Action seek to strike the answer interposed by the Defendants in Action No. 1, and the Amended Complaint in Action No. 2, on the grounds that the agreements on which ASG/Tap's allegations are based are illegal. Lipco/Action allege that, in contravention of Labor Law § 220-b(3)(b), ASG was a silent partner, pursuant to a secret oral agreement, in the Lipco/Action joint venture during the period of Tap's debarment when Tap was prohibited from bidding on, or being awarded, public work. Movants maintain that there was an oral agreement between the principals of Lipco/Action (Spina and Lipari) and Cardillo, the president of Tap,

[2] By Decision dated April 26, 2011, the Court granted the motion by ASG/Tap to file an Amended Complaint in Action No. 2.

making ASG a silent partner in the Lipco/Action joint venture from the beginning with the first of the four successful contracts with the New York City Transit Authority. Although ASG was ostensibly a consultant to the Lipco/Action joint venture, movants maintain that it was actually a silent partner which shared in the profits of the joint venture and its role as such was not revealed to the New York City Transit Authority.

In opposition, ASG and Tap argue that the debarment provision of Labor Law § 220-b(3)(b) as amended in July, 1989, shortly before Tap's disbarment, was limited to "a contractor or subcontractor and/or its successor." They further claim that a debarred contractor such as Tap was not precluded from using its resources to perform non-prevailing work in connection with a public contract, such as estimating jobs, bookkeeping, purchasing of materials, preparing work schedules and leasing equipment. ASC/Tap argue that Lipco/Action have failed to demonstrate, as a matter of law, that Tap's debarment in November of 1989 precluded its principals, and a separately formed business entity, ASG, from performing consulting services on public work contracts. ASG/Tap also argue that the principals of Lipco/Action seek to void the subject contracts predicated on their purported illegality/unenforceability in an effort to avoid liability for their own wrongful conduct in denying ASG access to the books and records of Lipco and Action, failing to provide an accounting, fraudulently transferring/converting partnership assets for their own benefit and wrongfully depriving ASG of its share of partnership profits.

ASG/Tap also submit that the Lipco/Action motion must fail as a matter of law based on the doctrine of judicial estoppel. ASG argues that, having previously taken a directly contradictory position in judicial and administrative pleadings, sworn statements and testimony on the issue of whether ASG was a silent partner in the joint venture, Lipco/Action are estopped from espousing a contrary position in this action.

With respect to the spoliation application, Lipco/Action argues that, although it was allegedly provided with a hard copy printout of the records sought, the only way to confirm the accuracy of hard copy data was by obtaining raw data in computerized form. After lengthy hearings regarding electronic discovery, over a period of several years, Lipco/Action argue, and ASG/Tap dispute, that ASG/Tap's hard drive was tampered with/encrypted to prevent Lipco/Action from obtaining electronic files of Lipco/Action projects relating to records, costs, expenses, and other relevant information.

RULING OF THE COURT

A. Summary Judgment

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Illegality Defense

It is a general rule of law that no right of action can spring out of an illegal contract. *Parpal Rest. v. Martin Co.*, 258 A.D.2d 572, 573 (2d Dept. 1999). The general rule, however, does not always apply. The violation of a statute that is merely *malum prohibitum* will not necessarily render a contract illegal and unenforceable. *Benjamin v Koeppel*, 85 N.Y.2d 549, 553 (1995), quoting *Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 N.Y.2d 124, 127 (1992). This is especially true where there are issues as to whether a party is attempting to utilize an illegality defense as a sword for personal gain rather than as a shield for public good. *Chirra v Bommareddy*, 22 A.D.3d 223, 224 (1st Dept. 2005), citing *Lloyd Capital, supra*, at 128. If the statute does not expressly provide that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy, the right to recover will not be denied. *Lloyd Capital Corp.*, 80 N.Y.2d at 127, quoting *Rosasco Creameries v. Cohen*, 276 N.Y. 274, 278 (1937).

C. Debarment Provisions

Debarment provisions are penal in nature. *Hull Corp. v. Hartnett*, 77 N.Y.2d 475, 481 (1991), citing McKinney's Cons. Laws of N.Y., Book 1, Statutes § 273. They must be strictly construed against the party seeking their enforcement and in favor of the party being proceeded against. *Id.*, quoting McKinney's Cons. Laws of N.Y., Book 1 Statutes § 271(a).

D. Judicial Estoppel

The doctrine of estoppel against inconsistent positions precludes a party from framing his pleadings in a manner inconsistent with a position taken in a prior judicial proceeding. *Kimco of New York, Inc. v. Devon,* 163 A.D.2d 573, 574 (2d Dept. 1990). It is to be distinguished from collateral estoppel which assumes a full and fair opportunity to litigate the issue in the prior action. *Id.*, citing *Kaufman v. Lilly & Co.*, 65 N.Y.2d 449, 455 (1985). The doctrine rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise. The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. *Id.*, quoting *Environmental Concern v. Larchwood Constr. Corp.*, 101 A.D.2d 591, 593 (2d Dept. 1984).

E. Spoliation

The Supreme Court has broad discretion in determining sanctions for spoliation of evidence. *Scarano v. Bribitzer*, 56 A.D.3d 750 (2d Dept. 2008). To support a determination of sanctions pursuant to CPLR § 3126, the moving party has the burden of demonstrating that the responsible party's actions were willful and contumacious or in bad faith. *Id.*, quoting *Denoyelles v. Gallagher*, 40 A.D.3d 1027 (2d Dept. 2007). The common law doctrine of spoliation allows for sanctions when a party negligently disposes of evidence; the court, however, must consider prejudice resulting from spoliation in determining what type of sanction, if any, is warranted as a matter of fundamental fairness. *Id.* at 750-751.

When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the Court should dismiss the pleadings of the party responsible. *Squiteri v. City of New York*, 248 A.D.2d 201, 202 (1st Dept. 1998). Although sanctions may be imposed for even negligent spoliation, striking a pleading is usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability. *Russo v. BMW of N. Am., LLC*, 82 A.D.3d 643, 644 (1st Dept. 2011).

F. Application of these Principles to the Instant Action

The Court denies the motion to dismiss, based on the alleged illegality of the contracts at issue, in light of the Court's conclusion that Lipco/Action are attempting to utilize the illegality defense as a sword for personal gain rather than as a shield for public good, especially in light of the fact that they seek relief in Action No. 1 based on the very agreements they seek to repudiate.

In addition, the Court denies the motion for summary judgment dismissing the Amended Complaint based on the Court's conclusion that in light of the factual disputes, it cannot be said, as a matter of law, that an oral silent partnership agreement existed during the period of Tap's debarment pursuant to which Tap was a silent partner in the Lipco/Action joint venture in connection with public works contracts in violation of Labor Law § 220-b(3)(b). While Lipco/Action argue the existence of a silent partnership agreement between Tap and Lipco/Action during the period of Tap's debarment, this claim is arguably at odds with, *inter alia*, the denial by Lipari and Spina of such an agreement at a hearing before the New York City Transit Authority. These arguably conflicting statements further demonstrate that there is an issue of fact as to the existence of the alleged silent partnership, rendering summary judgment inappropriate.

The Court also denies the motion to dismiss, or for sanctions, based on alleged spoliation. As noted during oral argument in this matter on October 31, 2011, Lipco/Action, in fact, ultimately decrypted the data and obtained the data as it existed prior to encryption. As such, there do not appear to be grounds to dismiss the Complaint in Action No. 2, or to impose a monetary sanction against ASG/Tap for the cost of electronic discovery based on a claim of spoilation, given the hotly contested contradictory arguments of the parties and the decisions of the Referee in this matter. Movants have made no showing that there, in fact, was any loss of evidence, or that their ability to defend the claims in Action No. 2 have been adversely affected.

In light of the foregoing, the Court denies the motion in its entirety.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on February 1, 2012 at 9:30 a.m., at which time this matter shall be scheduled for trial.

ENTER

DATED: Mineola, NY
January 26, 2012

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
FEB 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE