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SHORT FORM ORDER

INDEX NUMBER: 17813-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

***Present*: HON. EMILY PINES**
J. S. C.

Original Motion Date: 10-09-2012
Motion Submit Date: 01-15-2013
Motion Sequence No.: 003 MOTD

[ ] FINAL
[x] NON FINAL

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POSILLICO CIVIL INC.,

Plaintiffs,

-against-

GREENS AT HALF HOLLOW LLC and HALF HOLLOW CONSTRUCTION CO., LLC.,

Defendants.

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ORDERED that the defendants' motion for summary judgment (Mot. Seq. 003) is granted in part and denied in part, as set forth herein.

The plaintiff, Posillico Civil, Inc. (hereinafter "Posillico") commenced this action against defendants Greens at Half Hollow LLC and Half Hollow Construction Co. LLC (hereinafter "Defendants"), to recover damages for breach of contract, unjust enrichment, and quantum meruit. By order dated October 12, 2010, this Court (Pines, J.) dismissed the first and second causes of action. The remaining causes of action allege that the Defendants breached an agreement entered into by the parties pursuant to which Posillico furnished materials, equipment and labor in connection with asphalt paving and grading work at a condominium community developed by Defendants known as the Greens at Half Hollow located in Huntington, New York.

The complaint alleges that Defendants breached the agreement by failing to pay $467,125.90 for the materials, equipment, and labor furnished by Posillico. Defendants assert a counterclaim against Posillico alleging, among other things, that the agreement between the parties called for Posillico to be compensated based upon an agreed price per square yard of multiplied by the total amount of square yards paved. Defendants contend that Posillico over-estimated the total number of square yards to be paved and then charged Defendants for 38,000 square yards of paving that was not performed, resulting in an overpayment by Defendants to Posillico in the amount of $850,000.

It is undisputed that Posillico and the Defendants entered into an agreement in 2002, pursuant to which Posillico agreed to perform paving work. What is hotly contested is whether the agreement called for Posillico to be paid a lump sum amount irrespective of the total amount of square yards actually paved or whether the agreement provided that Posillico would be paid a set price per square yard actually paved. Posillico furnished a "Revised Price Proposal" to Defendants dated October 24, 2002, which states, in relevant part:

> "Our scope of work and unit pricing is as follows:
>
> - Fine grade & re-compact pavement sub-grade
> - Place, Grade & Compact 6" RCA sub-based course (load & truck from on-site stockpile)
> - Furnish, Place, Compact 1-1/2" Type 1A asphalt binder course
> - Furnish, Place, Compact 1" Type 1AC asphalt top course
>
> **Total Unit Price $13.25 per SY**
>
> Based upon an estimated total pavement area of 215,000 square yards, at a total unit price of $13.25 per square yard, our price for the above scope of work is **$2,848,750.00**, lump sum.

Defendants now move for summary judgment dismissing Posillico's remaining causes of action and for partial summary judgment on the issue of liability on their counterclaim for breach of contract. In support of their motion, the Defendants principally rely on an affidavit of James Kaplan, a member of both defendant limited liability companies. Mr. Kaplan, states, among other things, that the Revised Price Proposal from Posillico dated October 24, 2002, indicates that Posillico was to be paid a unit price of $13.25 per square yard of paved area. He states that Posillico over-estimated the area to be paved at 215,000 square yards, and that the area actually paved amounted to 180,498, a difference of 34,502 square yards, for which Posillico was paid by Defendants. Defendants premise their arguments in

support of their motion on the conclusion that the Revised Price Proposal clearly provided for Posillico to be paid per square yard actually paved. However, Defendants acknowledge that the term "lump sum" in the Revised Price Proposal is ambiguous and undefined. Notably, the Defendants do not provide an affidavit, or any other admissible evidence, from anyone involved in 2002 with the negotiation of the agreement between Posillico and Defendants. Mr. Kaplan admits at his deposition that he had "zero" involvement with Posillico prior to 2009.

In opposition to the motion, Posillico submits, among other things, an affidavit from its President and Chief Executive Officer, Joseph K. Posillico. Mr. Posillico states, among other things, that the Revised Price Proposal provides for Posillico to be paid a lump sum, i.e. fixed, price of $2,848,750.00 for the paving work. He further states that "[a]t no time did the parties agree, or even discuss, making an adjustment to the contract price in the event that the estimated area to be paved, 215,000 square [yards] was inaccurate. Nor did the parties agree that Posillico's compensation would be based upon the actual square yardage of paving work that it performed." According to Mr. Posillico, the only reason the revised price proposal quantified the estimated area to be paved and provided a unit price of $13.25 per square yard, was to identify the manner in which Posillico calculated the lump sum price. Posillico argues that the Defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law because they rely only on the conclusory assertions of individuals who lack personal knowledge of the negotiations between the parties at the time the Revised Price Proposal was submitted by Posillico. Additionally, Posillico contends that Defendants motion should be denied because the evidence demonstrates the existence of issues of fact as to the meaning of the phrase "lump sum" in the Revised Price Proposal.

Discussion

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). "[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant" (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

> "'A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties. To determine whether a writing is unambiguous, language should not be read in isolation because the contract must be considered as a whole. Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement and, therefore, extrinsic evidence may be considered only if the agreement is ambiguous. Ambiguity is present if language was written so imperfectly that it is susceptible to more than one reasonable interpretation' (*Brad H. v City of New York*, 17 NY3d 180, 185-186 [citations and internal quotation marks omitted])."

(*Critelli v Commonwealth Land Title Ins. Co.*, 98 AD3d 556 [2d Dept. 2012]).

Here, considering the agreement as a whole, the relevant language in the Revised Price Proposal was susceptible to more than one reasonable interpretation. Because the agreement states that the total unit price for the work was $13.25 per square yard, one reasonable interpretation is that Posillico was to be paid $13.25 for each square yard paved. However, the agreement also states that Posillico's price for the work was $2,848,750.00, "lump sum." Thus, another reasonable interpretation is that Posillico was to be paid the lump sum amount of $2,848,750.00 for the paving work, estimated to be 215,000 square yards. In fact, as mentioned above, Defendants' concede that the term "lump sum" as used in the Revised Price Proposal is ambiguous. Because the agreement is ambiguous, extrinsic evidence that the parties intended a meaning different than that expressed in the agreement can be considered. In support of their motion the Defendants have failed to offer any evidence to support their contention that the parties intended that Posillico would be paid $13.25 per square yard actually paved. James Kaplan admits in his affidavit that he did not have any involvement with Posillico until 2009. Thus, the Defendants have failed to make a prima facie showing of their entitlement to judgment as a matter of law and the sufficiency of the opposition papers need not be considered (*see, Winegrad, v New York Univ. Med. Ctr.*, 64 NY2d 85; *Critelli v Commonwealth Land Title Ins. Co.*, 98 AD3d 556).

In any event, the evidence submitted by Posillico in opposition to the motion, including the affidavit of Joseph K. Posillico, establishes the existence of a material issue of fact as to the parties' intended meaning of the relevant language in the agreement concerning payment to Posillico for its work. Accordingly, that branch of the Defendants' motion which seeks summary judgment dismissing the third cause of action for breach of contract and on the counterclaim for breach of contract is denied.

Those branches of the Defendants' motion seeking summary judgment dismissing the fourth and fifth causes of action for unjust enrichment and recovery in quantum meruit respectively, are granted. Here, there is no dispute that a valid and enforceable contract existed between the parties and, therefore, recovery in quasi-contract may not be obtained (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]; *Whitman Realty Group, Inc. v. Galano*, 41 AD3d 590, 593 [2d Dept 2007]).

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: March 21, 2013
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

[ ] FINAL
[x] NON FINAL