East Hampton Union Free Sch. Dist. v Sandpebble Bldrs., Inc.
2016 NY Slip Op 30170(U)
January 15, 2016
Supreme Court, Suffolk County
Docket Number: 01113/2007
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX NO. 01113/2007

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:
HON. JERRY GARGUILO
SUPREME COURT JUSTICE

ORIG. RETURN DATE: 12/14/15
FINAL SUBMITTED DATE: 1/6/16
MOTION SEQ#011
MOTION: MD

EAST HAMPTON UNION FREE SCHOOL DISTRICT,

Plaintiff,

-against-

SANDPEBBLE BUILDERS, INC.,

Defendant.

PLAINTIFF'S ATTORNEY:
PINKS ARBEIT BOYLE & NEMETH
140 FELL COURT, STE 303
HAUPPAUGE, NY 11788
631-234-4400

DEFENDANT'S ATTORNEY:
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108 EAST MAIN ST, POB 279
RIVERHEAD, NY 11901
631-369-1700

The Plaintiff, East Hampton Union Free School District (East Hampton), petitions the Court by way of motion pursuant to CPLR 3212 seeking an order of "partial summary judgment" in favor of Plaintiff and against the Defendant, limiting damages, if any, on Defendant's first counterclaim to the terms Articles 9.6 and 9.7 of the underlying agreement dated April 2002. The Defendant, Sandpebble Builders, Inc., (Sandpebble), opposes the Petition in all respects.

The court has considered the following in connection with its determination:

1. Notice of Plaintiff's Motion For Partial Summary Judgment, Affirmation In Support, inclusive of Exhibits A through J, Movant's Statement of Undisputed Facts Under Rul 19-a; and
2. Defendant's Affirmation In Opposition To Plaintiff's Motion For Partial Summary Judgment, Defendant's Response and Counterstatement to Plaintiff's Statement of Undisputed Facts Pursuant to Rule 19-a, inclusive of Exhibits A through E and Memorandum of Law In Opposition To Plaintiff's Motion For Partial Summary Judgment.
3. Response By Plaintiff To Defendant's Response and Counter-Statement To Plaintiff's Statement of Undisputed Facts Under Rule 19-a and Reply Affirmation In Further Support of Plaintiff's Motion For Partial Summary Judgment with Exhibit K.

The Plaintiff commenced this action almost 10 years ago seeking declaratory judgment that it had properly terminated a contract with the defendant. The Plaintiff's position is that proper termination does not constitute a breach. The Defendant, *inter alia*, seeks damages, alleging a breach by the Plaintiff.

Plaintiff's current Petition seeks partial summary judgment on the question of what damages the Defendant may recover under the contract. The Defendant claims Plaintiff's current position is contrary to its prior position in that Plaintiff now asserts that it is of no consequence whether termination was proper or improper as concerns recoverable damages.

The District's position rests on Article 9 of the contract (termination, suspension and abandonment) which allows for termination. According to the Plaintiff, paragraph 9.6 of Article 9 provides for the amount to be recovered by the Defendant in the event of termination:

> In the event of termination not the fault of the Construction Manager, the Construction Manager shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due and all Termination Expenses as defined in Paragraph 9.7.

In essence, the District claims that, regardless of the cause of termination, the Defendant's damages are limited as per paragraphs 09.6 and 9.7 of the contract. The District's position is that the contractor is not entitled to recover traditional breach of contract damages (lost profits) as a result of its agreement and as set forth in paragraph 9.6 of the contract. In other words, fault is not an issue when it comes to termination by the District.

As the Court sees it, the question presented is whether the Defendant, under any circumstances, is limited to damages consisting of defined "reimbursable" and "termination expenses." The District equates breach with termination without differentiation. The Defendant claims an exquisite differentiation between allowable termination and breach.

The Court's notes that Article 10, section 10.6 of the underlying contract presents a merger clause.

> 10.6 This Agreement represents the entire and integrated agreement between the Owner and Construction Manager and

> supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Construction Manager.

Furthermore, Article 10 entitled Miscellaneous Provisions addresses "causes of action between the parties." More particularly:

> 10.3 Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of substantial completion for acts or failures to act occurring prior to substantial completion, or the date of issuance of the final project certificate for Payment for acts or failures to act occurring after substantial completion (emphasis added).

The contract contemplates "causes of action" stemming from "acts or failures to act."

The Court is also confronted with a December 2011 decision from the Appellate Division-Second Department that noted:

> Since this is, in part, a declaratory judgment action, the matter must be remitted to the Supreme Court, Suffolk County, for further proceedings on so much of the first cause of action as sought a judgment declaring that the School District properly terminated the contract in accordance with its terms, the third cause of action [claiming breach on an alleged all estimating services contract], and [Sandpebble's] the counterclaims and, thereafter, for the entry of a judgment, inter alia, declaring that the April 2002 contract is valid and enforceable and dismissing the second cause of action. East Hampton Union Free School District v. Sandpebble Builders, Inc., 90 A.D.3d 815, 820 (2nd Dept. 2011).

As per the direction of the Second Department, the issue to be tried is whether the Contract was "properly terminated... in accordance with its terms" by the District. The Defendant suggests that the Plaintiff's Petition runs counter to accepted protocol between the

trial court and the appellate court.

The matter of Glassman v. ProHealth Ambulatory Surgery Center, 96 A.D.3d 799, 946 N.Y.S.2d 602 (2012) stands for the proposition that

> A trial court, upon a remand or remittitur, is without power to do anything except to obey the mandate of the higher court, and render judgment in conformity therewith (*United States v Pink*, 36 NYS2d 961, 965 [1942]). The judgment or order entered by the lower court on a remittitur must conform strictly to the remittitur, and it cannot afterwards be set aside or modified by the lower court (*Matter of Minister, Elders & Deacons of Refm. Protestant Dutch Church of City of N.Y. v Municipal Ct. of City of N.Y., Borough of Manhattan*, 185 Misc 1003, 1007 [1945], *affd* 270 App Div 993 [1946], *affd* 296 NY 822 [1947]).

In the *United States v. Pink* found at 36 N.Y.S.2d 961 the following is found:

> The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it, further than to settle so much as has been remanded. *Ex parte Sibbald*, 12 Pet. 488, 37 U.S. 488, 492, 9 L.Ed. 1167.

This Court will adhere to the protocol as set forth hereinabove and decide the matter at trial as articulated by the Appellate Division.

Nevertheless, the parties are put on notice that the Court's recital of Article 10, Section 10.3 of the Contract mitigates against the position taken by the Plaintiff-Petitioner herein. To hold otherwise would render Article 10 Section 10.3 superfluous.

> It is a cardinal principle of contract construction that the document should be read to give effect to all its provisions and to render them consistent with each other. Restatement of Contracts (Second) § 202(5); see comment *Mastrobuono v. Shearson Lehman Hutton, Inc., et al*, 115 S.Ct. 1212

The interpretation advanced by the Plaintiff places Articles 9 and 10 of the Contract at odds with each other.

The Petition is ***DENIED***. The parties are to appear before the undersigned for a conference on February 1, 2016 at 9:45 a.m.

The foregoing constitutes the decision and ***ORDER*** of this Court.

Dated: January 15, 2016

HON. JERRY GARGUILO, JSC