SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

NORTHRIDGE COOPERATIVE SECTION NO. 1, INC.,

Plaintiff,

-against-

OTIS ELEVATOR COMPANY and SDA INDUSTRIES, INC.,

Defendants.

Index No. 10763/12

DECISION AND JUDGMENT AFTER TRIAL

Hon. Howard G. Lane

IAS Part 6

In this action for breach of contract and negligence, plaintiff Northridge Cooperative Section No.1, Inc. ("Northridge") commenced this action seeking $360,144.30 in damages from defendant SDA Industries, Inc. ("SDA") for its failure to meet its legal and contractual duty to Northridge to close out the work permits SDA procured from the New York City Department of Buildings ("DOB") to perform facade repairs and building envelope maintenance on certain five (5) contiguous residential cooperative buildings that caused Northridge to suffer the loss of a J-51 tax abatement totaling $465,144.30. Defendant's Answer consists of a general denial of the allegations in the Complaint and affirmative defenses of complete performance of the contract. The court notes prior to the trial of this action, plaintiff had claims and cross claims against defendant Otis Elevator Company ("Otis"). However, plaintiff settled with Otis and the action proceeded solely against defendant SDA. The matter was tried before the court without a

jury on March 16, 2015 and was submitted for decision on March 20, 2015. The parties were directed to submit to the court, post-trial memorandums by April 20, 2015 which date was extended at the request of counsel until May 4, 2015.

Findings of Fact

After consideration of all of the testimonial evidence and the exhibits introduced at trial, and having been afforded the opportunity to evaluate and access the demeanor and credibility of the witnesses who appeared herein, the court makes the following findings of fact and conclusions of law:

Plaintiff, Northridge, is a cooperative apartment corporation consisting of five (5) contiguous residential cooperative buildings in Jackson Heights, Queens. Joseph Radel testified that he is president of SDA Industries, Inc., which is in the business of building consulting. Specifically, SDA is in the business of evaluating the exterior of buildings (T. 241). In January 2005, Northridge retained SDA to perform specific engineering services in relation to Local Law 11, work which included performing structural and engineering review of the buildings, overseeing the work of contractors, conducting final inspection and close out of the project. The terms of the agreement between Northridge and SDA were memorialized in a series of five (5) written proposals-- one (1) proposal for each building (T. 218, L. 10-13) dated January 10, 2005, February 28, 2006, February 28, 2006 (sic August 5, 2005), March 21, 2006, March 21, 2006,

July 21,2006, September 5, 2006, November 2, 2006 and December 4, 2006. (All of these writings were admitted into evidence collectively as Plaintiff's Exhibit 1 and herein shall be referred to as either the "agreement" or the "proposals"). Although the SDA's written proposals use the term "close out", the proposals do not define "close out" or set a specific date or deadline to complete the close out of the work permits. SDA vice president, Philip Radel ("Radel") testified that to close out a building permit means to represent to the DOB that the work is complete and to obtain necessary documentation from DOB acknowledging same.

The proposals submitted by SDA to Northridge involved the scope of work SDA was agreeing to perform to assist Northridge in complying with Local Law 11 (T. 247). There is nothing in the proposals that mention or reference J-51 tax abatement (T. 244-250). Indeed, plaintiff stipulated at trial that the words "J-51" and "tax abatement" do not appear in any of the proposals that SDA prepared (T. 250).

Northridge's managing agent Pamela DeLorme ("DeLorme") testified that prior to receiving SDA's first written proposal in 2005, she advised Joseph Radel of Northridge's intention to seek a J-51 abatement upon completion of the facade work on the buildings (T. 106, L. 20) and discussed with Joseph Radel, Northridge hiring SDA "for the purpose of producing documents for the filings for the J-51 for each building for all the work that [Northridge] (T. 106, L. 20, also at T. 225,

L. 18-23) needed to do in compliance with Local Law11." Joseph Radel claims that he first became aware of J-51 in 2010, and not in 2005 as DeLorme asserts.

As part of its scope of work obligations in its agreement with Northridge, SDA obtained five (5) permits from DOB to perform work at each of Northridge's five (5) buildings. The work performed by the contractor, Apogee Enterprises, on all five (5) buildings was completed in or about November 2008 and thereafter SDA began the procedures to close out the permits for each of the five (5) buildings. SDA closed out all five (5) work permits for the five (5) Northridge buildings (T. 252). Four (4) of the five (5) permits were closed out at the same time in 2008 (T. 260, L. 9) shortly after November 25, 2008, the date that the contractor, Apogee Enterprise, claimed it completed its contracted work on the five (5) buildings, and the fifth (5th) permit was "closed out later" in July 2011 (T. 253, L. 4; T. 257).

With respect to the fifth (5th) permit, SDA was initially unsuccessful in closing out this permit with the DOB. Due to various reasons impacting on the final completion of the close out, some of which were not specifically identified or explained by SDA, SDA was delayed in completing the close out within the time generally required to complete a close out. Northridge claimed that as a result of the delay, it incurred the lose of a J-51 tax abatement. SDA through the testimony of Phillip Radel, posited several reasons for not closing out the fifth (5th) work

permit within the same time period as the four (4) other work permits, including: the close out of the fifth (5th) building took a longer period of time to complete because of a number of issues including DOB's rejection of drawings; "red flagging" whereby the DOB randomly selects a set of plans for close scrutiny (T. 256) and DOB's demand for a "survey of the building from the street level" (T. 269, L. 18). SDA succeeded closing out the fifth (5th) permit in July 2011, which is approximately two (2) years, seven (7) months after November 25, 2008, the date that the work was completed.

Phillip Radel admitted the "typical" amount of time to close out a permit with DOB is approximately one (1) month (T. 260, L. 12). SDA hired Noel Brothers, an expediting firm for the purpose of closing out the permits, and later after Noel Brothers failed to timely close out the permits, SDA hired Sam Gurder to perform the task.

After entering into the written agreement in 2005, in 2010 the parties engaged in a series of oral and written communications that reflect that DeLorme on behalf of Northridge communicated to SDS that Northridge was actively applying for a J-51 tax abatement, and the urgency of SDA completing the task of closing out the fifth (5th) permit, and that the application would be denied if SDA failed to timely close out the fifth (5th) permit.

Phillip Radel admitted that in 2010, he had an oral communication with

Northridge's managing agent, Pamela DeLorme, wherein she specifically advised him of the need to have all permits closed out because of Northridge's J-51 tax abatement application. He further admitted receiving several e-mails from Northridge inquiring about the status of the violations which had to be cured by the deadline of December 2010 (T. 265, L. 5-15 et seq.).

Phillip Radel admitted that in 2011 he had conversations with DeLorme that violations needed to be cleared promptly so that Northridge could obtain a J-51 tax abatement (T. 262-26). Phillip Radel further admitted that he did not personally inform DeLorme that he was having any problems closing out the permits (T. 264, L. 11).

In connection with the project, in addition to SDA, Northridge hired and entered into contracts with two (2) other contractors, Otis Elevator Company and Apogee Enterprises. Each of the written contracts were prepared by Northridge's lawyers and both of these contracts contain specific language and provisions that the contractor agreed to provide Northridge assistance with the J-51 filing (T. 216-220, see defendant's Exhibit B and plaintiff's Exhibit 2). Such language is absent from the 2005 written proposals.

CONCLUSIONS OF LAW

The plaintiff Northridge seeks to recover damages for breach of contract and negligence. Northridge claims that it had a contract with the defendant SDA

requiring that SDA close out work permits procured from the New York City Department of Buildings in a timely fashion in order for Northridge to satisfy a requirement of Northridge's application for a J-51 tax abatement, that Northridge did what it was required to do under the contract and that SDA breached the contract by closing out only four (4) or five (5) permits timely, resulting in Northridge's J-51 application being denied. SDA claims that although there was a contract between Northridge and SDA, it did not agree to the essential term of the contract that SDA would close out permits timely in order that Northridge satisfy the requirements for Northridge's J-51 Tax Abatement application, there was no agreement on an essential term of the contract, and it did what it was required to do under the contract.

Northridge has the burden of proving, by a preponderance of the evidence, that it had a contract with SDA requiring that SDA close out permits timely in order that Northridge satisfy the requirements for Northridge's J-51 Tax Abatement application, that SDA breached the contract by failing to close out all work permits timely, resulting in Northridge's J-51 application being denied, that Northridge did what it was required to do under the contract, that SDA breached the contract by not doing what it was required to do under the contract and that Northridge sustained damages because of SDA's breach.

In deciding this case, the court must first determine the existence of a valid

contract and what were the essential terms of that contract that the parties agreed. We begin with the examination of the communication and writings between the parties.

To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent and an intent to be bound (22 NY Jur 2d, Contracts § 9). That meeting of the minds must include agreement of all essential terms (*id.* at 31) (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]).

Whether a contract has been made must be determined in light of the "totality" of the parties conduct and communications (*Zheng v City of New York*, 19 NY3d 556, 572 [1012], *quoting Brown Bros. Elec. Construs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977], without placing "disproportionate emphasis ... on any single act, phrase or other expression'" (*Zheng,* 19NY3d at 572, *quoting Brown Bros.*, 41 NY2d at 399-400).

Under New York law, a contract is unenforceable when there has been no meeting of the minds between the parties regarding its material terms (*Brando v Urban*, 182 AD2d 287, 289 [2d Dept 1992]). The question of when a meeting of the minds occurs where no fully integrated contract has been executed requires a case-by-case analysis of the parties communications and conduct.

The absence of an agreement or discussion of matters that seriously affect

the rights and obligations of the parties may be fatal to an assertion that the parties intended to be bound to an agreement.

The recipient of an offer is under no duty to respond. Silence, when not misleading, may not be translated into acceptance merely because the offeror purports to attach the effect to it (*Albrecht Chemical Co. v Anderson Trading Corporation*, 298 NY 437 [1949]; *Gomez v Bicknell*, 302 AD2d 107 [2d Dept 2002]).

"An offeree's acceptance must comply with terms of the offer. Generally, in order for the excercise of the power of acceptance to create a bindng contract, the acceptance must be clear, unambiguous and unequivocal." (§2.9 New York Contract Law, p. 39).

The legal effect of an offer is to create a power in the offeree to enter into a contract. The offeree enters the contract by making his acceptance. The offer does not by itself bring a contract into being, and the contract is formed only when the offer is accepted.

DISCUSSION

Here, the parties entered into a written agreement in 2005 embodied in the form of five (5) written proposals. The written agreement is silent as to the time to complete the close out of the permits and silent as to SDA agreeing to provide Northridge assistance with anything related to J-51 filing. Nowhere in the 2005

written proposals is there any provision wherein SDA agreed or guaranteed to plaintiff to close out the permits timely for Northridge to obtain a J-51 tax abatement. Moreover, although DeLorme testified that in 2005 she "discussed" J-51 with Joseph Radel, there is no evidence that SDA agreed to Northridge's offer or proposal. Indeed, the Proposals submitted to Northridge subsequent to the conversations with SDA include absolutely no reference to any J-51 work by SDA. Because SDA did not include J-51 work in its proposal, it is fair to conclude that SDA declined Northridge's request that SDA perform any J-51 work.

However, plaintiff argues that the several written proposals prepared by SDA on different dates are only "a portion of the 'contract' in this action" (Plaintiff's Post Trial Memorandum, P. 4). Plaintiff concedes that the 2005 proposals show that SDA agreed only to perform a structural and engineering review of certain affected areas of five (5) buildings, to design improvements for those affected areas, to complete a specification package for bids, to oversee the bidding process, to oversee the work of the selected contractors, to conduct a final inspection and to "close out" the project. However, plaintiff argues that in 2010 and later, the parties engaged in subsequent oral and e-mail communications where plaintiff offered additional terms which defendant accepted and agreed.

Plaintiff argues that the additional terms relate to: (1) timely close out of

the permits; and (2) close out of the permits within a reasonable time or within a reasonable period of time prior to the final deadline for Northridge to satisfy and complete the requirements of New York City's application process for the J-51 tax abatement program. Plaintiff further argues that these communications along with defendant's conduct, constituted evidence that there was a meeting of the minds of the parties reached regarding new additional material terms. Defendant disputes that the subsequent communications between the parties involved proposing new material terms, and further argues that even if plaintiff was attempting to propose new material terms, defendant never accepted them and there was no meeting of the minds.

Did defendant intend to be contractually bound to plaintiff when in 2010 and later Radel communicated orally and by email to Northridge that SDS would close out the work permits so that Northridge could timely satisfy the requirements of its J-51 application?

The court determines that the answer to this question is "No". It is clear from defendant's words and conduct that defendant did not intend its acts or actions to constitute an acceptance of plaintiff's offer, and therefore, there was no contract.

When Phillip Radel stated to DeLorme that he would close out the permits with the DOB, he did not also intend to represent that SDS was agreeing to guarantee that the DOB would close out the permits timely. Philip Radel's intent

was that SDS would take the necessary steps to file with DOB appropriate documentation with DOB and to work with the DOB to provide all required documentation requested by DOB to satisfy DOB's compliance requirements**.** Moreover, although SDA promised Northridge that it would close out the work permit with DOB, SDA's performance on its promise was conditioned on the DOB approving to close out the permits, which is a result that was solely in the control of the DOB and outside of SDA's control.

Defendant's emails and communication with plaintiff were not clear, unambiguous and unequivocal acceptance of plaintiff's offer.

In 2010 when Joseph Radel agreed with DeLorme to "close out" the work permits it is not clear as to whether Joseph Radel was acknowledging SDA's obligation and agreement to comply with the terms that arose from under the 2005 written proposals, that were silent on the subject of plaintiff's J-51 tax abatement application, or whether Joseph Radel was accepting DeLorme's offer to perform additional or new task or services (i.e. SDS to close out the permits timely to satisfy the requirements for plaintiff's J-51 tax abatement application) under some agreement which plaintiff claims was formed in 2010 after an oral conversation with DeLorme. The task or service of defendant's timely close out of the permits

with DOB in order for defendant to comply with the applications requirements of plaintiff's J-51 Tax Abatement application was an additional or different term from the 2005 written agreement. The court notes that it appears that defendant did make a good faith effort to close out the permits with the DOB for the five (5) buildings. However, the DOB rejected one (1) and accepted four (4) of the close outs.

The court finds that defendant's communications in response to plaintiff's offer from defendant to agree to perform an additional or different service/task to the 2005 written agreement were ambiguous and equivocal.

Here, there was no contract because the parties were not in agreement on an essential term, to wit, defendant agreeing with plaintiff to assist plaintiff in procuring a J-51 tax abatement and to ensure that plaintiff would ultimately be awarded a J-51 tax abatement. Defendant never contracted with plaintiff to assist plaintiff in the procurement of a J-51 tax abatement. Although, the evidence does show that defendant agreed to assist in "project close-out," a task different from assisting plaintiff procure a J-51 tax abatement.

Plaintiff had the burden of proving by a preponderance of the evidence that defendant accepted its offer for defendant to assist plaintiff in procuring a J-51 tax abatement by timely closing out work permits with the DOB. The court finds that plaintiff has failed to meet its burden, in that, plaintiff has not proved that

defendant's acceptance of its offer was clear, unambiguous and unequivocal. As this court finds that the defendant did not accept an essential term of plaintiff's offer, there was no meeting of the minds, and therefore, no binding contract.

Plaintiff' claim sounding in negligence.

A breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated and the legal duty springs from circumstances extraneous to, and not constituting elements of, the contract (*Sommer v Federal Signal Corp.,* 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 [1992]; *Clark-Fitzpatrick, Inc. v Long Island R. Co.,* 70 NY2d 382, 521 NYS2d 653, 516 NE2d 190 [1987]; *D'Ambrosio v Engel,* 292 AD2d 564, 741 NYS2d 42 [2d Dept 2002]*; Non-Linear Trading Co., Inc. v Braddis Associates, Inc.,* 243 AD2d 107, 675 NYS2d 5 [1st Dept 1998]; *see Gordon v Teramo & Company, Inc.,* 308 AD2d 432, 764 NYS2d 144 [2d Dept 2003] [allegation that work was performed in less than skillful and workmanlike manner states cause of action for breach of contract, not negligence]). The focus in distinguishing between breach of contract and tort is on whether a noncontractual duty was violated (*Trustees of Columbia University in City of New York v Gwathmey Siegel and Associates Architects*, 192 AD2d 151, 601 NYS2d 116 [1st Dept 1993]; *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 529 NYS2d 279 [1st Dept 1988] [summarizing noncontractual duties giving rise to tort liability]). SDS did not owe

a tort duty to perform its contractual obligations to Northridge with reasonable care because the contract did not create a relationship for which a duty to Northridge was owed separate from the contractual obligations (*Logan v Empire Blue Cross and Blue Shield*, 275 AD2d 187, 714 NYS2d 119 [2d Dept 2000]). Northridge presented no evidence that the services that SDS contracted to perform gave rise to a tort duty separate and apart from the obligations arising from the contract (*Abacus Federal Savings Bank v ADT Sec. Services, Inc.*, 18 NY3d 675, 944 NYS2d 443, 967 NE2d 666 [2012]).

Moreover, even where tort liability is available, recovery in negligence is unavailable for purely economic loss (*see Verizon New York, Inc. v Optical Communications Group, Inc.*, 91 AD3d 176, 936 NYS2d 86 [1st Dept 2011]). This rule reflects the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort, regardless of whether the claim is based on product nonperformance or negligent performance of services *(Id.)*. Here, plaintiff's claims are purely for economic loss. Therefore, recovery in negligence is unavailable.

As the court finds that the defendant has no liability to the plaintiff, the issue of damages need not be considered.

CONCLUSION

Accordingly, judgment is awarded in favor of the defendant, and the Complaint is dismissed.

This constitutes the decision and order of the court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Counsel are directed to contact the clerk of IAS Part 6 at (718) 298-1113 to retrieve their Exhibits. If the Exhibits are not retrieved within 30 days of the date of this order, they will be discarded without further notice.

Dated: January 28, 2016

.....
Howard G. Lane, J.S.C.