ORIGINAL

SUPREME COURT-STATE OF NEW YORK
DECISION AFTER TRIAL
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

J.S. McHUGH, INC.,

Plaintiff,

-against-

WEB CONSTRUCTION CORP.,

Defendant.

TRIAL/IAS PART: 12
NASSAU COUNTY

Index No. 603096-13

This Court held a bench trial on October 13 and 15, 2015 on the plaintiff's claim for breach of contract.[1] The parties submitted post-trial memoranda in November 2015. As discussed in more detail below, the Court concludes that the plaintiff has established that the parties had an enforceable contract, and has proven the damages flowing from defendant's unexcused breach of that contract. Plaintiff is therefore entitled to judgment in the amount of $152,575, along with prejudgment and postjudgment interest.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jeffrey Mulhall is the president and sole owner of plaintiff J.S. McHugh, Inc. ("JSM"). In early 2013, JSM engaged in negotiations with defendant Web Construction Corp. ("Web") regarding a project in which JSM would, in effect, oversee the procurement and installation of cabinetry at a school renovation project in Long Beach. The project was to commence in May 2013 and be completed before the new school year started in September 2013.

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[1]By stipulation of the parties, the plaintiff's quantum meruit claim was dismissed.

In the course of the parties' negotiations, JSM forwarded to Web on or about May 7, 2013 a proposal (the "Revised Quote") to supply the cabinetry. That cabinetry was to be "phenolic" casework, which is a special composite that is more resistant to water and moisture than other substances. An exchange of emails between John Guecia, a then-project manager at JSM, and Peter Bauer, a project manager at Web, accompanied the Revised Quote. The emails and Revised Quote, which were collectively received in evidence as Exhibit 1, along with the other credible evidence, reflect the following:

(1) Bauer signed the Revised Quote on behalf of Web,

(2) In an email accompanying the Revised Quote signed by Bauer, Bauer stated that JSM could "start shop drawings and submit ... insurance[],"

(3) The Revised Quote provides a price for the work as follows: "Furnished and Installed = $490,000"

(4) The Revised Quote does not contain any payment terms for that agreed-upon price of $490,000,

(5) The Revised Quote states that terms are "To Be Discussed Upon Contract."

(6) There is no other document reflecting payment terms.

Mulhall stated that the phrase "To Be Discussed Upon Contract" was merely "boilerplate," and credibly explained that discussion of payment terms was often typical when the contract involved a private construction project due to the risk of non-payment. Contracts involving public construction, such as the project here, did not warrant such a concern because of bonds that provided JSM with, as Mulhall credibly explained, the "security in that, knowing that you would get paid." Because contracts involving public construction did not need significant

original verbiage to ensure payment, JSM and others in public construction projects used a standard AIA form contract, albeit with minor adjustments regarding specific days on which payment would be due. Such a form contract, with these minor modifications, was used by the parties in a prior construction project on behalf of the Garden City School District (Exh. A).

Consistent with the overall framework he described, Mulhall explained that there were discussions between JSM and Web "in the broadest sense in this world" regarding payment terms. Such discussions centered around a deposit that Web could provide, which JSM would in turn give to the manufacturer of the cabinetry to achieve a lower price. Thus, Mulhall explained, the missing terms could, in effect, be "filled in" due to what is typical in the industry or what is typical between the parties. For example, he stated that requests for payment are typically made on the 20th of the month in the industry, and payment is received 45 days later. Web did not reasonably refute this credible testimony, whether on cross-examination or in the defense case.

Believing it had a contract with Web, JSM executed a contract with another company called PerMar to manufacture the cabinetry at issue at a cost to JSM of $257,475. PerMar then prepared shop drawings of the cabinetry. JSM also made arrangements with another company, American Wood Industries, to install that cabinetry at a cost of $80,000. JSM's anticipated profit from its relationship with Web was thus $152,575 (contract price of $490,000, minus $257,475 and minus $80,000). That computation was not challenged by Web, and thus is the amount of damages to which JSM is entitled upon the existence of an enforceable contract.

In early June 2013, Guecia, who apparently was preparing to leave JSM, advised Bauer that PerMar would not supply JSM with the cabinetry. Guecia told Bauer that JSM had not been paying its bills, and that other manufacturers of phenolic cabinetry had not been paid by JSM and

had shown up at JSM's offices looking for payment. Web then began to negotiate directly with PerMar to provide the cabinetry. Shortly thereafter, Bauer advised Mulhall that Web would no longer work with JSM.

The initial legal issue here is simple: whether the parties had an enforceable contract. A mere agreement to agree is, of course, unenforceable. *Martin, Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109 (1981). Thus, the Court must determine whether there is "definiteness as to material matters [which] is of the very essence of contract law," as [i]mpenetrable vagueness and uncertainty will not do." *Id.* Nevertheless, not all terms of a contract must be "fixed with absolute certainty." *Express Industries and Terminal Corp. v. New York State Department of Transportation*, 93 N.Y.2d 584 (1999). Indeed, as the Court of Appeals has recognized, "at some point virtually every agreement can be said to have a degree of indefiniteness . . .. While there must be a manifestation of mutual assent to essential terms, parties also should be held to their promises and courts should not be 'pedantic or meticulous' in interpreting contract expressions. *Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483 (1989), citing 1 Corbin, Contracts, § 95.

Guided by these precepts, the credible evidence before the Court established that the parties had a sufficient meeting of the minds to form an enforceable contract. The "Revised Quote" that Bauer accepted on behalf of Web contains a detailed description of the scope of the work JSM was to provide, and the price Web was to pay for that work. That is the essence of the parties' agreement. The Court is not persuaded that, where JSM and Web clearly agreed upon the scope of work and price of that work, potential indefiniteness as to the terms of payment defeats an otherwise enforceable contract. Indeed, the credible testimony of Mulhall

demonstrated that this uncertainty was, at most, minuscule as it could be readily alleviated by a form AIA contract that is typical in the industry, albeit with some minor tinkering. Moreover, the Court credits Mulhall's testimony that "terms" of payment may not be of significant concern in contracts involving public construction because of the various bonding mechanisms used in such contracts.

The Court rejects Web's assertion that, even if a contract between the parties existed, JSM anticipatorily breached that contract due to some inability to pay PerMar for the cabinetry that would excuse Web's decision not to honor its agreement with JSM and instead contract directly with PerMar. The Court does not credit as truthful any of Guecia's testimony that JSM could not honor its contract with Web, which is the central evidence that Web adduced to support the reasonableness of its anticipatory repudiation claim. Guecia's bias against JSM, his former employer, was clear throughout his testimony. The evidence before the Court established that Guecia's actions in claiming issues existed between JSM and PerMar were motivated by some combination of ill will towards JSM coupled with a desire to form his own relationship with Web and PerMar. Indeed, Guecia formed his own new venture shortly thereafter. The credible evidence before the Court did not establish, beyond Guecia's self-interested suppositions and speculation, that JSM was somehow unable to perform any agreement with PerMar to provide the factual predicate for an anticipatory repudiation defense by Web.

Moreover, even if Guecia's June 2013 statements to Web regarding JSM were somehow believable, the Court rejects the defendant's assertion that Guecia was acting as JSM's agent during those conversations. Creation of such an agency requires an affirmative act by JSM as the principal, and Web's reliance on Guecia's authority as an agent must be reasonable. *See Hallock*

v. State of New York, 64 N.Y.2d 224, 231 (1984). Here, Guecia had neither actual nor apparent authority during those discussions to promote what was, in effect, his own agenda in an attempt to advance his own self-interest. In any event, it would not be reasonable for Web to rely on Guecia's statements regarding JSM's alleged inability to perform the contract without verifying those assertions with Mulhall.

Settle judgment on ten (10) days notice.

ENTER

DATED: Mineola, NY
February 24, 2016

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