At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 16th day of February 2018.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

PINNACLE CONSTRUCTION, INC.,

Plaintiff,

-against-

VILLAGE OF JOHNSON CITY, NEW YORK,

Defendant.

DECISION AND ORDER

Index No. 2011-0214
RJI No. 2017-0103-C

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the motion of the defendant Village of Johnson City, New York (Village) for summary judgment against the plaintiff Pinnacle Construction, Inc. (Pinnacle) dismissing the complaint. Pinnacle opposes the motion.

The motion was returnable and oral argument was heard on February 16, 2018. As the Village submitted papers on February 14, 2018 which changed the basis for the motion,[1] Pinnacle was given until March 23, 2018 to submit a response and the Village was given until April 9, 2018 to reply. These dates were later extended to March 30, 2018 and April 19, 2018, respectively, upon the requests of counsel.

This action arises out of a dispute regarding work Pinnacle performed beginning in 2005 on a Village project known as the Johnson City Joint Sewage Treatment Plant (Project). Pinnacle claims the Village still owes it nearly $320,000.00 with respect to the Project.

Pinnacle commenced this action by filing a summons and complaint on January 26, 2011 alleging causes of action for breach of contract, unjust enrichment, and account stated. The Village served an answer generally denying many of the claims and asserting twelve affirmative defenses and one counterclaim for breach of contract. Pinnacle served a reply to the Village's counterclaim generally denying the counterclaim and asserting eleven affirmative defenses.

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1 As set forth and discussed below.

On March 31, 2017, this Court issued a stipulated scheduling Order requiring, among other things, completion of discovery by October 15, 2017 and dispositive motions by November 15, 2017. On this motion, the Village asserts it has been unable to schedule a deposition of Pinnacle's representative despite numerous attempts and has not yet received a transcript of Mr. Bennett's June 28, 2017 deposition. It is on this basis – i.e., the failure to comply with discovery – that the Village initially sought summary judgment dismissing the complaint.

On December 19, 2017, the Village filed the supplemental affidavit of its counsel stating that the deposition of Pinnacle's owner William Goldsworthy, Jr. was held on December 11, 2017, but Mr. Goldsworthy testified he was not involved with the Project and he had no knowledge of the pertinent facts. Based on this, the Village sought dismissal of the complaint or, in the alternative, to extend the time to move for a dispositive motion to January 31, 2018, as well as costs and attorney's fees related to the motion.

In opposition, Pinnacle submitted the affirmation of its counsel, who argued the Village's motion was moot since Mr. Goldsworthy had been deposed. As for the Village's request for dismissal based on Mr. Goldsworthy's lack of knowledge with respect to the Project, Pinnacle asserts it does not have any active employees and no longer employs the people who worked on the Project. Therefore, it argues, the only person it can produce without a subpoena is Mr. Goldsworthy. Further, Pinnacle argues that due to the nature of its claims,[2] it does not need a Pinnacle representative with first-hand knowledge to testify at trial.

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Including the Village's failure to: pay interest on late payments to Pinnacle during the course of the Project; accept a bond in lieu of withholding retainage from each of Pinnacle's

It asserts that any necessary facts can be established through the contract documents and testimony from Mr. Goldsworthy, the Project Owner, its representative, and the Project engineers, as well as by subpoenaing Pinnacle's former employees.

On February 14, 2018, the Village submitted the reply affidavit of its Director of Public Services, Robert A. Bennett, who details the nature of the six claims against the Village on the Project for which Pinnacle filed Notices of Claim.[3] He reiterates the request to dismiss the complaint based on Mr. Goldsworthy's lack of knowledge of and involvement in the Project.

In response, Pinnacle submitted the affidavit of Mr. Goldsworthy, who argues there are several issues of fact that require a trial. He explains that Pinnacle's co-owner, who served as its chief estimator and project manager, passed away in 2009. He reiterates his argument that his lack of firsthand knowledge does not diminish Pinnacle's claims, arguing: (1) the claims involve simple contract interpretation; (2) any necessary facts can be established through the testimony of the Project Owner, its representative, the Project engineers, and by subpoenaing its former employees; and (3) the letters sent by Pinnacle during the Project fully explain its position with respect to each claim. He puts forth numerous arguments regarding the validity of Pinnacle's claims based on his 40 years of experience in the construction of wastewater treatment plants and a review of the Project Specifications and Drawings and correspondence from Pinnacle.

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pay applications; and pay the extra costs associated with supplying two additional grinder pumps, which it says the Village required.

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With this affidavit, the nature of the Village's motion for summary judgment shifts from one based on noncompliance with the discovery schedule to one based on the substance – i.e., by attempting to establish its prima facie case of entitlement to judgment dismissing the complaint as a matter of law.

In reply, the Village submitted the answering affidavit of Mr. Bennett, who makes numerous arguments regarding the invalidity of Pinnacle's claims.

Law

Summary judgment is a drastic remedy which should be granted only when it is clear that there is no material issue of fact for resolution by a jury (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Redcross v. Aetna Cas. & Sur. Co.*, 260 AD2d 908, 913 [3d Dept 1999]). It is well established that the function of the court on a motion for summary judgment is issue finding, not issue determination, and if a genuine issue of fact is found, summary judgment must be denied (*see Sillman*, 3 NY2d at 404; *see also Salvador v. Uncle Sam's Auctions & Realty, Inc.*, 307 AD2d 609, 611 [3d Dept 2003]; *Schaufler v. Mengel, Metzger, Barr & Co., LLP*, 296 AD2d 742, 743 [3d Dept 2002]; *Encotech, Inc. v. Cotton Fact, Inc.*, 280 AD2d 748, 749 [3d Dept 2001]). The moving party on such a motion bears the initial burden to establish a prima facie case of entitlement to judgment as a matter of law (*see Encotech*, 280 AD2d at 749). Once this initial burden is met, the opposing party must come forward with proof in admissible form which establishes the existence of a triable issue of fact (*see id.* at 749-750).

Analysis

As noted above, the Village's initial submissions on this motion suggested that it was based on noncompliance with the discovery schedule – specifically, Pinnacle's failure to cooperate in scheduling a deposition of one of its representatives within the timeframe

provided in the stipulated scheduling Order.[4] After that deposition was held, the basis of the motion became the Village's dissatisfaction with the level of knowledge (or, more accurately, the lack thereof) of the representative deposed, and then later it shifted to the Village's contention that it is entitled to dismissal of the complaint based on its defenses to Pinnacle's claims.

There is no basis for a grant of summary judgment related to any issues these parties had with respect to discovery or the scheduling of depositions. A party responding to a discovery request, including a notice to take deposition, is only required to produce what it has. Here, the former co-owner who was personally involved in the Project has died. The facts that Pinnacle no longer has active employees and that the representative who was produced for the deposition – Mr. Goldsworthy – did not have personal knowledge of the Project do not by themselves provide a basis for summary judgment.

The nature of the Village's supplemental papers on this motion shift from the discovery issue to the substance of the action. Its proof in this regard is largely based on the affidavits of Mr. Bennett, who was directly involved in the Project. Through his affidavits, Mr. Bennett provides his interpretation of the Project's contracts, Drawings, and Specifications as they relate to Pinnacle's claims based on his experience as both the Village's Director of Public Services and representative as lead agency on the Project. Pinnacle responds with the affidavit of Mr. Goldsworthy, who disputes much of Mr. Bennett's assertions based on his

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It is unusual to file a motion for summary judgment based on a discovery dispute. Typically, a motion to preclude is filed, which is sometimes later followed by a motion for summary judgment.

experience in the construction of wastewater treatment plants, a review of the Project's contracts, Drawings, and Specifications, and correspondence from Pinnacle to the Village or its engineers regarding the Project.[5]

Viewed broadly, part of the issue here is whether the fact that Pinnacle no longer has an employee or representative with firsthand knowledge of this Project is fatal to its claims. As to this motion, the issue is whether – given the competing affidavits of Mr. Bennett and Mr. Goldsworthy and the language of the contract documents, Specifications, and Drawings – there are fact issues requiring a trial.

One of Pinnacle's claims is for the cost of two additional sludge grinders, which it asserts arose due to a discrepancy between the Project Specifications and the Drawings.

In support of its motion with respect to this claim, the Village argues that there is no discrepancy given the contract language. It acknowledges that the Specifications call for ten combined pumps and grinders, but points out that the Drawings clearly show those plus two additional grinders without pumps. The Village cites language from the Specifications stating, "The pumps, grinders . . . and other equipment as shown on the Drawings and specified in this section shall be provided by a single supplier" as evidence that the Specifications and Drawings are meant to complement one another (*see* Specifications § 11200 Part 1.1A). The Village also quotes a section which sets forth the intent of the Specifications:

> "These Specifications are intended to give a general description of what is required, but may not cover all details, which will vary in accordance with requirements of the equipment and delivery of all materials, equipment and all

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Most, if not all, of this correspondence was sent by the former (deceased) co-owner. In Mr. Goldsworthy's affidavit, he notes that these letters were either produced by the Village in response to Pinnacle's document demand or the Village's engineer in response to subpoenas.

> appurtenances for complete pumping and grinding units as herein specified, whether specifically mentioned in these Specifications or not" (Bennett reply affidavit at ¶ 5).

Based on this, the Village argues that Pinnacle's responsibility to supply and pay for the two additional grinders "may be reasonably inferred from Contract Documents."

Pinnacle disagrees, asserting there are fact issues in that regard. Pinnacle points out that Specification § 11200 provides that it must furnish and install ten pumps and grinder assemblies and that the relevant Drawing (M-4) only directs that it install two grinders, not that it furnish them.

In comparing the language quoted by the Village above against the text of the actual Specifications, it is apparent that certain language was omitted. That language appears in bold in the following excerpt:

> "These Specifications are intended to give a general description of what is required, but may not cover all details, which will vary in accordance with the requirements of the equipment **application. It is, however, intended to cover the furnishing, testing, storage** and delivery of all materials, equipment and all appurtenances for complete pumping and grinding units as herein specified, whether specifically mentioned in these Specifications or not" (Specifications at Part 1.1B [emphasis added]).

In this Court's view, the omitted language changes the intent and meaning of the Specifications. Read in its entirety as it actually appears, this section provides that while the Specifications may not be exhaustive depending on the equipment's application, they are meant to cover the furnishing of the materials and equipment. This includes the grinders at issue here. Therefore, contrary to the Village's contention, the language does not support an inference that it was Pinnacle's responsibility to furnish or supply and pay for the two additional grinders.

The Village's arguments against this claim are illustrative of the types of arguments it makes with respect to the other claims on this motion. However, the law is clear that courts must focus on issue finding rather than issue determination, and deny the drastic remedy of summary judgment if there is any doubt as to whether a material factual issue exists or if such an issue is even arguable (*Black v. Kohl's Dept. Stores, Inc.*, 80 AD3d 958 [3d Dept 2011]). In light of that, the Village's motion for summary judgment is denied.

Conclusion

In light of the foregoing, the Village's motion for summary judgment is denied.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Jeffrey A. Tait

Digitally signed by Jeffrey A. Tait
DN: CN=Jeffrey A. Tait, C=US, OU=Supreme Court Justice, O=Broome County Supreme Court, E=taitjsc@nycourts.gov
Date: 2018-06-29 09:44:00

Dated: June 29, 2018
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice

FILED
JUL 02 2018
BROOME COUNTY CLERK

Most or all of the documents upon which this Decision and Order is based were received by Chambers in a scanned electronic format from the Broome County Clerk's Office and the originals remain filed with the Broome County Clerk. Therefore, except as noted below, now documents have been forwarded to the Broome County Clerk with this Decision and Order.

Documents forwarded to the Broome County Clerk with this Decision and Order:

- Affirmation in Opposition of Jason B. Bailey, Esq., dated February 5, 2018 together with attached Exhibits A through D;
- Affidavit in Opposition of William Goldsworthy, sworn to March 30, 2018 together with attached Exhibits E through I.