

Isufi v Prometal Constr., Inc.
2020 NY Slip Op 34047(U)
December 3, 2020
Supreme Court, New York County
Docket Number: 653265/2012
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

INDEX NO. 653265/2012

DURIM ISUFI, ENVER KLOGJERI, individually and on behalf of all other persons similarly situated who were employed by PROMETAL CONSTRUCTION, INC. along with other entities affiliated with or controlled by PROMETAL CONSTRUCTION, INC., with respect to certain Public Works Project awarded by the City of New York, and THE NEW YORK CITY HOUSING AUTHORITY,

MOTION DATE 12/01/2020

MOTION SEQ. NO. 010

Plaintiffs,

**DECISION + ORDER ON
MOTION**

- v -

PROMETAL CONSTRUCTION, INC.,STV
CONSTRUCTION, INC., and RLI INSURANCE COMPANY,

Defendants.

-----X

PROMETAL CONSTRUCTION, INC.

Third-Party
Index No. 595237/2015

Plaintiff,

-against-

AKROPOL GENERAL CONTRACTORS, INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 010) 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345

were read on this motion to/for ENFORCE SETTLEMENT AGREEMENT

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiffs to enforce the Settlement Agreement and Release dated November 2019 and to direct defendant Pro Metal Construction, Inc. to perform the

terms of such Settlement Agreement, including but not limited to, "convening the services of a mutually agreed upon neutral to hear and decide" the settlement amounts to be paid to Authorized Claimants, is granted; and it is further

ORDERED that within ten days of service of a copy of this order with notice of entry, defendant Pro Metal Construction Inc. shall convene with plaintiffs and co-defendant RLI Insurance Company to agree upon such neutral; and it is further

ORDERED that pursuant to CPLR 908, upon such mediated determination of the agreed upon neutral, plaintiffs shall submit, for approval of this court, a final Fairness Hearing notice to be published in accordance with the delivery method and languages set forth in paragraph 2.5(B) and (C) of the Settlement Agreement, which, at a minimum, informs all Authorized Claimants of (1) the terms of the proposed settlement, including, but not limited to (a) the last four numbers of the social security number of each Authorized Claimant, (b) the category of work, for example, as roofer or laborer, performed by each such Authorized Claimant, (c) the number of weeks that each such Authorized Claimant carried out such work at the subject Public Works Project, and (d) the settlement amount representing underpaid wages to be distributed to each Authorized Claimant, as allocated in the determination mediated by the neutral; (2) how an Authorized Claimant may

object to the proposed settlement mediated by the neutral; (3) the time period within which such objection, if any, may be made; and (4) the date on which the Trial Court will hold a final Fairness Hearing, at which same will consider the fairness of the proposed settlement, which date shall not be earlier than 30 days after expiration of the time period within which any Authorized Claimant may make an objection to the proposed settlement mediated by the neutral.

DECISION

Paragraph 3.5, captioned "Allocation of Net Settlement Amount to Class Members" of the Settlement Agreement and Release dated November 2019 (the Agreement), states:

- (A) The allocation of Authorized Claimants for Settlement Checks will be made from the Net Settlement Amount.
- (B) The balance of the Authorized Claimants shall have their Net Settlement Amount allocation distributed based on a variety of factors contained in the wage underpayment report prepared by the Class Counsel as well as other documents and sources including certified payroll reports, check stubs, cancelled checks, cash payment receipts, sign-in sheets, attendance sheets, written statements and testimony and weekly payroll sheets.

The Agreement ¶ 3.1 entitled "Settlement Terms", states, in pertinent part:

- (A) This is a claims-made settlement. AS such, subject to the "cram down" provisions in Section 3.1(B), and the termination provision in accordance with Section 3.1(C), the maximum potential amount that Prometal shall be required to contribute before exercising the right to terminate, for payment to all Authorized Claimants, and Costs and Fees, Service Awards, and

employer's share of taxes, shall not exceed the cumulative amount of \$1,700,000.00.

- (B) If the aggregate of all payments to be made inclusive of (a) any Court-approved attorneys' fees, costs, and expenses, (b) all settlement amounts to be paid to Authorized Claimants; (c) any Court-approved Service Awards; and (d) any costs related to the administration of the settlement by the Claims Administrator should total between One Million Seven Hundred Thousand Dollars (\$1,700,000) and Two Million One Hundred Thousand dollars (\$2,100,000) and the Parties are unable to reach agreement on renegotiated terms of this Agreement, the Parties shall convene the services of a mutually agreed upon neutral to hear and decide within this range. The decision of the mediator will be final and binding.

"Authorized Claimant" is defined as "a Class Member who has submitted a timely Claim Form and supporting documents as agreed to by the Parties or authorized by the Court." Agreement ¶ 1.1.

The phrase "balance of the Authorized Claimants" referenced in ¶ 3.5(B) is undefined under the Agreement. Nor is there any reference in Agreement ¶ 3.1(B) to the wage underpayment report referred to in ¶ 3.5(B).

As stated in Georgia Malone & Company, Inc. v E. & M. Associates, 163 AD3d 176, 185-186 (1st Dept 2018):

"Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]; see also *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]).

Crucially, an agreement can be deemed unambiguous "if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the

[agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' " (*Greenfield*, 98 NY2d at 569, quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]).

However, a contract is ambiguous when "read as a whole, [it] fails to disclose its purpose and the parties' intent" (*Ellington*, 24 NY3d at 244; see *Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534 [1996]), or when specific language is "susceptible of two reasonable interpretations" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). Moreover, the agreement must be read as a whole "to ensure that excessive emphasis is not placed upon particular words or phrases" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005]).

Stated differently, the existence of ambiguity is determined by examining " 'the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed,' " with the wording viewed " 'in the light of the obligation as a whole and the intention of the parties as manifested thereby' " (*Kass v Kass*, 91 NY2d 554, 566 [1998], quoting *Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524 [1927]). And, importantly, "[i]n construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless" (*Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]).

Defendant Pro Metal argues that, in seeking enforcement of the Agreement, "Plaintiffs and RLI are insisting that Pro Metal agree to the outsized, guaranteed payment." Such argument has no basis, either implicitly, or under the clear terms of the Agreement, read as a whole. Nothing in the Agreement provides that the amounts allocated, including \$580,000.00 in the category "Global Settlement Group" (a/k/a Albanian national workers) listed in the underpayment report prepared by Class Counsel is a "guaranteed" payment to be made to either the Authorized Claimants, or the undefined "balance

of Authorized Claimants", in settlement of this action. On the contrary, read as a whole, under the Agreement, the parties promised that that if the aggregate amount of all sums to be made, comprised of the sum of the "settlement amounts to be paid to the Authorized Claimants", as proposed in the underpayment report prepared by Class Counsel, plus the other amounts set forth in Agreement ¶ 3.1(B), exceeds \$1,700,000.00 and the parties cannot renegotiate such aggregate amount, the parties must submit the issue of "the settlement amount to be paid to the Authorized Claimants" to a neutral, whose mediated decision "will be final and binding". Contrary to the interpretation that Pro Metal urges, the Agreement does not provide that the mediator must adopt or rubber stamp the underpayment amounts and allocation thereof reported by Class Counsel. Such an interpretation would render the word "mediation"¹ meaningless. Nor under the Agreement did defendant Pro Metal agree to "the settlement amount to be paid to the Authorized Claimants", as set forth in the underpayment report prepared by Class Counsel. Such an interpretation would likewise give no force and effect to

¹Binding mediation consists of the selection of a neutral, who will meet with the parties and broker an agreement on the settlement terms, including the settlement amount to be paid to the Authorized Claimants and allocation thereof among such Authorized Claimants. Such is distinct from binding arbitration where the neutral would make a decision with written findings after an evidentiary hearing, which decision would require confirmation or rejection by this court pursuant to CPLR § 7510. See Application of Chris O'Connell, Inc. v Beacon Looms, Inc., 235 AD2d 248, 249 (1st Dept. 1997).

the words of Agreement 3.1(b) that "should. . . the Parties [be] unable to reach agreement on renegotiated terms of this Agreement".

Pro Metal alleges that certain Authorized Claimant or Claimant(s) made threats to one of its key witnesses on the question of underpaid wages. According to Pro Metal, such the Authorized Claimant(s) who made the verbal threats are defendants under a federal criminal indictment, which indictment is beyond the subject matter of this court. Nor has Pro Metal made a cross motion to set aside the Agreement based upon coercion. The court notes that it does not understand how such alleged threat, which occurred only after execution of the Agreement, would provide any ground to set it aside, in any event. Most importantly, it is imperative that Pro Metal file any complaints in that regard with the appropriate law enforcement agencies. In any event, during the course of mediation, Pro Metal may raise such assertions with the mediator or any other challenge to the bona fides of the underpaid wage claims of any such Authorized Claimant, wherein credibility of any such Authorized Claimant would be implicated.

Finally, nothing in the Agreement modifies CPLR 908, which requires court approval of any settlement, whether brokered by the mediator or otherwise. Pro Metal's argument that this court must conduct a Fairness Hearing in advance of the mediator brokered settlement is in contravention of both CPLR 908 and

Agreement ¶ 2.8, captioned "Final Hearing, Final Approval of Settlement, and Dismissal with Prejudice".

12/3/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE