Monterey Mech. Corp. v. ROP, 13 ROP 247 (Tr. Div. 2006)

MONTEREY MECHANICAL CORPORATION,
Plaintiff,

v.

REPUBLIC OF PALAU, ELBUCHEL SADANG, MASASINGE ARURANG, MARCELINO MELAIREI, SINGERU NGIRAMOLAU, AUGUST REMOKET, TOMMY E. REMENGESAU, JR., and RICHARD MANGHAM,
Defendants.

CIVIL ACTION NO. 02-108

Supreme Court, Trial Division
Republic of Palau

Decided: April 3, 2006

ARTHUR NGIRAKLSONG, Chief Justice:

Before the Court are two motions for summary judgment filed by both of the parties. For the reasons articulated below, the Plaintiff's motion is denied and the Defendant's motion is granted.

BACKGROUND

Between 1994 and 1997, Plaintiff Monterey Mechanical Corporation ("Monterey") entered into several contracts with the Republic of Palau. These contracts included work on the Echang Sewer Project, the Choll Project, the Ngeklau Project, the National Gymnasium Project, the Ngardmau Water System Project, the Koror/Airai Back-up Generator Project, the Peleliu Rural Water System Project, and the Koror Wastewater Pump Station Upgrade. The agreements between the parties permitted two types of payments: progress payments and final payments. As one might expect from these terms, the contractor was entitled to final payment only after completion of each project, but it could receive interim progress payments. The Republic, however, could retain five to ten percent of the entire value of performance depending on the circumstances.

With those projects in various states of ⊥248 completion, Plaintiff filed this lawsuit against the Republic and several of its employees in their official capacity under the theories of breach of contract, quantum meruit, and accounts stated. Plaintiff alleges that the Republic has failed to make payments required by the contracts. The Republic counterclaimed for breach of contract.

On July 2, 2003, Monterey filed a motion for summary judgment, asserting that documents including invoices, payments, and calculations for each of the seven projects evidence that there are no genuine issues of material fact left to be resolved. In addition,

Monterey claims that the Republic's counterclaim should be dismissed. The Republic filed its own motion for summary judgment on November 12, 2003, arguing that Monterey failed to exhaust its administrative remedies, that certain contracts are void, that no legal claim exists as to the individual defendants, and that both the quantum meruit and account stated claims fail based on the assertion of an express contract. In addition to these assertions covering all the projects, the Republic also argues that certain changes in the Echang Project were not approved by the Director of the Bureau of Program, Budget and Management, and as a result, that change order is not enforceable against the Republic. Both parties argued their motions before the Court on February 14, 2006.

ANALYSIS

Republic of Palau Rule of Civil Procedure 56 provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ROP R. Civ. P. 56(c). Summary judgment is appropriate against a party who fails to make an evidentiary showing sufficient to raise a factual question as to an element essential to that party's case and on which that party will bear the burden of proof at trial. *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 109 (1995). A party may defeat a motion for summary judgment by offering evidence that shows there is a genuine issue of material fact to be resolved at trial. *Id.* at 110.

The broadest argument presented by either party is the Republic's contention that Monterey has failed to exhaust its administrative remedies under 40 PNC § 651.[1] ⊥249 The

[1] **§ 651. Authority to resolve contract dispute.**

(a) This section applies to controversies between the government and a contractor and which arise under, or by virtue of, a contract between them. This includes, without limitation , controversies based upon performance, interpretation, or compensation due under said contract. *(emphasis added)*.

(b) The Procurement Officer concerned is authorized to settle and resolve a controversy described in part (a) above.

(c) Any dispute must be filed in writing with the Procurement Officer concerned within 14 calendar days after obtaining knowledge of the facts surrounding the dispute. If such a dispute is not resolved by mutual agreement, the Procurement Officer shall issue a decision in writing within 90 days after receipt of notice of dispute. The decision shall include:

(1) a description of the dispute;
(2) reference to pertinent contract terms;
(3) a statement of factual areas of disagreement or agreement; and
(4) a statement of decision as to the factual areas of disagreement and conclusion of the dispute with any supporting rationale.

(d) A copy of the decision under subsection (c) above shall be mailed or otherwise furnished immediately to the contractor within 90 days after receipt of the notice of dispute.

(e) The decision under subsection (c) of this section shall be final and conclusive unless fraudulent or unless any person adversely affected by the decision seeks review of the decision by the Supreme Court within six months after notice of the decision is served.

(f) A contractor that has a dispute pending before a Procurement Officer must continue to perform

Republic argues that § 651 mandates that a contractor must first present its dispute before the Procurement Officer prior to bringing a lawsuit to court. Monterey counters by arguing that § 651 does not apply, and even if it were to apply, Monterey satisfied the statutory requirements.

Both parties agree that § 651 is not a model of clarity. The statute states that it "applies to controversies between the government and a contractor and which arise under, or by virtue of, a contract between them. This includes, without limitation, controversies based upon performance, interpretation, or compensation due under said contract." 40 PNC § 651(a) *(emphasis added)*. It further states that the Procurement Officer "is authorized to settle and resolve a controversy described in part (a)," and that "[a]ny dispute must be filed in writing with the Procurement Officer concerned within 14 calendar days after obtaining knowledge of the facts surrounding the dispute." *Id.* § 651(b), (c). In addition, the statute provides that the decision of the Procurement Officer is final unless the decision is appealed to the Supreme Court. *Id.* § 651(e).

The Court finds the most reasonable reading of the statute to require a contractor to pursue a remedy for failure to pay an invoice under the contract from the Procurement Officer prior to bringing a lawsuit to court. This result permits an internal screening to develop relevant facts and correct errors before potentially lengthy litigation is initiated. *See Schlesinger v. Councilman*, 420 U.S. 738, 756-57 (1975). "It also encourages the use of more economical and less formal means of resolving disputes" and will promote accuracy, efficiency, agency autonomy, and judicial economy." 2 Am. Jur. 2d *Administrative Law* § 475.

Monterey argues that when a statute does not specifically require exhaustion of remedies, the court has jurisdiction over claims filed by parties that failed to exhaust administrative remedies. Nevertheless, it is not mandatory for the court to hear the case in these circumstances. *See Lewis v. United States*, 32 Fed. Cl. 59, 65 (1994). The Claims Court in that case states that it retains the discretion to refrain from applying the exhaustion doctrine. *Id.*; *see also McCarthy v. Madigan*, 503 U.S. 140 (1992) (holding that a court has discretion to hear a case where there is a statute that does not clearly require exhaustion).

Monterey's reliance on *Ren Int'l Co. v. Garcia* , 11 ROP 145 (2004), is inapposite. The *Ren International* Court in that case declined to rule on the issue of administrative ⊥250 exhaustion, stating, "This Court has not previously had occasion to address what circumstances might require an aggrieved party to pursue and complete an available administrative process as a precondition for seeking relief in this Court. Because of the specific language of the [Protection of Resident Workers] Act, we need not do so here because even if such a doctrine was adopted, it would not apply to these facts." *Id.* at 150. Moreover, the statutory scheme at issue in *Ren International* included an express provision that "[a]ny such agreements or conditions agreed to by an employer shall be legally enforceable in the courts of the Republic." 30 PNC § 143(b).

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according to the terms of the contract and failure to continue shall be deemed to be material breach of the contract unless the contractor obtains a waiver of this provision from the Procurement Officer.

(g) If the Procurement Officer does not issue the written decision required under subsection (c) of this section within 90 days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

Monterey argues that § 651 does not apply because its invoices and the Republic's failure to pay them do not create a controversy or dispute under the statute. The Court agrees with Monterey's contention that its mere claim or invoice for a progress payment does not rise to the level of a controversy or a dispute. A claim or invoice does not necessarily create a disagreement between the contracting parties, which is inherent in a controversy or dispute. Nevertheless, this Court rejects Monterey's attempt to distinguish between the term "controversies" in paragraphs (a) and (b) and the term "dispute" in paragraph (c). Although the term dispute is defined earlier in the chapter as "a disagreement concerning the terms of the contract and the legal rights and obligations of the contracting parties," this definition is consistent with the elaboration of controversy in § 651(a), which is "without limitation" or restriction and should be read as it written.

Moreover, the court finds that Monterey's submission of invoices coupled with the Republic's denial of payment [2] falls under the categories of both controversy and dispute. They relate to the performance, interpretation, or compensation due under the contract and, therefore, they create a controversy. *See* 40 PNC § 651(a). In addition, the terms of the contract (whether these payments should be progress payments or final payments) and the legal obligations of the contracting parties (the obligation of Monterey to submit certain documents or the obligation of the Republic to make progress payments) are at issue and, therefore, the events create a dispute. None of the authorities in Monterey's lengthy rebuttal memorandum directly challenges this finding.

The court also rejects Monterey's argument that it satisfied the statute by drafting letters to the Republic and some of its employees. Monterey is correct that its letters are sufficient to initiate a controversy or dispute under § 651, but the letters, alone, cannot constitute a dispute. As discussed above, a mere claim or invoice for a payment does not rise to the level of a controversy or a dispute. The claim must be coupled with a refusal to pay in order for the events to rise to the level of controversy or dispute. As the responses to Monterey's letters reveal, the Republic was not denying their claim; it was requesting clarifications. The September 17 and 19, 2001, letters between Ric Mangham and Larry Peterson are particularly illuminating. [3] These letters illustrate the ⊥251 back-and-forth discussion between the two parties. They do not, however, evidence disagreement, which is inherent in controversies and disputes.

Monterey has presented no pleadings, depositions, answers to interrogatories, admissions, or affidavits that show that it has complied with § 651, as interpreted by this decision. Thus, summary judgment is appropriate. The only issue remaining is whether Monterey's motion relating to Defendant's counterclaim should be granted.

This counterclaim relates to the Echang Project. Monterey argues that the project was completed and it was inspected and accepted by the Republic. It also contends that it delivered

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[2] The Court notes that – as discussed below – it does not appear as though the Republic is refusing to make payments. It merely wants appropriate documentation to confirm the requests for payment.

[3] These letters are attached as exhibits 154 and 155 to the Fourth Affidavit of Larry Peterson, filed September 14, 2001.

the keys, operation/maintenance manuals, and spare parts for the Project to the Republic in June 2000. The Republic has provided an affidavit by James Oiterong, which brings into question whether the keys were in fact delivered. Monterey even concedes that based on this, "it would appear that there is a genuine issue of material fact as to the turnover aspect of the lawsuit insofar as it concerns Echang." Plaintiff's Rebuttal at 24. Thus, summary judgment is not appropriate on the counterclaim.

CONCLUSION

For the reasons set forth above, the Defendant's Motion for Summary Judgment is GRANTED and the Plaintiff's Motion for Summary Judgment is Denied.