

SELECT ENERGY NEW YORK, INC.,

Plaintiff,

v.

GENESEE HEALTH FACILITIES
ASSOCIATION,

Defendant.

DECISION AND ORDER

Index #2006/07121

Plaintiff, Select Energy New York, Inc., moves by CPLR 3212 for an order granting it summary judgment against defendant for the relief demanded in the complaint. Defendant, Genesee Health Facilities Association, cross moves for summary judgment dismissing the complaint or, alternatively, for an order granting it leave to amend its answer to include the affirmative defense of fraudulent inducement.

Plaintiff commenced this action seeking to collect \$35,753.68 from defendant for natural gas services provided to the Jennifer Matthew Nursing Home, a member of the defendant association. Defendant alleges that one of the services it provides to its members is the opportunity to obtain more cost effective services by using common business providers. See Chambery Affidavit, ¶3. In March 2003, defendant recommended (through broker Energy Solutions) that its members switch natural gas suppliers, from TXU Energy to plaintiff. Consequently, each

member of the defendant association allegedly signed a separate and identical agreement for the provision of gas services from plaintiff. Id. at ¶10. The relevant member herein, Jennifer Matthew Nursing Home, signed an agreement with plaintiff on June 11, 2003. Defendant contends that plaintiff's representative, Annette Durnack, signed on behalf of plaintiff and that the fully executed document is in plaintiff's possession. See Reply Affidavit of P. Fahy, ¶4-5. The document was requested in discovery served by Defendant on March 1, 2007. Defendant contends that plaintiff maintained separate accounts for each member and billed each member separately.

In September 2003, defendant alleges that, because of market changes, the situation arose where the defendant association's members could lock into a new, fixed pricing rate. Defendant alleges that because the rate lock-in needed to occur expeditiously, plaintiff recommended (through broker Energy Solutions) that defendant execute the new agreement on behalf of the members. Thus, in September, 2003 the defendant association executed an agreement for provision of natural gas services to members. This agreement was executed both by plaintiff and defendant and was identical in many respects to the original agreement executed only by Jennifer Matthew Nursing Home. Both agreements contain a merger clause that states:

Please read this Agreement carefully as it governs the entire understanding of the

parties concerning Customer's purchase of natural gas from SENY and supercedes any previous representations (verbal or written) concerning Customer's rights and responsibilities under this Agreement.

The September 2003 agreement also contains an "Attachment A" which lists, in relevant part, Jennifer Matthews Nursing Home's address, and RG&E account numbers, and then states the following:

The above facilities are to be included in the fixed pricing arrangement with Select Energy of New York. All payment obligations remain under the same terms as indicated in the original NYMEX agreement.

Defendant alleges that, following execution of the September 2003 agreement, plaintiff continued billing Jennifer Matthew Nursing Home directly.

When the September 2003 agreement expired in June 2004, most members entered into individual agreements once again with plaintiff. However, defendant asserts that plaintiff refused to provide services to Jennifer Matthew Nursing Home due to its bad credit history and payment arrears. Plaintiff then commenced this action against the defendant association, seeking to recover the arrears attributable to the Jennifer Matthews Nursing Home under the September 2003 agreement.

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect

Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted). See also Potter v. Zimmer, 309 A.D.2d 1276 (4th Dept. 2003) (citations omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003), *citing* Alvarez, 68 N.Y.2d at 324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater Buffalo, 12 A.D.3d 1089 (4th Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v Johnson, 147 A.D.2d 312, 317 (2nd Dept. 1989) (citations omitted).

Irrespective of whether the June 2003 agreement was effective,¹ that agreement was superceded by the September 2003

¹ Although there is not a fully executed copy of the June 2003 Agreement before the court, it is noted that defendant contends that such a fully executed document exists. Defendant's representative, in reply, states that he requested that document in discovery.

agreement, by the clear language of the agreement indicating that it superceded all prior agreements and indicating that the superceding agreement covered the provision of natural gas services at the Jennifer Matthew Nursing Home. The analysis of this matter thus depends upon the interpretation of the September 2003 agreement.

The principles of contract interpretation are well settled. "The best evidence of what parties to a written agreement intend is what they say in their writing." Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002), quoting Slamow v. Del Col, 79 N.Y.2d 1016, 1018 (1992). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Id.

A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing (see, e.g., Mercury Bay Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 269-270, 557 N.Y.S.2d 851, 557 N.E.2d 87; Judnick Realty Corp. v. 32 W. 32nd St. Corp., 61 N.Y.2d 819, 822, 473 N.Y.S.2d 954, 462 N.E.2d 131; Long Is. R.R. Co. v. Northville Indus. Corp., 41 N.Y.2d 455, 393 N.Y.S.2d 925, 362 N.E.2d 558; Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 365, 239 N.Y.S.2d 865, 190 N.E.2d 230). That rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses * * * infirmity of memory * * * [and] the fear that the jury

will improperly evaluate the extrinsic evidence." (Fisch, New York Evidence § 42, at 22 [2d ed].) Such considerations are all the more compelling . . . where commercial certainty is a paramount concern.

W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990). See also Lee v. Tetra Tech, Inc., 14 Misc.3d 1235(A), *5 (Sup. Ct. Monroe Co. 2007). "Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous." South Rose Associates, LLC v. International Business Machines Corp., 4 N.Y.3d 272, 277-78 (2005). See also, Lee, 14 Misc.3d at *6 (stating that the extrinsic evidence "is not admissible so long as the court finds that the contractual provisions in question are unambiguous").

But the determination of whether ambiguity is presented cannot occur in a vacuum. As stated in William C. Atwater & Co. v. Panama R. Co., 246 N.Y. 519 (1927):

He, however, takes the isolated clause in dispute, and finds its meaning plain. In this we think he disregarded the proper rule for the construction of contracts. 'Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish.' Robertson v. Ongley Electric Co., 146 N. Y. 20, 24, 40 N. E. 390, 391; Gillet v. Bank of America, 160 N. Y. 549, 556, 55 N. E. 292. The court should examine the entire contract and *consider the relation of the parties and the circumstances under which it was executed*. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance, and a sensible meaning of words should be sought.

Id. 246 N.Y. at 524 (emphasis supplied). See Kass v. Kass, 91 N.Y.2d 554, 566 (1998) (same).

"Attachment A" of the September 2003 agreement creates an ambiguity necessitating the consideration of extrinsic evidence. As quoted above, "Attachment A" states:

The above *facilities* are to be included in the fixed pricing arrangement with Select Energy of New York. All payment *obligations* remain under the same terms as indicated in the original NYMEX agreement.

(emphasis supplied). "Attachment A" explicitly references the reader back to the June 2003 agreement and states that the "facilities," not the association, are part of the fixed pricing arrangement with plaintiff, and that "payment obligations" are to remain the same. Several "payment obligations" are set forth in the June 2003 agreement and the New York State Certification forms attached thereto, including the entity from whom the "payment obligation" is expected. The June 2003 agreement contemplates payment by Jennifer Matthew Nursing Home, the "Customer," at paragraph 4:

The price to be paid by Customer for each Dth of natural gas delivered by SENY to Customer at the Delivery Point shall be the NYMEX Monthly Settlement plus \$1.49 per Dth, plus all applicable Taxes, as defined below. The price is available so long as the Term is completed. If Customer does not complete the Term, then Customer will be in default and subject to additional charges as described below.

The first paragraph of the June 2003 agreement defines "Customer"

as "Jennifer Matthews. However, the September 2003 agreement contains nearly an identical fourth paragraph relating to payment:

The Price to be paid by Customer for each Dth of natural gas delivered by SENY to Customer at the Delivery Point shall be \$6.77 per Dth, plus all applicable Taxes, as defined below. The price is available as long as the Term is completed. If Customer does not complete the Term, then Customer will be in default and subject to additional charges as described below.

But the September 2003 agreement defines "Customer" as the defendant association. Therefore, although "Attachment A" of the latter agreement states that the "facilities" are parties to the pricing "arrangement" and that "payment obligations remain under the same terms as indicated" in the June 2003 agreement, the September 2003 agreement states that it supercedes all prior agreements, including, presumably, the payment obligations set forth in the June 2003 agreement, specifically the provision naming the "Customer" as Jennifer Matthew Nursing Home. Taken alone, the interplay of these provisions creates an ambiguity and inconsistency which is not "irrational" and cannot "reasonably be reconciled" by a court. G & B Photography, Inc. v. Greenberg, 209 A.D.2d 579, 581 (2d Dept. 1994) (citing, Proyecfin de Venezuela, S.A. v. Banco Indus. de Venezuela, S.A., 2d Cir., 760 F.2d 390, 395-396; 3 Corbin, Contracts, § 547, at 172-173 [1960]). Cf., Mundaca Inv. Corp. v. Rivizzigno, 247 A.D.2d 904, 906 (4th Dept.

1998). It is impossible for the court, on the basis of these provisions alone and without reference to extrinsic evidence, to ascertain whether the September 2003 agreement contemplated payment by Jennifer Matthew Nursing Home (as provided for in the June 2003 payment term), or whether the September 2003 agreement intended to supercede that provision by naming the defendant association as the "Customer" in the superceding agreement.

Furthermore, a related ambiguity arises because, although the Association is named as the "Customer" on the face page of the September 2003 agreement, the Attachment, in addition to providing that all payment obligations remain the same, also lists the Jennifer Matthews Nursing Home account number with RG&E (#400) as the one to be charged and billed, the same one listed under the June 2003 agreement. If, as plaintiff contends, the September 2003 agreement superceded the June 2003 agreement as to the entity responsible for payment, then there would be no reason to include or refer to Jennifer Matthews Nursing Home's RG&E account number on the September 2003 agreement. Accepting plaintiff's reading of the September 2003 agreement, and it must be remembered that the drafter of the agreement and attachment was Select, against whom negative inferences must be made, Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 348 (1955) ("that principle is particularly appropriate in this case, where the contract was embodied in a printed form prepared

specifically by plaintiff for its use and where plaintiff itself, by its own . . . [devices], introduced the element of uncertainty into an otherwise clear provision. It would be anomalous if a lessor could, by his own conduct, vary the scope and meaning of a provision of his own formulation to the disadvantage of the lessee.”), would render the RG&E account number provision meaningless. “[A] contract should not be interpreted so as to render any clause meaningless.” RM 14 FK Corp. v. Bank One Trust Co., N.A., 37 A.D.3d 272 (1st Dept. 2007).

Resolution of ambiguities in an agreement is a question for the trier of fact, not the court, State v. Home Indem. Co., 66 N.Y.2d 669, 671 (1985); Williams v. Brosnahan, 295 A.D.2d 971, 973 (4th Dept. 2002); Arrow Communication Laboratories, Inc. v. Pico Products, Inc., 219 A.D.2d 859, 860 (4th Dept. 1995), unless the extrinsic evidence submitted by both parties points only in one direction, as it does here. James v. Jamie Towers Housing Co., Inc., 294 A.D.2d 268, 270-71 (1st Dept. 2002) aff'd, 99 N.Y.2d 639 (2003). See Pezzi v. O'Brien & Gere Inc. of North America, 309 A.D.2d 1295, 1296 (4th Dept. 2003) (only where “the parties introduced *conflicting* extrinsic evidence” is it necessary to submit the issue to the jury) (emphasis supplied); Village of Hamburg v. American Ref-Fuel Co. of Niagara, L.P., 284 A.D.2d 85, 88 (4th Dept. 2001). Moreover, when the proffered interpretation of the contract offered by plaintiff poses

multiple conflicts with other provisions in the contract, as this one does, the matter is also for the court. James v. Jamie Towers Housing Co., Inc., 294 A.D.2d at 270 (because "the alternative reading of the contract advocated by plaintiffs unreasonably creates multiple internal inconsistencies, there is no question of contract construction to be submitted to a jury").

Furthermore, the merger clause does not, in these circumstances, bar admission of extrinsic evidence. The court may consider extrinsic evidence where a term is sufficiently ambiguous, despite the presence of a merger clause. Chocolas Assoc. Ltd. Partnership v. Handelsman, 262 A.D.2d 133 (1st Dept. 1999). "It is a well-established canon of interpretation that in seeking for the intent of the parties the fact that a construction contended for would make the contract unreasonable may be properly taken into consideration." Fleischman v. Furgueson, 223 N.Y. 235, 241 (1918). On the other hand, a court "may not make or vary [a] contract ... to accomplish its notions of abstract justice or moral obligation." Breed v. Ins. Co. of N. Am., 46 N.Y.2d 351, 355 (1978). But to accept plaintiff's reading of this contract would produce "strange, unnatural and unreasonable" results, Fleischman, 223 N.Y. at 241, in which a putative obligor either obligated an entirely separate entity not a party to the contract to substantial financial obligations without any apparent authority (considering the face page of the

agreement), or obligated itself to pay the same substantial financial obligation in exchange for which it received nothing (considering the attachment). "A contract should not be interpreted to produce a result that is absurd (see Tougher Heating & Plumbing Co. v. State of New York, 73 A.D.2d 732, 423 N.Y.S.2d 289), commercially unreasonable (see Elsky v. Hearst Corp., 232 A.D.2d 310, 311, 648 N.Y.S.2d 592; Madison Murray Assoc. v. Perlbinder, 215 A.D.2d 204, 626 N.Y.S.2d 180, lv. denied 88 N.Y.2d 810, 649 N.Y.S.2d 377, 672 N.E.2d 603) or contrary to the reasonable expectations of the parties (see 833 Northern Corp. v. Tashlik & Assoc., P.C., 256 A.D.2d 535, 537, 683 N.Y.S.2d 111)." In re Lipper Holdings, LLC, 1 A.D.3d 170, 171 (1st Dept. 2003).

Nor can the fundamental question whether defendant or the nursing home is the intended obligor be reconciled by reference to the provision on the pre-printed face page of the agreement that it controls in the event of a conflict with the attachment. A clause such as that, applying as it does to contract administration of the substantive agreement between two putative parties, cannot without more "reasonably reconcile" such a basic and overarching issue as the intent of the parties with respect to the proper party to be bound when the balance of the provisions of the contract on that very issue is in multiple and irreconcilable conflict. If this order of precedence clause was

intended to have application to anything more than the described substantive business relationship between obligor and obligee, a clarification of its intended application would naturally be expected before a court reasonably should apply its terms to so rudimentary a question as who, indeed, the parties to the contract were intended to be. Given the setting, "the relation of the parties and the circumstances under which . . . [the agreement] was executed," Kass v. Kass, 91 N.Y.2d at 566; William C. Atwater & Co. v. Panama R. Co., 246 N.Y. at 524, the very real conflict in the contract documents on the issue of which entity was intended to be a party to the contract obligated to pay, and the absence of any specific indication in the writing that the order of precedence clause was intended to apply to such an issue, it would be entirely unreasonable to employ it here as a matter of law to resolve the ambiguity.

Accordingly, extrinsic evidence is admissible, is overwhelmingly and without contradiction supportive of defendant's reading of the contract that the association was not intended as an obligor, and thus requires that plaintiff's motion for summary judgment be denied, and defendant's motion be granted. James v. Jamie Towers Housing Co., Inc., 294 A.D.2d at 270-71. This renders academic the motion to amend.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: May __, 2007
Rochester, New York