HANKIN, SANDMAN,
& PALLADINO
Counsellors-at-Law
A Professional Corporation
30 South New York Avenue
Atlantic City, NJ 08401
(609) 344-5161

Attorneys for Defendant, Cape May County

SOUTH STATE, INC., Plaintiff, v. CAPE MAY COUNTY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-000631-11 Civil Action ORDER

THIS MATTER having been brought before this Court on Motion by James McMahon, Esquire of the law firm of Lewis & McKenna, Attorneys for Plaintiff, South State, Inc., for an Order seeking Summary Judgment and Opposition to said Motion and a Cross Motion for Summary Judgment having been filed by Evan M. Labov, Esquire of Hankin, Sandman & Palladino, Counsellors-at-Law, a Professional Corporation, Attorneys for Defendant, Cape May County; and the Court having reviewed the submissions of Plaintiff and the Opposition and Cross Motion submissions of Defendant and having conducted oral argument; and for good cause having been shown;

IT IS on this 8th day of April, 2013, **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion seeking Summary Judgment be and the same is hereby denied.
2. Defendant's Cross Motion for Summary Judgment is hereby granted.
3. A copy of this Order shall be served on all counsel within seven (7) days.

J. Christopher Gibson, J.S.C. J.S.C.

PAPERS FILED WITH THE COURT: Memorandum of Decision attached

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: Evan M. Labov, Esquire
HANKIN SANDMAN PALLADINO
30 South New York Avenue
Atlantic City, NJ 08401

CASE: South State, Inc. v Cape May County
DOCKET NO. CPM L 631-11

NATURE OF APPLICATION: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

MEMORANDUM OF DECISION ON MOTION

The Complaint was filed on November 18, 2011. The discovery end date was December 10, 2012. The discovery end date was extended once before it expired. Trial is scheduled for May 13, 2013.

The court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

Factual Background

This matter arises out of an alleged breach of contract entered into by Plaintiff South State Construction and Defendant Cape May County to furnish labor and materials for certain improvements to Bayshore Road in Cape May County, New Jersey.

Legal Analysis

Summary Judgment

R. 4:46-2(c), governing motions for summary judgment, provides, in pertinent part, that

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Id. (citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Id. (citations omitted).

In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of

proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

Movant's Position

Plaintiff moves for summary judgment. Essentially, Plaintiff argues that Defendant does not dispute the facts of this case nor does it allege that Plaintiff's work, in accordance with the contract, was faulty or inferior. Therefore, Plaintiff maintains that summary judgment should be granted in Plaintiff's favor.

I. Defendant is required to pay fuel escalation costs as a matter of law.

Plaintiff argues that since August 1990, the New Jersey Department of Transportation has published an index reflecting fluctuations in prices for fuel and asphalt costs. Plaintiff notes that to deal with the drastic rises in asphalt and fuel costs, the New Jersey legislature amended New Jersey's Local Public Contract Law, which governs contracts between contractors and counties to specifically include an escalation provision. Plaintiff maintains that said escalation provision provides that contractors on county projects are to be compensated for both asphalt and fuel price adjustments.

Plaintiff cites the following language from N.J.S.A. 40A:11-16 in support:

> Every bid specification prepared pursuant to this section may be eligible for a fuel price adjustment. Fuel that is eligible for a fuel price adjustment

> shall be the sum of the quantities of the eligible pay items in the contract times the fuel usage facts as determined by the Department of Transportation.

N.J.S.A. 40A:11-16(e)(1). Plaintiff stresses that the legislature conditions "eligibility" for a fuel adjustment upon the Department of Transportation's guidelines; not a county's contract. Plaintiff further cites to a report from the Assembly Housing and Local Government Committee which states in pertinent part, "...it is the committee's understanding that the legislation will, at the outset of the bidding process, clarify and make the costs of certain commodities more predictable for bidders...The amended bill also requires a fuel price adjustment pursuant to the Department of Transportation's rules." In further support of the legislative intent, Plaintiff relies on the Senate Committee statement released on November 23, 2009 which indicates that "the Department of Transportation will specify which pay items listed in a bid specification will be eligible to receive a fuel price adjustment..." Plaintiff stresses that the NJDOT specifications state that "the department will make monthly price adjustments for fuel usage for Items Listed in Table 161.03.01-1" and that the Department will calculate fuel price adjustments based on the monthly pay quantities of listed Items using the fuel usage factors listed in same.

Specifically, Plaintiff notes that among the items includes in this table are (1) Excavation Unclassified, (19) Densely Graded Aggregate, 6' thick, (2) HMA Mill 3'-6' and (21, 22, 23) Asphalt. Plaintiff indicates that it submitted a request payment for the escalations of costs along with the calculation of same per the Local Public Contract Law in the amount of $62,531.10 to Defendant. Plaintiff argues that it is undisputed that the Local Public Contracts Law governs the

contract at issue and it is further undisputed that said Law requires Defendant to pay fuel adjustment in accordance with the NJDOT specifications. As such, Plaintiff requests that judgment be entered in its favor in the amount of $62,531.10.

II. Plaintiff is entitled to interest on its contract balance.

Plaintiff argues that here, there is no dispute that Plaintiff performed and completed all of its work on both Projects. Plaintiff submits that as the total amount remaining due and owing is a liquidated sum, for which Defendant had no legal basis to withhold from Plaintiff for nearly two years now, Plaintiff also seeks interest on the amount. Plaintiff notes that the New Jersey Contractual liability Act specifically holds that the courts can award prejudgment interest on the whole or part of a judgment arising out of or relating to claims for the construction or installation of improvements to real property in accordance with principles of equity. See N.J.S.A. 59:13-8. In further support for the award of interest, Plaintiff points to the New Jersey Prompt Payment Act, N.J.S.A. 2A:30A-1, 2 which holds that interest shall be due and owing on contract balances due from an Owner to a general contractor. As such, Plaintiff argues that it is entitled to interest in the amount of $2,735.00 for judgment in the total amount of $64,266.10.

Defendant's Opposition and Cross-Motion

Defendant opposes Plaintiff's motion for summary judgment and also cross-moves for judgment in its favor. Essentially, Defendant argues that the plain language of the law upon which Plaintiff relies can only be read as not requiring payment for escalation in fuel prices.

I. Summary judgment should be granted in favor of Defendant on the construction of N.J.S.A. 40A:11-16 because it presents a pure question of law and the plain language and legislative history establish that Defendant's interpretation is correct.

Defendant agrees that the Local Public Contracts Law, N.J.S.A. 40A:11-1, *et seq.* governs the instant contract between New Jersey counties and private contractors and therefore, governs the instant contract. Defendant further agrees that in 2009, the New Jersey Legislature amended the LPCL to address the manner in which contractors were to be compensated for certain price fluctuations; particularly fluctuations in asphalt and fuel prices. Defendant maintains that whether this amendment requires or simply permits a fuel price adjustment for contracts entered into under the LPCL is a question of law appropriate for disposition by summary judgment.

Defendant argues that the clearest indication of a statute's meaning is its plain language. In respect to N.J.S.A. 40A:11-1. Defendant notes that in respect to N.J.S.A. 40A:11-16, the legislature made two things clear: 1) all contracts under the LPCL "shall include," where applicable, a price adjustment for asphalt, N.J.S.A. 40A:11-16(d); and 2) under certain circumstances a contract "shall not" include a price adjustment for fuel prices, N.J.S.A. 40A:11-16(e). As such, Defendant submits that the statute establishes that a price adjustment for asphalt must always be included in a contract and that under certain circumstances a price adjustment for fuel must not be included.

Defendant argues that the missing element required to support Plaintiff's position is a provision requiring the inclusion of fuel price adjustments in all contracts. Defendant notes that the statute uses a permissive phrasing when

describing the inclusion of fuel price adjustments: "may be eligible for a fuel price adjustment..." N.J.S.A. 40A:11-16(e)(1). Defendant submits that the Legislature undoubtedly indicated the ability to require the inclusion in all contracts of a price adjustment for a material. Specifically, Defendant points to the mandatory language of asphalt which states "shall include a pay item for any asphalt price adjustment." Defendant argues that the legislature purposely did not use such mandatory language for fuel and thus, the only inference that can be drawn from the plain language of the statute is that the Legislature did not intent to require counties to include a pay item for eligible fuel price adjustments.

Moreover, Defendant maintains that Plaintiff has attempted to shift focus from the obvious meaning of the statutory language by relying on the May 7, 2009 committee report of the Assembly Housing and local Government Committee. Defendant submits, however, that the May 7, 2009 committee report addresses a draft of the bill reported by the committee that is entirely different than the bill eventually passed. Defendant acknowledges that that version of the bill would fully support Plaintiff's position if it had become law as it stated, "every bid specification prepared pursuant to [N.J.S.A. 40A:11-16] that has pay items that are eligible for a fuel price adjustment, pursuant to the most recent edition of the New Jersey Department of Transportation Standard Specifications for Road and Bridge Construction shall include a pay item for fuel price adjustment." Defendant argues that the above is the exactly language the Legislature would have used had it intended to require counties to include a fuel price adjustment for eligible items. Defendant, however, stresses it was not the language ultimately adopted. Because both the plain language and legislative history of N.J.S.A.

40A:11-16 establish that the statute does not require payment for fuel price adjustments, Defendant argues that summary judgment is appropriate in its favor.

II. Summary judgment is inappropriate on Defendant's liability because disagreements of material fact relevant to Defendant's affirmative defenses remain.

If the Court grants summary judgment to Plaintiff on the question of statutory interpretation, Defendant argues that the Court should nonetheless refrain from granting summary judgment in favor of Plaintiff as to Defendant's liability. Defendant argues that even if the Court agrees with Plaintiff's interpretation of N.J.S.A. 40A:11-16, Defendant has raised affirmative defenses that present genuine issues of material fact which would preclude a grant of summary judgment in Plaintiff's favor.

Specifically, Defendant maintains that Plaintiff breached its contractual obligations in failing to immediately notify Defendant of Defendant's failure to include fuel escalation as a pay item as it was required to do under subsection 102.04 of the Special Provisions. Defendant states that instead, Plaintiff waited until work was substantially completed before it notified Defendant of its intent to seek payment for fuel price escalation. Defendant argues that a material breach of contract by one party to a contract may excuse the further performance of the other party to the contract. Further, Defendant maintains that Plaintiff is equitably estopped from asserting its claims based on the failure to assert them at an earlier time as required by the provisions of the contract. Therefore, Defendant argues that even if the Court grants summary judgment in favor of

Plaintiff on the statutory construction issue, summary judgment is inappropriate on Defendant's liability.

III. Summary judgment is inappropriate on Plaintiff's damages because disagreements of material fact relevant to the calculation of damages remain.

Defendant notes that it is undisputed that NJDOT corrected typographical errors in its table as they relate to fuel price adjustment. To the extent that NJDOT specifications controlled the contract, Defendant maintains that it was the intention of the contract that corrections and revisions to those specifications become part of the contract. Relying on Celanese Ltd. v. Essex County Improvement Authority, 404 N.J. Super. 514, 528 (App. Div. 2009), Defendant maintains that although interpretation of a contract is a question of law for the court, summary judgment is not appropriate where there is uncertainty, ambiguity, or the need for parol evidence in aid of interpretation. Based on Plaintiff's asserted damages figures, Defendant contends that there can be no doubt that there is substantial disagreement about the intentions of the parties and the contract itself. As such, Defendant requests this Court dismiss Plaintiff's motion for summary judgment. Defendant further requests this Court grant its cross-motion for summary judgment.

Plaintiff's Reply

In reply, Plaintiff argues as follows: 1) N.J.S.A. 40A:11-16 requires a fuel price adjustment; 2) summary judgment is required as to liability as no genuine issues of material fact exist; and 3) Defendant's attempt to generate an issue of fact under the guise of contractual interpretation fails as a matter of law.

I. N.J.S.A. 40A:11-16 requires a fuel price adjustment.

Plaintiff notes that in the entirety of its opposition, Defendant has chosen only to reference the first sentence of the relevant statute which contains permissive phrasing. Plaintiff maintains, however, that this neglects the second sentence, which modifies the first, and states that "fuel that is eligible for a fuel price adjustment shall be the sum of the quantities of the eligible pay items in the contract times the fuel usage factors..." Plaintiff therefore argues that the thrust of the statute is clear: in order to obtain a fuel price adjustment, a contractor must first be "eligible" for the adjustment. Relying on N.J.S.A. 40A:11-16, Plaintiff submits that eligibility is conditioned upon the criteria found in N.J.S.A. 40A:11-16(2)(2) which states:

> (2) the fuel requirement for items not determined by the Department of Transportation to be eligible, and for pay items in the bid specifications calling for less than 500 gallons of fuel, shall not be eligible for a fuel price adjustment. If more than one pay item has the same nomenclature but with different thicknesses, depths, or types, each individual pay item must require 500 gallons or more of fuel to be eligible for a fuel price adjustment. If more than one pay item has the exact same nomenclature, similar pay items shall be combined and this combination must require more than 500 gallons or more of fuel to be eligible for the fuel price adjustment.

Plaintiff states that it acknowledges these qualifications and only seeks those increased costs with meet the eligibility requirement of N.J.S.A. 40A:11-16. Plaintiff indicates that for those "eligible" fuel costs, the plain language of the statute requires that the "fuel adjustment shall be the sum of the quantities of the eligible pay items in the contract times the fuel usage facts." Plaintiff reiterates that the legislative history supports Plaintiff's interpretation of the statute.

Plaintiff notes that even Defendant agrees that that the report favors Plaintiff's position. While Plaintiff acknowledges that the final legislation differs from the earlier amended draft, Plaintiff argues that there is nothing to support Defendant's assertion that the legislature's intent was not to require payment for fuel price adjustments. Plaintiff also points to the Committee Notes from November 23, 2009 session, commenting on the version of the bill which was eventually passed by the Legislature, in support. Plaintiff argues that as evidenced by the Committee Notes and statutory language, the legislature intended the Department of Transportation, not the county, to determine which items would receive a pay adjustment. Plaintiff maintains that if the Legislature had intended to permit counties to exclude fuel price adjustments from its contracts, N.J.S.A. 40A:11-16 would be completely unnecessary.

Plaintiff reiterates that if permissive, there would be no need for the statute to contain a quantities minimum or a minimum 5% fuel escalation in a given month, for the escalation provisions to apply. Plaintiff submits that if the statutory structure was permissive, the County could simply provide escalation if and when it saw fit.

2) Summary judgment is required as to liability as no genuine issues of material fact exist.

Plaintiff argues that Defendant's allegations that Plaintiff breached its contractual obligations are disingenuous and contrived. Plaintiff notes that Defendant, in opposition, claims to have been damaged by Plaintiff's delay in submitting fuel price escalation claims. Recognizing that Defendant fails to point

to any particular provision in the contract, Plaintiff surmises that Defendant intends to rely on the following provision:

> If conditions of the Project Limits are inconsistent with the contract or there are discrepancies, errors, omissions or ambiguities within the Contract, the Bidder shall immediately notify the Department as specified in 101:04.

Plaintiff argues that the above section is wholly inapplicable in that it refers to "errors" in the Contract. Plaintiff submits that it does not contend that there was an error in the Contract. Plaintiff argues that to the extent this provision is enforceable at all, it is inapplicable as no party has alleged that the Contract contains an error.

Plaintiff reiterates that the Legislature has deemed that fuel and asphalt escalation shall be part of all contracts under the New Jersey Public Contract Law. Plaintiff maintains that a review of the testimony before the legislature, even post-amendment, reveals the discussion is always in regard to asphalt and fuel adjustments in conjunction with each other. In further support, Plaintiff points to the New Jersey League of Municipalities (the "League") testimony. Plaintiff maintains that in said testimony, asphalt and fuel are discussed together and not as being conditional.

3) Defendant's attempt to generate an issue of fact under the guise of contractual interpretation fails as a matter of law.

Plaintiff notes that in an attempt to manufacture some issue of fact, Defendant has set forth an alleged correction. Plaintiff maintains that this is nothing more than a desperate attempt to create a factual dispute. Plaintiff notes, however, that the document at issue was a Baseline Document Change issued not by Defendant by but the NJDOT. Plaintiff argues that said document was issued

on June 17, 2011: nine months after the Project was bid and a binding contract was executed between Defendant and Plaintiff. Plaintiff argues that as this document did not exist when the agreement was entered into between the parties, it could not be part of the terms of said agreement as a matter of law.

Moreover, Plaintiff submits that the face of the document itself explicitly states that it is not for retroactive application. Plaintiff reiterates that this contract had already been advertised for bid, executed, and performed prior to the creation of the NJDOT change. Plaintiff maintains that the change itself was for future contracts in design and not for ongoing projects. Because the document change was not incorporated into the Contract by Defendant, either by addendum or change order, Plaintiff asserts there is no evidence that this document was incorporated into the Contract at issue and, as it did not exist at the time of formation, its incorporation could not have been the intention of either party. As such, Plaintiff requests this Court deny Defendant's cross-motion for summary judgment and grant judgment in its favor as a matter of law.

Discussion

Plaintiff seeks judgment in its favor in the amount of $62,531.10 for fuel escalations. Defendant opposes Plaintiff's motion and cross-moves for judgment in its favor. As a threshold matter, both parties concede that the instant contract is government the Local Public Contracts Law, N.J.S.A. 40A:11-1. Therefore, the issue before this Court on the instant motion is whether said law requires Defendant to pay fuel escalations.

The Court agrees with the parties that the "clearest indication of a statute's meaning is its plain language." G.S. Dep't of Human Servs., 157 N.J. 161, 172

(1999). It is axiomatic that a court is to first consider the plain language of a statute, and only where there is ambiguity should it turn to extrinsic materials. See State v. Bard, 415 N.J. Super. 455, 466 (App. Div. 2010). Where the text of a statute is unambiguous, the statue should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from the language. Id.

Therefore, the Court will, as the parties did, begin with the language of the statute. N.J.S.A. 40A:11-16(e) states as follows:

> (1) Every bid specification prepared pursuant to this section may be eligible for a fuel price adjustment. Fuel that is eligible for a fuel price adjustment shall be the sum of the quantities of the eligible pay items in the contract times the fuel usage factors as determined by the Department of Transportation. The types of fuel furnished shall be at the option of the contractor.
>
> (2) The fuel requirement for items not determined by the Department of Transportation to be eligible, and for pay items in the bid specifications calling for less than 500 gallons of fuel, shall not be eligible for a fuel price adjustment. If more than one pay item has the same nomenclature but with different thicknesses, depths, or types, each individual pay item must require 500 gallons or more of fuel to be eligible for a fuel price adjustment. If more than one pay item has the exact same nomenclature, similar pay items shall be combined and this combination must require 500 gallons or more of fuel to be eligible for the fuel price adjustment.
>
> (3) Fuel price adjustments shall not be made in those months for which the monthly fuel price index has changed by less than five percent from the basic fuel price.

Defendant argues that based on the permissive language used in N.J.S.A. 40A:11-16(e)(1) ("may be eligible") in conjunction with mandatory language used in N.J.S.A. 40A:11-16(d)'s reference to the asphalt price adjustment ("shall include a pay item)," that the statute does not require counties to include a pay item for eligible fuel price adjustments. Plaintiff acknowledges these

qualifications and only seeks those increased costs with meet the eligibility requirement of N.J.S.A. 40A:11-16.

Although both parties rely in large part on legislative intent, the need for legislative elucidation is superfluous where no ambiguity exists on the face of the statute. In other words, the Court finds the plain meaning not reasonably susceptible to differing interpretations such that extrinsic evidence is necessary. N.J.S.A. 40A:11-16(e)(1) states that every bid specification prepared pursuant to this section "may be eligible" for a fuel price adjustment.

The Court finds the plain language of the statute sufficiently clear. While the legislative intent is helpful it is not needed to interpret the statutory language. The plain meaning is clear, "every bid specification...may be eligible for a final price adjustment." The next sentence reads, in part, "fuel that is eligible for a fuel price adjustment shall be the sum of the quantities..." The word shall is mandatory but when used here only mandatory in the exercising of calculating the fuel price adjustment if appropriate. This is further supported by the difference in statutory language regarding asphalt where the language clearly requires an adjustment.

In addition to the statutory language, the contract language supports the Defendant's argument. Exhibit C to the County Engineer's certification includes page 37 of the contract, specifically Section 160, dealing with price adjustments. Section 160 is titled Price Adjustments and discusses only adjustments for asphalt not fuel. This is significant for two reasons: first, the contract does not mention any adjustment for fuel and second, the County incorporated an adjustment section for asphalt where the statute requires it and no adjustment

for fuel where the statutes language is permissive in nature and not mandatory. In other words, the language of the contract is consistent with the statute and contradicts the Plaintiff's position that a fuel adjustment is mandatory.

For the Court to find otherwise it would have to ignore the contract the parties signed. If Plaintiff believes asphalt and fuel price adjustments to be mandatory, it signed an agreement only calling for an asphalt adjustment. There are no facts in the record to contradict this fact. Both the statute and the contract are sufficiently clear and are both interpreted by the Court in favor of the Defendant.

Accordingly, this Court finds no genuine issue as to any material fact exists on the issue of fuel price adjustment and that Defendant is entitled to judgment as a matter of law. Defendant's motion is granted, Plaintiff's motion is denied.

Conclusion

The cross-motions for summary judgment are opposed. Defendant is entitled to the relief sought pursuant to R. 4:46-2(c), the standards enunciated in Brill, and N.J.S.A. 40A11-16. Defendant motion is granted. Plaintiff's-motion is denied.

An appropriate form of Order has been executed. Conformed copies of that Order will accompany this Memorandum of Decision.

April 5, 2013

J. Christopher Gibson, J.S.C.