

Matter of V.C. Vitanza Sons, Inc. v City of New York
2010 NY Slip Op 31962(U)
July 22, 2010
Sup Ct, NY County
Docket Number: 600705/10
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 600705/2010
V.C VITANZA SONS, INC.
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

UNFILED JUDGMENT

Answering Affidavits — Exhibits _____
Replying Affidavits _____

~~This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room~~

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Motion sequence 001 and 002 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the application of Petitioner V.C. Vitanza Sons, Inc. under motion sequence 001, for a judgment under Article 78 of the CPLR (1) annulling the purported determination of respondent New York City Department of Sanitation which purportedly assessed petitioner \$31,000.00 in Liquidated Damages under City Contract No. 20040014885, Rehabilitation of Brooklyn 14 Garage, 356 Winthrop Street, since said determination was arbitrary and capricious and an abuse of discretion; or, in the alternative (2) compelling Sanitation to consider the Notice of Dispute of petitioner and provide a detailed response to same, is denied in its entirety; and it is further

ORDERED and ADJUDGED that the cross motion of Respondent The City of New York and the New York City Department of Sanitation under motion sequence 002 to dismiss the petition pursuant to CPLR §§ 7804(f) and 3211(a)(1), (a)(5), (a)(7), and (a)(8) on the grounds that (I) petitioner's claim is barred by the applicable four-month statute of limitations set forth in CPLR § 217(1); (ii) to the extent petitioner asserts that its claim is subject to dispute resolution, this proceeding is time-barred; (iii) should petitioner's claim be concerted into a plenary action, the action would be time-barred under the contract; and (iv) Sanitation is not a suable entity, is granted on statute of limitations grounds and the instant Petition is dismissed, with prejudice and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for petitioner.

Dated: 7/22/10



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

_____ x
In the Matter of the Application of

Index No. 600705/10

V. C. VITANZA SONS, INC.,

DECISION/ORDER

Petitioner

For a Judgment under Article 78 of the
Civil Practice Law and Rules

-against-

THE CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF SANITATION,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
144B).

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner V.C. Vitanza Sons, Inc. (petitioner) under motion sequence 001, moves for a judgment under Article 78 of the CPLR (1) annulling the purported determination of respondent New York City Department of Sanitation (Sanitation) which purportedly assessed petitioner \$31,000.00 in Liquidated Damages under City Contract No. 20040014885, Rehabilitation of Brooklyn 14 Garage, 356 Winthrop Street, since said determination was arbitrary and capricious and an abuse of discretion; or, in the alternative (2) compelling Sanitation to consider the Notice of Dispute of petitioner and provide a detailed response to same.

Respondent The City of New York (the City) and Sanitation under motion sequence 002¹ cross move to dismiss the petition pursuant to CPLR §§ 7804(f) and 3211(a)(1), (a)(5), (a)(7), and (a)(8) on the grounds that (I) petitioner's claim is barred by the applicable four-month statute

¹ Motion sequence 001 and 002 are consolidated for joint disposition.

of limitations set forth in CPLR § 217(1); (ii) to the extent petitioner asserts that its claim is subject to dispute resolution, this proceeding is time-barred; (iii) should petitioner's claim be concerted into a plenary action, the action would be time-barred under the contract; and (iv) Sanitation is not a suable entity.

Background

On or about November 31, 2003, petitioner was awarded a construction contract (the "Contract") in the amount of \$234,000.00. The date for the commencement of all work relative to the Project was February 2, 2004, and the time for completion was January 31, 2005, a total of 365 consecutive calendar days. The Contract was to furnish all labor and material necessary and required for the Rehabilitation of Brooklyn 14 Garage Facility at 356 Winthrop Street (the "Project"). The Contract provides that Sanitation shall assess liquidated damages in the event that petitioner fails to complete the Project within the allotted time.² Schedule A of the General Conditions, referenced in Article 15.1, provides that liquidated damages is in the amount of "\$500 Dollar[s] for each consecutive Calendar Day, or fraction thereof, for failure to complete all contract work by Calendar Day number 365 until all Contract Work is complete." Sanitation determined that petitioner caused 62 days of delay; 48 days from March 30, 2005 to May 16,

² Article 15. Liquidated Damages

15.1 In the event the Contractor fails to complete the Work within the time fixed for such completion in Schedule A of the General Conditions, plus authorized time extensions, or if the Contractor, in the sole determination of the Commissioner, has abandoned the Work, the Contractor shall pay to the City the sum fixed in Schedule A of the General Conditions, for each and every Day that the time consumed in completing the Work exceeds the time allowed therefor, which said sum, in view of the difficulty of accurately ascertaining the loss which the City will suffer by reason of delay in the completion of the Work hereunder, is hereby fixed and agreed as the liquidated damages that the City will suffer by reason of such delay, and not as a penalty. This article shall apply to the Contractor if it is defaulted pursuant to Chapter X of this Contract. Neither the failure to assess liquidated damages nor the granting of any time extension shall operate as a waiver or release of any claim the City may have against the Contractor for either actual or liquidated damages.

2005 and 14 days from July 5, 2005 to July 18, 2005. Accordingly, Sanitation would deduct \$31,000 of liquidated damages (62 days of delay at \$500 per day) from later payments to petitioner.

According to petitioner, as a result of delays to the Project which were not attributable to petitioner, petitioner requested four extensions which were approved by the respondents.

Petitioner submitted its requisition for payment #6 on November 14, 2005. Respondents assert that in a handwritten letter dated November 15, 2005, Sanitation notified petitioner that \$31,000 would be deducted for liquidated damages and set forth the basis for this determination. The letter indicates that \$29,268.98 of the \$31,000 of liquidated damages would be deducted from payment #6 and the balance, \$1,731.02 would be deducted from the substantial completion payment.

Accordingly, Sanitation withheld \$29,268.98 from payment #6 on December 6, 2005. In a second letter dated May 22, 2006, Sanitation informed petitioner that the balance of the liquidated damages, \$1,731.02 would be deducted from the substantial completion payment. In connection with the substantial completion payment, Sanitation withheld \$1,731.02 on August 11, 2008.

Sanitation issued a written Final Acceptance of the petitioner's work pursuant to the Contract on or about March 19, 2009.

On or about September 1, 2009, petitioner purported to challenge the liquidated damages assessment by submitting a Notice of Dispute to the Commissioner of Sanitation. In a letter dated November 20, 2009, Sanitation advised petitioner that its dispute is not subject to the dispute resolution provisions of the Contract.

Petitioner commenced this proceeding on March 19, 2010.

Petitioner's Contentions

Section 27.1.2 of the Contract requires that Sanitation issue a complete response to the Notice of Dispute. Neither the purported imposition of liquidated damages nor the allegations of contract delays/inefficiencies fall within the ambit of Section 27.1.1. Further, the City's suggestion that in lieu of filing a Notice of Dispute, petitioner may file a claim with the Comptroller is misplaced.

Respondents' Contentions

At the latest, petitioner should have commenced a proceeding challenging the assessment of liquidated damages no later than December 11, 2008 - four months after the balance, \$1,731.02 of the liquidated damages were deducted from the substantial completion payment on August 11, 2008.

Article 56 of the Contract states, in relevant part:

56.2.1 Any claims arising out of events occurring after the date the commissioner issues a Certificate of Substantial Completion and before Final Acceptance of the Work *shall be asserted within six (6) months of Final Acceptance of the Work.* (emphasis added)

56.2.2 Any claims for monies deducted, retained or withheld under the provisions of the Contract *shall be asserted within six (6) months after the date when such monies becomes due and payable hereunder...* (emphasis added)

Petitioner failed to commence a breach of contract claim under Article 56 within six months of Final Acceptance or by September 19, 2009.

Additionally, petitioner failed to commence an action under Article 56 for the monies deducted under liquidated damages within six months of when such monies became due and

payable. Payment #6 became due and payable on December 6, 2005 and the substantial completion payment became due and payable on August 11, 2008. Under the Contract, petitioner should have asserted its claim by June 6, 2006 - six months from December 6, 2005 or at the latest by February 11, 2009 - six months from August 11, 2008.

On or about September 1, 2009, more than three years from the November 15, 2005 assessment letter and over a year beyond the \$1,731.02 liquidated damages deduction from the substantial completion payment, petitioner submitted a Notice of Dispute to the Commissioner of Sanitation, challenging the liquidated damages assessment.

Under Article 27.4.1 of the Contract and §4-09(d)(1) of the Procurement Policy Board Rules (9 RCNY §4-09(d)(1), "the Contractor shall present its dispute in writing ('Notice of Dispute') to the Commissioner within thirty (30) days of receiving written notice of the determination or action that is the subject of the dispute."

In a letter dated November 20, 2009, Sanitation advised petitioner that its dispute is not subject to the dispute resolution provisions of the Contract.

Petitioner's Opposition to the Cross Motion

Petitioner denies ever receiving notification from either Sanitation or any other entity that liquidated damages were being assessed against petitioner since the date petitioner received a copy of correspondence sent by Sanitation to petitioner's attorneys dated April 28, 2008 advising that liquidated damages had not been assessed against petitioner. And, if Sanitation attempted to assert liquidated damages, it would be inappropriate as any delays were not the fault of petitioner. Petitioner has never received notification of final acceptance of the Project from Sanitation in accordance with Article 2.1.17 of the Contract.

The purported notice that the liquidated damages assessment became final and binding on petitioner "on or about November 15, 2005," is based solely on a handwritten unsigned single-paged document which purports to summarize liquidated damages. This cannot possibly constitute adequate notice.

Most notably, however, respondents' argument is contradicted by correspondence dated April 29, 2008 from Danny Walsh and directed to petitioner's counsel indicating that no liquidated damages have been assessed against petitioner and would not be until the Comptroller is finished with its review. To date, neither petitioner's counsel nor petitioner has received notification from the Comptroller that it has completed its review.

Further, respondents have not demonstrated why petitioner's sole avenue of recourse would have been to commence a breach of contract action, as Article 27 of the Contract and §93(I) of the City Charter describe the dispute resolution process, and respondents have failed to set forth any basis as to why petitioner should be precluded from following those respective avenues to seek relief.

Respondents' Reply

Petitioner introduces a letter dated April 29, 2008 sent by Sanitation to petitioner's attorneys. This letter was sent by Sanitation in response to petitioner's inquiry regarding the status of the Certification for Estimate for Partial Payment #7. In the April 29th letter, Sanitation cited various dates and events to explain the delay in processing the Substantial Completion Payment Request. Sanitation then stated, "[a]s a result of the foregoing, your client's request for a time extension as well as the Substantial Completion Payment is being reviewed at the Comptroller's office, as would happen with any contractor in a similar situation. No Liquidated

Damages have been assessed against your client and won't be until the Comptroller is finished with its review." In paragraph 11 of the Wolf affidavit, petitioner claims that it has never received notification that the Comptroller completed its review of the Substantial Completion Payment request and final time extension request. Petitioner further claims it has never received notification from Sanitation or the Comptroller that liquidated damages were imposed against petitioner. Petitioner is mistaken.

The April 29, 2008 letter that petitioner uses to support these claims was sent on or about April 29, 2008 to petitioner's attorney. Two months later, in a facsimile dated June 27, 2008, Sanitation notified petitioner that the substantial completion payment and final time extension were approved, which included the handwritten assessment of liquidated damages for 62 days of delay for which petitioner was responsible. The approved final time extension and assessment of liquidated damages was signed by the Comptroller's office on June 27, 2008.

It cannot be disputed that petitioner received notification that the Comptroller finished its review and that liquidated damages were assessed for 62 days. Petitioner acknowledged receipt of the June 27, 2008 approved final time extension and assessment of liquidated damages. On the second page, the notation "Rec'd V.C.V.S, Inc. 6/27/08" and initials appear on the top right corner. This handwritten notation by petitioner clearly demonstrates that it received the assessment of liquidated damages. Moreover, in a facsimile dated June 27, 2008, Louis Vitanza, on behalf of petitioner, acknowledged to Sanitation that it received the approved final time extension and assessment of liquidated damages.

For petitioner to state that it never received notification that liquidated damages were being assessed is disingenuous at best because petitioner acknowledged receiving the approved

final time extension, which included the assessment of liquidated damages.

Analysis

An Article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes “final and binding upon the petitioner” (*Yarbough v Franco*, 95 NY2d 342 [2000]; CPLR §217[1]; *New York State Assn. of Counties v Axelrod*, 78 NY2d 158 [1991]). An administrative determination becomes “final and binding” when the petitioner seeking review has been aggrieved by it. An administrative action is not final and binding within the contemplation of CPLR §217 until it “has its impact” upon the petitioner (*Bludson v Popolizio*, 166 AD2d 346, 347 [1st Dept 1990], citing *Matter of Edmead v McGuire*, 67 NY2d 714 [1986]). The statute of limitations does not begin to run until the petitioner receives notice of the determination (*Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]).

Viewing this in the light most favorable to petitioner, at the latest, on August 11, 2008, petitioner was aware of the liquidated damages assessment. While petitioner’s time to challenge the assessment of liquidated damages could have begun on June 27, 2008 - the day it received the approved final time extension and assessment of liquidated damages, petitioner was aware, at the very latest of the assessment of liquidated damages on August 11, 2008 - the day the balance of the liquidated damages, \$1,731.02, was withheld from the Substantial Completion Payment. The proceeding was commenced on March 19, 2010 and therefore is untimely under CPLR §217 as more than four months passed from either June 27, 2008 or August 11, 2008.

Even assuming arguendo that the dispute resolution provision under Article 27 of the Contract and the Procurement Policy Board Rules applies to the assessment of liquidated

damages, then this proceeding cannot be maintained because petitioner failed to timely submit its Notice of Dispute. Under Article 27.4.1 of the Contract and §4-09(d)(1) of the Procurement Policy Board Rules (9 RCNY §4-09(d)(1)), “the Contractor shall present its dispute in writing (“Notice of Dispute”) to the Commissioner within thirty (30) days of receiving written notice of the determination or action that is the subject of the dispute.” Petitioner submitted its Notice of Dispute to Sanitation on September 1, 2009, more than three years from the November 15, 2005 assessment letter and over a year beyond the deduction from the substantial completion payment on August 11, 2008.

Conclusion

Based on the foregoing, it is hereby

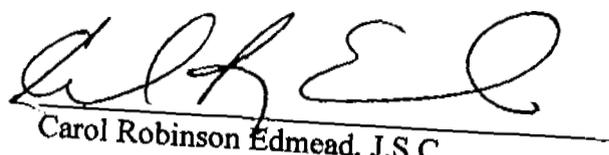
ORDERED that the application of Petitioner V.C. Vitanza Sons, Inc. under motion sequence 001, for a judgment under Article 78 of the CPLR (1) annulling the purported determination of respondent New York City Department of Sanitation which purportedly assessed petitioner \$31,000.00 in Liquidated Damages under City Contract No. 20040014885, Rehabilitation of Brooklyn 14 Garage, 356 Winthrop Street, since said determination was arbitrary and capricious and an abuse of discretion; or, in the alternative (2) compelling Sanitation to consider the Notice of Dispute of petitioner and provide a detailed response to same, is denied in its entirety; and it is further

ORDERED and ADJUDGED that the cross motion of Respondent The City of New York and the New York City Department of Sanitation under motion sequence 002 to dismiss the petition pursuant to CPLR §§ 7804(f) and 3211(a)(1), (a)(5), (a)(7), and (a)(8) on the grounds that (I) petitioner’s claim is barred by the applicable four-month statute of limitations set forth in

CPLR § 217(1); (ii) to the extent petitioner asserts that its claim is subject to dispute resolution, this proceeding is time-barred; (iii) should petitioner's claim be concerted into a plenary action, the action would be time-barred under the contract; and (iv) Sanitation is not a suable entity, is granted on statute of limitations grounds and the instant Petition is dismissed, with prejudice and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for petitioner.

Dated: July 22, 2010



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMOAD

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).