

Mezzacappa Bros., Inc. v City of New York

2004 NY Slip Op 30017(U)

October 6, 2004

Supreme Court, New York County

Docket Number: 0107566/2002

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

MEZZACAPPA BROS., INC.,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

INDEX NO. 107566/2002

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that:

Motion is decided in accordance with the accompanying decision and order.

FILED
OCT 18 2004
CLERK OF THE COURT

Dated: October 18, 2004

KARLA MOSKOWITZ J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

-----X
MEZZACAPPA BROS., INC.,

Plaintiff,

Index No. 107566/2002

-against-

DECISION & ORDER

THE CITY OF NEW YORK,

Defendant.

-----X
KARLA MOSKOWITZ, J:

Defendant moves: (1) pursuant to CPLR 3025 (b), for leave to amend its answer to add an affirmative defense based upon the Statement of Claims provision of the parties' contract; (2) pursuant to CPLR 3212, for summary judgment and (3) alternatively, pursuant to CPLR 3211, to dismiss plaintiff's third cause of action for failure to state a cause of action and lack of subject matter jurisdiction.

This action arises out of Contract No. RED-348 that the plaintiff Mezzacappa Bros., Inc. (Mezzacappa) and the defendant The City of New York (the City), entered into in June 1995 for the installation of water mains in various locations in Staten Island and other Boroughs (the Contract). The Contract was for a one-year period, and was only for the City's needs during that period. Work was to begin on August 24, 1995 and was to end on August 23, 1996. The City granted two time extensions, the first from August 23, 1996 to April 1, 1997, and the second from April 2, 1997 to May 2, 1997. After the May 2, 1997 date, the City rescinded any remaining work orders.

Mezzacappa asserts five causes of action in the complaint. In its first cause of action, Mezzacappa seeks interest in the amount of \$42,104.66 for the City's alleged late issuance of

progress payments. The second cause of action seeks interest in the amount of \$10,246.50 for the City's alleged failure to reduce, in a timely fashion, the retainage withheld for certain work. The third cause of action is for loss of anticipated profits in the amount of \$2,317,241.83; the fourth cause of action seeks payment for extra work in the amount of \$11,235.0 and the fifth cause of action requests interest in the amount of \$75,020.58 for the City's alleged delay in issuing the final payment.

The City first requests leave to amend its answer to include a proposed eleventh affirmative defense that Mezzacappa cannot prosecute this action due to its failure to serve a verified statement of claim on the New York City Comptroller within 40 days after the mailing of the final Contract payment, Article 44 of the parties' contract required. Article 44 of the Contract, entitled "Acceptance of Final Payment," provides, in pertinent part as follows:

The Contractor, however, shall not be barred from commencing an action for breach of contract under this provision provided that a detailed and verified statement of claim is served upon the Contracting agency and Comptroller not later than forty (40) days after the mailing of such final payment. The statement shall specify the items upon which the claim will be based and any such claim shall be limited to such claim items.

(Speilberg Aff., Ex. A).

Pursuant to CPLR 3025 (b), leave "shall be freely given upon such terms as may be just . . ." Where, as here, no prejudice will result in allowing the amendment, leave is to be freely granted (Edenwald Contracting Co., Inc. v City of New York, 60 NY2d 957, 959; see also Murray v City of New York, 43 NY2d 400).

The City next moves for summary judgment dismissing the complaint because Mezzacappa did not comply with Article 44, as well as another provision of the Contract

regarding service of statement of claims. Article 54 of the Contract, entitled "Claims and Actions Thereon," provides in relevant part that:

No claim against the City for damages for breach of Contract or compensation for extra work shall be made or asserted in any action or proceeding at law or in equity, unless the Contractor shall have strictly complied with all requirements relating to the giving of notice and information with respect to such claims as have been herein provided.

(Speilberg Aff., Ex. A).

According to the City, it mailed final payment to Mezzacappa on October 17, 2001. Mezzacappa cashed the final payment on December 5, 2001. The City contends that Mezzacappa did not serve a notice of claim on the Comptroller until January 16, 2001, three months after Mezzacappa received payment and 42 days after Mezzacappa cashed the final payment. Consequently, the City contends that the provisions of Article 44 bars Mezzacappa's claims and that the court should dismiss the complaint.

Mezzacappa counters that, in fact, it submitted a verified statement of claims with a letter to the New York City Department of Design and Construction (the DDC) dated October 8, 1999, wherein Mezzacappa requested a final time extension. Thus, Mezzacappa contends, it submitted its statement of claims well before the time period ending 40 days after mailing of the final payment. Mezzacappa set forth five claims in that verified statement of claims: 1) the Contract balance, that the City subsequently paid through the final payment; 2) interest on late payments (the first cause of action in the complaint); 3) interest on retainage (the second cause of action); 4) extra work (the fourth cause of action); and 5) lost profits (the third cause of action). The only claim the complaint contained that was not set forth in the October 8, 1999 statement of claims

was the fifth cause of action, for interest attributable to the late issuance of the final time extension, and, consequently, the late issuance of the final payment. Mezzacappa asserts that, because the City had not issued the final time extension at that time, it was impossible to calculate that claim and present it in that verified statement of claims.

Mezzacappa further contends that the DDC forwarded Mezzacappa's statement of claims to the Comptroller's office, and that the Comptroller's office at first refused to issue the final payment because it contended that Mezzacappa should not have included all of the claims it did in the verified statement of claims.

Mezzacappa points to Article 42 of the Contract, which provides, in part, as follows:

VERIFIED STATEMENT OF CLAIMS.

The Contractor must also submit with the final requisition a final verified statement of any and all alleged claims against the City, in any way connected with or arising out of this Contract (including those as to which details may have been furnished pursuant to Articles 27 and 28 hereof) setting forth with respect to each such claim the total amount thereof, the various items of labor and materials included therein, and the alleged value of each such item; and if the alleged claim be one for delay, the alleged cause of each such delay, the period or periods of time, giving the dates when the Contractor claims the performance of the work, or a particular part thereof, was delayed, and an itemized statement and breakdown of the amount claimed for each such delay Nothing contained in this Article is intended to or shall relieve the Contractor from the obligation of giving timely notice of claims pursuant to Articles 27 and 28 hereof. The Contractor is warned that unless such claims are completely set forth as herein required, the Contractor upon acceptance of the final payment, pursuant to Article 44 hereof, will have waived any such claims.

(Mezzacappa Aff., Ex. A).

Mezzacappa also relies on the first paragraph of Article 44, providing, in part, that:

The acceptance by the Contractor, or by anyone claiming by or through him, of the final payment . . . shall constitute and operate as a release to the City from any and all claims of, and liability to, the Contractor for anything heretofore done or furnished for or relating to or arising out of this Contract and the work done hereunder. . . excepting a claim, not otherwise waived, which is contained in the verified statement filed with the Contractor's final requisition pursuant to Article 42 hereof.

(Emphasis added; id.).

New York courts have repeatedly required strict compliance with the notice provisions in public contracts, as such provisions are conditions precedent to the pursuit of claims for compensation (see A.H.A. General Const., Inc. v New York City Housing Auth., 92 NY2d 20; Healy/Yonkers/Atlas-Gest v City of New York, 258 AD2d 363; Lasker-Goldman Corp. v City of New York, 221 AD2d 153, 154; Huff Enterprises, Inc. v Triborough Bridge and Tunnel Auth., 191 AD2d 314).

Here, Mezzacappa did not strictly comply with Articles 44 and 54 of the Contract because it never served its statement of claims on the Comptroller and did not verify the statement as required. In addition, Mezzacappa expressly waived any use of that statement of claims for any purpose other than the extension of time it was requesting.

As to the verification, there is merely an acknowledgment by Sam Mezzacappa that the corporate seal affixed to the statement is in fact the corporate seal, and that the order of the Board of Directors of the corporation so affixed it. (Mezzacappa Aff., Ex. B, at D0534). This is insufficient verification in that it does not attest to the truth of the matters asserted. If a notice of claim is required to be verified and it is not, it is proper to dismiss the complaint (see City of New York v Port Authority of New York and New Jersey, 284 AD2d 195; Migrant Properties,

Inc. v Port Authority of New York and New Jersey, 191 Misc 2d 334).

As to the lack of service upon the Comptroller, Mezzacappa contends that because the Comptroller received actual notice through DDC, the notice is sufficient. However, where strict compliance with the terms of a contract are required, deviation from the terms of the contract are not acceptable (see Lasker-Goldman Corp. v City of New York, 221 AD2d 153, supra).

Moreover, the Comptroller did not receive actual notice of the all the claims Mezzacappa has asserted. The fifth cause of action, for interest based upon the lateness of the final payment, did not arise until after issuance of the final payment and was not in the statement of claims.

Finally, along with its request for an extension of time, and its statement of claims, in October 1999, Sam Mezzacappa, as president of Mezzacappa, set forth the following paragraph:

In connection with the application for extension of contract time for performance of Contract RED - 348, we agree that neither the fact of the granting of the application for the extension of time, the papers or records on which it is granted, nor the application itself, shall be referred to or offered in evidence by the undersigned or their attorneys in any action or proceeding between them and the City.

(Mezzacappa Aff., Ex. B, at D0533).

For these reasons, the terms of the Contract preclude Mezzacappa from bringing this action.

In addition, Mezzacappa cannot bring its third cause of action for lost profits, because it has already chosen to assert that claim in another forum. On April 28, 1997, after learning that the City was granting all remaining water main work to another company, Sam Mezzacappa wrote to DDC Commissioner Luis Tormenta demanding that the City acknowledge that the disputed work sites were part of the scope of the Contract, and advising the DDC that if it transferred the work to any other contractor, Mezzacappa would "seek our legal remedies

available to enforce our contractual rights under the contract” (Spielberg Aff., Ex. I, ¶ 21).

Thereafter, on May 1, 1997, Richard Myhre, the Director of Staten Island Construction for DDC, wrote to Mezzacappa advising it, *inter alia*, that “all remaining locations listed under Contract RED 348 have been rescinded, and a new contract RED 349 A, was awarded to Felix Industries, Inc. on March 12, 1997 and registered on April 14, 1997 [which] will supercede FED 348” (Speilberg Aff., Ex. J).

On May 15, 1997, Mezzacappa sent another letter to DDC Commissioner Tormenta, that it termed a “formal Notice of Dispute.” On May 28, 1997, Mezzacappa sent the DDC a “Notice of Dispute Documentation” pursuant to the dispute resolution procedures set forth in Article 51 of the Contract.

Article 51, subdivision 1 of the Contract, entitled Resolution of Disputes, provides that:

1. Any dispute concerning the scope of the work delineated by the contract, the interpretation of contract documents, the amount to be paid for extra work or disputed work performed in connection with the contract, the conformity of the contractor’s work with the contract and the acceptability and quality of the contractor’s work shall be resolved in accordance with this Section of the Contract, and Section 746 of the Rules of the Procurement Policy Board.

(Spielberg Aff., Ex. A).

Thereafter, by letter dated September 12, 1997, the DDC issued its determination, rejecting Mezzacappa’s claim, and stating that:

When new “annual” contracts are registered it is normal practice to transfer the remaining locations from the previous to the new contract. Such transfers have occurred earlier on your projects when Mezzacappa was awarded RE346 in 1994 and when Mezzacappa succeeded itself on two consecutive “annual” contracts (RED 346 and RED 348) in 1995.

(Spielberg Aff., Ex. M). The letter continued that, if Mezzacappa was not satisfied with the decision, it had 20 days to present its claim to the Comptroller, in accordance with Article 51 of the Contract. Mezzacappa did not appeal that decision. Having commenced the alternative dispute resolution procedure set forth in its Contract and having participated in that alternate forum, Mezzacappa cannot now bring the dispute to this court (see eg. Matter of Calisi v CNA Ins. Co., 295AD2d 219; In re of North River Ins. Co [Morgan], 291 AD2d 230; Matter of De Laurentis [Cinematografica De Las Americas, S.A.], 12 AD2d 467, affd 9 NY2d 503).

Accordingly, for the foregoing reasons, it is

ORDERED that the motion by defendant The City of New York, pursuant to CPLR 3025 to amend its answer to assert an affirmative defense based upon Article 44 of the contract is granted, and the answer is deemed so amended; and it is further

ORDERED that part of the motion pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 06, 2004

ENTER:

FILED
OCT 18 2004
 NEW YORK
 COUNTY CLERK'S OFFICE



 J.S.C.