

CAB Associates v City of New York

2005 NY Slip Op 30113(U)

February 9, 2005

Supreme Court, New York County

Docket Number: 0111077/2004

Judge: Faviola Soto

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

PRESENT: FAVIOLA SOTO
J.S.C.
Justice

PART 52

Cab Assoc

INDEX NO. 111077/04

MOTION DATE 11/22/04

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

City of NY

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

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

FEB 15 2005

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: February 9, 2005

FAVIOLA SOTO
J.S.C. *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 52

-----X
CAB ASSOCIATES,

Plaintiff,

-against-

Index No. 111077/2004

CITY OF NEW YORK and CITY OF NEW YORK
DEPARTMENT OF TRANSPORTATION,

DECISION AND ORDER

Defendants.

-----X
HONORABLE FAVIOLA A. SOTO, J.:

This action involves payment disputes over construction delays arising out of a contract between a contractor and the City of New York's Department of Transportation (DOT) for the reconstruction of bridges over the Franklin Avenue shuttle in Brooklyn, New York. Pursuant to CPLR 3211, defendants move to dismiss the complaint on the ground that plaintiff's claims are time-barred. In the alternative, defendants argue that the eighth cause of action should be dismissed in favor of the alternative dispute resolution procedures set forth in the parties' agreement. This action and motion were randomly reassigned to City Part 52 following the November 22, 2004 reference of Justice Richard Lowe III.

BACKGROUND

The following does not appear to be in dispute. Plaintiff CAB Associates entered into a contract dated February 18, 1993 with DOT for rehabilitation of the Sterling Place Bridge, St. John's Place Bridge, and Lincoln Place Bridge. The original contract price was for \$3,262,756.40. The project experienced serious construction delays, and work on the St. John's Place Bridge was deleted from the contract, apparently to avoid further delays. Although the original completion date of the contract was set for March 9, 1996, the contract did not reach

substantial completion until November 26, 1997. Defendants point to a City of New York (City) interdepartmental memo dated April 17, 2001 which indicates that the contract was completed on September 22, 1999; plaintiff states that defendants did not send this memo to it, and otherwise did not so advise it and references the history that follows.

By letters dated January 19, 2000, July 19, 2001, August 17, 2001 and November 21, 2001, plaintiff sends to defendants letters requesting the City's approval for a Final Time Extension, which also included a bill of particulars for claims that plaintiff intended to assert against the City under the terms of the contract. By a letter dated May 9 2002, DOT approved the Final Time Extension. The letter states further states that "(I)n consideration of being granted this extension of time, the contractor agrees to waive all claims he may have arising from this contract except the items of claims which the contractor reserve and are set forth in the attached Bill of Particulars."

Plaintiff submitted a claim dated November 13, 2002 to defendants. By a letter dated January 15, 2004 to the City Comptroller, plaintiff inquired as to the status of plaintiff's claims. On January 21, 2004, plaintiff was mailed a check for \$32,529.37. When plaintiff's attorney again inquired about the status of its claims, the Comptroller's office allegedly informed plaintiff that it was insufficiently staffed, and that the only way for the office to review its claim was for plaintiff to commence a lawsuit.

On July 30, 2004, plaintiff commenced this action. The complaint sets forth nine causes of action. The first six causes of action seek damages for the costs of additional supervision, field office expenses, maintenance and protection of traffic, home office overhead, increased wages, other miscellaneous costs, and overhead and profit for all of those costs. The eighth

cause of action seeks payment for disputed work, and the ninth cause of action is for increased insurance costs.

DISCUSSION

Defendants argue that the complaint is time-barred by application of a four-month limitations period contained in article 53 of the parties' agreement, or by the six-year statute of limitations for breach of contract. If the complaint is not time-barred, defendants argue that the eighth cause of action should be dismissed because the parties also agreed in their contract to resolve that dispute in accordance with the rules of the Procurement Policy Board.

Article 53 of the agreement between plaintiff and DOT states, in pertinent part:

No action shall lie or be maintained against the City by the Contractor upon any claims based upon this Agreement unless such action be commenced within four (4) months after the date of filing in the Office of the Comptroller of the City of the certificate for the final payment¹ hereunder, or within four (4) months of the termination or conclusion of this Agreement, or within four (4) months after the accrual of the Cause of Action, whichever first occurs.

According to defendants, plaintiff's causes of action accrued on the date of substantial completion, which is November 26, 1997.

The Court of Appeals has held that the accrual date for claims for extra work and delay damages is the date of completion of the actual physical work, "even though incidental matters relating to the project remain[] open" (*Phillips Constr. Co. v City of New York* (61 NY2d 949,

¹Defendants allege that final payment occurred on January 21, 2004, which plaintiff disputes. To be clear, defendants' argument here is based on the accrual date of plaintiff's causes of action, not on the date of final payment. In any event, article 53 provides that the limitations period runs from the date of filing of a certificate of final payment, if that date occurs first. The documentary evidence does not indicate when, or if, that certificate was ever filed. Therefore, the date of final payment is irrelevant for the purposes of article 53.

951 [1984]). In most cases, that date is the date of substantial completion of the contract (*see e.g. 645 First Ave. Manhattan Co. v Silhouette Drywall Sys.*, 212 AD2d 394, 396 [1st Dept 1995]).

However, in this case, defendants' internal documents indicate that the contract was not complete until almost two years after the date of substantial completion, which suggests that the remaining open matters on the contract were not incidental.² Therefore, the accrual date of all of plaintiff's claims cannot be fixed solely at the date of substantial completion. To the extent that plaintiff can show that the actual physical work was completed after the date of substantial completion, and that such work was not "incidental," the actual date of completion shall be the accrual date.

Although an interdepartmental memo indicates that the final completion date was September 22, 1999, the documentary evidence does not conclusively establish that the contract was completed on this date. Under the parties' agreement, the date of contract completion is set forth in the certificate of completion and acceptance that is signed by the DOT Commissioner and filed with the City Comptroller's office. Defendants have not submitted that certificate with their papers.

Even assuming that September 22, 1999 is the date of final completion, and the court in this decision does not on this dismissal motion, plaintiff argues that defendants are estopped from enforcing the four month limitations period. Plaintiff claims that defendants' actions and inactions lulled into not filing this lawsuit, given its ongoing communications with the City Comptroller's office and defendants' continued negotiations of the change order work. Contrary to defendants' arguments, a municipality can be estopped from asserting a contractual limitations

²The testimonial evidence that defendants submit in their reply to establish that only incidental matters remained after the substantial completion date cannot be considered on this motion to dismiss.

period (*see Planet Constr. Corp. v Board of Educ. of City of N.Y.*, 7 NY2d 381, 385 [1960]; *Whitler Contr. Co. v New York City Housing Auth.*, 59 AD2d 882, 883 [1st Dept 1977]).

Although defendants argue that their alleged conduct does not rise to the level of estoppel, the arguments raise factual issues that go beyond the scope of this motion to dismiss.

Notwithstanding the discussion above, the parties agree that the limitations period set forth in Article 53 does not govern plaintiff's eighth cause of action, but rather Article 27 governs this claim. Article 27 establishes a three step process of alternative dispute resolution, which ultimately entails filing a petition with the Contract Dispute Resolution Board (CDRB). Plaintiff asserts that it has complied with the first two steps of this process, but that the third step has yet to be completed because the City Comptroller has neither reviewed nor approved plaintiff's claims, and therefore it is proceeding by way of this action.

Therefore, plaintiff's eighth cause of action is dismissed for the failure to exhaust administrative remedies (*see Chambers Servs. v City of New York*, 277 AD2d 66 [1st Dept 2000]). Dismissal is without prejudice to plaintiff's right to petition the CDRB, and without prejudice to any defenses defendants may raise in opposition to the petition. Defendants point out that Article 27, paragraph 7 permits plaintiff a limited time to petition the CDRB even if the City Comptroller has not settled or adjusted plaintiff's claims. It is unclear whether plaintiff's time to petition the CDRB has expired. Defendants' remaining arguments that plaintiff did not submit timely, adequate notice of the claims governed by Article 27 are raised improperly for the first time in reply (*see Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]).

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted only to the extent that the eighth cause of action is severed and dismissed without prejudice; and it is further

ORDERED that the motion to dismiss is otherwise denied; and it is further

ORDERED that the remaining action shall continue; and it is further

ORDERED that the parties shall appear for a compliance conference on March 2, 2005, at 3:00 p.m., at 80 Centre Street, Room 103.

Dated: New York, New York
February 9, 2005



FAVIOLA A. SOTO, J.S.C.

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