

Eaton Elec., Inc. v Dormitory Auth. of State of N.Y.

2006 NY Slip Op 30573(U)

December 6, 2006

Supreme Court, New York County

Docket Number: 20626/05

Judge: Carolyn E. Demarest

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At an IAS Term, Part Comm-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of December, 2006.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

-----X

EATON ELECTRIC, INC.,
Plaintiff,

- against -

Index No. 20626/05

DORMITORY AUTHORITY OF THE
STATE OF NEW YORK,
Defendant.

-----X

The following papers numbered 1 to 7 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 - 4 _____
Opposing Affidavits (Affirmations) _____	5 - 7 _____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers in this action by plaintiff Eaton Electric, Inc. (Eaton) to recover damages for an alleged breach of a construction contract, defendant Dormitory Authority of the State of New York (DASNY) moves, pursuant to CPLR 3211 (a) (7) and 3212, for partial summary judgment dismissing the second, third, and fourth causes of action

of Eaton's complaint as against it based upon a purported release and discharge from these claims.

DASNY is a public authority which issues bonds for the financing of construction projects at non-profit institutions, including the City University of New York (CUNY). In 1999, DASNY, which acts as an owner with respect to CUNY projects and contracts for construction, conducted a public bid in connection with a project consisting of the gut renovation of the existing library and the construction of a substantial new addition to that library at Brooklyn College. Eaton, an electrical contractor, was the successful low bidder for the electrical work, and, on May 10, 1999, the DASNY and Eaton entered into a written contract under which Eaton agreed to perform certain electrical work and furnish all necessary supplies and materials incident to that work for a fixed price of \$8,933,000. As required by the contract, Eaton furnished a payment bond and a performance bond in favor of DASNY, as obligee, covering payment for labor and materials and performance of Eaton's obligations under the contract. The bonds were issued by Axa Global Risks U.S. Insurance Company (Axa).

Under General Conditions section 17.01A, DASNY was to make a partial payment for the contract work and approved changes performed by Eaton each month based upon "an approved estimate of the Work performed during each preceding business month." DASNY also reserved the right to "retain five percent (5%) of the amount of each [monthly] estimate." Pursuant to General Conditions section 17.01E, Eaton was required to submit

monthly requisitions, applying for payment supported by certified payrolls which substantiated each payment requested. Eaton began submitting such monthly requisitions on August 2, 1999.

Although the contract set forth that Eaton's work under the project was to be completed no later than March 10, 2001, Eaton's performance was delayed. Eaton, by letter dated February 1, 2001, formally informed Turner Construction Company (Turner), DASNY's construction manager for the project, that Eaton's contract work remained delayed because of the manner in which DASNY coordinated the schedule and the precedent work of other contractors, which were beyond Eaton's control. Eaton requested an equitable adjustment to the contract price and its time. Due to the delays and disruptions, the extension of the project beyond its original completion date and demands by DASNY that Eaton increase its workers and working hours to accelerate the project, Eaton incurred financial difficulties and sought financial assistance from Axa. Axa agreed to advance funds to assist Eaton in the completion of the construction contract in exchange for an assignment, entitled "Assignment of Contract Moneys" (the Assignment), which was executed by Eaton on January 4, 2002.

The Assignment of Contract Moneys, in pertinent part, provided as follows:

“[Eaton] does hereby assign, transfer, and set over to Axa . . . all of [its] right, title and interest in and to any and all payments on account of estimates, change orders, extras, claims or bonuses including, but not limited to, the final estimate, final payment and retainage, and any other money now due or hereafter to become due arising out of the Contract between

[Eaton] and [DASNY], together with all rights of action accrued or which may accrue thereunder.

“[Eaton] authorizes, empowers, and directs [DASNY] . . . to pay to [Axa] all monies due or to become due to [Eaton] by virtue of said contract.

“[Eaton] does hereby constitute and appoint [Axa] as [its] true and lawful attorney -in-fact, irrevocably in the premises, to do and perform all acts, matters, and things touching upon the premises, in like manner, and to all intents and purposes as [Eaton] could do if personally present.

“[Eaton] agrees to make, execute and deliver any and all papers, instruments and documents that may be required by [Axa] and/or [DASNY] . . . to effectuate the purpose hereof, and [Eaton] authorizes and empowers [Axa] to sign for and on behalf of [it] any and all papers, instruments and documents that may be required by [DASNY] . . . to effectuate the purpose thereof.”

The Assignment of Moneys further provided that Axa received the monies advanced as a trust fund for certain required payments for services rendered or materials supplied in connection with the performance of the work. This provision complied with section 20.04 of the contract, which permitted Eaton to “assign[] all or part of any moneys due or to become due under the Contract” if it contained such a requirement. By letter dated January 4, 2002, Axa’s counsel forwarded the Assignment of Contract Moneys to DASNY and requested that it docket the assignment so that all future payments would come directly to Axa.

Following the docketing of the January 4, 2002 Assignment of Moneys, Axa did not take over any of Eaton’s performance obligations under the contract. Rather, Eaton

continued to perform its contract work and dealt directly with DASNY and Turner with regard to all matters arising out of the construction contract. Eaton, in accordance with General Conditions sections 17.01A and E, continued to submit certified monthly payment requisitions to DASNY, billing for the value of the work completed each month. However, all payments under the contract, following the January 4, 2002 Assignment of Moneys, were remitted by DASNY directly to Axa as such payments became due and payable to Eaton.

During the time period subsequent to the January 4, 2002 Assignment of Moneys, Eaton continued to incur costs and expenses as a result of work disruptions and suspensions encountered on the project. By letter dated February 7, 2002, Eaton advised DASNY and Turner that it was requesting full compensation for these additional costs and expenditures. It explained that it was “currently in the process of tabulating these costs” and that “[a] final billing w[ould] be submitted upon completion of this project.” By letter dated March 5, 2002, Eaton again advised DASNY and Turner that it was incurring certain uncompensated costs as a result of the extended working hours directed by DASNY and that it was entitled to be fully reimbursed for all of these increased costs.

On August 28, 2002, temporary certificates of occupancy inspections were conducted and DASNY took beneficial occupancy of the premises. Beneficial Occupancy is defined under General Conditions section 1 of the contract as “[t]he use, occupancy or operation by the Owner of the work or any part thereof as evidenced by a notification of Beneficial Occupancy executed by the Owner.” DASNY executed a Notification of Construction

Completion which referred to the August 28, 2002 inspections, and stated that DASNY accepted Eaton's construction work as complete with the exception of all outstanding punch list items. As reflected in the August and September 2002 punch lists, there were over 800 incomplete work items, which included significant contract work and extras which remained to be completed. Among these uncompleted items were the completion of the fire alarm sound, clock and power and light systems for the project.

By letter dated August 29, 2002 to Turner, Eaton requested that DASNY reduce the retainage withheld from its monthly partial payments from 5% to 2.5% "based upon [Brooklyn] College's beneficial occupancy of the library." DASNY did not take action on Eaton's August 29, 2002 request for a reduction in retainage until February 7, 2003, when Sean Magee (Magee), on behalf of Turner, transmitted to Eaton a "new payment application," which he directed Eaton to use for the retainage reduction. The new payment application was an unnumbered requisition form dated February 7, 2003, which contained an itemized schedule that included the previously earned contract value and retainage as of February 28, 2003. On February 11, 2003 (following the submission by Eaton of 42 prior monthly partial payment requisitions), Eaton used this payment application to request payment of one-half of the retainage that DASNY was withholding as of that date, which it calculated to be \$260,351.31. Eaton billed the sum of \$260,351.31 on the retainage line of this requisition, and returned it to Magee, along with a letter stating that the certified payroll

reports (as required by General Conditions sections 17.01A and E) had been previously submitted.

Turner's project manager, Frank Yozzo (Yozzo), by memorandum dated February 19, 2003 in response to the February 11, 2003 requisition, informed DASNY's project manager for the project, Eugene Leung (Leung) that Eaton had completed 99.55% of the work required by the contract, with the remaining amount totaling \$40,300.23, and 75% of the punch list items, with the remaining amount valued at no more than \$75,000. Yozzo further stated that change orders remained to be processed that were valued at \$578,000. Yozzo recommended a reduction of retainage from 5% to 2.5% and the release of a payment in the amount of \$260,351.

By memorandum dated February 20, 2003 to Jay Goldstein, the project manager for CUNY of DASNY, and Michael Kolk, the CUNY Capital Program Director, Leung, computing that \$10,414,049.59 in work had been completed by Eaton to date (as of payment #42), recommended payment of \$260,351. Leung signed the requisition form on February 20, 2003. DASNY, however, in approving the requisition, increased the amount of retainage to be released from \$260,351.31 to \$262,319.84 to reflect retainage on a pending progress payment (shown on the following month's partial payment requisition) that was not included in Eaton's calculation.

By cover letter to Axa dated March 3, 2003, DASNY enclosed a "Release Form" for "Reduction of Retainage" and a "Consent of Surety" for "Reduction of Retainage." The

letter directed Axa to execute and return “[t]he consent forms” to it. The Release Form referred to Axa as the contractor and stated that, in consideration of the sum of \$10,230,468.17 heretofore or now paid by DASNY, Axa:

“has remised, released, and forever discharged and by these presents does for itself, its successors and its assigns, remise, release and forever discharge [DASNY], . . . from all claims of liability to the Contractor for anything furnished or performed in connection with, or arising out of [the subject] contract . . . between [DASNY] and the Contractor . . . or out of the work covered by said contract . . . or arising out of the subject-matter of said contract, and any prior act, neglect or default on the part of [DASNY] . . . the Contractor ever had, now has, or which its successors or assigns hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever . . .”

The Release Form specifically excluded therefrom the portion of the retainage that was not being released in the amount of \$262,319.70. It also provided a space for Axa to write in any additional exclusion of “a claim for damages in the amount of _____ dollars presented to [DASNY].” The Consent of Surety provided that Axa, as surety on the performance and payment bonds issued as part of the contract “hereby approves of reduction of retainage on the Contract and agrees that any such payment to the Contractor shall not relieve the Surety Company of any of its obligations to [DASNY] as set forth in the said bonds.”

On March 7, 2003, Axa, by its surety claims manager, Paul Alongi, Sr. (Alongi), executed the Release Form. Alongi asserts that he understood that this was a surety consent form and that Axa was only being asked, as Eaton’s surety for the project, to release any

surety claims it might have had with regard to DASNY's payment of the monies earned by Eaton through March 3, 2003. Alongi, in executing the Release Form, inserted the notation, "N/A" (not applicable), in the blank space provided for additional exclusion of a claim for damages. Alongi states that he did so because he believed that this reference to such a claim was wholly inapplicable to its aforesaid surety claims and to Axa's consent to the reduction of retainage. Also on March 7, 2003, Axa, by its bond manager, Michael J. Tully, executed the Consent of Surety.

By memorandum dated March 17, 2003, Turner informed Eaton that it would not close-out Eaton's contract or recommend Eaton for final payment because significant items of contract work and corrective work remained open. On April 1, 2003, DASNY issued a check to Axa for \$262,319.84. By memorandum dated June 27, 2003 and letter dated July 2, 2003, Turner again informed Eaton that it would not close-out Eaton's contract or recommend Eaton for final payment due to these outstanding items of work.

Eaton continued to perform work under the contract and to submit certified monthly partial payment requisitions to DASNY until August 31, 2003 (the last six of which were submitted after the February 11, 2003 reduction of retainage requisition), and these requisitions were processed and paid by DASNY. By letters dated September 23, 2003, October 17, 2003, November 4, 2003, and December 4, 2003, Turner continued to assert that substantial contract work and corrective work had to be completed before it would close-out

Eaton's contract or recommend Eaton for final payment. Eaton completed the contract on July 30, 2004.

By Verified Statement of Claim dated July 30, 2004, Eaton submitted a claim to DASNY under the contract for payment of the additional sum of \$12,467,606 as reimbursement for damages and losses on account of "unanticipated and unforeseen additional costs of labor, materials and vendors [and] additional job supervision, overhead and related project costs." This Verified Statement of Claim also sought payment of a claimed unpaid balance of the contract price in the amount of \$452,810, consisting of the unpaid retainage and payment for change orders for extra work performed and completed by Eaton.

On July 5, 2005, Eaton brought this action against DASNY. Eaton's first cause of action seeks the alleged unpaid balance of \$452,810 for the contract and extra work performed and completed by it. Eaton's second, third, and fourth causes of action seek damages in the sum of \$13,000,000, which includes the additional costs of labor, materials, and tools; additional job, overhead and supervisory expenses; additional insurance expenses; loss of use of equipment; additional costs of maintenance and repairs; and other additional costs of construction. Eaton alleges that it sustained these damages due to DASNY's breach of contract. Specifically, Eaton claims that its performance of the contract was repeatedly and continuously suspended, delayed, and disrupted by DASNY's failure to provide an adequate and complete design for the project or to follow an acceptable coordinated schedule

for the project, and by the repeated and continuous material contract changes made by DASNY throughout the course of the project. Eaton asserts that as a result of DASNY's design and scheduling defaults, its contract work was extended more than 40 months beyond the original 22-month contract period, which required it to incur these substantial increased costs for labor, materials, equipment, and supervision.

In support of its instant motion for partial summary judgment, DASNY relies upon sections 17.01D, 17.02, and 17.03 of the General Conditions of the contract. Section 17.01D of the General Conditions of the contract provides:

- “ D. After the Owner has determined Substantial Completion of the Work, the Contractor shall submit to the Owner, for the Owner's approval, a detailed estimate of the value of the known remaining items of Work as set forth by the Owner and a schedule of completion for said items of Work. The Owner shall review that estimate and make the final determination.

The Owner, when all the Work is substantially complete, shall pay to the Contractor the balance due the Contractor pursuant to the Contract, less:

1. two (2) times the value of any remaining items of Work to be completed or corrected; and
2. an amount necessary to satisfy any and all claims, liens or judgments against the Contractor.

As the remaining items of Work are completed and accepted by the Owner, the Owner shall pay the appropriate amount pursuant to the duly completed and submitted monthly requisition.”

Section 17.02 of the General Conditions of the contract states:

“Section 17.02 - Acceptance of the First Payment Pursuant to Section 17.01D. of the Contract Constitutes Release

The acceptance by the Contractor of the first payment pursuant to Section 17.01D. shall be and shall operate as a release to the Owner of all claims by and all liability to the Contractor for all things in connection with the Work and for every act and neglect of the Owner and others relating to or arising out of the Work . . .”

Section 17.03 of the General Conditions of the contract provides:

“Section 17.03 - Release and Consent of Surety

Notwithstanding any other provision of the Contract Documents to the contrary, the first payment pursuant to Section 17.01D. shall not become due until the Contractor submits to the Owner a General Release and a Consent of Surety to said payment pursuant to Section 17.01D., both in form and content acceptable to the Owner.”

DASNY asserts that Eaton’s February 11, 2003 requisition, which applied for payment of half of the retainage previously withheld from progress payments in the amount of \$260,351.31, was a request for a substantial completion payment pursuant to section 17.01D. It states that during the processing of Eaton’s retainage reduction requisition, Turner sent Eaton a copy of the August 28, 2002 Notification of Construction Completion and that this document showed that there was “Substantial Completion” of the work. Its avers that since the Turner and DASNY memorandum noted that twice the value of Eaton’s remaining punch list items was \$150,000, and the remaining unpaid balance of retainage would exceed \$150,000 after a payment to Eaton of one-half the retainage, it approved Eaton’s requisition for retainage reduction as meeting the requirements of section 17.01D.

DASNY states that since, as required by section 17.03, the first payment pursuant to section 17.01D could not become due until the Contractor submitted to it a General Release and a Consent of Surety to said payment, it sent the Release Form and Consent of Surety to Axa. While the General Release was executed by Axa, instead of being submitted ~~to~~ by Eaton, as required by section 17.03, DASNY argues that pursuant to the Assignment of Contract Moneys, Axa had the authority to execute this document on Eaton's behalf. DASNY contends that, therefore, pursuant to section 17.02, Axa's execution of the Release Form constitutes an acceptance by Eaton of the first payment pursuant to section 17.01D, thereby operating as a release ~~of~~ of all claims by and all matters in connection with the contract work, including the claims now asserted by Eaton in its second, third, and fourth causes of action.

The court rejects DASNY's argument. As noted above, DASNY's argument that Axa had the authority to release Eaton's claims is predicated upon the Assignment of Contract Moneys executed by Eaton in favor of Axa. DASNY contends that this Assignment of Contract Moneys provided Axa with a broad assignment of rights and a power of attorney appointment sufficient to authorize it to execute a release of Eaton's claims. Such contention is devoid of merit. While DASNY points out that the Assignment of Contract Moneys assigned to Axa all of Eaton's "right, title and interest in and to any and all *payments* on account of . . . claims . . . including . . . retainage . . . and all rights of action accrued or which may accrue" under Eaton's contract with DASNY, this provision merely served to authorize

DASNY “to pay to [Axa] all monies due or to become due to [Eaton] by virtue of said contract” (emphasis supplied). The scope of the Assignment of Contract Moneys was thus limited to an assignment of the contract proceeds.

It is well settled that an assignment of contract monies, which functions as an assignment of contract proceeds, does not constitute an assignment of a contract, or any claims arising out of the contract (*see Brace v City of Gloversville*, 167 NY 452, 457 [1901]; *Anders v State of New York*, 42 Misc 2d 276, 279-280 [1964]; *A.E. Ottaviano, Inc. v State of New York*, 41 Misc 2d 578, 579 [1964]; *Aster Agency Inc. v State of New York*, 12 Misc 2d 44, 45-46 [1958]). Here, the Assignment of Contract Moneys, by its explicit terms, only assigned to Axa all of Eaton’s right to collect the monies earned or recovered under the contract as and when such funds became due to Eaton. The Assignment of Contract Moneys did not assign any authority to Axa with respect to contract performance by Eaton. The Assignment of Contract Moneys was, therefore, not an assignment of the construction contract, and it did not assign any authority to Axa with respect to contract performance by Eaton. Eaton did not assign its contract rights to Axa or authorize or empower Axa to exercise all of Eaton’s contract rights. The assignment did not divest Eaton of its contractual rights or obligations. It did not wrest control from Eaton over its claims for additional compensation or damages and did not authorize Axa to control, settle, or release any of Eaton’s contract claims for additional compensation or damages.

DASNY's reliance upon the language of the Assignment of Contract Moneys wherein Eaton appointed Axa as its "true and lawful attorney-in-fact . . . to do and perform all acts . . . touching upon the premises . . . as [Eaton] could do if personally present" and the language providing that Eaton "authorize[d] and empower[ed] [Axa] to sign for and on behalf of [Eaton] any and all papers, instruments and documents that may be required by [DASNY] to effectuate the purposes hereof," is misplaced. "A basic precept of contract interpretation is that agreements should be construed to effectuate the parties' intent" (*Welsbach Elec. Corp. v MasTec North America*, ___NY2d___, 2006 WL 3344982 [2006]; see also *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). While the Assignment of Contract Moneys does appoint Axa as Eaton's attorney-in-fact, permitting Axa to sign for and on behalf of Eaton "any and all papers, instruments and documents that may be required by [DASNY]," such authorization and empowerment (as quoted above) was expressly limited to "effectuat[ing] the purpose hereof" [i.e., the purpose of the Assignment of Contract Moneys] (emphasis supplied). Thus, the intent of the parties regarding the purpose of the Assignment of Contract Moneys, as disclosed from its express language, as well as the context in which it was made, was to serve as a security instrument which was expressly authorized under General Conditions section 20.04 as well as under Lien Law § 25. It simply served to secure Eaton's obligations to Axa for any future advances made by Axa to facilitate Eaton's performance and completion of its contract work.

Indeed, Eaton never defaulted under the contract. It fully performed and completed the construction contract without breaching or defaulting upon any of its contractual obligations to DASNY or Axa. Therefore, the broad default assignment provisions enforced in *North American Specialty Insurance Company v Montco Construction Co., Inc.* (2003 WL 2138323, * 4 [WD NY 2003]) and *Hutton Construction Co. v County of Rockland* (1993 WL 535012, *4 [SD NY 1993], *affd* 52 F3d 1191 [2d Cir 1995]) and relied upon by DASNY to support its contention that the Assignment of Contract Moneys authorized Axa to release all of Eaton's claims are not applicable to this case. Due to such lack of default by Eaton, Axa was never required to undertake performance of the contract on Eaton's behalf. Instead, Axa's role was limited to the mere collection of the monies earned by Eaton. As discussed above, Eaton continued to perform all work and to submit all requests for payment.

In addition, Eaton continued to submit and pursue all claims for additional compensation and delay damages, as evidenced by its ^{Be Her of} February 7, 2002, which followed the January 4, 2002 Assignment of Contract Moneys. Axa did not assume or exercise any rights under the construction contract, and did not participate in any discussions, negotiations, or transactions concerning the amount or timing of any payment or claim under the construction contract. Axa's only written communications with DASNY involved the filing of the Assignment of Contract Moneys, receipts of the monies earned by Eaton, as and when those proceeds became due, and executing the surety consent forms received from DASNY's accounting department.

The mere fact that Axa executed the March 3, 2003 Release Form, is of no moment. A release form, no matter how generally worded, cannot serve as a release with respect to a plaintiff where the person who executed it lacked the authority to release claims on the plaintiff's behalf. Moreover, the March 3, 2003 cover letter which annexed the Release Form did not ask Axa to sign a release for or on behalf of Eaton, but only directed Axa to execute and return "[t]he consent forms."

Thus, the Assignment of Contract Moneys did not cloak Axa with any authority to release or dispose of any of Eaton's contract claims, of which DASNY was made aware by Eaton's February 7, 2002 letter, when it sent Axa (rather than Eaton) such Release Form. Furthermore, Eaton has submitted Alongi's sworn affidavit, wherein he attests that he executed the consent forms, in Axa's name and solely on Axa's behalf, with the understanding that Axa was approving DASNY's reduction of retainage, and that it was releasing its potential surety claims arising from the contract payments earned by Eaton. As previously noted, Alongi, on Axa's behalf, actually inserted the notation "N/A," meaning not applicable, in the section of the release that pertained to claims arising out of the contract. Thus, DASNY's contention that the Release Form executed by Axa was in accordance with the requirement of section 17.03 and served to release Eaton's claims, is devoid of merit.

Moreover, the payment of retainage could not have been a first payment pursuant to section 17.01D so as to constitute a release under section 17.02. Eaton did not submit any detailed estimate of the value of the known remaining items of work or a schedule of

completion as required for a final payment under section 17.01D. Moreover, that section is only applicable after DASNY has determined that there has been “Substantial Completion” of the work. Section 1.01 of Article 1 - Definitions of the contract defines “Substantial Completion” as the “[s]tage of construction at which the owner determines there is a minimal amount of Work to be completed or work to be corrected.”

Contrary to DASNY’s assertion, the Notification of Construction Completion did not signify that Eaton’s work was substantially complete. A perusal of this document discloses that it merely reflected the fact that on August 28, 2002, after all of the inspections necessary for the issuance of a temporary certificate of occupancy had been successfully completed, DASNY accepted the work completed as of that date and, thereafter, used and occupied the library buildings. The Notification of Construction Completion also references outstanding punch list items, which, as discussed above, consisted of over 800 incomplete work items. Eaton expended over \$1.4 million in labor costs to complete those items of work after DASNY’s occupancy of the library on August 28, 2002. In addition, extra work valued at more than \$508,000 was subsequently added to the contract.

Furthermore, Thomas J. Comins, the Project Manager for Eaton, asserts that he had requested the reduction of retainage based only upon the beneficial occupancy by DASNY at the time of such request, as is a customary practice in the construction industry. This assertion is substantiated by the reference, in such request, to DASNY’s beneficial occupancy of the premises. As reflected by the memoranda and letters from Turner (as discussed

above), Turner, after August 28, 2002 and as late as December 4, 2003, actually informed Eaton that it would not close out Eaton's contract or recommend Eaton for final payment because significant items of contract work and corrective work remained open.

Moreover, DASNY's reduction of retainage payment in April 2003 was actually treated by DASNY, Turner, and Eaton as an ordinary monthly partial payment pursuant to General Conditions sections 17.01A and E, rather than as a Substantial Completion payment under section 17.01D. The payment was made pursuant to a monthly partial payment requisition and was calculated on the basis of the value of the work shown on the next month's partial payment requisition. That is, DASNY actually increased the reduction of retainage payment to Eaton from the amount billed by Eaton on the February 11, 2003 monthly payment requisition (\$260,351.31) to \$262,319.84 based on the additional partial payments billed by Eaton in the following month's partial payment application.

In addition, no where in any of the documents related to the reduction of retainage payment is there any indication that the payment constituted a final or substantial completion payment under General Conditions section 17.01D. The terms final payment, substantial completion payment, or balance due are not found on any of the correspondence, requisitions, or memoranda discussed above, which were prepared and exchanged by the parties in connection with the reduction of retainage. Nor is there any notation on the check for \$262,319.84 designating it as a final payment or substantial completion payment. Moreover, Eaton, in fact, later submitted six additional monthly partial payment requisitions after the

February 11, 2003 reduction of retainage requisition, all of which were processed and paid by DASNY in accordance with the partial payment provisions of General Conditions sections 17.01A and E.

Thus, Eaton's contract work was not substantially complete as of August 28, 2002, the date of DASNY's beneficial occupancy of the library buildings, February 2003, or at any time during the processing of the reduction payment. Consequently, inasmuch as DASNY's reduction of retainage was not based upon the substantial completion of Eaton's contract work, it cannot be deemed to have been a final or substantial completion payment under General Conditions section 17.01D so as to even trigger section 17.02, under which the contractor's acceptance thereof may operate as a release upon its execution of a general release pursuant to section 17.03. Therefore, in view of the lack of a substantial completion payment as well as the surety's lack of authority to release Eaton's claims, DASNY is not entitled to dismissal of these claims.

Accordingly, DASNY's motion for partial summary judgment dismissing the second, third, and fourth causes of action of Eaton's complaint as against it, is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.