

**In the Matter of Gottlieb Contr. Inc. v City of  
New York**

2007 NY Slip Op 30014(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0112385

Judge: Karen S. Smith

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

PRESENT: HON. KAREN SMITH  
Justice

PART 44

GoHlieb Contracting

112385/06

INDEX NO. ~~11253~~

MOTION DATE 12/21/06

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

City of New York

The following papers, numbered 1 to 4 were read on this ~~motion to~~ <sup>petition pursuant to CPLR Article 78</sup> ~~to~~ <sup>compel a ministerial act</sup> and cross-motion <sup>to dismiss the petition</sup>

Petition, Petition  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...  
Notice of Cross-Motion  
Answering Affidavits — Exhibits Memorandum of Law  
Replying Affidavits in opposition to Cross-Motion

PAPERS NUMBERED	
1	1
2-3	2-3
4	4

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this ~~motion~~ petition pursuant to CPLR Article 78 and cross-motion to dismiss the petition are decided in accordance with the attached memorandum decision and order

**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 41B).

Dated: 3/6/07

K. S.  
HON. KAREN SMITH J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 62

-----X  
In the Matter of the Application of

GOTTLIEB CONTRACTING, INC.,

Petitioner,

Index No. 112385/06

-against-

THE CITY OF NEW YORK,

Respondent

For an Order pursuant to Article 78  
the CPLR directing payment to Petitioner  
for work performed for rehabilitation of  
Brooklyn Borough Hall under  
Comptroller's Contract No. XC11398.

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11B)

-----X  
KAREN S. SMITH, J.:

Petitioner Gottlieb Contracting, Inc. (Gottlieb) brings this Article 78 petition seeking an order directing respondent the City of New York (the City) to pay Gottlieb (1) the sum of \$261,362.15, which is allegedly the contract balance due under the Comptroller's contract #XC11398 for electrical work performed for the rehabilitation of Brooklyn Borough Hall, or (2) the sum of \$101,613.46, which is the retainage due, plus the sum of \$55,910.87, the approved amount for work performed pursuant to change orders, and/or (3) the release of the sum of \$95,450.00, which are funds that were deposited by Gottlieb on the contract, pursuant to General Municipal Law § 106. The City cross-moves to dismiss the proceeding for failure to state a cause of action and

as barred by the statute of limitations.

#### FACTS

In June 1984, Gottlieb entered into a contract with the City by the Department of General Services, in which Gottlieb agreed to perform certain electrical work for the City for an agreed-upon sum of \$1,947,000.00. The original contract expiration date was June 27, 1986. Due to a number of delays, extensions were granted until March 15, 1989. Gottlieb substantially completed its work in July 1988. Gottlieb maintains that it completed the punch list items as well, which were valued at less than \$3,000.00.

During the course of the work, Gottlieb contends that the City issued approximately 75 change orders, the value of each of which was negotiated and agreed upon by the parties. On September 29, 1989, Gottlieb submitted a request for payment in the amount of \$63,632.22, which was the balance due on the change order work. The City lowered the amount to \$55,910.87, and approved the payment. However, the City sent Gottlieb a letter saying that the payment application could not be processed because a time extension was needed. Gottlieb maintains that, because the project was substantially completed in July 1988, and there was a time extension until March 15, 1989, there was no need for an extension. Gottlieb further explains that, at that time, the Department of General Services would withhold payment

until a contractor waived all claims before a final payment was issued. Gottlieb had a number of significant outstanding claims, and, therefore, refused to sign a waiver. As a result, payment was never processed. Gottlieb does not address the significance of the contractual provision which required a contractor to waive claims before receiving final payment.

In March 1992, Gottlieb filed a Notice of Claim with the Comptroller of the City of New York, seeking compensation for the balance due on this contract, work done under protest, the balance on the change orders, and delay damages. The total amount claimed was \$1,319,500. Those claims were abandoned; Gottlieb never commenced an action to recover on them. Gottlieb's vice president acknowledged that the claim was dropped in her September 1, 2005 letter to the Comptroller's office.

In addition to the payment that was never made, Gottlieb seeks a release of funds held in a bond on the retainage. Gottlieb states that the city retains five percent of each approved payment application. Gottlieb posted a bond in lieu of retainage, which has matured, and Gottlieb asserts that the City is holding \$95,450.00 cash in lieu of retainage. The money is in a JP Morgan account being held in the name of the Comptroller of the City of New York.

In explaining the delay in seeking relief, petitioner states that in 1992, it moved its offices from Jamaica, Queens to Great

Neck. The file on this matter was misplaced for several years. In 2004, Gottlieb discovered that it had never received the retainage and the balance due on the approved change orders and the contract. The Department of General Services no longer exists, so Gottlieb went to the accounts payable department of the New York City Department of Citywide Administrative Services. While, according to Gottlieb, the records there confirmed the amounts claimed, the department could not help get the funds released. The letter from that department stated that, due to the age of the claim, the agency was unable to either confirm or refute Gottlieb's claim. Notice of Petition, Ex. G, April 8, 2005 letter. Nor was the New York City Department of Design & Construction, the successor to the Department of General Services, able to assist Gottlieb. The Comptroller's office stated that it could not release the money in the absence of either a certification from the agency that all work was satisfactorily completed, or a provision in the formal settlement of a lawsuit or claim, or a court order, requiring the release. Hence, it could not release the funds.

Gottlieb notes that every year, the Comptroller sends Gottlieb a bill for \$300 as an annual custody account fee for the retainage account.

In this proceeding, Gottlieb seeks to compel the City to perform what it characterizes as a "ministerial duty" to pay the

demanded amounts. Gottlieb asserts that its entitlement to those amounts are undisputed, but does not provide any evidence to that effect. To the contrary, Gottlieb acknowledges that it opted not to waive its claims, which, according to the portion of the contract submitted by the City, was a prerequisite to receiving final payment.

## DISCUSSION

### Statute of Limitations

The City maintains that even if this proceeding were properly brought pursuant to Article 78 of the CPLR, which it maintains it was not (*see infra*), the statute of limitations expired four months after Gottlieb became aggrieved by the agency determination. The City maintains that the court should not exercise its discretion to convert the proceeding to a plenary action, because such action is also time-barred. The statute of limitations for an action on this contract is contractually limited to one year. Since Gottlieb sought payment in July 1988, the statute of limitations ran in July 1989. Further, Gottlieb was clearly aware of its claim in March 1992, when it filed a Notice of Claim. It is now more than 14 years after that notice of claim was filed, which exceeds the statutory period of limitations as well.

Gottlieb does not address the statute of limitations

argument in its reply papers.

There is no question that the statute of limitations has elapsed. Whether the action was properly brought as an Article 78 proceeding or a plenary action, and whether it was brought pursuant to the time limitations contained in the contract or by statute, the time within which to bring this proceeding has long since passed. Accordingly, the petition must be dismissed.

Under these circumstances, it is unnecessary for the court to reach the question of whether the issues raised are appropriate for an Article 78 petition. However, the court notes that the act of approving amounts to be paid is not a ministerial action, and cannot be ordered by mandamus. See *Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d 88, 96-97 (1981). Here, Gottlieb is not seeking merely to have the Comptroller issue a check for an amount that was already approved; it also seeks to have additional funds paid which have not been approved. Even those amounts that were approved were subject to Gottlieb's waiving any claims it may have had, which Gottlieb has not done. Thus, the relief sought is not appropriate for mandamus relief. Nor is an Article 78 proceeding an appropriate vehicle to adjudicate a dispute that arises from an alleged breach of contract, which appears to be, at least in large part, the underlying issue raised by Gottlieb. See *Abiele Contr., Inc. v New York City School Constr. Auth.*, 91 NY2d 1, 8 (1997).

## Retainage

Gottlieb points out that the City did not oppose its claim for release of the bond held on the retainage on the merits. In fact, the City did not address that claim except in the context of arguing that it is not properly the subject of an Article 78 proceeding. Despite the fact that the City did not oppose the petition on the merits, the court cannot grant Gottlieb the relief it seeks with respect to that bond because this matter is not properly before the court.

The City is correct in stating that an Article 78 proceeding is not an appropriate method for obtaining this relief. As stated *supra*, relief can be obtained through an Article 78 proceeding only if the agency were to be directed to perform a merely ministerial function that involved no discretion. Here however, it appears from the papers that, before the funds can be released, the contracting agency would have to certify that all the work was satisfactorily completed. See Ex. G to Petition, September 28, 2005 letter from Comptroller. Thus, there is clearly discretion involved in approving the release of the funds held in the bond on the retainage.

There is also no basis for converting this portion of the proceeding to a plenary action. Gottlieb has not offered any evidence that it sought the certification necessary to obtain a release of the retainage. Additionally, while Gottlieb attaches

a statement from JP Morgan which lists a balance under the name of the Comptroller and Gottlieb, there is no indication on the document that elucidates to what the statement refers. Gottlieb has also failed to include any documentation, such as the underlying contract, that would enable the court to ascertain whether Gottlieb sought release of the bond in the manner required by contract, or whether it complied with all prerequisites to obtain that release. Gottlieb has not submitted sufficient evidence to prove its case, nor has it joined the appropriate agency (which would have to provide the certification) or JP Morgan as parties. Consequently, this portion of the petition must also be dismissed.

CONCLUSION

Accordingly, it is hereby

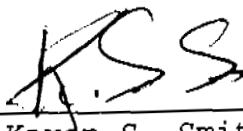
ORDERED that the cross motion to dismiss is granted; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the Court.

Dated: March 6, 2007

ENTER:



Karen S. Smith, J.S.C.

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