Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

MULVIHILL ELECTRICAL CONTRACTING 2004 CORP.	Index Number 15696
	Motion Date October 24, 2006
- against -	
	Motion Cal. Number 17
NAB CONSTRUCTION CORPORATION	
	Motion Seq. No. 2

The following papers numbered 1 to 12 read on this motion by defendant NAB Construction Corporation for an order granting summary judgment dismissing the complaint on the grounds of statute of limitations, pursuant to CPLR 3211(a)(5).

	Papers Numbered
Notice of Motion-Affirmation-Exhibits (A-E).....	1-4
Opposing Affirmation-Exhibits (A-E).....	5-8
Reply Affirmation-Exhibit (A).....	9-11
Other Affirmation.....	12

Upon the foregoing papers it is ordered that this motion is decided as follows:

The court, in an order dated July 18, 2006, denied plaintiff Mulvihill Electrical Contracting Corp.'s (Mulvihill) motion for a default judgment, and excused defendant NAB Construction Corporation's (NAB) default in answering the complaint, as it demonstrated that it has a meritorious defense to the action, and a justifiable excuse for the default. Defendant was directed to serve the proposed verified answer within 30 days after the date of the order. Defendant's cross motion to dismiss the action pursuant to CPLR 3215(c), 3211(a)(1), (5) and (8), however, was denied. NAB thereafter timely served its verified answer and interposed the affirmative defenses of lack of personal jurisdiction, and statute of limitations.

NAB entered into a contract with Metro North Commuter Railroad for the rehabilitation of the Park Avenue Viaduct (general contract). On January 10, 1994 NAB entered into a subcontract with Mulvihill to perform all work and provide labor and equipment for certain electrical work to be completed within the time frame set forth in the agreement or the time frame set forth in the general contract. The subcontract provided that the work performed by Mulvihill did not include any extra, additional or other work beyond the scope of the agreement, unless there was a written extra work order directed to Mulvihill from NAB, and set forth the payment terms for extra work. In the event that there was a dispute as to whether any work, labor or materials fell within the scope of work, or constituted extra work, the subcontract provided that the parties would negotiate the dispute, and in the event that it was still not resolved, after the completion of the disputed work and its acceptance by NAB and the owner, the subcontractor was free to seek to recover the fair and reasonable value of the work, pursuant to paragraph 12 of the agreement. NAB agreed to pay Mulvihill the sum of $7,476,564.00 for the work, pursuant to the schedule of payments set forth in the agreement. Paragraph 3(d) of the agreement provided that Mulvihill was to submit to NAB, on the 20th day of each month, or as required by NAB, until the completion of the work, a "(i) detailed and itemized statement of the work performed and labor and material provided, with supportive documentation; (ii) written requisition for progress payment, in form satisfactory to NAB, which shall summarize SUBCONTRACTOR's WORK for the one month preceding the requisition; and (iii) an affidavit, duly acknowledged, in form satisfactory to NAB, by a controlling principal of SUBCONTRACTOR, that all of the obligations of SUBCONTRACTOR under this AGREEMENT and the GENERAL CONTRACT to said date have been met; and (iv) execution by SUBCONTRACTOR of a partial release of mechanic's lien in the form annexed hereto or otherwise satisfactory to NAB, and other evidence to NAB that the subject premises are free from all liens or other claims chargeable to the premises or SUBCONTRACTOR." All payments by NAB to the subcontractor were subject to a condition precedent that NAB received payment from the owner.

Paragraph 3(f) of the agreement provides "[f]inal payment of the contract price shall be made by NAB to SUBCONTRACTOR within seven (7) working days of all of the following: (i) completion of SUBCONTRACTOR's performance under this AGREEMENT and the acceptance of same by both NAB and OWNER; (ii) payment in full by OWNER to NAB; (iii) the issuance in form satisfactory to NAB and OWNER of all warranties, guarantees and any other document required by this AGREEMENT or the GENERAL CONTRACT, or by OWNER, OWNER's Architect, or other authorized agent of OWNER, it being specifically understood and agreed by SUBCONTRACTOR that all warranties and guarantees of SUBCONTRACTOR'S WORK required by the

GENERAL CONTRACT shall be provided by SUBCONTRACTOR; and (iv) execution by SUBCONTRACTOR of final release of mechanic's lien and affidavit and general release, all in the form annexed hereto or in form otherwise satisfactory to NAB and such other satisfactory evidence that NAB may require indicating that the subject premises are free from all liens or other claims chargeable to the premises or to SUBCONTRACTOR." The final payment terms were subject to the express condition precedent that NAB receive final payment from the owner. The subcontractor agreed to accept that risk that if NAB was not paid by the owner, then it would not be paid as well.

Paragraph 12 of the subcontract provides, in pertinent part, that "No action or proceeding shall be instituted by SUBCONTRACTOR upon any claim arising out of, or relating to this AGREEMENT or the breach thereof, on any theory in law or in equity, unless such action or proceedings shall be commenced within six (6) months of the earlier of NAB's or OWNER's acceptance of SUBCONTRACTOR's WORK as complete, or the issuance of a certificate of occupancy. Such action or proceeding must be commenced in the Supreme Court of New York, County of Queens, where NAB maintains its principal place of business. Notices pursuant to this AGREEMENT shall be sufficient if given by certified mail or, registered mail, return receipt requested, or by hand delivery, to the address set forth on the first page hereof."

Plaintiff commenced this action on July 12, 2004, and alleges in its first cause of action for breach of contract that it entered into the subject contract in 1993, that it performed all of the work under the terms of the contract, as well as extra work at the direction of, and authorized by NAB pursuant to additional work orders, that it received a payment on April 15, 2002 in the sum of $48,428.00, bringing its total payment to $7,147,983.80, and that it is entitled to a balance of $722,135.02. In the second cause of action for an account stated, plaintiff alleges that it "stated an account with NAB for the aggregate sum of $722,135.02 and said account was delivered to and accepted by NAB," and that as a result of NAB's failure to object to the account, it is indebted to plaintiff in the amount of $722,135.02. The third cause of action alleges that NAB refused to pay certain invoices submitted by the plaintiff having an agreed and reasonable value of $329.270.29. The fourth cause of action alleges that NAB refused to pay certain invoices submitted by the plaintiff having an agreed and reasonable value of $213,093.55. The fifth cause of action alleges that NAB refused to pay certain invoices having a reasonable value of $146,962.52. The sixth cause of action alleges that NAB took improper credits in the sum of $128,408.52 against the total amount due to the plaintiff.

Defendant NAB now seeks to dismiss the complaint pursuant to the subject contract's six month period of limitations. The court previously vacated NAB's default in answering on the grounds that NAB had a meritorious defense and a reasonable excuse for the default, and made no determination on the merits when it denied the prior cross motion to dismiss the complaint. Therefore, contrary to plaintiff's assertions defendant is not now barred from seeking such relief.

It is well settled that "[p]arties to a contract may agree to limit the period of time within which an action must be commenced to a shorter period than that provided by the applicable Statute of Limitations" (Matter of Incorporated Vil. of Saltaire v Zagata, 280 AD2d 547, 547 [2001], lv denied 97 NY2d 610, [2002]; see also Kassner & Co. v City of New York, 46 NY2d 544, 550-551, [1979]; Joseph v Insureco, Inc., 25 AD3d 764 [2006]; CPLR 201), and here the parties' "intent to shorten the limitations period [is] set forth in a clear and unambiguous manner" (Fitzpatrick & Weller v Miller, 309 AD2d 1273, 1273 [2003]). Thus, "[a]bsent proof that the contract is one of adhesion or the product of overreaching, or that [the] altered period is unreasonably short, the abbreviated period of limitation will be enforced" (Timberline Elec. Supply Corp. v Insurance Co. of N. Am., 72 AD2d 905, 906 [1979], affd 52 NY2d 793, [1980]; see Jam. Hosp. Med. Ctr. v Carrier Corp., 5 AD3d 442, 443 [2004]; Wayne Drilling & Blasting v Felix Indus., 129 AD2d 633, 634 [1987]). Where, as here, the party against which an abbreviated Statute of Limitations is sought to be enforced does not demonstrate duress, fraud, or misrepresentation in regard to its agreement to the shortened period, it is assumed that the term was voluntarily agreed to (see, Incorporated Village of Saltaire v Zagata, supra).

Gary Simpson, NAB's president, states in an affidavit that NAB and the owner accepted Mulvihill's work as complete in 2001, and that Mulvihill executed a "Certificate of Compliance" with the New York City Department of Transportation, on January 16, 2001 in which it stated that it completed its work on October 6, 2000. Mr. Simpson further states that the project was completed, and that NAB received final payment from the owner in 2002. It is therefore asserted that the six month period of limitations set forth in the parties' agreement expired no later than July 1, 2003, and that the commencement of the within action on July 12, 2004, is untimely.

Plaintiff's counsel asserts in an affidavit that the subject contract provided that the defendant or the owner, Metro North, must accept plaintiff's work as complete, or a certificate of occupancy must have been issued, and that paragraph 12 required that written notice of either event be given to plaintiff by

certified or registered mail or by hand delivery to plaintiff at its office. It is asserted that as defendant has not provided proof that these conditions have been satisfied, the contractual period of limitations has not begun to run. It is further asserted that the certificate of compliance executed by plaintiff does not constitute an acceptance of plaintiff's work by the defendant or the owner.

Plaintiff's president, Hollis Mulvihill Petrozza states in an affidavit that defendant agreed to pay additional sums for agreed upon and approved change orders, and for approved extra work orders, and that during the course of the contract work it submitted extra work orders totaling $213,093.55, and an approved change order totaling $146,96.52, and that it had not been paid for this work. He also asserts that the defendant, during the course of the contract work, deducted $32,709,35 from payment requisitions without any explanation, and that the defendant did not dispute any of these payment requisitions.

Plaintiff Mulvihill's contention that the defendant was required to give it written notice of its acceptance of its work as complete as a condition precedent to the running of the statute of limitations is rejected. The parties' contract did not require that such written notice be given by either NAB or the owner. Furthermore, paragraph 12 of the contract merely provides the acceptable methods for serving notices under the contract, when such notices are required.

Plaintiff in its complaint alleges that it performed the work required under the contract, as well as extra work, but does not state the dates when said work was performed, the date it submitted an account stated to the defendant, the dates of the invoices and when they were submitted to the defendant, or the date(s) the alleged credits were taken by the defendant. Although the failure to set forth any dates in the complaint may be attributed to inartful pleading, the continued failure to set forth any evidentiary facts and dates in the opposition papers can only be viewed as a deliberate attempt to avoid the consequences of the applicable statute of limitations. The court finds that the Certificate of Completion, executed and filed by the plaintiff on January 21, 2001, in which it states that it completed its work in October 2000, constitutes an admission by the plaintiff its work was completed by October 2000. Plaintiff does not deny that its work was completed in October 2000, or that its work was accepted by NAB and the owner. Plaintiff also does not deny that the project has long been completed, that it was paid over $7 million dollars for the work it performed, and that NAB had been paid by the owner. Therefore, to the extent that plaintiff may be seeking to recover for extra work, as well as for work performed under the subcontract, the claim for breach

of contract accrued no later than July 1, 2003, which was six months after NAB was paid in full by the owner. Plaintiff's first cause of action for breach of contract therefore is time barred (see DiPietro v Feldman-Mondlick, Inc., 6 AD3d 1216, 1217 [2004]; Gruet v Care Free Hous. Div. of Kenn-Schl Enters., 305 AD2d 1060, 1061 [2003]; Minichello v Northern Assur. Co. of Am., 304 AD2d 731, 732 [2003]; see also Gianakakos v Commodore Home Sys., 285 AD2d 907, 908 [2001], lv denied 97 NY2d 606, [2001]).

The statute of limitations for an account stated cause of action is six years (see CPLR 213[2]; Erdheim v Gelfman, 303 AD2d 714 [2003]), and an action based on an account stated accrues on the date of the last transaction in the account (see 75 NY Jur 2d, Limitations & Laches § 90; Gaier, P.C. v Iveli, 287 AD2d 375 [2001]). "The very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness ... so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained" (Interman Indus. Prods. v R.S.M. Electron Power, 37 NY2d 151, 153-154, quoting Newburger-Morris Co. v Talcott, 219 NY 505, 512). While an account stated may often result from the retention of an invoice without objection, as also noted in Newburger-Morris (supra), a different result may follow depending upon "the circumstances that surround the submission of the statements" (id. at 511). Furthermore, the rendering of bills after the date upon which services are completed does not restart the statute of limitations each time those bills are generated (see Gaier, P.C. v Iveli, supra; Stewart v Stuart, 262 AD2d 396 [1999]).

Here, the parties' contract required the plaintiff to submit invoices and other documents on a regular basis in order to receive payment. Since plaintiff, in both the complaint and opposing papers fails to set forth any evidentiary facts in support of the claims for an account stated, for payment on the invoices and for the restoration of money credited to NAB, and fails to state when any of these events allegedly occurred, the court finds that these causes of action all arise out of the parties' breach of contract claim, and therefore are also time barred.

In view of the foregoing, defendant's motion for an order dismissing the complaint in its entirety on the grounds of statute of limitations, is granted.

Dated: March 14, 2007

J.S.C.