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SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 003 MD
004 MD

Present:
Hon. SANDRA L. SGROI

Adj'd Date: 12-21-07
Return Date: 7-26-07

ANGELO CAPOBIANCO, INC.,

Plaintiff,

-against-

BRENTWOOD UNION FREE SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 27 read on these motions: Notice of Motion and supporting papers 1-8; Notice of Cross Motion and supporting papers 9-17; Affirmation in opposition and supporting papers 19-22; Affirmation in reply and supporting papers 23-26; Exhibits 18;27; it is,

ORDERED that this motion by the Plaintiff and the cross motion by the Defendant are denied.

On January 5, 2007 this Court issued a decision denying the motions of the Plaintiff and Defendant for

summary judgment finding that there were triable issues of fact that could not be determined without a trial. The Court adheres to that prior decision because (1) the parties dispute the amount owed as a result of the modification to the contract and the method to be used in calculating the credit and (2) the Plaintiff timely commenced this action against the Defendant. The written contract that the parties entered into is not dispositive of the fact issues herein.

On or about November 14, 2001, the Plaintiff entered into a contract with the Defendant School District wherein the Plaintiff agreed to act as the general contractor on a Project to renovate various buildings used by the Defendant. The Project value of the agreement was $11,654,025.00 and was "subject to additions and deductions as provided in the Contract Documents" (see, District Exhibit B §§4.1 and 4.2). The Plaintiff placed a separate value on each of ten different construction items including replacing and repairing the roofs above the Boys' and Girls' locker rooms at each of the school buildings covered by the contract. Work continued on this construction project, which was clearly large in scope, over the course of several years.

On or about August 8, 2002, the Defendant gave notice to the Plaintiff that it intended to delete the locker room portion of the roofing work. It is undisputed that the Defendant was entitled to reduce the scope of the work on the project and that following the reduction of work, the Defendant would be entitled to a credit to reduce the contract price. While neither the Architect nor the Defendant ever issued a Construction Change Directive, the Architect issued a "Proposal Request No. G-17" that asked the Plaintiff "to submit an itemized proposal for changes in the contract sum and contract time" in the form of a Change Order for the deleted and changed work therein. According to the Defendant, the Plaintiff has not provided the Defendant with a credit for the deleted work that the Plaintiff did not perform.

The Plaintiff did prepare a proposed change order in October of 2002 that indicated that it was entitled to a credit of $50,382.00, but the Defendant never agreed to the reduction in the contract price proposed by the Plaintiff allegedly because there was no substantiation provided to justify the figures in the proposal of the Plaintiff. In April of 2003, the Architect rejected the proposal of the Plaintiff and determined that the total credit due and owing the Defendant for the deleted roof work was $131,445.00. It appears that in that same month, April of 2003, the Plaintiff revised and lowered its calculation of the roof credit from $50,382.00 to $47,095.00.

Despite the Architect's rejection of the proposal, the Plaintiff and the Defendant continued negotiating the amounts owed under the contract. In October of 2003, the Plaintiff sent another letter to the Defendant outlining its opinion that its calculations were correct. The Defendant did not respond to this letter. On November 19, 2004, December 6, 2004 and June 16, 2005, the Plaintiff met with the Defendant and the Architect for the purpose of closing out the project and computing final payment for the project.[1]

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[1]The Court finds that these meetings are critical to its decision herein and if these meetings did not occur, there would be a different outcome in this matter (see, ***Matter of Hawthorne Cedar Knolls Union Free School Dist. v. Carey & Walsh, Inc.***, 36 A.D.3d 810, 828 N.Y.S.2d 221; see also ***George A. Nole & Son, Inc. v. Clinton Cent. School Dist.***, 38 A.D.3d 1343, 832 N.Y.S.2d 706, reargument denied 836 N.Y.S.2d 482, 2007 N.Y. App. Div. LEXIS

On or about August 24, 2005, the Plaintiff served a Notice of Claim upon the School District when, after a Demand for Payment was made, the Plaintiff was not paid the amount of money that it claimed was owed to it by the Defendant under the construction contract. The Plaintiff commenced this action against the School District on December 21, 2005.

The Defendant School District claims that the Statute of Limitations began running on April 14, 2003, when the Architect for the project issued his opinion as to the total credit due and owing the Defendant for the work deleted from the contract. The Plaintiff, in opposition, states that it issued no Demand for Payment to the School District until after negotiations and discussions between representatives of the parties at the last close out meeting on June 16, 2005 failed to resolve the dispute as to payment. After the parties did not reach an agreement as to payment, the Plaintiff submitted its final application for payment or Demand for Payment on August 17, 2005.

Education Law § 3813 (1), which governs the presentation of claims against a school district and sets forth the requirement that a verified notice of claim be filed within three months after the accrual of a claim, provides that if a claim against a School District is one "for monies due arising out of contract, accrual of such claim shall be deemed to have occurred as of ***the date payment for the amount claimed was denied***." (emphasis provided by the Court).

In ***Albany Specialties, Inc. v. Shenendehowa Cent. Sch. Dist.***, (307 A.D.2d 514, 763 N.Y.S.2d 128), the Appellate Division held that "a cause of action accrues and the statute of limitations begins to run in contract actions from the time of the breach, which occurs when the plaintiff possesses a legal right to demand payment" but "a claim under ***Education Law*** § 3813 (1) is deemed to accrue when damages become ***ascertainable***." (emphasis provided by the Court). The Appellate Division in ***Albany Specialties, Inc. v. Shenendehowa Cent. Sch. Dist.***(supra) ***specifically*** found that the statute of limitations did not begin to run when the Architect for the School District opined as to the value of the services of the contractor but, instead, it accrued when final payment was demanded by the contractor and refused by the School District (see also, ***Matter of Piazza Bros., Inc. v. Board of Educ. of Mahopac Central Sch. Dist.***, 29 A.D.3d 701, 814 N.Y.S.2d 726; ***Philson Painting Co. v. William Floyd Union Free Sch. Dist.***, 202 A.D.2d 653, 609 N.Y.S.2d 915 app'l dism'd 84 N.Y.2d 850, 617 N.Y.S.2d 139, 641 N.E.2d 160)(emphasis provided by the Court). While this Court recognizes that under some contracts the date that the Architect's opinion is rendered will be the date that should be chosen as the date that damages became ascertainable, that is not the situation herein because of the nature of the contract herein and the continued contacts between the parties after the Architect's opinion was issued (see generally, ***Planet Const. Corp. v. Board of Ed. of City of New York***, 7 N.Y.2d 381, 198 N.Y.S.2d 68, 165 N.E.2d 758). The Defendant School District never clearly rejected the entreaties for additional payment by the Plaintiff until, at the earliest, June 16, 2005, the date of the final negotiations between Plaintiff and Defendant.

7190, 2007 NY Slip Op 5112).

It is undisputed that the contract covered construction of additions and alterations to the North Middle School, South Middle School, East Middle School and West Middle School and the Defendant School District agreed to pay the Plaintiff certain lump sum *and* unit prices in this contract. It is not reasonable to believe that the Plaintiff, where it is alleged that negotiations as to payment continued after the initial opinion issued by the Architect, should be required to commence an action against the Defendant in 2003.

The facts in the instant case are consistent with the facts in ***Albany Specialties, Inc. v. Shenendehowa Cent. Sch. Dist.*** (supra)(see also, ***Leeward Const., Inc. v. Sullivan West Central School Dist.***, 2006 WL 1722577, S.D.N.Y. Jun 20, 2006). There are no additional facts present herein that would require the Court to deviate from the holding in that case and find that the claim accrued on a different date than the date of the Demand for Payment was made by the Plaintiff.

Therefore, the service of the Notice of Claim by the Plaintiff approximately two months after the final meeting with the District and the Architect and two days after the Demand for payment by the Plaintiff was timely. The Court notes that whether June 16, 2005, the date of the final negotiations between the parties, or August 17, 2005, the date of the demand for payment by the Plaintiff, is used as the accrual date for the Plaintiff's cause of action, the service of the notice of claim in August of 2005 and the commencement of this action in December of 2005 were timely.

Dated: 8/14/07

SANDRA L. SGROI, J. S. C.