

Cab Assoc. v Dormitory Auth. of State of N.Y.

2007 NY Slip Op 34075(U)

December 13, 2007

Supreme Court, Nassau County

Docket Number: 4893-06/

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 12

CAB ASSOCIATES,

Plaintiff,

**INDEX NO.: 004893/2006
MOTION DATE: 10/26/2007
MOTION SEQUENCE: 003**

-against-

X X X

**THE DORMITORY AUTHORITY OF THE
STATE OF NEW YORK,**

Defendant.

The following papers read on this motion:

Notice of Motion & Statement of Undisputed Facts.....	1
Affidavit of Daljeet Sandhu in Support of Defendant's Motion for Summary Judgment & Exhibits Annexed.....	2
Affirmation of Andrea T. Vavonese in Support of defendant's Motion for Summary Judgment & Exhibit P, Volume I.....	3
Volume 1, Exhibit P (cont.).....	4
Volume 3, Exhibit P (cont.).....	5
Volume 4, Exhibit P (cont.) and Exhibits Q through V.....	6
Defendant The Dormitory Authority of the State of New York's Memorandum of Law in Support of its Motion for Summary Judgment.....	7
Affidavit of Charles Warshaw in Opposition to Defendant's Motion for Summary Judgment, Affidavits, Affirmation, Response to Statement of Facts & Exhibits Annexed.....	8
Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment.....	9
Affirmation of Andrea T. Vavonese in Support of Defendant's Reply in Support of its Motion for Summary Judgment, Affidavit & Exhibits Annexed.....	10
Reply of Defendant The Dormitory Authority of the State of New York in Support of its Motion for Summary Judgment.....	11
Response to First Set of Interrogatories, Volume 1.....	12
Response to First Set of Interrogatories, Volume 2.....	13

Motion pursuant to CPLR 3212 by the defendant The Dormitory Authority of the State of New York for summary judgment dismissing the complaint.

The defendant Dormitory Authority of the State of New York moves for summary judgment dismissing claims for payment for extra work made by the plaintiff-contractor, CAB Associates ["CAB"], arising out of a construction project at the State University College at Old Westbury.

The record establishes that after the original project contractor defaulted, CAB entered into a substitute contract to perform all work necessary to complete the project. Essentially it required CAB to assume the prior contractor's project obligations, correct defects, remediate deficiencies, and complete any unfinished work in accord with the original "design and build" agreement, as modified by the parties own contract, the September 2001 "Tender and Substitution Agreement" (Pltff's Exh., "11").

During the course of project, CAB apparently submitted some 71 claims for extra work which it claimed were not included in the roughly \$35 million final contract price. The defendant subsequently denied those claims in their entirety.

The plaintiff thereafter commenced the within action to recover the principal sum of \$1,201,171.12, representing outstanding amounts which it contends are still due and owing on the aforesaid 71 claims (Pltff's Exh., "2"). Many of the claims arise out of a dispute about whether the contract was a design/build or just a build contract.

Discovery has proceeded and defendant now moves for summary judgment dismissing the complaint on the basis, *inter alia*, that the plaintiff failed to adhere to contractually prescribed dispute resolution procedures relating to contested claims and extra work (*see*, "3.0 General Conditions," Article 11, Disputes, ¶¶ 11.01 A[2], 11.03; Def's Vol. "4" Exh., "14" at 18). The Court agrees that the failure bars recovery on the claims.

Significantly, "New York case law recognizes that prompt, written notice requirements in public works contracts serve salutary purposes * * * and merit strict enforcement" (*Huff Enterprises, Inc. v. Triborough Bridge and Tunnel Authority*, 191 AD2d 314, 316-317 *see generally*, *A.H.A. Gen. Constr. v. New York City Hous. Auth.*, 92 NY2d 20, 30-31 [1998]; *MRW Const. Co., Inc. v. City of New York*, 223 AD2d 473; *Naclerio Contracting Co., Inc. v. Environmental Protection Admin.*, 113 AD2d 707, 710 *see also*, *Fahs Rolston Paving Corp. v.*

County of Chemung, 43 AD3d 1192; *Kingsley Arms v. Sano Rubin Constr. Co.*, 16 AD3d 813, 814).

Accordingly, “[f]ailure to strictly comply with such provisions generally constitutes waiver of a claim for additional compensation” (*Kingsley Arms v. Sano Rubin Constr. Co.*, *supra*, at 814 *see*, *Mezzacappa Bros., Inc. v. City of New York*, 29 AD3d 494, 495; *Rondout Electric, Inc. v. Monroe Woodbury Cent. School Dist.*, 1 AD3d 423; *Healy/Yonkers/Atlas-Gest v. City of New York*, 258 AD2d 363; *Lasker-Goldman Corp. v. City of New York*, 221 AD2d 153, 154).

Preliminarily, the Court disagrees with the plaintiff’s assertion that the defendant has waived reliance upon the dispute resolution provisions by failing to raise the plaintiff’s alleged noncompliance therewith as an affirmative defense (Pltff’s Brief at 18-19)(*see*, CPLR 3015[a]).

Since the plaintiff’s complaint expressly alleges “full performance of its obligations under the contract in its complaint” (Cmplt., ¶ 16), the “defendant’s general denials [are] sufficient” to preserve the defense that the plaintiff failed to comply with the subject, contract dispute procedures (*see*, *Roel Partnership v. Amwest Sur. Ins. Co.*, 258 AD2d 780, 781 *accord*, *Allis-Chalmers Mfg. Co. v. Malan Constr. Corp.*, 30 NY2d 225, 233 [1972]; *U.S. Fidelity and Guar. Co. v. Delmar Development*, 22 AD3d 1017, 1022 *cf.*, *1199 Housing Corp. v. International Fidelity Ins. Co.*, 14 AD3d 383, 384; *CAB Associates v. State*, 14 AD3d 639; CPLR 3015[a])(Cmplt., ¶ 16; Pltff’s Brief at 18-19).

Nor does the Court agree that the dispute resolution provisions relied on by the defendant are inapplicable to the subject dispute (Pltff’s Brief at 20). The foregoing provisions are contained in certain “General Conditions,” which are expressly referenced as controlling and applicable “Contract Documents” in CAB’s 2001 Tender Agreement (*see*, “Tender and Substitution Agreement”, Exh., “A” [“3.0 General Conditions,” Article 11; Def’s Vol “4”, Exh., 14”]).

Accordingly, these requirements are not trumped or superseded by the pre-Tender agreement “notice of claim” provisions relied on by the plaintiff, which are applicable, *inter alia*, to claims made against the project surety (*see*, “Solicitation for Offers,” Book 1 of 4”; Article 6, ¶, 6.1, *et. seq.*, [Lovett Addendum “12”]; *Warshaw Aff.*, Exh., “25”).

Turning to the relevant contract provisions, it is clear that the dispute resolution scheme

at issue creates a mandatory and strict notice procedure pursuant to which a contractor must file a claim relating to allegedly objectionable, Owner-based work directives and then await the owners's response, after which he must then deliver to the owner a written, verified statement establishing why the Owner's decision is contrary to the contract and/or "reserving its rights in connection with the matter * * *" (Article 11, ¶¶ 11.01, 11.03).

The provisions also unequivocally "set forth the consequences of noncompliance" (*Promo-Pro Ltd. v. Lehrer McGovern Bovis, Inc.*, 306 AD2d 221, 222), by providing that a contractor's failure to comply with the foregoing requirements will constitute "a conclusive and binding determination * * * that said order, [w]ork, action or omission does not involve extra work and is not contrary to the terms and provisions of the Contract" and additionally, will constitute "a waiver by the Contractor of all claims for additional compensation or damages as a result of said * * * [w]ork * * *" (General Conditions," Article 11, "Disputes", ¶ 11.01 B [1], [2]).

It is undisputed that the plaintiff failed to comply with, *inter alia*, the verification procedures set forth in paragraph 11.03 (Pltff's Rule 19A Statement, ¶ 19A; Warshaw Aff., ¶ 45). Accordingly, and by operation of the foregoing requirements, it has been contractually established that plaintiff's claims have been waived; that they did "not involve extra work;" and that the work was "not contrary to the terms and provisions of the Contract" (*see generally, Rondout Electric, Inc. v. Monroe Woodbury Cent. School, supra*, 1 AD3d 423 *see also, 4-A General Contracting Corp. v. New York City Housing Authority*, 28 AD3d 261; *Kovachevich v. New York City Housing Authority*, 290 AD2d 325; *Master Painting and Roofing Corp. v. New York City Housing Authority*, 258 AD2d 275).

Nor has the plaintiff raised a factual issue with respect to the claim that the defendant should be estopped from relying on the subject, dispute resolution provisions (*A.H.A. Gen. Constr. v. New York City Hous. Auth, supra; Kingsley Arms v. Sano Rubin Constr. Co., supra*, at 814; *4-A General Contracting Corp. v. New York City Housing Authority, supra*).

The fact that the defendant consistently asserted that CAB's Tender Agreement constituted "a design and build" contract, while plaintiff persistently viewed it as a build contract, neither establishes bad faith nor prevented the plaintiff from filing the requisite, verified statements or complying with any of the other contract requirements relating to claims for extra

work. The defendant's position did not constitute misconduct, much less conduct which "prevented or hindered * * * [the plaintiff's] compliance with the notice and reporting requirements" (*A.H.A. Gen. Constr. v. New York City Hous. Auth, supra*, at 31; *4-A General Contracting Corp. v. New York City Housing Authority, supra*; *Kingsley Arms v. Sano Rubin Constr. Co., supra*).

None of the plaintiff's additional claims concerning the defendant's conduct suffices to establish an excuse for its failure to comply with the relevant dispute resolution requirements and procedures (e.g., *Fahs Rolston Paving Corp. v. County of Chemung, supra*; *4-A General Contracting Corp. v. New York City Housing Authority, supra*; *Kingsley Arms, Inc. v. Sano Rubin Const. Co., Inc., supra*; *Huff Enterprises, Inc. v. Triborough Bridge and Tunnel Authority, supra*, at 317).

The Court has considered the plaintiff's remaining contentions on this issue and concludes that are insufficient to defeat the defendant's motion.

In light of the Court's determination, it is unnecessary to reach the parties' remaining contentions.

Accordingly, it is,

ORDERED that the motion pursuant to CPLR 3212 by the defendant the Dormitory Authority of the State of New York, for summary judgment dismissing the complaint, is granted.

The foregoing constitutes the decision and order of the Court.

Dated: December 13, 2007


J.S.C.

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ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**