Long Is. Mech. of N.Y., Inc. v Connetquot Cent. School Dist.
2008 NY Slip Op 31126(U)
April 1, 2008
Supreme Court, Suffolk County
Docket Number: 0011447/2007
Judge: Elizabeth H. Emerson
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SHORT FORM ORDER

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NO.: 11447-07

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 9-19-07
SUBMITTED: 10-24-07
MOTION NO.: 001-MG; CASE DISP

LONG ISLAND MECHANICAL OF NEW YORK, INC.

Plaintiff,

-against-

CONNETQUOT CENTRAL SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 30 read on this Motion for Summary Judgment; Notice of Motion and supporting papers 1-12; Answering Affidavits and supporting papers 13-29; Replying Affidavits and supporting papers 30; it is,

ORDERED that this motion by the defendant for summary judgment dismissing the complaint is granted.

In the fall of 2003, the plaintiff entered into a written contract with the defendant school district to perform mechanical work for a public improvement construction project at the Arthur Premm Learning Center located in Islip, New York. The project was scheduled to be substantially completed by the end of 2004, but the plaintiff did not complete its portion of the work until June 2006 due to delays. By a letter dated November 29, 2005, the plaintiff submitted to the project's architect a claim in the amount of approximately $630,000 for additional costs incurred as a result of the delays. The plaintiff sent a copy of the letter (with attachments) to the defendant school district, but did not receive any response. On February 6, 2006, the plaintiff sent another letter to the architect regarding the same claim. That letter, which was also copied to the defendant school district, provides as follows:

> Long Island Mechanical is nearing completion on this project. As you are aware LIM was forced to perform additional work due to design changes and or construction lack of access to our contract work. We have sustained approximately $630,000 in additional costs which have not been responded to or addressed by the district. For your use please find a copy of the previously submitted costs.

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> At this juncture we have no choice but to seek the payment of our additional costs through the dispute resolution process defined in the contract. If we do not have movement on this issue by the end of the month we will proceed with the mentioned legal action.

On June 28, 2006, the plaintiff submitted an application to the defendant school district for payment of the final balance due on the contract ($47,145.57). On December 26, 2006, the plaintiff served a notice of claim on the architect and on the defendant school board for payment of the final contract balance of $47,146 and for delay costs in the amount of $628,130.65. On April 11, 2007, the plaintiff commenced this action to recover those sums. The defendant answered and now moves for summary judgment dismissing the complaint, inter alia, for failing to file a timely notice of claim.

Pursuant to Education Law § 3813 (1), a notice of claim must be served upon a school district within three months after accrual of the claim. Timely service of a notice of claim is a condition precedent to the commencement of an action against a school district (*see*, **Parochial Bus Sys. v Board of Educ. of City of N.Y.**, 60 NY2d 539, 547-548). Moreover, the accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied (*see*, Education Law § 3813 [1]; **Lenz Hardware v Board of Educ. of Van Hornesville-Owen D. Young Central School District**, 24 AD3d 1278, 1279).

The plaintiff contends that its claims did not accrue until November 2, 2006, when it substantially completed its work on the project and that it could not have ascertained the final balance due or the amount of delay costs before that date. The plaintiff further contends that pursuant to the contract, it was not entitled to receive payment of the contract price or any unresolved claims until it had substantially completed its work.

Contrary to the plaintiff's contentions, its claim for delay damages accrued on February 28, 2006, when the architect constructively denied the claim, not when the plaintiff could have ascertained its damages (*see*, Education Law § 3813 [1]; **Matter of Hawthorne Cedar Knolls Union Free School District v Carey & Walsh, Inc.**, 36 AD3d 810, 811). In any event, the documentary evidence establishes that the plaintiff had ascertained its delay damages as early as November 29, 2005, when it first submitted a claim for delay costs to the architect. The documentary evidence also establishes that the plaintiff had completed its work on the project by June 2006, when it submitted an application for final payment to the defendant school district. Thus, the plaintiff's contention that it could not have ascertained the final balance due or the delay costs before it substantially completed the work on November 2, 2006, is self-serving and belied by the record. Accordingly, the court finds that the notice of claim, which was served on December 26, 2006, is untimely insofar as it seeks delay damages.

The court also finds that the plaintiff's causes of action for delay damages are time-barred and barred by the contract's no-damages-for-delay clause. Education Law § 3813 (2-b) provides that no action or special proceeding shall be commenced against a school district more than one year after the cause of action arose (*see*, **Matter of Mahopac Central School District v Piazza Brothers**, 29 AD3d 699, 700). This action was commenced on April 11, 2007, more than

one year after the plaintiff's causes of action for delay damages arose on February 28, 2006. Moreover, contrary to the plaintiff's contentions, the actions by the defendant that are alleged to have caused the delays amounted to no more than poor planning and scheduling and inept administration, which are within the scope of the no-damages-for-delay clause (*see*, **T.J.D. Constr. Co. v City of New York**, 295 AD2d 180; **S.N. Tanner v A.F.C. Enters.**, 276 AD2d 363, 364).

Turning to the plaintiff's claim for final payment, a cause of action to recover damages for breach of contract arises, and the statute of limitations begins to run, from the time of the breach. A breach of contract is said to occur when the claimant's bill is expressly rejected or when the party seeking payment should have viewed his claim as having been constructively rejected (*see*, **Mainline Elec. Corp. v East Quogue Union Free School District**, 46 AD3d 859, 860-861). Here, there is no evidence in the record that the plaintiff's application for final payment was either expressly or constructively rejected at any point prior to the commencement of this action. Moreover there is no evidence in the record that the plaintiff complied with any of the conditions precedent to final payment.

The contract provides, in pertinent part, that neither final payment nor any remaining retained percentage shall become due until the plaintiff submits the following documents to the architect and the construction manager:

> (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the work have been paid or otherwise satisfied,
>
> (2) a certificate evidencing that insurance required to remain in force after final payment is in effect and will not be canceled or allowed to expire until 30 days' prior written notice has been given to the defendant,
>
> (3) a written statement that the plaintiff knows of no substantial reason that the insurance will not be renewable to cover the period required by the contract,
>
> (4) the consent of the surety, if any, to final payment, and
>
> (5) if required by the defendant, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the contract.

The plaintiff does not contend that it provided the aforementioned documents. Rather, the plaintiff argues that the defendant failed to employ a construction manager for the project, thereby preventing the processing of the final payment. Thus, the plaintiff contends that the defendant is estopped from disputing its right to receive the final payment. The plaintiff, however, proffers no explanation for its failure to provide the aforementioned documents to the

architect, as required by the contract. Accordingly, the court finds that the plaintiff's claim for final payment has not yet accrued.

In view of the foregoing, the motion is granted and the complaint is dismissed.

HON. ELIZABETH HAZLITT EMERSON

DATED: April 1, 2008

J. S.C.