D & L Assoc., Inc. v New York City Sch. Constr. Auth.

2008 NY Slip Op 33753(U)

October 8, 2008

Supreme Court, New York County

Docket Number: 102477/04

Judge: Eileen Bransten

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

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D & L ASSOCIATES, INC.,

Plaintiff,

Index No. 102477/04
Motion Date: 5/30/08
Motion Seq. No.: 005

-against-

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendant.

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FILED
OCT 15 2008
NEW YORK
COUNTY CLERK'S OFFICE

EILEEN BRANSTEN, J:

Pursuant to CPLR 3211(a)(5) and (7) and CPLR 3212, defendant, New York City School Construction Authority ("SCA"), moves for (1) dismissal of certain claims by plaintiff D&L Associates, Inc.("D&L") on the grounds that a Notice of Claim was not served within three months of accrual as required by Public Authorities Law § 1744(2)(i) and, (2) dismissal of the complaint in its entirety as time-barred because D&L failed to commence this action within one year of accrual pursuant to Public Authorities Law § 1744(2)(ii). D&L opposes the motion.

Background

D&L is a construction contractor who had entered into over 20 contracts with SCA, a public benefit corporation established by Title VI of the Public Authorities Law § 1725 (affirmation in support [aff supp] Exhibit A ¶¶ 1-2, 8, 13, 18, 23). D&L commenced this action to recover $748,005.45 allegedly owed by SCA for the unpaid portions of four

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contracts: Contract No. C000008759 ("New Utrecht Contract"); Contract No. 000008697 ("Walton Contract"), C000002754 ("Van Arsdale Contract"), and C000008197 (Julia Richman Contract) (aff supp Exhibit A ¶¶ 1- 8, 13, 18, 23).

For each contract, SCA and D&L executed a Certificate Substantial Completion in which D&L certified that "(i) all Work has been satisfactorily completed in accordance with the contract...and (iv) the Work can be safely used for its intended purpose" (aff supp Exhibits D, G). Specifically, a Certificate of Substantial Completion was executed for the Julia Richman Contract on April 13, 2001 (aff supp Exhibit D), for the Walton Contract on January 25, 2002 (aff supp Exhibit E), for the New Utrecht Contract on March 31, 2002 (aff supp Exhibit F), and for the Van Arsdale Contract on August 27, 2002 (aff supp Exhibit G).

On September 24, 2002, D&L served a Notice of Claim upon SCA that set fourth breaches of 14 contracts, including the four contracts at issue in this case (aff supp Exhibit H Nos. 6,10,11,14). The Notice of Claim asserted that (1) SCA failed "to make payments due and owing pursuant to the 14 contracts", (aff supp Exhibit H ¶ A), (2) D & L had "performed in conformance with the applicable contracts sufficient to require that SCA make payments to D&L," (aff supp ¶ B), and (3) that SCA was in continuous breach of the fourteen contracts since, although Article 15 of SCA's General Conditions allows SCA to "withhold payments otherwise due and owning to D&L," (aff supp Exhibit H ¶ C), SCA

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failed to give D&L notice of its intent to withhold payment and thus had no right to hold back money (aff supp Exhibit H ¶¶ C - G). Although the aggregate value of the 14 claims amounted to $2, 979,283.36, the Notice of Claim alleged that the amounts due on the four contracts at issue here were: $240,572 for the New Utrech Contract; $106,315.33 for the Walton Contract; $672,195.15 for the Van Arsdale Contract, and $59,503.07 for the Julia Richman Contract (aff supp Exhibit H Nos. 6,10,11,14).

According to D&L, "SCA responded to the 1st Notice of Claim by making payments pursuant to the contracts." (affidavit in opposition [affid opp] at 5 ¶ 21. The parties agreed that SCA would make some payments directly to subcontractors and that amount would be deducted from the total amount owed on the contracts.[1]

On October 9, 2003, Charles E. Williams, III, SCA's Principal Attorney for Contracts, Construction and Real Estate, sent D&L a letter advising that, pursuant to the continuing investigation by SCA's Office of the Inspector General, payments to D&L and its subcontractors on the four contracts at issue in this case would be withheld (affid opp

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[1] Plaintiff claims the following amounts are still due on four school construction projects:

New Utrecct High School, Kings County	$122,018
Walton High School, Bronx County	$47,447.92
Arsdale High School, Queens County	$524,705.84
Julia Richman High School, New York County	$53,833.69

Exhibit D). The investigation allegedly concluded on November 24, 2003 (aff supp Exhibit I ¶ E).

On December 10, 2003, D&L made a demand on SCA for full payment of the amounts due on the four contracts. In that demand, D&L set a deadline of December 29, 2003 for SCA to remit payment. According to D&L, "SCA failed and refused to pay D&L all sums due and owning pursuant to the contracts...notwithstanding D&L's demand for payment" (aff supp Exhibit I ¶ G).

On January 6, 2004, D&L served a second Notice of Claim on SCA which set forth that SCA's failure pay or respond to the demand for payment is a breach of each of the contracts (aff supp Exhibit I ¶ H).

On February 18, 2004, D&L commenced this breach of contract action claiming that, although it "performed all work required by the [four] Contract[s].... SCA has breached the [four] Contract[s] in that the SCA has refused and continues to refuse to compensate D&L pursuant to the terms of the [four] Contract[s] so that compensation is due and owing pursuant to the terms and conditions of the [four] Contract[s]" (aff supp Exhibit A at Complaint ¶¶ 9,10, 14, 15, 19, 20, 24, 25).

On May 7, 2004 SCA served its Answer denying the allegations of breach and asserting affirmative defenses of including, failure to state a cause of action, and expiration of the statute of limitations. Defendant also asserted a counterclaim "seeking recision of

three separate contracts between [D&L] and the SCA, on the ground that they were fraudulently induced" (memorandum in support [memo supp] at 2 Footnote 1). D&L, among other things, denied the counterclaim's allegations (aff supp Exhibit C). On May 30, 2008, Defendant filed this Motion to Dismiss and/or for Summary Judgement.

Analysis

Notice of Claim

SCA moves to dismiss three of the four breach of contract claims on the grounds that D&L failed to timely serve a Notice of Claim as required by Public Authorities Law Section 1744(2)(i). SCA argues that the claims accrued when the parties executed the Certificates of Substantial Completion for each contract. D&L counters that the Notices of Claim were timely and asserts that the claims did not accrue until the scope and magnitude of its damages were known.

As a condition precedent to maintaining an action against SCA for breach of contract, an aggrieved party must serve a "detailed, written, verified notice of each claim... within three months after the accrual of such claim" (Public Authorities Law §1744(2)(i); *see also C.S.A. Contracting Corp. v New York City School Construction Authority,* 5 NY3d 189, 192 [2005]). A Notice of Claim allows "municipal defendants to conduct an investigation ... and to determine whether the claims should be adjusted or satisfied before the parties are

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subjected to the expense of litigation" (*Koren-DiResta Construction Co., Inc., v New York City School Construction Authority*, 293 AD2d 189, 193 [1st Dept 2002], quoting *Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 62 [1984]). Failure to comply with the Notice of Claim requirement is fatal and mandates dismissal of the claim (*see P&C Giampills Contracting Co., Inc. v New York City School Construction Authority*, 211 AD2d 524, 524 [1st Dept 1995]). It is a claimant's "obligation to plead and prove that its Notice of Claim was served within three months after the accrual of its claim" (*CSA Contracting Corp. v New York City School Construction Authority,* 5 NY3d 189, 192 [2005], citing *Parochial Bus Sys. v Board of Educ of City of NY,* 60 NY2d 539, 547 [1983] and *Rogers v Village of Portchester* 234 NY 182, 185 [1922]).

Generally, a contractor's breach of contract "claim accrues when its damages are ascertainable" (*CSA Contracting Corp. v New York City School Construction Authority,* 5 NY3d 189, 192 [2005]; *see also Matter of Board of Education of Enlarged Ogdensburg City School Dist.* 37 NY2d 283, 290 [1975]). "Although the determination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, 'it generally has been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted'" (*CSA Contracting Corp. v New York City School Construction Authority,* 5 NY3d 189, 192 [2005],

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quoting *New York City School Construction Authority v Kallen & Lemelson* 290 AD2d 497, 497 [2d Dept 2002]).

SCA claims that the four Certificates of Substantial Completion mark the point at which the damages in this case were ascertainable since each Certificate was signed by an authorized representative of both parties certifying that "all work has been satisfactorily completed in accordance of the contract" (aff supp ¶¶ 10 - 12).

D&L argues that accrual must be measured from the point at which the scope and magnitude of its damages became known, which, at the very earliest, was the date on which it received SCA's October 9, 2003 letter notifying it that payments on the four specific contracts would remain withheld due to an investigation by the Office of the Inspector General (*see* affid opp ¶ 8; memorandum in opposition [mem opp] at 3). D&L contends that before that time it was impossible for it to ascertain the scope and magnitude of damages because SCA's "General Conditions," which the four contracts in question allegedly incorporate, allowed the SCA to withhold payment (*see* mem opp at 3; affid opp Exhibit B § 15.05).

D&L's argument is unavailing. Knowledge of the scope and magnitude of the damages is irrelevant in determining accrual for purposes of timely serving a Notice of Claim (*see Koren-DiResta Construction Co., Inc., v New York City School Construction Authority*, 293 AD2d 189, 192 [1st Dept 2002]). It is well settled under New York law that "a

contractor's claim accrues when its damages are ascertainable," not when the contractor actually ascertains that it has suffered damages (*see CSA Contracting Corp. v New York City School Construction Authority,* 5 NY3d 189, 192 [2005]; *Koren-DiResta Construction Co., Inc., v New York City School Construction Authority*, 293 AD2d 189, 192 [1st Dept 2002] ["a contractor's claim 'accrues' when it can ascertain the amount appropriate as compensation for the items of work performed"]). In fact, for "purposes of the notice of claim, it matters not one wit that no breach has yet occurred, such as the refusal to pay for the work in question" (*Koren-DiResta Construction Co., Inc., v New York City School Construction Authority*, 293 AD2d 189, 192 [1st Dept 2002]; *see also CSA Contracting Corp. v New York City School Construction Authority,* 5 NY3d 189, 192 [2005] ["Although... the date on which damages are ascertainable [could depend] on the facts and circumstances of [a] case," generally "'damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted'"] quoting *New York City School Construction Authority v Kallen & Lemelson* 290 AD2d 497, 497 [2d Dept 2002]; *CSA Contracting Corp. v New York City School Construction Authority,* 5 NY3d 189, 194 [2005] [plaintiff's claim could be time-barred before there was reason to expect litigation]. Thus, the General Conditions, which allow SCA to withhold payment, are irrelevant as is the fact that D&L did not know the exact amount of its damages until October 9, 2003.

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D&L's further argument that use of the substantial completion date for purposes of accrual is merely a "general rule" that should not serve as the basis for dismissal (*see* memo opp at 6) and that the Court must consider all the facts and circumstances of a case to determine when the claim accrues, which, in this case, would necessitate denial of the Defendant's motions (*see id.*) is also unavailing. Although Courts have relied on factors such as the actual date of completion of the project to constitute the date of accrual of a claim (*see CSA Contracting Corp. v New York City School Construction Authority,* 5 NY3d 189, 192-193 [2005]; *New York City School Construction Authority v Kallen & Lemelson* 290 AD2d 497, 497 [2d Dept 2002]), D&L did not set forth any fact or circumstance that occurred between the dates of any of the Certificates of Completion and the September 24, 2002 Notice of Claim that would justify use of a later accrual date.[2] D&L's only assertion was that SCA withheld payment and did not attempt to resolve the unpaid amounts until a later date. Those facts are immaterial.

Since D&L had served Defendant with a Notice of Claim on September 24, 2002, only claims that accrued on or before June 24, 2002 (within three months) would survive a motion to dismiss if the Certificate of Substantial Completion is used to mark accrual. In this case, only the claim related to the Van Arsdale Contract would survive since the relevant

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[2] Although Section 9.01(A) of SCA's General Considerations provides that the contract itself notes the date of "Final Completion," D&L fails to argue or establish that the parties' agreement contained such a date.

Certificate of Substantial Completion was executed August 27, 2002. The claims for breach of the New Utrecht Contract, Walton Contract and Julia Richman Contract are thus dismissed for failure to timely serve a Notice of Claim within three months of substantial completion.

One Year Statute of Limitations

Public Authorities Law §1744(2)(ii) provides that an action against SCA must be "commenced within one year after the happening of the event upon which the claim is based" (Public Authorities Law §1744(2)(ii)). Here, D&L's claim is based on breach of the Van Arsdale Contract and in "New York, a breach of contract cause of action accrues at the time of the breach" *(Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

SCA moves to dismiss the Van Arsdale Contract claim on the ground that it is time barred by the Public Authorities Law's one year statute of limitations. According to SCA, the cause of action accrued no later than September 24, 2002, when D&L served its original Notice of Claim. SCA points out that the Notice of Claim sets forth that it allegedly failed "to make payments due and owing" in the amount of $672,195.15 (*see* affid supp Exhibit C at ¶D; affid supp Exhibit C at No. 11) and that its failure to give notice of its intent to withhold payment was a "continuing breach" of the Van Arsdale Contract (*see* affid supp Exhibit C ¶ F).

D&L counters that the date of accrual was October 9, 2003 when the scope and magnitude of its damages became ascertainable because it received a letter informing it of SCA's intent to withhold further payment. Alternatively, D&L urges that the claim accrued on December 29, 2003, when SCA failed to answer or pay the demand for payment.

Once again, D&L is mistaken. The Court of Appeals has made clear that "[t]he Statute of Limitations begins to run at the time of the breach though no damage occurs until later" regardless of whether the injured party knows of the existence of the wrong or injury. (*Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 81 NY2d 399, 399 [1993]).

D&L acknowledged that SCA breached the Van Arsdale Contract in its September 24, 2002 Notice of Claim, which unequivocally states that SCA was in continuous breach. Thus, the breach, by D&L's own admission, happened on or before September 24, 2002 marking the opening of the one year window for commencement of an action against SCA. Since the one year expired on September 24, 2003, the February 18, 2004 action based on the Van Arsdale Contract is time barred and Defendant's motion to Dismiss the Breach of Contract No. C000002754 ("Van Arsdale Contract") is granted.

Accordingly, it is ORDERED that the motion to dismiss is granted and the complaint is dismissed and the Clerk is directed to enter judgement accordingly.

This constitutes the Decision and Order of the Court.

FILED
OCT 15 2008
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Dated: New York, New York
October 8, 2008

ENTER

Hon. Eileen Bransten