

Vardo Constr. Corp. v Spectrum Contr. Group, Inc.

2009 NY Slip Op 30141(U)

January 19, 2009

Supreme Court, New York County

Docket Number: 119008/06

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

VARDO CONSTRUCTION CORP.,
Plaintiff,

INDEX NO. 119008/2006

- v -

MOTION DATE 8/4/08

MOTION SEQ. NO. 001

SPECTRUM CONTRACTING GROUP, INC.,
Defendant.

MOTION CAL. NO. 109

The following papers, numbered 1 to 4 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affirmation— Exhibits A-D	<u>1-2</u>
Answering Affirmation — Exhibits 1-7	<u>3</u>
Replying Affirmation	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

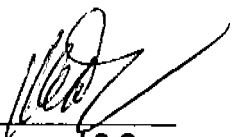
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JAN 26 2009

COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN

Dated: 1/19/09
New York, New York


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

-----X
VARDO CONSTRUCTION CORP.,

Index No. 119008/06

Plaintiff,

DECISION AND ORDER

- against -

SPECTRUM CONTRACTING GROUP, INC.,

Defendant

HON. MICHAEL D. STALLMAN, J.:

In this dispute involving payment under a construction contract, defendant Spectrum Contracting Group, Inc. (Spectrum) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, based on the application of a contractual statute of limitations.

Background

Spectrum entered into a contract with the New York City Housing Authority (NYCHA) to provide labor and materials for a project known as the Polo Grounds Towers Community Center (the Project). Spectrum subcontracted certain work to plaintiff Vardo Construction Corp. (Vardo), pursuant to a written agreement (the contract). Notice of Motion, Ex. D.

It is Spectrum's position that Vardo was unwilling to complete the project, requiring Spectrum to hire another contractor to complete the work, while Vardo complains that it was not permitted to complete the work, and is owed the balance of its contract price.

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The contract between the parties contained a four-month statute of limitations, as follows:

[n]o action shall be maintained by or on behalf of the Subcontractor against the General Contractor upon any claim arising out of or based upon this Subcontract, or by reason of any act, omission, or requirement of the General Contractor, unless commenced within four (4) months from the time the project was completed by the Subcontractor or material was furnished pursuant to this subcontract, or any other alleged breach of this Subcontract occurred.

Vardo brings this action based on a single cause of action for breach of contract, stemming from Spectrum's alleged failure to pay in full the price of the contract, plus extra work. Vardo seeks damages in the amount of \$104,117.57.

In this motion, Spectrum claims that Vardo's cause of action for breach of contract cannot have accrued from the date upon which Vardo completed the Project, because that date will never occur. It claims instead that the accrual date, as provided by the contract, must either run, under the contract, either from when the materials were furnished to Vardo, prior to August 30, 2005, or when Spectrum, in a letter dated September 23, 2005, informed Vardo that Vardo would not be completing the project. Thus, under both scenarios, the action, commenced December 22, 2006, would be time-barred.

Vardo maintains that its time in which to commence this action has not yet expired, due to Spectrum's failure to comply with certain notice requirements in the contract. This argument is

based on section 35 (b) of the contract, entitled "Progress Payments," which requires that Vardo, as subcontractor, be paid 10 days after Spectrum, as contractor, has been paid by the owner of the project (here, NYCHA). Because apparently neither party knows when NYCHA remitted payment to Spectrum, Vardo urges that Spectrum cannot establish that this action was not timely commenced. In fact, Vardo appears to be arguing that its cause of action did not accrue until four days *after* it commenced suit, when Spectrum allegedly first sent it notice, in a letter dated December 26, 2006, that Spectrum would not be paying the remainder of the contract price to Vardo, and would, in fact, be seeking to back-charge Vardo for so much of Vardo's work as had been completed by another subcontractor. As such, Vardo is essentially arguing that it commenced this action before it had a cause of action against Spectrum, negating any statute of limitations problems.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Canter*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible

form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Vardo argues that Spectrum may not raise the affirmative defense of statute of limitations, because it failed to do so in its answer. However, the Appellate Division, First Department, has found that CPLR 3211 (e), concerning the waiver of certain defenses, including the affirmative defense of statute of limitations, "does not apply to what is only a contractual, and not a statutory, provision." *Schmal v McCulla*, 274 AD2d 339, 340 (1st Dept 2000). Thus, Spectrum may defend based on the contractual statute of limitations.

As Spectrum points out, Vardo's complaint is not based on Spectrum's failure to make progress payments, the ground upon which Vardo now claims the statute of limitations has yet to run. The complaint deals with Spectrum's failure to pay Vardo for work Vardo did not complete. This issue is addressed in a letter Spectrum sent to Vardo on September 23, 2005 (September 2005 letter).

In the September 2005 letter, Spectrum informed Vardo that:

As you have not completed your contract work on the project and you are not willing to complete it, we indicated to you that the balance of the monies allowed under the contract (the \$70,000) will be withheld until we complete your contract work. Upon our completion of your contract work we will back charge Vardo for all expenses incurred in completing the work. If said expenses do not exceed the total sum payable (\$70,000) under the contract, we will pay you the remaining balance. In the event that the expenses incurred in

completing the work exceed the total sum payable (\$70,000) under the contract, Vardo will be required to pay the balance to Spectrum.

This Court finds that Spectrum's alleged breach of contract accrued at the time that this letter was sent, when Vardo knew it was not going to be allowed to complete the Project, would not be paid until completion of the project by another party, and indeed, might not be paid at all. At that time, Vardo had a claim against Spectrum. Consequently, the contractual statute of limitations began to run from September 2005, and was long past when plaintiff brought this action.


Accordingly, it is

ORDERED that the motion to dismiss is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 7, 2009
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. ...

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