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

PRESENT: **MARCY S. FRIEDMAN** PART 57
Justice

Robert Troeller

-v-

Joel Klein

INDEX NO. 601337/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this ~~motion~~ Petition to/~~for~~ accept late notice of Claim

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 2A
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5, 6
Memos of Law	M1-M4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Petition - is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4-13-09

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

ROBERT J. TROELLER, AS PRESIDENT AND BUSINESS MANAGER OF LOCAL 891, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Index No.: 601337/08

Petitioner,

DECISION/ORDER

- against -

JOEL I. KLEIN, AS CHANCELLOR OF THE DEPARTMENT OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondent.

In this proceeding, petitioner Robert J. Troeller, as President and Business Manager of Local 891, International Union of Operating Engineers, AFL-CIO (" Local 891") seeks a judgment, pursuant to Education Law § 3813 (2-a), deeming timely a notice of claim dated April 18, 2008 and filed on April 21, 2008, against respondent Joel I. Klein, as Chancellor of the Department of Education of the City School District of the City of New York ("DOE"). Respondent DOE cross-moves to dismiss the petition on the ground that petitioner's notice of claim was filed more than one year after the cause of action accrued and therefore after the one year statute of limitations for commencing an action.

The following facts are undisputed: Petitioner, a union that represents school custodian engineers, filed a demand for arbitration against DOE alleging that it had failed to pay

"temporary care assignments" to certain engineers. On January 3, 2007, the parties entered into a stipulation of stipulation that resolved the payment issues for all but five of the engineers. (Ex. C to Petition.) On March 22, 2007, DOE paid the engineers who had settled the arbitration. The same day, petitioner's attorney sent a letter via facsimile to DOE's Deputy Director of Labor Relations and Supervising Attorney, Robert Waters, notifying him in substance that Local 891's Vice President, Matt Wile, had been informed that DOE had calculated the payments incorrectly, and that payments were supposed to be at 100% of the engineers' compensation rate (i.e., 100% of the Maximum Permissible Retainage rate) from a specified date. (See Wile Aff. In Opp. to Cross-Motion, Ex. A.) On May 8, 2007, Wile sent an email to Waters requesting "the list of CE's [custodian engineers] receiving payment, the assignment and period that they were paid for and the amount they were paid." (Id., ¶12.) Waters responded by email on May 10, 2007, attaching a spreadsheet of the payments made on March 22, 2007. (Id., ¶13; Ex. B.) On October 31, 2007, an arbitration hearing was held on the claim of the five custodian engineers who were not covered by the January 3, 2007 stipulation of settlement. (Petition, ¶19.) At this arbitration, the parties argued the issue of the interpretation of the provision of the stipulation regarding the method for calculation of payments to the custodian engineers. However, in his opinion and award dated March 31, 2008, the arbitrator did not reach that issue, denying payment to the five engineers on other grounds. (Petition, Ex. D.) On April 21, 2008, petitioner served DOE with the notice of claim, dated April 18, 2008, which is at issue in this proceeding. (Id., E.) The notice of claim alleged that DOE failed to pay the settling custodian engineers for temporary care assignments at the rate required by the January 3, 2007 stipulation of settlement. Petitioner commenced an action on this claim by filing a complaint on May 2, 2008.

Education Law § 3813(1) provides that no action or proceeding against a school district

shall be commenced unless "a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim, and . . . the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment." Education Law § 3813(2-b) provides, with exceptions not here relevant, that an action or proceeding against a school district shall be commenced within "one year after the cause of action arose." Thus, "[u]nder the Education Law, a claim for payment from the Board of Education must be preceded by a notice of claim served on the Board within three months of its accrual, and an action thereon must be commenced within a one-year statute of limitations." (See Mitchell v Board of Educ. of the City School Dist. of the City of New York, 15 AD3d 279, 280 [1st Dept 2005] [internal citations omitted].) Section 3813 (2-a) of the Education Law authorizes the court in its discretion to extend the time to serve a notice of claim upon consideration of specified factors, but provides that "[t]he extension shall not exceed the time limited for the commencement of an action by the claimant against any district."

Petitioner contends that the March 22, 2007 facsimile, by which it objected to DOE's calculation of the payments that DOE made on that date, satisfied the requirements for a notice of claim. In the alternative, petitioner argues that its claim did not accrue until May 10, 2007 when it received DOE's breakdown for the payments showing DOE's non-compliance with the stipulation of settlement. Petitioner argues that its filing of the notice of claim on April 21, 2008 was therefore within the one year statute of limitations for commencing an action. Petitioner also claims that the statute of limitations was tolled by its participation in the arbitration for the five engineers who were not covered by stipulation of settlement. Respondent argues that petitioner's

claim accrued at the latest as of March 22, 2007 when DOE made the payments using the allegedly erroneous method of calculation.

As a threshold matter, this court rejects petitioner's contention that the March 22, 2007 facsimile satisfied the notice of claim requirement. As respondent concedes, this facsimile provided sufficient details as to the nature of the claim. (Resp. Memo. In Further Support of Cross-Motion at 3.) However, as respondent also correctly argues, the facsimile was not served upon the proper public body or official and therefore does not satisfy the statutory notice of claim requirement. (See Parochial Bus Sys., Inc. v Board of Educ., 60 NY2d 539 [1983].)

The court also rejects petitioner's claim that the arbitration tolled the statute of limitations. A "pending arbitration proceeding . . . not instituted by the parties in order to resolve the present controversy . . . [does] not toll the Statute of Limitations." (Matter of Majka v Utica City School Dist., 247 AD2d 845, 846 [4th Dept 1998]. See also Provenzano v Ioffe, 12 AD3d 353, 355 [2d Dept 2004] lv denied 5 NY3d 701 [2005].) The issue submitted in the arbitration was the right of the engineers who were not covered by the stipulation of settlement to payment for temporary care assignments at the rate required under the parties' collective bargaining agreement. (Petition, Ex. D.) The issue raised by petitioner's notice of claim is whether DOE breached the stipulation of settlement by paying the settling engineers at an incorrect rate. These issues are facially distinguishable, notwithstanding that petitioner also sought interpretation of the stipulation in the context of the arbitration. Petitioner is therefore not entitled to the toll of the statute of limitations. (Compare Francese, Inc. v Enlarged City School Dist. of Troy, 95 NY2d 59 [2000].)

The court accordingly turns to the issue of the accrual date of petitioner's cause of action.

It is well settled that a cause of action for breach of contract accrues, and the statute of limitations begins to run, from the time of the breach.[1] (Kassner & Co. v City of New York, 46 NY2d 544, 550 [1979].) "A breach of contract can be 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." (Capstone Enters. of Port Chester, Inc. v Valhalla Union Free School Dist., 27 AD3d 411, 412 [2d Dept 2006], quoting Henry Boeckmann, Jr. & Assoc. v Board of Educ., Hempstead Union Free School Dist. No. 1, 207 AD2d 773, 775 [2d Dept 1994]; D.J.H. Mech. Assoc., Ltd. v Mahopac Cent. School Dist., 21 AD3d 521 [2d Dept 2005].) A constructive rejection of a claim may be found where "the putative debtor declines to timely respond to the claimant's demand letter" (Alfred Santini & Co. v City of New York, 266 AD2d 119, 120 [1st Dept 1999], lv denied 95 NY2d 752 [2000]) or fails to take any action upon the claim. (Matter of Hawthorne Cedar Knolls Union Free School Dist. v Carey & Walsh, Inc., 36 AD3d 810 [2d Dept 2007].)

In Mitchell v Board of Educ. of the City School Dist. of the City of New York (15 AD3d 279, supra), this Department held that the defendant did not expressly deny the plaintiff's claim for payment under a stipulation of settlement until a meeting at which the defendant's counsel informed the plaintiff that it would not comply with the settlement. In so holding, the Court reasoned that the claim had not been rejected during prior negotiations when the plaintiff's

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[1]The cases distinguish between the date of accrual of the claim for purposes of serving the notice of claim, and the date of accrual of the cause of action for purposes of triggering the one year statute of limitations for bringing an action on the claim. (See Koren-DiResta Constr. Co. v New York City School Constr. Auth., 293 AD2d 189 [1st Dept 2002].) Education Law § 3813(1) provides, for purposes of service of the notice of claim, that "[i]n the case of an action or special proceeding 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."

counsel was attempting to obtain compliance and the defendant's counsel said he would "look into it" or "speak to his clients." (Id. at 280-281.)

On this record, petitioner's claim for moneys due under the stipulation did not accrue until DOE constructively denied payment on May 10, 2007. Immediately after payment was made to the Local 891 members at an amount less than what petitioner claimed the stipulation required, petitioner notified DOE as to the discrepancy by means of the March 22, 2007 facsimile. Matthew Wile, the Vice President of Local 891 attests, and respondent does not dispute, that he attempted to obtain information on who was not paid properly from DOE and its Division of School Facilities between March 22 and May 8, 2007, but was not successful. (Wile Aff., ¶ 10.) Instead of expressly rejecting petitioners' requests, respondent only first responded to them on May 10, 2007 by sending petitioner the spreadsheet that outlined the March 22, 2007 payments. Thus, because respondent failed to respond to or reject petitioner's claim prior to May 10, 2007, it cannot be said that the claim was constructively denied, and therefore that petitioner's cause of action accrued, prior to May 10, 2007. (See Alfred Santini & Co. v City of New York, 266 AD2d 119, supra; Mitchell v Board of Educ. of the City School Dist. of the City of New York, 15 AD3d 279, supra.)

Petitioner's notice of claim was filed on April 21, 2008, within the one year statute of limitations for a breach of contract cause of action. As respondent correctly argues, the application under Education Law § 3813 (2-a) for an extension of time to file a late notice of claim, or for leave to deem a late notice of claim timely filed, must also be made within the one year period of limitations. (See Consolidated Constr. Group, LLC v Bethpage Union Free School Dist., 39 AD3d 792 [2d Dept 2007], lv dismissed 9 NY3d 980; Pope v Hempstead Union

Free School Dist. Bd. of Educ., 194 AD2d 654 [2d Dept 1993], lv dismissed 82 NY2d 846.) Contrary to respondent's contention, this application is also timely, as the petition was filed on May 2, 2008.

The court accordingly turns to the remaining issue of whether the notice of claim should be deemed timely. Section 3813(2-a) of the statute provides that in determining whether to grant the extension, the court should consider, among other factors, whether DOE "acquired actual knowledge of the essential facts constituting the claim within [90 days] or within a reasonable time thereafter[;] . . . whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the district or school . . .; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the district or school against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the district or school in maintaining its defense on the merits." (See also Prote Contr. Co., Inc. v Board of Educ. of the City of New York, 183 AD2d 404, 405-406 [1st Dept 1992]; Matter of Vicari III v Grand Ave. Middle School, 52 AD3d 838, 839 [2nd Dept 2008].) It is further settled that "the presence or absence of any one factor is not necessarily determinative." (Vicari III, 52 AD3d at 839.)

Petitioner contends that it had an excuse for its delay in filing the notice of claim because it anticipated that paragraph four of the stipulation would be interpreted by the arbitrator. It further asserts that it expected to resolve this issue without bringing a court action based on its long-standing relationship with DOE and their history of resolving disputes without litigation. While petitioner's excuse for its delay is not compelling, "the lack of a reasonable excuse is not, standing by itself, sufficient to deny an application for leave to serve and file a late notice of

claim." (Matter of Ansong v City of New York, 308 AD2d 333, 334 [1st Dept 2003].) On this record, the other factors that justify the filing of a late notice of claim have been convincingly met. It is clear that respondent had notice of the essential facts of petitioner's claim within 90 days of the alleged breach. The same day that respondent paid the engineers, petitioner notified respondent of petitioner's conflicting interpretation of the stipulation. Petitioner gave respondent further notice of its dispute by requesting additional information about the specific payments, and requesting the spreadsheet that respondent provided. Respondent also acknowledges that, although the arbitrator's decision did not address how the stipulation of settlement should be interpreted, this issue arose at the arbitration hearing. (See Respondent's Memo. Of Law In Supp. at 6.) Significantly, also, respondent makes no showing that it was prejudiced by petitioner's delay.

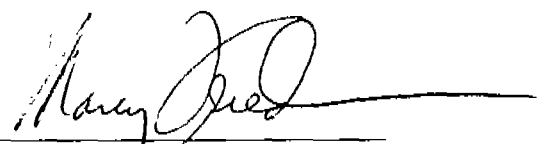
It is accordingly hereby ORDERED that the petition is granted to the following extent: Petitioner's notice of claim filed on April 21, 2008 is deemed timely; and it is further

ORDERED that respondent's cross-motion to dismiss is denied in its entirety; and it is further

ORDERED that the Notice of Claim in the form annexed to the moving papers is deemed timely served upon service of a copy of this order with notice of entry. Service shall be made within 20 days of the date of entry of this order.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
April 13, 2009



MARCY FRIEDMAN, J.S.C.