

Matter of JCH Delta Contr., Inc. v Thompson

2009 NY Slip Op 32223(U)

September 24, 2009

Supreme Court, New York County

Docket Number: 109047/08

Judge: Marcy S. Friedman

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

MARCY S. FRIEDMAN

PRESENT: _____

PART 57

Index Number : 109047/2008

JCH DELTA CONTRACTING,

VS.

THOMPSON, WILLIAM C.

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. 109047/08

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

petition
this motion for Art. 78

PAPERS NUMBERED

1/A

2

3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Memor of Law M1-M4

Upon the foregoing papers, it is ordered that this ~~motion~~ *petition* is

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

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: _____

9-29-09

MARCY S. FRIEDMAN c.

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

_____ x
In the Matter of the Application of
JCH DELTA CONTRACTING, INC.,

Petitioner,

Index No.: 109047/08

For an Order and Judgment pursuant to Article 78
of the CPLR directing release and payment to
Petitioner of its Contract Retainage monies for work
performed for the Renovation of Pier 36, Borough
of Manhattan under Comptroller's Contract No.
9318223,

DECISION/ORDER

- against -

WILLIAM C. THOMPSON, JR., as
COMPTROLLER OF THE CITY OF NEW YORK,
DAVID J. BURNEY, as Commissioner of the
NEW YORK CITY DEPARTMENT OF DESIGN AND
CONSTRUCTION, and THE CITY OF NEW
YORK,

Respondents.

_____ x
In this Article 78 proceeding, petitioner JCH Delta Contracting, Inc. ("JCH") seeks an order of mandamus directing respondents Comptroller of the City of New York ("Comptroller"), New York City Department of Design and Construction ("DDC"), and the City of New York ("City") to turn over the sum of \$186,905.65 that petitioner claims it is owed in contract retainage on a project for the renovation of Pier 36. Respondents cross-move to dismiss the petition for failure to state a cause of action and on statute of limitations grounds.

The relevant facts are as follows: JCH entered into a public improvement contract with

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1413)

the City dated October 30, 1992, for the agreed-upon sum of \$16,370,000. (Petition, Ex. 1.) By stipulation dated January 6, 1995 petitioner, the City, and the Comptroller entered into a full and ~~final settlement for delay damages and extended indirect costs petitioner incurred or would incur~~ on the project until its substantial completion. (Respondents' Cross-Motion, Ex. C.) The project was deemed substantially completed as of January 19, 1996. (Petition., Ex. 2.) On or about July 7, 1997, DDC executed an "Estimate for Partial Payment No. 29" and a "Certificate of Completion & Acceptance." (Id., Ex. 8) Petitioner claims that at the time these documents were executed it was entitled to final payment and release of its contract retainage. (See Aff. of Toula Hanjis [Petitioner's President], ¶ 15.) According to petitioner, the parties engaged in negotiations over various claims for payments, extra work, and delay damages from 1997 until late 2007. (Hanjis Aff., ¶ 5.) On April 11, 2008, Petitioner served a verified notice of claim on the Comptroller for unpaid contract retainage in the amount of \$186,905.65. (Petition, Ex. 9.) By letter dated April 29, 2008, the Comptroller rejected petitioner's claim stating that the contract is subject to the Procurement Policy Board ("PPB") rules and should be resolved in accordance therewith. (Id., Ex. 10.)

It is well settled that "[a]n article 78 proceeding may lie in the absence of a final determination where the relief sought is . . . by way of mandamus to compel performance by an administrative agency of a duty enjoined by law. Mandamus for such purpose, however, lies only where the right to relief is 'clear' and the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion." (Hamptons Hosp. & Med. Ctr. v Moore, 52 NY2d 88, 96 [1981].) It has been held that mandamus relief is

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not appropriate where release of retainage purportedly due “involves the exercise of a discretionary municipal function, not a ministerial one, requiring certification by the administering agency’s engineer and approval from its commissioner.” (Matter of Gottlieb Contr., Inc. v City of New York, 49 AD3d 409, 410 [1st Dept 2008].)

On this record, JCH fails to show that the Comptroller’s disbursement of the claimed retainage is ministerial and does not involve the exercise of a discretionary municipal function. Article 43 (“Final Payment”) of the contract, entitled “Preparation of Final Voucher,” states:

Upon determining the balance due hereunder . . . the Engineer will prepare and certify, and the Commissioner will approve, a voucher for final payment in that amount less any and all deductions authorized to be made by the Commissioner under this contract or by law. . . .

All prior certificates and vouchers upon which partial payments were made, being merely estimates made to enable the Contractor to prosecute the work more advantageously, shall be subject to correction in the final voucher, and the certification of the Engineer thereon and the approval of the Commissioner thereof shall be condition precedent to the right of the Contractor to receive any money hereunder.

(Petition, Ex. 1.) Therefore, retainage could only be dispersed if it was approved by the Commissioner.

JCH does not submit any evidence showing that the requisite final approval was made so that dispersal of the retainage was merely a ministerial duty. JCH produces an estimate for partial payment certified by the engineer, estimates for final payment, and a certificate of completion and acceptance. (See id., Ex. 8 at 2-6.) However, these documents do not state that JCH was owed retainage for the amount it claims or that the disbursement of retainage was approved by the Commissioner. Nor does the unauthorized and incomplete “Final Completion

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Payment Requisition # 29” that JCH submits show that the retainage was approved and all that remained was to reimburse JCH for that amount. (Id., Ex. 8 at 7.) JCH also relies on an internal DDC memorandum dated October 7, 2004, stating that “[t]here is an outstanding retainage amount of \$186,905.65.” (Id., Ex. 3.) However, JCH does not show that the Comptroller approved disbursement of the amount.

In contrast, the record shows that the retainage disbursement was not ministerial but rather involved the exercise of discretion by the Comptroller. Indeed, JCH itself avers that the parties engaged in negotiations and dispute resolution for a period of ten years over what monies, if any, JCH was still owed. The only document which JCH submits to show that it requested the retainage is a letter to DDC dated September 12, 2006 (Petition, Ex. 5), to which DDC responded by letter dated September 21, 2006, stating that the Engineering Audit Office needed copies of certain documents in order to proceed with the payment process. (Id., Ex. 6.)¹ However, JCH does not claim that it ever sent the requisite documents to that office, and instead produces a letter which it sent to DDC in response, stating that DDC and not JCH had the documents in its possession. (Id., Ex. 7.) JCH does not claim that it corresponded with DDC on this issue again until February 2008. (Hanjis Aff., ¶¶ 11-13.) Moreover, JCH’s attorney states that on March 25, 2008, DDC Senior Counsel Robert Sottile contacted her and advised her that he was “‘looking into the details’ of a couple of ‘permanent deductions’ taken by the DDC’s Engineering Audit Office [from] petitioner’s Contract Retainage.” (Affirmation of Joyce Sun, ¶ 13.) As DDC was looking into permanent deductions, the exercise of discretion would be required in order to

¹These documents included the Certificate of Completion and Final Acceptance, the Final Contractor Evaluation, and the Substantial Completion and Final payment requisitions.

disperse the contract retainage, if any was still owed. Mandamus relief is therefore not appropriate here. (Compare Fehlhaber Corp. v O'Hara, 53 AD2d 746 [3rd Dept 1976].)

~~Even assuming arguendo that JCH is entitled to mandamus relief, its claim is untimely.~~

It is well settled that “[b]efore bringing a petition seeking mandamus, a party must first make a demand and await a refusal. As a general rule, a party has four months from the time of the refusal to commence a mandamus proceeding. (Schwartz v Morgenthau, 23 AD3d 231, 233 [1st Dept 2005], lv granted 6 NY3d 707 [2006], affd 7NY3d 427; CPLR 217[1].) “However, this does not mean that the aggrieved party can, by delay in making his demand, extend indefinitely the period during which he is required to take action.” (Id. [internal quotation marks and brackets omitted].)

Here, the substantial completion date of the project was January 19, 1996 and JCH claims that it was entitled to release of the contract retainage as early as July 7, 1997, when the Certificate of Completion and Acceptance was prepared. Although JCH was aware that it was owed the contract retainage at that point, JCH does not submit any evidence that it demanded payment of the retainage at any time before 2006. The only evidence in the record showing a demand for payment on the contract prior to 2006 was a letter dated November 19, 2004, which denied a notice of claim JCH sent on May 30, 2003 requesting payment of delay damages and extra/disputed work costs. (Defs.’ Cross-Motion, Ex. D.) By this letter, respondents unequivocally rejected the claim by JCH as time-barred, and JCH failed to commence an action within four months of that denial.

To the extent that JCH contends that the retainage was not addressed in the November 19,

2004 letter, this argument is unavailing because JCH cannot delay its demand for the retainage indefinitely in order to stay the running of the limitations period. (Schwartz v Morgenthau, 23 AD3d 231, supra; Town of Nassau v Westchester Fire Ins. Co., 281 AD2d 803 [3rd Dept 2001].)

In addition, any ongoing negotiations with respondents with respect to the contract retainage do not serve as a basis for tolling the statute of limitations. (See Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 968 [1988]; JCH Delta Contr., Inc. v City of New York, 44 AD3d 403, 404 [1st Dept 2007]; A.G. Lichtenstein, P.E. v Goldin, 166 AD2d 320, 321 [1st Dept 1990] [holding that “mere settlement negotiations, requests for further information, or statements that a matter is being investigated are not a predicate for an estoppel”].) Thus, as JCH commenced this proceeding on June 30, 2008, it is untimely as a matter of law.

JCH appears to argue in the alternative that the Comptroller’s April 29, 2008 letter, stating that JCH’s claim for retainage is subject to the PPB rules, was arbitrary and capricious. This claim need not be reached because, for the reasons stated above, JCH’s commenced this proceeding more than four months after its claim for retainage accrued and thus after the limitations period expired.

To the extent that JCH contends that it timely commenced this action pursuant to Article 53 of the contract, this argument too is unpersuasive. While the statute of limitations on a contract action is six years from the time of breach, the parties may shorten the prescribed time by written agreement. (CPLR 201.) Article 53 states that “an action or proceeding on a claim for monies . . . retained or withheld under the provisions of this Contract . . . , must be commenced within one year after the date of final payment hereunder or after such monies become due and

payable hereunder, whichever is later.” (Petition, Ex. 1.) JCH claims that it has never received final payment or payment of its contract retainage and that it therefore timely filed the petition.

~~(See Hanjis Aff., ¶ 19.) In support of this contention, JCH cites the Estimate for Partial Payment No. 29 signed by DDC’s resident Engineer Roberto Lorusso which contains handwritten notes in the left column stating that, as of July 14, 1997, the total payment due on this estimate was \$240,662. (Petition, Ex. 8 at 2.) JCH’s president Hanjis states that she “believe[s] that that amount included JCH Delta’s unpaid Contract Retainage,” and that she never received this final payment on the contract. (Hanjis Aff., ¶¶ 17, 19.)~~

Petitioner’s conclusory assertion that it never received final payment under the contract is insufficient to avoid the bar of the one year statute of limitations for the retainage claim under Article 53. As noted above, it is undisputed that the substantial completion date for the project was January 19, 1996. The parties’ January 1995 stipulation settled substantial claims for payments due under the contract. Petitioner subsequently filed a claim for delay damages that was denied by respondents’ November 19, 2004 letter. The record contains no evidence of any subsequent written claim by petitioner for amounts due under the contract other than petitioner’s September 12, 2006 claim for the \$186,905.65 retainage, followed by its April 2008 notice of claim, also for the retainage. While petitioner claims that the parties were engaged in negotiations from 1997 until 2007 over claims for payments under the contracts (see Hanjis Aff., ¶ 5), petitioner makes no showing as to what payments were due in addition to the retainage. Petitioner’s reliance on the 1997 estimate showing an amount due of \$ 240,662 (Petition, Ex. 8 at 2) is unavailing. As discussed above, this document states on its face that it is an estimate, and

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there is no showing that it was ever approved by the Comptroller. Notably, also, the instant petition does not claim that petitioner is entitled to the \$53,756.35 difference between the

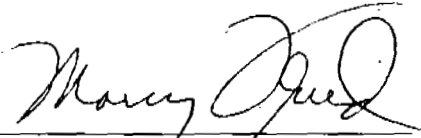
~~\$240,662 estimated contract balance and the 186,905.65 retainage, and does not identify the~~

components of the \$53,756.35. On this record, petitioner thus fails to make any showing that the final payment was not made and that the statute of limitations for the retainage claim did not begin to run. Accordingly, even if JCH had commenced this proceeding as a plenary action for breach of contract, it would be untimely because it was not brought within one year of the making of the final payment.

It is accordingly hereby ORDERED and ADJUDGED that the Cross-Motion of defendants Comptroller of the City of New York, New York City Department of Design and Construction, and the City of New York is granted to the extent that the petition is dismissed.

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

Dated: New York, New York
September 24, 2009


MARCY FRIEDMAN, J.S.C.

UNFILED JUDGMENT
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