

P & K Contr., Inc. v New York School Constr. Auth.

2009 NY Slip Op 32941(U)

December 10, 2009

Supreme Court, New York County

Docket Number: 114259/08

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 5

Index Number : 114259/2008
P & K CONTRACTING, INC.
VS.
NY SCHOOL CONSTRUCTION AUTH.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2
3
4

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED
DEC 17 2009
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 12/10/09


HON. EILEEN A. RAKOWER

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 5

-----X
P & K CONTRACTING, INC.,

Plaintiff,

Index No.
114259/08

- against -

FILED

**DECISION
and ORDER**

THE NEW YORK SCHOOL CONSTRUCTION
AUTHORITY and CITY OF NEW YORK

Defendants.

Mot. Seq.
001

DECEMBER 2009
NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff P&K Contracting, Inc. ("P&K") brings this action against the New York School Construction Authority ("SCA") and the City of New York ("City") for Defendants' alleged breach of contract. Specifically, P&K and SCA entered into a contract ("the contract") wherein P&K was to perform flashing and repair work on the exterior walls, roofs, parapets, and paved areas of Susan Wagner High School in Staten Island, New York.

During the course of the work, P&K submitted a Request for Information ("RFI"). The RFI inquired as to whether a certain drawing detail of the contract called for work on only one roof, or to additional roofs on the building. On or around January 28, 2008, SCA responded to the RFI, stating that the drawing detail applied to all roofs with parapet wall crenellations. The necessary material to complete the work on the drawing detail was delivered on March 3, 2008, and installation began that day.

On or around August 4, 2008, P&K served SCA with a notice of claim, taking the position that the drawing detail constituted additional work not agreed upon by the parties under the contract. P&K's notice of claim sought \$157,885.80 for the alleged additional work performed pursuant to the drawing detail. The notice of claim was not verified. P&K subsequently served Defendants with a summons and complaint on October 27, 2008.

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Defendants now move for dismissal pursuant to CPLR §3211(a)(7) on the grounds that (1) P&K failed to timely serve its notice of claim; (2) P&K failed to serve a verified notice of claim; and (3) the City is not a proper party to this action.

CPLR §3211 states, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

Generally, in determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). However, while a §3211(a)(7) motion is best approached by viewing the four corners of the complaint and assessing whether plaintiff has alleged a proper cause of action, “[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Under Public Authorities Law §1744(2),

No action or proceeding for any cause whatever... relating to the design, construction, reconstruction, improvement, habilitation, repair, furnishing or equipping of educational facilities, shall be prosecuted or maintained against the authority or any member, officer, agent, or employee thereof, unless (i) it shall appear by and as an allegation in the complaint or moving papers, that a detailed, written, verified notice of each claim upon which any part of such action or proceeding is founded was presented to the board within three months after the accrual of such claim, that at

least thirty days have elapsed since such notice was so presented and that the authority or the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof, and (ii) the action or proceeding shall have been commenced within one year after the happening of the event upon which the claim is based....

Defendants first argue that P&K's notice of claim is untimely, taking the position that "[t]he accrual date was no later than March 3, 2008, when the metal coping required to do the flashing work at issue was delivered to the project site and installation began." Defendants assert that at this point, P&K knew that SCA considered this work to be pursuant to the contract between the parties, and knew what the cost of labor and materials to perform the work would be. However, "[a] cause of action for breach of a construction contract accrues upon substantial completion of the work" (*Superb Gen. Contracting Co. v. City of New York*, 39 A.D.3d 204 [1st Dept. 2007]) (citations omitted).

Under the contract, the work is to be deemed substantially complete when, "at the sole discretion of the SCA" several conditions are met, including, *inter alia*, that all work has been satisfactorily completed in accordance with the contract. P&K argues that accrual did not occur until August 1, 2008, when P&K supplied a detailed invoice of the work performed (by way of its notice of claim); or alternatively, on September 1, 2008, when SCA gave notice of substantial completion. While the record fails to indicate when exactly the work was substantially completed, (*see Superb* at 205-06) (holding that contract clause which places determination of completion of work within unilateral control of one of the parties does not govern the accrual of causes of action), there is no indication that accrual occurred at such a time as to render the August 1, 2008 notice of claim untimely.

As for Defendants' contention that the action must be dismissed because P&K's claim was unverified, unlike other notice statutes, Public Authorities Law §1744(2) does not contain any provision which allows the court to excuse noncompliance with its requirements (*see ADC Contracting & Constr. v. Town of Southampton*, 2007 NY Slip Op 8977 [2nd Dept. 2007]) (discussing Town Law §65(3), which governs actions against towns arising out of contracts entered into by the town). While there is little case law on the lack of verification in a notice of claim pursuant to Public Authorities Law §1744(2), the Second and Third Departments of the Appellate Division's

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treatment of Town Law §65(3), which is similar in nature to §1744(2), is instructive. These courts have held that a court “lacks authority to disregard the lack of verification of a notice of claim against a town arising out of a contractual dispute” (*ADC* at *2; *see also Aqua Dredge v. Little Harbor Sound Civic Improvement Assoc.*, 114 A.D.2d 825, 826 [2nd Dept. 1985]; *Perritano v. Town of Mamaroneck* 17A.D.2d 443 [2nd Dept. 1991]; *County of Rockland v. Town of Orangetown*, 189 A.D.2d 1058, 1059 [3rd Dept. 1993]).

Applying this reasoning to the case at bar, the court finds that it lacks the authority to disregard or otherwise excuse P&K’s noncompliance with the requirements of §1744(2).

Since the court finds that dismissal is warranted, the court need not address Defendants’ contention that the City is an improper party to this action.

Wherefore it is hereby

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

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 10, 2009


EILEEN A. RAKOWER, J.S.C.

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