

**S.J. Fuel Co., Inc. v New York City Hous. Auth.**

2009 NY Slip Op 33400(U)

March 20, 2009

Supreme Court, New York County

Docket Number: 601609-2008

Judge: Bernard J. Fried

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: BERNARD J. FRIED  
*Justice*

PART 60

**E-FILE**

S.J. FUEL CO., INC.,

Plaintiff,

INDEX NO. #601609-2008

-v-

NEW YORK CITY HOUSING AUTHORITY  
(CONTRACT NO. ME0100029)

Defendant.

MOTION DATE #001

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

Defendant New York City Housing Authority moves to dismiss this action.

Plaintiff S.J. Fuel Co., Inc.'s complaint asserts a single cause of action for breach of contract, based upon defendant's alleged failure to pay additional compensation in the amount of \$2,076,843.90. According to the complaint, plaintiff is due these monies because of "undisclosed and unforeseen site conditions" encountered at the site which were "vastly different than as represented" on plans & etc. provided by defendant. The complaint alleges that "[o]n or about April 2, 2008, the plaintiff duly presented its claims to [defendant] for adjustment by the filing of plaintiff's Notice of Claim".

**FILED**  
**Mar 24 2009**  
NEW YORK  
COUNTY CLERK'S OFFICE

In seeking dismissal of this action, the defendant contends that (1) the plaintiff failed to comply with the Notice of Claim provision of the Contract, a condition precedent to commencing this action; (2) this action is barred by the statute of limitations; and 3) plaintiff cannot recover damages for a pass-through claim which belongs to its subcontractor<sup>1</sup>.

Because I am persuaded that the plaintiff has failed to comply with the written notice requirement this motion is granted.

Section 23 of the Contract's General Conditions requires the filing of a notice of claim within 20 days, after the claim arises. Here Plaintiff's failed to file a timely notice of claim. Its claim for damages arose on June 17, 2005, when the defendant wrote a letter rejecting plaintiff's claim for additional work. (Mialkowski Aff., Ex. H). Plaintiff's subsequent letter, dated July 6, 2005, although sent within 20 days, does not constitute a notice of claim for "Extra Work entailing extra cost, or claims [for] compensation for any damages", i.e., it did not meet the requirements stated in "Section 23- CLAIMS"<sup>2</sup>. Clearly, there was a failure of the plaintiff to give the defendant timely written notice of the claim. This untimeliness, alone, requires dismissal of the action. (E.g., Kovachevich v. New York City Housing Authority, 290 AD 2d 325 [1<sup>st</sup> Dept., 2002] and Master Painting and Roofing Corp., v. New York City Housing Authority, 258 Ad2d 275 [1<sup>st</sup> Dept., 1999][cited in Kovachevich]). Furthermore, the plaintiff's letter, as a matter of law is defective (Bat-Jac Contracting, Inc. v. New York City Housing Authority, 1 AD3d 128 [1<sup>st</sup> Dept., 2003]).

Further discussion is unwarranted, and this action is dismissed.

Dated: 3/20/09  **HON. BERNARD J. FRIED**  
J.S.C.

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

<sup>1</sup>As noted at oral argument, this ground has been abandoned by the defendant. (Tr. p. 5).

<sup>2</sup> There was no statement "of intention to make a claim for such extra", no statement of "the nature and amount of the extra cost or damages sustained"; and no statement of "the basis of the Claim against the [defendant]".

