Mulvihill Elec. Contr. Corp. v NAB Constr. Corp.
2010 NY Slip Op 30298(U)
January 15, 2010
Supreme Court, Queens County
Docket Number: 15696/04
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

MULVIHILL ELECTRICAL CONTRACTING CORP.,

Plaintiff,

-against-

NAB CONSTRUCTION CORPORATION,

Defendant.

Index No.: 15696/04
Motion Date: 1/13/10
Motion Cal. No.: 40

The following papers numbered 1 to 30 read on this motion by defendant NAB Construction Corporation for an order granting summary judgment dismissing the complaint on the grounds of statute of limitations, pursuant to CPLR 3212; and cross-motion by plaintiff for an order, pursuant to CPLR 3212 and Rule 2215, granting summary judgment in plaintiff on its third cause of action in the amount of $329,370.20.

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Upon the foregoing papers it is ordered that this motion by defendant NAB Construction Corporation for an order granting summary judgment dismissing the complaint on the grounds of statute of limitations, pursuant to CPLR 3212; and cross-motion by plaintiff for an order, pursuant to CPLR 3212 and Rule 2215, granting summary judgment in plaintiff on its third cause of action in the amount of $329,370.20 are decided as follows:

This action stems from a contract defendant NAB entered into with Metro North Commuter Railroad for the rehabilitation of the Park Avenue Viaduct (hereinafter, "general

contract"). On January 10, 1994, NAB entered into a subcontract with plaintiff Mulvihill to perform all work and provide labor and equipment for certain electrical work to be completed within the time frame set forth in the agreement or the time frame set forth in the general contract. The subcontract provided that the work performed by Mulvihill did not include any extra, additional or other work beyond the scope of the agreement, unless there was a written extra work order directed to Mulvihill from NAB, and set forth the payment terms for extra work. In the event that there was a dispute as to whether any work, labor or materials fell within the scope of work, or constituted extra work, the subcontract provided that the parties would negotiate the dispute, and in the event that it was still not resolved, after the completion of the disputed work and its acceptance by NAB and the owner, the subcontractor was free to seek to recover the fair and reasonable value of the work, pursuant to paragraph 12 of the agreement.

NAB agreed to pay Mulvihill the sum of $7,476,564.00 for the work, pursuant to the schedule of payments set forth in the agreement. All payments by NAB to the subcontractor were subject to a condition precedent that NAB received payment from the owner. Paragraph 3(f) of the agreement provides A[f]inal payment of the contract price shall be made by NAB to SUBCONTRACTOR within seven (7) working days of all of the following: (I) completion of SUBCONTRACTOR's performance under this AGREEMENT and the acceptance of same by both NAB and OWNER; (ii) payment in full by OWNER to NAB; (iii) the issuance in form satisfactory to NAB and OWNER of all warranties, guarantees and any other document required by this AGREEMENT or the GENERAL CONTRACT, or by OWNER, OWNER'S Architect, or other authorized agent of OWNER, it being specifically understood and agreed by SUBCONTRACTOR that all warranties and guarantees of SUBCONTRACTOR'S WORK required by the GENERAL CONTRACT shall be provided by SUBCONTRACTOR; and (iv) execution by SUBCONTRACTOR of final release of mechanics lien and affidavit and general release, all in the form annexed hereto or in form otherwise satisfactory to NAB and such other satisfactory evidence that NAB may require indicating that the subject premises are free from all liens or other claims chargeable to the premises or to SUBCONTRACTOR.

The final payment terms were subject to the express condition precedent that NAB receive final payment from the owner. The subcontractor agreed to accept that risk that if NAB was not paid by the owner, then it would not be paid as well. Of particular significance to the instant motion, Paragraph 12 of the subcontract provides, in pertinent part, that No action or proceeding shall be instituted by SUBCONTRACTOR upon any claim arising out of, or relating to this AGREEMENT or the breach thereof, on any theory in law or in equity, unless such action or proceedings shall be commenced within six (6) months of the earlier of NAB's or OWNER'S acceptance of SUBCONTRACTOR'S WORK as complete, or the issuance of a certificate of occupancy.

Plaintiff commenced this action on July 12, 2004, and alleges in its first cause of action for breach of contract that it entered into the subject contract in 1993, that it performed all of the work under the terms of the contract, as well as extra work at the direction of, and authorized by NAB pursuant to additional work orders, that it received a payment on April 15, 2002 in the sum of $48,428.00, bringing its total payment to $7,147,983.80, and that it is entitled to a balance of $722,135.02. In the second cause of action for an account stated, plaintiff alleges that it As stated an account with NAB for the aggregate sum of $722,135.02 and said account was delivered to and accepted by NAB, and that as a result of NAB'S failure to object to the account, it is indebted to plaintiff in the amount of $722,135.02. The third cause of action alleges that NAB refused to pay certain invoices submitted by the plaintiff having an agreed and reasonable value of $329.270.29. The fourth cause of action alleges that NAB refused to pay certain invoices submitted by the plaintiff having an agreed and reasonable value of $213,093.55. The fifth cause of action alleges that NAB refused to pay certain invoices having a reasonable value of $146,962.52. The sixth cause of action alleges that NAB took improper credits in the sum of $128,408.52 against the total amount due to the plaintiff.

Defendant NAB previously sought dismissal of the complaint pursuant to the subject contract's six month period of limitations and its motion was granted by Justice Eliot. In his order, Justice Eliot found that the Certificate of Completion, executed and filed by the plaintiff on January 21, 2001, in which it states that it completed its work in October 2000, constituted an admission by the plaintiff that its work was completed by October 2000. He also found that plaintiff did not deny that its work was completed in October 2000, or that its work was accepted by NAB and the owner. Plaintiff also did not deny that the project had long been completed, that it was paid over $7 million dollars for the work it performed, and that NAB had been paid by the owner. Consequently, Justice Eliot held the claim for breach of contract was time barred. Justice Eliot also found that the claims for an account stated, for payment on the invoices and for the restoration of money credited to NAB, arose out of the parties' breach of contract claim, and therefore were also time barred.

Plaintiff appealed that Order, and in Mulvihill Elec. Contr. Corp. v. Nab Constr. Corp.,51 AD3d 881 (2d Dep't 2008), the Appellate Division reversed the dismissal of the complaint. The appellate court found, *inter alia*, that defendant had failed to demonstrate that the six-month limitations period had expired since it had failed to present sufficient evidence as to when either it or the owner accepted the plaintiff's work as complete, or a certificate of occupancy was issued. Defendant's reliance, in part upon the subcontractor's application for a certificate of compliance as proof that the work was complete as of a certain date was rejected. This document merely constituted evidence that the Department of Transportation found that the work conformed to contract requirements. Moreover, the subcontract did not recite that the issuance of the certificate of compliance would be considered an acceptance of the work as

complete by the contractor or the owner. The Court also rejected defendant's claim that its being paid in full was proof that plaintiff's work was accepted as completed, since, it had failed to submit adequate documentary evidence establishing that it was paid in full by the owner. The Appellate Court also rejected plaintiff's assertion, that plaintiff was entitled under the contract to written notice of either the acceptance of the plaintiff's work as complete by the owner or the defendant, or the issuance of a certificate of occupancy.

In an Order dated, February 23, 2009, this Court granted defendant's application for an order pursuant to CPLR 2307 permitting it to issue and serve a so-ordered Subpoena Duces Tecum directed to Metro North Commuter Railroad for the production of documents related to the work performed by NAB and Mulvihill Electrical Contracting Corp. in connection with a contract for the Rehabilitation of the Park Avenue Viaduct-Metro North Commuter Railroad Contract No.:9077 and for an order permitting NAB to issue and serve a so-ordered Subpoena and Notice of Deposition directed to Metro North to produced a person with knowledge for questioning under oral examination, is granted, without opposition. Those Subpoenas were issued and the defendant received the documents and conducted a deposition of Francis Doogan, Senior Construction Engineer for Metro-North on the subject project.

Based on this new evidence, defendant has now made the instant motion to dismiss the complaint as time-barred. According to defendant, the new evidence establishes that Metro-North accepted defendant's work as complete on September 28, 2001. This acceptance triggered the provisions of the subcontract regarding the six month period to commence an action. Thus, the limitation period expired on March 28, 2002. Therefor, the instant action, commenced on July 12, 2004, is untimely and must be dismissed. Plaintiff opposes this motion and claims that under the Second Department's decision, in order to prevail on this motion, defendant must present admissible evidence that the owner accepted plaintiff's work as complete by showing full payment of the contract or that a certificate of occupancy was issued. Since neither has been shown, the motion must be denied.

Initially, the Court notes that "[m]ultiple summary judgment motions in the same action should be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause" (Flomenhaft v Fine Arts Museum of Long Is., 255 AD2d 290 [2d Dept 1998]) a subsequent summary judgment motion may be properly entertained when "it is substantively valid and [when] the granting of the motion will further the ends of justice while eliminating an unnecessary burden on the resources of the courts" (Detko v McDonald's Rests. of N.Y., 198 AD2d 208, 209, 603 NYS2d 496 [2d Dept 1993].) Rose v. Horton Med. Ctr., 29 A.D.3d 977 (2d Dep't 2006.) Based on the new evidence, this Court finds it appropriate to entertain the instant motion by defendant.

In support of this motion, defendant has submitted the new evidence, which consists of

certain documents and the deposition testimony of Francis Doogan. One document is a Metro-North memorandum, dated October 4, 2001, written by Doogan to the construction manager, Betchel Infrastructure, which states "[a]s of September 28, 2001, NAB Construction Corporation satisfactorily completed all outstanding items on the punch list, and submitted all deliverables to the Railroad. " Doogan's deposition testimony indicates that he had made his determination and had written the memorandum as a result of his personal inspection of the job site. Doogan also stated that no certificate of occupancy had been issued because certificates of occupancy are not attached to projects of this type. Doogan also stated that defendant NAB had nothing left to complete after September 28, 2001. Based upon this newly discovered evidence, defendant claims that it has conclusively demonstrated that the limitations period, which commenced at the earlier of the acceptance of plaintiff's work as complete or the acceptance of NAB's work as complete by Metro-North, commenced running on September 28, 2001.

The Court finds that defendant has demonstrated its prima facie entitlement to summary judgment. The evidence shows that Metro-North accepted defendant's work as having been completed as of September 28, 2001. This established that plaintiff's work, which was included within defendant's work, was completed as of that date as well. It is well settled that parties to a contract may agree to limit the period of time within which an action must be commenced to a shorter period than that provided by the applicable Statute of Limitations. Matter of Incorporated Vil. of Saltaire v Zagata, 280 AD2d 547, (2d Dept 2001.) Here, plaintiff does not argue nor is there any indication that the shortened period was not voluntarily agreed to As such, the limitations period expired, at the latest, six months thereafter, on March 28, 2002. The instant action, commenced on July 12, 2004, is therefore untimely based upon the contractually shortened limitations period. See generally, Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985). The burden thereby shifted to plaintiff to raise an issue of fact regarding the time bar.

In opposition, plaintiff claims that under the Second Department's decision, in order to prevail on this motion, defendant must present admissible evidence that the owner accepted plaintiff's work as complete by showing full payment of the contract or that a certificate of occupancy was issued. Defendant acknowledges that no certificate of occupancy was issued in this matter. Further, plaintiff claims that defendant presents no evidence that defendant accepted plaintiff's work as complete, nor does defendant present evidence that the owner accepted plaintiff's work as complete. Accordingly, plaintiff asserts that the sole issue is whether defendant has established the owner's acceptance of plaintiff's work as complete by showing full payment of the contract. Since there is no evidence of such full payment, the motion must be denied.

The Court finds that, contrary to plaintiff's claim, the evidence does establish the owner and defendant accepted plaintiff's work as complete. Plaintiff does not refute the evidence on this issue. As set forth above, paragraph 12 of the agreement stated that the six month period "commenced within six (6) months of the earlier of NAB's or OWNER'S acceptance of SUBCONTRACTOR'S WORK as complete. Since defendant's work, as general contractor, was accepted as complete by Metro-North, this necessarily entailed acceptance of all of the

work defendant was responsible for, including its subcontracted work with plaintiff. Clearly, this is evidence that plaintiff's work was accepted as complete by the owner. Moreover, it would also indicate that defendant accepted plaintiff's work as complete at the latest, on the date Metro-North accepted as complete defendant's work. As such, the pre-requisites for the provision in the subcontract regarding the commencing of the six month limitation for bringing an action were met. Since six month's from the date of acceptance was March 28, 2002, and this action was not commenced until July 12, 2004, it is barred by the terms of the subcontract.

The Court notes that, the Appellate Division's reversal was not based on any evidence regarding Metro-North's acceptance of defendant's work as complete. Its ruling was specific and found plaintiff's application for a certificate of compliance was not proof that the work was complete as of a certain date. The Court also found insufficient proof that defendant was paid in full. The Appellate Court did not indicate defendant could only show the work was complete by proof of full payment. As such, this Court has reviewed the evidence in the instant motion, in light of the Appellate Division decision, and finds it sufficient to establish the date in which plaintiff's work was accepted by the Owner and defendant was September 28, 2001 and this action was commenced more than six months after that date. Finally, contrary to plaintiff's claim, contractual limitation for commencing this action covered "any claim arising out of, or relating to this AGREEMENT or the breach thereof, on any theory in law or in equity," which clearly includes all of the claims in the complaint.

Based on the above, defendant's motion is granted and the complaint is dismissed in its entirety as barred by the contractual limitation on commencing this action. Based on the dismissal of the complaint, the cross-motion by plaintiff is denied.

Dated: January 15, 2010 ________________________________

ORIN R. KITZES, J.S.C.