

Harris v Mattingly

2010 NY Slip Op 32891(U)

October 13, 2010

Supreme Court, New York County

Docket Number: 105857/09

Judge: Cynthia S. Kern

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

CYNTHIA S. KERN
J.S.C.

PRESENT: _____

PART 52

Index Number : 105857/2009

HARRIS, DEBRA

vs

MATTINGLY, JOHN B.

Sequence Number : 002

OTHER _____

INDEX NO. 105857/09

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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 *is decided in accordance with the attached decision.*

FILED

OCT 18 2010

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/13/10

CK
CYNTHIA S. KERN J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
Ms. Debra Harris, as sole owner and on behalf of
HUSH TOURS, INC.,

Petitioner,

Index No. 105857/09

For a Judgment Pursuant to Article 78 of the
Civil Practice Laws and Rules

-against-

John B. Mattingly, Administrator/Commissioner
of the New York City Administration for
Children's Services, Robert Doar, Commissioner
of the New York City Human Resources
Administration and the City of New York,

Respondents.
-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner brings this petition seeking rescission of the Administration for Children's
Services' ("ACS") decision to accept the bid of another entity for a certain contract and for
monetary damages. It alleges that ACS's denial of its bid was arbitrary and capricious.

Respondents the City of New York, John Mattingly, the Administrator/Commissioner of ACS
and Robert Doar, Commissioner of the New York City Human Resources Administration

(collectively, the "City") now move to dismiss the petition on the grounds that petitioner failed to join a necessary party, failed to serve the Notice of Petition timely, and that petitioner's claim is moot and barred by the doctrine of laches. For the reasons set forth more fully below, the City's motion is granted.

The relevant facts are as follows. On or about September 8, 2008, petitioner Debra Harris submitted a bid on behalf of Hush Tours, Inc. ("Hush") on a competitive bid solicitation for the provision of courier services for ACS. Hush's bid was the second lowest. The lowest bidder withdrew its bid, leaving Hush as the lowest bidder. ACS was allegedly concerned about Hush's bid and experience. On December 10, 2008, Hush sent petitioner a letter rejecting Hush's bid. The letter notified petitioner of its right to appeal the decision, which it did. That appeal was denied although the date of the denial is disputed. The City claims a letter with the denial was sent on January 28, 2009, while petitioner claims that the denial was dated March 6, 2009. On January 29, 2009, Deluxe Delivery Systems, Inc., ("Deluxe") was notified that it was the lowest responsive bidder and an award letter was sent on May 11, 2009. The term of the contract is for three years beginning April 1, 2009 and Deluxe is currently performing under the contract. On May 5, 2009, petitioner served its Petition on the City of New York. However, petitioner failed to serve a Notice of Petition on the City until April 2, 2010.

The Petition is dismissed by this court on the ground that the Petition is moot. In its Petition, petitioner seeks rescission of ACS's decision to reject its bid as well as monetary damages. The courts have held that where a competitive bidding process for a contract is at issue but the work under the contract has been completed or substantially completed, an Article 78 proceeding seeking rescission of the award of the contract is moot. *See Woods Advertising, Inc.*

v Hon. Edward I. Koch, Mayor of the City of New York, 178 A.D.2d 155 (1st Dept 1991); *Bush Terminal Roofing & Contracting v Board of Education of the City of New York*, 91 A.D.2d 662 (2d Dept 1982); *La Corte Elec. Constr. & Maint. Inc. v County of Schoharie*, 190 A.D.2d 899 (3d Dept 1993); *Gerster Sales & Service, Inc. v Power Auth. of State of New York*, 67 A.D.2d 1386 (4th Dept 2009). In the instant case, the contract is half completed and a proceeding to rescind the award of the contract is therefore moot. Petitioner does not submit any case law to the contrary.

However, even if the Petition is not moot because the contract is arguably not “substantially” completed, the petition is dismissed because petitioner served its Notice of Petition late. The Notice of Petition must be served within 15 days of the expiration of the statute of limitations. Assuming petitioner’s later date of March 6, 2009 is correct, the statute of limitations expired four months later, on July 6, 2009. Petitioner did not serve the Notice of Petition until 9 months later, on April 2, 2010.

The court, in its discretion, declines to extend the time to serve the Notice of Petition. The court may extend the time to serve the Notice of Petition in the “interest of justice.” *Leader v Maroney, Ponzini & Spencer*, 97 N.Y.2d 95 (2001). In deciding whether to do so, the court may consider the plaintiff’s diligent efforts at service as well as “any other relevant factor... including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant.” *Id.* In the instant case, petitioner did not attempt to serve the Notice of Petition prior to April 2010 and did not request an extension of time until the issue was raised by respondents in this motion. Moreover, the fact that work under the contract has been

proceeding for a year-and-a-half, which is half the term of the contract, weighs against granting such an extension. The court therefore declines to permit such an extension.

Accordingly, the City's motion is granted and the petition is dismissed in its entirety.

This constitute the decision and order of the court.

Dated: 10/13/10

Enter: CK

J.S.C.

CYNTHIA S. KERN
J.S.C.

FILED

OCT 18 2010

COUNTY CLERK'S OFFICE
NEW YORK