Everest Gen. Contrs., Inc. v New York City Hous. Auth.
2010 NY Slip Op 33855(U)
September 13, 2010
Supreme Court, New York County
Docket Number: 602195/09
Judge: Charles E. Ramos

E-FILE

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

PRESENT: CHARLES E. RAMOS **PART** 53
Justice

EVEREST GENERAL CONTRACTORS

- v -

NEW YORK CITY HOUSING AUTHORITY

INDEX NO. 602195/09
MOTION DATE
MOTION SEQ. NO. 001
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

NYS SUPREME COURT
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Upon the foregoing papers, it is ordered that

is decided in accordance with accompanying memorandum decision and order.

Dated: 9/13/2010

CHARLES E. RAMOS J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
----------X
EVEREST GENERAL CONTRACTORS, INC.,

Plaintiff,

- against -

Index No.
602195/09

NEW YORK CITY HOUSING AUTHORITY,

Defendant.
----------X

Charles Edward Ramos, J.S.C.:

Defendant New York City Housing Authority ("NYCHA") moves, in motion sequence 001, to dismiss the verified complaint of plaintiff Everest General Contractors, Inc. ("Everest"), pursuant to CPLR 3211(a)(1) and 3211(a)(7)[1].

Background

This is a breach of contract action arising out of a contract between Everest and NYCHA.

As alleged in Everest's complaint and affidavit, on August 13, 2001, NYCHA and Everest entered into a contract for roof replacement and asbestos abatement at a NYCHA development in Manhattan, the General Grant Houses (the "Contract")(Nicolaides Aff., ¶¶ 4, 6). The terms of the Contract required that the work be completed within 260 days, or approximately nine months (Complaint, ¶ 4). Section 15 of the Contract states that NYCHA may order Everest to suspend the work, provided that where such suspension is for an unreasonable period of time, an adjustment shall be made for increased costs incurred by the contractor as a

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[1] Originally, defendant also moved pursuant to CPLR § 3211(a)(5), but withdrew the argument in its Reply Memorandum of Law.

result of the delays (Goodman Aff., Exhibit 1). In addition, Section 23 of the Contract requires Everest to file a written notice of claim before asserting a claim for damages against NYCHA (*id.*).

On January 18, 2002, NYCHA directed Everest to commence the work on March 4, 2002 and complete the work by November 24, 2002 (Complaint, ¶ 8). However, in 2002, NYCHA directed Everest to stop or suspend work on three separate occasions, resulting in delays (Complaint, ¶¶ 10-12). On April 25, 2002, NYCHA directed Everest to stop work at all of the building canopies (Complaint, ¶ 10). On July 17, 2002, NYCHA directed Everest to stop work at Building # 4 (Complaint, ¶ 11). On November 7, 2002, NYCHA directed Everest to stop work at the Day Care Center building (Complaint, ¶ 12). From 2002 to 2004, NYCHA did not provide Everest with any direction regarding the designs of the work that was stopped or placed on hold, resulting in a 20 month delay of the performance of the contract (Nicolaides Aff., ¶ 23). Finally, in 2004, NYCHA directed that the work be completed as originally designed (Complaint, ¶ 13).

On July 26, 2004, Everest wrote a letter to NYCHA expressing that the 20-month delay resulted in Everest incurring additional expenses in the amount of $570,871.40 (Nicolaides Aff., Exhibit Q). The communication included an itemized list of the additional expenses incurred by Everest and a request for an "open monetary change order" (*id.*). However, no adjustments were ever made to reflect these expenses (Nicolaides Aff., ¶ 28).

As a result of the delays, substantial completion of the

work under the Contract did not occur until March 2006 (Complaint, ¶ 9). On July 7, 2006, George Nicolaides, owner and president of Everest, met with NYCHA to discuss Everest's claims for damages resulting from the suspension of work (Nicolaides Aff., ¶ 16, Exhibit K). At this meeting, NYCHA representatives allegedly acknowledged that the delays were unreasonable, instructed Nicolaides on how to prepare Everest's delay claims, and created a handwritten timeline of the events surrounding the work suspension (*id.*, ¶¶ 16-17).

On April 16, 2009, Everest submitted a notice of claim to NYCHA (Nicolaides Aff., Exhibit A; Complaint, ¶ 22). Subsequently, on July 16, 2009, Everest commenced this action, claiming that NYCHA breached Section 15 of the Contract by failing to make an adjustment to reflect the additional costs, in the amount of $1,240,870.36, incurred by the Everest as a result of the unreasonable suspensions of work (Complaint, ¶¶ 3, 24, 26).

On November 9, 2009, NYCHA moved to dismiss the action pursuant to CPLR 3211 on grounds that Everest failed to file a timely notice of claim, as required by Section 23 of the Contract.

Discussion

On a motion to dismiss pursuant to CPLR 3211, this Court accepts the facts as alleged in the complaint as true, accords plaintiffs the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [NY

1994]). A motion to dismiss based on documentary evidence may be appropriately granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). In assessing a motion under CPLR 3211(a)(7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon* at 88).

NYCHA moves to dismiss Everest's complaint on grounds that Everest failed to file a notice of its claim within 20 days after the claim arose, pursuant to Section 23 of the Contract (Reply, p. 1). NYCHA asserts that Everest's claim arose no later than March 2006 when the work under the Contract was substantially completed, and therefore, the time to file a notice of claim ended no later than April 20, 2006 (*id.* at p. 3). Thus, NYCHA argues that the April 2009 notice of claim was untimely, and consequently, Everest is precluded from asserting a claim for damages (*id.*).

Everest argues that Section 23 of the Contract should not apply to this action and that no notice of claim was required because its claim is based on NYCHA's breach of Section 15 of the Contract, a provision that does not contain a notice requirement (Pl. Opp., p. 6-7). Furthermore, Everest asserts that in the event that this Court finds that the notice provision of Section 23 of the Contract is applicable, the July 26, 2004 letter to

NYCHA satisfied the notice requirement (*id.* at 7). Alternatively, Everest argues that the July 7, 2006 meeting satisfied the notice requirement by providing NYCHA with actual notice of the delay claim, amounting to a waiver by NYCHA of the written notice of claim requirement (*Id.* at 7-8).

Turning to the applicability of Section 23 of the Contract to this action, it is well established that "a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]). Thus, "clear, complete writings should generally be enforced according to their terms" (*id.*). Furthermore, it is well-settled that "courts should construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms" (*Gessin Elec. Contrs., Inc. v 95 Wall Assoc., LLC*, 2010 NY Slip Op 4921, 2 [1st Dept 2010]). Therefore, "no provision of a contract should be left without force and effect" (*id.* at 3).

Everest argues that because Section 15 of the Contract does not contain an express notice requirement, while other provisions do, no notice of claim is required before asserting a breach of contract claim based on Section 15, and therefore Section 23 of the Contract is inoperable in this situation.

However, Everest's argument ignores the plain meaning of the terms of Section 23 of the Contract. The section clearly and unambiguously requires a written notice of claim before the contractor can assert a claim for damages against NYCHA "for any damages sustained by reason of any act or omission of..." NYCHA

(Goodman Aff., Exhibit 1).

The lack of a notice requirement in Section 15 of the Contract merely indicates that no notice is required before an adjustment can be made to the contract for unreasonable suspensions of work. It has no bearing on the requirement of a written notice of claim before an action for damages can be asserted against NYCHA. The unambiguous language of Section 23 of the Contract indicates that written notice of claim is required whenever a claim for damages is asserted against NYCHA, regardless of the section upon which a claim is based. Everest is asserting a claim for breach of Section 15 of the Contract for damages resulting from NYCHA's failure to properly adjust for the increased costs of the delay.

In light of the fact that this is not a claim for an adjustment, but for a breach of contract under which Everest seeks damages (Complaint, ¶¶ 3, 18-20), this action is clearly within the ambit of the notice of claim requirement of Section 23 of the Contract. Therefore, Everest was required to submit a written notice of claim within 20 days of the time the cause of action accrued.

Having established that Section 23 of the Contract applies to Everest's claim, the Court must now consider whether Everest satisfied the notice of claim requirement of Section 23 of the Contract. Under that section, Everest was obligated, "within twenty (20) days after such claim shall have arisen, [to] file with [NYCHA] written notice of intention to make [the] claim (Goodman Aff., Exhibit 1). The notice must include "the nature

and amount of the...damages sustained and the basis of the Claim against the Authority" (*id.*). Section 23 of the Contract further states that "[t]he filing by the Contractor of a notice of claim...shall be a condition precedent to the settlement of any claim or to the Contractor's right to resort to any proceeding or action to recover thereon, and failure to do so shall be deemed to be a conclusive and binding determination on the Contractor's part that he/she has no claim against the Authority...for compensation for damages" (*id.*).

Everest filed its verified notice of claim on April 16, 2009 (Nicolaides Aff., Exhibit A). Everest does not argue that this notice was timely, except to note that "final completion and payment was not made until April 15, 2009" (Pl. Opp. Memo. at 4).

However, the date of final payment is irrelevant here, because it is well settled that a "cause of action for breach of a construction contract accrues upon substantial completion of the work" (*Superb General Contracting Co. v City of New York*, 39 AD3d 204 [1st Dept 2007]). Plaintiff admits that substantial completion occurred in March 2006 (Complaint, ¶ 9). Therefore, even assuming that substantial completion occurred on March 31, 2006, notice of claim was required to be filed no later than April 20, 2006. Consequently, Everest's April 2009 notice of claim was too late.

Everest argues that it satisfied the notice of claim requirement by submitting to NYCHA a request by letter for an "open monetary change order" on July 26, 2004 that included an itemized list of expenses incurred by Everest from the suspension

of work (Nicolaides Aff., Exhibit Q). Everest fails to allege the July 26, 2004 letter was ever sent to NYCHA, but even if this Court were to assume that the letter was sent, it cannot satisfy the notice requirement because Everest's cause of action did not accrue until almost two years later, when the work was substantially completed in March 2006.

Moreover, the letter does not contain any language indicating that Everest intended to make a claim for damages. The letter merely stated that Everest requested "an open monetary change order be issued for the extended overhead" (Nicolaides Aff., Exhibit Q). Thus, the July 26, 2004 letter cannot satisfy the notice of claim requirement of Section 23 of the Contract.

Finally, Everest argues that the July 7, 2006 meeting, at which its delay claim was discussed, satisfied the notice of claim requirement. Everest's argument is unavailing because July 7, 2006 was already too late to satisfy the 20-day limit following substantial completion in March 2006. Furthermore, Section 23 of the Contract clearly requires a "*written* notice of intention to make a claim" (Goodman Aff., Exhibit 1 [*emphasis added*]). Everest does not allege that it provided any written submissions at the meeting on July 7, 2006.

Everest also argues that this meeting provided NYCHA with "actual notice" of the delay claim, and that NYCHA waived the requirement of written notice of claim because it had actual knowledge of the work delays and Everest's expenses. However, "neither prior dealings among the parties nor actual knowledge by defendant of plaintiff's claims and alleged damages relieved

plaintiff of the obligation to serve a timely and sufficiently detailed notice of claim" (*S.J. Fuel Co., Inc. v New York City Housing Authority*, 73 AD3d 413 [1st Dept 2010]).

Moreover, Everest does not allege that NYCHA, through its conduct or words, waived the requirement of a written notice of claim or advised Everest that the notice of claim was not required to be in writing. Everest admits that NYCHA provided instructions on how to present the delays in the notice of claim (Nicolaides Aff., ¶ 16). The fact that NYCHA advised Everest on how to prepare its claims indicates that a written notice of claim was requested by NYCHA, rather than waived. Therefore, the July 7, 2006 meeting cannot satisfy the notice of claim requirement of Section 23 of the Contract and does not constitute a waiver of written notice.

In light of the unambiguous contractual language, Everest's failure to submit a timely notice of claim pursuant to Section 23 of the Contract requires that Everest's complaint be dismissed based on the documentary evidence (CPLR 3211 [a] [1]).

Accordingly, it is

ORDERED that the defendant's motion to dismiss the verified complaint is granted in its entirety, thereby dismissing the complaint as against the defendant New York City Housing Authority.

This constitutes the decision and order of this Court.

Dated: September 13, 2010

Enter

J.S.C.

CHARLES E. RAMOS