

Eastcon Bldg. Servs., Inc. v New York City Hous.

2011 NY Slip Op 30036(U)

January 7, 2011

Sup Ct, New York County

Docket Number: 102322-10

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 102322/2010

EASTCON BUILDING SERVICES,

vs.

NEW YORK CITY HOUSING

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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'

FILED

JAN 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*and PC scheduled for
2/17/11 @ 9:30am Part 10*

JAN 07 2011

Dated: _____

HON. JUDITH J. GISCHE, 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):

FILED

JAN 10 2011

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Eastco Building Services, Inc.,

Plaintiff (s),

-against-

New York City Housing Authority,

Defendant (s).
-----X

NEW YORK
COUNTY CLERK'S OFFICE
DECISION/ORDER

Index No.: 102322-10

Seq. No.: 001, 002

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Seq No. 1	
Eastco n/m (3215) w/TJD affirm, SB affid (sep backs), exhs	1,2,3
Def's opp w/SWG affirm, exhs	4
Eastco reply w/CPM affirm, exhs	5
 Seq No. 2	
Def's n/m (3211) w/SWG affirm	6
Eastco opp w/CPM affirm, CS affid (sep backs) exhs	7,8
Def's reply w/SWG affirm, exhs	9

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action for breach of contract, unjust enrichment and quantum meruit. Presently before the court are two motions. Motion sequence number 1 is by plaintiff for entry of a default judgment against defendant. The other motion (sequence number 2) is by defendant for the pre-answer dismissal of this action on the basis that it is time barred and plaintiff did not timely file a notice of claim. Since the motions present interrelated

issues, claims and arguments, they are consolidated and will be decided in this decision and order.

The court first considers whether plaintiff's motion for entry of a default judgment against defendant should be granted. The crux of this motion is that plaintiff agreed to extend defendant's time to answer the complaint or move but defendant brought its motion to dismiss late. The summons and complaint were served March 1, 2010 and the time to answer or move was first extended to May 21, 2010 and then extended again to July 9, 2010. Defendant did not serve its motion to dismiss until July 16, 2010.

Defendant acknowledges there was a delay in bringing the motion but argues that: 1) the parties were trying to settle their dispute, 2) plaintiff has shown no prejudice; 3) defendant has a meritorious defense and; 4) the delay was de minimus.

Aside from being peeved that its repeated courtesies to defendant were taken for granted, plaintiff has presented no compelling reason why this case should not be decided on its merits. The general policy of the courts is to permit actions to be tried on their merits and where it appears that there is a reasonably meritorious defense and a valid excuse, the courts take a liberal approach to defaults (*see Machnick Builders, Ltd. v. Grand Union Co.*, 52 A.D.2d 655 [3rd Dept 1976]). Plaintiff's motion for entry of a default judgment against the defendant is denied and the court will move on to decide defendant's motion for the pre-answer dismissal of the complaint.

On a motion to dismiss, the court must decide whether, accepting all of the plaintiff's facts, they support the causes of action asserted (*Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). If, as defendant argues, this case is time barred, then once defendant establishes that defense, the burden shifts to the plaintiff to set forth facts

establishing that the case is timely (Assad v. City of New York, 238 AD2d 456 [2nd Dept 1997] *lv dismiss* 91 NY2d 848 [1997]).

Background, Claims and Arguments Presented

Plaintiff's claims involve a "Master Agreement" which was awarded to plaintiff on November 21, 2002 ("master agreement") and two job order contracts thereunder. The first job order contract dated August 12, 2003 was for the installation of "fire stopping" in 39 apartments at one of the buildings in a New York City Housing complex (JOC # 03X-JG08-00001-.00) ("contract"). The other job order contract was for additional fire stopping work in the same apartments (JOC # 03X-JG08-00001-.01) ("additional work"). Although the contract had a set price (\$118,185.98), the price for the additional work was never set. According to plaintiff, it is owed \$26,591.94 on the contract and \$181,374.75 for the additional work. The basis for the price of the additional work is the expenditures that plaintiff made in connection with the work, including paying for such things as labor, materials, etc.

Defendant argues this action is time barred for two reasons. The first reason is that this action, in order to have been timely, had to have been commenced no later than December 19, 2009. This is based on plaintiff having completed the project on December 19, 2003. The summons and complaint were, however, filed by plaintiff on February 23, 2010. The second reason defendant argues this case should be dismissed is based upon the language found in the "Claims" section (section 23) of the parties' master agreement. Section 23 requires that a contractor who has a claim for "Extra Work entailing extra cost . . . shall, within twenty days after such claim has arisen, file with the Authority [defendant] written notice of intention to make a claim for such extra

cost or damages, stating in such notice the nature and amount of the extra cost or damages sustained and the basis of the claim against the Authority.” According to defendant, did not comply with this notice provision because it did not notify defendant of a claim by January 8, 2004.

Where, such as here, affidavits and other evidentiary materials are provided in opposition to a motion to dismiss, they may be considered to any defects in the pleading (Leon v Martinez, 84 NY2d 83, 88 [1994]). Plaintiff provides the sworn affidavit of its Vice President of Operations, Chris Sanders and correspondence between the parties. Sanders states that plaintiff followed defendant’s own procedures for invoicing and that when defendant approved of plaintiff’s additional work, there was a balance due on the contract. Thus, the additional work was done as a “non-pricing task,” meaning that although there was a job order contract for the additional work, no pricing was agreed to before it began.

Sanders states that plaintiff could not have ascertained the costs for the additional work on December 19, 2003 because, although that was the last day of work on the project, plaintiff had to calculate how much it had laid out for labor, materials, etc. Sanders sent defendant a letter dated January 13, 2004 with documentation, including payroll records, material invoices and equipment costs stating it was owed \$180,965.65 for the additional work. Later correspondence (emails) show the parties were trying to work out their differences and it was not until April 2009 that defendant notified plaintiff it would be paying significantly less than plaintiff had demanded.

Discussion

Affording the complaint a liberal construction, plaintiff alleges fact that support the

claims asserted for breach of contract and quasi contract. Although the last day of work on the project was in December 2003, there is correspondence showing that the parties were negotiating the sum plaintiff was demanding to be paid. The final statement by defendant about how much it was willing to pay did not happen until defendant sent its April 2, 2009 letter. In that correspondence, defendant wrote that "after careful review of your request for compensation . . ." defendant would only pay \$20,351 for the fire stopping material plaintiff installed in eleven apartments (the additional work) plus \$29,546.52 still unpaid on the contract. Thus, plaintiff has presented facts showing its cause of action for breach of contract did not accrue on December 19, 2003, but after that making this action timely.

For the same reasons, the notice of claim sent by plaintiff January 13, 2004 is also timely, assuming such notice was, as defendant argues, requires for the additional work. The January 13, 2004 substantially complies with the requirements of section 23 in the master agreement. Plaintiff has established facts tending to show the parties had not priced the additional work and plaintiff did not know its expenses, costs, etc., until then.

Until the breach of contract claim is resolved, there is no reason to dismiss the claims in quasi contract. If the contract claim is proved, then the quasi contract claims may be academic. On the other hand, if plaintiff cannot prove a contract, then it may have to rely on the quasi contract claims (see Vitale v. Steinberg, 307 AD2d 107 [1st Dept 2003]).

Defendant's argument that plaintiff is not entitled to interest because of it did not demand payment for four years is not supported by this record and, in any event, may be raised as a defense (if available) in defendant's answer.

Plaintiff has asserted a claim for legal fees. In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same (AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 [1986]). Plaintiff cites no contractual provision or statute that in support of its legal fee claim nor does it address defendant's arguments in opposition. Therefore, the claim for legal fees is severed and dismissed.

Having denied plaintiff's motion for a default judgment against defendant and also denied defendant's motion for the dismissal of the complaint, except as to the legal fees claim, the court extends defendant's time to answer. The extension is in the manner provided under CPLR 3211 [f].

In anticipation of issue being joined, the court hereby schedules a preliminary conference for **February 17, 2011 at 9:30 a.m.** in Part 10.

Conclusion

Plaintiff's motion for a default judgment is denied. Defendant's motion to dismiss this action is also denied, except as to the claims for legal fees which are hereby severed and dismissed. A preliminary conference is scheduled for **February 17, 2011 at 9:30 a.m.** in Part 10. No further notices will be sent.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.


Dated: New York, New York
January 7, 2011

FILED

JAN 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

So Ordered:



Hon. Judith J. Gische, JSC