

**Kafka Constr., Inc. v New York City School Constr.
Auth.**

2011 NY Slip Op 33321(U)

June 29, 2011

Supreme Court, Queens County

Docket Number: 700136/10

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES

PART 17

Justice

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**KAFKA CONSTRUCTION, INC.,
Plaintiff,**

Index No.: 700136/10

Motion Date: 6/22/11

-against-

Motion Cal. No.: 29

**NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY,**

Defendant.

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The following papers numbered 1 to 14 read on this motion by defendant for an order pursuant to CPLR § 3212 granting partial summary judgment in its favor and dismissing so much of plaintiff's complaint against the SCA as seeks damages of \$121,039.75, on the grounds that the claims are time-barred under Public Authorities Law §1744(2)(I).

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Upon the foregoing papers it is ordered that the motion by defendant for an order pursuant to CPLR § 3212 granting partial summary judgment in its favor and dismissing so much of plaintiff's complaint against the SCA as seeks damages of \$121,039.75, on the grounds that the claims are time-barred under Public Authorities Law §1744(2)(I) is granted, for the following reasons:

According to the complaint, this action stems from three construction projects at which plaintiff performed work for defendant. The defendant, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY ("SCA") and KAFKA CONSTRUCTION, INC. ("Kafka") entered into agreements, by which Kafka, agreed to perform certain work in connection with projects known as PS 138X ("PS 138"), IS 144X ("IS 144"), and HSHILQ05 ("Hilcresst"). Thereafter, Kafka performed its obligations required on these projects, however, it has not been paid for its work. Consequently, Kafka commenced the instant action for breach of contract, quantum meruit, and for accounts stated. Plaintiff alleges it gave defendant timely notices of claim for the amount sought in this action, which is \$1,715,725.54.

Defendant now moves for an order directing partial summary judgment in its favor against

Kafka, dismissing claims totaling \$121,039.75 on the grounds that plaintiff failed to serve timely notices of claim on the SCA within three months of the accrual of its claim, a condition precedent to the commencement of an action against the SCA, and thus failed to timely commence the action. Kafka opposes this motion claiming the SCA has failed to establish prima facie entitlement to judgment, the SCA charges for which it seeks dismissal are not “claims” under Public Authorities Law § 1744, the Notices of Claim were timely, the SCA is estopped from asserting late Notice of Claim as a defense, and discovery is needed for Kafka to oppose this motion.

In support of its motion, the SCA has submitted, inter alia, an attorney’s affirmation, Certificates of Substantial Completion for the PS 138 and IS 144 projects, Change Orders for those two projects, plaintiff’s Notice of Dispute concerning those Change Orders. This evidence establishes the following: The contracts for PS 138 and IS 144 both achieved substantial completion on or about September 5, 2006. However, Kafka had not completed all of its work in time for the school to open and the SCA directed its emergency contractor to perform the unfinished work and back charged Kafka for the costs. On or about June 14, 2007, the SCA issued Unilateral Credit Change Order No. 5U in connection with Project IS 144 for \$48,225.75 representing the cost of site work, which was performed by the SCA's Emergency Contractor. On or about September 26, 2007, the SCA issued Unilateral Credit Change Order No. 10U in connection with Project PS 138 for \$72,814.00 representing the cost of site work, which was performed by the SCA's Emergency Contractor. The change orders were issued as unilateral change orders because Kafka refused to agree to the back charges, claiming that the work in question was not contract work and that the SCA's valuation of the cost of such work was unreasonable and not in accordance with the terms of the contract.

The SCA claims that the change orders issued to Kafka provided Kafka with unequivocal notice of the back charges which the SCA intended to assess against the projects' contract balances and therefore constitute the dates when plaintiff's claims accrued, June 14, 2007 with respect to PS 144 and September 26, 2007 with respect to PS 138. Kafka served Notices of Claim on the SCA in connection with each of the projects on June 11, 2009. The Notice of Claim relating to PS 138 seeks damages of \$72,814.00. The Notice of Claim relating to IS 144 seeks damages of \$48,225.75. Both Notices seek the exact amounts of the credits taken by the SCA with respect to IS 144 on June 14, 2007 and with respect to PS 138 on September 26, 2007. Kafka commenced this action by filing a summons and complaint on May 5, 2010 and serving it on the SCA on or about June 11, 2010. Kafka's claims arising out of PS 138 and IS 144 accrued not later than the dates on which the SCA issued the unilateral credit change orders (back charges) to Kafka, in June and September, 2007. The service of Kafka's Notices of Claim for these two projects on June 1, 2009 was well over three months from the date that Kafka's claims accrued on both projects. Consequently, pursuant to Public Authorities Law §1744(2)(I), the claims against the SCA relating to PS 138 and IS 144, were not timely served and must be dismissed. The SCA also claims that commencement of the action in May, 2010 is more than one year after the happening of the events upon which Kafka's claims were based. Therefore, Kafka's claims against the SCA are also time-barred under Public Authorities Law §1744(2)(ii).

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used

sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v. March*, 127 AD2d 810 (2d Dept. 1987). Finally, as stated by the court in *Daliendo v. Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied.

The court finds that the SCA has established prima facie entitlement to partial summary judgment as a matter of law. The SCA has established plaintiff failed to serve timely notices of claim on the SCA within three months of the accrual of its claim. This is a condition precedent to the commencement of an action against the SCA, and thus plaintiff has failed to timely commence the action. *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 (1986).

In opposition plaintiff has submitted, inter alia, the defendant's General Conditions for construction work, email correspondence between the parties, copies of the change orders, and a summary of the back charges and the supporting documents. Kafka claims that this evidence shows its claims did not accrue until plaintiff was advised by the SCA it would not negotiate further with Kafka over the back charge credit change orders, which occurred in May of 2009, and therefore contends that its June 2009 notice of claim and its September 2010 complaint were timely. Kafka also claims that the SCA should be equitably estopped from raising the failure to serve a timely notice of claim as a defense. Kafka argues that the SCA's "failure" to provide back up documents supporting the credit change orders "lulled Kafka into believing that the documents would be provided and ultimately resolved, thereby foregoing the need to file a claim." Kafka therefore contends that its claims did not accrue until May 19, 2009, when the SCA indicated its intention to close out the back charge change orders due to Kafka's inability to "prove to the CM that they are not responsible for the work associated with the backcharges and directed Kafka to "follow appropriate protocol" to dispute the back charges.

Kafka also argues that the Public Authorities Law notice of claim provisions should not be applied in circumstances where the SCA is seeking to recoup costs from the contractor. Kafka also claims that various SCA's activities which occurred post substantial completion extended the time for substantial completion or the period within which Kafka was required to file a notice of claim. These activities included failing to determine the value of the punch list remaining after the date of substantial completion, not requiring a release when executing a payment application after the certified substantial completion date, as is required by the contract, and processing a payment for a \$10,000 line item representing the guaranty monies after the certified substantial completion date.

The Court finds that plaintiff has not raised an issue of fact regarding its untimely Notice of Claim. Public Authorities Law § 1744(2) establishes the notice of claim requirement for contract actions against the School Construction Authority. Section 1744(2) requires that an action "relating to the design, construction, reconstruction, improvement, rehabilitation, repair, furnishing or equipping of educational facilities" may be maintained against the SCA only if a notice of claim

is presented "within three months after the accrual of such claim." The timely service of a statutorily-mandated notice of claim is a condition precedent to the commencement of an action against a governmental entity covered by the statute. Parochial Bus Systems, Inc. v. Board of Education, 60 N.Y.2d 539, 547 (1983.) Popular Construction, Inc. v. New York City School Construction Authority, 268 A.D.2d 467 (2d Dept. 2000) A contractor must plead and prove compliance with the notice of claim requirement, [C.S.A. Construction Corp. v. New York City School Construction Authority., 5 N.Y.3d 189, 192 (2005)] and the SCA may move to dismiss a complaint, based on plaintiff's failure to satisfy the period of limitations contained in the Public Authorities Law and other statutes. Under Public Authorities Law § 1744(2)(I), the three-month period for service of the notice of claim begins to run upon the "accrual" of the contractor's claim, that is, when the contractor's damages become "ascertainable." For a claim against the SCA, "[w]hile the date upon which a contractor's damages become ascertainable necessarily depends upon the particular facts of each case, it generally has been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted." New York City School Construction Authority v. Kallen & Lemelson, 290 A.D.2d 497 (2d Dept. 2002.)

In the instant case, the SCA's issuance of the unilateral change orders for IS 144 on June 14, 2007 and for PS 138 on September 26, 2007 constituted unequivocal notice of the back charges which the SCA intended to assess against the outstanding contract balances and therefore constituted the date that plaintiff's claims accrued. Measured from these dates, the three-month statutory period for serving a notice of claim ended on September 14, and December 26, 2007. Plaintiff's notices of claim served in June of 2009, almost two years after the claim accrual dates, are therefore untimely.

Contrary to plaintiff's claims the case of Koren Di-Resta Construction Co. v. N.Y. City School Construction Authority, 293 A.D.2d 189 (1st Dep't 2002), does not support its position. Rather, this case stands for the general rule that a contractor's claim "accrues" when it can ascertain the amount appropriate as compensation for the items of work performed", which occurs when once the work is substantially completed or a detailed invoice of the work performed is submitted. *See, New York City School Construction Authority v. Kallen & Lemelson*, 290 A.D.2d 497 (2nd Dep't 2002) Unlike Koren, here there is no dispute that Certificates of Substantial Completion were issued September 5, 2006, the date that the parties considered the work to be substantially complete on both projects. Therefore, Kafka's claims arising out of PS 138 and IS 144 accrued on substantial completion, September 5, 2006, and are thus time-barred. Moreover, even if the time period is measured from the dates that Kafka submitted "detailed invoice[s] for the work performed", two years before the notices of claim were served, the claims are still time-barred. The one payment application submitted in 2009 was not for contract work and therefore does not serve to extend the time period for filing a notice of claim.

Similarly, Kafka's claim that the date for substantial completion should be extended due to events which occurred after substantial completion is mistaken. These actions include the SCA's payment of \$10,000 payment to Kafka for the guaranty, the SCA's alleged failure to issue a "final determination" on the value of the punch list work and the SCA's alleged failure to require

Kafka to execute a release with its final payment application. These matters do not constitute "actual ongoing construction" nor do they constitute a basis to conclude that construction continued. State v. Lundin, 60 N.Y.2d 987, 990-91 (1983). Moreover, at best these were incidental items, (including repairs, punch list or other routine work,) which do not extend the completion date. *Id.* Kafka's claim that the three-month time period did not begin to run until the back charge credit change orders were fully executed, which occurs when they are included in a signed payment requisition is also mistaken as it is against settled authority as to the accrual of claims. Finally, Kafka's argument that the Public Authorities Law notice of claim provisions should not be applied in circumstances where the SCA is seeking to recoup costs from the contractor is without merit. The contract authorizes the SCA to withhold from amounts due the contractor "four times the value of uncompleted work", making it unnecessary for the SCA to bring a claim against the contractor. Accordingly, Kafka has failed to establish that its Notice of Claim was timely and as such, those claims totaling \$121,039.75 that relate to the above discussed back charges were untimely and are time-barred under Public Authorities Law §1744(2)(I).

Furthermore, Public Authorities Law § 1744(2)(ii) requires that the claimant commence an action "within one year after the happening of the event upon which the claim is based." The events upon which plaintiff's claims were based were the issuance of the credit change orders, which occurred in 2007. Therefore, the action, which was commenced in May of 2010, was untimely.

Furthermore, Kafka's claim that the SCA's "failure" to provide back up documents supporting the credit change orders "lulled Kafka into believing that the documents would be provided and ultimately resolved, thereby foregoing the need to file a claim" is without merit and does not warrant equitable estoppel being imposed against the SCA. Kafka claims that its claims did not accrue upon substantial completion on September 6, 2006, but rather three years later on May 19, 2009, when the SCA indicated its intention to close out the back charge change orders and directed Kafka to "follow appropriate protocol" if it wished to dispute them. Estoppel is available against a municipality only "under exceptional circumstances" not present in this case. Conquest Cleaning Corp. v. New York City School Construction Authority, 279 A.D.2d 546 (2nd Dep't 2001).

Here there is nothing to suggest that the SCA engaged in activities, conduct, statements or writings, that would lead Kafka to reasonably believe that it did not need to observe the statutory requirements to protect its claim. The SCA did not admit liability to Kafka, nor make any promises or assurances to Kafka or otherwise led it to believe that its claims would be viewed favorably. Rather the evidence shows the existence of an ongoing dispute regarding the back charges between plaintiff and defendant. As such, it would be unreasonable for Kafka to have forfeited means known to it for the enforcement of its claim by not filing a timely Notice of Claim. Accordingly, this Court finds no basis to find defendant is prevented from raising the untimely filing of the Notice of Claim defense. Mohl v Town of Riverhead, 62 A.D.3d 969, 970,(2nd Dep't 2009). *See also* Wade v. New York City Health & Hospitals Corp., 16 A.D.3d 677 (2d Dep't 2005)

Finally, this Court rejects Kafka's claims that the motion should be denied since there are essential issues of fact which are within the exclusive knowledge of the SCA. The needed

discovery relate to matters that are not capable of raising an issue of fact regarding the timeliness of the Notice of Claim and the filing of the complaint. Accordingly, there is no basis to deny the motion as being premature, pursuant to CPLR 3212 (f).

Based on the above, both the notice of claim and the complaint were untimely under Public Authorities Law §§ 1744(2)(I) and (ii). Accordingly, the motion by defendant for partial summary judgment is granted and plaintiff's claims seeking damages of \$121,039.75 related to PS 138X and IS 144X are dismissed.

DATED: June 29, 2011

ORIN R. KITZES, J.S.C.