

**Superstructures Constr. Corp. v Sewanhaka Cent.
High School Dist.**

2011 NY Slip Op 33650(U)

August 31, 2011

Supreme Court, Nassau County

Docket Number: 3545-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
SUPERSTRUCTURES CONSTRUCTION CORP.,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

**Index No: 3545-11
Motion Seq. Nos. 1 and 2
Submission Date: 8/5/11**

-against-

**SEWANHAKA CENTRAL HIGH SCHOOL
DISTRICT,**

Defendant.

-----X

The following papers having been read on these motions:

- Notice of Motion, Affidavit in Support and Exhibits.....X**
- Affirmation in Support and Exhibit.....X**
- Memorandum of Law in Support.....X**
- Affidavit in Opposition and Exhibit.....X**
- Memorandum of Law in Opposition.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on 1) the motion filed by Defendant Sewanhaka Central High School District (“District” or “Defendant”) on May 12, 2011 and 2) the cross motion filed by Plaintiff Superstructures Construction Corp. (“Superstructures or “Plaintiff”) on July 14, 2011, both of which were submitted on August 5, 2011. For the reasons set forth below, the Court 1) denies Defendant’s motion to dismiss; and 2) grants Plaintiff’s cross motion, and deems its Notice of Claim as timely filed.

BACKGROUND

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing the Complaint.

Plaintiff cross moves for an Order, pursuant to Education Law § 3813(2-a), permitting the notice of claim dated and served on October 22, 2010 to be deemed timely.

B. The Parties' History

The Complaint (Ex. A to Mehnert Aff. in Supp.) alleges as follows:

Superstructures is in business as a public works contractor. On or about September 15, 2009, Superstructures and the District entered into a contract ("Contract") for a public works project involving roof replacement and masonry restoration at Sewanhaka High School ("Sewanhaka") and Elmont High School ("Elmont").

On March 3, 2010, Superstructures advised the District by letter that it was due the sum of \$26,786.86 for work completed at Sewanhaka and the sum of \$132,692.21 for work completed at Elmont, for a total of \$159,479.07. The District has not paid any of these sums. On June 24, 2010, the District terminated the Contract ("Termination"), resulting in damages of \$159,479.07 for moneys not paid, and an estimated sum of \$400,000 as a result of the allegedly wrongful termination.

The Complaint contains a single cause of action for breach of contract. Plaintiff alleges that Defendant breached the Contract by wrongfully and improperly terminating the Contract and seeks damages of no less than \$559,479.07. Plaintiff further alleges that on or about October 21, 2010, it served a notice of claim ("Notice of Claim") on the District, more than thirty (30) days have passed since the filing of the notice of claim and the District has failed or neglected to pay that claim.

Article 18 of the General Conditions of the Contract (Ex. B to Mehnert Aff. in Supp.), titled "Claims and Disputes," provides in pertinent part as follows:

A. Definition. A "Claim" is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.

B. Time Limits on Claims. Claims by the Contractor must be made within thirty (30) days after occurrence of the event giving rise to such Claim, or within thirty (30) days after the claimant first recognizes the condition giving rise to the Claim, whichever is earlier. Claims must be made by written notice. An additional Claim made after the initial Claim has been decided by the Owner will not be considered unless submitted in a timely manner. Failure of the Contractor to give timely notice of claim shall constitute waiver of the claim. Claims must be made by written notice to the Construction Manager and Owner. The responsibility to substantiate Claims shall rest with the Contractor. [underlining in original]

Counsel for Defendant provides a copy of the Notice of Claim (Ex. C to Mehnert Aff. in Supp.) which contains a stamp reflecting that the District received the Notice of Claim on October 22, 2010.

In opposition, Samina Tosif (“Tosif”), the President of Superstructures, affirms that in the summer of 2009, Superstructures was “waiting for [the District] to resolve these open issues[] and [] notify Superstructures regarding what payment will be forthcoming from the sums requisitioned. But, such notification did not come” (Tosif Aff. in Opp. at ¶ 10). Tosif also avers that Superstructures was involved with another project in the summer of 2009 and “its resources were focused on that contract” (*id.* at ¶ 11). Tosif confirms that Superstructures did not file the Notice of Claim until October 21, 2010. He asks that, if the Court determines that the Notice of Claim was not timely, the Court grant leave to have the Notice of Claim deemed timely.

Tasif provides a copy of Plaintiff’s March 3, 2010 letter to Defendant (Ex. A to Tosif Aff. in Opp.). That letter, *inter alia*, 1) identifies the subject of the letter as “Roof Replacement & Masonry Restoration” at Sewanhaka and Elmont; 2) refers to Defendant’s letter dated March 1, 2010; 3) discusses numerous issues, including an extension of time for completion, a date for final inspection, and an infrared moisture test performed on the Elmont roof; and 4) discusses the dispute that is the subject of this action. Specifically, in the March 3, 2010 letter, Plaintiff advised Defendant that it was “patiently still waiting for our balance payments” for the Sewanhaka and Elmont projects, which are listed as the same sums demanded in the Complaint.

C. The Parties’ Positions

Defendant submits that 1) Superstructures never provided the written notice or notices of claim required by Article 18(B) of the General Conditions, and has not alleged compliance with

that provision, and therefore has failed to satisfy a condition precedent to suit; and 2) the Notice of Claim was untimely as it was filed more than three (3) months after the Termination, in violation of Education Law § 3813, and Plaintiff has therefore failed to meet the statutory condition precedent to the filing of this lawsuit.

Plaintiff opposes Defendant's motion, submitting, *inter alia*, that 1) Plaintiff makes no allegation or showing regarding when Plaintiff's request for payment was denied or rejected and, therefore, has not provided the date that "triggered the time" (P's Memorandum of Law at p. 4) when Plaintiff was required to provide notice pursuant to the Contract, or to provide the Notice of Claim; 2) as a result of Plaintiff's March 3, 2010 letter to Defendant, Plaintiff had actual notice of the underlying events giving rise to its claim, remedying any deficiency in the notice requirement; and 3) the Court should grant Plaintiff's application to have its Notice of Claim deemed timely, as Plaintiff cannot show any prejudice by the delay.

In reply, Defendant submits that the latest possible date that any breach of contract claim could have accrued was June 24, 2010, the date of the Termination. In light of Superstructures' conceded failure to provide notice as required by the Contract, or to file a timely Notice of Claim, the Court should dismiss the Complaint. Moreover, Defendant contends that the Court should deny Plaintiff's cross motion for an Order deeming the Notice of Claim timely, given Superstructures' failure to demonstrate a lack of substantial prejudice to the District, or to offer a reasonable excuse for its delay.

RULING OF THE COURT

A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When

entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Relevant Contract Principles

The Court must construe a contract in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners v. Presstek*, 12 N.Y.3d 640, 645 (2009). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Id.*

C. Notice of Claim

Pursuant to Education Law § 3813(1), no action may be maintained against any school district unless a written verified claim was presented to the governing body of the district or school within three months after the accrual of the claim, and the officer or body having the power to adjust or pay the claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment. In the case of an action for monies due arising out of contract, accrual of the claim shall be deemed to have occurred as of the date payment for the amount claimed was denied. Pursuant to Education Law § 3813(2-a), the court may extend the time to serve a notice of claim. In determining whether to grant the extension, the court shall consider, in particular, whether the district or school or its attorney or its insurance carrier or other agent acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter.

The purpose of Education Law § 3813 is to give a school district prompt notice of claims so that investigation may be made before it is too late for investigation to be efficient. *Parochial Bus Systems, Inc. v. Bd. of Educ. of the City of New York*, 60 N.Y.2d 539, 547 (1983), quoting *Matter of Bd. of Educ. (Wager Constr. Corp.)*, 37 N.Y.2d 283, 289 (1975). The essential elements to be included in the notice are the nature of the claim, the time when, the place where and the manner in which the claim arose. *Id.*, citing *Widger v. Central School Dist. No. 1*, 18 N.Y.2d 646, 648 (1966). Where an action in contract is involved, the notice should include the

monetary demand and some explanation of its computation. *Id.*, citing *P. J. Panzeca, Inc. v. Bd. of Educ.*, 29 N.Y.2d 508, 509 (1971).

Where a notice of claim against a school district has not been timely filed, the trial court, in its discretion, may grant an extension of the time within which to file one. *Palka v. Union Endicott School District*, 2 A.D.3d 1174, 1175 (3d Dept. 2003), citing Education Law § 3813(2-a). Among the factors the court should consider are whether the applicable district had prompt notice of the claim and an opportunity to investigate it or if the district was substantially prejudiced in maintaining a defense on the merits. *Id.*, quoting *Matter of Jackson v. Board of Educ., Colton-Pierrepoint Cent. School Dist.*, 194 A.D.2d 901, 904 (3d Dept. 1993), *app. den.*, 82 N.Y.2d 657 (1993). The court may not, however, grant an extension that exceeds the time limit for the commencement of an action against a school district, which is one year after it arose. *Id.* at 1175-1176, citing Education Law § 3813(2-b).

D. Application of these Principles to the Instant Action

The Court denies Defendant's motion to dismiss and grants Plaintiff's motion to deem its Notice of Claim timely filed. The Court grants an extension, pursuant to Education Law § 3813(2-a), based on its Conclusion that the District had prompt notice of the claim as a result of Plaintiff's March 3, 2010 letter and an opportunity to investigate the claim. Moreover, the District has not been substantially prejudiced in maintaining a defense on the merits, particularly in light of the detail and specificity contained in Plaintiff's March 3, 2010 letter. The Court also considers the minimal lateness of the Notice of Claim in granting this extension.

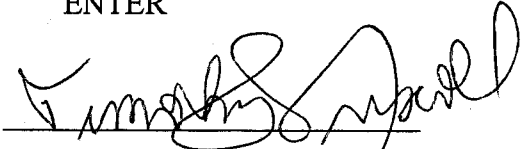
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear at a Preliminary Conference before the Court on October 6, 2011 at 9:30 a.m.

DATED: Mineola, NY
August 31, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

SEP 09 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**