

<b>Nova Cas. Co. v New York City Hous. Auth.</b>
2011 NY Slip Op 33731(U)
June 21, 2011
Supreme Court, New York County
Docket Number: 111954/2010
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 111954/2010

NOVA CASUALTY CO

vs.

NYCHA

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 12/23/10

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

12-14, 17-23

+ Transcript

12/21/10

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 accompanying memorandum decision.

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

Dated: 6/21/11

JUSTICE SHIRLEY WERNER KORNREICH  
*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
NOVA CASUALTY COMPANY,  
  
Plaintiff,

Index No. 111954/2010

DECISION & ORDER

-against-

NEW YORK CITY HOUSING AUTHORITY,  
  
Defendant.

-----X  
SHIRLEY WERNER KORNREICH, J.:

Defendant New York City Housing Authority (NYCHA) moves to dismiss the portion of the action that arises out of a project for the replacement of boilers at the Rafael Hernandez Houses (Hernandez Project) based upon a contractual statute of limitation. CPLR 3211(a)(5). Plaintiff Nova Casualty Company (Surety) opposes and cross-moves for summary judgment for the full amount allegedly owed to it for the completion, pursuant to bonds it issued to Van Heyningen Boiler Corporation (Contractor), on the Hernandez Project and a second project, the St. Nicholas Project. The Contractor defaulted on the Hernandez Project and the St. Nicholas Project (collectively, the Projects), which NYCHA owns and operates.

*NYCHA's Statute of Limitations Motion*

Where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion should be denied unless "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994). A party moving to dismiss on the ground of the statute of limitations has the initial

burden of presenting *prima facie* proof that the time to sue has expired. *Gravel v Cicola*, 297 AD2d 620 (2d Dept 2002); *Stanley v Morgan Guaranty Trust Co.*, 173 AD2d 390 (1st Dept 1991). Here, NYCHA has not met its burden.

NYCHA relies on a one-year statute of limitation allegedly contained in a document, the Hernandez Project contract between the NYCHA and the Contractor (Hernandez Contract). NYCHA alleges that the Hernandez Contract was incorporated by reference into the bond issued by the Surety. However, the record does not contain the contract between NYCHA and the Contractor that is referred to in the Surety's bond. All that is offered is a table of contents of NYCHA's general instructions to bidders and an unsigned portion of the General Conditions to a contract. Neither the instructions to bidders nor the General Conditions have identifying characteristics linking them to the Contractor or the Hernandez Project. There are no signatures. Therefore, NYCHA's motion to dismiss is denied, without prejudice to renewal upon summary judgment or at trial, because it has not presented *prima facie* proof that the time to sue has expired. It is not necessary to reach the Surety's arguments that the statute of limitations was not incorporated in the bond and that NYCHA is estopped from asserting the contractual statute of limitations.

#### *Surety's Cross-Motion for Summary Judgment*

The Surety's cross-motion for summary judgment is denied because issue has not been joined and the Internal Revenue Service (IRS) is a necessary party to the action. A necessary party is one that might be inequitably affected by a judgment in the action. CPLR 1001(a). It is undisputed that the IRS filed a lien against the monies due to the Contractor on each of the Projects. NYCHA asserts that the IRS is a necessary party and that it does not want to pay

money to the Surety that the IRS later may claim. Tr. of Oral Argument, dated 12/21/10, pp. 10-11. The Surety says that the IRS is owed nothing and need not be joined because the Surety paid more than the amount due the Contractor. In addition, the Surety asserts that if there were monies owed to the Contractor, they would be trust funds entitled to priority over the IRS liens. *Id.*, p. 12. The IRS has a right to be heard on these issues. Accordingly, it is

ORDERED that the motion by the NYCHA to dismiss the Hernandez Project claims as barred by the statute of limitations is denied without prejudice to renewal upon motion for summary judgment or at trial; the cross-motion for summary judgment by Nova Casualty Company is denied; and Nova Casualty Company is directed to serve a supplemental summons and amended complaint adding the Internal Revenue Service as a defendant; and it is further

ORDERED that the caption of the action is amended as follows:

NOVA CASUALTY COMPANY,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY and  
THE INTERNAL REVENUE SERVICE,

Defendants.

and it is further

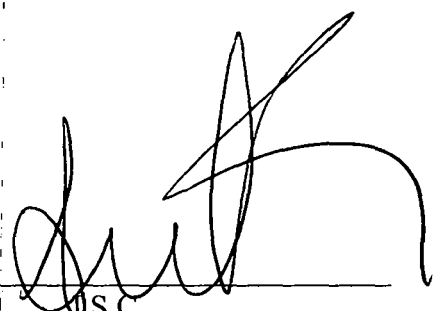
ORDERED that plaintiff Nova Casualty Company shall serve a copy of this order with notice of entry on the New York County Clerk and the Clerk of the Trial Support Office, Room 158, who shall note the amended caption in their respective records; and it is further

ORDERED that plaintiff Nova Casualty Company shall notify the court to schedule a pre-trial conference after it has effected service of the supplemental summons and amended

complaint upon the Internal Revenue Service.

Dated: June 21, 2011

ENTER:

  
S.C.