V.C. Vitanza Sons, Inc. v New York City Hous. Auth.
2011 NY Slip Op 33835(U)
July 5, 2011
Sup Ct, New York County
Docket Number: 650841/10
Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED Justice

E-FILE

PART 60

HON. BERNARD J. FRIED

V.C. VITANZA SONS, INC.,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY.

Defendant.

INDEX NO. #650841/2010

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

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED.

Dated: 7/5/2011

J.S.C.

HON. BERNARD J. FRIED

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: IAS PART 60

----------X

V.C. VITANZA SONS, INC.,

Plaintiff,

Index No. 650841/10

-against-

NEW YORK CITY HOUSING AUTHORITY

Defendant.

----------X

APPEARANCES:

For Plaintiff:

Fox & Kowalewski
4 Old Rte. 146
PO Box 958
Clifton Park, New York 12065

Edward Kowalewski Jr., Esq.

For Defendant:

New York City Housing Authority
250 Broadway
New York, New York 10007

Sonya M. Kaloyanides, Esq.
James E. Bayley, Esq.

FRIED, J.:

This breach of contract action arises out of a contract between plaintiff, V.C. Vitanza Sons, Inc., ("Vitanza" or "Plaintiff") and defendant, New York City Housing Authority ("Housing Authority" or "Defendant") entered into on July 2, 2004 for kitchen and bathroom renovations, apartment modifications, gas piping and other plumbing work at Marlboro Houses, (Amended Compl. ¶3), a public housing development owned and maintained by the Housing Authority. (Bayley Affirm. ¶3.) In its verified amended complaint ("Amended

Complaint"), Plaintiff seeks damages of $409,627.35, alleging that the Lead Hazard Control Procedures it was required to follow constituted "Extra Work" not included in the Contract. (Amended Compl. ¶¶11-16.)

The Housing Authority moves to dismiss the Amended Complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7) on the grounds that Plaintiff failed to meet the Contract's notice of claim requirements, and even if Plaintiff could overcome that hurdle, the Amended Complaint fails to state a claim because the alleged "Extra Work" was within the scope of the Contract. (Bayley Affirm. ¶¶3-4.) The Plaintiff argues that the notice of claim was timely, and because it was not put on notice that there was lead and had not performed lead abatement for a very similar project at the same Marlboro Houses, the lead abatement was not Contract Work, but Extra Work requiring Extra Compensation. For the reasons set forth below, the Housing Authority's motion is granted.

The Amended Complaint alleges the following: On or about July 2, 2004, Plaintiff and Housing Authority entered into a Contract for kitchen and bathroom renovation, apartment modifications, gas piping and other plumbing work at Marlboro Houses. (Amended Compl. ¶3.) Section 2 of the Contract detailing Scope of Work of the Contract Specifications provided in Note 4, "For the purposes of bidding assume that, unless specified otherwise, the debris generated by the work of this contract is not considered to be hazardous waste." (emphasis original) (Amended Compl. ¶6.) Plaintiff alleges that this representation was false and the Housing Authority either knew the representation was false and made it with the intent to deceive Plaintiff and other bidders, or made the representation recklessly. (Amended Compl. ¶7.) Relying on Note 4, Plaintiff did not include in its bid the cost of

performing the Contract Work in accordance with Housing Authority's Lead Hazard Control Procedures. (Amended Compl. ¶8.) On September 8, 2004, Plaintiff received a letter from the Housing Authority dated October 17, 2002 which stated:

> Please find attached Random sampling lead-testing results for Marlboro Houses recently received from Technical Services Lead Detection Unit. It should be noted that lead base paint was detected in various components...Therefore, lead protocols for bathrooms, kitchen and metal recycling procedure should be included in contract specification." (Amended Compl. ¶9.)

Plaintiff alleges that, had it been advised of the presence of lead paint prior to submitting its bid on March 3, 2004, it would have included the cost of performing the Lead Hazard Control Procedures in its bid. (Amended Compl. ¶9.) Defendant misrepresented the nature and scope of the Contract by failing to advise Plaintiff of the presence of lead, and this misrepresentation required Plaintiff to perform Extra Work in performing the Contract in accordance to the Lead Hazard Control Procedures, resulting in a breach of the Contract. (Amended Compl. ¶¶11-12.) Because of the alleged breach, Plaintiff incurred increased and additional costs amounting to $409,627.35. (Amended Compl. ¶13.) On or about August 29, 2005, Plaintiff served its Notice of Claim on Defendant. (Amended Compl. ¶17.)

In its motion to dismiss, the Housing Authority argues that the Amended Complaint fails to state a claim upon which relief can be granted because (1) Plaintiff failed to meet the Contract's notice of claim requirements of Section 23, which mandate that a notice of claim must be filed within twenty days from when the alleged claim arises and Plaintiff filed a notice of claim nearly a year after the time its claim for Extra Work arose (Bayley Affirm. ¶3); (2) even if Plaintiff could overcome this hurdle, it fails to state a claim because the purported Extra Work is actually Contract Work under the plain terms of the parties'

agreement; and (3) Plaintiff's claim for Extra Work is also barred by its failure to raise any issues, questions, or ambiguities regarding the scope or extent of Lead Hazard Control Procedures prior to submitting its bid. (*Id.* ¶4.)

Plaintiff contends that the claim accrued on either on August 11, 2005, upon being informed by the Housing Authority that this work was covered by the Contract, or upon substantial completion of the Contract on April 25, 2008, and therefore the filing of the notice of claim on August 29th was within the requisite twenty-day period. Plaintiff then argues that the lead abatement work was not covered under the Contract since the Contract provided that Lead Hazard Control Procedure should be followed when "more than two square feet of coated/painted components/surfaces (per work area) such as bathtubs, lavatories, and cast iron sinks, that contain or are assumed to contain lead above the current regulatory threshold are impacted during the course of interior apartment modernization" (Clandorf Aff. ¶6.), and Plaintiff had no reason to assume there was lead based on prior experience. Plaintiff stresses it also relied on Note 4 of Section 2 of the Contract which states, "For the purpose of bidding assume that, unless specified otherwise, the debris generated by the work of this contract is not to be hazardous waste" (emphasis original) (Vitanza Aff. ¶¶ 14-21.) Plaintiff also alleges that this project was for the same Marlboro Houses it performed similar work on in the prior two years as a subcontractor and the apartments were identical in their kitchen and bathroom components. (*Id.* ¶10.) Based on the above contractual provisions regarding lead hazard control procedures, Note 4 of Section 2 concerning hazardous waste and its prior experience performing similar renovations at Marlboro Houses, Plaintiff alleges there was nothing that would put it on notice of the need

to perform lead abatement or include the costs in its bid. (*Id.* ¶13.) Therefore, Plaintiff argues the lead abatement work is Extra Work justifying additional compensation to the work covered by the Contract.

It is well established that contractual notice provisions like Section 23 are conditions precedent to suit or recovery and failure to comply with the notice provisions warrants dismissal of the action. *A.H.A. Gen. Constr., Inc. v. New York City Hous. Auth.*, 92 N.Y.2d 20, 30-31 (1998). Section 23 and similar provisions have been strictly enforced by courts. *See Master Painting and Roofing Corp. v. New York City Hous. Auth.*, 258 A.D.2d 275 (1st Dep't 1999) (affirming dismissal because of plaintiff's failure to give defendant timely written notice of claim for extra work as required by section 23 of the contract); *S.J. Fuel Co., Inc. v. New York City Hous. Auth.*, 73 A.D.3d 413 (1st Dep't 2010) (upholding dismissal, emphasizing that neither prior dealings among the parties nor actual knowledge of plaintiff's claims relieved plaintiff of duty to file a timely notice of claim under Section 23); *Trio Asbestos Removal Corp. v. New York City Hous. Auth.*, Index No. 116514/07, slip op. (Sup. Ct., N.Y. County 2009) (dismissing plaintiff's claim against the Housing Authority for filing its notice of claim one day after the twenty day period expired).

Under Section 23, Plaintiff was required "within twenty (20) days after such claim shall have arisen, file with the Authority written notice of intention to make a claim for such extra cost or damages." (Contract ¶23[a]). This claim arose upon receipt of the Random sampling lead test results on September 8, 2004. The document explicitly provides, "lead protocols for bathrooms, kitchen and metal recycling procedure should be included in contract specification." (Amended Compl. ¶9). Plaintiff learned it had to perform the lead abatement

work and the claim arose on this date, and Section 23 therefore required that a notice of claim be filed by September 28, 2004.

There are no facts in dispute, but rather the interpretation of when a claim "arises." The Plaintiff's argument is that the claim arose on or around April 25, 2008 upon substantial completion of the work. Citing *Roz-A-Lite Elec. Contracting, Inc. v. New York City Hous. Auth.*, Index Nos. 6027799/09 & 112885/09, slip op. (Sup. Ct. N.Y. County 2010), Plaintiff argues that, "it is well established that a cause of action for breach of a construction contract accrues upon substantial completion of the work." *See Phillips Constr. Co. v. City of New York,* 61 N.Y.2d 949 (1984). However, Roz-A-Lite narrowly interprets the holding in Phillips, stating that, "*construction delay claims*....accrue no later than when the *contractor*, not the owner, has substantially completed its work, because by that time, the contractor's alleged damages are, or should be, ascertainable. *Roz-A-Lite*, supra at 6.

However, this is not a construction delay claim or nonperformance of payment claim, which by their nature are not cognizable until substantial performance. Here, Plaintiff learned of the alleged Extra Work upon receipt of the September 8, 2004 lead testing results, and while it argues that it did not know the extent of the cost at that time, there is no authority for the argument that a claim does not arise under Section 23 or similar provision until the full extent of the Extra Cost is known. In a very similar case, the plaintiff contractor gave defendant a written notice of claim before commencing performance of the disputed work, and also argued that the claim did not actually arise until the contractor performed said work and could quantify its costs for labor and materials, but the court nevertheless determined that, "the claim arose a year before the contractor gave the written notice, when defendant

notified plaintiff in writing that the contract called for the disputed work." *Target Sound Co., Inc. v. New York City Hous. Auth.*, Index No. 604385/1998, slip op. (Sup. Ct. N.Y. County 1999) (citing *Master Painting and Roofing Corp. v. New York City Hous. Auth.*, Index No. 103225/97, slip op. (Sup. Ct., N.Y. County 1997), *aff'd* 258 A.D.2d 275 [1999]).

Plaintiff's second argument citing to Target Sound, is that the claim arose upon the Housing Authority notifying the contractor "in writing of the Authority's determination that the disputed work was included among plaintiff's obligations under the existing contract." Plaintiff interprets this to mean that the claim arose on August 11, 2005 when it received a letter explaining why the lead abatement was not Extra Work. However, the September 8, 2004 Random lead sampling test results instructing Plaintiff to include lead protocols in Contract specifications is a writing clearly indicating that the lead abatement work is to be included among Plaintiff's obligations under the Contract.

Because New York courts consistently and strictly enforce Section 23, and other Notice of Claim provisions, and hold Section 23 to be a condition precedent to bringing suit, compliance with Section 23 is a threshold issue and failure to file within the twenty-day period bars recovery for additional compensation. Here, the complaint must be dismissed because Plaintiff failed to file its Notice of Claim within twenty days of the claim arising. Since compliance with the notice provision is entirely dispositive, I need not decide whether the work performed was Extra Work or Contract Work.

Accordingly for the foregoing reasons, the filing of the notice of claim on August 28, 2005 is untimely and the motion to dismiss is granted.

Dated: 7/5/2011

ENTER:

J.S.C.

HON. BERNARD J. FRIED