

Dart Mech. Corp. v Calcedo Constr. Corp.

2012 NY Slip Op 30077(U)

January 3, 2012

Sup Ct, Suffolk County

Docket Number: 17110-2011

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 17110-2011

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: HON. EMILY PINES
 J. S. C.

Original Motion Date: 09-09-2011
 Motion Submit Date: 09-27-2011
 Motion Sequence No.: 001 MOTD

FINAL
 NON FINAL

_____ X
DART MECHANICAL CORP.,

Plaintiff,

-against-

CALCEDO CONSTRUCTION CORP.,

Defendants.

_____ X

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ORDERED that the motion (motion sequence # 001) by defendant to dismiss the complaint is granted in part and denied in part, as set forth herein.

In this action to recover damages for breach of contract, the defendant Calcedo Construction Corp. ("Calcedo") moves to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), and (7). The plaintiff Dart Mechanical Corp. ("Dart") opposes the motion.

This action arises out of a public construction contract project known as PS 178 located in New York, New York ("Project"). On July 12, 2000, Dart, as subcontractor, entered into a written subcontract agreement ("Subcontract") with Calcedo, as contractor, pursuant to which Dart agreed to perform certain construction work at the Project in exchange for \$3,000,000. According to Dart, due to additions to the work the Subcontract price was increased by \$116,157.43 to a total of \$3,116,157.43. Dart alleges that it fully and satisfactorily completed its work and that Calcedo paid it \$2,977,816, leaving a balance owed on the Subcontract of \$138,341.43. It is undisputed that the Project was completed no later than September 2001.

Dart alleges that the parties agreed that Dart would not seek the balance owed on the Subcontract until resolution of a lawsuit brought by Calcedo in Supreme Court, Queens County against the owner of the Project, New York City School Construction Authority (“NYCSCA”), for breach of contract and reimbursement for acceleration costs (the “SCA Action”). By Order dated November 1, 2006, in the SCA Action, Justice Satterfield denied that branch of Calcedo’s motion seeking a judgment notwithstanding the verdict or, in the alternative, for a new trial and granted that branch of Calcedo’s motion seeking an award of pre-judgment interest on the directed verdict sum of \$198,940.12. According to Dart, the amount awarded to Calcedo was in connection with Calcedo’s contract balance claim against NYCSCA. Dart alleges that at some point thereafter the NYCSCA paid Calcedo the amount awarded in the SCA Action plus interest but that Calcedo never advised Dart that the SCA Action had been resolved.

Dart commenced this action against Calcedo on June 20, 2011. The complaint contains two causes of action. The first alleges that Calcedo breached the Subcontract with Dart and the alleged agreement to pay Dart the balance owed on the Subcontract upon resolution of the SCA Action. The second cause of action seeks recovery in quantum meruit.

In support of its motion Calcedo argues, among other things, that the first cause of action for breach of contract should be dismissed because it was commenced after the six-year statute of limitations expired. Calcedo contends that Dart’s breach of contract claim accrued upon substantial completion of the Project on September 4, 2001, and that the statute of limitations expired in September 2007, almost four years before Dart commenced this action. Calcedo denies Dart’s allegation that “Dart and Calcedo agreed that Dart would not seek its contract balance monies until resolution of The Calcedo/SCA Litigation which included Dart’s acceleration costs” and further argues that even if there was such an agreement, it would be unenforceable under General Obligations Law § 17-103, which requires agreements extending the applicable statute of limitations to be in writing signed by the promisor. Calcedo notes that Dart has not alleged that such a written agreement exists. Calcedo also contends that any argument that Dart’s Subcontract balance claim did not accrue until 2006 pursuant to section 8.3.3 of the Subcontract, which provides that receipt of final payment by Calcedo from NYCSCA for Dart’s work is a condition precedent to payment by Calcedo to Dart, is without merit as the Court of Appeals has held that such a contract provision is void against public policy set forth in Lien Law § 34. Finally, Calcedo argues that Dart’s second cause of action seeking recovery in quantum meruit cannot be maintained since an express contract governs the subject matter of the dispute between the parties.

In an affidavit in opposition to Calcedo’s motion, Douglas Karol, Vice President of Dart, states, among other things, that he and Joseph Tomei, Calcedo’s Vice President, agreed that Dart would not seek its Subcontract balance monies until resolution of The Calcedo/SCA Litigation. Karol further states

that in 2006 he was told by Tomei that the jury in the SCA action had ruled against Calcedo implying that Calcedo was not awarded any damages. Dart received a letter dated December 8, 2006, from Calcedo advising that Calcedo “did not prevail in our court action against the SCA” and that Calcedo’s motion to set aside the verdict was denied. Calcedo further advised in the letter that “[t]he end result of this action is that the final payment of \$1,997,842.80 was not recovered.” The letter indicates that a copy of Justice Satterfield’s order deciding Calcedo’s post-trial motion in the SCA Action was provided to Dart. Nevertheless, Karol claims that it was not until June 8, 2011, that he learned that Calcedo had been awarded \$198,940.12 plus interest in the SCA Action. He alleges that Calcedo intentionally misled Dart when it stated in the letter dated December 8, 2006, that “final payment of \$1,997,842.80 was not recovered” and that Calcedo never advised Dart that Calcedo had been paid contract balance monies. Thus, Dart contends that its first cause of action for breach of contract seeking recovery of the balance owed on the Subcontract accrued on June 8, 2011, when it first learned that Calcedo was paid by the NYCSCA for its contract balance, which included Dart’s Subcontract balance, and that Calcedo has an obligation to pay Dart the balance owed on the Subcontract in the amount of \$138,341.43 plus interest. Dart does not argue that section 8.3.3 of the Subcontract applies to delay accrual of its claim until Calcedo was paid by the NYCSCA. Rather, Dart argues that the resolution of the SCA Action was a condition precedent to Calcedo’s obligation to pay Dart the balance on the Subcontract and that the condition was not satisfied until June 8, 2011. Additionally, Dart argues that Calcedo is estopped from invoking the statute of limitations because it failed to inform Dart that it was awarded monetary damages in the SCA Action. Finally, Dart argues that the existence of the Subcontract does preclude its quantum meruit claim at the pleading stage because a party is permitted to plead alternate theories of recovery.

In reply, Calcedo contends, among other things, that Dart’s contract claim accrued in 2001, when the Project was completed, even if Dart was unaware that its claim had accrued. Calcedo also argues that even if there was an oral agreement between the parties that Dart would not seek the balance owed on the Subcontract until after resolution of the SCA Action, which Calcedo denies, it was made after Dart’s breach of contract cause of action had accrued in 2001 and, therefore, violates G.O.L. § 17-103.

DISCUSSION

“To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired” (*Kennedy v. Fischer*, 78 AD3d 1016, 1017 [2d Dept. 2010]). In contract cases, the cause of action accrues and the statute of limitations begins to run from the time of the breach and, as a general rule, when the right to final payment is subject to a condition, the obligation to pay arises and the cause of action accrues, only when the condition has been fulfilled (*John J. Kassner*

& Co., Inc. v. City of New York (46 NY2d 544, 550 [1979]).

Here, contrary to Calcedo's contention, Dart's claim for final payment under the Subcontract did not accrue upon substantial completion of the project, as this is not a claim by an owner against a contractor arising from defective construction. Rather, Dart's breach of contract claim seeking payment of the balance owed under the Subcontract is governed by the terms of Article 8 of the Subcontract. Section 8.3.1 of the Subcontract provides as follows:

APPLICATION Upon acceptance of the Subcontractor Work by the Owner and the Contractor and receipt from the Subcontractor of evidence of fulfillment of the Subcontractor's obligations in accordance with the Subcontract Documents and Subparagraph 8.3.2, the Contractor shall incorporate the Subcontractor's application for final payment into the Contractor's next application for payment to the Owner without delay, or notify the Subcontractor if there is a delay and the reasons therefor.

Thus, Dart's right to final payment and Calcedo's obligation to pay were conditioned upon the acceptance of Dart's work by the NYCSCA and Calcedo, as well as receipt from Dart of evidence of fulfillment of Dart's obligations in accordance with the Subcontract Documents and Subparagraph 8.3.2. Calcedo has failed to demonstrate the date on which these conditions were fulfilled and, therefore, has failed to demonstrate the date on which Dart's cause of action for breach of contract accrued. Because Calcedo has failed to meet its initial burden of establishing, prima facie, that the time in which to sue has expired, the burden does not shift to Dart and the sufficiency of Dart's opposition papers need not be considered. Accordingly, that branch of Calcedo's motion which is to dismiss the first cause of action for breach of contract is denied.

Because Dart does not argue that this action is timely because Section 8.3.3 of the Subcontract contains an express condition precedent clause – that Calcedo will pay Dart upon payment from the NYCSCA – and that this condition has not occurred, the Court need not address Calcedo's contention that this section of the Subcontract is void and unenforceable.

However, that branch of Calcedo's motion which is to dismiss the cause of action to recover in quantum meruit is granted. Because Dart alleges that there is a specific contract governing the subject

matter for which they seek to recover in quantum meruit, there can be no recovery in quantum meruit (*Melissakis v. Proto Constr. & Dev. Corp.*, 294 AD2d 342 [2d Dept. 2002]).

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: January 3, 2012
Riverhead, New York



EMILY PINES
J. S. C.

FINAL
 NON FINAL