

Matter of WWC Corp. v New York City Hous. Auth.

2012 NY Slip Op 32183(U)

August 10, 2012

Supreme Court, New York County

Docket Number: 113615/11

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

At To Matter of WWC Corp.
NYCHA

INDEX NO. 113615/11
MOTION DATE 5/21/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits _____

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

No(s) 1-6
~~X-mot~~ 7-18
No(s) 19-25
reply & mot 26-28

Upon the foregoing papers, it is ordered that this motion is

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION
Order & Judgment

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8/10/12

JBK, J.S.C.

JOAN B. LOBIS

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
IN THE MATTER OF WWC CORP.,

Petitioner,

Index No. 113615/11

-against-

Decision, Order, and Judgment

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent,

UNFILED JUDGMENT

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For A Judgment Pursuant to Article 78 of the CPLR

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner WWC Corp. ("WWC") brings this proceeding, under Article 78 of the C.P.L.R., seeking an order compelling respondent The New York City Housing Authority ("NYCHA") to require construction manager STV Construction, Inc. ("STV") to post a bond in accordance with State Finance Law § 137. NYCHA cross-moves for an order dismissing the petition, pursuant to C.P.L.R. Rules 3211(a)(5) and (7), on the grounds that petitioner failed to file a notice of claim as set forth in New York Public Housing Law § 157; that the claim is time barred; that the claim is barred by documentary evidence; and that the petition fails to state a cause of action.

In July 2007, STV and NYCHA entered into a contract for STV to provide construction management services for various capital construction projects (the "STV/NYCHA Contract"). In March 2010, WWC and STV entered into a contract for WWC to furnish labor and materials for a project at the Bay View Houses (a NYCHA housing development) in Brooklyn (the "WWC/STV Contract"). WWC maintains that after it performed the work for STV, STV refused to honor price terms agreed upon in the WWC/STV Contract. WWC then sought mediation of its

claim against STV and the payment bond pursuant to State Finance Law § 137. On August 12, 2011, STV responded that it was not required to post a bond for the project.

State Finance Law § 137(1) provides, in pertinent part, that

[i]n addition to other bond or bonds, if any, required by law for the completion of a work specified in a contract for the prosecution of a public improvement for the state of New York a municipal corporation, a public benefit corporation or a commission appointed pursuant to law, or in the absence of any such requirement, the comptroller may or the other appropriate official, respectively, shall nevertheless require prior to the approval of any such contract a bond guaranteeing prompt payment of moneys due to all persons furnishing labor or materials to the contractor or any subcontractors in the prosecution of the work provided for in such contract.

Pursuant to the second subsection of the statute,

[a] copy of such payment bond shall be kept in the office of the head of the department or bureau having charge of the public improvement in connection with which the bond was given and a copy shall also be kept in the office of the comptroller or other appropriate official; such copies shall be open to public inspection.

State Finance Law § 137(2).

WWC maintains that had NYCHA complied with its statutory obligation to obtain a payment bond from STV, guaranteeing payment to subcontractors on the project, WWC (as a subcontractor to STV) would have had recourse to make a claim on the bond for the money that STV owes it. WWC asks this court to compel NYCHA to require STV to provide a payment bond from a licensed surety with a penal sum equal to the amount of the WWC/STV Contract, so as to guarantee payment for labor and materials provided to STV under the contract.

NYCHA cross-moves to dismiss the action for WWC's failure to comply with Public Housing Law § 157(1), which sets forth that

[i]n every action or special proceeding, for any cause whatsoever, prosecuted or maintained against an authority, other than a claim arising out of a condemnation proceeding, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the authority for adjustment and that it has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

It is undisputed that petitioner did not file a notice of claim. Failure to allege compliance with Public Housing Law § 157(1) in a verified petition generally requires that the petition be dismissed. Leon v. New York City Hous. Auth., 214 A.D.2d 455 (1st Dep't 1995). However, when the relief sought is in the nature of mandamus, as it is here, courts have held that a notice of claim is not a condition precedent to bringing suit. In re Sharpe v. Sturm, 28 A.D.3d 777, 778-79 (2d Dep't 2006). See also In re BRG 3715 LLC v. N.Y.C. Hous. Auth., 2012 N.Y. Slip Op. 30656U, **7 n.3 (Sup. Ct. N.Y. Co. 2012) (Schlesinger, J.) (relief sounding in mandamus would not require a notice of claim). Accordingly, that branch of NYCHA's cross motion to dismiss the action for WWC's failure to file a notice of claim is denied.

NYCHA further cross-moves to dismiss the action due to the expiration of the statute of limitations or on the grounds that the action is barred by laches. Under C.P.L.R. § 217(1), mandamus-to-compel proceedings must be brought within four months "after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty[.]" There is no indication that WWC demanded that NYCHA require STV to provide a payment bond prior to commencing this special proceeding. In the absence of a pre-petition demand, a petition may

be considered the demand. See In re Rapess v. Ortiz, 99 A.D.2d 413, 414 (1st Dep't 1984). However, a petitioner may be guilty of laches, and thus the petition time barred, if the petitioner fails to make its demand within a reasonable amount of time "after the right to make the demand occurs or * * * where the petitioner has been misled by the respondent's conduct, within a reasonable time after he becomes aware of the facts which give rise to his right of relief." Id. (internal quotation marks and citation omitted). See also Austin v. Bd. of Higher Educ., 5 N.Y.2d 430, 442 (1959). "[W]hile invocation of the equitable defense of laches ordinarily requires a showing of prejudice, when the doctrine is invoked in an article 78 proceeding in the nature of mandamus, proof of unexcused delay without more may be enough." In re Sheerin v. N.Y. Fire Dep't Articles 1 & 1B Pension Funds, 46 N.Y.2d 488, 495-96 (1979) (internal citations and citations omitted).

NYCHA maintains that petitioner could have brought this action as early as March 2010, when it entered into the WWC/STV Contract. It contends the STV/NYCHA contract was attached to the WWC/STV Contract and was incorporated by reference therein, therefore, petitioner had ample opportunity to review whether STV was required to provide a payment bond before it signed the contract in March 2010. NYCHA argues that petitioner's delay of twenty-one (21) months is enough to bar its claim. Further, NYCHA maintains that it can show prejudice, as well, because it "cannot engage a surety pursuant to a statute that contemplates insurance that is required before the contract is executed to provide the bond to guarantee prompt payment retroactively for work performed and services provided under an agreement entered into over four and a half years ago."

In opposition to dismissal on the grounds of laches, WWC argues that it was never provided a copy of the STV/NYCHA Contract when it bid the job or when it entered into the WWC/STV Contract. Regardless, it maintains, the STV/NYCHA Contract does not explicitly reference the provisions of State Finance Law § 137, but does set forth that “each and every provision of the law required to be inserted in this Agreement shall [be] and is inserted herein” Petitioner argues that since State Finance Law § 137 “imposes a non-discretionary, non-delegable, non-waiveable statutory duty on the Authority” to require STV to post a bond, WWC had every reason to rely on the presumption that the Authority would obey the law. WWC maintains that prior to STV’s disclosure in August 2012, it had no reason to know that STV had not posted a bond. WWC argues that it brought this proceeding in a timely fashion (within four months) after being apprised that STV had not posted a bond.

In reply, NYCHA contends that WWC proceeded at its own risk when it determined to enter into the WWC/STV Contract without investigating whether STV had posted a bond. Citing an unpublished trial court decision, NYCHA asserts that it is the subcontractor’s burden to determine whether compliance with State Finance Law § 137 has occurred before claims against the contractor accrue and, if not, to bring a proceeding to compel compliance. Aldo Frustaci Iron Work, Inc. v. Promotech, Inc., Index No. 601278/00 (Sup. Ct. N.Y. Co. Oct. 24, 2001) (Ramos, J.).

Petitioner has failed to demonstrate that the delay in bringing this proceeding to compel was excusable. The issues of whether or not the bond was dealt with in the STV/NYCHA Contract, or whether or not WWC was given a copy of the STV/NYCHA Contract, are immaterial, given the fact that State Finance Law § 137(2) requires that the bond be made available for public

inspection. There is no excuse for WWC's failing to investigate the status of the bond prior to entering into the WWC/STV Contract. In other words, NYCHA could not have misled petitioner into thinking that STV had posted a bond because that information is a matter of public record. WWC had the right to demand that NYCHA require STV to provide a payment bond at least at the time it entered into the WWC/STV Contract in March 2010 and was required to do so before its claims against STV arose. Petitioner impermissibly delayed in commencing this action and is guilty of laches, and thus the proceeding is barred by the statute of limitations. See, generally, Sheerin v. N.Y. Fire Dep't Articles 1 & 1B Pension Funds, 46 N.Y.2d 488, 496-97 (1979).

As this proceeding is time barred, the court need not reach respondent's remaining arguments that the petition is barred by documentary evidence or fails to state a cause of action. Accordingly, it is hereby

ORDERED that the cross motion is partially granted, to the extent that the branch of the cross motion seeking dismissal of the petition on the grounds that it is time barred is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed, in accordance with the above decision.

Dated: *Aug. 10*, 2012

ENTER:

UNFILED JUDGMENT

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JOAN B. LOBIS, J.S.C.