

Schiavone Constr. Co., Inc. v City of New York

2012 NY Slip Op 33656(U)

January 5, 2012

Sup Ct, New York County

Docket Number: 105519/2002

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITLER
Justice

PART 45

Index Number : 105519/2002
SCHIAVONE CONSTRUCTION CO.,
vs.
THE CITY OF NEW YORK
SEQUENCE NUMBER : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ *by defendant to dismiss*

plaintiff's complaint is GRANTED;
motion by plaintiff to amend
its complaint and notice of
claim is DENIED

Per the attached Decision
and Order dated January 5, 2012

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

Dated: January 5, 2012

Melvin L. Schweitler

JULY 1 2012

- 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

issued its Notice to Proceed on September 19, 1994, making September 26, 1997 the contractual date of completion.

Over the course of the project, Schiavone encountered issues that caused delay in completion of the work and that necessitated work not contemplated by the original terms of the contract. Due to the costs that Schiavone incurred as a result of these unforeseen issues, the City issued change orders that increased the contract price to \$36,107,417. Additionally, the City issued a total of 1083 consecutive calendar days worth of extensions to Schiavone.

On September 14, 2000, Schiavone reached substantial completion on the project. The City made payments under the contract, with the most recent payment being made in November 2003. From November 2003, when it received its last payment, until the submission to the Court of its memorandum on August 5, 2011, Schiavone did not assert that there was any balance due under the Contract. To date, Schiavone has been paid \$36,107,660.39.

As far back as 2001, Schiavone claimed that the City was liable for damages resulting from the delays the City had allegedly caused over the course of the construction project. In pursuit of this claim, in December of 2001, Schiavone filed a document entitled “verified notice of claim and bill of particulars,” alleging delay damages of \$1,732,850.90.

In March 2002, Schiavone commenced this action, seeking the same amount of delay-based damages that was alleged in the verified notice of claim.¹ The parties agreed to extend the City’s time to answer, so that the parties could attempt to resolve the dispute through settlement negotiations.

¹In total, Schiavone’s March 2002 complaint based on delays sought damages in the amount of \$3,060,165.40. The excess of this total above the amount stated in the verified notice claim was money that Schiavone was not seeking for itself but, rather, on behalf of a subcontractor.

In May 2005, Schiavone submitted a document entitled “second amended notice of claim” alleging that its delay damages were actually \$5,711,701, and the reason for this increased figure was that Schiavone had decided to reevaluate its damages based on a “total cost” method of calculation. Pursuant to its standard procedures, the City began an extensive audit of Schiavone’s financial and project records in order to verify the accuracy of the damage amount calculated under the total cost method. In 2010, after several years of thorough auditing, the City decided that it was unwilling to negotiate above the amount in the original notice of claim.

Schiavone responded by immediately ending negotiations and resuming this action. In November 2010, Schiavone requested that the City stipulate to an amendment of the original notice of claim and complaint, so that the amount of damages requested would reflect the sum that Schiavone reached through a total cost method calculation of its delay damages, namely \$12,114,332.19. The City has declined to make this stipulation, and therefore, Schiavone has moved to amend, while the City has moved to dismiss.

Discussion

On a motion to dismiss, the court takes the facts as alleged in the complaint as true and grants the benefit of every favorable inference to the plaintiff. *See AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 (2005). The sole criterion is whether the pleading states a cause of action, and if “from the [pleadings] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, “a motion to dismiss will fail. *Ackerman v 305 East 40th Owners Corp.*, 189 AD2d 665, 666 (1st Dept. 1993).

This dispute is governed by the express terms of the Contract and, under the Contract, Schiavone has waived any claims that it may have against the City. Therefore, the pleadings fail to raise “any cause of action cognizable at law.” *Id.*

Article 42 of the Contract explicitly provides that, “

[t]he contractor must submit a final verified statement of any and all alleged claims against the City, in any way arising out of this contract.... setting forth with respect to each such claim the total amount thereof, the various items of labor and materials included therein, and the alleged value of each such item; and if the alleged claim be one for delay, the alleged cause of each such delay, the period or periods of time, giving the dates, when the contractor claims the performance of the work, or a particular part thereof, was delayed, and an itemized statement and breakdown of the amount claimed for each such delay..... The contractor is warned that unless such claims are completely set forth as herein required, the Contractor *upon acceptance of the final payment,.... will have waived any such claim.*

(Emphasis added)

Schiavone has brought a claim for delay and admits that it has not yet submitted a final verified statement of its claim containing the specific details of the delays that Article 42 requires the final statement to include. Schiavone tries to circumvent its failure to submit a statement of claim that complies with Article 42 by asserting that, under the terms of the Contract, such a failure only results in a waiver of all claims if the plaintiff has already received its final payment. Schiavone further contends that, based on the City’s own admission, it is still owed \$1,985.90 under the Contract and, since plaintiff has not yet been paid in full, its failure to submit a contractually compliant final statement has not yet resulted in a waiver of its claims.

Schiavone’s contention that its claims are not waived because it has not yet been paid in full is unconvincing. Until the submission of its memorandum to the Court on August 05, 2011, Schiavone conducted its affairs as if it had been paid in full. From the receipt of its last payment in

2003 until August of 2011, Schiavone did not make any attempt to collect any additional money under the Contract and did not even claim that it was owed any additional money. To the contrary, Schiavone explicitly indicated, through its attorney, that it received the entire balance owed to it under the Contract, when counsel for plaintiff stated in a letter dated December 17, 2004 that “the [contract] balance ... has been paid out.... and, therefore, is no longer at issue.”

Schiavone bases its recently introduced claim that it has been owed money for the past eight years on the statement of the City’s engineer on the construction project, Mr. Hom, that “according to [City] records, Schiavone is currently owed \$1,985.90.” However, in a later affidavit, Mr. Hom stated that a recent search of the relevant records revealed no information about the nature of the remaining balance. Mr. Hom stated that this absence of information suggests that the remaining balance may only be showing in the City’s records due to a record keeping error. This court acknowledges that it is self serving for a City employee to attribute this remaining unpaid balance to mere book keeping error, but in light of Schiavone’s complete inaction regarding any outstanding debt, and its attorney’s statement that the contract balance has been paid in full, it seems likely that the City’s records are mistaken, and that the contract price has indeed been paid in full.

The Court finds that, even if the City’s records are correct, and there still is a balance of \$1,985.90 that remains unpaid, this is not enough to save Schiavone’s claims from having been waived. In total, Schiavone has been paid over \$36 million on the contract and, in light of that sum, a remaining sliver amounting to less than \$2,000 is a *de minimus* amount that is insufficient to support the contention that a balance of the Contract remains unpaid. Schiavone has already been paid in full under the Contract, and has yet to submit a final notice that complies with the

requirements of Article 42. Thus, under the explicit terms of the Contract, Schiavone has waived any claim that it may have against the City.

Additionally, even if the Court were to find that there was a remaining unpaid balance owed to plaintiff, under the terms of the Contract Schiavone cannot use a “total cost” method of calculation to evaluate its damages. Plaintiff has cited numerous cases in support of the proposition that total cost or *quantum meruit* method of calculation is the “customary method” of measuring damages in construction contract cases. See *Najjar Indust. v City of New York*, 87 A.D.2d 329, 451 N.Y. S.2d 410 (1st Dep’t 1982). However, such evaluation methods are not appropriate in this case because there is a written contract governing any dispute arising out of the contract, and the New York Court of Appeals has stated that “the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987).

In *Clark-Fitzpatrick*, the defendant’s actions forced the plaintiff to make project changes that were not called for by the original terms of the construction contract, and the plaintiff sued in order to recover the additional costs that it incurred as a result of these project changes. *Id.* The plaintiff brought a claim for damages in quasi contract and the Court of Appeals upheld the dismissal of this claim. *Id.* In reaching its decision, the Court of Appeals reasoned that seeking damages on a quasi contract basis is incompatible with the existence of a written contract because “quasi contract only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party’s unjust enrichment.” *Id.* at 388. The court further stated that “it is impermissible, however, to seek damages in an action sounding in quasi contract

where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties.” *Id.*

The *Clark-Fitzpatrick* court applied this rationale to the facts before it, stating that “it is undisputed that the relationship between the parties was defined by a written contract, fully detailing all applicable terms and conditions, and specifically providing for project design changes with adjustments in compensation contemplated in light of those changes. Notwithstanding plaintiff’s claim that defendant breached the contract, plaintiff chose not to rescind the agreement, but instead, to complete performance of the contract and sue to recover damages, which of course was plaintiff’s right. Having chosen this course, however, plaintiff is now limited to recovery of damages on the contract, and may not seek recovery based on an alleged quasi contract.” *Id.*

The court finds that the reasoning set out by the Court of Appeals in *Clark-Fitzpatrick* applies to Schiavone’s claim. As was the case in *Clark-Fitzpatrick*, Schiavone has entered an agreement whose express terms were reduced to writing. Although the Contract does not explicitly prohibit the use a total cost method of calculation, it does demand that any claims for delay must be submitted in an itemized format. An itemized claim meeting the requirements of Schiavone’s Contract would be inherently inconsistent with a claim for damages that has been calculated on a total cost basis. This is so, because if Schiavone must provide an itemized breakdown of any damages that it is to recover, it would only be able to recover for exact expenses that it can directly attribute to specific delays caused by the City.

However, under a total cost method of calculation, the plaintiff would recoup its entire outlay, regardless of whether it can demonstrate that a particular expenditure was caused by the City’s delay. In order to protect itself from the potentially onerous results of having plaintiff

calculate its damages on a total cost basis, the City placed a clause in the Contract requiring that all delay damages be broken down and itemized. Schiavone agreed to the terms of this Contract, and fully performed its duties thereunder. Now, in seeking its remedy, it is limited to those that the Contract provides, as was the plaintiff in *Clark-Fitzpatrick*.

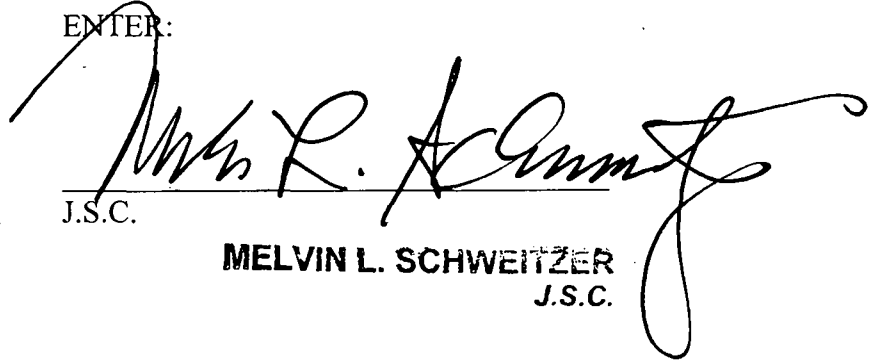
Accordingly, it is

ORDERED that defendant's motion to dismiss is granted; and it is further

ORDERED that plaintiff's motion to amend is denied.

Dated: January 5, 2012

ENTER:



J.S.C.

MELVIN L. SCHWEITZER
J.S.C.