Horizon Group of New England, Inc. v New York City School Constr. Auth.
2012 NY Slip Op 33682(U)
May 20, 2012
Supreme Court, Queens County
Docket Number: 19631/07
Judge: Orin R. Kitzes

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: ORIN R. KITZES **PART 17**
Justice

ORIGINAL

QUEENS COUNTY CLERK FILED 2012 MAR 26 A 9:50

HORIZON GROUP OF NEW ENGLAND, INC.
Plaintiff,

- against -

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY and ROTHZEID, KAISERMAN, THOMSON & BEE, P.C.
Defendants.

Index No: 19631/07
Motion Date: 1/18/12
Motion Cal. No.: 17
Motion Seq. No.: 2

The following papers numbered 1 to 6 read on this motion by defendant New York School Construction Authority (SCA) for summary judgment dismissing the complaint against it.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3
Memoranda of Law	4-6

Upon the foregoing papers it is ordered that the motion by defendant SCA is granted to the extent that: (1) that part of the plaintiff's complaint which seeks damages for unpaid pointing work is dismissed, (2) the plaintiff's third cause of action (delay damages) is dismissed, and (3) the plaintiff's fourth cause of action (quantum meruit) is dismissed.

Defendant SCA hired plaintiff Horizon Group of New York, Inc. to serve as the general contractor on a project at Public School 14, Queens, New York. Horizon alleges that it performed approximately 30,000 square feet of masonry pointing work for which SCA failed to pay compensation. SCA required Horizon to perform 30,000 square feet of pointing work which the company completed at a cost of $2,400,000. The dispute centers around the interpretation of the lengthy written contract entered into between SCA and Horizon and in particular around the interpretation of the contract's architectural drawings prepared by defendant Rothzeid Kaiserman Thomson & Bee, PC (RKTB), an architectural firm. SCA insists that the terms of the contract which make reference to the architectural drawings required Horizon to do pointing work over the

entire exterior wall surface of PS 14. On the other hand, Horizon, supported by the affidavit of an expert, insists that the architectural drawings only indicated possible areas where pointing work might have to be done with the actual scope of the work left to be determined in the future after an inspection from scaffolding.

Plaintiff Horizon began this action on or about August 8, 2007 by the filing of a summons and a complaint. The plaintiff's first cause of action seeks "additional compensation for extra work,", i.e., the pointing work and other work. The plaintiff's second cause of action seeks damages because of SCA's alleged failure to pay the contract balance due. The plaintiff's third cause of action seeks delay damages. The plaintiff's fourth cause of action seeks recovery in quantum meruit.

This court has previously denied companion motions by Horizon and RKTB for partial summary judgment and summary judgment respectively, finding that the contract was ambiguous concerning the required scope of the pointing work.

On SCA's instant motion for summary judgment, the defendant uses the alleged ambiguity (which it does not concede) with fatal effect on that part of the plaintiff's complaint which concerns the pointing work.

Section I of the Information for Bidders, made part of the contract documents, provides in relevant part:

> Examination of the Contract Documents and Site:
>
> A. Prospective bidders shall examine the Contract documents carefully and before bidding, shall make a written request to the SCA for clarification of any ambiguity or correction of inconsistency or error in the documents.
>
> ....
>
> C. ...The failure of any Bidder to obtain or to examine all Contract Documents or to request a clarification or correction shall in no way relieve any Bidder from any obligation in respect to the bid of such Bidder.

Thomas Weiss, who prepared the bid estimates for plaintiff Horizon, testified at his deposition as follows:

> Q. Do you see any brick work called out by this drawing [S-202]?
> A. No.
> Q. ...I ask the same question with respect to S-201.
> A. I see none indicated here.

Q. And what about S-203?

A. Again, I'll state this carefully, these drawings, these structural drawings do not indicate any work.

....

Q. And the same is true for 204, your interpretation of 204?

A. That's correct. I have to conclude by the way the drawings have presented before that no work is definitely called there.

Q. Okay. And I have the same question for 204, 206, 207?

A. I conclude no work from any of those pages.

Q. Didn't you consider it odd that the drawings would contain several pages which do not call out any work?

A. Yes.

Q. Why did you consider that odd?

A. Why would they bother.

Q. Right, so did you bring that to the attention of anyone at the SCA?

A. I'm not sure but I think we sent an e-mail that wasn't responded to.

....

Q. And you don't recall whether the SCA responded?

A. I recall that they didn't respond. I'm not sure whether I sent the e-mail. I think I did, but if they had responded, then it would have been clear one way of another.

Weiss failed to obtain clarification from SCA about the alleged ambiguity in the contract. This failure is particularly egregious because in the first solicitation of bids, which SCA cancelled, the contractor read the contract differently. The defendant architectural firm which prepared the contract drawings alleges that the plaintiff initially read and interpreted the contract drawings correctly. "[T]he plaintiff's initial bid contained a cost value for extensive masonry work to be performed based on a correct reading of the Contract Drawings. However, when this bid was cancelled and another solicitation was sent out based on the same contract drawings, the plaintiff inexplicably and significantly scaled down the extent and cost value for this very same portion of work."

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact ...." (Alvarez v. Prospect Hospital, 68 NY2d 320, 324.) Defendant SCA carried this burden with respect to that part of the plaintiff's complaint which concerns the pointing work. The defendant offered evidence that the plaintiff's estimator saw an ambiguity in the bid documents and failed to obtain clarification. Any ambiguity regarding the pointing work in Horizon's agreement with SCA must be construed against the contractor, since Section I of the Information for Bidders required the contractor to discover and to inquire about a claimed ambiguity prior to the submission of a bid. (*See*, Acme Builders, Inc. v. Facilities Development Corp., 51 NY2d 833; Delidakis Const. Co., Inc. v. City of New York, 29 AD3d 403; Thalle Const. Co., Inc. v. City of New York, 256 AD2d 157.) The burden shifted to the plaintiff to produce evidence showing that there is an issue of fact which must be tried. (*See*, Alvarez v. Prospect Hospital, *supra*.) The plaintiff relied on General Conditions Section 5.07 which provides: " The Contractor shall examine the Contract Documents thoroughly *before commencing the work* and report any errors, conflicts, or discrepancies to the SCA." (Italics added.) The plaintiff argues that the "Conflicting Provisions" section of the contract makes Section 5.07 controlling over Section I of the Information for Bidders and that it complied with Section 5.07 by requesting clarification about the scope of the pointing work prior to the date that it began its work on the project. However, the court finds that Section I of the Information for Bidders and Section 5.07 of the General Conditions are not in conflict because the former applies during the bidding stage of the contract and the latter applies after the contract has been signed. The contract gives SCA two different opportunities to clarify the scope of the work, thereby avoiding disputes.

Defendant SCA also demonstrated that the plaintiff's claim for damages based on the pointing work is barred by Public Authorities Law § 1744(2), a one-year Statute of Limitations. The alleged breach of contract in regard to the pointing work occurred on March 10, 2006 when SCA rejected Horizon's change order request. The plaintiff did not begin this action until August 8, 2007. The plaintiff's argument that its cause of action did not accrue until after damages were ascertainable lacks merit. A cause of action for breach of contract accrues at the time of breach despite the fact that no damage occurs until later. (Ely-Cruikshank Co., Inc. v. Bank of Montreal, 81 NY2d 399.) In D & L Associates, Inc. v. New York City School Const. Authority (69 AD3d 435, 435), the appellate court stated: "Given that plaintiff's September 2002 notice of claim alleged that defendant breached the contract, it triggered the running of the one-year statute of limitations... irrespective of whether or not plaintiff knew the precise amount of damages, or even if no damages occur until later...." The plaintiff's reliance on cases dealing with the timeliness of a notice of claim is misplaced because of the distinction between the accrual of a claim and the accrual of a cause of action. (*See*, In Matter of Board of Educ. of Enlarged Ogdensburg City School Dist. [Wager Constr. Corp.], 37 NY2d 283; Waterman v. State, 19 AD2d 264, affd. sub nom. Williams v. State of New York, 14 NY2d 793; C.S.A. Contracting Corp. v. New York City School, 5 NY3d

189 [concurring opinion].) " The expression 'claim accrued' is not identical with the expression 'cause of action accrued.' The claim accrues when it matures, and the words 'claim accrued' have the same meaning as 'damages accrued.'" (Dufel v. State, 198 App.Div. 97, 102.) The court notes further that the plaintiff's claim for extra work concerns more than pointing, and the plaintiff did not demonstrate that the cause of action is time-barred as to the other work.

In regard to the third cause of action, which seeks delay damages, Section 8.02 of the General Conditions provides in relevant part: " The contractor agrees to make no claim for increased costs, charges, expenses, or damages for delay in the performance of this contract, or for any delays or hindrances from any cause whatsoever, and agrees that any such claims shall be fully compensated for by extension in the time for substantial and/or final completion of the work."

As a general rule, "[a] clause which exculpates a contractee from liability to a contractor for damages resulting from delays in the performance of the latter's work is valid and enforceable and is not contrary to public policy if the clause and the contract of which it is a part satisfy the requirements for the validity of contracts generally ...." (Corinno Civetta Const. Corp. v. City of New York, 67 NY2d 297, 309.) While exceptions to the general rule exist (*see*, Corinno Civetta Const. Corp. v. City of New York, *supra*), the plaintiff failed to raise a genuine issue of fact concerning whether any of these exceptions are applicable to the case at bar. (*See*, New York Trenchless, Inc. v. Hallen Const. Co., Inc., 82 AD3d 850; Harrison & Burrowes Bridge Constructors, Inc. v. State, 42 AD3d 779.)

Finally, the existence of a valid contract between SCA and Horizon bars the latter's attempt to recover on a quantum meruit basis. (*See*, HGCD Retail Services, LLC v. 44-45 Broadway Realty, 37 AD3d 43; Singer Asset Finance Co., LLC v. Melvin, 33 AD3d 355; Aviv Const., Inc. v. Antiquarium, Ltd., 259 AD2d 445.) "A contractor cannot bring a quantum meruit claim for extra payments beyond the original contract price where there exists a contract governing how payment for extra work will be determined ...." (Aviv Const., Inc. v. Antiquarium, Ltd., 259 AD2d 445, 446.)

Dated: March 20, 2012

ORIN R. KITZES, J.S.C.