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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

HI-TECH CONSTRUCTION AND MANAGEMENT SERVICES, INC.,
Plaintiff,
-against-
THE HOUSING AUTHORITY OF THE CITY OF NEW YORK,
Defendant.

INDEX NO. 602377/05
MOTION DATE 07-17-2013
MOTION SEQ. NO. 002
MOTION CAL. NO.

HI-TECH CONSTRUCTION AND MANAGEMENT SERVICES, INC.,
Plaintiff,
-against-
THE HOUSING AUTHORITY OF THE CITY OF NEW YORK,
Defendant.

INDEX NO. 603609/05

The following papers, numbered 1 to 13 were read on this motion to/for summary judgment alternatively to amend the answer and extend time for discovery:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 6
Answering Affidavits — Exhibits ____cross motion ____	7 - 11
Replying Affidavits ____	12 - 13

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that THE HOUSING AUTHORITY OF THE CITY OF NEW YORK's motion pursuant to CPLR §3212, for summary judgment dismissing both consolidated actions is granted and the case is dismissed. The remainder of the relief sought is denied.

The Housing Authority of the City of New York (hereinafter referred to as "NYCHA") seeks an Order pursuant to CPLR §3212, granting it summary judgment dismissing both consolidated actions in their entirety without prejudice. Alternatively, NYCHA seeks an Order granting leave to serve an amended answer asserting additional affirmative defenses of judicial estoppel, collateral estoppel, judicial admission, and release; additionally extending the parties time to complete discovery and file a note of issue at least by sixty (60) days after final determination of the motion.

Plaintiff brought these two consolidated actions to recover for breach of contract. The action commenced under index number 602377/2005, is based on public contract # ST 9800009 CG 6 (hereinafter referred to as the "Harlem River Contract") entered into in 1999 (McNevin Aff., Exh. 2), for the repair of concrete and brickwork, replacing roofs and other related work at the Harlem River Houses, a public housing development located in New York, New York. On July 2, 2004, plaintiff served NYCHA with a formal notice of claim related to the Harlem River Contract. On

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

June 30, 2005, plaintiff commenced this action against NYCHA based on the Harlem River Contract (Marchisotto Aff., Exhs. 1). On November 29, 2012, plaintiff signed a release for all but four items in the action based on the Harlem River Contract; "(1) Slab replacement instead of slab through repair [Notice of Claim No. 12]; (2) Skim-coating in apartments [Notice of Claim No. 14]; Premiums: Performance & Payment Bonds, extra work [Notice of Claim No. 23]; and plaintiff's related claims for interest, costs, disbursement and fees" (Marchisotto Aff., Exh. 9).

The action commenced under index number 603609/2005, is based on public contract #GD0000057 (hereinafter referred to as the "Sheepshead Bay Contract") entered into in 2001 (Marzano Aff., Exh. 1), it is based on grounds improvement work performed at the Sheepshead Bay Houses, a public housing development located in Kings County, New York. On November 12, 2004, plaintiff served NYCHA with a notice of claim related to the Sheepshead Bay Contract. On June 30, 2005, the action based on the Sheepshead Bay Contract was commenced (Marchisotto Aff. Exhs. 4 & 5). On December 11, 2012, plaintiff signed a release for six of the items listed in the notice of claim (Marchisotto Aff., Exh. 10). The remaining items are: "(1) Remove and replace sidewalk concrete as ordered by the NYCHA Inspectors... [Notice of Claim No. 1]; (2) Remove and dispose of existing Asphalt, Concrete and other debris from the project...[Notice of Claim No. 2]; (3) Remove and replace basement walkway cheek walls...[Notice of Claim No. 3]; (4) Bond on extra amount $1,1951 19.30X0.03 [Notice of Claim No. 10]; and Credit Change-Order for work not performed [Notice of Claim No. 12]" (Marchisotto Aff., Exhs. 10 & 4).

Contracts Nos. GD0000057 and ST 9800009 each include, General Conditions, Section 23, titled, "CLAIMS," which specifically states,

> "(a) If the Contractor claims that any instructions of the Authority by drawings or otherwise, involve Extra Work entailing extra cost, or claims compensation for any damages sustained by reason of any act or omission of the Authority, or of any other persons, or for any other reason whatsoever, the Contractor shall, 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, stating in such notice the nature and amount of the extra cost or damages sustained and the basis of the Claim against the Authority*. If the Authority shall deem it necessary for proper decision, upon any notice filed hereunder, to require additional data, depositions, or verified statements, the Contractor must furnish the same within twenty (20) days after written demand therefor upon him/her. (emphasis added)
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> (b) *The filing by the Contractor of a notice of claim* and the compliance by the Contractor with the demand, if any, for additional data, depositions or verified statements, both *within the time limited herein, shall be a condition precedent to the settlement of any claim or to the Contractor's right to resort to any proceeding or action to recover thereon, and failure to do so shall be deemed to be a conclusive and binding determination on the contractor's part that he/she has no claim against the Authority for compensation for Extra Work or for compensation for damages, as the cause may be, and shall be deemed a waiver by the Contractor of all claims for additional compensation or for damages*." (emphasis added)
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> (McNevin Aff., Exh. 1, General Conditions, p. 12 & Marzano Aff., Exh. 1, General Conditions, p. 12).

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form sufficient to require a trial of material factual issues. Conclusions or unsubstantiated allegations are insufficient for purposes of opposing a motion for summary judgment (Zuckerman v. City of New York, 49 N.Y. 2d 557, 404 N.E. 2d 718, 427 N.Y.S. 2d 595 [1980]).

Failure to comply with a condition precedent of a contract bars further recovery. Failure to comply with the strict provisions of the parties contract requiring a timely written notice of claim as a condition precedent to recovery, results in the contractor's waiver of the claim. Failure to file a notice of claim within the time period indicated in the contract barrs the plaintiff from commencing an action to recover damages and extra costs (A.H.A. Gen. Constr. v. New York Housing Authority, 92 N.Y. 3d 20, 699 N.E. 2d 368, 677 N.Y.S. 2d 9 [1998]). The strict compliance with a timely notice of claim provision as a condition precedent to a contract cannot be waived (Northgate Electric Corp. v. Barr & Barr, Inc., 61 A.D. 3d 467, 877 N.Y.S. 2d 36 [N.Y.A.D. 1st Dept., 2009]). A notice of claim is required to be designated as such and state the amount of the extra cost. A letter that is not designated as a notice of claim and requiring further written confirmation does not satisfy the contractual condition precedent (Start Elevator, Inc. v. New York City Housing Authority, 106 A.D. 3d 450, 965 N.Y.S. 2d 59 [N.Y.A.D. 1st Dept., 2013]). A letter not designated a notice of claim and sent after accrual of the claim does not satisfy the contractual obligations (Everest General Contrs. v. New York City Housing Authority, 99 A.D. 3d 479, 951 N.Y.S. 2d 671 [N.Y.A.D. 1st Dept., 2012]).

The purpose of the timely written notice of claim requirements in public works contracts is to avoid credibility determinations resulting from unreliable modifications. There is no estoppel of the contractee's reliance on the condition precedent of written notice (Master Painting & Roofing Corp. v. New York City Housing Authority, 258 A.D. 2d 275, 682 N.Y.S. 2d 856 [N.Y.A.D. 1st Dept., 1999]). The defendant's actual knowledge of alleged damages based on prior dealings between the parties does not relieve plaintiff of the contractual obligation to serve a timely written notice of clam. An alleged breach of contract, does not estop reliance on the timely written notice of claim provisions, requiring dismissal of the action (S.J. Fuel Co., Inc. v. New York City Housing Authority, 73 A.D. 3d 413, 899 N.Y.S. 2d 603 [N.Y.A.D. 1st Dept., 2010]. Failure of the contractor to comply with the timely written notice of claim provision and to provide additional information as required under a contract are a basis for dismissal of an action, regardless of the merits of the claims (Kel-Tech Constr., Inc. v. New York City Housing Authority, 79 A.D. 3d 607, 912 N.Y.S. 2d 881 [N.Y.A.D. 1st Dept., 2010]).

A defendant is not under any obligation to notify the plaintiff of failure to timely file a written notice of claim. Failure to file a timely written notice of claim may be raised at any time prior to trial. Participation in litigation for years before raising the issue of timeliness does not constitute waiver (Nieves v. New York City Housing Authority, 96 A.D. 3d 621, 946 N.Y.S. 2d 859 [N.Y.A.D. 1st Dept., 2012] and Davis v. City of New York, 250 A.D. 2d 368, 673 N.Y.S. 2d 79 [1998]).

An exculpatory clause immunizes a party from liability based on its own misconduct. They differ from a condition precedent in a contract which is strictly enforceable (A.H.A. Gen. Constr. V. New York Housing Authority, 92 N.Y. 3d 20,

699, supra). The "no-damage- for-delay" clauses in public contracts, are generally enforceable exculpatory clauses, but exceptions are permitted (Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y. 2d 297, 502 N.Y.S. 2d 681 [1986]). The contractor is required to establish that the delays were a form of "grossly negligent conduct" of a type not contemplated by the contract (Matter of Teddy Giannopulos Gen. Contrs. v. New York City Housing Authority, 260 A.D. 2d 253, 688 N.Y.S. 2d 536 [N.Y.A.D. 1st Dept., 1999]). A claim of poor contract administration is not enough to circumvent a no-damages-for-delay exculpatory provision (Bat-Jac Contracting, Inc. v. New York City Housing Authority, (1 A.D. 3d 128, 766 N.Y.S. 2d 352 [N.Y.A.D. 1st Dept., 2003]).

Defendant seeks summary judgment related to the Harlem River Houses and Sheepshead Bay Houses contending that the plaintiff failed to provide timely written notice of claim, which is a condition precedent to recovery pursuant to General Conditions, Section 23, titled, "CLAIMS, under each of the contracts. Defendant also contends that any of the damages alleged by plaintiff for Extra Work are not recoverable pursuant to the terms and conditions of the contract. The plaintiff's claim for bond premiums is not ripe because, they do not increase until the overall contract price is increased. The claim is premature because plaintiff has not yet been found to be entitled to any additional funds. The extra monies sought are only recoverable if the Court finds NYCHA is obligated to pay the plaintiff's claims for the extra work.

The affidavit of Douglas McNevin, NYCHA Deputy Director of Construction responsible for Harlem River Houses and the project that is the subject of this lawsuit, is provided in support of the motion papers. He states that the claim related to skim-coating in apartments [Notice of Claim No. 14], arose no later than February 20, 2001, when plaintiff acknowledged that NYCHA had specifically instructed it to stop skim coating after the sample 17 apartments (McNevin Aff., Exh. 6). Plaintiff's notice of claim served on July 2, 2004, filed more than three years later is untimely. Mr. McNevin states that there was additional correspondence from the plaintiff in 2001, seeking to obtain NYCHA approval for skim coating for the initial 17 apartments (McNevin Aff. Exhs. 7 & 8). A letter sent to plaintiff dated February 4, 2002, clearly reiterates NYCHA's position that the request for skim coating was not considered "extra work" and was denied pursuant to the terms of the contract (McNevin Aff. Exhs. 10 & 11).

Mr. Mc Nevin states that the plaintiff's notice of claim arose no later than May 20, 2002, for Slab replacement instead of slab through repair [Notice of Claim No. 12]. Plaintiff was advised on May 20, 2002, at a meeting that NYCHA was denying its request for additional repairs because, "top of the slab" demolition was deemed, "the contractor's means and methods," under the contract. Plaintiff adopted the work merely for its own convenience. By letter dated June 14, 2002, NYCHA notified plaintiff of the events at the meeting (McNevin Aff., Exh. 13). Plaintiff's July 2, 2004, official Notice of Claim served prior to commencing the Harlem River Houses lawsuit is more than two years after the claim arose and is untimely.

The affidavit of Nicholas Maranzano, NYCHA Assistant Director of Capital Projects responsible for the Sheepshead Bay Houses and the project that is the subject of this lawsuit, is provided in support of the motion papers. Mr. Maranzano states that plaintiff is not entitled to compensation based on the claim for Removal and replacement of sidewalk concrete as ordered by the NYCHA [Notice of Claim No. 1]. The concrete claims accrued no later than August 6, 2002, when NYCHA inspectors directed plaintiff to correct defective concrete work (Maranzano Aff., Exh. 2). Plaintiff's concrete repeatedly failed testing and NYCHA sent letters advising of defects (Maranzano Aff., Exhs. 2 through 6). A March 25, 2003 punchlist further

directed plaintiff to remove and replace additional areas of concrete (Maranzano Aff., Exh. 7). The notice of claim filed November 12, 2004, is untimely (Maranzano Aff., Exh. 4). Sections 2 and 7(a) of the General Conditions of the Contract permit NYCHA to withhold payment for defective work (Sheepshead Bay Contract, Maranzano Aff., Exh. 1).

Paul Maranzano claims that plaintiff is not entitled to compensation for the removal and disposal of existing Asphalt, Concrete and other debris from the project [Notice of Claim No. 2]. Plaintiff's Asphalt Claim accrued no later than September 25, 2001 when plaintiff wrote to NYCHA regarding the field conditions that required excavation (Maranzano Aff., Exh. 10). Plaintiff's letter designated a notice of claim did not detail the nature and amount of the extra cost or damages sustained as required pursuant to General Conditions, Section 23 of the contract. Plaintiff filed a formal notice of claim on November 12, 2004, long after the claim accrued (Maranzano Aff., Exh. 4). In a letter dated May 13, 2003, NYCHA, reminded plaintiff that work done at a depth of over ten inches was not within the scope of the contract and would require approval as extra work (Maranzano Aff., Exh. 12).

Mr. Maranzano states that plaintiff's claim for removal and replacement of the basement walkway cheek walls [Notice of Claim No. 3], is untimely. Plaintiff's walkway cheek walls claim accrued no later than July 25, 2002 when plaintiff wrote to NYCHA requesting a change order to replace basement cheek walls for the basement walkway at an unspecified, "20 locations"(Maranzano Aff., Exh.16. NYCHA made requests of plaintiff related to the potential extra work with no response (Maranzano Aff., Exh. 16). The work performed by plaintiff on the wall cheeks was not approved in writing. The notice of claim filed November 12, 2004 related to wall cheek work is untimely.

Plaintiff opposes the motion claiming that the dates chosen by NYCHA for the notices of claim are arbitrary. There remain issues of fact concerning when plaintiff's claims accrued under the contract. NYCHA rejection should have occurred, for each of the alleged untimely notices of claim, when they were sent. NYCHA's failure to raise timely notice of claim until after approximately eight years of litigation, should result in this Court deeming the contentions concerning notice of claim waived. Plaintiff interprets the notice of claim requirement under General Conditions, Section 23 of each of the contracts, as not requiring any particular form of notice as long as NYCHA is aware of the claim and the intention to recover under it.

The affidavit of Abdul Sageer, President of Hi-Tech Construction Management Services, states that there is an issue of fact as to when the claims arose under Section 23, of the General Conditions of the Contract. The dates the actual claims arose cannot be determined by pointing to any single actual date. Repeated submission of change orders, requesting resolution of claims, should be deemed notice of claims even if they do not state that is the case. Mr. Sageer contends that he notified NYCHA that he was making, "continuous claims." He refers to letters dated February 7, 2002 and March 1, 2002, as proof that NYCHA was aware of his "continuous claims" position (Sageer Aff., Exh. 2). NYCHA was under an obligation to advise him that the notice of plaintiff's claims was improper and how to file a proper claim. The unpaid bond amounts are the subject of this litigation and will be determined when all the change orders are processed. Although the final amount will be determined based on the outcome of this litigation, the premiums were earned and this claim should not be dismissed as unripe.

Upon review of the papers submitted this Court finds that NYCHA has established a prima facie basis to obtain summary judgment. The correspondence sent

by plaintiff either did not clearly state it was a Notice of Claim, or to the extent it referred to a "continuous claim," did not clearly state the amount sought as part of the claim. Plaintiff's correspondence referring to dollar amounts in excess of the contract are not labeled as "notice of claim." The only formal notices of claim were those filed on July 2, 2004, for the Harlem River Contract and November 12, 2004, for the Sheepshead Bay Contract.

Plaintiff does not raise an issue of fact. General Conditions, Section 23 of each of the contracts, clearly states that as a condition precedent, a formal written notice of claim be filed within, "...*twenty (20) days after such claim shall have arisen...stating in such notice the nature and amount of the extra cost or damages sustained and the basis of the Claim against the Authority*." Timely notice of claim is a condition precedent to recovery under the contracts, it is not an exculpatory clause that might be excused based on NYCHA's gross negligence. There is no basis for plaintiff's claim that NYCHA was required to provide notification of the manner in which a timely written notice of claim should be filed, because it was clearly stated in General Conditions, Section 23 of the contracts. The whole purpose of a formal written notice of claim is to avoid the unreliable modifications that plaintiff is attempting to allege. Plaintiff's contention that the actual dates of notice of claim have been varied by NYCHA would have merit if plaintiff provided proof of proper written notices of claim prior to July 2, 2004 and November 12, 2004; which it did not. Plaintiff's contention that NYCHA had continuing notice of the claims, even when they were not in writing, incorrectly interprets the terms of the contract and applicable precedent. Plaintiff's contention of waiver and estoppel, does not apply based on the strict compliance provisions related to the condition precedent in the contracts. NYCHA could raise the issue of timely notice of claim at any time prior to commencement of trial. The bond issues require a favorable adjudication on the issues raised in this action. Plaintiff has not established a basis to obtain a favorable adjudication and the bond claims shall be dismissed.

NYCHA has established a basis for summary judgment. The remainder of the relief sought in this motion, seeking leave to serve an amended answer asserting additional affirmative defenses of judicial estoppel, collateral estoppel, judicial admission, and release; additionally extending the parties time to complete discovery and file a note of issue at least by sixty (60) days after finally determination of the motion, is denied as moot.

Accordingly , it is ORDERED that THE HOUSING AUTHORITY OF THE CITY OF NEW YORK's motion pursuant to CPLR §3212, for summary judgment dismissing both consolidated actions, is granted and the case is dismissed, and it is further,

ORDERED that, the remainder of the relief sought is in this motion is denied, as moot.

FILED ENTER:

AUG 02 2013

COUNTY CLERK'S OFFICE
NEW YORK

MANUEL J. MENDEZ,
J.S.C.

Dated: July 29, 2013

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE