

**Perini Corp. v City of New York**

2014 NY Slip Op 30863(U)

April 4, 2014

Sup Ct, New York County

Docket Number: 601720/03

Judge: Kathryn E. Freed

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

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PRESENT: \_\_\_\_\_  
Justice

PART 5

Index Number : 601720/2003  
PERINI  
vs  
CITY OF NEW YORK  
Sequence Number : 007  
REARGUMENT/RECONSIDERATION

*CAL: A52*

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

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

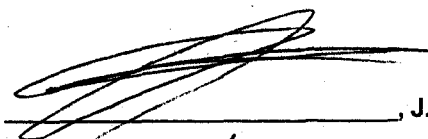
**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

APR 07 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4-4-14  
APR 04 2014

  
\_\_\_\_\_, J.S.C.

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

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  
COUNTY OF NEW YORK: PART 5

-----X  
PERINI CORPORATION,

Plaintiff,

DECISION/ORDER  
Index No. 601720/03  
Seq. No 007

-against-

CITY OF NEW YORK (Honeywell Street and  
Queens Boulevard Bridges)

PRESENT  
Hon. Kathryn E. Freed,  
J.S.C.

Defendant.

-----X  
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1, 2(Exs. A-F)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	...3..(Exs. 1-4)
REPLYING AFFIDAVITS.....	.....4.....
EXHIBITS.....	.....
OTHER.....(Memoranda of Law).....	.....5,.6.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this breach of contract action, the defendant City of New York (“the City”) moves, pursuant to CPLR 2221, for reargument of plaintiff Perini Corporation’s motion, pursuant to CPLR 213, 3211 (a) (7) and 3212 (a) and (e), for an order dismissing the City’s seventeenth and eighteenth affirmative defenses and first and second counterclaims. After oral argument, and upon reviewing the motion papers and applicable statutes and case law, the City’s motion for reargument is **denied**.

**FILED**

APR 07 2014

**FACTUAL AND PROCEDURAL BACKGROUND:**

In 1999, Perini and the City entered into a contract for the reconstruction of the Honeywell Street and Queens Boulevard Bridges which run over the Amtrak and Long Island Railroad train yard in Queens ("the project"). The United States Department of Transportation (US DOT) provided the majority of funding for the project and, pursuant to US DOT guidelines, which have been adopted by New York State and the City, companies that receive federal grants for a construction project must establish a program that is designed to award a percentage of the work on that project to Disadvantaged Business Enterprise (DBE) contractors. Plaintiff submitted a DBE plan for the project and defendant accepted plaintiff's proposal conditioned on plaintiff's satisfaction of the DBE program requirements.

In 2003, Perini commenced this breach of contract action against the City demanding over \$16 million in damages on the grounds that the City failed to 1) pay it an equitable adjustment for damages caused by certain work conditions and 2) apprise it of conditions that would affect or delay the work.

In December 2008, a federal grand jury indicted two of Perini's former officers on charges of conspiracy, mail fraud, wire fraud, and money laundering in connection with federally funded contracts entered into by Perini between 1998 and 2000. The indictment, which was unsealed in March 2009, charged the officers with conspiring with other contractors to falsely represent, in proposals and other documents, that DBE subcontractors would perform work in satisfaction of the DBE requirements when, instead, Perini used non-DBE subcontractors or its own forces to perform the work.

Following the unsealing of the indictment, the City moved to amend its answer to add the affirmative defenses of fraud in the inducement and fraud/illegality in the performance of the contract, as well as to assert two counterclaims based on Perini's allegedly fraudulent conduct. The 17<sup>th</sup> affirmative defense and first counterclaim alleged fraud in the inducement, claiming that, in order to induce the award of the contract, Perini circumvented the DBE requirements by entering into a conspiracy with several "DBE subcontractors" to misrepresent that DBE subcontractors were performing work on the Project. The 18<sup>th</sup> affirmative defense and second counterclaim alleged that Perini knowingly and falsely represented that it was making a good faith effort to comply with the DBE requirements.

Perini opposed the motion, asserting that: 1) the City waived its fraud claims when it entered into a Memorandum of Understanding (MOU)<sup>1</sup> with Perini in May 2004 because, at that time, the City knew, or should have known, that Perini had committed fraud; 2) the fraud claims were untimely because the alleged fraud claim accrued no later than 2002; 3) fraud cannot be predicated on promises of future performance; and 4) Perini's claims were barred by the equitable doctrine of laches because the City knew about Perini's alleged involvement in the DBE fraud as early as 2002.

In response, the City asserted that its fraud claims were timely because it had no knowledge that Perini was either the target of, or the subject of, a criminal investigation in connection with DBE fraud prior to entering into the MOU in May 2004 and that it had no knowledge of Perini's complicity in the allegedly fraudulent scheme until the indictment was unsealed in March 2009.

The City further maintained that the key issue underlying the fraud claims was not future

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<sup>1</sup>The MOU essentially acknowledged that the work on the project was substantially complete and that Perini was to be released from meeting its DBE requirements in exchange for conducting up to five DBE training seminars.

performance, but rather whether Perini deliberately misled it about “present facts”—that is, its alleged collusion with DBE subcontractors in a fronting scheme, which scheme was developed before Perini entered into the contract and which continued throughout Perini’s performance under the contract.

Finally, the City argued that it was not guilty of laches because Perini failed to show that the delay in amending the answer was prejudicial. This, urged the City, was because Perini knew or should have known of its officers’ allegedly fraudulent actions prior to commencing this action.

By decision dated March 16, 2010 and entered March 18, 2010 (*Perini Corp. v City of New York*, 27 Misc 3d 813 [Jaffe, J.]), this Court granted that branch of the City’s motion which sought leave to amend the answer to add the affirmative defenses and counterclaims sounding in fraud. In granting the City’s motion, this Court considered Perini’s arguments regarding the statute of limitations, the MOU, laches, and failure to state a fraud claim and found that Perini “neither allege[d] nor demonstrate[d] that the proposed amendment surprised or would prejudice it” and that the proposed amendment “may be meritorious given the indictment of [Perini’s] officers” (*Id.* at 819).

Moreover, this Court stated:

“[Perini] offer[ed] no evidence that [the City] knew of [Perini’s] alleged fraudulent activities before the unsealing of the indictment in 2009, and even if the [City] knew before then, a delay in moving for leave does not, in and of itself, preclude the amendment of a pleading absent a demonstration of significant prejudice to the opposing party. To the extent that the 2004 memorandum [MOU] estops [the City] from interposing the new fraud defenses and counterclaims, the subsequent indictment of [Perini’s] officers effectively negate[d] that estoppel.”

(*Id.* at 819 [*internal citation omitted*]).

In the same order, this Court also vacated the note of issue because discovery was incomplete (*Id.* at 817). Although Perini filed a notice of appeal from the March 18, 2010 decision, it did not perfect the same.

Perini subsequently moved, pursuant to CPLR 3211 (a) (7) and 3212 (a) and (e), for an order dismissing the City's seventeenth and eighteenth affirmative defenses and first and second counterclaims. In support of its motion, Perini argued that those affirmative defenses and counterclaims had to be dismissed because the fraud in the inducement defense and counterclaim could not be based on a promise to perform in the future and that the first and second counterclaims were untimely and barred by laches. Alternatively, it argued that the second counterclaim was, in actuality, a breach of contract claim which was barred by the six year statute of limitations.

In support of its arguments, Perini relied on documents generated by the City during the course of its work on the Project, a press release from the US DOT Office of the Inspector General, as well as, inter alia, Federal Construction Fraud Task Force documents and documents associated with Perini's bid on a different project. Most of these documents were not introduced in opposition to the City's motion to amend its answer. Perini contended that the claims were time barred because, based on these documents the City knew, or at least had reason to inquire, about Perini's allegedly fraudulent activities long before the unsealing of the indictment in 2009.

In opposition to the motion, the City argued that dismissal had to be denied because the issues of the timeliness of the affirmative defenses and counterclaims, as well as the sufficiency of the pleadings, were resolved by this Court's order of March 18, 2010.

The City also argued that the new documentary evidence that Perini relied on was not available to the City prior to the unsealing of the indictment; that the fraud in the inducement claim

was based on Perini's "present knowledge" because, when Perini entered into the contract, it knew that it would not use DBE contractors to perform the work; and that the affidavit submitted by Robert Band, President of Perini, had to be disregarded because Band did not have personal knowledge of the facts. In opposition to Perini's motion, the City submitted, inter alia, the affidavit of John Kantor, Chief of Investigations for the City's Department of Investigation ("DOI"), who stated that, as of 2006, the DOI was aware that a joint venture consisting of Perini and other entities had been a defendant in "numerous litigations" involving "allegations of fraud" and that Perini was being investigated for DBE fraud.

By order dated August 12, 2013 and entered August 13, 2013, this Court granted Perini's motion to dismiss the City's first and second counterclaims and 17<sup>th</sup> and 18<sup>th</sup> affirmative defenses. In so holding, this Court reasoned that Perini "submitted evidence that demonstrate[d] that [the City] had reason to make inquiry regarding the alleged fraud long before the unsealing of the indictment in 2009." In so holding, this court reasoned that:

1) the City's "own inspector issued daily reports for the period of June through November 2001 which show[ed] that Fairview Contracting Corporation's (Fairview) DBE work on the project was being performed by Walter Construction (Walter), a non-DBE contractor."

2) the US DOT "issued a press release in September 2004, which state[d] that the president of Fairview plead guilty to money laundering charges in connection with DBE fraud that occurred between January 2000 and December 2001 when he conspired with representatives of Perini and Walter to commit fraud." The press release stated that "[t]he scheme involved Fairview acting as a 'front' DBE under three NY City DOT construction projects in which Walter actually performed the subcontracted work, while Fairview submitted fraudulent invoices for the associated labor and materials to Perini..."

3) A November 11, 2002 letter from STV, Inc., the City's resident engineer, which memorialized a meeting between STV and members of New York State DOT and the City's DOT, reflected that Perini made no effort to meet its DBE goals and that it provided "contrived paperwork in an effort to prove higher DBE participation."

4) Perini produced a 2003 letter from the New York State DOT to the City's DOT stating that one of Perini's DBE contractors, VVSS, did not do any work on the project and that Perini did Fairview's assigned work.

5) Kantor's affidavit established that the City was aware of possible fraud committed by Perini.

This Court concluded that, based on the documentation submitted by Perini, the City "possessed timely knowledge, sufficient to have placed [it] under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations." (*citations omitted*). Further, this Court stated that the City was "aware of enough operative facts so that, with reasonable diligence, [it] could have discovered the fraud." (*citations omitted*).

The City now moves, pursuant to CPLR 2221, to reargue Perini's motion to dismiss. The City specifically seeks reargument of whether its fraud defenses and counterclaims are time barred.

#### **POSITIONS OF THE PARTIES:**

In support of its motion, the City argues that the documents submitted by Perini failed to establish that the City had notice of the alleged fraud prior to 2009. The City further asserts that its fraud defenses and counterclaims are not time barred because CPLR 203(d) excludes a defense or counterclaim from the statute of limitations "if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends [...and] it is not barred to the extent of the demand in the complaint..."

In opposition to the City's motion, Perini argues that the City fails to set forth any legal principle misapprehended by this Court. It further asserts that the City's fraud claims and defenses,

“which stem from Perini’s alleged failure to comply with the DBE requirements,” are not related to Perini’s claim for breach of contract and thus do not fall within the exception to the statute of limitations set forth in CPLR 203(d). Perini also argues that the City failed to raise the issue of the applicability of CPLR 203(d) in opposition to Perini’s motion to dismiss and thus cannot do so on this reargument motion. In the alternative, Perini asserts that, if reargument is granted, the City’s fraud claims and defenses must in any event be dismissed. It argues that fraud in the inducement cannot be based on an allegedly false promise.

In its reply affirmation in further support of its motion to reargue, the City asserts that Perini’s failure to comply with the contract’s DBE provisions was, in and of itself, insufficient to trigger the two-year limitations period set forth in CPLR 203(g). The City further maintains that an issue of fact exists as to whether the September, 2004 press release issued by the US DOT provided the City with sufficient notice of the operative facts underlying Perini’s fraud. The City claims that the other documents relied upon by this Court in its decision did not suggest that Perini committed fraud but rather reflected Perini’s non-compliance with contract/DBE requirements.

The City further asserts that it may rely on CPLR 203(d) since it opposed Perini’s motion to dismiss on the ground that its fraud claims and defenses were timely. It further maintains that its counterclaims for fraud are related to Perini’s breach of contract claim and thus fall within the exception to the statute of limitations set forth in CPLR 203(d).

Finally, the City asserts that Perini’s arguments regarding the merits of the City’s fraud defenses and counterclaims are irrelevant since the City’s motion for reargument was limited to the timeliness of those claims and defenses.

### LEGAL CONCLUSIONS:

A motion for leave to reargue “shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the prior motion.” CPLR 2221(d)(2). Such motion “is addressed to the sound discretion of the court.” *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1<sup>st</sup> Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782 (1993). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1<sup>st</sup> Dept. 1984]), or to present arguments different from those originally asserted. *William P.Pahl Equip. Corp. v. Kassis, supra* at 27; *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374 (2d Dept. 2004). On reargument, the court’s attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v. Browning School*, 80 A.D.2d 790 (1<sup>st</sup> Dept. 1981). Professor David Siegel in N.Y. Prac, § 254, at 449 (5<sup>th</sup> ed) succinctly instructs that a motion to reargue “is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind.”

This City’s motion to reargue Perini’s motion to dismiss the counterclaims and affirmative defenses sounding in fraud is denied.

Initially, the City’s motion is defective because it fails to annex a complete copy of its initial motion papers and the opposition thereto. *See* CPLR 2214(c); *Biscone v JetBlue Airways Corp.*, 103 AD3d 158 (2d Dept 2012), *appeal dismissed* 20 NY3d 1084 (2013). CPLR 2214 (c) provides, in pertinent part, that “[t]he moving party shall furnish...all other papers not already in the possession of the court necessary to the consideration of the questions involved.” This Court does not retain

motion papers after it decides a motion “and should not be compelled to retrieve the clerk’s file in connection with its consideration of subsequent motions.” *Sheedy v Pataki*, 236 AD2d 92, 97 (3d Dept 1997), *lv denied* 91 NY2d 805 (1998). Although this Court notes that Perini does not raise this point in its opposition to the motion to reargue, the movant, here the City, is responsible for assembling complete papers documenting the procedural history of the motion and providing a proper foundation for the relief requested. *See Fernald v Vinci*, 13 AD3d 333 (2d Dept 2003). Since it failed to do so, this Court may refuse to consider its incomplete papers. *See Wells Fargo Home Mtge., Inc. v Mercer*, 35 AD3d 728 (2d Dept 2006). Although the City annexes to its motion the affidavits and affirmations submitted in connection with Perini’s underlying motion to dismiss, it omits virtually all of the voluminous exhibits submitted, mostly by Perini, in connection with the application.

In any event, the motion for reargument is denied since the City failed to identify any point of law or fact overlooked or misapprehended by this Court. *See* CPLR 2221. In its decision dated August 12, 2013, this Court properly determined, relying on the documentation enumerated in the factual statement above, and on the cases of *Port Parties, Ltd. v ENK Intern. LLC*, 84 AD3d 685, 685-686 (1<sup>st</sup> Dept 2011) and *Rite Aid v Grass*, 48 AD3d 363, 364-365 (1<sup>st</sup> Dept 2008), that the City had reason to make inquiry regarding the alleged fraud long before the unsealing of the indictment in 2009.

The City’s argument that it could not have stated a fraud claim until 2009, when the indictment was unsealed, because it did not previously have specific information that Perini’s principals were involved in the alleged fraud, or that the contract at issue in this action was involved, is without merit. As this Court found in deciding the underlying motion, the notice that triggers the

two year discovery period set forth in CPLR 203(g) need not be that which reflects positive knowledge of the fraud, or reflects each and every element of a fraud claim. *See Davis v Smith Corp.*, 262 AD2d 752, 754-755 (3d Dept 1999). Rather, “a plaintiff need only be aware of enough operative facts so that, with reasonable diligence, [he] could have discovered the fraud (*id.* at 755 [internal quotation marks and citations omitted]). Here, the City had information sufficient to place a reasonable person under a duty to make inquiry regarding possible fraud by Perini. Kantor even admitted, in an affidavit submitted in opposition to Perini’s motion to dismiss, that, as of 2006, the DOI was aware of several other litigations in which Perini, as part of a joint venture, was being investigated for fraud.

Finally, as Perini correctly asserts, the City may not rely on CPLR 203(d) in asserting that its fraud defenses and counterclaims are not time barred. That section excludes a defense or counterclaim from the statute of limitations “if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends [...and] it is not barred to the extent of the demand in the complaint...” However, since the City’s underlying motion did not raise the potential applicability of CPLR 203(d) to the facts of this matter, this Court need not address it on this motion for reargument. *See CPLR 2221(d)(2)*.

Given the “maxim that no man may take advantage of his own wrong” (*Erbe v Lincoln Rochester Trust Co.*, 13 AD2d 211, 214 [4<sup>th</sup> Dept 1961], quoting *Glus v Brooklyn Eastern Term.*, 359 U.S. 231, 232-233 [1959]), this Court notes that it is frustrated to reach the decision set forth herein since it rewards Perini, an entity whose operations have been questioned and investigated for well over a decade. However, this Court is constrained by the law to deny the City’s motion because

it cannot conclude that Perini, by “deception or any violation of duty” (*Erbe v Lincoln Rochester Trust Co., supra* at 213) rendered the City unable to assert the statute of limitations as a counterclaim or affirmative defense in a timely fashion. On the contrary, as noted above, there was a plethora of information in the City’s possession which could, or should, have caused it to investigate possible fraud by Perini as early as 2001. This information, if it had been analyzed with “reasonable diligence” (*see Davis v Smith, supra* at 755), may have provided the City with the opportunity to assert timely affirmative defenses and counterclaims sounding in fraud.

Therefore, in accordance with the foregoing, it is hereby:


ORDERED that the motion by the defendant City of New York to reargue the motion by Perini Corporation to dismiss the City’s 17th and 18th affirmative defenses and first and second counterclaims is denied; and it is further,

ORDERED that this constitutes the decision and order of this Court.

DATED: April 4, 2014

APR 04 2014

ENTER:



KATHRYN E. FREED,  
J.S.C.

CLERK OF SUPREME COURT

**FILED**

APR 07 2014