

W&W Steel, LLC. v Port Auth. of N.Y. & N.J.
2014 NY Slip Op 32275(U)
August 25, 2014
Sup Ct, New York County
Docket Number: 650913/2013
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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W&W STEEL, LLC.,

Plaintiff,

**DECISION AND ORDER
Motion Sequence No.: 001**

-against-

Index No. 650913/2013

**THE PORT AUTHORITY OF NEW YORK & NEW
JERSEY,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

On this motion (Motion Sequence Number 001), defendant Port Authority of New York & New Jersey (the "Port Authority") moves, pursuant to CPLR 3211 (a)(2), to dismiss the complaint for lack of subject matter jurisdiction.

I. Facts

Non-party National September 11 Memorial and Museum at the World Trade Center Foundation, Inc. (the "Foundation") is a not-for-profit corporation responsible for designing, operating, funding, and maintaining the National September 11 Memorial and Museum at the World Trade Center (the "Project"). The Foundation hired non-party Lend Lease (US) Construction LMB, Inc., f/k/a Bovis Lend Lease LMB, Inc. ("Lend Lease") to act as construction manager for the Project. On October 30, 2009, the Foundation, through Lend Lease as its agent, entered into a \$7,289,240 contract (the "Contract") with plaintiff W&W Steel, Inc. ("W&W"), whereby W&W agreed to furnish and install the structural steel for the pavilion at the Project. The Foundation subsequently assigned all of its rights, title, interest and obligations under the Contract to the Port Authority (the "Assignment").

W&W was to commence its work on the Project on September 1, 2009, begin construction on or about March 16, 2010, and complete construction within 80 working days. W&W alleges that throughout the course of the Project, it was directed to make a number of changes to the scope of the work, and that the Foundation and/or the Port Authority had approved change orders totaling \$5,014,744.00, for a revised Contract price of \$12,303,984.00. W&W alleges that the Foundation and/or the Port Authority failed to pay \$2,613,475.00 of the approved change orders, and failed to

approve \$1,151,227.00 in pending change orders. W&W also alleges that the Foundation and/or the Port Authority delayed work on the Project, thereby creating additional costs and expenses. On January 11, 2012, W&W submitted a claim and a request for an equitable adjustment change order of \$4,791,146.00. W&W asserts that the Foundation and/or the Port Authority did not respond to its request for an equitable adjustment change order.

II. Procedural History

On April 1, 2012, W&W commenced an action in this court against the Foundation, the Port Authority, and Lend Lease under Index No. 651025/2012 (the “Prior Action”). W&W amended the complaint on June 21, 2012. In its answer, filed July 17, 2012, the Foundation asserted crossclaims against the Port Authority. On November 27, 2012, the court dismissed W&W’s claims against the Port Authority for failure to file the statutorily required notice of claim. The court rejected the argument that the Port Authority should be estopped from invoking the notice of claim requirement because W&W failed to “demonstrat[e] that the Port Authority acted in a way that through some affirmative action of misleading [W&W] or acted negligently to induce a party who is entitled to rely and who changes his position to his detriment or prejudice” (*W&W Steel, LLC v National Sept. 11 Memorial & Museum at the World Trade Center Foundation, Inc.*, No. 651025/2012 NYSCEF Doc. No. 29, p. 4 [Sup Ct. NY Cnty Nov. 27, 2012]).

On November 30, 2012, W&W served the Port Authority with a notice of claim and, after sixty days had passed, on February 19, 2013, moved for leave to further amend its complaint to reassert claims against the Port Authority. Before the Court acted on that motion, on March 14, 2013, W&W filed a summons with notice in the instant action. On April 13, 2013, W&W, the Port Authority, and the Foundation filed a stipulation in the Prior Action withdrawing the motion for leave to amend the complaint. On August 27, 2013, the Court dismissed the Foundation’s crossclaim against the Port Authority in the Prior Action, also for failing to serve a proper notice of claim. The dismissal ended the Port Authority’s participation in the Prior Action.

In the instant action, W&W alleges causes of action for breach of contract, unjust enrichment and *quantum meruit*. W&W seeks damages in the amount of \$8,555,848.00. These claims are substantially the same as the claims brought in the Prior Action. Port Authority moves to dismiss the complaint, claiming the action is now time barred.

III. Discussion

The State of New York has enacted a limited waiver of sovereign immunity which allows suits against the Port Authority provided certain conditions precedent are met (McKinney's Uncons Laws of NY § 7101). In particular, would be plaintiffs must commence the action "within one year after the cause of action therefor shall have accrued" (Uncons Laws § 7107). Additionally, a notice of claim must be filed at least sixty days prior to commencing an action (*id.*). These provisions are jurisdictional conditions precedent which are "mandatory" and "must be strictly construed" (*See In re New York City Asbestos Litigation*, 106 AD3d 617, 618 [1st Dept 2013]).

The Court of Appeals considered a similar situation in *Yonkers Contracting Co. v Port Authority Trans-Hudson Corp.* (93 NY2d 375 [1999]). In *Yonkers*, the plaintiff's initial suit was dismissed for failure to comply with a condition precedent (*id.* at 377-378). Six months after the case was dismissed, but more than one year after accrual of the action, the plaintiff commenced a second action. In affirming dismissal of the second action for lack of subject matter jurisdiction, the Court of Appeals emphasized that "[t]he requirement to bring an action within one year . . . [is] a condition precedent to suit, which cannot be tolled" (*id.* at 378). The court held that "the limitation of time is so incorporated with the remedy given as to make it an integral part of it, and the condition precedent to the maintenance of the action at all" (*id.* at 379 [internal citation omitted]).

W&W argues that, contrary to the position taken in the Prior Action, its cause of action did not accrue until the Port Authority breached the contract by refusing to issue payments for change orders or to accept W&W's Request for Equitable Adjustment. W&W asserts that this occurred after a cost-sharing dispute between the Foundation and the Port Authority was resolved on September 17, 2012. If W&W's interpretation is correct, the action is timely, as this action was filed on March 14, 2013.

W&W's argument is belied by the complaints it filed in this action and the Prior Action. In both actions, W&W alleged that after unsuccessfully seeking to resolve the dispute, on February 8, 2011, February 25, 2011, and May 26, 2011, it contacted the Port Authority requesting that the matter be submitted to arbitration (Compl. ¶ 28). W&W submitted its claim and request for an equitable adjustment change order on January 11, 2012 (Compl. ¶ 30). W&W filed the Prior Action on April 1, 2012, more than one year before the instant action.

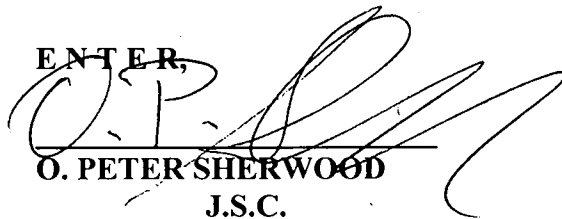
W&W's claim is untimely. Although W&W argues that the dispute between the Foundation and the Port Authority caused the date on which the Port Authority "was in a position to finalize the outstanding change orders and make payments for same" to be delayed until September 11, 2012 (Compl. ¶ 38), the Contract does not condition the Port Authority's duty to pay on any agreement with the Foundation. In fact, as the Complaint alleges, the Foundation "assigned all of its rights, title, interest and obligation under the Contract to the Port Authority" (Compl. ¶ 9). Because any dispute between the Foundation and the Port Authority is irrelevant to the right of W&W to receive payment under the Contract, the action accrued before March 14, 2012 and is therefore untimely, depriving this Court of subject matter jurisdiction over the action.

W&W's argument that the Port Authority should be estopped from raising a statute of limitations defense fails for several reasons. First, W&W raised the same argument in the Prior Action with regards to the notice of claim, and is therefore collaterally estopped from making the identical argument. Second, W&W cannot argue that the Port Authority's actions caused it to refrain from commencing timely litigation when W&W *did* commence litigation, specifically, the Prior Action. It was W&W's failure to file a notice of claim sixty days prior to that action that resulted in dismissal. The Port Authority's alleged representations regarding the processing of change orders did not result in any forbearance to sue. On the contrary, W&W maintained the Prior Action in spite of these representations. Finally, W&W's estoppel argument relies on *Robinson v City of New York* (24 AD2d 260 [1st Dept 1965]), which stands merely for the proposition that a municipal defendant may be estopped from pleading the statute of limitations. Where, as here, the issue is the jurisdictional condition precedent, *Robinson* is inapposite. It is hereby;

ORDERED that the motion to dismiss is GRANTED and the action is dismissed.

This constitutes the decision and order of the court.

DATED: August 25, 2014

ENTER,

O. PETER SHERWOOD
J.S.C.