Glenman Indus. & Commercial Contr. Corp. v New York City Sch. Constr. Auth.
2014 NY Slip Op 33156(U)
November 21, 2014
Supreme Court, Queens County
Docket Number: 700844 2014
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA PART_2__

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Glenman Industrial & Commercial Contractor Corp. Index No: 700844 2014

Plaintiff, Motion Date: July 3, 2014

- against - Mot. Seq. No. 1

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY (P.S. 90, SCA CONTRACT NO: C0000105000)

Defendants.

The following papers numbered E5 to E47 read on this motion by defendant New York City School Construction Authority (SCA) for an order dismissing the complaint with prejudice pursuant to CPLR 3211(a)(1),(2)(5) and (7) on the grounds that the plaintiff failed to file a timely notice of claim as required by Public Authorities Law §1744(2)(i) and executed a binding release.

	Papers Numbered
Notice of Motion-Affirmation-Affidavit-Exhibits.....	E5-22
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Upon the foregoing papers the motion is determined as follows:

Plaintiff Glenman Industrial & Commercial Contractor Corp. (Glenman) commenced the instant action by e-filing a summons and complaint on February 6, 2014. Plaintiff alleges in its complaint that on or about July 25, 2008, it entered into a contract with the SCA to perform construction work at P.S. 90, a New York City public school

located in Brooklyn; that the SCA agreed to pay it a lump sum and unit prices set forth in the contract; that plaintiff duly performed all of the terms and conditions of the contract, together with any and all additional work requested and directed by the SCA, except insofar as its "performance was waived, prevented or frustrated by the SCA and its breaches of contract."

Glenman alleges that on June 1, 2009 the SCA issued a Certificate of Substantial Completion and took partial occupancy of the unfinished project; that at said time the project was less than 75% complete and Glenman was directed by the SCA to perform substantial items of extra work; that between June 1, 2009 and September 30, 2013, the SCA specifically requested that Glenman perform contract work and extra work; that due to the SCA's partial occupancy of the project and its untimely changes and directives that Glenman perform additional extra work, the SCA extended the duration of the project, and prevented Glenman from substantially completing its work until September 30, 2013; and that the SCA refused to close-out the project or process final payment, thereby preventing Glenman from finally completing its contract work.

Glenman alleges in the complaint that it presented a notice of dispute and verified Notice of Claim to the SCA dated October 13, 2013, which was within three months of substantial completion of the project, and that the SCA has refused to mediate the dispute or make an adjustment or payment. The Notice of Claim seeks a balance due of $838,813.00.

Plaintiff, in its first cause of action, seeks to recover an unpaid contract balance of $838,813.57, together with interest; the second cause of action seeks to recover the sum of $711,242.42 for additional and extra work, together with interest; the third cause of action for breach of contract seeks to recover damages of $1,616,037.00, together with interest, for increased labor and material costs, and for additional general conditions and additional job supervision and management costs.

Prior to the commencement of the instant action, Glenman commenced an action on May 24, 2010, against the SCA to recover damages with respect to work performed at P.S. 90 (Index No. 13167/2010). Glenman in its prior complaint sought to recover damages totaling $461,556.00 for certain items of extra work, as well as for a delay of 286 days it encountered during the course of the project. The Honorable David Elliot, in an order dated January 9, 2013, granted the SCA's motion to dismiss the complaint without prejudice to commencing a new action that was not otherwise barred by the statute of limitations, and denied Glenman's cross motion to discontinue the action. Glenman had stated in its complaint in that action that it had attained substantial completion of the subject project on June 1, 2009, acknowledged that it had failed to annex a notice of claim to the complaint, and

also acknowledged that the September 10, 2009 notice referred to in its complaint was, in fact, not a notice of claim. Justice Elliot declined to permit the plaintiff to discontinue its action as premature, as the statements made by Glenman in its complaint–that its claim had accrued and that it had filed a notice of claim–constituted binding judicial admissions.

Defendant SCA in this pre-answer motion, seeks to dismiss the complaint on the grounds that plaintiff failed to file a timely notice of claim as required by Public Authorities Law § 1744 (2)(i), and that plaintiff executed a binding release which precludes the claims asserted herein. It is asserted that Glenman's claims in the present action are largely identical to those asserted in the prior action and that plaintiff is attempting avoid the consequences of Justice Elliot's order and revive its previously dismissed claims.

Defendant asserts that during the course of the subject project, Glenman failed to perform certain work required by the contract and failed to complete various items of work in a timely fashion. The SCA states that this resulted in its issuance of a stop work order on August 11, 2008, which directed Glenman to cease the majority of its work on the P.S. 90 project. The SCA then engaged TDX Construction (TDX) to perform the work Glenman had failed to complete, and reduced Glenman's contract price by the amount paid by SCA to TDX in a series of change orders. The SCA asserts that Glenman's work was deemed substantially completed on June 1, 2009, and that both parties executed a Certificate of Substantial Completion on said date.

Defendant SCA asserts that the change orders relevant to this action consist of credit change orders, also known as back charges, which reduced Glenman's scope of work to be performed, thereby reducing the overall amount it would be paid by the SCA. Said unilateral change orders are as follows:

Change Order 20U: Deletion of trailer requirement. A credit in the amount of $53,950.00, back charged to Glenman, as the requirement that Glenman have trailer was deleted from the contract. The SCA informed Glenman that said change order had been fully executed in a letter dated December 17, 2008.

Change Order 21U: Emergency construction. A credit in the amount of $221,987.00 back charged to Glenman, representing the cost of hiring TDX to perform emergency work necessary to complete bathroom renovations in time for the school year. The SCA informed Glenman that said change order had been fully executed in a letter dated July 10, 2009.

Change Order 31U: Security Service. A credit in the amount of $60,869.00 back charged to Glenman due to its failure to provide site security services. The SCA informed Glenman that said change order had been fully executed in a letter dated May 17, 2011.

Change Order 32U: Accessibility Millwork. A credit in the amount of $44,541.00, back charged to Glenman, representing the cost of hiring TDX to perform the work that Glenman had failed to perform. The SCA informed Glenman that said change order had been fully executed in a letter dated August 2, 2011.

Change Order 33U: Construction Services. A credit in the amount of $282,842.38, back charged to Glenman, representing the cost of hiring TDX to perform the work. The SCA informed Glenman that said change order had been fully executed in a letter dated May 24, 2010.

SCA asserts that Glenman did not file a notice of claim with respect to the above five change orders until November 16, 2012, and that the notices of claim filed on June 6, 2013, July 1, 2013, and October 23, 2013, all pertain to the same items, and are untimely.

The SCA also asserts that Glenman, in connection with a payment application submitted in September 2012, executed a document entitled "General Release-Post Substantial Completion", dated September 28, 2012, in favor of the SCA, which explicitly discharges the SCA from all liability for any potential claims arising from the P.S. 90 project.

Plaintiff, in opposition, has submitted an affidavit from Thomas Conneally, Glenman's president, who asserts that although the SCA issued certificates of substantial completion in 2009, Glenman's contract work was only partially complete at that time and was not finished until September 13, 2013. It is asserted that the SCA issued two certificates of substantial completion, dated April 1, 2009 and June 1, 2009; that said certificates did not reflect the status of the contract work and extra work that had been performed as of those dates; that Glenman's contract work was neither deleted nor reduced by the SCA; and that through September 2013 the SCA required Glenman to perform and complete the full contract scope, together with substantial extra work. It is asserted that after Glenman completed the work, the SCA refused to make any determination as to the value of the completed work or the remaining balance due and owing for work performed by Glenman.

Mr. Conneally seeks to rely upon the "As Built Critical Path Project Schedule" which was attached to its Notice of Claim dated October 22, 2013, and asserts that the SCA failed to acknowledge Glenman's completion of the work and refused to process or calculate the remaining final balance due for the work it had completed. He states that through November 2012, the SCA continued to process partial payment applications based upon approved estimates of contract work and extra/change order work that Glenman had performed on the subject project. He asserts that due to delays on the part of the SCA, Glenman was unable to complete its contract work prior to September 2013, and that it could not calculate the

actual amounts due for the completed work and for additional costs and damages it had incurred prior to its final completion of the project. It is therefore asserted that plaintiff timely served its notice of claim on October 22, 2013 and that defendant's motion should be denied in its entirety.

Mr. Conneally further states that in December 2011 and May 2012, Glenman was directed to perform extra work to review and fix the existing fire alarm system and that the SCA has yet to issue appropriate change orders for the extra fire alarm work it requested in December 2011. It is asserted that the SCA has not rendered a final determination concerning Glenman's request for a time extension or for additional compensation for general conditions; that Glenman's application pertaining to this request has been pending since January 19, 2009; that although the SCA included a response to its email of October 21, 2011, it did not send Glenman the "formal final decision"; that the SCA did not finalize any of the proposed credit change orders. With respect to the five credit change orders, Conneally asserts that the the SCA repeatedly requested proposals and back-up from Glenman and that it promised to schedule meetings with its Change Order Unit and provide Glenman with an opportunity to contest and negotiate the amount of any credits that would be assessed against Glenman; that no such meetings were scheduled; and that after being instructed to file for mediation in June 2013, Glenman filed its Notice of Claim with respect to the five unilateral change orders. It is further asserted that the SCA refused to honor Glenman;s request for mediation, and following the its final completion of the project, Gleman was advised that the SCA would not participate in any negotiations or consider any application for payment or any claim regarding the project.

With respect to the release, it is asserted that it was executed as part of an interim payment made to Glenman in the amount of $99,453.21, at which time no effort had been made to close out the project or determine the remaining consideration due and owing under the contract. It is also asserted that the terms and language of the release are ambiguous, as the stated sum of $2,450,000.00 is the actual original contract price, and does not represent the remaining balance due under the contract; that the SCA did not agree to pay Glenman the sum stated in the release in addition to the contract price; and that the amount paid to Glenman, including the interim payment totaled $2,322,428.00, which was less than the amount stated in the release. It is asserted that at the time the release was executed in September 2012, the remaining amount due under the contract could not be ascertained because of the remaining work to be completed by Glenman and the open change orders that to be negotiated with the SCA.

It is well established that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital*

Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer,* 72 AD3d 803 [2d Dept 2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2nd Dept 2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2nd Dept 2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept 1985], *affirmed* 66 NY2d 946 [1985]).

"When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see*, *id.*; *accord*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2nd Dept 2006], *quoting Doria v Masucci*, 230 AD2d 764,765 [2d Dept 2006]; *lv. to appeal denied* 89 NY2d 811 [1997]).

A party seeking dismissal of a complaint under CPLR 3211(a)(1) must submit documentary evidence that " 'conclusively establishes a defense to the asserted claims as a matter of law'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] *quoting Leon v Martinez,* 84 NY2d at 88; *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713 [2d Dept 2012]).

Public Authorities Law §1744(2) requires that an action "relating to the design, construction, reconstruction, improvement, rehabilitation, repair, furnishing or equipping of educational facilities" may be maintained against the SCA only if a notice of claim is presented "within three months after the accrual of such claim", and further requires that any action based thereon be commenced within one year.

Public Authority Law §1744(3) provides that "[t]he notice of claim presented pursuant to subdivision two of this section must set forth in detail with respect to such claim; (i) the amount of the claim; (ii) a specific and detailed description of the grounds for the claim, relating the dollar amount claimed to the event purportedly giving rise to the claim and

indicating how the dollar amount is arrived at; and (iii) the date of the event allegedly underlying the claim."

A timely notice of claim is a condition precedent to suit, and Glenman has the obligation to plead and prove that its notice of claim was served within three months after the accrual of its claim (Public Authority Law §1744; *C.S.A. Contracting Corp. v New York City School Construction Authority*, 5 NY3d 189, 192 [2005]; *Parochial Bus Systems, Inc. v Board of Education*, 60 NY2d 539, 547 [1983]; *Popular Construction, Inc. v New York City School Construction Authority*, 268 AD2d 467 [2000]).

With respect to the five unilateral change orders, in each instance the SCA provided Glenman with written notice that each change order had been fully executed. The SCA asserts that prior to the final execution of each change order, the SCA requested that Glenman provide its own proposal for the value of each of the subject change orders, and that Glenman failed to do so. The SCA claims that the change orders issued to Glenman provided Glenman with unequivocal notice of the back charges which the SCA intended to assess against the project's contract balance and therefore constitute the dates when plaintiff's claims accrued, December 17, 2008 with respect to CO20U, July 10, 2009 with respect to CO21U, May 24, 2010 with respect to CO33U, May 17, 2011 with respect to CO31U, and August 2, 2011 with respect to CO32U.

Glenman's Notices of Claim dated May 15, 2013, June 26, 2013, June 27, 2013, and October 18, 2013 all pertain to these change orders. In the May 15, 2013 and June 26, 2013 Notices of Claim, Glenman stated that Yakov Goykhman and Glen Crandall, SCA Project Officers, informed Glenman at a meeting held on October 22, 2012 that the subject change orders had been "finalized" by the Change Order Unit, and that Glenman would not be able to negotiate them through the Change Order Unit. Glenman also stated that at another meeting with SCA in April 2013, it was told that the formal proposals for these back-charges needed to be submitted to the Change Order Unit, and that Glenman had since formally submitted its requests, and that its "proposals were rejected based on different reasons without the opportunity to even negotiate them". In the October 2013 Notice of Claim, Glenman asserted that it was still waiting for change order meetings on 5 unilateral change orders that were fully processed by the SCA, without giving Glenman a chance to properly negotiate them.

Glenman's claims arising out of CO20U, CO21U, CO31U, CO32U and CO33U accrued no later than the dates on which the SCA issued the unilateral credit change orders (back charges) to Glenman in December 2008, July 2009, May 2010, May 2011 August 2, 2011. The service of the Notices of Claims for these change order in May and June 2013 was well over three months from the date that Glenman's claims accrued on this project.

To the extent that the SCA and Glenman exchanged emails in April and May 2013 regarding a possible of engaging in negotiations with respect to the change orders does not alter or extent the accrual dates with respect to said change orders. It is noted that estoppel is generally not available against a municipal defendant with regard to the exercise of its governmental functions (*Palm v Tuckahoe Union Free School Dist.*, 95 AD3d 1087, 1090 [2d Dept 2012], and that plaintiff does not allege that the SCA improperly engaged in any conduct which lulled plaintiff into sleeping on its rights to its detriment *(see generally, Conquest Cleaning Corp. v New York City School Construction Authority*, 279 AD2d 546 [2d Dept 2001]). The SCA's suggestions to Glenman regarding submissions to the Change Order Unit, and any discussions of possible negotiations of plaintiff's claims do not constitute a waiver of the statutory notice of claim provision. Consequently, pursuant to Public Authorities Law §1744(2)(i), the claims against the SCA relating to said change orders were not timely served and must be dismissed.

With respect to Glenman's claim for delay damages, the documentary evidence submitted herein establishes that Glenman sought an extension of time on September 10, 2008, and thereafter submitted to the SCA a request dated September 10, 2009, for costs relating to the delay in the amount of $461,556.00. Glenman states in its June 26, 2013 Notice of Claim that the project was delayed "from the beginning", and that it was pursuing a claim for delay damages. Glenman, however, did not submit a detailed Notice of Claim for delay damages until October 23, 2013.

Glenman's assertion that a contractor's claim accrues when the "contract work is actually completed or substantially completed, or when the final value of the completed contract work and payments due under a contract can be determined and invoiced", misconstrues the applicable law. "It is well settled that a contractor's claim accrues when its damages are ascertainable (*see Matter of Board of Educ. of Enlarged Ogdensburg City School Dist.* [*Wager Constr. Corp.*], 37 NY2d 283 [1975]). Although the determination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, 'it generally has been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted' **(***New York City School Constr. Auth. v Kallen & Lemelson*, 290 AD2d 497 [2002][internal quotation marks and citations omitted])." (*C.S.A. Contracting Corp. v New York City School Construction Authority*, 5 NY3d 189, 192 [2005]).

Glenman's present attempt to shift the date of substantial completion from June 1, 2009 to September 2013, therefore, is unavailing. Here, substantial completion is defined by the parties' contract, and is not dependent upon any formula as to the percentage of the remaining work to be performed, the time it takes to perform the remaining work, or the value of the remaining work to performed. Rather, the contract provides that : "The Work

shall be deemed substantially complete when, at the sole discretion of the SCA: I) all Work has been satisfactorily completed in accordance with the Contract; ii) all equipment, machinery, instruments and other systems furnished or installed as part of the Work have been tested, demonstrated, and commissioned and are fully operational; iii) all documents, certifications, permits and proofs of compliance required by the Contract for the lawful use of the Work have been provided; and iv) the Work can be safely used for its intended purposes".

In the prior action it was determined that the statement in Glenman's complaint that the date of substantial completion was June 1, 2009 constituted a formal judicial admission in that action. Said complaint is admissible against Glenman in this action as an informal judicial admission (*Cramer v Kuhns*, 213 AD2d 131, 138 [3d Dept 1995]). An informal judicial admission is not conclusive; it is merely evidence of the fact or facts admitted (Prince, Richardson on Evidence § 8-219). However, the documentary evidence submitted herein establishes that Glenman and the SCA executed a certificate of substantial completion on June 1, 2009, and that Glenman in its September 10, 2009 request to the SCA for an extension of time, affirmatively stated that the project was "currently substantially complete" at that time and referred to an executed certificate of completion. Glenman, in opposition to the within motion, has not presented a basis for this court to disregard the June 1, 2009 certificate of substantial completion. The fact that work on the project was not fully completed as of June 1, 2009 is not determinative as to when Glenman's claim for damages became ascertainable.

Here, the certificates of substantial completion was executed on June 1, 2009, more than three months prior to plaintiff's filing its notices of claim for delay damages based upon the contract on which it seeks to recover. As the delay damages are alleged to have occurred in 2008 through the Spring 2009, said certificate fixed the date on which damages were ascertainable, and therefore when plaintiff's claim accrued *(see C.S.A. Contr. Corp. v New York City School Constr. Auth.*, 5 NY3d at 192; *D & L Assoc., Inc. v New York City School Constr. Auth.*, 69 AD3d 435 [1st Dept 2010]; *Koren-DiResta Constr. Co., Inc. v New York City School Const. Auth.*, 293 AD2d 189, 191-192 [1st Dept 2002]). Accordingly, as plaintiff's claims for breach of contract and delay damages accrued more than three months before the notice of claim is dated, they are barred by the late filing of the notice of claim. Consequently, pursuant to Public Authorities Law §1744(2)(i), the Notices of Claim against the SCA relating to breach of contract and delay damages were not timely served and must be dismissed.

The court notes that Glenman received a post-substantial completion payment of $99,453.21, and executed a general release dated September 28, 2012. It is well settled that "[a] release is a contract whose interpretation is governed by contract law principles. Where

the language of the release is clear, effect must be given to the intent of the parties as indicated by the language employed. A release may not be read to cover matters which the parties did not desire or intend to dispose of" (*Around the Clock Delicatessen, Inc. v Larkin*, 232 AD2d 514, 515 [2nd Dept 1996]). Here, the release on its face set forth the original contract price of $2,450,000.00, rather than the sum paid to Glenman in connection with the release. In addition, the release is dated 2012, while Glenman's acknowledgment bears a 2011 date. Finally, although the SCA asserts Glenman failed to exempt any items of extra work in Schedule A to the release, it has not included a copy of Schedule A in its moving papers. Therefore, the court finds that the SCA may not rely upon the release in order to defeat plaintiff's claim for extra work.

Glenman, in its October 2013 Notice of Claim, claimed that it was entitled to the sum of $838,813.57 for the subject five change orders , and also stated that it was entitled the sum of $605,454.00 for additional general condition for extended contract work; the sum of $1,0101,583.00 for additional management, and the sum of $1,616,037.00 for delays, suspensions and interferences with its work, for which it had not been paid. At the most the examples provided in said notice relate to the five back charge change orders and delays that occurred for the most part in 2008. The October 18, 2013 Notice of Claim, however, does not specify the extra work allegedly performed and the dates of performance, and does not provide a breakdown of the damages sought. Rather, Glenman attached to the said Notice of Claim a list of change orders, without specifying when these change orders were issued, whether the work was performed and whether Glenman was paid for the work. The court therefore finds that Glenman's Notice of Claim, to the extent that it seeks damages for extra work to impermissibly vague (*see generally Alex-Mitchell: El v State of New York*, 2 AD3d 549 [2d Dept 2003]; *Bovis Lend Lease LMB, Inc. v New York City Sch. Constr. Auth.*, 2012 N.Y. Misc. LEXIS 6318, 2012 NY Slip Op 33352 [U][Sup. Ct., Queens County 2012]). Glenman's claims for extra work it allegedly performed, therefore, must be dismissed, as the Notice of Claim is inadequate.

In view of the foregoing, defendant's motion to dismiss the complaint is granted and the complaint is dismissed.

Dated: November 21, 2014

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J.S.C.