

**Stealth Contr., Inc. v New York City Sch. Constr.
Auth.**

2016 NY Slip Op 33111(U)

May 31, 2016

Supreme Court, Kings County

Docket Number: 500206/2015

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

[* 1]

FILED
KINGS COUNTY CLERK
2016 JUN 28 AM 8:07

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 31st day of May, 2016.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

-----X

STEALTH CONTRACTING, INC.,

Plaintiff(s),

- against -

**THE NEW YORK CITY SCHOOL
CONSTRUCTION AUTHORITY,**

Defendant(s).

-----X

DECISION AND ORDER

Index # 500206/2015

The following papers numbered 1 to 7 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
Other Papers _____

1, 2

3, 4

5, 6

Defendant, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY (“SCA”), moves for an Order dismissing Plaintiff’s complaint for, *inter alia*, its failure to timely file a notice of claim (“NOC”) pursuant to New York Public Authorities Law (“PAL”) §1744[2]; failure to sufficiently describe the extra work claims in its NOC as required by PAL §1744[3]; and, execution of an instrument dated January 29, 2014, releasing SCA from any claims or liabilities arising out of the contract at issue.

Background

Plaintiff, STEALTH CONTRACTING, INC., commenced this action on February 12, 2015, to recover monies allegedly due on a contract dated April 11, 2011, between itself and SCA for the construction of Public School 112 in Brooklyn, New York. Plaintiff filed its NOC with the SCA on October 18, 2014. The NOC alleges the following items of damages: (1) \$1,691,580.01 for

additional work order "Notice of Direction No 00002" dated January 27, 2012, Construction Phasing; (2) \$92,710.72 for additional work order "Notice of Direction No 00013 Grouting of Masonry Walls" dated September 28, 2012; (3) \$55,000 for additional work removing existing caulking joint along parapet water table and installation of new mortar joint via email dated April 24, 2012; (4) \$78,729.86 for additional work order "Notice of Direction No 00019" terra cotta anchoring calculation dated April 10, 2013; and (5) \$60,000 for the "[r]emaining [m]oney from the base contract."

It is SCA's position that the October 18, 2014 NOC is untimely because it was submitted more than three months after the April 30, 2013 "substantial completion" date and more than three months after submission to the SCA of detailed estimates of the work performed.

SCA also argues that the subject NOC fails to provide the requisite details under PAL §1744[3] because the additional work claims do not provide a detailed "description of the grounds for [each] claim, relating the dollar amount claimed to the event purportedly giving rise to [each] claim and indicating how the dollar amount is arrived and ...the date of the event allegedly underlying [each] claim."

SCA also contends that any delay damages claimed by Plaintiff, namely item (1) in the NOC, is precluded by Section 8.02 of the parties' contract because Plaintiff failed to comply with this provision, which required Plaintiff to notify SCA in writing not more than two business days after the commencement of any disruption the effect and cause of said disruption.

Finally, SCA argues Plaintiff's second cause of action sounding in quasi contract must be dismissed because a valid and enforceable written contract governs this action.

In opposition to SCA's motion to dismiss, Plaintiff argues SCA should be estopped from asserting a NOC defense where SCA made promises to pay and Plaintiff relied on said promises to its detriment by refraining from immediately filing a NOC with each and every changed condition by the SCA. Specifically, Plaintiff states that it met with top SCA officials on three separate occasions: June 3, 2015; October 16, 2015 and throughout 2016 to discuss payment for the extra work and that SCA promised to pay Plaintiff as long as Plaintiff submitted "all proposals and extra work as a single change order."

Secondly, Plaintiff argues that its NOC is timely with respect to at least a portion of its outstanding claims. Specifically, that the claims for items (3) and (5) in its NOC are timely because SCA concedes Plaintiff never submitted an invoice to it for this work and that such work was not completed until late 2014. Further, that the date reflected in the certificate of substantial completion, April 30, 2013, cannot be used as the accrual date because it is an administrative filing that does not reflect the actual date of substantial completion of Plaintiff's work. In this regard, Plaintiff submits that its principal was forced to sign the certificate of completion on February 8, 2013, and to speculate as to the date of completion which turned out to be incorrect especially given that SCA issued a directive to Plaintiff to perform extra work just 13 days before the purported substantial completion date.¹ Plaintiff submits an email exchange between it and SCA regarding electrical work to be performed on or around February 17, 2014, as evidence that work was still being completed beyond the substantial completion date.

With respect to whether the NOC was sufficiently detailed, Plaintiff argues its NOC contained sufficient details, that SCA cannot claim any possible prejudice, and that, in any case, SCA had all relevant details of Plaintiff's claims since SCA approved all plans and ordered each and every item of extra work that form the basis of Plaintiff's claims.

Plaintiff also submits it did not waive its claims by signing the general release dated January 29, 2014, because it was still performing significant work past the date of the general release.

Plaintiff also contends its claims are not barred by its alleged failure to comply with the contractual two-day notice provision because this provision only applies to extensions of time and not to the recovery of delay damages.

Finally, Plaintiff argues its quantum meruit cause of action should not be dismissed because any claim for delay damages is outside of the contract and plaintiff need not comply with a NOC provision for such damages.

Discussion

PAL §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

¹ Plaintiff states this "belated extra work" was completed in January 2014.

accrual of such claim.” A timely notice of claim is a condition precedent to suit, and the plaintiff has the obligation to plead and prove that its notice of claim was served within three months after the accrual of its claim (PAL §1744; *C.S.A. Construction Corp. v New York City School Construction Authority*, 5 NY3d 189, 192 [Ct App 2005]).

“It is well settled that a contractor’s claim accrues when its damages are ascertainable” (*C.S.A. Construction Corp.*, 5 NY3d at 192). “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’” (*id. citing New York City School Constr. Auth. v Kallen & Lemelson*, 290 AD2d 497 [2002]).

Here, Plaintiff concedes that its NOC is untimely at least with regards to claims (1), (2) and (4) but asserts SCA should be estopped from asserting a NOC defense based on its promises to pay. However, estoppel against a public corporation will lie only when the public corporation’s conduct was calculated to, or negligently did, mislead or discourage a party from serving a timely notice of claim and when that conduct was justifiably relied upon by that party (*see Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 668 [Ct App 1976]; *Dier v Suffolk County Water Auth.*, 84 AD3d 861, 862 [2d Dept 2011]). In addition, the alleged inducement must have occurred before expiration of the notice period (*see Attallah v Nassau Univ. Med. Ctr.*, 131 AD3d 609, 610 [2d Dept 2015]).

Here, SCA’s conduct, namely, promising to pay during settlement meetings, occurred well after the expiration of the period Plaintiff was required to file a NOC. Thus, Plaintiff could not have relied on SCA’s conduct on June 3, 2015 and thereafter, in discouraging it from serving a timely NOC. With the exception of these belated settlement meetings, Plaintiff fails to proffer any evidence in support of its claim that SCA continuously promised to pay. Due to Plaintiff’s failure to demonstrate misleading or negligent conduct by SCA that occurred prior to the expiration of the statutory periods for serving a NOC, claims (1), (2) and (4) in Plaintiff’s NOC must be dismissed as untimely.

With regards to claims (3) and (5), which Plaintiff asserts were timely because the caulking work was not finished until “late 2014,” the Court finds Plaintiff has failed to offer any supporting evidence or facts showing that this work was, in fact, finished in late 2014. Plaintiff’s own affidavit states that a material portion of the caulking work was completed in early 2013. To the extent

Plaintiff provides evidence of work being done on or around February 2014, the NOC would still be deemed untimely as to such work because it was not filed until October 2014, approximately eight months later.

Moreover, Plaintiff's NOC with regards to claim (5) is insufficient under PAL §1744[3] as it fails to provide a description of the grounds for the claim and how the dollar amount for the additional work was arrived at. PAL §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." Although Plaintiff contends SCA should have known about the details of the work because it ordered the work, "neither prior dealings among the parties nor actual knowledge by defendant of plaintiff's claims and alleged damages [relieves] plaintiff of the obligation to serve a timely and sufficiently detailed notice of claim" (*S.J. Fuel Co., Inc. v New York City Housing Authority*, 73 AD3d 413, 413-14 [1st Dept 2010]). As a result of the foregoing, claims (3) and (5) must also be dismissed.

Accordingly, SCA's motion to dismiss Plaintiff's complaint for failure to comply with PAL §1744 is GRANTED.

In light of the foregoing, the Court does not address SCA's alternative grounds for dismissal.

This constitutes the Decision and Order of the Court.

2016 JUN 28 AM 8:07
KINGS COUNTY
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E N T E R,

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Sylvia G. Ash, J.S.C.