

Centex Bldrs., Inc. v NYC Dept. of Parks & Recreation

2017 NY Slip Op 31213(U)

February 24, 2017

Supreme Court, Queens County

Docket Number: 3172/2016

Judge: David Elliot

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FILED
FEB 28 2017
COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

CENTEX BUILDERS, INC.,
Plaintiff(s),

Index
No. 3172 2016

- against -

Motion
Date August 12, 2016

NYC DEPARTMENT OF PARKS & RECREATION
and THE CITY OF NEW YORK,
Defendant(s).

Motion
Cal. No. 28

Motion
Seq. No. 1

The following papers numbered 1-13 read on this motion by defendants for an order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the complaint in its entirety on the grounds that plaintiff has failed to commence this action within the contractual period of limitations and that the complaint fails to state a cause of action for unjust enrichment.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-5
Answering Affirmation - Exhibits.....	6-9
Reply.....	10-13

Upon the foregoing papers it is ordered that this motion is determined as follows:

This matter was reassigned to the undersigned on February 6, 2017 by order of the Administrative Judge of this court.

This action arises out of a construction contract entered into on February 23, 2011, between plaintiff and defendant New York City Department of Parks and Recreation (DPR)

for the former to perform demolition and reconstruction work on a project located at West 158th Street between Edgecombe Avenue and the Harlem River Drive, in Highbridge Park, New York. Plaintiff commenced this action by Summons and Complaint filed on March 15, 2016, seeking damages in the amount of \$356,085.00, for an outstanding balance, which includes additional costs incurred by plaintiff, such as increased insurance costs and labor and materials escalations. Plaintiff asserts two causes of action for breach of contract and unjust enrichment.

Article 44 of the parties' contract, entitled Substantial Completion Payment, at section 44.1 states: "When the Work in the opinion of the Commissioner, has been substantially but not entirely completed, he/she shall issue a certificate of Substantial Completion." Section 44.2 directs the contractor – plaintiff in this case – to submit with the Substantial Completion Requisition a final verified statement of any and all alleged claims against the City which is in any way connected with or arising out of the subject contract.

Article 56, entitled Claims and Actions Thereon, states the following, in relevant part:

"56.1 Any claim . . . against the City for damages for breach of Contract shall not be made or asserted in any lawsuit, unless the Contractor shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims, as herein before provided.

"56.2 Nor shall any lawsuit be instituted or maintained on any such claims unless such lawsuit is commenced within six (6) months after the date the Commissioner issues a Certificate of Substantial Completion pursuant to Article 44; except that:

"56.2.1 Any claims arising out of events occurring after the date the Commissioner issues a Certificate of Substantial Completion and before Final Acceptance of the Work shall be asserted within six (6) months of Final Acceptance of the Work."

The record demonstrates that on March 14, 2014, DPR issued a Substantial Completion Use Inspection Report/Certificate pursuant to Article 44 of the contract, notifying plaintiff that all work in connection with the substantial completion use inspection held on February 7, 2014, was deemed to be substantially completed except for the Final Punch List items, which were attached to said Report, and directing plaintiff to complete the items on the Final Punch List by April 24, 2014.

Plaintiff then submitted to DPR a Verified Bill of Particulars dated June 19, 2014, setting forth the monies alleged to be owed to plaintiff on the project. On June 9, 2015, plaintiff served a Notice of Claim (NOC) on the Comptroller of the City of New York. Though the claim was given a claim number, the claim number was cancelled since the NOC was nearly identical to one which was previously filed by plaintiff, dated January 29, 2014. The June 9, 2015 NOC was, thus, consolidated with the prior one. On February 4, 2016, DPR issued a Certificate of Final Acceptance pursuant to Article 14 of the contract, certifying that all work was performed by plaintiff in accordance with the terms of the contract.

In support of their motion to dismiss plaintiff's first cause of action, defendants contend that the action was commenced beyond the six-month limitations period contained in Article 56 of the parties' contract. As to plaintiff's second cause of action, defendants state that dismissal of a claim of unjust enrichment is warranted in light of the fact that the scope of the dispute is covered by the parties' contract.

A defendant seeking dismissal on the ground that its defense is founded upon documentary evidence pursuant to CPLR 3211 (a) (1) bears the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Botach Mgt. Group v Gurash*, 138 AD3d 771 [2d Dept 2016]). Further, in moving to dismiss a cause of action pursuant to CPLR 3211 (a) (5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired (*see Campone v Panos*, 142 AD3d 1126 [2d Dept 2016]; *Franklin v Haffika*, 140 AD3d 922 [2d Dept 2016]; *Botach Mgt. Group*, 138 AD3d at 773; *Geotech Enters., Inc. v 181 Edgewater, LLC*, 137 AD3d 1213 [2d Dept 2016]; *City of Yonkers v. 58A JVD Indus., Ltd.*, 115 AD3d 635 [2d Dept 2014]). Once this burden is satisfied, it then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period (*Campone*, 142 AD3d at 1127; *Geotech Enters., Inc.*, 181 AD3d at 1214; *City of Yonkers*, 115 AD3d at 637). It is noted that parties to a contract may agree to limit the period of time within which an action must be commenced to a period shorter than that provided by the applicable statute of limitations (*see Batales v Friedman*, 144 AD3d 849 [2d Dept 2016]; *City of Yonkers*, 115 AD3d at 637; *John v State Farm Mut. Auto. Ins. Co.*, 116 AD3d 1010 [2d Dept 2014]). Finally, on a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2d Dept 2004]).

Here, defendants have met their burden of demonstrating that the instant action was commenced after the expiration of the limitations period contained in the parties' contract. The unambiguous language of Article 56 of the contract clearly states that any lawsuit for damages for breach of the contract shall be commenced within six months of issuance of the Certificate of Substantial Completion. The Certificate of Substantial Completion was issued on March 14, 2014, and the action was not commenced until March 16, 2016, well after the expiration of the limitations period on September 14, 2014 (*cf. J.A. Lee Elec., Inc. v City of New York*, 119 AD3d 652[2d Dept 2014]).¹

In opposition to the motion, plaintiff has failed to establish that it commenced the action within the applicable limitations period. Though section 56.2.1 of the contract provides that any claims arising out of events occurring after the issuance of a Certificate of Substantial Completion and before Final Acceptance of the Work (in this case, events occurring between March 14, 2014 and February 4, 2016) shall be asserted within six months of Final Acceptance of the Work, plaintiff has not established that its claims arose during that period of time. Though plaintiff's Verified Bill of Particulars, which was annexed to its NOC, is dated June 19, 2014, it itemizes plaintiff's claimed damages for increased insurance costs for insurance effective February 19, 2012 and February 19, 2013, both for a period of one year, as well as material and labor escalation costs from October 3, 2011 to February 9, 2014. Thus, contrary to plaintiff's arguments herein, its claimed damages do not arise out of events which occurred after the Certificate of Substantial Completion was issued. Pursuant to the parties' contract, it is the date that the claim arises, and not the date the claim is made, that is operative for purposes of determining whether plaintiff had six months from the date of final acceptance of the work to commence an action against defendants (*see* section 56.2.1: "[a]ny claims arising out of events occurring after the date the Commissioner issues a Certificate of Substantial Completion . . ." [emphasis added]). Thus, the time within which the instant action was to be commenced expired on September 14, 2014, six months from issuance of the Certificate of Substantial Completion on March 14, 2014. Inasmuch as the instant action was commenced after the expiration of the contractual period of limitations, the branch of defendants' motion to dismiss plaintiff's first cause of action for breach of contract is granted.

Furthermore, the branch of defendants' motion to dismiss plaintiff's second cause of action for unjust enrichment is granted, since a cause of action predicated on a theory of

1. Generally, a claim for a breach of a construction contract accrues when the contract was substantially completed (*see Phillips Constr. Co., Inc. v City of New York*, 61 NY2d 949 [1984]; *Town of Poughkeepsie v Espie*, 41 AD3d 701 [2d Dept 2007]; *Suffolk County Water Auth. v J.D. Posillico, Inc.*, 267 AD2d 301 [2d Dept 1999]).

quasi-contract or implied contract cannot stand when there is an express agreement governing the subject matter of the action (*see Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.*, 144 AD3d 1093 [2d Dept 016]; *Diecidue v Russo*, 142 AD3d 686 [2d Dept 2016]).

Accordingly, the motion is granted. Plaintiff's complaint is dismissed

Dated: February 24, 2017



J.S.C.

FILED

FEB 28 2017

**COUNTY CLERK
QUEENS COUNTY**