

**Unicorn Constr. Enters, Inc. v City of New York**

2017 NY Slip Op 31267(U)

June 7, 2017

Supreme Court, New York County

Docket Number: 162714/2015

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN
Justice

PART 33

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UNICORN CONSTRUCTION ENTERPRISES, INC.

INDEX NO. 162714/2015

Plaintiff,

MOTION DATE 11/09/16

- v -

MOTION SEQ. NO. 001

THE CITY OF NEW YORK,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36

were read on this application to/for Dismiss

Plaintiff Unicorn Construction Enterprises, Inc. entered in a contract with defendant The City of New York to rehabilitate twelve bridges. Plaintiff claims it was not fully compensated for its services as to six bridges and commenced a breach of contract action against defendant seeking payment of \$1,877,554. Defendant moves pursuant to CPLR 3211[a][1] to dismiss the complaint based on contractual time limitations to bring a claim, and on waiver. Plaintiff submitted opposition; defendant replied. This decision and order is as follows:

The parties entered a contract on July 25, 2007, to rehabilitate twelve bridges in New York City (the project), six of which are at issue (Def't's Mot, p 2). Article 44 of their contract requires defendant to issue a Certificate of Substantial Completion (Certificate) when the project is "substantially but not entirely completed" (id., exh D). Thereafter, if plaintiff has a claim against defendant for breach of the contract, plaintiff must commence an action within six months of the issuance of the Certificate (id., exh E - Article 56).

Of the six bridges at issue, defendant issued Certificates for five bridges with the following dates of substantial completion: (i) 13<sup>th</sup> Avenue Bridge – July 10, 2013; (ii) Jackie Robinson Parkway and Union Turnpike Bridge – July 10, 2013; (iii) Albee Avenue Bridge – November 14, 2013; (iv) Inwood Hill Park Pedestrian Bridge – August 20, 2014; and (v) West 148<sup>th</sup> St Bridge – August 20, 2014. There is no dispute that the Certificate is missing for the sixth bridge at issue here, the East 174<sup>th</sup> Street North Pedestrian Bridge (174<sup>th</sup> St. Bridge)<sup>1</sup> and defendant concedes the period of limitation does not apply for the 174<sup>th</sup> St. Bridge because of the missing certificate (*id.*, p 3, exh F; Deft’s Mot, p 3; Pltf Opp Memo, pp 7-8).

### *Discussion*

Plaintiff argues that defendant’s motion pursuant to CPLR 3211[a][1] is improper as defendant waived the defense in failing to file a pre-answer motion pursuant to CPLR 3211[e], and the answer asserting the defense is not based on documentary evidence (Pltf Opp Memo of Law at p 3; August aff at ¶¶ 4-6). CPLR 3211[e] permits a pre-answer motion; it does not mandate it. Defendant’s fourth defense in its answer asserted that the action was untimely, thus preserving its right on this defense (Deft’s Mot, exh C, p 5). As to a motion under CPLR 3211 [a][1], “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Thus, defendant’s motion to dismiss under CPLR 3211[a][1] must be supported by documentary evidence that conclusively establishes its asserted defense that the claims are time-barred or waived.

In reviewing a motion to dismiss, the court must accept all facts contained in the pleadings to be true, give plaintiff every beneficial inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d at 88). If from the four corners of the complaint “factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss must fail.” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations and quotations omitted]).

This case involves a contractual time limitation to bring a claim against defendant. Generally, parties have the liberty to establish period of limitations to bring suit in their contracts (*see John J. Kassner & Co. v City of New York*, 46 NY2d 544 [1979]). Plaintiff’s failure to raise claims within the limitation period after the issuance of the Certificate for each bridge provides a grounds for dismissal (*see also Phillips Constr. Co. Inc. v City of New York*, 61 NY2d 949, 951 [1984] [documentation of substantial completion of a project should be honored to

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<sup>1</sup> The missing certificate was for additional work that defendant subsequently ordered for the 174<sup>th</sup> St. Bridge. Before ordering additional work, defendant issued a certificate for this bridge on December 28, 2011, but it contained a scrivener’s error with the date as December 28, 2012.

determine the applicable limitation period]; *Dart Mech. Corp. v City of New York*, 121 AD3d 452 [1st Dept 2014]; *D & L Assoc., Inc. v New York City Sch. Const. Auth.*, 69 AD3d 435 [1st Dept 2010] [applying different limitations for each construction project based on date of substantial completion]).

Defendant contends that plaintiff failed to timely commence this action within the contractual period of limitation for five of the six bridges at issue. As to the sixth bridge – the 174<sup>th</sup> Bridge – defendant argues that plaintiff's time to commence the action was not extended because plaintiff waived its claims with its submission of requests for an Extension Of Time For Performance (Extension Requests).

In support of its motion, defendant provides uncontested evidence of substantial completion dates for the five bridges as July 10, 2013, November 14, 2013, and August 20, 2014 (Deft's Mot, exh F; Deft's Reply p 3). To assert a claim against defendant on these contracts, plaintiff had to commence an action six months after these dates; this action was commenced on December 15, 2015. Plaintiff argues that defendant's inability to locate the Certificate for the 174<sup>th</sup> St. Bridge extinguishes the contractual limitation for the other five bridges. However, the missing Certificate for one bridge does not alter the contract or the limitation periods for the other five bridges because the substantial completion dates were clearly documented and issued for each bridge (Pltf Opp Memo, pp 9-10. Deft's Mot, exh F). Therefore, the action for the five bridges is time barred.

Defendant contends that plaintiff waived its right to raise a claim for the 174<sup>th</sup> St. Bridge because plaintiff failed to specify this right in the July 22, 2014 Extension Request (Deft's Mot, p 5). Article 13, specifically § 13.8.2[c] of the contract requires contractors to include "a statement that Contractor waives all claims except for those delineated in the application, and the particulars of any claims which the Contractor does not agree to waive" in the Extension Request (Deft's Mot., exh H, p 15).

New York State honors time extension requests that reserves a plaintiff's right to file a claim (*see Victor Hoyecki v City of New York*, 121 AD2d 905 [1st Dept 1986]). However, even when a plaintiff deliberately did not intend to waive its right to file a claim, the failure for it to explicitly state its right to reserve such a claim provides grounds for waiver of the right to sue (*see Mars Assoc., Inc. v City of New York*, 70 AD2d 839 [1st Dept 1979]; *J. Baranello & Sons v City of New York*, 52 AD2d 531 [1st Dept 1976]).

Defendant provides two Extension Requests dated April 24, 2013 and July 22, 2014 (Deft's Mot, Langloss aff, exhs I and J, respectively). Plaintiff's April 24, 2013 Extension Request for the subject six bridges, including the 174<sup>th</sup> St. Bridge, citing them as either "in progress" or "not yet started", and reserved its right to file

a claim (*id.*, exh I). The Extension Request that followed on July 22, 2014, listing two bridges as “in progress” and reserved the right to file a claim for all incomplete bridges, but it did not include the 174<sup>th</sup> St. Bridge in the incomplete category. Indeed, it was marked completed (*id.*, exh J). The question turns to whether the reservation of rights for the incomplete 174<sup>th</sup> St Bridge in the April 24, 2013 Extension Request supersedes the July 22, 2014 Extension Request. However, the failure of plaintiff to explicitly reserve its rights may constitute a waiver regardless of plaintiff’s intent (*see J. Baranello & Sons*, 52 AD2d 531) rendering plaintiff’s attempt to show its intent through other documents irrelevant.

Plaintiff, in response, cites to other documents that it submitted after the Extension Request as an attempt to show its intent to reserve its right to file a claim. These documents include: the May 12, 2016 Final Payment Release from defendant attaching plaintiff’s July 27, 2015 letter on payment and close out (Pltf Opp Memo, exh 3); plaintiff’s September 8, 2015 Statement of Claim (*id.*, exh 4), and the September 15, 2015 Notice of Claim (*id.*, exh 5). These documents, however, are not Extension Requests, where the reservation of right to sue is to be made. Notably, the latter two documents are connected to the commencement of this action. Contrary to plaintiff’s argument, the claims for the 174<sup>th</sup> St. Bridge are waived.

Lastly, plaintiff’s argument for quantum meruit is, aside from being time-barred, it is also precluded by the existence of a valid and enforceable contract that is at issue in this case (*see Sound Beyond Elec. Corp. v City of New York*, 100 AD3d 412 [1<sup>st</sup> Dept 2012]; *American Curtainwall, Inc. v NTD Const. Corp.*, 83 AD3d 597, 598 [1<sup>st</sup> Dept 2011 citing *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 [1987]; *Randall v Guido*, 238 AD2d 164 [1st Dept 1997]).

Accordingly, defendant’s motion to dismiss is granted in its entirety. The complaint is dismissed. The Clerk of the Court is directed to enter judgment in the defendant’s favor as written.

This constitutes the decision and order of the court.

6/7/2017  
DATE

  
MARGARET A. CHAN, J.S.C.

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPROPRIATE: CHECK IF APPROPRIATE: