

**Volmar Constr., Inc. v New York City Sch. Constr.
Auth.**

2017 NY Slip Op 32673(U)

November 17, 2017

Supreme Court, Queens County

Docket Number: 706760/2014

Judge: Cheree A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY
COMMERCIAL PART C

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

VOLMAR CONSTRUCTION, INC.,

Plaintiff,

-against-

NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY,

Defendant.

Index No. 706760/2014

Motion
Date: November 17, 2015, Fully
Submitted to Part 30 Chambers on
June 23, 2017

Motion Cal. No. 163

Motion Sequence No. 1

FILED
DEC - 4 2017
COUNTY CLERK
QUEENS COUNTY

The following efile papers numbered 6-24, 34-42 fully submitted and considered on this motion by defendant New York City School Construction Authority seeking an Order pursuant to CPLR 3211 (a) and (7) dismissing plaintiff Volmar Construction, Inc. First, Second, Third and Sixth Causes of Action in their entirety; dismissing those portions of plaintiff's Fourth and Fifth causes of action that failed to comply with the requirements set forth in Public Authorities Law §1744 and/or dismissing plaintiff's complaint as barred by an executed general release.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 6-23
Memorandum of Law.....	EF 24
Memorandum of Law in Opposition-Affidavits- Exhibits.....	EF 34-37
Reply Affirmation-Affidavits-Exhibits.....	EF 38-42

This action arises out of a contract between plaintiff Volmar Construction, Inc. (hereinafter "Volmar"), a general contractor and defendant New York City School Construction Authority (hereinafter "SCA"). pertaining to construction work to be performed at P.S. 59 R at St. Peters, Staten Island, New York (the "Project") at an agreed price of \$12,108,515.27. As a result of an

alleged breach by SCA, Volmar filed a Notice of Claim on June 26, 2013 and Request for Mediation and an Amended Notice of Claim and Request for Mediation on December 19, 2013. Volmar filed its summons and complaint on September 19, 2014.

SCA moves pursuant to CPLR 3211 (a) and (7) dismissing plaintiff Volmar Construction, Inc. First, Second, Third and Sixth Causes of Action in their entirety; dismissing those portions of plaintiff's Fourth and Fifth causes of action that failed to comply with the requirements set forth in Public Authorities Law §1744 and/or dismissing plaintiff's complaint as barred by an executed general release. This matter was previously assigned to Honorable Duane A. Hart. Defendant filed the instant motion to dismiss which was returnable on November 17, 2015. By Order of Justice Hart dated November 25, 2015, a decision on the motion was held in abeyance pending the Commercial Division mediation of the matter. The parties completed mediation and by Order of Honorable Jeremy S. Weinstein dated May 5, 2016, the motion was referred to the undersigned. However, the motion papers were never submitted to chambers. As a result, the undersigned directed the parties to resubmit working copies of the motion papers directly to chambers. The working copies were fully submitted to chambers on June 23, 2017.

According to the notice of claim, Volmar was issued a Notice to Proceed ("NTP") to commence work on the Project on or about August 8, 2012 and the NTP fixed a date by which Volmar was to attain substantial completion of the Project of June 28, 2013. Under section 15.01B SCA could make partial payments "on the basis of an approved estimate of the Work performed during each preceding business month." Section 15.01E of the Agreement provides that "after the SCA has determined that the Work is substantially complete, the Contractor shall submit... a detailed estimate of the value of the known remaining items of Work." Section 15.01 E of the contract provides that when all work is substantially complete, it shall pay to the Contractor pursuant to the Contract, less:

1. four (4) times the value of the remaining punch list items to be completed plus;
2. an amount, calculated in accordance with this Contract, necessary to satisfy all claims, liens or judgments against the Contractor; plus
3. any amounts held in accordance with other terms and conditions of this Contract.

Based upon the Notice to Proceed, the original substantial completion date was to be June 28, 2013. According to SCA, the project reached substantial completion on September 24, 2013, however there was still punch list work left remaining to be completed at the project, and no close-out documents issued for the project to demonstrate the Project had reached Final Completion under the agreement.

In its first cause of action, Volmar alleged that between August 2012 and September 5, 2014, it performed work under the contract, labor and services and provided materials, including change orders, which were approved by the SCA, having a fair and reasonable and agreed value, except unilateral Notices of Direction (“NOD”) issued by the SCA, which Volmar had not agreed to, in the amount of \$12,108,515.27. Volmar further alleged that SCA failed to issue approvals of numerous requested change orders and failed to compensate it for costs related to the extended duration which were not part of the contract. Volmar stated that it had received payments from SCA in the amount of \$11,196,548.85 for said work, labor, services and materials performed at the Project, however, although payment was duly demanded, SCA failed and refused to make further payments. By virtue of SCA’s alleged breach of contract, Volmar seeks \$911,966.42 in damages.

In its second cause of action, Volmar seeks \$1,489,644.00 in damages, plus interest for delay. The damages sought in Volmar’s second cause of action relate to project delays which were out of its control, including SCA’s failure to approve Mechanical Electrical Plumbing coordination drawings (hereinafter “MEP’s”) which caused a delay in Volmar starting the Project; issuing numerous bulletins, NOD’s and verbal directions to perform additional work, including work following Superstorm Sandy; delays during the period of February 7, 2013 to September 24, 2013 related to SCA’s delay by directing Volmar to perform additional plastering, secondary impacts from the additional work orders of SCA. SCA failed to issue an extension of time, thus Volmar was caused to implement an accelerated program of additional shifts, overtime and weekend work to mitigate some of the delays, however, extended general conditions were incurred to maintain a site presence for an additional 88 days longer than anticipated and not including the acceleration program costs resulted in damages in the amount of \$655,590; additional costs due to acceleration in order to mitigate delays resulted in damages in the amount of \$594,458; and unabsorbed home office overhead expenses incurred in the amount of \$239,617.

In moving to dismiss Volmar’s second cause of action, SCA contended that under Section 8.02 of the General Conditions portion of the parties agreement, delay claims are only to be compensated by awarding extensions of time for completion of the contract, allowing the contractor to avoid imposition of liquidated damages. This relief is only available if the contractor informs the SCA in writing within two business days of the condition causing the delay. In its complaint, Volmar alleged that the Project was delayed in reaching substantial completion by 88 days due to the SCA’s failure to approve MEP coordination drawings until March 2013, additional plastering and wall board lamination which was performed February 2013 to September 2013, as well as additional work orders issued by SCA affecting the planned sequence of construction. SCA alleged that Volmar failed to make such claims in either of its Notices of Claim, nor does its complaint alleged compliance with the contracts two-day notice of delay provision, and, further, Volmar did not comply with Section 8.02, by sending SCA a letter addressing any of these delays. SCA purportedly only received a June 27, 2013 letter, which described delays, sent from Volmar to SCA Project Officer Dwight Clarke. A copy of this letter was annexed to SCA’s motion papers. SCA alleged that Volmar failed to comply with a condition precedent to its suit, warranting dismissal.

In its third cause of action, Volmar seeks a declaration that the contract be extended an

additional 88 days so that substantial completion of the contract is deemed to be September 24, 2013, however SCA has already issued a Certificate of Substantial Completion acknowledging that substantial compliance took place on September 24, 2013.

Further, SCA stated that it has already paid Volmar for NOD 29, NOD 38 and 66, Bulletin 20, change orders which were fully negotiated between the parties, and acquiesced to by Volmar with its signature on said orders. On September 23, 2014 SCA issued Volmar a check in the amount of \$145,366.56, which included payment for the request for payment number 15 in the amount of \$14,576.00 (NOD 66). A copy of a cancelled check related to same was annexed to the motion. This included work performed from April 30, 2014 to September 5, 2014. Request for payment number 16 invoice work performed between September 5, 2014 to March 20, 2015, which included NOD 29-Steel Beams for Ductwork in the amount of \$13,377.10 and NOD 38-Auditorium Seat Removal for \$12,169.92 totaling \$25,547.02, and on April 22, 2015 SCA issued Volmar a check in the amount \$257,457.58 which included the amounts included in NOD 29 and NOD 38. Thus, since SCA has paid these amounts, Volmar's sixth cause of action must be dismissed.

Similarly, portions of Volmar's fourth and fifth causes of action must be dismissed for failure to comply with the a condition precedent to its suit. Under New York Public Authorities Law §1744(2) (i) filing a Notice of Claim is a condition precedent to Volmar maintaining its action against SCA. Volmar's first Notice of Claim dated June 26, 2013 was later amended on December 19, 2013. In its fourth and fifth causes of action Volmar seeks a total of \$2,880,910.60 for additional work claims, however, a number of claims were absent from the Notice of Claim. SCA enumerated several work claims totaling at least \$604,414.09 which should therefore be dismissed. Also, the action was commenced on September 19, 2014 and all claims accruing prior to that date must be dismissed for the failure to commence the litigation within one year of the accrued claim. Thus, SCA alleged that additional work claims in the amount of \$444,687.47 must be dismissed.

Volmar seeks damages in the amount of \$40,123.02 its sixth cause of action arising from certain NOD's and Bulletins issued by defendant that constituted additional work and were negotiated but were still pending the issuance of formal change order.

Volmar executed a "General Release-Substantial Completion" on February 24, 2014 as part of its substantial completion package. Attached to this General Release was a copy of Volmar's December 20, 2013 Notice of Claim. On April 9, 2015, Volmar executed a subsequent "General Release-Post-Substantial Completion" as part of a post-substantial completion payment package, which was not accompanied with a Schedule A or any other attachment exempting any claims from the release. Under the terms of the clear language of the General Release, Volmar waived all claims not specifically reserved against the SCA. Thus, Volmar is barred from bringing the lawsuit and its complaint should be dismissed.

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7) the sole criterion is whether the four corners of the complaint set forth factual allegations sufficient to sustain any cognizable cause of action (*see Leon v Martinez*, 84 NY 2d 83 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

In opposition, Volmar maintained that the defendant's motion should be denied on several grounds. Volmar stated that its first cause of action for breach of contract is for breach of contract for "work performed and materials provided" and not for retainage alone. Therefore, it has sufficiently pled a cause of action for breach of contract and whether the damages sought is solely for retainage is insufficient to grant the motion to dismiss. Volmar submitted the affidavit of the Chairman of the Board and Secretary of Volmar, John P. Volandes (hereinafter "Volandes"). He attested that on or about August 8, 2012, SCA issued a Notice to Proceed to Volmar to commence work on the project, fixing June 28, 2013 as the date which Volmar was to obtain substantial completion. During the project, Volmar encountered unforeseen site condition which were not anticipated, and the unforeseen site conditions caused SCA to direct Volmar to perform extra work and during the project SCA changed the scope of work and directed Volmar to perform additional work, however, SCA failed and refused to issue written Bulletins to Volmar for the extra work. Volandes attested that SCA eventually issued Bulletins setting forth the extra work, as well as Notices for Direction ("NOD"). The NOD's originated before SCA submitted written request for proposal to Volmar, without the Bulletins and NOD's, however, same were included in the initial and amended claims. However, without the Bulletins and NOD's Volmar could not provide the required specificity for its claims. SCA issued many NOD's after its issuance of the Certificate of Substantial Completion on September 24, 2013. Volmar filed its notice of claim on June 26, 2013 identifying the extra and additional work without an assigned Bulletin or NOD number. Volmar's December 19, 2013 notice of claim was based upon Bulletin designations made at a November 14, 2013.

Volmar maintained the parties have spent two years trying to resolve the issues. Its first cause of action seeks damages for breach of contract, and this action is not only for retainage it is also for "work performed and materials provided." Thus, SCA's motion to dismiss this first cause of action must be denied.

Its second cause of action seeks damages for delay and SCA seeks to dismiss said cause of action based upon Volmar's failure to comply with section 8.02 of the General Conditions to the contract between SCA and Volmar, which argument is disingenuous based upon a June 27, 2013 letter from NK Construction Consultants, Inc., on behalf of Volmar. SCA also delayed approval of MEP drawings. Volmar submitted its MEP drawings to SCA on October 12, 2012 and the drawings were returned by SCA to Volmar in late November 2012. Volmar resubmitted in December 2012 and the drawings were not approved until February 25, 2013. Final approval of the MEP drawings was not done by SCA until late March 2013, a delay of approximately three months which could not have been anticipated by Volmar. SCA also delayed the addition of Plaster and Wall Board Lamination Work.

Turning next to its second cause of action Volmar seeks \$1,489,644.00 in damages, plus interest for delay, the Court of Appeals held in the case *A.H.A. Gen. Const. v New York City Housing Authority*, 92 NY2d 20, 206 (1998) that there is a difference between exculpatory and notice or condition precedent clauses:

“While an exculpatory clause will not be enforced when ‘in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing,’ the standard for excusing a condition precedent is different. A condition precedent is linked to the implied obligation of a party not to “do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract...a party cannot insist upon a condition precedent, when its non-performance has been caused by himself.”

Volmar’s third cause of action is for a declaration that the duration of the Project was extended eighty-eight (88) calendar days from June 28, 2013 to September 24, 2013. The parties agree that the SCA issued the Certificate of Substantial Completion on September 24, 2013 and denied Volmar’s request for an extension of time of the duration of the Project. Volmar seeks a declaration that the duration was extended, since, without it, SCA could attempt to assess liquidated damages against it for the eighty eight (88) calendar days. Moreover, the request for a declaration that the duration of the project was extended was raised in Volmar’s June 26, 2013 notice of claim, paragraphs 3, 17 and 18.

SCA’s motion to dismiss the fourth and fifth causes of action should also be denied. Volmar alleged these claims were alleged in its notice of claim dated June 26, 2013. And even if they were not, they substantially complied giving details in the notice (*see Koren-DiResta Constr. Co. v New York City School Construction Authority*, 298 AD2d 189 [1st Dept 2002]). With respect to the Notice of Direction 10 (Bulletin 11) and Notice of Direction 11 (Bulletin 10) the claims accrued within one (1) year of Volmar filing its summons and complaint on September 19, 2014, since a contractor’s claim accrues when damages can be ascertained (*Matter of Board of Ed. of Enlarged Ogdensburg City School Dist.*, 37 NY2d 283 [1975]); such as when the work is substantially completed or a detailed invoice of the work performed is submitted (*see C.S.A. Contr. Corp. v New York City School Construction Authority*, 5 NY3d 189 [2005]). Moreover, the general releases executed by the parties by their own terms, are unambiguous and exclude Volmar’s claims in this action.

In reply, SCA contended that its motion should be granted based upon the evidence and arguments set forth in the moving papers. The project is currently in the close-out phase, but final close-out has not occurred because SCA is awaiting a final lot survey from Volmar before transferring the project to the Department of Education and achieving final close-out. In late 2015 and early 2017, the parties engaged in mediation and settled a number of claims at issue in this motion. Volmar’s claim for NOD #12 (additional plywood subfloor) listed as a claim as part of Volmar’s Fourth Cause of Action was settled during mediation and a change order was issued for

\$13,454.00 on or about November 16, 2016. Volmar's claim for NOD #74 (various plaster repairs), listed as a claim as part of Volmar's Fifth Cause of Action, was settled during mediation process and a change order was issued for \$92,275.00 on or about November 16, 2016. Volmar's claim for NOD #75 (architectural changes) listed as a claim as part of Volmar's Fifth Cause of Action was settled during mediation and a change order was issued for \$31,956 on or about March 3, 2016. Volmar's claim for NOD #79 (miscellaneous architectural changes) listed as a claim as part of Volmar's Fifth Cause of Action was settled during the mediation process and a change order was issued in the amount of \$69,606.00 on or about December 24, 2015. Volmar's Sixth Cause of Action has been paid also and Volmar has withdrawn these claims.

Under Public Authorities Law §1744 [2], "[n]o action or proceeding for any cause...relating to the design, construction, reconstruction, improvement, rehabilitation, repair, furnishing, or equipping of educational facilities, shall be prosecuted or maintained against the [defendant] unless...it shall appear by and as an allegation in the complaint or moving papers, that a detailed, written, verified notice of each claim upon which any part of such action or proceeding is founded was presented to the board [of the defendant] within three months after the accrual of such claim. Therefore, plaintiffs were obligated to serve a notice of claim within three months of the date that it ascertained its damages (*see C.S.A. Contr. Corp. v New York City School Constr. Auth.*, 5 NY3d 189, 192 [2005]; *AMCC Corp. v New York City School Construction Authority*, __ AD3d __, 2017 NY Slip Op 06934 [2d Dept 2017]). Therefore, Volmar's claims accrued when it submitted each proposed change order ("PCO") detailing how much it believed that the defendant should increase its contract price, why it was warranted and how it arrived at the amount requested, regardless of the fact that plaintiff was unaware of whether the defendant would reject the proposals and had not substantially performed the work. (*See Koren-DiResta Constr. v New York City School Const. Authority*, 293 AD2d 189 [1st Dept 2002]).

Based upon the aforementioned, the Court finds that several claims were settled by the parties during the mediation process and the plaintiff's claims for damages should be adjusted based upon those settled claims. The Court finds that plaintiff's first and second cause of action were sufficiently pled and state a cause of action. The General Release executed by the parties excluded the claims set forth in Schedule A, therefore, the General Release does not act as a complete bar plaintiff's claims herein. Plaintiff's third cause of action is valid because although SCA declared that substantial completion occurred on September 24, 2013, Volmar seeks a declaration that same was extended so that SCA does not assess liquidated damages against it. As to the claims asserted by plaintiff in its fourth and fifth causes of action, any claims which accrued prior to September 19, 2013 are barred pursuant to Public Authorities Law §1744 [2]. Plaintiff's sixth cause of action is dismissed as it was voluntarily withdrawn.

Therefore, the defendant's motion is granted to the extent aforementioned. The plaintiff is directed to contact the Preliminary Conference Part to schedule a conference related to the remaining claims.

This constitutes the decision and Order of the Court.

Dated: November 17, 2017



Hon. Chereé A. Buggs, JSC

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