

<b>D. Gangi Contr. Corp. v City of New York</b>
2018 NY Slip Op 30310(U)
January 11, 2018
Supreme Court, Richmond County
Docket Number: 150177/2015
Judge: Kim Dollard
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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D. GANGI CONTRACTING CORP.,

DCM Part 4

Present:

Plaintiff,

HON. KIM DOLLARD

-against-

DECISION AND ORDER

THE CITY OF NEW YORK and THE NEW YORK  
CITY DEPARTMENT OF PARKS AND  
RECREATION,

Index No. 150177/2015

*motion 002*

Defendants.

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Notice of Motion to Reargue pursuant to CPLR §2221 By Defendants With Supporting Papers and Exhibits (Dated August 14, 2017).....	1
Affirmation in Opposition to Motion to Reargue by Plaintiff (Dated October 26, 2017).....	2
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The defendants, City of New York and New York City Department of Parks and Recreation (hereinafter "City Defendants"), bring this motion to reargue a prior decision of this Court dated June 23, 2017, which denied their motion to dismiss on the basis that it was time barred.

The plaintiff, D. Gangi Contracting Corp. (hereinafter "Gangi") contracted with the City defendants with respect to a construction project at Owl Hollow Soccer Fields in Staten Island. The contract appears to be dated September of 2006.

On or about February 25, 2015, Gangi instituted action against the City defendants. The complaint states after the contract was executed, issues and difficulties arose that were not contemplated. The foregoing difficulties and resulting delays were stated to be due to the fault and negligence of the defendants. Gangi therefore seeks \$14,010,519.00 in “damages, extra and additional costs that it incurred in performing the Project”. Gangi asserts a first cause of action for breach of contract; a second cause of action to have the contract price equitably increased by the amount of \$14,010,519.00; and a third cause of action based on quantum meruit.

Defendants contend that according to Article 56 of the contract, “any lawsuit by the contractor against the City for breach of contract must be ‘commenced within six(6) months after the date the Commissioner issues a Certificate of Substantial Completion’ ”. The City defendants further contend that on August 7, 2013, the defendants notified the plaintiff that substantial completion had occurred. Since the within action was instituted on February 25, 2015 and more than six months beyond the August 7, 2013 letter, the defendants moved to dismiss the complaint as untimely.

On the motion return date of June 23, 2017, the plaintiff showed the court a 2013 CPLR containing Section 217-a, which read :

“Notwithstanding any other provision of law **of the contract**, and irrespective of whether the relevant statute is expressly amended by the uniform notice of claim act, every action for damages to injuries to real or personal property, or for the destruction thereof, or for personal injuries or wrongful death, against any political subdivision of the state, or any instrumentality or agency of the state or a political subdivision, any public authority or public benefit corporation that is entitled to receive a notice of claim as a condition precedent to commencement of an action, shall not be commenced unless a notice of claim shall have been served on such governmental entity within the time established by section fifty-e of the general municipal law and such action must be commenced in compliance with all the requirements of section fifty-e and subdivision one of section fifty-I of the general municipal law. Except in an action for wrongful death against such an entity, an action for

damages or for injuries to real or personal property, or for the destruction thereof, or for personal injuries, alleged to have been sustained, shall not be commenced more than one year and ninety days after the cause of action shall have accrued, or within the time period otherwise prescribed by any special provision of law, whichever is longer. ”

Based on this version of CPLR §217-a, the Court denied the City defendants’ motion to dismiss based upon plaintiff’s argument that the contract was superceded by this CPLR provision.

The City defendants now move to reargue and attach McKinney’s 2013 Sessions Laws of New York containing the actual amendment to CPLR§217-a, which reads:

“Notwithstanding any other provision of law **to the contrary**, and irrespective of whether the relevant statute is expressly amended by the uniform notice of claim act, every action for damages to injuries to real or personal property, or for the destruction thereof, or for personal injuries or wrongful death, against any political subdivision of the state, or any instrumentality or agency of the state or a political subdivision, any public authority or public benefit corporation that is entitled to receive a notice of claim as a condition precedent to commencement of an action, shall not be commenced unless a notice of claim shall have been served on such governmental entity within the time established by section fifty-e of the general municipal law and such action must be commenced in compliance with all the requirements of section fifty-e and subdivision one of section fifty-I of the general municipal law. Except in an action for wrongful death against such an entity, an action for damages or for injuries to real or personal property, or for the destruction thereof, or for personal injuries, alleged to have been sustained, shall not be commenced more than one year and ninety days after the cause of action shall have accrued, or within the time period otherwise prescribed by any special provision of law, whichever is longer. ”

Upon the documents submitted, the motion to reargue is granted; however for the reasons stated herein, the Court adheres to its original decision denying the motion to dismiss.

The Court agrees with the defendants that CPLR §217-a does not supercede the contract terms. As set forth by the City defendants, the version of CPLR §217-a put forth by the plaintiff contained a typographical error and the statute actually reads: “Notwithstanding any other provision of law to the contrary . . . .”.

Notwithstanding, in reviewing the Contract relied upon and cited by the City defendants, Article 56 states:

Section 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 . . . ”

Therefore, the statute of limitations was shortened to six months “after the date the Commissioner issues a Certificate of Substantial Completion”.

Parties to a contract may limit the statute of limitations for breach of contract if they so chose. CPLR §201 provides:

“An action ... must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement.”

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 City of Yonkers v. 58A JVD Indus., Ltd., 115 A.D.3d 635, 637, 981 N.Y.S.2d 736.

To be enforceable, such provision must be clear and unambiguous (see, Smile Train, Inc. v. Ferris Consulting Corp., 117 A.D.3d 629, 630, 986 N.Y.S.2d 473). Absent proof that the contract is one of adhesion or the product of overreaching, or that the altered period is unreasonably short, the abbreviated period of limitation will be enforced (Matter of Incorporated Vil. of Saltaire v. Zagata, 280 A.D.2d 547, 547–548, 720 N.Y.S.2d 200, quoting Timberline Elec. Supply Corp. v. Insurance Co. of N. Am., 72 A.D.2d 905, 906, 421 N.Y.S.2d 987, *affd.* 52 N.Y.2d 793, 436 N.Y.S.2d 707, 417 N.E.2d 1248.

No proof of unreasonableness, adhesion or overreaching is demonstrated by the plaintiff, and therefore the plaintiff failed to raise an issue of fact in this regard.

However, pursuant to the terms of actual contract, the action must be commenced within six months after the date the Commissioner issues a Certificate of Substantial Completion. The City defendants fail to annex a copy of the "Certificate of Substantial Completion", and instead, annex a document entitled "Substantial Completion Inspection Report" dated August 7, 2013, and claims that the six months began to run from this date.

Agreements limiting the time in which an action can be brought are viewed cautiously and construed strictly against the party invoking the shorter period. Backus v. Nationwide Mut. Ins. Co., 56 A.D.2d 724, 392 N.Y.S.2d 765, 766, 4<sup>th</sup> Dept., 1977.

Further, ambiguities must be construed against the drafter and in favor of the party who had no voice in the selection of its language (Guardian Life Insurance Co. Of America, Inc. V. Schaefer, 70 N.Y.2d 888, 524 N.Y.S.2d 377, 519 N.E.2d 288 [1987]; 67 Wall St. Co. v. Franklin National Bank, 37 N.Y.2d 245, 371 N.Y.S.2d 915, 333 N.E.2d 184 [1975] ).

In applying these rules of construction and in strictly construing the contract terms against the City defendants, it is clear that the statute of limitations begins to run after the commissioner issues a Certificate of Substantial Compliance. To being the running of the six month abbreviated statute of limitations, the contract requires that the commissioner issue a document entitled a "Certificate of Substantial Compliance". Issuance or service of the document entitled "Substantial Compliance Inspection Report" does not comply with the terms of the contract and therefore does not start the six month statute of limitation period to begin to run. Accordingly, the City defendants have failed to establish that the plaintiff did not institute action within six months of issuance of a

Certificate of Substantial Compliance.

Accordingly, based upon the foregoing, it is,

ORDERED, that the motion of the defendants, CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, to reargue is granted; and it is further, ORDERED, that upon reargument, the motion of the defendants, CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, to dismiss the Complaint on the basis that it is time barred is denied.

Dated: January 11, <sup>2018</sup>~~2017~~

ENTER

*Kim Dollard*

Hon. Kim Dollard

Acting Justice Supreme Court