Arnell Constr. Corp. v New York City Sch. Constr. Auth.
2018 NY Slip Op 32402(U)
August 7, 2018
Supreme Court, Queens County
Docket Number: 717514/2017
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN IA Part 10
Justice

Arnell Construction Corporation, x

Plaintiff,

- against -

New York City School Construction Authority,

Defendant.
x

Index Number 717514 2017

Motion Date May 21, 2018

Motion Seq. No. 1

The following numbered papers read on this motion by defendant New York City School Construction Authority (defendant), for an order dismissing, in part, plaintiff Arnell Construction Corporation's (plaintiff) complaint pursuant to CPLR 3211 (a)(1), (2), (5) and (7).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 4-41
Answering Affidavits - Exhibits	EF 43-49
Reply Affidavits	EF 50

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

This is an action to recover damages arising out of the performance of a contract between the parties (Contract No. C000013147), for general construction services in the renovation of an existing building and construction of a new building at Public School 96X Richard Rogers, located at 2385 Olinville Avenue, in Bronx County. On or about March 23, 2017, plaintiff filed with defendant a Notice of Claim with respect to the project and plaintiff subsequently commenced the instant action sounding in breach of contract and alleging the following two causes of action: 1) for a contract balance and change orders for extra and

additional work totaling $2,711,716.00, and 2) damages for delays caused by defendant totaling $6,071,304.46.

Defendant has now moved, pursuant to CPLR 3211 (a)(2) and (5), to dismiss portions of plaintiff's complaint. CPLR 3211 (a)(2) provides that a party may move to dismiss an action on the ground that "the court has not jurisdiction of the subject matter of the cause of action." CPLR 3211 (a)(5) provides that a party may move for dismissal on the ground that "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds." Inasmuch as defendant has failed address its motion papers to these branches of its motion, it is not entitled to the relief sought.

Next, the court will turn to the branches of defendant's motion to dismiss portions of plaintiff's complaint pursuant to CPLR 3211 (a)(1) and (7). CPLR 3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence..." "To successfully move to dismiss a complaint pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d 899, 900 [2d Dept 2013], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453 [2d Dept 2000]; *see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Lakhi Gen. Contractor, Inc. v. N.Y. City Sch. Const. Auth.*, 147 AD3d 917 [2d Dept 2017]).

CPLR 3211 (a)(7) provides that a party may move to dismiss an action on the ground that "the pleading fails to state a cause of action." "On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; CPLR 3026; *see Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]).

In general, "[t]he court is limited to 'an examination of the pleadings to determine whether they state a cause of action'" (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014], quoting *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *see Fedele v Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 AD3d 965, 967 [2d Dept 2016]). Furthermore, on a CPLR 3211 (a)(7) motion, "[w]hether the plaintiff can ultimately establish the allegations is not part of the calculus" (*Etzion v Etzion*, 62 AD3d 646, 651 [2d Dept 2009][internal quotes omitted]; *see*

EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; *Aberbach v Biomedical Tissue Servs., Ltd.*, 48 AD3d 716, 717–718 [2d Dept 2008]).

First, defendant seeks to dismiss a portion of the first cause of action in which plaintiff has alleged to have submitted a Change Order list with the Notice of Claim consisting of a total of 24 extra work claims. Defendant seeks to have 18 out of these 24 claims dismissed pursuant to CPLR 3211 (a)(7), which 18 claims total the amount of $521,480.16. After a careful examination of the complaint under the standard of review pursuant to CPLR 3211 (a)(7), and affording plaintiff the benefit of every favorable inference, the court has determined that the facts, as have been alleged in the complaint in this case, are sufficient to state a cause of action to recover damages arising from defendant's alleged breach of contract by failing to pay for the portion of the first cause of action for which plaintiff submitted a Change Order list with the Notice of Claim that consisted of 18 of the 24 extra work claims.

With regard to the branch of defendant's motion pursuant to CPLR 3211 (a)(1), to dismiss this portion of the first cause of action, defendant has argued that 18 of the 24 extra work claims, totaling $521,480.16, have been paid and/or resolved by defendant and that payment has been accepted by plaintiff. In support of its motion, defendant has relied upon, among other things, a copy of the complaint and various documents including a copy of the "General Conditions Line Projects" contract with a revised date of February 15, 2012 (the contract), a copy of a Notice of Claim dated March 23, 2017, copies of invoices, change orders, requests for time extensions and for compensation, and a copy of a Certificate of Substantial Completion.

Based upon a review of the documentation provided, defendant has failed to satisfy its burden with regard to the 18 of the 24 extra work claims, totaling $521,480.16. Defendant's documentary evidence has failed to "resolve[] all factual issues as a matter of law, and conclusively dispose[] of the plaintiff's claim" by adequately demonstrating that these 18 claims were paid by defendant and that payment was accepted and, in fact, received by plaintiff (*Nevin v Laclede Professional Prods.*, 273 AD2d at 453; *see Martin v New York Hosp. Med. Ctr. of Queens*, 34 AD3d 650 [2d Dept 2006]). As such, defendant is not entitled to the relief sought on the branch of its motion relating to this portion of the first cause of action.

Next, defendant has argued that the portions of the first cause of action that seek $129,338,27, for extra work claims, and $3,371,955.85, in delay damages should be dismissed pursuant to CPLR 3211 (a)(7). Based upon a thorough review of the complaint, with regard to the branch of defendant's motion made pursuant to CPLR 3211 (a)(7), the court has determined that plaintiff has adequately alleged facts sufficient to state a cause of action for the portions of the first cause of action for defendant's alleged breach of contract

by failing to pay plaintiff $129,338,27, for extra work claims, and by failing to pay plaintiff $3,371,955.85, in delay damages.

As to this branch of defendant's motion made pursuant to CPLR 3211 (a)(1), defendant has argued that plaintiff failed to timely present the extra work claims totaling $129,338,27, because plaintiff's Notice of Claim was submitted on March 23, 2017, more than three months after the accrual of these claims in violation of Public Authorities Law § 1744 (2). Defendant has further argued that plaintiff has failed to comply with a mandatory condition precedent to the commencement of the instant action by failing to timely present a Notice of Claim for its claim for delay damages in the amount of $3,371,955.85, also in violation of Public Authorities Law § 1744 (2).

Public Authorities Law § 1744, entitled "Claims and actions against the authority," provides in section (2), in relevant part, that:

> "No action or proceeding for any cause whatever, other than the one for personal injury, death, property damage or tort, which shall be governed by subdivision one of this section, relating to the design, construction, reconstruction, improvement, rehabilitation, repair, furnishing or equipping of educational facilities, shall be prosecuted or maintained against the authority or any member, officer, agent, or employee thereof, unless (i) 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 within three months after the accrual of such claim, that at least thirty days have elapsed since such notice was so presented and that the authority or the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof ..."

"It is well settled that a contractor's claim accrues when its damages are ascertainable" (*C.S.A. Contr. Corp. v New York City School Const. Auth.*, 5 NY3d 189, 192 [2005]). "[D]etermination 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.*, quoting *New York City School Constr. Auth. v. Kallen & Lemelson*, 290 AD2d 497 [2d Dept 2002]).

Based upon a review of the documents submitted under the standard for a motion made pursuant to CPLR 3211 (a)(1), including the copy of the Notice of Claim dated March 23, 2017, copies of various invoices and requests for time extensions, compensation and

change orders that were submitted by plaintiff at various points in the project and a copy of the Certificate of Substantial Completion which provided that the substantial completion date of the project was accepted by defendant as December 28, 2016, defendant has failed to satisfy its burden on this branch of its motion (*see Martin v New York Hosp. Med. Ctr. of Queens*, 34 AD3d at 650; *Nevin v Laclede Professional Prods.*, 273 AD2d at 453). The documents and their filing dates do not, on their face, "resolve[] all factual issues as a matter of law, and conclusively dispose[] of the plaintiff's claim[s]" for the claims in the amount of $129,338,27, for extra work claims and in the amount of $3,371,955.85, in delay damages (*Nevin v Laclede Professional Prods.*, 273 AD2d at 453). Therefore, defendant is not entitled to the relief sought on this branch of its motion.

Lastly, defendant has argued that plaintiff's second cause of action must be dismissed in its entirety. Plaintiff's second cause of action sounds in damages for delays caused by defendant totaling $6,071,304.46. Upon a careful examination of the complaint, with regard to the branch of the motion made pursuant to CPLR 3211 (a)(7), the court has determined that plaintiff has adequately alleged facts sufficient to state the second cause of action sounding in defendant's breach of contract and failure to pay plaintiff for its performance of work under the contract.

As to the branch of defendant's motion made pursuant to CPLR 3211 (a)(1) to dismiss plaintiff's second cause of action, defendant has argued that plaintiff failed to comply with the contractual requirement for asserting damages for delay because plaintiff failed to notify defendant of any condition causing delay within two business days of the commencement of such condition. The terms of the contract between the parties provides the following, in pertinent part, in section 8.02, entitled "Claims for Delay":

> "The Contractor agrees to make no claim for increased costs, charges, expenses or damages for delay in the performance of this Contract, or for any delays or hindrances from any cause whatsoever, and agrees that any such claim shall be fully compensated for by an extension in the time for Substantial and/or Final Completion of the Work. Should the Contractor be or anticipate being delayed or disrupted in performing the Work hereunder for any reason, it shall promptly, and in no event more than two (2) business days after the commencement of any condition which is causing or threatening to cause such delay or disruption, notify the SCA in writing of the effect of such condition, stating why and in what respects the condition is causing or threatening to cause such delay or disruption. Failure strictly to comply with this notice requirement shall be sufficient cause to deny Contractor a change in Schedule and to required it to conform to the Schedule then in effect."

After a careful examination of plaintiff's complaint and the terms of section 8.02 of the contract, the court has determined that the documentary evidence does not satisfy defendant's burden (CPLR 3211 [a][1]; *see Martin v New York Hosp. Med. Ctr. of Queens*, 34 AD3d at 650; *Nevin v Laclede Professional Prods.*, 273 AD2d at 453). In the complaint, plaintiff has alleged compliance with all conditions precedent to commencing the action. The plain terms of section 8.02 provide that the consequence of a failure to abide by the written notice requirement of "two (2) business days after the commencement of any condition which is causing or threatening to cause such delay or disruption," "shall be sufficient cause to deny Contractor a change in Schedule and to required it to conform to the Schedule then in effect." This language, on its face and by its plain meaning, does not preclude the commencement of the instant action. Therefore, defendant is not entitled to dismissal pursuant to CPLR 3211 (a)(1), of plaintiff's second cause of action sounding in damages for delays caused by defendant totaling $6,071,304.46.

Accordingly, defendant's motion is denied in its entirety.

Dated: August 7, 2018

Kevin J. Kerrigan, J.S.C.

FILED
AUG 14 2018
COUNTY CLERK
QUEENS COUNTY