

**Eastcoast Elec., LLC v Sodus Cent. Sch. Dist.**

2019 NY Slip Op 30304(U)

February 5, 2019

Supreme Court, Wayne County

Docket Number: 79814

Judge: John B. Nesbitt

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

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**EASTCOAST ELECTRIC, LLC,**

Plaintiff

-vs-

*Index No. 79814*

**SODUS CENTRAL SCHOOL DISTRICT**

Defendant.

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**APPEARANCES:** Adams Bell Adams, PC  
(Anthony J. Adams, Jr., Esq., of counsel)  
*Attorneys for the Plaintiff*

Ferrara Fiorenza PC  
(Nicholas P. Jacobson, Esq., of counsel)  
*Attorneys for the Defendant*

**MEMORANDUM - DECISION**

John B. Nesbitt, J.

Defendant Sodus Central School District ("*School District*") moves pursuant to CPLR 3124 for an order compelling plaintiff Eastcoast Electric, LLC ("*Eastcoast*") to respond to certain discovery demands. The issue remaining after argument of the motion is the merit of Eastcoast's objection to the School District's demand for production of certain of Eastcoast's business records that Eastcoast views as either "totally unrelated" to this litigation (Cook Aff. ¶6) or, at best, "marginally relevant" in very limited respects (Plaintiff's Memorandum of Law at 8).

The subject matter of this action controls the scope of permissible discovery. On or about June 9, 2015, the School District entered into a written contract with Eastcoast "whereby [East Coast] agreed to perform the electrical work for a construction project known as the 'Capital Improvement Project - Phase 1 (Site)' for a price of \$550,000." (Jacobson Aff. ¶2 Exhibit A [Complaint ¶3] and ¶4 Exhibit B [Answer]). Eastcoast alleges the contract required that it commence its work on June 9, 2015 and that the work be substantially complete by September 30, 2015 (Complaint ¶4). The work was not substantially complete by September 30, 2015, and apparently, certain work never did reach the stage of substantial completion. On December 23, 2015, according

to Eastcoast, albeit with work yet remaining to be done under the contract, the School District unilaterally repudiated the contract by excluding Eastcoast from the worksite and declaring that the remaining work would be performed by others (Complaint ¶11).

In its complaint, Eastcoast advances three causes of action. The first and third are classic breach of contract claims, delineated by the type of damages sought and the nature of the alleged contract breach by the School District. Eastcoast alleges that there were certain contractually specified conditions precedent to its obligation to do certain of the work called for in the contract. Specifically, Eastcoast was to install four exterior light poles and certain associated fixtures. Eastcoast claims that the School District caused unreasonable delay in Eastcoast's ability to complete this work by failing to provide timely access to the worksite and to approve the lighting plans, both of which were required before Eastcoast could do its work. It was only when the School District had satisfied these two conditions - the latter occurring on August 27, 2015 - was Eastcoast able to order the equipment fabricated and delivered to the site on September 30, 2015. Less than a week thereafter, Eastcoast allegedly attempted to install the lighting equipment, only to be stymied by a long stretch of bad weather rendering the rain-soaked ground unable to support the crane necessary to do so. Although by December 23, 2015, Eastcoast allegedly had substantially performed all its contract work, except the installation of the four exterior light poles and associated fixtures, delayed due to alleged School District failures and consequent site conditions, the School District nevertheless barred Eastcoast from further contract performance, announcing that Eastcoast's remaining contract obligations would be completed by others.

In its first cause of action, Eastcoast alleges that the School District's action on December 23, 2015 was "wrongful." If so, under contract theory, the School District's action would be considered a "repudiation," in the sense that "the repudiation of a contract by one of the parties in effect prevents a condition precedent to the other party's duty to perform from occurring" (13 Williston on Contracts §39:38 (4<sup>th</sup> ed.); *see also* 22A NY Jur. 2d, Contracts §424; *Highbridge Development v Diamond Development*, 67 AD3d 1112 [3<sup>rd</sup> Dept 2009]). More specifically, under the doctrine of prevention, "[w]hen a promisor prevents, hinders, or renders impossible the occurrence of a condition precedent to its promise to perform, or to the performance of a return promise, the promisor is not relieved of the obligation to perform and *may not legally terminate the*

*contract for nonperformance*” (*id.* at §39:3)(emphasis added). In such a case, such repudiation constitutes an actionable breach of contract, exposing the breaching party to a claim for money damages. In its first cause of action, Eastcoast alleges that “[a]t the time [the School District] breached the contract [Eastcoast] was owed an unpaid contract balance of \$105,621.81,” and claims damages in that amount from the School District.<sup>1</sup>

The third cause of action is also based upon an alleged breach of contract by the School District; specifically, the delay by the School District in providing worksite access and lighting plan approval. “A building and construction contractor has the right to recover damages resulting from a delay caused by a default of the contractee. The damages in such a case may include the amount by which the contractor’s costs were increased by the delay” (36 NY Jur2d, Damages §53 [2005, as supplemented]); see also 24 Williston on Contracts §66:15 [4<sup>th</sup> ed.][“Where the owner causes delay in the completion of the construction project, the contractor may recover damages for the delay, including overhead incurred during the extended construction period, unless the contract expressly absolves the owner from liability for additional compensation due to delay”]). In this case, in addition to unpaid contract balance sought in the first cause of action, Eastcoast seeks damages in the amount of \$31,624.49 representing “additional and unforeseeable costs” caused the School District’s “prevention of [Eastcoast’s] timely performance of its work.”

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<sup>1</sup> See 22A NY Jur.2d, Contracts §434 (2008, as supplemented):

Where a building or construction contract has been breached by owner, preventing the contractor from performing, the contractor has an election to pursue one of three remedies:

(1) acquiesce in the breach, treat the contract as rescinded, and recover upon quantum meruit so far as the contractor has performed, or, in other words, the reasonable value of the performance.

(2) refuse to acquiesce in the breach, keep the contract alive for the benefit of both parties, being at all times ready and able to perform, and at the end of the time specified in the contract for performance sue under the contract; or

(3) treat the repudiation as terminating the contract and sue for the profits that would have been realized if he or she had not been prevented from performing.

It appears that Eastcoast elects the second remedy.

The second cause of action is not based upon the parties' written contract (apparently), but upon agreement implied in fact.<sup>2</sup> Eastcoast alleges that during the time it was performing under the written contract, the School District directed that it "perform various items of additional work, outside the scope of the Contract, under circumstances entitling [Eastcoast] to be paid additional compensation."<sup>3</sup> Complying with these directives, which Eastcoast terms "unexecuted change orders," implied the School District's obligation to compensate Eastcoast for the reasonable value of these services and materials, totaling \$82,517.22. For Eastcoast to prevail under this cause of action, the circumstances must evidence the mutual intent of the parties to contract:

Contracts implied in fact are inferred from the facts and circumstances of the case, and are not formally or explicitly stated in words. It is often said that the only difference between an express contract and a contract implied in fact is that in the former the parties arrive at their agreement by words, whether oral or written, while in the latter their agreement is arrived at by a consideration of their acts and conduct, and that in both of these cases there is, in fact, a contract existing between the parties, the only difference being in the character of evidence necessary to establish it. In other words, in an express contract all the terms and conditions are expressed between the parties, while in an implied contract some one or more of the terms and conditions are implied from the conduct of the parties (17 Am Jur 2d, *Contracts* §3 [1964]).

The merits of Eastcoast's claims are not now before the Court. Rather, the issue is the School District's demand for production of documents pertaining to Eastcoast's other construction contracts

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<sup>2</sup> Calamari & Perillo, *Contracts* §10, at p. 10-11. (1970):

**§10 Express and Implied Contracts (Quasi Contracts)**

When the parties manifest their agreement by words the contract is said to be express. When it is manifested by conduct it is said to be implied in fact. If A telephones a plumber to come to A's house to fix a broken pipe, it may be inferred that A has agreed to pay the plumber a reasonable fee for his services although nothing is said of this. The contract is partly express and partly implied in fact. There are cases of contracts wholly implied in fact. The distinction between this kind of contract and a contract expressed in words is unimportant; both are true contracts formed by a mutual manifestation of assent.

<sup>3</sup> The additional work consisted of purchase and application of special backfill for certain trenches, relocation of an underground conduit, repair of a light pole foundation, and installation of a temporary electrical line and conduit to a trailer used by a School District agent.


that Eastcoast was performing at the time it was performing its contract with the School District. This demand starts with a request for “[a] list of each and every project that [Eastcoast] performed work on during the period from May 26, 2015 to December 23, 2015,” and summaries of the nature of each project, the scope of Eastcoast’s services, its compensation, and claims or complaints received or asserted by Eastcoast. The School District demands, *inter alia*, copies of Eastcoast’s contracts relating to those projects, including bids, payroll records, attendance sheets, including construction meetings, daily logs, staffing records, equipment leases, including cranes, project schedules, claims or complaints asserted against Eastcoast, and all certificates of substantial completion.

Eastcoast objects to this demand, arguing that these projects are “totally unrelated to the project that is the subject of this action.” The School District counters that they are related, at least to the claim for delay damages, upon the information and belief that Eastcoast “failed to adequately staff the [Sodus] project due to its need to provide staffing for other projects that it was engaged in concurrently with [the Sodus] project.” Eastcoast responds that even if staffing is arguably relevant, then the issue is “the number of personnel working on this [Sodus] project, not the number of personnel working on other unrelated projects.”

The Court finds that it is relevant to the delay damages claim whether Eastcoast was overextended because of other ongoing projects and for that reason, understaffed the Sodus project. However, the scope of the School District’s demands go beyond what could be relevant to establishing that defense. At this early stage in the discovery process prior to depositions, there is no basis to assume that Eastcoast had a finite (and possibly inadequate) labor pool to service its projects during the relevant period. There may be documents that may be relevant to that issue, and those documents are those that would reveal construction delays or contract extension requests arguably staffing related. To that end, the Court will compel that Eastcoast respond to paragraphs 1, 10, and 11 of the demand, together with a direction to produce all project records, including correspondence, memoranda, project meeting notes, and requests for extension, where the staffing of the project by Eastcoast was a subject or otherwise noted. After depositions, if the circumstances warrant, the School District may apply for further compelled disclosure if necessary.

Counsel for the School District shall submit a proposed order consistent with this memorandum-decision upon notice to, or approved as to form, by opposing counsel.

Dated: February 5, 2019  
Lyons, New York



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JOHN B. NESBITT  
Acting Supreme Court Justice