

Picone/WDF, JV v City of New York
2019 NY Slip Op 32569(U)
August 28, 2019
Supreme Court, New York County
Docket Number: 653642/2018
Judge: Lyle E. Frank
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

-----X

PICONE/WDF,JV

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 653642/2018
MOTION DATE N/A
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISS

Upon the foregoing documents, it is ordered that the defendant's motion to dismiss the complaint is denied.

This action arises from a construction contract between the defendant and plaintiff for plumbing work during renovation and construction at the Croton Water Treatment Plant (hereinafter referred to as "the contract".) The major issue in this motion is whether the action by plaintiff is time barred due to the terms of the contract.

The Contract

For purposes of this motion, the relevant contract provisions are Articles 14, 44 and 56. Article 14 states in pertinent part:

14.2 The work will be deemed to be substantially complete when the two conditions set forth in Articles 14.1.2 and 14.2.2 have been met. The Commissioner will then issue a Certificate of Substantial Completion.

1 The defendant also moves to dismiss all counts of the complaint that relate to extra work. The plaintiff indicates they are not seeking any such relief. As such, this part of the defendant's motion is denied as moot, with leave to bring this part of the motion again should plaintiff attempt to pursue any such causes of action.

Sections 14.1.2 and 14.2.2 referenced in this provision state:

14.2 Determining the Date of Substantial Completion: The Work will be deemed to be substantially complete with the two conditions set forth in Articles 14.2.1 and 14.2.2 have been met. The Commissioner will then issue a Certificate of Substantial Completion.

14.2.1 Inspection: The Engineer has inspected the Work and has made a written determination that it is substantially complete.

14.2.2 Approval of Final Punch List and Date for Final Acceptance. Following inspection of the Work, the Engineer shall furnish the Contractor a final punch list, specifying all items of Work to be completed. The Contractor shall then submit to the Engineer dates for the completion of each specified item of Work. Within a reasonable time after receipt, the Engineer, in a written notification to the Contractor, shall approve the Contractor's completion dates or, if they are unable to agree, shall establish dates for the completion of each item of Work. The latest completion date specified shall be done for Final Acceptance of the Work.

Article 44 of the contract provides in pertinent part:

ARTICLE 44. SUBSTANTIAL COMPLETION PAYMENT 44.1 When the Work in the opinion of the Commissioner has been substantially but not entirely completed, he/she shall issue a certificate of Substantial Completion.

Article 56 of the contract reads in pertinent part:

ARTICLE 56. CLAIMS AND ACTIONS THEREON 56.2 Nor shall any lawsuit be instituted or maintained on any such claims [against the City for damages for breach of Contract] unless such lawsuit is commenced within six (6) months after the date the Commissioner issues a Certificate of Substantial Completion pursuant to Article 44.

Additional Facts

On June 30, 2017, a letter was sent by Assistant Commissioner Michael Borsykowski of the Bureau of Engineering Design and Construction of the New York City Department of Environmental Protection to the plaintiff informing the plaintiff, in substance, that an inspection

was completed on January 18, 2017 pursuant to section 44 of the contract. “The work was found to be substantially complete and subject to the attached punch list. The date for commencement of the one-year guarantee period is January 18, 2017. Upon notification of completion of the punch list items another inspection will be scheduled.”

Action was commenced by plaintiff July 20, 2018, which is greater than six months after the date of the certificate of substantial completion, which defendant says the letter of June 30, 2017 letter is. At oral argument, the defendant also argued that even if the certificate of substantial completion was not properly provided, the time to challenge that document stemmed from the June 30, 2017 date. The plaintiff argues that the certificate of substantial completion has never been filed, as the conditions of Article 14 of the contract has not been met.

Discussion

While it appears there is some ambiguity in the contract, Article 14 expressly discusses the steps that need to be taken for a certificate of substantial completion to be issued. Defendant claims that all of the prerequisites for filing a certificate of substantial completion were met, according to Article 14. That is incorrect. In addition to the presentation of a punch list item, according to Section 14.2.2, there must also have been dates set for the completion of this work in order for the certificate of substantial completion to then be issued. Without that, according to the terms of Article 14, a valid certificate of completion could not have been issued.

Defendant cites a number of cases where the Court found that a letter sent by the City of New York pursuant to Article 44 was considered a certificate of completion.² However, none of

² It must be noted that among those cases cited was *Arkay Construction Corp. v. The City of New York Department of Sanitation*, Index number 113831/2010. In that case, the plaintiff's complaint was dismissed by this Court as time barred. However, Article 14 was never raised in that case, nor was the methods of how the certificate of substantial completion was issued was challenged.

these cases mention Article 14 and are decided on other grounds. Thus, it is not even clear if the provisions of Article 14 were raised by any party in those cases. Moreover, it is not clear in those cases as to what occurred prior to the issuance of this certificate.

Clearly, the contract intended there to be at least some back and forth between the parties about punch list items before the work could be deemed substantially complete. While article 44 gives the Commissioner discretion to issue the certificate of completion, it seems odd that there would be no standards for the Commissioner to base this decision on. The standard for this determination no doubt is article 14. What it appears the Assistant Commissioner did in his June 30, 2017 letter was reiterate the position of the engineer that the work was substantially complete pursuant to section 14.2.1.

Defendant also argues that Article 14 merely addresses the date of the certificate of completion. That simply ignores the plain language of Article 14, which specifically sets forth what must occur for the certificate of substantial completion to be properly issued. Finally, the Court rejects defendant's argument that the matter is time barred because the plaintiff should have challenged an improper certificate of completion. If the certificate of completion was a nullity, the provisions of Article 56 would never have been triggered.

Based on the foregoing, it if hereby

ORDERED, that the defendant's motion to dismiss is denied.

8/28/2019
DATE


LYLE E. FRANK, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

**HON. LYLE E. FRANK
J.S.C.**