

P.A.L. Evtl. Safety Corp. v APS Contr., Inc.
2020 NY Slip Op 30925(U)
April 13, 2020
Supreme Court, New York County
Docket Number: 452131/2018
Judge: Saliann Scarpulla
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SALIANN SCARPULLA PART IAS MOTION 39EFM

Justice

-----X

P.A.L. ENVIRONMENTAL SAFETY CORP. D/B/A PAL
ENVIRONMENTAL SERVICES,

Plaintiff,

INDEX NO. 452131/2018

MOTION DATE 11/19/2019

MOTION SEQ. NO. 001

- v -

APS CONTRACTING, INC., FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, ZURICH AMERICAN
INSURANCE COMPANY,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
ZURICH AMERICAN INSURANCE COMPANY

Plaintiff,

Third-Party
Index No.

-against-

APS CONTRACTING, INC., SVETOZAR SAVRESKI, BEATA
LODARSKA

Defendant.

-----X

APS CONTRACTING, INC.

Plaintiff,

Second Third-Party
Index No.

-against-

NEW YORK CITY HOUSING AUTHORITY

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 193, 194, 200, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 283, 284

were read on this motion to/for DISMISSAL.

This is a motion by the New York City Housing Authority (“NYCHA”) to dismiss APS Contracting, Inc.’s (“APS”) first-amended second third-party complaint.

This action involves a public works project Contract No. RF1321094 for Exterior Restoration and Roofing Replacement at the Pomonok Houses North public housing development (“Pomonok”), which NYCHA awarded to APS on May 20, 2014 for the contract price of \$46,209,001.53 (the “Contract”). APS seeks payment for work completed for the Project that was allegedly outside the scope of the Contract.

APS commenced this second third-party action against NYCHA, alleging six causes of action for: (1) recovery of additional costs due to acceleration of work under the Contract; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) unjust enrichment; (5) account stated; and (6) indemnification.

NYCHA now moves to dismiss each cause of action. In its opposition to the motion, APS concedes the portions of the motion to dismiss the first, fourth, fifth, and sixth causes of action, and therefore, they are dismissed.¹

In support of the second cause of action for breach of contract, APS alleges that NYCHA breached the Contract by: (1) failing to pay \$11,533,209 for numerous Contract and scope change items performed by APS; and (2) wrongfully withholding \$699,053 in retainage. In the third cause of action for violation of the covenant of good faith and fair dealing, APS alleges that NYCHA breached the implied covenant of good faith and fair

¹ NYCHA also moved to dismiss the second third-party complaint based on APS’s failure to comply with the Section 157 of the New York Public Housing’s notice-of-claim requirements, however, NYCHA withdrew this portion of its motion without prejudice.

dealing by arbitrarily reducing the estimated quantities of work specified after APS was awarded the Contract.

NYCHA moves to dismiss the second cause of action for breach of contract on the ground, among others, that APS failed to comply with contractual notice provisions, and that it is not entitled to damages under the Contract. With respect to APS's third cause of action for breach of the covenant of good faith and fair dealing, NYCHA argues that it is refuted as a matter of law by the Contract.

Breach of Contract (Second Cause of Action)

NYCHA argues that the second cause of action should be dismissed because APS failed to comply with the notice requirements set forth in section 23 of the general conditions to the Contract ("Section 23") by failing to: file notices for certain claims; timely file notices for certain claims; and/or state the "amount of the extra cost or damages sustained" for certain claims, as required by Section 23. Next, NYCHA argues that, even if APS's notices satisfied Section 23, certain claims seeking compensation for Extra Work should be dismissed because they were within the scope of the Contract.

A claim arises under Section 23 when the contractor receives "any instructions of [NYCHA], by drawings or otherwise, involve Extra Work entailing extra cost, or claims compensation for any damages sustained by reason of any act or omission of [NYCHA], or of any other persons, or for any other reason"

Section 23 requires a contractor to timely file a notice of intention to make a claim for "Extra Work entailing extra cost," or its claims are waived. Specifically, a contractor must,

within twenty (20) days after such claim shall have arisen, file with [NYCHA] written notice of intention to make a claim for such extra cost or damages, stating in such notice the nature and amount of the extra cost or damages sustained and the basis of the Claim against [NYCHA]. If [NYCHA] shall deem it necessary for proper decision, upon any notice filed hereunder, to require additional data, depositions or verified statements, the Contractor must furnish the same within twenty (20) days after written demand therefor upon him/her.

Section 23(a). Moreover,

the filing by the Contractor of a notice of claim and the compliance by the Contractor with the demand, if any, for additional data, depositions or verified statements, both within the time limited herein, shall be a condition precedent to the settlement of any claim or to the Contractor's right to resort to any proceeding or action to recover thereon, and failure to do so shall be deemed to be a conclusive and binding determination on the Contractor's part that he/she has no claim against [NYCHA] for the compensation for Extra Work or for compensation for damages, as the case may be, and shall be deemed a waiver by the Contractor of all claims for additional compensation or for damages.

Section 23(b).

Section 62 of the Contract contains the following provision entitled “NO ESTOPPEL OR WAIVER”:

(a) [NYCHA] shall not be precluded or estopped by any acceptance, certificate or payment, final or otherwise, made by any of its officers, agents or employees, from showing the true amount and character of the work performed or that such acceptance, certificate or payment is incorrect or improperly made, and to recover on such account any monies paid in excess of those [APS] is entitled to or any damages it may have sustained by reason of the [APS]'s failure to comply with the Contract.

(b) No act done or permitted to be done by any member, officer, agent or employee of [NYCHA] at any time shall be deemed to be a waiver of any provision of the Contract, excepting only a resolution of the members of [NYCHA] providing expressly for such waiver.

Although the Contract contains a no estoppel or waiver provision, NYCHA's reliance on this provision is directly refuted by NYCHA's own conduct, based on the

allegations in the complaint, and in the affidavit and documents of Svetozar Savreski – which was submitted by APS in opposition to this motion.² For example: (1) in an email dated July 14, 2016, a Deputy Director at NYCHA informed APS that “APS has the right to claim @ end of project . . .” Savreski Aff., Ex. N (NYSCEF 221); and (2) by letter dated September 18, 2017, an Executive Project Manager at NYCHA updated APS on the status of numerous change orders, and informed APS that “[p]ursuant to . . . Section 23 (Claims) in the general Conditions of the Contract Agreement, [APS] may exercise its rights in this dispute and file a claim,” Savreski Aff., Ex. R (NYSCEF 225). APS also alleges that NYCHA continued to negotiate with APS regarding its claims, even after NYCHA purportedly rejected the claims.

These examples, in addition to the numerous written communications between the parties submitted on this motion, raises issues as to, *inter alia*, whether NYCHA essentially waived Section 23 notice requirements by conduct and in writings and/or whether APS’s claims were timely submitted, issues which cannot be resolved on a motion to dismiss. *See Amc United, Inc. v NEW York City Hous. Auth.*, 2013 N.Y. Slip Op. 31576[U] (NY Sup Ct, New York County 2013) (denying summary judgment motion to dismiss, because letter from NYCHA to contractor negotiating the “resolution of a change order” “provides a clear example of correspondence that is sufficient to raise a triable issue of fact as to whether NYCHA waived the section 23 notice requirement”);

² The court “may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one.” *Chanko v American Broadcasting Co.*, 27 NY3d 46, 52 (2016) (citation omitted).

see also APS Contractors, Inc. v New York City Hous. Auth., 2020 N.Y. Slip Op. 30694[U] (NY Sup Ct, New York County 2020) (denying motion to dismiss).

NYCHA's remaining argument is that, even if APS's notices satisfied Section 23, certain claims in the breach of contract cause of action seeking compensation for Extra Work should be dismissed because they do not constitute Extra Work. On a motion to dismiss, "the pleading is to be afforded a liberal construction" – the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (internal citations omitted). APS has pled that it was not paid for Extra Work, and I am required to accept that allegation. The issue of whether APS's claims actually constitute Extra Work as defined in the Contract is intensely fact-laden and may not be resolved on a pre-answer motion to dismiss.

Breach of Covenant Of Good Faith and Fair Dealing (Third Cause of Action)

APS alleges that NYCHA breached the implied covenant of good faith and fair dealing by arbitrarily reducing the estimated quantities of work specified after APS was awarded the Contract. Section 8(a) of the Contract provides in part that NYCHA "may, at any time after the acceptance of [APS's] Proposal, make changes . . . by omitting or reducing the Work in part, or, upon five (5) days' notice to [APS], in whole, the Contract Price being adjusted as hereinafter provided."


This breach of the covenant of good faith and fair dealing cause of action “would imply an obligation inconsistent with other terms of the contractual relationship.” *Keifer v Sony Music Entertainment, Inc.*, 8 AD3d 107, 107 (1st Dept 2004) (citation omitted). The Contract expressly permits NYCHA to reduce quantities of work, and therefore, this cause of action is dismissed. *Id.*

In accordance with the foregoing, it is hereby

ORDERED that second third-party defendant New York City Housing Authority’s motion to dismiss second-third party APS Contracting, Inc.’s first-amended second third-party complaint is granted as to the first, third, fourth, fifth, and sixth causes of action and is denied as to the second cause of action; and it is further

ORDERED that the parties appear for a preliminary conference at 60 Centre Street, Room 208 on June 24, 2020 at 2:15 p.m.

This constitutes the decision and order of the Court.

<p><u>4/13/2020</u> DATE</p>			 <hr/> <p>SALIANN SCARPULLA, J.S.C.</p>			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE