

Hilt Constr., Inc. v New York City Sch. Constr. Auth.
2020 NY Slip Op 33783(U)
November 13, 2020
Supreme Court, New York County
Docket Number: 653868/2019
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

HILT CONSTRUCTION, INC.

Plaintiff,

- v -

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendant.

INDEX NO. 653868/2019
MOTION DATE N/A
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for DISMISSAL

This action arises out of the performance by plaintiff Hilt Construction Company (Hilt) of a contract (the Contract) for construction work at Public School 333, located at 154 West 93rd Street in Manhattan. The Contract was terminated for convenience by defendant New York City School Construction Authority (SCA) on September 17, 2019. SCA now moves, pursuant to CPLR 3211 (a) (1), (2), (5), and (7), to dismiss the complaint.1 The plaintiff has cross-moved to amend the complaint.

The complaint alleges the following five causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) common law indemnification; (4) a request for injunctive relief; and (5) a request for declaratory relief. In all, the Complaint seeks \$2,867,963.03 for extra-contractual work required by SCA, for which SCA failed to pay, and \$2,000,000 in damages incurred as a consequence of delay, imposed upon plaintiff by SCA.

1 The Court would like to thank Samuel Cherniak Esq. for his assistance in this matter.

Plaintiff no longer seeks the relief requested in the fourth and fifth causes of action.

Those claims are, therefore, dismissed.

“The principle of common law, or implied indemnity permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party”

17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. Of Am., 259 AD2d 75, 80 [1st Dept 1999].

Hilt has not been held vicariously liable to anyone. Accordingly, the third cause of action, too, must be dismissed. Indeed, plaintiff offers no opposition to such dismissal.

SCA argues that the second cause of action duplicates the first. However, the complaint alleges, among other things, that, pursuant to the Contract, SCA could issue unilateral change orders only if the additional work would cost less than \$50,000.00, and that, in bad faith, SCA issued change orders that required Hilt to advance sums far in excess of that amount. Those allegations state a cause of action that differs from breach of contract.

SCA contends that the breach of contract claim must be dismissed, because plaintiff failed to comply with statutory conditions precedent to commencing a lawsuit against SCA, to wit, filing timely notices of claim. Public Authorities Law (PAL) § 1744 (2) provides, in relevant part:

“No action or proceeding for any cause whatever, other than one for personal injury, death, property damage or tort ... shall be prosecuted or maintained against the authority ... unless (i) it shall appear by an allegation in the complaint . . . 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 ... In the case of an action or special proceeding for monies due out of contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied.”

PAL § 1744) (2) (ii) provides that:

“the action or proceeding shall have been commenced within one year after the happening of the event upon which the claim is based....”

SCA's principal argument is that Hilt failed to file timely notices of demand (NOD). With regard to NOD No. 8, SCA argues that its issuance of a unilateral change order in the amount of \$2,963, together with a copy of emails between the parties, showing that they had failed to reach an agreement, constituted a denial of payment beyond the amount authorized in the unilateral change order. Inasmuch as the change order was dated June 11, 2018, and plaintiff's notice of claim was submitted on July 3, 2019, far more than three months after said denial, SCA contends that the notice of claim was untimely.

With regard to NOD No. 10, SCA argues that, after Hilt submitted a Request for Information (RFI), asking whether certain structural steel contained in stone parapet walls that Hilt had been directed to demolish, would remain in place, SCA's response, dated February 28, 2018, directing Hilt to remove the parapet "down to existing roof deck" (Epstein affidavit, exhibit H at 3) constituted a denial of a claim for payment for the removal of the structural steel, and that therefore, Hilt's July 3, 2018 Notice of Claim was untimely.

With regard to NOD No. 13, which pertains to certain roofing work, plaintiff submitted an RFI requesting SCA to issue a revised NOD in order to take into account the removal of steel plates and concrete that had been found beneath the roofing surface. SCA refused that request on September 21, 2018 and directed Hilt to perform the work "per contract base scope." Epstein affidavit, exhibit I at 3. SCA contends that its answer to the RFI constituted an express denial of any additional funds, and accordingly, that Hilt's January 3, 2019 Notice of Claim was untimely.

Regarding NOD NO. 12, SCA contends that it received no notice of claim, and that Hilt's allegations to the contrary are conclusory and fail to plead timeliness. It is elementary that, on a motion to dismiss for failure to state a claim, the allegations of the complaint are taken to be true. *Tekton Bldrs LLLC v 1232 S. Blvd., LLC*, 180 AD3d 616, 617 [1st Dept 2020], citing *Lwon v*

Martinez, 84 NY2d 83, 87 [1994]. Here, the complaint alleges that, with regard to NOD 12, “Hilt issued a notice of claim to SCA.” Complaint, ¶ 48. Clearly, a plaintiff has no obligation to plead that its actions were timely. The affidavit of Jessica Reyes, which avers, in part, that a diligent search of SCA records failed to find a notice of claim pertaining to NOD No. 12, raises an issue for the jury, but does not suffice as a ground for dismissing this claim.

SCA further argues that this action is untimely, with regard to NOD Nos. 8 and 10, and that Hilt’s claim for delay damages must be dismissed, both because Hilt listed no delay damages on any of its Notices of Claim, and because Hilt’s claims for such damages are wholly conclusory.

Contrary to SCA’s contentions, a change order proposal is not a request for final payment, and therefore, its rejection does not trigger the running of the applicable limitations period. *See Lanmark Grp., Inc. v New York City Sch. Constr. Auth.*, 167 AD3d 519, 519 [1st Dept 2018]. Even less does an answer to an RFI, directing the contractor to perform certain work, allow the contractor to ascertain its damages, and a claim does not accrue until damages can be ascertained. *D & L Assoc., Inc. v New York City School Constr. Auth.*, 69 AD3d 435, 435 [1st Dept 2010], citing *C.S.A Constr. Corp. v New York City School Constr. Auth.*, 5 NY3d 189, 192 [2005]. SCA states that its answer to the RFI pertaining to NOD No. 10:

“direct[ed] Hilt to ‘[r]emove the existing parapet ... down to existing roof deck,’ as per the contract documents (citation omitted). SCA’s answer informed Hilt that removal of the structural steel was within the scope of the contract and indicated that SCA would not be providing additional funds for the work.”

Defendant’s memorandum of law in support of its motion, at 7. PAL § 1744 (2) unambiguously provides that a claim accrues when payment is denied. An “indicat[ion]” that payment will not be made is not a denial of payment, especially where, as here, the work has not been fully performed.

SCA's contention, with regard to NOD No. 8, that a Unilateral Change Order constitutes a denial of a demand for payment, ignores the fact that, pursuant to the governing contract, a Unilateral Change Order is not a denial of payment, but is, rather, a preliminary cost estimate, pending negotiation of a final change order. *See* Reddy, Affidavit, exhibit A, General Conditions, Art. 7.03.

The RFI pertaining to NOD No. 10 was not a demand for payment, but an inquiry as to whether the steel frames embedded in the concrete pediments on the roof would remain in place or should be removed. *See* plaintiff's exhibit CC. Accordingly, SCA's response, directing Hilt to remove the steel was not a denial of a demand for payment, but an instruction on how to proceed with the work.

In addition to arguing that Hilt failed to comply with the conditions precedent set forth in PAL § 1744 (2), SCA argues that Hilt's claims with respect to NOD 8 and 10 are untimely, because this action was not commenced within the one-year limitations period set forth in PAL § 1744 (2) (ii). That argument rests entirely upon SCA's arguments, discussed above, that both a unilateral change order, and an answer to an RFI, constitute a denial of a demand for payment. *See* NYSCEF Doc. No 30 at 9. For the reasons given above, the court rejects those arguments.

SCA contends, with regard to these claims, that the contract documents unambiguously state that the stone parapets on the roof are to be razed. However, SCA does not contend that those documents, or the associated drawings, give any indication that the parapets contain structural steel, and, indeed, they give no such indication. *See* Epstein affirmation, exhibit H at 4. As its ultimate argument, SCA posits that, if Hilt had any questions about the scope of the work that it contracted to perform, it should have raised them prior to contracting. Absent any indication on the part of SCA that structural steel was embedded in the concrete structures that

were to be removed, Hilt had no reason to ask whether a hidden impediment, that would raise the cost of such removal, was present. It has long been held that “[n]othing but the clearest expression of such a design would justify the assumption that an executed contract was intended by either party as a snare.” *Hoffman & Place v Aetna Fire Ins. Co.*, 32 NY 405, 415 (1865).

With regard to NOD No. 13, SCA argues that Hilt is not entitled to extra payment for the removal of the concrete and steel plates, which covered the spandrel beams beneath the roofing surface of Roof No.’s 1-6, because the Contract drawings clearly require such removal. However, those drawings, and the associated legends, appear to require the removal of the steel only where it would, otherwise, interfere with welding. Moreover, Hilt submitted two RFIs regarding the steel plates, and SCA, responded, without denying Hilt’s claims.

Regarding damages attributable to delay, Hilt acknowledges that it may not have “file[d] a detailed notice of its ... claims before commencing this action.” NYSCEF Doc No. 51, at 16. This court grants Hilt permission to amend its complaint,

Accordingly, it is hereby

ORDERED that the motion of defendant New York City School Construction Authority to dismiss the complaint is granted to the extent that the third, fourth, and fifth causes of action are dismissed, and the claim for delay damages is dismissed without prejudice and the motion is otherwise denied; and it is further

ORDERED that the plaintiff’s motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to contact the Court to schedule a preliminary conference to be held on or before January 29, 2021.

11/13/2020
DATE



LYLE E. FRANK, J.S.C.

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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

HON LYLE E. FRANK
J.S.C.