

APS Contrs., Inc. v New York City Hous. Auth.
2021 NY Slip Op 31149(U)
April 9, 2021
Supreme Court, New York County
Docket Number: 155973/2020
Judge: Carol R. Edmead
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. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

Justice

-----X

INDEX NO. 155973/2020

APS CONTRACTORS, INC., NORTH AMERICAN
SPECIALTY INSURANCE COMPANY

MOTION DATE 08/04/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY HOUSING AUTHORITY, VITO
MUSTACIUOLO,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 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

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the verified petition/complaint of petitioners APS Contractors, Inc. and North American specialty Insurance Company (motion sequence number 001) is denied with respect to the second, third, fourth, fifth, sixth and seventh causes of action therein, and held in abeyance with respect to the first cause of action; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents New York City Housing Authority and Vito Mustaciulo, in his capacity as General Manager and Chief Operating Officer of the respondent New York City Housing Authority (motion sequence number 001), is granted to the extent that the second, third, fourth, fifth, sixth and seventh causes of action of the verified petition/complaint are dismissed; and it is further

ORDERED that respondent is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry on all parties; and it is further

ORDERED that counsel are directed to appear for a discovery conference via Microsoft Teams on April 20, 2021 at 2:30 pm.

In this hybrid Article 78 proceeding/declaratory judgment action, petitioners APS Contractors, Inc. (APS) and North American Specialty Insurance Company (NAS; together, petitioners) seek an order to vacate a default declaration issued by Vito Mustaciuolo, in his capacity as General Manager and Chief Operating Officer of the respondent New York City Housing Authority (NYCHA), and NYCHA cross-moves to dismiss the petition (together, motion sequence number 001). The parties' respective applications are disposed of in accordance with the following decision.

FACTS

NYCHA owns and manages a low-income residential apartment complex known as the Walt Whitman Houses, which is located at 287 Myrtle Avenue in the County of Kings, City and State of New York. *See* verified petition/complaint, ¶ 3. APS is a construction contractor that NYCHA retained to perform renovation work at the Walt Whitman Houses, and NAS is APS's insurer. *Id.*, ¶ 4.

Pursuant to the rules promulgated by the US Department of Housing and Urban Development (HUD), APS submitted a bid for the subject work to NYCHA in 2016, and NYCHA awarded it a contract on August 15, 2016 (the contract). *See* verified petition/complaint, ¶ 4; exhibit B. Section 25 of the "General Conditions" portion of the contract and Article I, Section 3(e) of the contract, obligated APS to complete the work within 791 days of receiving a notice to proceed from NYCHA. *Id.*, exhibit B. NYCHA served that notice on APS on August 30, 2016, and specified a completion date thereon of October 30, 2018. *See* notice of cross motion, Nahmias affirmation, exhibit 4. Article II, Section 10 of the "Special Conditions" section of the contract also required APS to obtain a performance bond in an amount

“ten percent (10%) of the amount of the bid/proposal.” *See* verified petition/complaint, exhibit B. APS obtained such a bond from NAS in the amount of \$29,393,616.00 which was effective as of April 6, 2016 (i.e., before it commenced the work). *Id.*, exhibit C. Three of the contract’s provisions are relevant to this litigation. The first is the blanket “Default” clause found at Section 32 (a) of the “General Conditions” portion of the contract, which provides as follows:

“(a) If the Contractor [i.e., APS] refuses or fails to prosecute the work, or any separable part thereof, with the diligence that will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within this time, the Contracting Officer [of NYCHA] may, by written notice to the Contractor, terminate the right to proceed with the work (or separable part of the work) that has been delayed. In this event, the PHA [i.e., NYCHA] may take over the work and complete it, by contract or otherwise, and may take possession of and use any materials, equipment, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the PHA resulting from the Contractor’s refusal or failure to complete the work within the specified time, whether or not the Contractor’s right to proceed with the work is terminated. This liability includes any increased costs incurred by the PHA in completing the work.”

Id., exhibit B. The next is the more detailed “Default” provision found at Article II, Section 38 of the “Special Conditions” portion of the contract, which states as follows:

“(a) The Authority [i.e., NYCHA] shall have the right to declare the Contractor [i.e., APS] in default on the whole or any part of the Contract and/or the Project if:

- “1. The Contractor shall fail to begin the Work to be done under the Contract on the date of award or the date otherwise specified in writing by the Authority, or if the Contractor shall abandon the Project, or
- “2. The Contractor shall assign the Contract or sublet the Work otherwise than as permitted by the Contract, or
- “3. The Contractor has unnecessarily or unreasonably delayed the Project or any part thereof, or has persistently or repeatedly refused or failed to supply enough properly skilled workers or proper materials, or
- “4. The Contractor has failed to make prompt payment to subcontractors, suppliers of materials, or other creditors; or has failed to display the prevailing wage poster, to provide a copy of the prevailing wage schedule when requested, to complete the Development Log or to submit the Contractor Daily Sign-In Sheets in compliance with the requirements of Form HUD-5730 Section 46, as amended by Supplemental Section 48 (below); or has failed to observe or perform the provisions of any term whatsoever of the Contract, or
- “5. The Contractor shall become bankrupt or insolvent, or makes an assignment for the benefit of creditors, or its affairs are placed in the hands of a receiver or trustee.

“(b) Upon declaration of default in writing to the Contractor, the Contractor shall not begin or shall discontinue or not resume the work. Pursuant to Section 151 (1) of the New York Public Housing Law, in the case of default by the Contractor the Authority may adopt on behalf of the Authority all subcontracts made by such Contractor and all such subcontractors shall be bound by such adoption if made, and the Authority may relet, with or without public advertisement, the work specified in the original contract, exclusive of so much thereof as shall be presided in any subcontracts so adopted. The Authority may prosecute the same to completion as agent for and at the expense of the Contractor, either directly or through other contractors, with or without public advertisement, or by calling upon the surety or sureties, if any, to complete the Contract as provided for in the Performance Bond, and the Contractor and sureties shall be liable to the Authority for any loss, damage, extra cost, or detriment to the Authority thereby. The Authority may take immediate possession of and utilize in completing the Work all materials and equipment provided for the Work. The Authority may also adopt and enforce any subcontracts which may have been let for any part of the Work. The Authority's certificate as to the excess cost and excess time, if any, of completing the Work, and the amount of damage suffered, shall be binding and conclusive upon the Contractor and its sureties.

“(c) The right to declare the Contractor in default for any of the grounds specified or referred to in Section 32 of HUD Form 5370 shall be exercised by the Authority by sending the Contractor a written notice setting forth the ground or grounds upon which such default is declared (the ‘Notice of Default’).

“(d) *The Authority's determination that the Contractor is in default shall be conclusive, final and binding on the parties and such a finding shall preclude the Contractor from commencing a plenary action for any damages relating to the Contract. If the Contractor protests the Authority's determination, the Contractor may commence a lawsuit in a court of competent jurisdiction of the State of New York under Article 78 of the New York Civil Practice Law and Rules.*”

Id., exhibit B (emphasis added). Finally, the “claims” provision found at Article II, Section 33 of the “Special Conditions” portion of the contract states as follows:

“(a) If the Contractor claims that any instructions of the Authority, 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 the Authority, or of any other persons, or for any other reason whatsoever, the Contractor shall, within twenty (20) days after such claim shall have arisen, file with the Authority 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 the Authority. If the Authority 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. The time period within which the Contracting Officer shall decide the claim or notify the Contractor of the date by which the decision will be made, as set forth in Section 31(d) of [the contract] shall not commence until such time as the Contractor has

furnished all such additional data and verified statements required by the Authority and, if so required by the Authority, all such depositions are complete.

“(b) *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 in the Contract, shall be a condition precedent (unless such condition is waived by the Authority in writing) 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 it has no claim against the Authority for compensation for extra Work or for compensation for damages, as the cause may be, and shall be deemed a waiver by the Contractor of all claims for additional compensation or for damages.*

“(c) The Authority shall have the right at any time that a claim is made or a lawsuit is brought by the Contractor on any account to audit the books and records of the Contractor with respect to all matters relating to the subject matter of the claim or lawsuit”

Id., exhibit B (emphasis added).

NYCHA alleges that APS exceeded the 791 day period specified in the notice to proceed by failing to complete the subject work by October 30, 2018. *See* notice of cross motion, Nahmias affirmation, ¶ 14. NYCHA further asserts that it had granted APS two extensions, but that APS nevertheless only completed phase one and part of phase two of the work by 2019, and that it had not performed any of the items specified in phases three and four of the work by then. *Id.* As a result, NYCHA served APS with a notice of default on October 9, 2019. *Id.*; verified petition/complaint, exhibit A. On November 13, 2019, NYCHA thereafter also served APS with a notice of claim, pursuant to its NAS performance bond, which demanded that APS complete its work. *Id.*, ¶ 16; verified petition/complaint, exhibit II. APS objects that NYCHA served the notice of default improperly “without prior notice . . . and without providing a hearing or an opportunity to cure.” *Id.*, verified petition/complaint, ¶ 5. APS further asserts that NYCHA itself caused the default by engaging in obstructive acts and failing to make duly demanded periodic payments. *Id.* Finally, on December 10, 2019 and January 15, 2020, NAS and APS served respective notices of claim on NYCHA that alleged that NYCHA’s failure to make timely

contract payments had caused them to incur money damages in the amount of the forfeited performance bond. *See* notice of cross motion, Nahmias affirmation, ¶¶ 18-19; verified petition/complaint, exhibits MM, NN.

APS thereafter commenced this hybrid matter by serving a “verified petition and complaint” on August 7, 2020 which set forth causes of action for: 1) violation of CPLR Article 78; 2) breach of contract; 3) money damages (loss of bond); 4) a declaratory judgment; 5) money damages (consequential damages/lost profits); 6) contractual indemnity; and 7) violation of Due Process. *See* verified petition/complaint, ¶¶ 67-91. Rather than answer, NYCHA submitted a cross motion to dismiss the verified petition/complaint on October 16, 2020. *See* notice of cross motion. The matter is now fully submitted (together, motion sequence number 001).

DISCUSSION

Although petitioners commenced this matter as a hybrid proceeding, they raise three initial arguments that their “challenge to NYCHA’s default declaration should proceed by way of a plenary action and not Article 78.” *See* petitioners’ mem of law at 5-17. None are persuasive.

Petitioners first argue that their “right . . . to a plenary action rather than an Article 78 hearing is a threshold issue.” *See* petitioners’ mem of law at 5-7. They assert, without citing any authority, that “NYCHA does not have the statutory authority to make the contract default determination pursuant to a quasi-judicial process.” *Id.*, at 6. The relevant governing authority is, however, found in the Court of Appeals decision in *Abiele Contr. v New York City School Constr. Auth.* (91 NY2d 1 [1997]), which stated as follows:

“A municipal agency’s finding that a general contractor has defaulted on its performance under the contract will not bind the general contractor, and foreclose a plenary action, unless the agency is endowed with *contractual or statutory authority* to render a quasi-judicial, final and binding determination. While defendant correctly notes that judicial review of administrative actions is generally achieved through an article 78 proceeding, *the administrative action must, as a prerequisite, be authorized.*”

91 NY2d at 8 (emphasis added). Here, Article II, Section 38 (d) of the “Special Conditions” portion of the contract plainly states as follows:

“(d). The Authority’s determination that the Contractor is in default shall be conclusive, final and binding on the parties and such a finding shall preclude the Contractor from commencing a plenary action for any damages relating to the Contract. If the Contractor protests the Authority’s determination, the Contractor may commence a lawsuit in a court of competent jurisdiction of the State of New York under Article 78 of the New York Civil Practice Law and Rules.”

See verified petition/complaint, exhibit B). This plain contractual language clearly provides that the parties may only dispute the validity of a NYCHA default determination in an Article 78 proceeding. Because this provision plainly confers “contractual authority to render a quasi-judicial, final and binding determination” regarding contractor defaults on NYCHA, petitioners’ assertion that there is a “threshold issue” presented herein is incorrect, and the court rejects it.

Next, petitioners argue that the foregoing contractual provision “is void as a matter of public policy because it impermissibly changes the standard of proof for a breach of contract cause of action; breaches the implied contractual duty of good faith and fair dealing; and is not a remedy as there is no possibility of relief.” See petitioners’ mem of law at 7-13. This assertion is also incorrect. The Appellate Division, First Department, consistently upholds the validity of similar provisions against claims that they violate public policy, and also routinely enforces them against contractors. See e.g., *Colonial Sur. Co. v New York City Hous. Auth.*, 182 AD3d 517, 518 (1st Dept 2020); citing *Cal-Tran Assoc., Inc. v City of New York*, 43 AD3d 727, 727 (1st Dept 2007), citing *Westinghouse Elec. Corp. v New York City Transit Auth.*, 82 NY2d 47 (1993). Therefore, the court rejects petitioners’ second argument.

Finally, petitioners argue that the subject provision “violates the Due Process protections of the United States and New York State Constitutions.” See petitioners’ mem of law at 13-17. This assertion has likewise been rejected by both the federal courts and the courts of this state.

See e.g., *Smalls v New York City Employees' Retirement System*, 2020 WL 5525746, *5, 2020 US Dist LEXIS 168694, *12 (SD NY 2020), citing *Hellenic Am. Neighborhood Action Comm. v City of New York*, 101 F3d 877, 881 (2d Cir 1996); *Matter of C/S Window Installers v New York City Dept. of Design & Constr.*, 304 AD2d 380 (1st Dept 2003). Therefore, this court rejects it as well. Accordingly, the court concludes that Article II, Section 38 (d) of the “Special Conditions” portion of the contract is valid, and that it limits petitioners’ ability to challenge NYCHA’s determination that it defaulted in its performance of the subject contract to commencing a proceeding pursuant to CPLR Article 78.

“Judicial review in this CPLR article 78 proceeding is limited to whether the challenged determination ‘was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion’ CPLR 7803 (3).” *Matter of Stonewall Contr. Corp. v New York City Sch. Constr. Auth.*, 120 AD3d 503, 504 (2d Dept 2014); citing *Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142, 146 (2004); *Matter of Scherbyn v Wayne–Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 (1991); c.f. *Abiele Contr. v New York City Sch. Constr. Auth.*, 91 NY2d at 8. A determination will only be found arbitrary and capricious if it is “without sound basis in reason, and in disregard of the . . . facts.” See *Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983); citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974). However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

Here, petitioners make five assertions with respect to their Article 78 claim; specifically that: 1) “a hearing is required to determine any disputed factual issues pursuant to CPLR 7804 (h);” 2) NYCHA “waived the time is of the essence contract completion date by permitting APS to continue to perform under the contract after April 2019 without re-establishing a reasonable completion date;” 3) the default determination “lack[ed a] rational basis because that date was waived by NYCHA and NYCHA acknowledged that that completion date was obsolete and not operative;” 4) the default determination “was vitiated by a cardinal change occurring on the project giving rise to NYCHA’s fundamental breach of its obligations under the contract”; and 5) “NYCHA's failure to give APS access to the worksite constitutes a fundamental breach of NYCHA’s obligations under the contract.” *See* petitioners’ mem of law at 18-29. However, NYCHA does not respond to any of these arguments in its cross motion, or request the court to dismiss petitioners’ Article 78 claim. Instead, NYCHA’s cross motion requests the dismissal of petitioners’ second through seventh causes of action pursuant to CPLR 3211 (a) (7) for failure to state a claim. *See* notice of cross motion, Nahmias affirmation, ¶¶ 35-54. Further, in its reply papers, NYCHA specifically states that respondents “reserve their right to answer the Petition and Complaint pursuant to CPLR Section 7804 (f) and Rule 3211(f), and respectfully request the Court extend their time to answer until 30 days after service of the order deciding this cross-motion with notice of entry.” *See* Nahmias affirmation, ¶ 55, and reply affirmation, ¶ 46. For their part, petitioners do not challenge NYCHA’s right to submit an answer herein, but rather request that, in the event that NYCHA is permitted to do so, an evidentiary hearing be held on the merits of their Article 78 claim. *See* petitioners’ mem of law in opposition to cross motion at 2. Without deciding that request, and in light of the parties’ apparent agreement regarding NYCHA’s right to file an answer, the court declines to consider the arguments that petitioners

raised in support of their Article 78 claim at this juncture. Instead, the court turns its attention to NYCHA's cross motion.

As mentioned, that cross motion requests the dismissal of petitioners second through seventh causes of action pursuant to CPLR 3211 (a) (7). *See* notice of cross motion. NYCHA specifically argues that these claims are barred because petitioners failed to serve a timely notice of claim pursuant to Article II, Section 33 of the "Special Conditions" portion of the contract. *See* respondent's mem of law at 15-22. NYCHA cites the contractual provision's language that state that a notice of claim must be served "within 20 days after it arises," and that the timely service of a notice of claim is "a condition precedent . . . to the Contractor's right to resort to any proceeding or action to recover thereon." *Id.*; verified petition/complaint, exhibit B. NYCHA then notes that petitioners served their respective notices of claim on December 10, 2019 and January 15, 2020, both of which dates are more than 20 days after it served the notice of default on October 9, 2019. *Id.*; verified petition/complaint, exhibits II, MM, NN. NYCHA concludes that this documentary evidence demonstrates that petitioners violated Article II, Section 33 of the "Special Conditions" portion of the contract by failing to serve notices of claim within the proscribed 20-day time limit, and that their causes of action relating to the contract and the performance bond are therefore barred. *Id.* The court finds that the documentary evidence persuasive. The court also notes that the First Department consistently upholds the dismissal of contractual claims asserted against NYCHA by contractor/plaintiffs who do not comply with *all* of the notice requirements set forth in a contract's notice of claim provision. *See e.g., Universal Constr. Resources, Inc. v New York City Hous. Auth.*, _ AD3d _, 2021 NY Slip Op 01372 (1st Dept 2021); *Universal Constr. Resources, Inc. v New York City Hous. Auth.*, 176 AD3d 642 (1st Dept 2019); *Matter of Intercontinental Constr. Contr., Inc. v New York City Hous. Auth.*, 173

AD3d 453 (1st Dept 2019). As a result, the court concludes that petitioners' second through sixth causes of action, all of which sound in breach of contract, are subject to dismissal. Petitioners nevertheless raise three several arguments in opposition.

First, petitioners assert that NYCHA's notice of claim argument "misconstrues the contract and case law and is fully refuted by notice exhibits in the petition." *See* petitioners' mem of law in opposition to cross motion at 13-19. Petitioners argue that "Section 33 merely requires the contractor to supply NYCHA with written 'notice of intention to make a claim,'" that it "does not require that the notice be sent in a single transmission or that the notice contain the words, 'Notice of Claim,' or refer to Section 33," and that "the language itself connotes submission of a less formal notice with a more formal notice in the future." *Id.*, at 13. To support their argument, petitioners present copies of a quantity of correspondence between their counsel and NYCHA which predated their notices of claim. *See* verified petition/complaint, exhibits A, D, E, F, O, U, V, X, HH. They assert that this correspondence fulfilled the same function as a notice of claim even if it was not designated as such, because it alleged that NYCHA's failure to make certain payments had precipitated petitioners' inability to complete its work, and demanded that NYCHA cure its improper practices and remit the subject payments. *See* petitioners' mem of law in opposition to cross motion at 14-16. NYCHA responds that petitioners' argument mischaracterizes the language of Section 33, which specifically requires a claiming party to serve a "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 the Authority." *See* respondent's reply mem in support of cross motion at 13-17. NYCHA cites a quantity of First Department case law which holds that a claiming party must strictly comply with all of the provisions in a contract's notice clause in

order for a the notice of claim to be sustained. *Id.* NYCHA’s description of First Department jurisprudence is accurate. *See e.g., Universal Constr. Resources, Inc. v New York City Hous. Auth.*, 176 AD3d at 642-643; *Matter of Intercontinental Constr. Contr., Inc. v New York City Hous. Auth.*, 173 AD3d at 454; *Hi--Tech Constr. & Mgt. Servs. Inc. v Housing Auth. of the City of N.Y.*, 125 AD3d 542, 542 (1st Dept 2015); *Metropolitan Bridge & Scaffolds Corp. v New York City Hous. Auth.*, 138 AD3d 423 (1st Dept 2016); *Centennial El. Indus., Inc. v New York City Hous. Auth.*, 129 AD3d 449, 450 (1st Dept 2015). After reviewing petitioners’ correspondence, the court also agrees that NYCHA’s allegation, that none of it satisfied the contract’s notice of claim requirements, is also accurate. Here, only one piece of petitioners’ correspondence is designated as a “notice of intention to make a claim,” and it does not specify any damages. *See* verified petition/complaint, exhibit F. The remaining correspondence is designated either as “notices to cure” or “financial impact statements,” neither of which are provided for in the contract. *Id.*, exhibits A, D, E, O, U, V, X, HH. Nor does the correspondence taken together include all three of the required notice elements of: 1) a specific “claim for extra cost or damages against NYCHA”; 2) “the nature and amount of the extra cost or damages sustained”; and 3) “the basis of the claim.” The First Department has repeatedly made it clear that neither prior dealings between parties nor a defendant’s actual knowledge about a plaintiff’s claims and alleged damages relieves the plaintiff of the obligation to serve a timely and detailed notice of claim. *Centennial El. Indus., Inc. v New York City Hous. Auth.*, 129 AD3d at 450; citing *S.J. Fuel Co., Inc. v New York City Hous. Auth.*, 73 AD3d 413, 414 (1st Dept 2010). Therefore, the court rejects petitioners’ contention that they sufficiently complied with the contract’s notice of claim provision by supplying NYCHA with alternate notices.

Next, petitioners argue that “there is no basis to dismiss [NAS]'s claims against NYCHA” because NAS was not a party to the contract. *See* petitioners’ mem of law in opposition to cross motion at 19-21. Petitioners specifically assert that “the performance bond’s language does not incorporate by reference Section 38 of the Contract . . . but incorporates contract terms for completion of the project as distinguished from all contract terms and conditions.” *Id.*, at 19. Petitioners cite a number of decisions which did not involve NYCHA construction contracts to support the principle that “alternative dispute resolution clauses must be specifically incorporated by reference.” *Id.* NYCHA, however, asserts that the relevant contractual language belies petitioners’ assertion. *See* respondent’s reply mem in support of cross motion at 11-13. Upon reviewing the pertinent language, the court finds that NYCHA is correct. Article II, Section 38 (b) of the “Special Conditions” portion of the contract provides that:

“[NYCHA] may prosecute the [work] to completion as agent for and at the expense of the Contractor, either directly or through other contractors, with or without public advertisement, or by calling upon the surety or sureties, if any, to complete the Contract as provided for in the Performance Bond, and the Contractor and sureties shall be liable to the Authority for any loss, damage, extra cost, or detriment to the Authority thereby.” *See* verified petition/complaint, exhibit B. The preamble to the performance bond states that:

“The Surety [i.e., NAS], for value received, hereby stipulates and agrees, if requested to do so by the Owner [i.e., NYCHA] to fully perform and complete the Work to be performed *under the Contract, pursuant to the terms, conditions, and covenants thereof*, if for any cause, the Principal [i.e., APS] fails or neglects to so fully perform and complete such Work. The Surety further agrees to commence such Work of Completion within twenty (20) days after written notice thereof from the owner, and to complete such work within twenty (20) days from the expiration of the time allowed the principal in the Contract for the completion of such Work.” *Id.*, exhibit C, at 2 (emphasis added). NYCHA cites the recent decision by this court (Lebovits, J.) in *Colonial Sur. Co. v. New York City Housing Authority* (2018 NY Slip Op 32096(U) [Sup Ct NY County 2018]), which involved a NYCHA construction contract and a performance bond that both contained identically worded clauses to the ones above. Justice Lebovits found that “[w]here a bond incorporates the terms contained in a contract between the owner (the bond's

obligee) and the contractor (the bond's principal), the surety's liability on the bond is co-extensive with the contractor's liability on the contract." 2018 NY Slip Op 32096(U), * 4, citing *Babylon Assocs. v County of Suffolk*, 101 AD2d 207, 218 (2d Dept 1984). Petitioners have not explained why this court should ignore the fact that the above-cited provisions are identical to those considered in *Colonial Sur. Co.* and instead deem that Section 38 is not a "term, condition, and covenant" of the contract which outside the ambit of the performance bond. The court declines to do so and instead finds that the language of NAS's performance bond exposed it to liability to NYCHA. Therefore, the court rejects petitioners' argument.

Petitioners' final argument concerns their sixth cause of action for contractual indemnity which, they assert, NYCHA has "completely misconstrued." See petitioners' mem of law in opposition to cross motion at 22. However, the court need not reach this argument because it has already determined that this cause of action must be dismissed as a result of petitioners' failure to serve a timely notice of claim.

The court notes, in closing, that petitioners' seventh cause of action alleging violation of the Due Process clauses of the federal and State constitutions is also subject to dismissal pursuant to CPLR 3211 (a) (7), because the case law mentioned supra established that the portion of the contract that obliges petitioners to proceed through the vehicle of an Article 78 proceeding did not violate either constitution. See *Hellenic Am. Neighborhood Action Comm. v City of New York*, 101 F3d at 881; *Matter of C/S Window Installers v New York City Dept. of Design & Constr.*, 304 AD2d at 380. Accordingly, the court concludes that the instant petition should be denied, and NYCHA's cross motion should be granted, solely to the extent of dismissing petitioner's second through seventh causes of action, and that the balance of the petition should be held in abeyance until NYCHA submits an answer to the Article 78 claim asserted therein.

DECISION

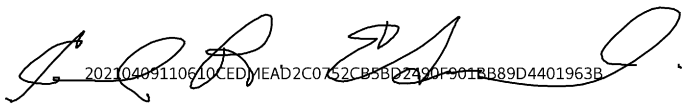
ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the verified petition/complaint of petitioners APS Contractors, Inc. and North American specialty Insurance Company (motion sequence number 001) is denied with respect to the second, third, fourth, fifth, sixth and seventh causes of action therein, and held in abeyance with respect to the first cause of action; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents New York City Housing Authority and Vito Mustaciuolo, in his capacity as General Manager and Chief Operating Officer of the respondent New York City Housing Authority (motion sequence number 001), is granted to the extent that the second, third, fourth, fifth, sixth and seventh causes of action of the verified petition/complaint are dismissed; and it is further

ORDERED that respondent is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry on all parties; and it is further

ORDERED that counsel are directed to appear for a discovery conference via Microsoft Teams on April 20, 2021 at 2:30 pm.


20210409110610CEDMEAD2C0752CB5B27420F901BB89D4401963B

4/9/2021
DATE

CAROL R. EDMOAD, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input checked="" 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