

**Cashman Dredging & Mar. Contr. Co., LLC v City of
New York**

2023 NY Slip Op 31421(U)

April 28, 2023

Supreme Court, New York County

Docket Number: Index No. 653152/2022

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

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CASHMAN DREDGING AND MARINE CONTRACTING
CO., LLC

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 653152/2022

MOTION DATE 04/24/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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

were read on this motion to/for DISMISS.

Defendant’s motion to dismiss is granted and plaintiff’s cross-motion is denied.

Background

This action arises out of a dredging job in Queens. Plaintiff contends it entered into a contract with defendant and that it is entitled to increased costs of construction due to compensable delays.

Defendant moves to dismiss on the ground that this action is time-barred. It explains that the contract provides that plaintiff had six months to start a lawsuit after substantial completion of the project. It argues that the Department of Environmental Protection (“DEP”) issued a letter on October 22, 2020 that deemed

the work substantially complete and that this lawsuit was not filed until August 31, 2022, well more than six months after substantial completion.

Plaintiff cross-moves for alternative relief that if defendant's motion is granted, it be permitted to amend its pleading to add an Article 78 claim under a mandamus to compel theory. It contends that DEP should be compelled to make the contractually required determination about plaintiff's delay claims. Plaintiff argues the motion should be denied because defendant failed to perform its obligations under the terms of the contract. It insists that the delay damages cause of action has not yet accrued because DEP never issued a determination about that request. It emphasizes that the delays were not plaintiff's fault and so they are compensable under the contract.

In opposition to the cross-motion, defendant points out that the alternative relief requested by plaintiff is also time-barred and that plaintiff cannot seek to amend to add a claim that is not timely.

Discussion

The Court's analysis begins with the parties' contract. It provides, in pertinent part, that "Nor shall any action be instituted or maintained on any such claims unless such action is commenced within six (6) months after Substantial Completion" (NYSCEF Doc. No. 9, ¶ 56.2).

Defendant met its burden on this motion to dismiss by submitting the October, 22, 2020 substantial completion letter from DEP (NYSCEF Doc. No. 12). This letter stated that a substantial completion inspection was performed on August 7, 2020 (*id.*). This communication satisfied the definition of substantial completion under Article 14.2 of the contract.

Plaintiff did not raise a legitimate dispute with this date. Instead, plaintiff argues that the Court should interpret the contract differently to permit the limitations period to run from the issuance of a post-substantial completion determination. But that interpretation is not supported under the terms of the contract. Moreover, the Court observes that plaintiff sent a letter detailing its “final verified statement of its pending claim for damages” on May 5, 2021 (NYSCEF Doc. No. 13), well more than six months before this action was commenced. Simply put, there is no basis to find that the instant action was timely under a plain reading of the contract.

The Court also denies the cross-motion to amend. Plaintiff did not attach a proposed pleading as required under CPLR 3025(b) and so the Court cannot evaluate if plaintiff’s proposed claims state a cognizable cause or causes of action.


To the extent that plaintiff claims it wanted to bring an Article 78 mandamus to compel cause of action, the Court finds that such a claim is also time-barred by the applicable four-month limitations period. The contract provided that:

“Within 60 days of submission of the final verified statement of claims pursuant to Article 44, the Commissioner shall make a determination as to whether a compensable delay has occurred and, if so, the amount of compensation due the Contractor. Notwithstanding the above, the Commissioner may make a determination as to whether a compensable delay has occurred at any time after the Contractor’s first submission of a statement of delay damages provided, however, that the amount of compensation due to the Contractor will not be determined until the Commissioner determines that the Work is delayed after the date set for substantial completion” (NYSCEF Doc. No. 9, ¶ 11.1.3)

As stated above, the final verified statement of claims is dated May 5, 2021. That means that the Commissioner had 60 days to issue a determination—that deadline expired in early July 2021. Significantly more than four months have passed since the Commissioner’s time to issue a determination expired and so plaintiff’s Article 78 claims are time barred.

Accordingly, it is hereby

ORDERED that defendant’s motion to dismiss is granted and the complaint is dismissed, and plaintiff’s cross-motion is denied.

<p>4/28/2023</p> <hr/> <p>DATE</p>	 <hr/> <p>ARLENE P. BLUTH, J.S.C.</p>																				
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