

AWL Indus. Inc. v New York City Hous. Auth.

2023 NY Slip Op 31829(U)

May 30, 2023

Supreme Court, New York County

Docket Number: Index No. 657030/2020

Judge: Lyle E. Frank

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

<p>PRESENT: <u>HON. LYLE E. FRANK</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>AWL INDUSTRIES INC.</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>NEW YORK CITY HOUSING AUTHORITY,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 11M</p> <p>INDEX NO. <u>657030/2020</u></p> <p>MOTION DATE <u>05/22/2023, 05/09/2022</u></p> <p>MOTION SEQ. NO. <u>001 002</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 12, 13, 14, 37

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion to dismiss is granted in its entirety.

Facts:

Plaintiff AWL INDUSTRIES INC. signed a public contract with defendant the NEW YORK CITY HOSUING AUTHORITY (“NYCHA”). The contract contains a notice and reporting clause which requires plaintiff to timely file a notice of claim to defendant if extra cost or damages arise out of the contracted work. The present suit centers on several claims of extra cost or damages resulting from the boiler rigging, gas pipe testing, and Covid-19 related delays. Plaintiff filed four counts including breach of contract, unjust enrichment, and declaratory judgment, claiming all notices of claim were timely filed with defendant and the notice clause should not bar the recovery of the claims. Defendant disagreed and filed the motion to dismiss the entire complaint.

Motion to dismiss general standard

On a motion to dismiss the court “merely examines the adequacy of the pleadings”, the court “accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff’s claim.” *Davis v Boenheim*, 24 N.Y.3d 262, 268 (internal citations omitted).

CPLR § 3211(a)(1)

Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted *conclusively* establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (emphasis added). “[S]uch motion may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff’s factual allegations.” *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (emphasis added). A paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable”. *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 A.D.3d 189, 193 [1st Dept 2019].

CPLR § 3211(a)(7)

“In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” *Leon v. Martinez*, 84 N.Y.2d 83, 88. “What the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading “will seldom if ever warrant the relief [the defendant] seeks unless [such evidence] establish[es] conclusively that plaintiff has no cause of action”. *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*,

115 A.D.3d 128, 134 [1st Dept 2014]. “[T]he Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim.” *Id.*

CPLR § 3001 Declaratory Judgment

Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy. CPLR 3001. The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations. While fact issues certainly may be addressed and resolved in the context of a declaratory judgment action, the point and the purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact. *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 94 [1st Dept 2009].

Construction of Public Contract-General Standard and Public Policy Consideration.

Strong public policy considerations favor scrutiny of claims of bad faith when offered by contractors to excuse noncompliance with notice and reporting requirements in public contracts. These provisions, common in public works projects, provide public agencies with timely notice of deviations from budgeted expenditures or of any supposed malfeasance, and allow them to take early steps to avoid extra or unnecessary expense, make any necessary adjustments, mitigate damages and avoid the waste of public funds. *A.H.A. Gen. Constr. v NY City Hous. Auth.*, 92 NY2d 20, 23 [1998].

“(A) notice of claim requirement in a public contract is strictly enforced in order to avoid waste of public funds and protect the integrity of the bidding process.” *Aps Contrs. v NY City Hous. Auth.*, 193 AD3d 628, 629 [1st Dept 2021]. “By failing to comply with the strict notice provisions of the public contract, plaintiff waived its claims.” *Id.*

In the following analysis, the court will parse all four claims raised by plaintiff, including the boiler rigging, extension of the rental boiler, the gas pipe testing, and the Covid-related project delay claims to see whether they can survive the dismissal challenge. NYSCEF Doc. No. 67, page 13.

Breach of Contract and Unjust Enrichment (The First and Third Causes of Action)

At issue here is whether plaintiff timely notified defendant NYCHA of alleged breaches and its claims in the way required by §§ 37 of Article III of the contract signed by both parties. NYSCEF Doc. No. 18, page 116. If so, the court can move on to discuss the substance of the claims. If not, both claims must be dismissed for failure to timely notify defendant of possible changes in work and cost relating to the public contract.

As a threshold issue, the court is unconvinced by plaintiff's novel theory of "two-step process" of filing a notice of claim and its interpretation of the relation between §§ 37 of Article III and § 31 of HUD Form 5370. NYSCEF Doc. No. 67, page 4. For starters, §§ 37 of Article III supplements § 31 of HUD Form 5370, the umbrella agreement for the disputed work. The two sections compose the whole provisions governing contractual disputes. Second, §§ 37 develops the filing standard and handles situations such as extra cost or damages that are not specified in § 31, which functions as a general clause for dispute resolution. Third, §§ 37 particularizes the starting point of the contracting officer's decision period mentioned in § 31(d). The clock won't begin ticking until the relevant officer receives all supporting materials for the claim. Fourth, §§ 37(b) emphasizes the importance of filing a timely notice of claim because it is a condition precedent to the settlement of any claim or preservation of the right to sue.

Additionally, plaintiff's emphasis on the difference between the wording "notice of intention to make a claim" in §§ 37(a) and "notice of claim" used by §§ 37(b) seems unreasonable

to the court. Immediately succeeding §§ 37(a), §§ 37(b) explains the consequence of failure to file a timely notice of claim complying with the standard outlined in §§ 37(a). One of the key principles in contract construction is to avoid unreasonable meaning and inconsistency. Albeit slightly different, these two documents appear to be the same. With that in mind, the court now moves to the analysis of the filing standard imposed by §§ 37.

§§ 37(a) of Article III states in pertinent part that “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.”

Id.

Here, plaintiff is seeking compensation for additional work done for NYCHA, including boiler rigging, gas pipe testing, and the extension of rental boilers. Accordingly, these claims fall under the ambit of §§ 37(a) and the court will examine whether the notice of claim is timely filed. If not, §§ 37(b) would kick in and foreclose any action brought by the contractor against defendant.

1. The gas pipe testing claim

At issue here is when the claim for the extra pipe testing accrued. Here, AWL quoted a price for the required additional pipe testing on May 1, 2019, and received the amended cost breakdown approved by defendant on May 2, 2019. NYSCEF Doc. No. 22, page 17. Plaintiff proceeded to perform the test, a gesture recognizing the amended quote. So, May 2, 2019, is the date when the cost for the extra work is “fixed” and

ascertainable, and thus began accruing. Accordingly, the notice of claim should be filed no later than May 22, 2019. See *C.S.A. Contr. Corp. v NY City Sch. Constr. Auth.*, 5 NY3d 189, 191 [2005] (A contractor's claim accrues *when its damages are ascertainable*. Although the determination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, it generally has been recognized that damages are ascertainable once the work is substantially completed, or a detailed invoice of the work performed is submitted.) Therefore, the Notice of Claim filed on June 30, 2020, is untimely and the claim must be dismissed pursuant to the condition precedent provision of §§ 37(b).

2. The rental boiler claim (unjust enrichment)

The rental period for the boiler expired in December 2020. NYSCEF Doc. No. 27, page 1. Plaintiff filed a change order to extend the period by another six months on June 2, 2020. *Id.* Plaintiff received a message from defendant on December 29, 2020, denying the extension and holding extending the rental period is plaintiff's contractual obligation. *Id.* plaintiff filed a notice of claim on January 15, 2021, demanding approval of an extension of the rental period by another six months. *Id.*

The court disagrees with the defendant on the date of accrual. The claim against defendant should start accruing on December 29, 2020, when plaintiff got an unambiguous decision from defendant that the extension of the rental boiler was denied. From that day on, every day the two boilers stay on the site could be every penny owed to plaintiff. The fact that plaintiff filed the change order six months ahead of the expiration date has no bearing on the issue because back then, defendant was still

paying for the rental boilers and no damages had been generated. Accordingly, the notice of claim was filed timely within the 20-day time limit.

The problem is the notice does not fit in with the filing standard called for by §§ 37(a), which provides that the notice should specify *the nature and amount of the damages and the basis* of the claim. Here, the notice missed the amount and the basis for such damages. The court does not know the damages plaintiff demanded and how plaintiff reached that number. The \$126,680.7 contained in the change order is not the actual damages incurred by plaintiff by January 15, 2021. It is an estimate for another six-month rental. *Id.* Besides, the change order is not an official notice of claim defined by §§ 37(a). Therefore, the claim must be dismissed for failing to comply with the notice filing standard.

3. The boiler rigging claim

The court agrees with plaintiff that the extra cost for boiler rigging became ascertainable on May 15, 2020, when plaintiff submitted the change order with an amount of \$ 505,296.55. NYSCEF Doc. No. 67, pages 13-14. A change order initiated by the contractor is part of the contract. *Id.* at 4. But the change order is not a formal notice of claim because it lacks the formality required by §§ 37(a). Accordingly, plaintiff needed to file a notice of claim no later than June 4, 2020, and the one addressed to defendant on June 30, 2020, is untimely. Therefore, the claim must be dismissed pursuant to CPLR § 3211(a)(1).

4. The unjust enrichment claim should also be dismissed as duplicative of the breach of contract claim. See, e.g., *Panwest NCA2 Holdings LLC v. Rockland NCA2 Holdings, LLC*, 205 AD3d 551, 552 [1st Dept 2022] (unjust enrichment claim should have been

dismissed as duplicative of the breach of contract claim. The parties do not dispute the existence of a valid written agreement).

Covid-19 Delay Damages and Declaratory Judgement of Entitlement to Extension of Time (The Second and Fourth Causes of Action)

At issue here is whether the exculpatory clauses will hinder plaintiff's recovery for damages. "Contract clauses barring a contractor from recovering damages for delay in the performance of a contract are valid, they will prevent recovery of damages resulting from a broad range of reasonable and unreasonable conduct by the contractee if the conduct was contemplated by the parties when they entered into the agreement". *Corinno Civetta Constr. Corp. v New York*, 67 NY2d 297, 305 [1986] (emphasis added). "The effect of the exculpatory clause can be overcome only if the qualitative level of misconduct by the contractee is the equivalent of an *intentional* wrong." *Id.* "Generally, even with such a clause, damages may be recovered for: (1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) unanticipated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract." *Id.*

Here, the contract in dispute contains an exculpatory clause that states in pertinent part that "all losses or damages arising out of the nature of the Work to be done under the Contract, or for any unforeseen obstructions except as otherwise provided in the Contract, . . . , shall be fully borne by the Contractor." NYSCEF Doc. No. 44, page 16, § 5(e). Covid-related delays are unforeseen obstructions, but they are not carved out in the contract. They are not unanticipated conduct committed by defendant intentionally, either. Therefore, the pandemic may be an unanticipated work of God imposing additional obstacles on plaintiff to complete the work, but the case law

upon which is relied by plaintiff fails to relieve it of the burden placed by the exculpatory clause since none of the above exceptions applies here. The Executive Order issued by the state fails to deliver the exemption desired by plaintiff because construction is an essential business “shall not be subject to the in-person restrictions.” NYSCEF Doc. No. 32, page 2. The argument by plaintiff as to § 13(a) of the umbrella agreement also fails since plaintiff has never produced any evidence proving Secretary of Labor determined that working on construction sites during the pandemic constituted “unsanitary, hazardous, or dangerous” to the employee’s health. NYSCEF Doc. No. 18, page 78. Since plaintiff had contracted away its right to bring a claim for delay damages and none of the exceptions applies here, the court has no choice but to dismiss both claims pursuant to CPLR § 3211(a)(1) & (a)(7). Based on the foregoing, it is hereby

ADJUDGED that defendant’ motion to dismiss pursuant to CPLR § 3211(a)(1) & (a)(7) is granted in its entirety; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

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LYLE E. FRANK, J.S.C.

5/30/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE