

**Volmar Constr. Inc. v City of New York**

2023 NY Slip Op 32511(U)

July 20, 2023

Supreme Court, New York County

Docket Number: Index No. 654645/2020

Judge: Barry R. Ostrager

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

**PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM**

*Justice*

-----X		INDEX NO.	654645/2020
VOLMAR CONSTRUCTION INC.,		MOTION DATE	
Plaintiff,		MOTION SEQ. NO.	003
- v -			
THE CITY OF NEW YORK,		<b>DECISION + ORDER ON MOTION</b>	
Defendant.		-----X	

HON. BARRY R. OSTRAGER

The Court heard oral argument via Microsoft Teams on July 19, 2023, on the motion by defendant The City of New York (“The City”) for summary judgment, pursuant to CPLR 3212, dismissing all claims asserted by plaintiff Volmar Construction Inc. (“Volmar”). The Court also heard at that time argument on Volmar’s cross-motion for summary judgment dismissing The City’s counterclaim for liquidated damages and precluding The City from introducing certain evidence, including expert testimony, at trial. In accordance with the July 19, 2023 transcript of proceedings, The City’s motion is denied based on triable issues of fact, but for the dismissal of Volmar’s claim for certain compensation for temporary scaffolding and generators, which claim was dismissed as untimely in the June 23, 2023 decision by the Contract Dispute Resolution Board (“CDRB”), subject to an Article 78 proceeding.

The Court also denies Volmar’s cross-motion for summary judgment dismissing The City’s counterclaim for liquidated damages based on triable issues of fact. In addition, the Court denies Volmar’s motion to preclude certain evidence, including expert testimony, from the trial without prejudice to an application at the trial.

At issue is a Contract between the parties, dated June 18, 2013, as amended (NYSCEF Doc. No. 26) pursuant to which The City retained Volmar to complete repairs on over 100 homes damaged during Hurricane Sandy. The Contract contained a detailed procedure for Volmar's submission of invoices to The City for work performed and for The City's review and payment of the invoices. Volmar claims in this action that The City owes Volmar approximately \$27 million, and The City has counterclaimed for an unspecified amount of liquidated damages in the sum of \$500.00 per day for alleged delays by Volmar in completing the work with respect to some, most, or all of the privately owned homes on which Volmar performed work.

It is undisputed that The City has not paid Volmar all sums that Volmar invoiced based on the Contract between the parties. In fact, during oral argument, The City acknowledged that it had only recently decided to pay Volmar an additional \$4.7 million and that The City expected to send Volmar a check with an explanation of its calculations by July 26, 2023. It appears that The City has yet to send Volmar a Final Determination with respect to many of Volmar's invoices. With respect to its counterclaim for liquidated damages, The City confirmed (for the first time, according to Volmar's counsel) that The City intends to rely at trial on the calculation of claimed damages in its expert report. Counsel further confirmed that, while the liquidated damages claim is a matter that must ultimately be determined by the Court, all other claims are subject to the contractual dispute resolution procedure before the CDRB.

Under these circumstances, the Court finds that neither party has established as a matter of law whether Volmar is or is not entitled to the sums demanded. Indeed, the parties do not even agree as to the process for the review of invoices and the authority, if any, of The City's Engineering Audit Office to adjust payment amounts.

Issues of fact also exist as to whether The City properly and timely issued Deficiency Reports and/or Final Determinations in response to all of Volmar's outstanding invoices, whether withholdings were properly documented and correctly made, and whether The City has released all the retainage amounts that Volmar claims it is due. Nor can the Court find based on the current record that any of Volmar's claims are moot, other than the claims recently determined by the CDRB (NYSCEF Doc. 163).

Volmar's cross-motion to dismiss The City's liquidated damages counterclaim similarly must be denied based on triable issues of fact. The record submitted to the Court on the motion -- which does not even include the amount of damages claimed -- is insufficient for the Court to determine whether the liquidated damages constitute an unenforceable penalty. Further, The City in its papers has identified various potential damages and has asserted that precise damages may be difficult to calculate, all of which the Court must consider when evaluating the liquidated damages claim. Therefore, the claim is not subject to dismissal on summary judgment, and the matter must proceed to trial.

The preclusion of evidence requested by Volmar in its cross-motion based on The City's alleged noncompliance with discovery cannot be determined as a matter of law without a fuller record. And the Court declines to strike The City's expert report as untimely, finding that any prejudice can be cured by providing Volmar with ample opportunity to complete any expert discovery and produce a report from Volmar's own expert. Counsel are directed to confer and agree upon a reasonable schedule for expert disclosure and the exchange of any additional reports, which the Court can confirm at the next conference or in a stipulation submitted by counsel before that time.

The parties have requested a bench trial, but the action is clearly not trial ready, as demonstrated by this Decision and the proceedings on the record on July 19, 2023. But The City’s three-year delay in processing all of Volmar’s invoices is unacceptable, and the action must move forward to a resolution without further delay. To that end, the Court directs The City to pay to Volmar no later than July 26, 2023, the amounts which The City has determined are due and payable to Volmar based on the invoices at issue in this case and that The City simultaneously issue to Volmar Final Determinations as to any amounts denied so that Volmar can timely commence the contractually mandated administrative challenges. By July 26, as indicated above, counsel shall also confer and determine what additional expert information is needed so that the liquidated damages issue will truly be trial ready.

Further, all counsel and a representative from each party with knowledge of the claims and full settlement authority shall appear in person on July 27, 2023 at 10:00 a.m. in Room 232 at the Courthouse at 60 Centre Street, New York, NY for a settlement conference so the outstanding issues can be resolved or at least narrowed.

Dated: July 20, 2023

  
 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION