Admiral Constr., LLC v New York City Dept. of Design & Constr.
2023 NY Slip Op 34066(U)
November 15, 2023
Supreme Court, New York County
Docket Number: Index No. 451159/2022
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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ADMIRAL CONSTRUCTION, LLC

Plaintiff,

- v –

NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION,

Defendant.

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INDEX NO. 451159/2022

MOTION DATE 08/17/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISSAL.

I. INTRODUCTION

This action arises from a public improvement contract for renovations and repairs to the New York Hall of Science in Corona, Queens, entered into by the plaintiff contractor, Admiral Construction, LLC (Admiral), and the defendant, New York City Department of Design and Construction (DDC) in August 2012. The work was to be completed in August 2014 but was delayed and Admiral achieved substantially completion in February 2016. Admiral seeks to recover from DDC $2,011,934.37 for delay damages, the $182,569.39 withheld by DDC for liquidated damages and declaratory relief.

DDC moves, pre-answer, to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), arguing that the action is time-barred under the terms of the parties' contract as it was not brought within six-months after it issued the Certificate of Substantial Completion, or even the Certificate of Completion and Acceptance. Admiral opposes the motion, arguing that the delays were due to change orders and other circumstances beyond its control and the contractual six-month limitations period should be disregarded as unreasonable since it could not ascertain damages within that time period. The motion is granted.

II. BACKGROUND

By a contract entitled "City of New York Standard Construction Contract – Delay Damages Pilot", dated June 18, 2012, Admiral was awarded a prime public improvement contract for repairs at the Hall of Science project and commenced work in August 2012. The completion date was scheduled for August 8, 2014, which is 730 consecutive calendar days (CCDs) from the start date. The initial contract price was $12,998,000.00.

Article 13.10 provides in part that the "contractor agrees to make no claim for damages for delay in the performance of this contract except as set forth in Article 11" which defines compensable and non-compensable delays.

Article 15.1 of the contract provides that DDC is entitled to withhold payment, as liquidated damages, from Admiral according to a designated schedule if Admiral "fails to complete the Work within the time fixed for such completion … plus authorized time extensions" which the "Commissioner may deduct and retain out of the monies which may become due hereunder."

Article 44.1 of the contract provides that "[w]hen the work in the opinion of the Commissioner has been substantially but not entirely completed, he/she shall issue a Certificate of Substantial Completion."

Article 44.4 provides that after payment on the Certificate of Substantial Completion, "no further partial payments shall be made to the contractor except that the "commissioner may grant a waiver for further partial payments after the date of Substantial Completion to permit payments for change order work and/or release of retainage and deposits" and any "such waiver shall be in writing."

Article 45.1 provides that after the Commissioner issues a Final Acceptance of the Work, the contractor shall submit all necessary documents to the Commissioner for payment for work performed subsequent to Substantial Completion and set forth the types of labor and materials, value of each item, and the alleged cause and period of any delay.

Article 56.2 of the contract provides that no lawsuit shall be instituted or maintained unless it is commenced within six (6) months after the date the Commissioner issues a

Certificate of Substantial Completion, except that, pursuant to 56.2.1, any claims arising out of events occurring after the date the Commissioner issues a Certificate of Substantial Completion and before Final Acceptance of the Work shall be asserted within six (6) months of Final Acceptance of the Work, and pursuant to Article 56.2.2, any claims for monies deducted, retained or withheld under the provisions of this Contract shall be asserted within six (6) months after the date when such monies becomes due and payable.

The project completion was delayed several times for various reasons including change orders and unforeseen subsurface conditions. On January 15, 2016, Admiral submitted to DDC a Notice of Claim for General Condition Costs for Time Extension of 551 CCDs to request compensation for the additional time spent on the Project (Time Extension Claim).

A “substantial completion inspection” was conducted at the project site on February 11, 2016. On December 15, 2016, DDC issued a Substantial Completion Certificate with Final Punch List, which states that, upon that inspection, the project was deemed substantially complete as of February 11, 2016. The punch list included 35 outstanding items with a total cost of $114,600.00. As per the contract, this Substantial Completion Certificate triggered the six-month limitations period for commencing any action. None was commenced in that period.

On September 24, 2019, DDC accepted Admiral’s work on the Project by issuance of the Certificate of Completion and Acceptance. That certificate noted the original contract price of $12,998,000.00, and “change orders issued for additional work” in the amount of $2,023,849.98, for a “total amount payable under contract” of $15,021,849.98. It also reflected that the project was to be completed by August 8, 2014, but was not substantially completed until February 11, 2016, and that the last day of physical work by the contractor was July 30, 2019. The certificate also noted that $256,868.09 was “retained upon guarantee” pursuant to Article 23 of the contract and that DDC was assessing $253,200.00 as “delay liquidated damages” against Admiral for the delays it caused.

On February 17, 2017, Admiral requested an “extension of contract time” of one day, from February 10, 2016, to February 11, 2016, based on a number of listed “change orders that impacted the completion of this project.” Admiral stated that the one-day extension would be “for the purpose of expediting payment” and that it “agreed to an do hereby waive and release any

and all claims, including but not limited to damages for delay or any other cause whatsoever which we may have against the City of New York."

More than two years later, on November 25, 2019, DDC granted Admiral's request and notified it by e-mail that the Comptroller's Office had assessed liquidated damages against Admiral in the sum of $253,200.00. DDC attached a Certificate of Extension of Contract Time (certificate of extension) extending the contract one day from February 10, 2016, to February 11, 2016, "to expedite payment" and "with the understanding that any claims heretofore waived by the contractor shall not be revived by reason of this extension." DDC ultimately paid Admiral's subcontractors $424,621.43 and withheld $182,569.40 from Admiral's total payment as liquidated damages.

In responding to DDC's November 25, 2019, email, Admiral's principal objected to the retention of $182,569.40 and claimed that after the issuance of the Substantial Completion Certificate, Admiral had been communicating with DDC and the Comptroller's Office to resolve the extension/liquidated damages issue thereby tolling the six-month limitations period. DDC maintained its position.

On March 12, 2020, Admiral filed a petition with the Contract Dispute Resolution Board (CDRB) of the Office of Administrative Trials and Hearings (OATH), challenging DDC's actions. In an order dated March 17, 2022, the CDRB granted a motion by DDC to dismiss the petition, concluding that Admiral's "claims are barred by the terms of the contract and not within the Board's jurisdiction."

In the meantime, on February 7, 2022, just before the CDRB issued its decision, Admiral commenced the instant breach of contract action asserting four causes of action against DDC and seeking declaratory and monetary damages. Specifically, Admiral seeks (1) delay damages of $2,011,934.37, (2) a judgment declaring that the Project was extended for 551 CCDs and the substantial completion date for the Project is February 11, 2016, (3) a judgment declaring that DDC's assessment of liquidated damages of $253,200.00 was improper, and (4) damages of $182,569.39 representing the amount wrongfully withheld as the result of the improper assessment of liquidated damages.

DDC now moves, pre-answer, for dismissal of the complaint pursuant to CPLR 3211(a)(1), a defense founded in documentary evidence, CPLR 3211(a)(5), statute of limitations, and CPLR 3211(a)(7), failure to state a cause of action. However, the gravamen of its argument as to each ground is that the action is time-barred by the six-month contractual limitations period. DDC maintains that Admiral's claim for delay damages was required by contract to be brought on or before March 24, 2020, or May 25, 2020, making this action, commenced 1 ½ years later, on February 7, 2022, untimely. In support of its motion, the defendant submits, *inter alia*, the subject agreement, the affidavit of Elaine Windholz, of the Corporations Counsel's Office, the Certificate of Substantial Completion and Final Punch List, and the Certificate of Completion and Acceptance.

In opposition, Admiral does not dispute the terms of the contract or the facts as set forth by DDC but argues that the six-month limitations period should not be enforced as it is unreasonable since damages here were not objectively ascertainable in that amount of time, and because the parties had been communicating regarding Admiral's time extension claim, which was not resolved until November 2019. Admiral submits the time extension claim, the certificate of extension, an affirmation of counsel and an affidavit of its Vice-President Devanand Jurakhan. In his affidavit, Jurakhan states, *inter alia*, that Admiral and DDC had been communicating regarding Admiral's time extension claim over a period of years such that "Admiral did not know, based on these conversations between DDC and Admiral, that this lawsuit would be needed, as DDC had not yet rejected the claim for additional compensation tied to the time extension."

III. DISCUSSION

Initially, the court notes that this is essentially a breach of contract action for which Admiral seeks monetary damages. To the extent that Admiral also seeks declaratory relief in the second and third causes of action, those causes of action must be dismissed, as duplicative of the first and fourth causes of action. That is, resolution of the breach of contract claims would necessarily require a determination of whether DDC abided by the terms of the contract and provide full relief. See Upfront Megatainment, Inc. v Thiam, 215 AD3d 576 (1st Dept. 2023); Moghtaderi v Apis Capital Advisors, 205 AD3d 504 (1st Dept. 2022); Nationstar Mortgage, LLC v Ocwen Loan Svcg, LLC, 194 AD3d 490 (1st Dept. 2021); Wildenstein, v 5H & Co., Inc., 97 AD3d 488 (1st Dept. 2012).

Furthermore, the requested declaratory relief would be no more than a declaration of findings of fact, inconsistent with the purpose of a declaratory judgment. "A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration." Bregman v E. Ramapo Cent. Sch. Dist., 122 AD3d 656, 657 (2nd Dept. 2014). "A declaratory judgment is intended to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact." Touro Coll. v Novus Univ. Corp., 146 AD3d 679, 679 (1st Dept. 2017). Notably, the relief sought by the plaintiff in the second cause of action is a judgment declaring that the work was substantially completed on February 11, 2016, which is consistent with the plaintiff's position.

The first and fourth causes of action must be dismissed as they are time-barred pursuant to the parties' six-month contractual limitations period.

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the statute of limitations, a defendant must establish, *prima facie*, that the time within which to sue has expired. Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period." Flintlock Constr. Services, LLC v Rubin, Fiorella & Friedman, LLP, 188 AD3d 530, 531 (1st Dept. 2020), *quoting* Quinn v McCabe, Collins, McGeough & Fowler, LLP, 138 AD3d 1085 (2nd Dept. 2016).

It is well settled that parties may agree to a contractual limitations period for bringing claims arising from the contract. See Rockmore Contracting Corp. v City of New York, 216 AD3d 82 (1st Dept. 2023); Turner Constr. Co. v Nastasi & Assocs., Inc., 192 AD3d 103 (1st Dept. 2020); Hudson Ins. Co., Inc. v City of New York, 170 AD3d 622 (1st Dept. 2019); Dart Mechanical Corp. v City of New York, 121 AD3d 452 (1st Dept. 2014); A.J. McNulty & Co. v P.J. Carlin Constr. Co., 247 AD2d 254 (1st Dept. 1998). "Parties may contract for a shorter period to commence and action than set forth by statute, provided that the period is reasonable (see John J. Kassner & Co. v City of New York, 46 NY2d 544 [1979]).

Regarding the first causes of action, the Certificate of Substantial Completion was filed on December 15, 2016. Thus, under the terms of the contract pursuant to Article 56.2, Admiral had until June 15, 2017, to bring an action. The six-month statute of limitations period was

explicit in the public works contract and the limitations period accrued upon the defendant's issuance of the Certificate of Substantial Competition. See Tutor Perini Corp. v New York City Dept, of Transp., 206 AD3d 505 (1st Dept. 2022); Hudson Ins. Co., Inc. v City of New York, supra. In Hudson, the Appellate Division similarly found that the complaint against the defendant City was properly dismissed as time-barred by the "explicit six- month limitations period which accrued upon the defendant's issuance of a certificate of substantial completion." Id. at 523. The Court rejected an argument similar to the argument raised by Admiral, stating "[w]e reject plaintiff's contention that it elected to submit all of its damages for extra work and delays at the same time that it requested an extension of the project's completion, and that it had given the City notice of damages and delays by letter and at meetings throughout the project." Id. The Court further held that any purported representation or assurances by the City's representatives did not serve to toll the limitations period, which was explicit in the parties' contract which also had "explicit merger, estoppel and no oral modification clauses." Id. The very same contract and contract terms are at issue here.

The same six-month limitations period provided for in the parties' public works contract has been upheld as reasonable and enforceable. See Rockmore Contracting Corp. v City of New York, supra [contractor's action time-barred by six-moth limitations period, and merger, no estoppel and no oral modification provisions of contract undermine any claim of reasonable reliance]; see also Picone/WDF, JV v City of New York, 193 AD3d 433 (1st Dept. 2021) [action time-barred by six-month limitations period which was triggered by a letter from the City stating that there was substantial completion as the contract did not require a particular form of a Certificate of Substantial Completion or supporting documents]; Dart Mechanical Corp. v City of New York, supra [limitations period does not conflict with provision regarding procedures for obtaining payment for substantially complete work, as they address independent obligations]; cf. Turner Constr. Co. v Nastasi & Assocs., Inc., 192 AD3d 103, 106-107 (1st Dept. 2020) [one-year limitations period in private construction contract unreasonable with condition precedent of full payment by owner]; AWI Security and Investigators, Inc. v Whitestone Constr. Corp., 164 AD3d 43 (1st Dept. 2018) [six-month limitations period in securities service contract unreasonable with a condition precedent of settlement of separate wage class action]; Greystone Bldg & Dev. Corp., Makro Gen. Contractors, Inc., 181 AD3d 468 (2020) [one-year limitations period unreasonable with condition precedent that negotiation between parties and non-party New York City Transit Authority over value of deleted work items to be concluded].

With respect to the fourth causes of action, the DDC correctly argues that the final acceptance of the work, established by the Certificate of Completion and Acceptance on September 24, 2019, thereby limited Admiral's time to assert a claim for liquidated damages to March 24, 2020, pursuant to Article 56.2.1. However, even when determining the contractual limitation for liquidated damages under Article 56.2.2, the assessment of liquidated damages and denial of the extension claim occurred on November 25, 2019, giving Admiral until May 25, 2020, to timely bring suit. As this action was commenced on February 7, 2022, all claims are contractually barred.

To the extent it so argues, Admiral is correct in observing that if a contract imposes a condition precedent that cannot be met within the time frame of the limitations period under the available facts, the limitations period is unenforceable. See Country-Wide Ins. Co. v Preferred Trucking Servs. Corp., 22 NY3d 571 (2014). The relevant question when deciding whether a limitations period is enforceable is whether and when the damages were objectively ascertainable. See CAB Assoc. v City of New York, 32 AD3d 229 (1st Dept. 2006). Here, however, there was no condition precedent as the limitations period does not conflict with the provision regarding procedures for obtaining payment for substantially complete work, as they address independent rights and obligations. See Dart Mechanical Corp. v City of New York, supra. Furthermore, and contrary to Admiral's contention, the damages were ascertainable in a timely manner. As noted by DDC, the amount requested in Admiral's time extension claim, submitted on January 15, 2016, asserted the same damages as in the instant complaint. That was nearly a month before the substantial completion inspection took place on February 11, 2016. Therefore, Admiral's damages were, in fact, ascertainable during the limitations period*, i.e.,* on or before January 15, 2016.

Notably, Admiral does not dispute that in the time extension claim submitted to DDC on January 15, 2016, it expressly "agreed to an do hereby waive and release any and all claims, including but not limited to damages for delay or any other cause whatsoever which we may have against the City of New York." This waiver was confirmed by DDC in the certificate of extension it sent to Admiral on November 25, 2019.

Contrary to Admiral's further contention, the CDRB proceeding did not toll the running of the limitations period (see Tutor Perini Corp. v New York City Dept, of Transp., 206 AD3d 505 (1st Dept. 2022); Kahn v New York City Dept. of Education, 18 NY3d 457 (2012). Nor did

Admirals ongoing discussions with DDC serve as a toll. See Hudson Ins. Co., Inc. v City of New York, supra. Admiral does not claim that these ongoing communications with DDC after the limitations period expired constituted "wrongful or negligent conduct which induced plaintiff to forgo its suit" sufficient to invoke the doctrine of estoppel." Top Quality Wood Work Corp. v City of N.Y., 191 AD2d at 264 (1st Dept. 1993). Furthermore, absent unusual factual circumstances, the doctrine of estoppel is not available against a public agency. See West Midtown Mgt. Group, Inc. v State of New York, Dept. of Health, 31 NY3d 533 (2018); Tutor Perini Corp. v New York City Dept, of Transp., supra; Porter v New York City Housing Auth., supra. Additionally, the parties' contract includes merger, no estoppel and no oral modification provisions. See Rockmore Contracting Corp. v City of New York, supra; Picone/WDF, JV v City of New York, supra.

The plaintiff's remaining contentions have been considered and rejected.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED that the defendant's motion to dismiss the complaint is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk shall mark the file accordingly,

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/15/2023
DATE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE