

Gibraltar Contr., Inc. v Tully Constr. Co. Inc.

2025 NY Slip Op 32290(U)

June 24, 2025

Supreme Court, New York County

Docket Number: Index No. 653712/2023

Judge: Lyle E. Frank

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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**

<p>PRESENT: <u>HON. LYLE E. FRANK</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>GIBRALTAR CONTRACTING, INC.</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>TULLY CONSTRUCTION CO. INC.,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 11M</p> <p>INDEX NO. <u>653712/2023</u></p> <p>MOTION DATE <u>02/11/2025</u></p> <p>MOTION SEQ. NO. <u>003</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 003) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47
 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendant’s motion for summary judgment is denied and plaintiff’s cross-motion to dismiss an affirmative defense is granted.

This action arises out of allegations that defendant breached a subcontract agreement with plaintiff when it failed to pay. Defendant previously moved to dismiss, contending the action was time barred, based upon the Certificate of Final Completion. The motion was denied, based on the language of the Certificate, identifying it as a recommendation for acceptance. Defendant now moves for summary judgment with an affidavit from the owner’s representative to establish that the underlying action is time barred.

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a

drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

In support of its motion for summary judgment, defendant relies on the affidavit of Henry J. Keane, P.E., Senior Vice President and Chief Engineer of the Triborough Bridge and Tunnel Authority ("Owner"). Mr. Keane affirms that his signature of the Certificate of Final Completion is acceptance of the work by the owner, thus triggering the shortened six-month statute of limitations.

In opposition to the motion and in support of its cross motion, plaintiff contends that the action is timely as there are two conditions that must be met for the shortened statute of limitations to be triggered, final acceptance of the work by the owner is not the sole factor. Plaintiff further argues that based on the defendant's obligation to pay contingent on it receiving payment from the owner voids the shortened limitation period. Plaintiff cites to paragraph 32, that states in relevant part

(2) if Owner does not issue a certificate of substantial completion, any claims shall be asserted within six months of final acceptance of the work by Owner; **and** (3) any claims for monies deducted, retained or withheld under the provisions of this Agreement shall be asserted within six months after the date when such monies became due and payable hereunder[.]

See NYSCEF Doc. Emphasis added. Plaintiff contends that a "date when such monies" become due and payable is not ascertainable based on paragraph 3 of the agreement that states, "[a]pproval and payment by Owner is a condition precedent to Contractor's obligation to pay Subcontractor." Thus, plaintiff contends, the shortened statute of limitations of six-months is void and defendant's affirmative defense should be dismissed.

In further support of its motion and in opposition to plaintiff's motion, defendant contends that the payment contingency did not prevent plaintiff from making a demand for payment during multiple stages of the project. Defendant further argues that the First Department has already determined that the shortened six-month statute of limitations was not unreasonably short, and that ruling is law of the case, *see (Gibraltar Contr., Inc. v Tully Constr. Co. Inc., 234 AD3d 436, 437 [1st Dept 2025])*.

Preliminarily, the Court rejects defendant's contention that the First Department's holding that the six-month statute of limitations was not unreasonably short is law of the case and thus is an issue that cannot be relitigated. The Court does not find that First Department's determination addressed the issue raised in opposition to the motion for summary judgment, whether the shortened limitations period along with the payment contingency is valid in the underlying contract.

Here, consistent with the holding in *Turner* the provision of the contract that specifies that defendant will not be obligated to pay the plaintiff until it receives payment from the owner voids the shortened statute of limitations, thus the six-year limitations period applies, *see (Turner Constr. Co. v Nastasi & Assoc., Inc., 192 AD3d 103, 107 [1st Dept 2020])*. The Court rejects defendant's contention that notwithstanding the language that defendant's obligation to pay does not begin absent payment from the owner, that plaintiff could have and should have made demands for payments at multiple stages of the project. Defendant does not articulate how a demand for payment would have been timely or proper before its obligation to pay accrued, nor does defendant address how plaintiff would have known when payment was made to ascertain the date when defendant's obligation to pay began. Accordingly, it is hereby

ADJUDGED that defendant's motion for summary is denied; and it is further

ADJUDGED that the defendant’s motion for summary judgment is denied; and it is further ORDERED that plaintiff’s cross motion is granted and defendant’s second affirmative defense is dismissed.

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6/24/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE