

Massa Constr., Inc. v Clyde-Savannah Cent. Sch. Dist.
2025 NY Slip Op 35275(U)
February 10, 2025
Supreme Court, Wayne County
Docket Number: Index No. CV088603
Judge: Daniel J. Doyle
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

MASSA CONSTRUCTION, INC.,

Plaintiff,

vs.

**Decision, Order, and
Judgment**

Index No.: CV088603

CLYDE-SAVANNAH CENTRAL SCHOOL DISTRICT,

Defendant.

Appearances:

Jason B. Bailey, Esq., Sheats & Bailey, PLLC, for Plaintiff
Ryan L. McCarthy, Esq., Ferrara Fiorenza, PC, For Defendant

Daniel J. Doyle, J.,

Plaintiff Massa Construction, Inc. (hereinafter “plaintiff”) initiated this action by the filing of a summons and complaint in May of 2021 alleging that defendant Clyde-Savannah Central School District (hereinafter “defendant”) breached a construction contract (hereinafter “contract”) for a construction project known as “2017 Capital Improvement Project – Phase II, Middle/ High School & Elementary School Additions and Alterations” (hereinafter “project”).¹ The complaint attached

¹ The plaintiff’s complaint contains two causes of action: breach of contract and unjust enrichment.

two exhibits: (1) a notice of claim dated June 2, 2020 wherein the plaintiff sought damages due to the defendant's architect's denial of additional compensation under the contract due to delays caused by the COVID-19 pandemic; and (2) a notice of claim dated March 30, 2021 wherein the plaintiff sought \$49,000 in compensation for removal and replacement of a concrete slab.

The defendant answered the complaint and asserted various affirmative defenses, including that the plaintiff failed to abide by the conditions precedent in the construction contract prior to initiating suit, and the plaintiff failed to abide by the contract's notice of claim requirements.

The defendant moves for summary judgment seeking dismissal of the plaintiff's complaint arguing: (1) that the plaintiff failed to comply with the contractual requirement of arbitration before bringing suit; (2) the plaintiff cannot establish damages; and (3) any damages are precluded by a contractual provision preventing damages due to delay.

For the reasons that follow, the defendant's motion for summary judgment is GRANTED.

Summary Judgment Standard

A party seeking summary judgment pursuant to CPLR 3212 must make prima facie showing of entitlement to judgment as a matter of law and submit sufficient

evidence to demonstrate the absence of any material issue of fact. (*Iselin & Co. Inc v Landau*, 71 NY2d 420 [1988].) Summary judgment may only be granted when "it has been clearly ascertained that there is no triable issue of fact outstanding; issue finding, rather than issue determination, is its function". (*Suffolk County Dep't of Soc. Servs. v James M.*, 83 NY2d 178, 182 [1994].) Only when the proponent demonstrates entitlement to summary judgment, the opposing party must then demonstrate, generally by admissible evidence, the existence of an issue of fact requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 851 [1985].)

“It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’ (*Scott v. Long Is. Power Auth.*, 294 A.D.2d 348, 348, 741 N.Y.S.2d 708; *see Ruiz v. Griffin*, 71 A.D.3d 1112, 1115, 898 N.Y.S.2d 590).” (*Katz v. Beil*, 142 AD3d 957, 964 [2nd Dept. 2016].) ““When reviewing a motion for summary judgment the focus of the court's concern is issue finding, not issue determination, and the affidavits should be scrutinized carefully in the light most favorable to the party opposing the motion”. (*Goldstein v County of Monroe*, 77 AD2d 232, 236; *Renda v Frazer*, 75 AD2d 490.)” (*Robinson v. Strong Mem'l Hosp.*, 98 AD2d 976, 976 [4th Dept. 1983]; *see also Gitlin v. Chirinkin*, 98 AD3d 561 [2nd Dept. 2012].)

Relevant Facts²

Plaintiff and defendant entered into the contract on January 10, 2019. The parties dispute whether the plaintiff was timely performing its obligations under the contract prior to the start of the COVID-19 pandemic. However, once the COVID-19 pandemic began, the plaintiff halted construction. After construction resumed, plaintiff filed a notice of claim (dated June 22, 2020) wherein the plaintiff notified the plaintiff that it was seeking additional compensation for the impacts of COVID-19. Notably, the notice of claim referenced the May 21, 2020, decision by the architect (as initial decision maker) to deny extra compensation. Plaintiff filed a second notice of claim (dated March 30, 2021) seeking additional compensation as plaintiff was required to replace a concrete slab. Notably, plaintiff claimed that the defendant “on February 2, 2021, rejected all other remedies and insisted the slab be removed and replaced”.

Plaintiff initiated suit but did not initiate mediation as required by the contractual terms.

Relevant herein, the contract contained the following provisions:

² The Court rejects the plaintiff's arguments regarding the admissibility of the defendant's submitted exhibits.

§ 15.1.2 Notice of Claims. Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Construction Manager and Architect, if the Construction Manager and or Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.³

§ 15.3 Mediation

§ 15.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.6 shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 15.3.2 The parties shall endeavor to resolve their Claims by Mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.⁴

³ The parties designated the project architect, Hunt Engineers, Architects, and Land Surveyor's P.C., as the "initial decision maker" pursuant to § 6.1 of the contract.

⁴ The contract defined "binding dispute resolution" as "litigation in a court of competent jurisdiction" pursuant to § 6.2.

In March of 2020 the project was temporarily paused due to the COVID-19 pandemic. Thereafter, the project was deemed “essential” by the defendant and the defendant demanded that the plaintiff proceed with work on the project under safety protocols developed by the plaintiff to abide by applicable regulations for construction projects during the COVID-19 pandemic.

Relevant to this issue, the contract contained the following provisions:

§ 10.1 Safety Precautions and Programs

The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall submit the Contractor’s safety program to the Construction Manager for review and coordination with the safety programs of other Contractors. The Construction Manager’s responsibilities for review and coordination of safety programs shall not extend to direct control over or charge of the acts or omissions of the Contractors, Subcontractors, agents or employees of the Contractors or Subcontractors, or any other persons performing portions of the Work and not directly employed by the Construction Manager.

* * *

§ 10.2.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

* * *

§ 10.4 Emergencies

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor’s discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed

by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

The Defendant's Motion to Dismiss the Quantum Meruit Claim is Granted

As there was an existing contract between the parties, and the plaintiff's claim for damages clearly falls under the contract, the claim for quantum meruit must be dismissed. "Contrary to the plaintiff's contention, it cannot alternatively recover under a theory of quantum meruit. Where, as here, there is an existing contract between the parties covering the dispute in issue there can be no recovery in quantum meruit (*see, Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 516 N.E.2d 190; *Harder v. Reedy*, 217 A.D.2d 833, 834, 629 N.Y.S.2d 527)." Here, there is no question of the validity of the contract between the parties and there is no claim by the plaintiff that it provided work outside the scope of the contract.

Thus, the quantum meruit cause of action must be dismissed. (*Thompson v. Horowitz*, 141 AD3d 642 [2nd Dept. 2016]; *Tako Holdings, Inc. v. Tillman*, 272 AD2d 394, 396 [2nd Dept. 2000]. *Compare, Loheac v. Children's Corner Learning Ctr.*, 51 AD3d 476 [1st Dept. 2008].)

The Defendant's Motion to Dismiss the Breach of Contract Claim is Granted

Here, it is undisputed that the plaintiff failed to abide by the contractual requirement that all controversies related to the contract be mediated prior to the

initiation of litigation. (Section 15.3.1 of the contract.) Pursuant to the contract, the plaintiff was required to send a request for mediation in writing, delivered to the defendant, and filed with the person or entity administering the mediation. Plaintiff did not do so. (*D & M Concrete, Inc. v. Wegmans Food Markets, Inc.*, 133 AD3d 1329, 1331 [4th Dept. 2015]: “Inasmuch as there is no dispute that plaintiff failed to comply with the contractual dispute resolution procedures, and that compliance was a condition precedent to commencing a lawsuit, we conclude that defendant established its entitlement to judgment as a matter of law (*see Acme Supply Co., Ltd. v. City of New York*, 39 A.D.3d 331, 332, 834 N.Y.S.2d 142, *lv. denied* 12 N.Y.3d 701, 876 N.Y.S.2d 349, 904 N.E.2d 504).”)

Furthermore, the contract required all notices of claim to be filed within twenty-one (21) days “after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later”. Each notice of claim filed by plaintiff specifically references a date from which the claim was ripe and each date is more than twenty-one (21) days prior to the filing of the claim. The plaintiff failed to abide by this condition precedent. “It is well settled that [c]ontract clauses that require the contractor to promptly notice and document its claims made under the provisions of the contract governing the substantive rights and liabilities of the parties ... are ...

conditions precedent to suit or recovery” (*Accadia Site Contr., Inc. v. Erie County Water Auth.*, 115 A.D.3d 1351, 1352, 983 N.Y.S.2d 387 [4th Dept. 2014] [internal quotation marks omitted]), and “a condition precedent is ‘an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises’ ” (*MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645, 884 N.Y.S.2d 211, 912 N.E.2d 43 [2009]; see *Accadia Site Contr., Inc.*, 115 A.D.3d at 1352, 983 N.Y.S.2d 387).” (*Doyle v. Nole*, 181 AD3d 1314, 1315, [4th Dept. 2020].)

The plaintiff did not satisfy either condition precedent- the notices of claim were untimely, and the plaintiff failed to request mediation. Thus, the defendant met its initial burden in establishing entitlement to summary judgment dismissing the complaint. (See *Providence State St. Hous. Dev. Fund Co., Inc. v. Buckingham Constr., LLC*, __ AD3d __; No. 23-01071, 2025 WL 352125, [4th Dept. January 31, 2025]; *Centennial Elevator Indus., Inc. v. JRM Constr. Mgmt., LLC*, 212 AD3d 457 [1st Dept. 2023]; *Archstone Dev. LLC v. Renval Constr. LLC*, 156 AD3d 432, 433 [1st Dept. 2017]: “The motion court correctly dismissed the breach of contract claim on the ground that plaintiff failed to satisfy a condition precedent required for bringing suit. Although plaintiff timely filed a notice of claim with the initial decision maker under section 15.1.2 of the AIA A201-2007 form agreement (construction agreement), it did

not pursue mediation as required by section 15.3.1 (*see MCC Dev. Corp. v Perla*, 81 AD3d 474, 475 [1st Dept 2011], *lv denied* 17 NY3d 715 [2011]).” *See also Acme Supply Co. v. City of New York*, 39 AD3d 331, 332 [1st Dept/ 2007]: “the complaint should have been dismissed because plaintiff failed to comply fully with the contractual dispute resolution procedure.” *See also Lakeland Fire Dist. v. E. Area Gen. Contractors, Inc.*, 16 AD3d 417 [2nd Dept. 2005].)

The defendant having met its initial burden, the burden shifts to the plaintiff to establish the existence of a material issue of fact.

The plaintiff argues that the contract’s condition precedents should be excused, arguing that the defendant breached the contract – thus excusing the condition precedents- by assuming the means and methods of performing the work on the project. Specifically, the defendant argues that the defendant, by mandating that the project proceed pursuant to required regulations governing COVID-19 construction projects, assumed the means and methods of the construction project.⁵

⁵ The Court rejects this argument. Section 10.2.2 of the contract states: “[t]he [plaintiff] shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.” The defendant met its initial burden on its motion to establish that the requirements for construction projects under COVID-19 protocols were mandated by state regulation, not the defendant. (See NYSCEF Docket # 71.) The plaintiff’s conclusory argument that the defendant “voluntarily imposed” the 6’ social distancing requirement is belied by the defendant’s evidentiary submissions.

“...[A] party to a contract “cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition” (*Kooleraire Serv. & Installation Corp. v. Board of Educ.*, 28 N.Y.2d 101, 106, 320 N.Y.S.2d 46, 268 N.E.2d 782; see also, *Amies v. Wesnofske*, 255 N.Y. 156, 163, 174 N.E. 436; *Patterson v. Meyerhofer*, 204 N.Y. 96, 100–101, 97 N.E. 472).” (*A.H.A. Gen. Const., Inc. v. New York City Hous. Auth.*, 92 NY2d 20, 31 [1998].) “[I]t is well settled that a “party's obligation to perform under a contract is only excused where the other party's breach of the contract is so substantial that it defeats the object of the parties in making the contract” (*Frank Felix Assoc., Ltd. v Austin Drugs, Inc.*, 111 F3d 284, 289 [1997]; see *Robert Cohn Assoc., Inc. v Kosich*, 63 AD3d 1388, 1389 [2009]), and plaintiff failed to raise a triable issue of fact whether defendant's actions defeated the parties' objectives in entering into the contract.” (*Accadia Site Contracting, Inc. v. Erie Cnty. Water Auth.*, 115 AD3d 1351, 1353 [4th Dept. 2014].)

Assuming *arguendo* that the defendant did improperly assume control of the means and methods of contract performance by the plaintiff, the plaintiff does not offer any evidence that this prevented the plaintiff from properly complying with the notice of claim and mandatory arbitration provisions in the contract between the parties. Here, the plaintiff failed to make any showing that the defendant's alleged interference with the plaintiff's discretion in performing the work required

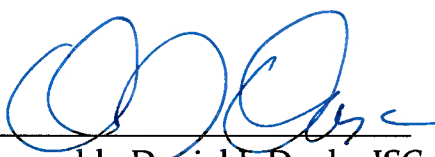
under the contract frustrated its ability to comply with the notice of claim and mandatory arbitration provisions contained in Article 15 of the contract.⁶ (See *Accadia Site Contracting, Inc. v. Erie Cnty. Water Auth.*, 115 AD3d at 1353: “We note in any event with respect to plaintiff’s second contention that, although “it is undisputedly the rule that one who frustrates another’s performance cannot hold that party in breach” (*Water St. Dev. Corp. v City of New York*, 220 AD2d 289, 290 [1995], *lv denied* 88 NY2d 809 [1996]; see *Young v Hunter*, 6 NY 203, 207 [1852]), plaintiff failed to raise a triable issue of fact whether its performance with the notice and reporting requirements was prevented or hindered by defendant’s alleged misconduct (see *A.H.A. Gen. Constr.*, 92 NY2d at 34; *DiPizio Constr. Co., Inc. v Niagara Frontier Transp. Auth.*, 107 AD3d 1565, 1566 [2013]; cf. *Turbo Carpentry Corp. v Brancadoro*, 21 AD3d 479, 480 [2005]).”)

The breach of contract claim is dismissed. (*Providence State St. Hous. Dev. Fund Co., Inc. v. Buckingham Constr., LLC, supra.*)

⁶ As the Court of Appeals observed in *A.H.A. Gen. Const., Inc. v. New York City Hous. Auth, supra*: “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. Such provisions are important both to the public fisc and to the integrity of the bidding process.” (*Supra*, at 33–34.)

Based upon the foregoing, and the papers submitted herein,⁷ it is hereby
ORDERED that the defendant's motion for summary judgment is GRANTED;
and it is further
ORDERED that the complaint is dismissed.
This constitutes the Decision and Order of the Court.

Dated: February 10, 2025



Honorable Daniel J. Doyle, JSC

⁷ Notice of Motion (NYSCEF Docket # 32); Affirmation in Support (NYSCEF Docket # 33); Affirmation in Support (NYSCEF Docket # 34); Statement of Material Facts (NYSCEF Docket # 35); Memorandum of Law in Support (NYSCEF Docket # 36); Exhibits (NYSCEF Docket #s 37-71); Affirmation in Opposition (NYSCEF Docket # 76); Response to Statement of Material Facts (NYSCEF Docket # 77); Memorandum of Law in Opposition (NYSCEF Docket # 78); Affidavit in Opposition (NYSCEF Docket # 79); Affidavit in Opposition (NYSCEF Docket # 80); Affidavit in Opposition (NYSCEF Docket # 81); Exhibits (NYSCEF Docket #s 82-103); Memorandum of Law in Reply (NYSCEF Docket # 104); Affirmation in Reply with exhibits (Docket #s 105-107).