4A General Contr. Corp. v New York City Hous. Auth.
2005 NY Slip Op 30550(U)
February 2, 2005
Supreme Court, New York County
Docket Number: 107261/2004
Judge: Walter B. Tolub

[* 1]

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

4A General

-v-

NYC Housing

INDEX NO. 107261/04

MOTION DATE 11/10/04

MOTION SEQ. NO. 01

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision

FILED
FEB 9 2005

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/2/05

WALTER B. TOLUB J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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4A GENERAL CONTRACTING CORP.,

Plaintiff,

Index No. 107261/2004
Mtn Seq. 001

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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WALTER B. TOLUB, J.:

By this motion, defendant, the New York City Housing Authority (NYCHA) seeks to dismiss this action pursuant to CPLR 3211 (a)(1) and (a)(7).

Plaintiff, a general contractor, bid for and was awarded a construction contract for bathroom and kitchen renovations at the Murphy Houses/1010 East 178th Street under NYCHA Contract No. E.D. 9900018 (the contract). The contract awarded to plaintiff set forth NYCHA construction requirements, and further provided 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 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 costs 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. If the authority shall deem it necessary for proper decision, upon any notice filed hereunder, to require additional data, depositions or verified statements, the Contractor must furnish the same within twenty (20) days after

written demand therefor upon him/her (Contract, Section 23(a), Notice of Motion, Exhibit D).

At some point after the contract was executed, defendant requested that plaintiff complete additional work relating to the renovation. In response to the new requirements, in May, 2003, plaintiff submitted a revised cost proposal to defendant. The proposal included all of the charges related to this additional work. The total cost for this work was billed as $ 210,628.00 (Opposition Exhibit C).

On December 15, 2003, plaintiff received a fax from Defendant containing a cost breakdown for the additional completed work. Defendant's calculations resulted in a bill of $47,883.85 (Affirmation in Opposition, Exhibit D). The relevant text of the fax reads:

> Attached please find our estimated cost for upgrade removal procedures for ceramic components at 1010 E. 178th Street Houses. If you agree with our estimated cost of $47,834.00 (forty-eight thousand one hundred thirty-four dollars), please indicate your acceptance below and fax - back this form so that we can prepare our final paperwork for your signature. If you are in disagreement with any part of this estimate, please submit detailed description and related documentation. (Affirmation in Opposition, Exhibit D).

Plaintiff admittedly did not sign the faxed paperwork because it did not agree with defendant's estimate. In February, 2004, plaintiff filed a notice of claim with respect to the unpaid

amount. The instant litigation followed.

Discussion

At the core of this dispute is the question of whether plaintiff filed its notice of claim in a timely manner. Defendant's position is that plaintiff's claim arose on December 15, 2003 when NYCHA refused to pay the amount plaintiff requested for completing the additional work, and that the time in which plaintiff had to file its notice of claim expired twenty days thereafter. Plaintiff contends that the notice of claim filed in February, 2004 is timely because plaintiff had no knowledge as to whether defendant had made a final determination with respect to the additional work cost estimate provided to them.

Plaintiff's argument, however, is problematic in that the complaint clearly indicates that plaintiff recognized it had a cause of action as of December, 2004:

> 9. Despite submission by 4A of its reasonable request for payment of work performed pursuant to the aforesaid change order, on or about December 15, 2003 NYCHA refused to pay the amount requested, offering to instead to pay the sum of $47,833.85.
>
> 10. NYCHA's refusal to pay 4A's requisition for payment of the change order is a breach of its contract with 4A, causing 4A to be damaged in the total sum of $210,148.00 plus interests and costs (Notice of Motion, Exhibit A).

Accepting all of the allegations of the complaint as true and affording plaintiff all favorable instances to be drawn from them,

plaintiff simply cannot, on any reasonable view of the facts, succeed on its cause of action.

The terms of Section 23 of the contract are quite straightforward: within 20 days after a claim arises, the aggrieved party must file a notice of claim with the NYCHA. This provision is the prerequisite to recovery under the contract and failure to satisfy this contractual requirement, which is subject to strict construction as a matter of public policy (*A.H.A. General Construction, Inc. v. New York City Housing Authority*, 92 NY2d 20 [1998]), will effectively bar the claim (see, *Bat-Jac Contracting, Inc. v. New York City Housing Authority*, 1 AD3d 128 [1st Dept. 2003]; *A.H.A. General Construction, Inc. v. New York City Housing Authority*, 92 NY2d 20 [1998]).

In the instant case, defendant faxed plaintiff in December, 2003 to inform them that they did not intend to pay the $210,628.00 sought by plaintiff. Once they received that communication, regardless of what day the defendant made the actual decision, plaintiff, as a condition precedent, had to file a notice of claim within twenty days. Even if this court accepts plaintiff's argument that they did not know exactly which day in December defendant made their decision to not pay the amount sought, by the time they filed the notice of claim in February, 2004, the twenty days in which it had to respond under the contract governing this matter had lapsed. The notice of claim in this case is therefore

untimely, and plaintiff's recovery is barred under the contract. Moreover, plaintiff's second cause of action must also fail, as where a valid and enforceable contract exists between the parties, claim of unjust enrichment cannot lie (*Katz v American Mayflower Life Insurance Company of New York*, 2004 WL 2984899 [1st Dept. 2004]; *Cornhusker Farms, Inc. v. Hunts Point Cooperative Market, Inc.*, 2 AD3d. 201 [1st Dept. 2003]).

Accordingly, it is

ORDERED that the defendant's motion to dismiss the instant complaint is granted.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/2/05

HON. WALTER B. TOLUB, J.S.C.