

**Bovis Lend Lease LMB, Inc. v New York City Sch.
Constr. Auth.**

2012 NY Slip Op 33352(U)

July 18, 2012

Supreme Court, Queens County

Docket Number: 23878 2009

Judge: Marguerite A. Grays

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ORIGINAL

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS
Justice

IA Part 4

BOVIS LEND LEASE LMB, INC.,

Plaintiff(s)

-against-

NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY,

Defendant(s)

_____x

Index
Number 23878 2009

Motion
Date May 29, 2012

Motion
Cal. Number 4

Motion Seq. No. 3

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QUEENS COUNTY CLERK
FILED

The following papers numbered 1 to 8 read on this motion by defendant New York City School Construction Authority (SCA) for leave to reargue and/or renew and upon reargument and/or renewal, seek an order vacating this court's order of April 4, 2012, and granting SCA's prior motion for an order (1) dismissing that portion of the second cause of action for extra work for claims in the aggregate amount of \$2,348,683.86, as identified in Schedule A to the substantial completion release dated June 5, 2009, and in Schedule A attached to both the notice of claim dated August 31, 2010, and the amended complaint dated November 22, 2010; and (2) dismissing the third cause of action to recover damages for delay, pursuant to CPLR 3211(a)(1) and (7), on the grounds that plaintiff failed to file notices of claim in compliance with the statutory prerequisites set forth in Public Authorities Law §1744, and staying discovery pending the determination of this motion.

| | <u>Papers Numbered</u> |
|--|----------------------------|
| Notice of Motion-Affirmation-Exhibits(A-J)-Affidavit of Service..... | 1-4 |
| Prior Motion Papers-Affidavit of Service..... | 5-6 |
| Affirmation in Partial Opposition-Affidavit of Service..... | 7-8 |

Upon the foregoing papers this motion is determined as follows:

Defendant SCA's motion for leave to renew is granted. This court denied the SCA's prior motion, as it had failed to demonstrate that it had timely appeared in the action, served an answer to the original complaint, or otherwise moved with respect to the original complaint, or moved for leave to serve a late answer. It was noted that both the parties' papers and the court's file was devoid of any such evidence, and that the SCA had failed to attach a copy of the October 5, 2010 stipulation it had referred to in its moving papers. The court also noted that although plaintiff had served an amended complaint on November 26, 2010, the court could not determine whether the said amendment was proper.

Contrary to counsel for the SCA's assertion, the court's prior determination was not based upon any perceived default on the part of the defendant. Rather, the SCA previously failed to properly inform this court of the series of stipulations entered into by the parties extending the SCA's time to answer both the original complaint and the amended complaint. Notably, there is a gap of 26 months between the commencement of this action and the SCA's pre-answer motion, and none of the relevant stipulations were attached to the prior motion papers, or filed with the Clerk of the Court. In the absence of such documentary evidence, this court was unable to determine, based upon the papers submitted, whether the SCA's prior motion was timely.

The documentary evidence now submitted establishes that plaintiff Bovis Lend Lease LMB, Inc. (Bovis) commenced this action on September 9, 2009, and served the SCA with process on September 14, 2009. The parties, in a stipulation dated September 28, 2009, agreed to extend the SCA's time to respond until thirty days after receipt of plaintiff's counsel's written demand for a response to the complaint. Plaintiff's counsel has not made a written demand for a response to the original complaint. On November 26, 2010 plaintiff served the SCA with an amended complaint, pursuant to CPLR 3025(a), and the parties entered into a stipulation dated December 8, 2010, whereby they agreed to extend the SCA's time to respond until thirty days after receipt of plaintiff's counsel's written demand for a response to the amended complaint. Plaintiff's counsel made a written demand for a response to the amended complaint in a letter dated September 26, 2011, which was received by the SCA on September 29, 2011. The parties, in a stipulation dated October 5, 2011 extended the SCA's time to respond to the amended complaint until November 14, 2011. The SCA's prior motion to dismiss a portion of the second cause of action, and to dismiss the third cause of action was served on November 14, 2011 and, therefore, is timely.

Plaintiff Bovis alleges in its complaint that it entered into a contract with the SCA, dated September 30, 2005, whereby Bovis agreed to perform labor and furnish equipment and materials in connection with the construction of a new school building known as New Middle School/High School at MS/HS 352(X) in the Bronx, New York. Bovis alleges that it furnished all bonds required under the contract and thereafter performed all of the terms

and conditions of the contract. Plaintiff alleges that it filed with the SCA verified and itemized notices of claims on November 26, 2008, February 5, 2010, June 18, 2010 and August 31, 2010, and that more than 30 days has elapsed since the filing of these notices of claim and that the SCA has neglected or refused to adjust or pay its claims.

Plaintiff Bovis, in its first cause of action, seeks to recover the sum of \$2,403,953.00 together with interest, for approved extra and additional work. The second cause of action alleges that Bovis performed certain additional work, itemized in Schedule A, and seeks to recover the sum of \$3,039,601.00 for said additional work. The third cause of action alleges that the SCA breached the contract, unreasonably delayed plaintiff's work, and interfered with and disrupted plaintiff's operations, which prevented plaintiff from maintaining its planned schedule for the completion of the contract work and required it to accelerate its performance, causing additional and increased costs of labor, supervision, equipment, materials, field costs, overhead and other construction costs, in an amount not less than \$5,947,410.00. The fourth cause of action alleges that during the performance of the contract, defendant caused others to perform alleged corrective work without due notice to plaintiff, and that defendant has or intends to take unreasonable credits or back charges for the alleged corrective work in the sum of \$1, 262, 688.00 and that said sum is due and owing to Bovis, together with interest.

Defendant SCA seeks to dismiss the second cause of action for extra work on the grounds that the November 26, 2008 notice of claim fails to comply with the provisions of Public Authorities Law §1744 (3), and that the additional notices of claim are deficient and were not timely filed. Defendant SCA seeks to dismiss the third cause of action for delay damages on the grounds that the June 18, 2010 and August 31, 2010 notices of claim were untimely filed more than three months after the claims accrued, a condition precedent to suit (Public Authorities Law §1744 [2]), and that the filing of these notices after this action was commenced deprived the SCA of pre-litigation notice.

Plaintiff asserts, in opposition, that the SCA adopted an alternate five step claim resolution procedure for each of its claims that is inconsistent with the Public Authorities Law §1744 notice of claim procedure. It is therefore asserted that the SCA waived or is estopped from asserting the statutory notice of claim requirements. Plaintiff also asserts that many of the claims objected to by the SCA are supported by timely and proper notices of claim. With respect to the second cause of action for extra work, Bovis asserts that there are a total of 41 extra work claims and that the SCA only objects to 20 claims as being unsupported by timely notice; that six of these claims were included in the November 26, 2008 notice of claim; and that at least 21 extra work claims should survive this motion. In addition, it is asserted that the extra work claims were timely filed and that each claim was sufficiently detailed. With respect to the delay claim, plaintiff asserts that these claims were

sufficiently detailed.

Public Authorities Law § 1744(2) requires that an action "relating to the design, construction, reconstruction, improvement, rehabilitation, repair, furnishing or equipping of educational facilities" may be maintained against the SCA only if a notice of claim is presented "within three months after the accrual of such claim."

Public Authority Law §1744(3) provides that "[t]he notice of claim presented pursuant to subdivision two of this section must set forth in detail with respect to such claim; (i) the amount of the claim;(ii) a specific and detailed description of the grounds for the claim, relating the dollar amount claimed to the event purportedly giving rise to the claim and indicating how the dollar amount is arrived at; and (iii) the date of the event allegedly underlying the claim."

A timely notice of claim is a condition precedent to suit, and Bovis has the obligation to plead and prove that its notice of claim was served within three months after the accrual of its claim (Public Authority Law §1744; *C.S.A. Construction Corp. v New York City School Construction Authority*, 5 NY3d 189, 192 [2005]; *Parochial Bus Systems, Inc. v Board of Education*, 60 NY2d 539, 547 [1983]; *Popular Construction, Inc. v New York City School Construction Authority*, 268 AD2d 467 [2000]). "It is well settled that a contractor's claim accrues when its damages are ascertainable (see *Matter of Board of Educ. of Enlarged Ogdensburg City School Dist. [Wager Constr. Corp.]*, 37 NY2d 283 [1975]). Although the determination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, 'it generally has been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted' (*New York City School Constr. Auth. v Kallen & Lemelson*, 290 AD2d 497[2002][internal quotation marks and citations omitted])." (*C.S.A. Construction Corp. v New York City School Construction Authority.*, 5 NY3d at 192).

Bovis' claim that the SCA's claim resolution procedure constitutes a waiver of the statutory notice of claim, is rejected. Compliance with Section 1744, unless waived, is a condition precedent to the commencement of this action. This statutory provision will be deemed to have been waived only where there is an express agreement that it is inapplicable or where waiver may be implied from the fact that the parties have set out detailed procedures which are "plainly inconsistent" with those contained in that section (*Davis-Wallbridge, Inc. v Syracuse*, 71 NY2d 842, 843-844 [1988]; *N. Picco & Sons Contracting Co. Inc. v Bd. of Ed. of Bronxville School*, 26 AD3d 317 [2006]; *Matter of South Colonie Central School Dist.*, 86AD2d 686 [1982]; *Matter of Guilderland Cent. School Dist. [Guilderland Cent. Teachers Assn.]*, 45 AD2d 85, 86[1974]).

Here there was no express agreement to waive the notice of claim provision of Public Authority Law §1744, and the procedures set out in the contract's dispute resolution clause are not plainly inconsistent with the provisions of Section 1744. Rather, the contract between the SCA and Bovis, permits a "[c]laimant who files a Notice of Claim in conformity with the provisions of Section 1744 of the New York State Public Authorities Law" to elect to submit the matter to non-binding mediation. The contract's dispute resolution procedure does not evidence any intention on the part of the SCA to waive the statutory notice of claim.

Bovis' assertion that the SCA should be estopped from raising the defense of the failure to comply with the statutory notice of claim provision is equally unavailing. Estoppel is available against a municipality only "under exceptional circumstances". Here, there is no evidence that the SCA improperly engaged in any conduct which lulled plaintiff into sleeping on its rights to its detriment (see *Conquest Cleaning Corp. v New York City School Construction Authority*, 279 AD2d 546 [2001]). Furthermore, there is nothing to suggest that the SCA engaged in activities, conduct, statements or writings, that would reasonably lead Bovis to believe that it need not observe the statutory requirements to protect its claim. The SCA's discussion of possible mediation or resolution of plaintiff's claims does not constitute a waiver of the statutory notice of claim provision.

Bovis filed a verified notice of claim dated November 26, 2008, possibly in connection with an election to mediate certain claims. Said notice of claim states that Bovis had performed extra work at the direction of the SCA amounting to \$7,399,316.00 for which it had not been paid. Bovis also claimed that the SCA had breached the contract, delayed Bovis' work, and interfered with and disrupted its operations, and claimed that it was entitled to an extension of its contract time in which to complete its work, and sought payment of the sum of \$5,574,537.77 for additional and increased costs of labor, supervision, equipment, materials, field costs, overhead and other construction. The November 26, 2008 notice of claim did not specify the extra work allegedly performed, did not provide any details with respect to any of the claims and the amounts sought, and did not set forth the dates the alleged events giving rise to these claims.

It is undisputed that upon reaching substantial completion, Bovis received a payment of \$2,486,796.76, and executed a general release dated June 5, 2009, except for the items listed in Schedule A which was attached to, and made a part of, the general release. Bovis, in said Schedule A, identified and set forth a description of the extra work claimed, the dates each claimed item was submitted to the SCA, and the dollar value of each item. Certain items do not contain the date they were submitted to the SCA and bear the abbreviation "TBD" (to be determined).

Bovis commenced the within action on September 2, 2009. Prior to serving the amended complaint on November 26, 2010, Bovis filed three additional notices of claim with the SCA. In a verified notice of claim dated February 5, 2010, Bovis stated that during the performance of the contract the SCA informed Bovis that it intended to assess back charges with a value of \$1,262,688.00 against funds due and owing to Bovis, and that such back charges, when and if assessed, are improper and constitute a breach contract.

In a verified notice of claim dated June 17, 2010, Bovis seeks the additional sum of \$1,818,213.00, and extension of the contract time to at least 88 days in order to reach substantial completion, and a further extension to reach final completion. Bovis stated that it performed extra work at the SCA's direction in the sum of \$131,729.00 which it previously claimed in prior notices, and that this sum has not been paid; that the SCA breached the contract, delayed Bovis' work, and interfered with and disrupted its operations, which prevented Bovis from completing the contract by the planned substantial completion date of June 9, 2008 and final completion date of August 8, 2008. Bovis in this notice of claim seeks an extension of the contract's substantial and final completion dates, and the sum of \$1,686,484.00 for additional and increased cost of labor, supervision, equipment, materials, field costs, overhead and other costs of construction, in addition to the costs claimed in the notices of claim filed on November 26, 2008 and February 5, 2010.

In an "amended and supplemental" verified notice of claim dated August 30, 2010, Bovis stated that it was amending and supplementing the previous notices of claim filed on November 26, 2008, February 5, 2010 and June 18, 2010, and demanded (1) the sum of \$11,390,964.00; (2) the return of any credits taken or to be taken by the SCA as improperly assessed back charges with a value of \$1,262,688.00; and (3) an extension of the contract time to reach substantial and final completion. Bovis claimed that pursuant to the contract it is owed the sum of \$2,403,953.00 for approved extra and additional work; that during the performance of the contract it performed extra work listed in Schedule A, which it attached to the notice of claim, totaling \$3,039,601.00; that the SCA breached the contract, unreasonably delayed, interfered with and disrupted Bovis' work, which prevented it from completing the contract by the planned substantial completion date of June 9, 2008 and final completion date of August 8, 2008; and seeks an extension of the contract's substantial and final completion dates, and the sum of \$5,947,410.00 for additional and increased cost of labor, supervision, equipment, materials, field costs, overhead and other costs of construction.

Bovis was required to file a notice of claim with the SCA prior to commencing the within action. The November 26, 2008 notice of claim is the only notice of claim filed by

Bovis prior to the commencement of this action. With respect to the second cause of action for extra work, the November 26, 2008 notice of claim did not set forth “a specific and detailed description of the grounds for the claim, relating the dollar amount claimed to the event purportedly giving rise to the claim and indicating how the dollar amount is arrived at” as required by Public Authority Law §1744(3). The first time Bovis itemized its extra work in a notice of claim is in the August 30, 2010 notice of claim, which attaches Schedule A. The identical Schedule A is also attached to the amended complaint. Said Schedule A, unlike the Schedule A attached to the June 5, 2009 general release, does not set forth “the date of the event allegedly underlying the claim” as required by Public Authority Law §1744(3).

The SCA, in the within motion, identifies in its Exhibit J, twenty items of extra work that were submitted by Bovis and listed in Schedule A attached to the August 30, 2010 notice of claim which total \$2,348,683.36, and are also listed, with their submission dates, in the Schedule A that Bovis attached to the general release. As to these twenty items of extra work, the date of the general release, at the latest, fixed the date on which damages were ascertainable, although it is noted that many of these claims were submitted to the SCA prior to the date of the general release. Thus, at the latest, plaintiff’s claim as to said twenty items accrued on June 5, 2009 (see *C.S.A. Contr. Corp. v New York City School Constr. Auth.*, *supra* ; *D & L Assoc., Inc. v New York City School Constr. Auth.*, 69 AD3d 435 [2010]; *Koren-DiResta Constr. Co., Inc. v New York City School Const. Auth.*, 293 AD2d 189, 191-192 [2002]). Accordingly, as the November 26, 2008 notice of claim is deficient, and the claims for said twenty items of extra work accrued more than three months prior to the service of the August 30, 2010 notice of claim, said claims for extra work as identified in defendant’s Exhibit J, totaling \$2,348,683.36, are barred by the late filing of the notice of claim.

Plaintiff’s third cause of action seeks to recover damages arising out of delays in the work in the sum of \$5,947,410.00. The November 26, 2008 notice of claim, the June 17, 2010 notice of claim and the August 30, 2010 notice of claim each set forth Bovis’ claim for delay damages in impermissibly vague and general terms, alleging such generic acts on the part of the SCA as breach of contract, delayed of Bovis’ work, and interfered with and disrupted of Bovis’ operations, resulting in additional and increased costs of labor, supervision, equipment, materials, field costs, overhead and other costs of construction. (see generally *Alex-Mitchell:El v State of New York*, 2 AD3d 549[2003]). In addition, although the November 26, 2008 notice of claim sought to recover \$5,574,537.77, the June 17, 2010 notice of claim sought to recover an additional \$1,686,484.00, and the August 30, 2010 notice of claim sought to recover \$5,947, 410.00, these sums were stated in the aggregate and no amounts were stated in relation to any particular increase cost .

Bovis was aware of the requisite details of its delay claim by April 2, 2009, when it sent a multi-page letter to the SCA setting forth in detail and accounting for the sums incurred amounting to \$4,212,178.29. In the Schedule A attached to the June 5, 2009 general release, Bovis listed a claim for "BBL Compensable Time Extension Claim", that it had submitted to the SCA on April 2, 2009, in the sum of \$4,212,178.29. Therefore, as Bovis's delay claim in the sum of \$4,212,178.29 was ascertainable no later than June 5, 2009, this claim accrued more than three months prior to the filing of the June 18, 2010 and August 30, 2010 notices of claim, and is time barred.

To the extent that Bovis sought an additional aggregate sum of \$1,686,484.00 in the June 17, 2010 notice of claim and the aggregate sum of \$5,947,410.00 its August 30, 2010 notice of claim, these notices of claim were filed well after this action was commenced in September 2009, and therefore are untimely.

Accordingly, defendant SCA's motion to renew is granted and upon renewal, that branch of SCA's prior motion which seeks an order dismissing that portion of the second cause of action for extra work for claims in the aggregate amount of \$2,348,683.86, as identified in Schedule A to the substantial completion general release dated June 5, 2009, and in Schedule A attached to both the notice of claim dated August 31, 2010, and the amended complaint dated November 22, 2010, is granted. That branch of defendant SCA's prior motion which seeks an order dismissing the third cause of action to recover damages for delay is granted.

Dated:

JUL 18 2012



MARGUERITE A. GRAYS

J.S.C.