SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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FERREIRA CONSTRUCTION CO.,

Plaintiff,

-against-

CITY OF NEW YORK, DEPARTMENT OF TRANSPORTATION

Defendant.

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DECISION AND ORDER
Index No. 652458/2014
Mot. Seq. 001

HON. ANIL C. SINGH, J.:

Defendant City of New York, Department of Transportation ("the DOT" or "defendant") moves for dismissal of Ferreira Construction Co.'s ("Ferreira" or "plaintiff") complaint pursuant to CPLR 3211 (a) (1), (5) and (7).

Plaintiff Ferreira is suing the DOT for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment and *quantum meruit*.

The complaint alleges the following: plaintiff entered as a general contractor into two contracts with DOT involving bridge reconstruction, the first one, the reconstruction of the East 8th Street Access Ramp Bridge over the Belt Parkway in Brooklyn, New York ("East 8th Street Project"); the second one, the reconstruction of the East 78th Street Pedestrian Bridge over the FDR Drive ("FDR Drive

Project"). Both contracts included in a Notice to All Bidders a statement that the contract is part of a "pilot program", known as the 2008 Delay Damages Pilot Standard Construction Contract ("Pilot Contract"), which was specifically designed to compensate contractors for "delay damage" where the contractor incurred additional costs "as a result of acts or omissions of the City agency or its representatives."

The complaint further alleges that, regarding both projects, DOT was responsible for delays in reconstruction.

For the FDR Drive Project, plaintiff alleges that in 2011, its work was delayed by approximately 5 months due to an error in the contract drawing for structural steel, DOT's "excessive" time to review and approve shop drawings for the main bridge span, and delay in renewing permits regarding street closures.

For the East 8th Street Project, Ferreira alleges that, between 2009 and early 2012, its work was delayed by approximately 15 months due to the late issuance of the Notice to Proceed, resulting in changed work sequences and delay during calendar year 2009, storms in February and March 2010, the City's acts and omissions resulting in delays relating to the redesign of bearings for the bridge structures, redesign of structural steel beams, review of electrical work, adjustments to the lengths of pier piles, and change in the design of structural

concrete, all prior to October 2010, and unspecified alleged delays in late 2011/early 2012.

Plaintiff avers that it was given reassurances from representatives of DOT that it would receive an appropriate recovery. Plaintiff filed its claims for delay damages pursuant to Article 11 ("Article 11 claims") for the FDR Drive Project on July 10, 2012 and for the East 8th St Project on December 25, 2012.

Ultimately, plaintiff's claims for delay damages pursuant to Article 11 ("Article 11 claims") were denied by the DOT. Due to its failure to receive the sums to which it claims a just entitlement, plaintiff brings the instant action.

DOT moves for dismissal of the complaint on the ground that the claims sought by plaintiff are now untimely pursuant to Article 56.2 of the Pilot Contract. In this case, according to DOT, a party is precluded from bringing a lawsuit related to the agreements after six months from the date that the Commissioner of DOT issues a certificate of substantial completion with respect to the project.

Plaintiff did not commence this suit until August 12, 2014, over six months after the dates it received notice of substantial completion of both projects. Thus, DOT contends that plaintiff cannot sue DOT for the recovery of delay damages in connection with the two projects.

Discussion

DOT is moving for dismissal of the complaint on three grounds, documentary evidence (CPLR 3211 [a] [1]); statute of limitations (CPLR 3211 [a] [5]); and failure to state a cause of action (CPLR 3211 [a] [7]). "In order to prevail on a CPLR 3211 (a) (1) motion, the moving party must show that the documentary evidence conclusively refutes plaintiff's . . . allegations (citation omitted)" AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 N.Y. 3d 582, 590-591 (2005). When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference See, Leon v Martinez, 84 N.Y. 2d 83, 87 (1994).

Breach of contract (Count One)

The Pilot Contract is clear that a contractor must assert delay claims by commencing an action within six months of notice of substantial completion. Article 56.2 of the Pilot Contract states in relevant part:

> Any claim...against the City for damages for breach of Contract shall not be made or asserted in any lawsuit...unless such law suit is commenced within six (6) months after the date the Commissioner issues a Certificate of Substantial Completion pursuant to Article 44...

Substantial completion was achieved with respect to the FDR Drive Project on January 20, 2012, and plaintiff was notified on January 30, 2012, making July 30, 2012 the latest date on which plaintiff could assert a claim for delay, pursuant to Article 56.2. Similarly, defendant notified plaintiff that substantial completion was reached for the East 8th Street Project Plaintiff on May 4, 2012, making December 25, 2012 the last date on which plaintiff could assert a claim for delay on the project. However, plaintiff commenced suit on the projects on August 12, 2014.

The exception provided in Article 56.2.1 does not apply

Plaintiff argues its claims are made with respect to the adequacy of payment and should therefore be assessed under the exception, Article 56.2.1. Pursuant to Article 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.

Article 2.1.17 of the Pilot Contract defines "Final Acceptance" as "final written acceptance of all the Work by the Commissioner, a copy of which shall be sent to the Contractor." Plaintiff asserts that Final Acceptance occurred when it received the Final Payment Voucher, which was issued on February 11, 2014 for the FDR Drive Project and January 9, 2015 for the East 8th Street Project. Since the

lawsuit was filed on August 12, 2014, Plaintiff contends that the suit was filed before final acceptance and is timely.

Plaintiff's argument is flawed. The gravamen of plaintiff's complaint relates to alleged DOT delays that resulted in additional cost of the projects. These events and circumstances associated with the delay periods occurred prior to notice of substantial completion on each project. The delays in the FDR Drive Project occurred in 2011 while the delays in the East 8th St Project occurred between 2009 and early 2012. The defendant's denial of plaintiff's Article 11 delay claims are not separate events occurring after substantial completion. Rather, the delay claims seek compensation for the very same circumstances and events that plaintiff's complaint alleged caused delay on both projects. Since these circumstances and events did not arise after but before substantial completion of the projects, the exception to Article 56.2.1 does not apply. The Pilot Contract is unambiguous such claims have to be "commenced within six (6) months after the date the Commissioner issues a Certificate of Substantial Completion".[1] Therefore, plaintiff's lawsuit is untimely.

[1] The fact that defendant notified plaintiff of substantial completion by means of a letter, and not a certificate, has no bearing upon the date of accrual. See e.g., Dart Mechanical Corp. v. City of New York, 121 A.D.3d 452, 452 (1st Dept 2014) ("The letter constitutes a "certificate of substantial completion" under the terms of the contract, and it was issued by the Commissioner's duly authorized representative, as permitted under the contract.")

Moreover, the fact that the DOT denied plaintiff's Article 11 claim after substantial completion does not change the fact that plaintiff's cause of action accrued on the date of notice of substantial completion, as that would have been the date plaintiff's injury would have been known. Apart from the Pilot contract, New York case law is clear that "a cause of action for breach of a construction contract accrues upon substantial completion of the work." See e.g., Dart Mechanical Corp. v. City of New York, 121 A.D.3d 452, 452 (1st Dept 2014); Superb Gen. Contr. Co. v. City of New York, 39 A.D.3d 204 (1st Dept 2007); EastCo Bldg Servs., Inc. v. N.Y. City Hous. Authority, 98 A.D. 3d 920 (1st Dept 2012).

Alternatively, plaintiff argues that DOT's construction of its contractual limitations period is unfair and unreasonable and should not be enforced. Plaintiff argues that the application of a six-month limitations period would require it to file suit unreasonably early. However, the courts have upheld similar limitations periods as reasonable and enforceable. See e.g., Dart Mechanical Corp, 121 A.D. 3d 452 (enforcing a six-month limitation period); CAB Assc v. City of N.Y., 32 A.D.3d 229, 232 (1st Dept 2006) (enforcing four-month limitation period); Top Quality Wood Work Corp. v. City of New York, 191 A.D.2d 264, 264 (1st Dept 1993) (enforcing six-month limitation period).

Plaintiff's argument that the problem with the six-months limitation is "not its duration, but its accrual" is also unavailing. Plaintiff cites to Executive Plaza LLC v. Peerless Inc., 22 N.Y. 3d 511 (2014) to support its argument. However, Executive Plaza is distinguishable as it involved a fire insurance policy that contained a clause limiting the time in which the insured may bring suit under the policy. The limitation period was two years, running from the date of the fire. The policy allowed the insured to recover the cost of replacing destroyed property—but only after the property has already been replaced. The court held that the two-year limitation period was unreasonable as the insured could not reasonably replace the property within two years. The limitation period nullified the claim.

Here, unlike in Executive Plaza, the delays had occurred prior to plaintiff receiving notice of substantial completion of the work. Plaintiff had sufficient time to put in an Article 11 delay claim.

Accordingly, defendant's motion to dismiss plaintiff's first cause of action for breach of contract is granted.

Breach Of Implied Covenant Of Good Faith And Fair Dealing (Count Two)

A claim for breach of implied covenant of good faith and fair dealing must be dismissed as duplicative of a breach of contract claim where, as here, "both claims arise from the same facts and seek the identical damages for each alleged breach." See, Netologic, Inc. v. Goldman Sachs Group, Inc., 110 A.D.3d 433, 434

(1st Dept 2013); Logan Advisors, LLC v. Patriarch Partners, LLC, 63 A.D. 3d 440, 443(1st Dept 2009). Moreover, a claim of implied duty of good faith and fair dealing cannot create new duties under a contract or substitute for an insufficient contract claim. Triton Partners LLC v. Prudential Sec. Inc., 301 A.D.2d 411, 411 (1st Dept.2003) It merely brings to light implicit duties to act in good faith already contained, although not necessarily specified in the contract. Duration Mun. Fund, L.P. v. J.P. Morgan Securities Inc., 2009 WL 2999201, at *7 (Sup. Crt. NY Cnty, September 16, 2009), aff'd 77 A.D.3d 474 (1st Dept 2010). The implied covenant cannot be construed so broadly as effectively to nullify other express terms of the contract, or to create independent contractual rights." Fasseha v. TD Waterhouse Inv'r Servs., Inc., 305 A.D. 2d 268 (1st Dept 2006).

Plaintiff argues that its Article 11 claim on the FDR Drive Project was rejected in bad faith because it submitted claim on the East 8th Street Project. Plaintiff contends that it had months long negotiations with representatives of the DOT even after notice of substantial completion had been given. It maintains that the parties agreed that a compensable delay had occurred, agreed on the dollar amount of the delay claim and that DOT's representatives explicitly communicated that the delay claims would be paid.

Further, plaintiff alleges that the DOT had lulled it into allowing the limitations period to lapse by encouraging it to submit an Article 11 delay claim and giving it extensions of time to file its delay claims.

First, plaintiff's claim is duplicative of its breach of contract claim. It arises from the same facts. The denials of the Article 11 claims are governed by Article 56.2. "The covenant of good faith and fair dealing cannot serve to negate that provision." Transit Funding Associates, LLC v. Capital One Equipment Finance Corp., 2017 WL 754335, *4 (1st Dept, Feb. 28, 2017).

Second, "[t]he defense of estoppel (or ratification, acquiescence or laches) cannot be invoked against a governmental agency to prevent it from discharging its statutory duties." A.C. Transp., Inc. v. Bd. of Educ., 253 A.D.2d 330, 337 (1st Dept 1999). "For the purpose of discouraging fraud on a massive scale, the assertion of estoppel against a governmental entity is foreclosed in all but the rarest cases." Id. (internal citations omitted). "To prevail [on a claim for estoppel], plaintiffs must show that they were induced to change their position in reliance upon some promise or action by [the government agency]." Id. at 338. The court has held that to support an estoppel claim, a plaintiff must show that a "municipal defendant's conduct was calculated to, or negligently did, mislead or discourage the plaintiff." JCH Delta Construction, Inc. v. City of N.Y., 44 A.D. 3d 403 (1st Dept 2005).

The DOT's continued negotiations and communications with plaintiff was not calculated or negligently mislead or discourage the plaintiff. In Dart Mechanical Corp, 121 A.D. 3d at 452, the court held that "an insurer's request for documentation regarding an insured's claim does not waive or toll a contractual limitations period." See also, State v. Lundin, 60 N.Y.2d 987 (1983) (ongoing relationship between the project owner and construction contractor beyond the date of statute of limitations regarding post-construction price negotiations did not affect the accrual date); Gilbert Frank v. Federal Ins. Co., 70 N.Y.2d 966, 968 (1988) (the fact that the defendant insurer continued to communicate and negotiate with claimant before and after the contractual limitation period expired "is not, without more, sufficient to prove waiver or estoppel"); JCH Delta Constr., 44 A.D.3d at 403 ("Nor was defendant estopped from relying upon the statute of limitations defense on the basis it entertained ongoing negotiations with plaintiff regarding the claims"); Arnell Construction v. City of New York, 2012 WL 10007776, at *7-8 (Sup. Crt. N.Y. Ctny, May 7, 2012) (issuance of partial payment not enough to waive or estop City's contractual limitation); Volmar Construction Corp v. NYC Sch Construction Authority, 25 Misc.3d 1239(A), at *7 (Supt. Crt. Kings Cnty, December 2, 2009) (denying plaintiff's claim that the public agency defendant should be estopped based on the negotiation meetings that were held as

"[plaintiff] could not have relied to its detriment on the meetings because March 21, 2001 was already a year after the date of substantial completion").

Moreover, plaintiff's argument that "the parties agreed that compensable delays had occurred and agreed on the amount of delay damages" for the FDR Drive Project is unavailing. Statements from DOT employees that do not have the authority to bind the City will not estop the City from invoking the contractual limitations. See e.g., Legal Aid Soc. v. City of New York, 242 A.D.2d 423, 426 (1st Dept 1997) ("doctrine of estoppel is unavailable against a public agency...notwithstanding the inconsistent statement of a governmental officer"); Grishman v. N.Y, 183 A.D. 2d 464, 466 (1st Dept 1992) (noting there is no estoppel against the City and denying plaintiff's claim based upon mistaken representations made by a government employee); Griffith v. Staten Island Rapid Transp. Operating Authority, 269 A.D.2d 596, 597 (2d Dept 2000) ("the statement by the Hearing Examiner did not constitute misconduct which would require an estoppel" against the public agency).

Here, the Pilot Contract states that only the Commissioner or her duly appointed representative had authority to make a determination on plaintiff's Article 11 claim. See, Pilot Contract at Article 11.1.3. Plaintiff's alleged reliance on "DOT's representative's" statements is unfounded and does not estop the DOT from enforcing the contractual limitations. Notably, an audit pursuant to Article 11

is a preliminary step in the determination of an Article 11 claim; it does not guarantee that the claim will be approved. Therefore, to the extent that plaintiff was instructed to file claim and follow procedure, it was not a guarantee of payment.

The DOT's motion to dismiss plaintiff's second cause of action is granted.

Quasi-contractual claims (Count Three and Four)

The court also dismisses the plaintiff's claims for unjust enrichment and *quantum meruit* as the claims arise out of the same subject matter governed by a valid and enforceable written contract, namely, the Pilot Contract. See e.g., Clark-Fitzpatrick, Inc. v. Long Island R.R.Co., et. al., 70 N.Y.2d 382, 388 (1987), Cox v. NAP Construction Co. Inc., 10 N.Y.3d 592, 607 (2008).

Accordingly, it is

ORDERED that the motion to dismiss plaintiff's complaint in its entirety is granted without leave to replead.

Date: March 6, 2017
New York, New York

Anil C. Singh