

**Underground Util., Inc. v Comptroller of the City of  
N.Y.**

2017 NY Slip Op 30487(U)

March 13, 2017

Supreme Court, New York County

Docket Number: 157356/2014

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33

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UNDERGROUND UTILITIES, INC.,

Plaintiff,

**DECISION/ORDER**  
**Index No. 157356/2014**

-against-

COMPTROLLER OF THE CITY OF NEW YORK,  
CITY OF NEW YORK

Defendants.

-----X  
MARGARET A. CHAN, J.:

Plaintiff Underground Utilities, Inc., entered into four bridge rehabilitation contracts with the New York City Department of Transportation (DOT) between 1989 and 1993, and now seeks to recover \$1,570,000 in retainage funds on the four contracts that are held by defendant, the Comptroller of the City of New York. Defendants move for summary judgment on statute of limitations and other grounds, which plaintiff opposes and cross-moves for summary judgment for conversion, unjust enrichment, and a declaratory judgment pursuant to CPLR 3001.

Undisputed Facts

The four contracts at issue all contain a “Retained Percentage” Article, which allows DOT Commissioner to deduct and retain 5% of the estimated total amount to be paid to the contractor as security for “faithful performance of the contract” (Defts’ Lear Aff, exhs 6 and 7 at Chap. V, Art 21). The Comptroller of the City of New York (Comptroller) is the custodian of the retained money. Contractors wishing to withdraw from the contract retainage may do so by purchasing bonds as security naming both the Comptroller and the plaintiff as account holders. The bonds in this matter were held by JP Morgan Chase Bank, N.A. (the “Bank”). The bonds are the retainage and has matured to a total amount \$1,570,000, the amount in suit.

The Director of DOT’s Financial and Management F&M Audit Bureau (F&M Audit Bureau), Lucita Andres, conducted a financial audit of plaintiff’s work under three of the four contracts as a matter of course before closing Contracts HBCREPL91, HBCREPL92B and HBCY089. The audit showed that DOT overpaid plaintiff due to plaintiff’s overbilling for employee work hours; billing for unsubstantiated materials; improperly including Workers’ Compensation Insurance and Unemployment Insurances coverages as additional costs; calculation errors; and resubmission of bills that had been reimbursed. In a memorandum dated May 16, 1996, to DOT’s Engineering Audit Bureau, Andres recommended that because the overpayments exceeded the retainages on the contracts, the disallowed amount be deducted from plaintiff’s future billings (Andres Aff at ¶¶ 1, 3-6).

The April 24, 1997 Audit Reports of Contract HBCREPL91 with a retainage of \$501,060 showed an overpayment of \$1,388,214 to plaintiff. The April 13, 1998 Audit Reports of Contract HBCREPL92B with a retainage of \$901,527 showed an overpayment of \$2,610,019 to plaintiff. And the June 23, 1998 Audit Reports of Contract HBCY089 showed an overpayment of \$75,154 (*id.* at ¶¶ 8-10).

At the time of DOT's audits, plaintiff's president, Henry Fulton, was incarcerated on his July 1995 bribery and mail fraud conviction. His wife, Inez Fulton, became plaintiff's president, and on October 9, 1996, filed a claim for the unreleased retainage, which was denied on November 1, 1996; plaintiff did not appeal the denial (Stanton Aff at ¶¶ 9-11). On July 2, 1998, the City of New York commenced an action against plaintiff to recover the overpaid amounts. By December 29, 1999, the New York State Department of Taxation and Finance dissolved plaintiff's business by proclamation. There had been no activity by plaintiff in the late 1990's. Thereafter, the City abandoned its lawsuit against plaintiff (*id.* at ¶¶ 13-14). On May 26, 2003, DOT advised Inez Fulton that it made a final determination to close out the three contracts at issue.

Inez Fulton passed away in July 2003. According to DOT, Henry Fulton passed away in prison on May 18, 1999 (*id.* at ¶ 16, exh 10). Henry Fulton disagrees with that last statement, and avers that he is still alive (Fulton Aff at ¶ 1). On October 1, 2007, Inez Fulton's daughter, Dawn Manos, as plaintiff's president, wrote to the Comptroller in an effort to recover the retainage on the four contracts (Defts' Statement of Undisputed Facts at ¶ 32; Hendricks Aff at ¶ 16, exh 3). DOT denied Manos' request by letter dated November 14, 2007. On February 26, 2014, plaintiff's attorney sought to obtain from the Comptroller, a release of the bond funds that were plaintiff's retainage (Hendricks Aff at ¶ 23, exh 6). Plaintiff filed a Notice of Claim to recover the retainage on June 25, 2014 (*id.* at ¶ 29, exh 9).

Henry Fulton contests the statute of limitations defense proffered by defendants arguing that the action accrued on March 31, 2014 because the clock started running upon his February 26, 2014 demand letter to the Comptroller for a turn-over of the retainage funds by a date certain (Fulton Aff at ¶¶ 39-41). He denies the occurrence of a set-off where the retainage was used to make up for DOT's overpayments, and if that occurred, it was without notice to plaintiff (*id.* at ¶ 15). He argues that the retainage, as a security for the faithful performance of the contract, cannot be used as a set-off (*id.* at ¶ 17). Indeed, he points out that DOT never applied the retainage to set off the overpayments as the funds were transferred from Chase to accounts maintained by the Comptroller on plaintiff's behalf (Millman Aff at ¶ 9). Plaintiff insists that the bonds, which have matured into \$1,570,000 in proceeds, was held in trust for plaintiff and therefore belongs to plaintiff.

Plaintiff commenced a separate action against the Bank in New York County Supreme Court under Index 653124/2014 for the return of the retainage funds claiming that the Bank breached its fiduciary duty it owed to plaintiff (*id.*; Lear Aff at ¶ 7, exh 4). By order dated January 21, 2016, another justice of this court dismissed plaintiff's complaint against the Bank finding that the Bank did not owe plaintiff a fiduciary duty as an escrow agent or in any other manner when it disbursed \$1,570,000 to the Comptroller and closed the four accounts (*see Underground Utilities, Inc. v JP Morgan Chase Bank, N.A.*, 2016 WL 270828 [Sup Ct, NY Cty, Jan. 21, 2016] *aff'd* 2017 WL 758205 [Feb 28, 2017]).

## DISCUSSION

Summarily, plaintiff's position in this suit is that it substantially completed its contracts and is entitled to the retained funds upon its February 26, 2014 demand to the Comptroller. Failure to return the retained funds constitutes conversion and a breach of a fiduciary duty, which it claims were timely asserted. Defendants' position is that DOT properly deducted the overpayments it made to plaintiff from the retainage funds. Disputes as to the deductions are breach of contract issues and the time to dispute these 1989-1993 contracts has long passed.

As the retainage is the focus of this suit, the retainage provision of the four contracts at issue is as follows:

Article 21. Retained Percentage. As further security for the faithful performance of this contract, the Commissioner shall deduct, and retain until the substantial completion of the work, five percent (5%) of the value of work certified for payment in each partial payment voucher, or, in case of a unit price contract, five percent (5%) of the estimated amount to be paid to the Contractor under the contract.

And as substantial completion is a prominent factor in the release of the retainage, that provision is as follows:

Article 43. Substantial Completion Payment. When the work, in the opinion of the Commissioner, has been substantially but not entirely completed, he will issue a certificate of substantial completion and a voucher calling for payment of any part or all of the balance due under the contract, including monies retained under Article 21 hereof, less the value of the work still to be done, and less any and all deductions authorized to be made by the Commissioner under this contract by law. Such a payment shall be considered a partial and not a final payment.

(Lear Aff, exhs 6 and 7).

Based on a clear reading of the parties' contract, upon substantial completion of a contract, DOT may make authorized deductions before paying out a final payment which also includes the retainage funds. The deductions here consist largely of plaintiff's billing of insurance coverage as additional costs, and overbilling of employee hours and material. Plaintiff does not claim these deductions are unauthorized, and under Article 22 entitled "Insurance", "the cost . . . is borne totally by the Contractor" (*id.*). Plaintiff, instead, argues that the retainage should not be used as a set-off. This argument is not supported by the plain language of Article 43 of the contract which allows for deductions. If no deductions were necessary or authorized, and absent any remaining work to be done, then all monies, including that retained under Article 21 will be included in the voucher for payment of the outstanding balance of the contract.

Boiled down to its essence, the issue goes to what is permitted by the parties' contracts that were substantially completed between 1993 and 1998 – a breach of contract issue. Nonetheless, plaintiff asserts that the retainage funds were escrow funds to be maintained by the Comptroller on its behalf.

“[I]t is settled law that an escrow agent owes his or her beneficiary a fiduciary duty” (*Talansky v Schulman*, 2 AD3d 355, 359 [1st Dept 2003]). “A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (*Underground Utilities, Inc. v JP Morgan Chase Bank, N.A.* 2016 WL 270828, *aff’d* 2017 WL 758205 [1st Dept, Feb. 28, 2017] quoting *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 158 [2008][internal citations and quotation marks omitted]). “An escrow is a written agreement that imports a legal obligation to deposit an instrument or property by the promisor [] with a third party [] to be kept by the latter in the capacity of depository or escrowee until the performance of a condition or the happening of an event, which then is to be delivered by the escrow agent to the promisee []” (*Underground Utilities, Inc. v JP Morgan Chase Bank, N.A.*, *supra*, quoting *National Union Fire Ins. Co. Pittsburgh, Pa. v Proskauer Rose Goetz & Mendelsohn*, 165 Misc2d 539, 544 [Sup Ct NY Cty, Aug. 2, 1994], *aff’d* 227 AD2d 106 [1st Dept 1996]).

Plaintiff’s attempts to make out a cause of action for conversion and for breach of a fiduciary duty are based on hearsay and incomplete documents. These documents purportedly show that the retainage was held in trust or in escrow for plaintiff. To wit, plaintiff submits a March 6, 2013 e-mail from Elisa Velazquez which stated “. . . we need to solve this. This isn’t a claims issue... there is some account somewhere that has a bunch of [Underground Utility]’s money in it that has been held as retainage and not returned for far too long. I know this is old, why does the vendor want this now, blah blah...but this is still money owed to the vendor...who apparently needs it...let me know when you are able to discuss...thanks” (Millman Aff, exh 2 [ellipsis in original]).

To complete the narrative, defendants submitted a reply e-mail, also dated March 6, from Adam Buchanan, one of the recipients of Velazquez’s e-mail, that informed Velazquez about the DOT’s overpayment to plaintiff, and in fact, plaintiff owes DOT approximately \$514,754 (Lear Aff in Reply, exh 1). Buchanan attached a May 6, 2003 notice closing the accounts of three of the four contracts, and a November 7, 2007, letter from the Comptroller to Manos informing her that it had no authority to release the retainage to plaintiff.

Plaintiff submitted other snippets of e-mail and a recollection of a telephone conversation “faithfully transcribed” to show the existence of a fiduciary relationship, but as they are incomplete and otherwise inadmissible, they are not considered. Ultimately, there is no agreement between plaintiff and the Comptroller. There is no showing of a relationship between plaintiff and the Comptroller where the latter is obligated to act on plaintiff’s behalf. There is no showing that the Comptroller had any control over the retainage; it is up to DOT to release the retainage. In short, plaintiff’s contention that the Comptroller was its escrow agent and owed it a fiduciary duty is unsupported and unsubstantiated.

Plaintiff’s statute of limitations argument is that the clock started running after the 30<sup>th</sup> day of its February 26, 2014 demand letter. By this argument, plaintiff discounts the requests for the same by its former presidents, Inez Fulton and Dawn Manos. Plaintiff, instead, asserts that those requests are inconsequential because (i) the letter denying Inez Fulton’s request does not mention “retainage”; (ii) both Inez Fulton’s and Manos’ respective requests references only one contract each; and (iii) Paul Stanton, the Assistant

Commissioner who denied Inez Fulton's request, had no personal knowledge of Inez Fulton's letter (Millman Aff at ¶ 23; Stanton Aff, exh 3; Hendricks Aff, exh 3).

Even if that were the case, plaintiff offers no explanation for DOT's May 26, 2003, reply letter from Stanton to Inez Fulton closing out the three subject contracts without further payments (Stanton Aff, exh 11). There was no action from plaintiff until Manos' October 2007 letter, which, according to plaintiff, was not a demand letter. No further request was made by any of plaintiff's officers. In any event, there was no claim to contest the May 2003 closing of these contracts without further payment.

Henry Fulton's February 26, 2014 demand raises a few questions. Plaintiff company was dissolved and defunct as of December 29, 1999. Henry Fulton was a former president whose term ended when he was incarcerated in 1995. There is nothing in the record that shows that the company was revived and who is currently the president. Henry Fulton does not state anywhere in his affidavit nor was it mentioned in the complaint or motion papers that he is now plaintiff's president or officer or even a shareholder with standing to sue on its behalf. His affidavit is silent on the identity or even the existence of a current president. Assuming that Henry Fulton had standing to make the February 26, 2014 demand, it still does not render this case timely. Plaintiff's former presidents, Inez Fulton and Dawn Manos made demands for the retainage, which were denied in 2003 at the earliest, and 2007 at the latest, as defendants have shown. In any event, these questions do not stand in the way of defendants' motion seeking dismissal, which is granted.

Accordingly, it is

ORDERED that defendants Comptroller of the City of New York and The City of New York's motion for summary judgment pursuant to CPLR 3212 is granted in its entirety; and it is further

ORDERED that plaintiff Underground Utilities, Inc.'s cross-motion for summary judgment and other relief is denied. The clerk of the court is directed to enter judgment as written in favor of the defendants.

This constitutes the decision and order of the court.

DATE : 3/13/2017



MARGARET A. CHAN, JSC