D.A. Elia Constr. Corp. v New York State Thruway Auth.
2000 NY Slip Op 30008(U)
June 12, 2000
Court of Claims
Docket Number: 87413
Judge: Thomas J. McNamara

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**Decision and Order of Justice Thomas J. McNamara,
Dated June 12, 2000 and Filed July 6, 2000.**

STATE OF NEW YORK COURT OF CLAIMS

D. A. ELIA CONSTRUCTION CORP.,

Claimant,

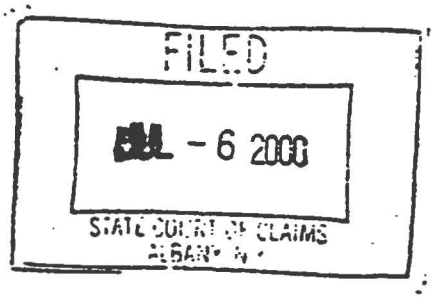
DECISION

-v-

NEW YORK STATE THRUWAY AUTHORITY,

Claim No. 87413

Defendant.



BEFORE: HON. THOMAS J. MCNAMARA
Judge of the Court of Claims

APPEARANCES: For Claimant:
Damon and Morey, Esqs.
(William F. Savino, Esq.
and Brian D. Gwitt, Esq., of counsel)

For Defendant:
Hon. Eliot Spitzer, Attorney General
(Arthur Patane, Esq., of counsel)

This claim arises out of a contract between the parties for repair of deteriorated structural concrete on four piers of the Castleon-on-Hudson bridge which forms part of the Berkshire spur of the New York State Thruway. The work was performed in 1991. Causes of action for breach of contract, quantum meruit and unjust enrichment are alleged in the claim. Each cause of action is pleaded with respect to three distinct items of work in the contract; epoxy bonding compound. epoxy mortar patching and change in the scope of the work of repairing the deteriorated concrete.

The essence of the work involved removing deteriorated areas of concrete from the columns, cap beams, struts and plinths of the four piers and filling the voids with newly poured concrete.

EPOXY BONDING COMPOUND

The epoxy bonding compound was to be applied to the surface of the existing concrete, after the deteriorated concrete was removed, to provide a bond with the newly poured concrete patch. The contract provided that the compound was to be applied such that the surfaces were coated with a one sixty-fourth of an inch film thickness. Because measuring such a thickness is impractical, the application was to be considered acceptable if it appeared wet to visual observation. The contractor was then to be paid a unit price for each gallon of the compound incorporated into the work.

Claimant maintains that it was not paid for all of the compound used on the job because the defendant had unilaterally determined that it would pay for the item at the rate of 50 square feet per gallon rather than by the method set forth in the contract.

Although Claimant correctly points out that the resident engineer did not have authority to alter the terms of the contract, i.e. change the method of payment for applying the compound. the contract provides that the contractor has the burden of proving that it was not paid for each gallon of epoxy "incorporated into the work". The proof offered presents several obstacles to reaching a determination that Claimant has met that burden.

Claimant was paid for 491.89 gallons of epoxy bonding compound as determined by the resident engineer. Claimant contends that it should have been paid for all 1.001 gallons used less 5% for waste. The calculation of the number of gallons for which Claimant contends it should be paid is based on testimony by Daniel A. Elia, a vice president of the Claimant corporation. that the

contractor applied the compound to an area until told to stop and that all opened cans of epoxy were used.

Carl Niemann, the resident engineer on the project, testified that he interpreted "incorporated into the work" to mean applied in the proper manner and thickness to the work surface. He also testified that Charlie Stainer, the superintendent for Claimant on the project, performed some tests and determined that the compound could properly be applied at a rate of 50 square feet per gallon. He and Mr. Stainer then agreed to use 50 square feet per gallon as the measure for incorporating the compound into the work in accordance with the contract standard. In addition, Mr. Niemann testified that there were large amounts of waste from such problems as mixing more of the compound than could be used within the appropriate application time, having to re-pour failed patches (an item for which the contractor was not compensated) and applying more of the compound than was required.

While Mr. Niemann was on the site on an almost daily basis, Mr. Elia was only at the job site five or six times making the latter's testimony regarding application of the epoxy and waste weak by comparison. In addition, Mr. Elia did not offer a basis for how the figure of 5% for waste was determined. The proof that a certain number of gallons of the compound were delivered to the site. that the contractor applied the compound to an area until told to stop and that all opened cans of epoxy were used has not persuaded the court that additional gallons of the compound were "incorporated into the work". Furthermore, there is nothing in the contract to prohibit the resident engineer and superintendent from agreeing that the compound could be applied to contract standards on a 50 square foot per gallon basis. Such an agreement does not violate the contract prohibition against the resident engineer making unilateral changes in the terms of the contract. Rather, it recognizes that the contract standard for proper application could be achieved at that rate and

establishes that the amount of material incorporated into the work was measured using the square foot method. The breach of contract claim for the epoxy bonding compound is, therefore, dismissed.

EPOXY MORTAR PATCHING

This item in the contract involved the application of a product known as Aquaseal gel to underwater areas of the pier footings. According to Claimant, the item was deleted from the contract by Defendant after the project was begun because the product, Aquaseal, was not suitable for the intended purpose. Under a clause in the contract, Defendant had the right to terminate any portion of the contract. In the event of termination, however, the contractor was to be reimbursed for organizing the work and moving equipment to and from the job where the volume of work was too small to compensate the contractor for such expenses under the contract unit prices. Claimant maintains that it incurred expenses associated with this item before the item was terminated and that it was not paid for any work under the item. Claimant seeks reimbursement for the cost of organizing the work and moving equipment to and from the job and for the costs of returning unused materials to the supplier.

Defendant concedes that it was determined that Aquaseal was not proper for application but only on a portion of the anticipated work, i.e. at Pier 13, and that the contractor was excused from that work. However, Defendant maintains that there were appropriate uses for the material in other areas of the project and that the contractor misapplied it in attempting some of those applications and then requested relief from the item. According to Defendant, the item was deleted from the contract based upon the request by the contractor.

The testimony by Mr. Elia with respect to this item implies that the item was deleted strictly because the material was not appropriate for the intended use. However, Claimant does not directly

refute the testimony by Mr. Niemann that there were other appropriate uses for the product. Mr. Niemann testified that it was determined that the use of Aquaseal gel was not appropriate for the work at Pier 13 but was suitable for work at Pier 12 and Pier 11. According to Mr. Niemann, the contractor did work at Pier 12 but misapplied the product and was not paid for the work. Thereafter, Mr. Niemann testified, the contractor asked to be excused from the remaining work and the request led to the item being deleted from the contract.

Mr. Niemann's testimony in this respect was credible as he had specific recollections of being able to peel the Aquaseal gel off a pier where it had been misapplied and of seeing cans of the material being burnt in a fire in an attempt to heat the product to a temperature appropriate for application. In addition, he recalled that the contractor's request for relief was granted even though he felt at the time that there was still good money to be made on the item. According to Mr. Niemann, the item had been bid at a cost that involved using divers to apply it and when the contractor requested relief there was still work to be done which would allow for simply wading out to the pier and applying the product.

Claimant no doubt incurred expenses in preparing to perform this work and was not reimbursed for those costs. However, the evidence offered will not support an award for the damages claimed. Mr. Niemann's testimony that the product could have been used for work at Pier 11 and Pier 12, despite its unsuitability for the work at Pier 13, and his testimony that the contractor requested relief from the item with that work undone undermines the argument that the contractor is entitled to reimbursement under the termination clause of the contract. The clause provides that when any portion of the contract is terminated for any of the reasons set forth in the clause the contractor may be reimbursed in the manner claimed here. However, requests for relief by the

contractor is not among the reasons stated and a fair reading of the provision shows that it was not intended to apply in instances where the termination was brought about by acts or omissions of the contractor. In addition, even if some of the expenses could be attributed to the unsuitability of the product to the work at Pier 13, there is no way of determining from the proof offered what amount of the damages claimed might be attributed to that cause. Some or all of those expenses may be attributable to the work where the product was misapplied. Any award, therefore, would be purely speculative. Accordingly, the breach of contract claim related to the epoxy mortar patching work is dismissed.

EXTRA/ADDITIONAL WORK

The claim for extra/additional work relates to the replacement of deteriorated structural concrete. This work was to be paid at a unit price (per cubic yard). The estimated areas of repair were shown on the bid drawings and had been determined, according to the contract, by field inspection. The actual areas of repair were to be determined in the field by the Engineer-in-Charge (resident engineer) and the work was to be performed as ordered by the engineer and paid at the bid price for the item.

Claimant maintains that the work was significantly modified by Defendant in two ways. First, according to Claimant, the procedures for concrete repair were altered to restrict the contractor to working on one quadrant of a column at a time rather than being able to repair any two faces in a pier column section as provided in the contract. Second, Claimant contends that Defendant significantly increased the number, and decreased the size, of the concrete repair areas.

According to Mr. Ella, the change from being able to work on two faces of a column to one quadrant had a big impact on the choice of scaffolding which was a separate pay item but also affected the contractor's ability to progress the work. However, the proof established that Claimant

was advised of the change at a meeting on November 30, 1990 which was prior to the award of the contract. Claimant, therefore, was provided an opportunity to react to the change before the contract was made. Because the quadrant restriction was imposed before the contract was made, the change cannot be considered a breach of the contract or provide a basis for an award of damages.

The more significant problem, according to Claimant, was the change in the number and size of the repair areas. Mr. Elia testified that in preparing Claimant's bid, he performed an analysis of what a work activity would cost and that he relied on the bid drawings, which showed areas selected for repair, in making calculations of costs for concrete repair. He testified that there were 170 repair areas shown on the bid drawings but 480 actual repair areas and the shapes of the actual repairs were radically different from the largely rectangular repair areas shown on the drawings. According to Mr. Elia, the location and size of the repair areas were critical functions of estimating cost and while he expected some changes, he anticipated only reasonable modifications.

The field inspection of the piers had been done by sounding, hammering on the columns to determine areas of deterioration, and by visual inspection. While the visual inspection was recent, the soundings had been done some five years earlier. Mr. Elia testified that he did not believe it was going to be an on-the-job sounding operation because normal procedure is to sound the structure beforehand to establish repair areas. He also noted a provision in the standard specifications indicating that the plans had been prepared with care and only reasonable modifications in the quantities of the work were anticipated.

Testimony was also offered by Douglas Pressley, an engineer with extensive experience in corrosion engineering, that in an aggressive corrosive environment such as this bridge, inspections by sounding are only good for about two years and then, because of continuing deterioration, the

results no longer present a complete picture of the problem. Visual inspections, according to Mr. Pressley, have limitations in that they do not reveal smaller areas of deterioration.

Claimant argues that the contract drawings were not prepared with due care because the soundings were outdated and visual inspection was not adequate and maintains that the changes amounted to a qualitative change in the nature of the work.

Defendant relies on exculpatory clauses in the contract which bar claims for the difference between actual field conditions and those shown on the contract plans.

The provision in the contract barring claims based on the difference between field conditions and those in the contract plans is not effective if the modifications amount to a qualitative change in the nature of the work outside the contemplation of the contract as opposed to being a quantitative change (Triple Cities Construction Co. Inc., v State of New York, 194 AD2d 1037). Claimant relies on the number and size of the changes in the repair work, the provision in the contract about reasonable modifications and its expectation that the field inspection was done by sounding to show that more than quantitative changes were involved. However, the contract indicated that the contract drawings showed "[a]ll the major areas known to exist at the time of contract preparation, [and] have been shown to indicate the approximate extent of deterioration to be repaired by the contractor" (Exh. 1-A, p.2, Note No. 40, emphasis added). Warning was also given that the exact extent of reconstruction work cannot always be accurately determined prior to the commencement of work (Exh. 1-A, p.2, Note No.22). A further provision in the contract barred any claim by the contractor for work pertaining to modifications as may be required due to any difference between actual field conditions and those shown by the details and dimensions on the contract plans (Exh. 1-A, p.2, Note No.8). In addition, Mr. Pressley testified that in reviewing the construction drawings he noted that

there were no small areas of deterioration shown thus indicating that the field inspection was done visually rather than by hammer sounding. He also testified that the absence of small repair areas would have led him to question the drawings. Thus the assumptions relied upon by Claimant in preparing its bid, i.e. that the contract drawings were the product of a recent inspection done by sounding and that only minor modifications would be made, is not justified either by the language in the contract or the contract drawings. The modifications, though large in number, were reasonable considering the cautionary language in the contract and the information provided by the drawings. The breach of contract claim for extra/additional work is, accordingly, dismissed.

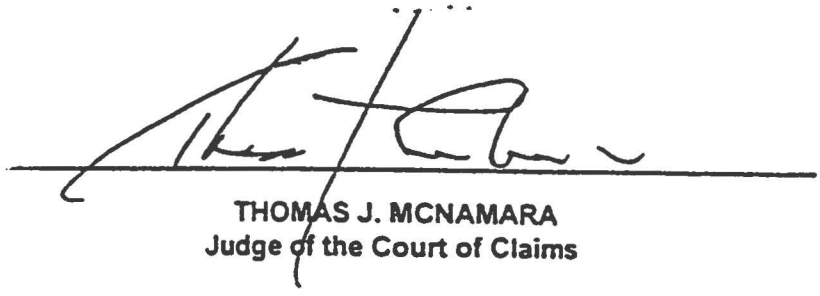
SUMMARY

The breach of contract cause of action based upon the epoxy bonding compound is dismissed on the basis that Claimant failed to prove that it was not paid for the amount of compound incorporated into the work. The claim for breach of contract based upon the epoxy mortar patch work is dismissed on the basis that the contractor requested relief from the item and because the contractor was not entitled to payment under the termination clause in the contract. The cause of action for breach of contract for extra/additional work is dismissed based on the exculpatory clauses in the contract and because Claimant failed to establish that the change in the number and shape of the repair areas amounted to a qualitative change in the work. Finally, because there was a contract

governing Claimant's entitlement to payment for the work performed, recovery may only be had pursuant to the express contract and not under the implied or quasi-contract theories of quantum meruit or unjust enrichment (Panetta v Tonetti, 182 AD2d 977). Accordingly, all claims based upon quantum meruit and unjust enrichment are dismissed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Saratoga Springs, New York
June 12, 2000



THOMAS J. MCNAMARA
Judge of the Court of Claims