Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Bayside Refrigeration Inc.,

Plaintiff,

- against -

The Department of Education of The City of New York,

Defendants.

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Index Number: 15771/11

Motion Date: 9/10/12

Motion Cal. Number: 8

Motion Seq. No.: 1

The following papers numbered 1 to 20 read on this motion by defendant (DOE) to dismiss; and cross-motion by plaintiff for leave to serve a late notice of claim and to add an additional party defendant.

	Papers Numbered
Notice of Motion-Affirmation-Affidavit-Exhibits....	1-5
Memorandum of law.....	6-7
Notice of Cross-Motion-Affidavit-Exhibits.....	8-11
Affirmation in Opposition-Exhibits.....	12-15
Reply-Exhibits.....	16-18
Memorandum of Law.....	19-20

Upon the foregoing papers it is ordered that the motion is decided as follows:

As a preliminary matter, this Court is deciding the instant motion since it was referred to this Court pursuant to the memorandum issued by Justice Martin E. Ritholtz on September 10, 2012. The papers were received in chambers on September 12, 2012.

Motion by the DOE to dismiss the complaint for lack of subject-matter jurisdiction, pursuant to CPLR 3211(a)(2), and for failure to state a cause of action, pursuant to CPLR 3211(a)(7), is granted. Cross-motion by plaintiff for leave to serve a late notice of claim upon the DOE and for leave to amend the complaint to add All Phase Mechanical Corp. as an additional party defendant is denied.

The DOE hired a contractor, All Mechanical Corp., to provide heating and ventilation repair work to various public school buildings, pursuant to a contract dated September 13, 2006. Bayside concedes that it was hired by All Mechanical as a subcontractor. Bayside alleges that it provided labor and materials in April 2010 totaling $101,125.08 which sum was due and owing as of April 14, 2010. Bayside commenced the underlying action against the DOE on July 5, 2011, alleging causes of action for breach of contract, account stated and unjust enrichment.

The DOE moves to dismiss the complaint upon the grounds that plaintiff failed to serve a notice of claim, that plaintiff fails to state a cause of action for breach of contract because there is no privity of contract between plaintiff and the DOE, and that the complaint fails to state a cause of action either for an account stated or unjust enrichment.

Plaintiff cross-moves for leave to serve a late notice of claim upon the DOE and for leave to amend the complaint to add All Phase Mechanical Corp. as an additional party defendant.

A condition precedent to commencement of any action against the DOE is the service of a notice of claim upon it within three months after the cause of action accrues (see Education Law §3813[1]). Moreover, in order for the complaint to state a cause of action, it must also allege that a timely notice of claim was presented and that the DOE has not paid the claim for 30 days after such presentment.

The Court may, upon application, in its discretion, grant leave to serve a late notice of claim (see Education Law §3813[2-a]). However, since the purpose of §3813 is to give the DOE prompt notice of a claim so as to enable a timely investigation, the essential elements of a notice of claim under §3813 are "the nature of the claim, the time when, the place where and the manner in which the claim arose...and, where an action in contract is involved, the monetary demand and some explanation of its computation" (Parochial Bus Systems, Inc. v Board of Educ. of the City of New York, 60 NY 2d 539, 547 [1983][internal citations omitted]).

The proposed notice of claim annexed to the cross-moving papers merely describes the nature of the claim and the time, place and manner in which the claim arose as follows: "Plaintiff provided Defendant with various work, labor, services, materials, and goods in the amount of $101,125.08, together with interest from April 14, 2010...Business transacted within the City of New York – beginning April 2010." This notice fails to state when the cause of action accrued. It merely states vaguely that business

was transacted beginning on some unspecified date in April and seeks interest from April 14, 2010. Although it may be extrapolated from its demand that the DOE pay interest from April 14, 2010 that the first transaction of business or presentment of bills for payment and, therefore, that the first accrual date was April 14, 2010, no date is specified when the last alleged transaction or payment due date occurred. Moreover, although the notice sets forth the total sum demanded, it is bereft of any explanation of its computation. Likewise, the complaint heretofore served also provides insufficient information to have apprised the DOE of the nature, time and manner in which plaintiff's claim arose. Plaintiff alleges vaguely in its complaint that it performed work "beginning in or about April 2010 and continuing", the value of which totaled $101,125.08 and that it rendered an account stated totaling said sum "in or about April 2010 and at various times thereafter", with interest from April 14, 2010. Thus, the proposed notice of claim is insufficient and may not serve as a predicate to the underlying action. Therefore, that branch of the motion for leave to serve a late notice of claim must be denied on this basis alone.

Even had the proposed notice of claim included sufficient information so as to have constituted an adequate notice of claim, this Court is precluded from granting leave to serve a late notice of claim at this juncture, since the cross-motion was made more than one year after plaintiff's causes of action accrued.

The Court, in its discretion may extend the time to serve a notice of claim, but "[t]he extension shall not exceed the time limited for the commencement of an action by the claimant against any district or any such school" (Education Law §3813[2-a]). Section 3813(2-b) provides, in relevant portion, "Except as provided in subdivision two of this section and, notwithstanding any other provision of law providing a longer period of time in which to commence an action or special proceeding, no action or special proceeding shall be commenced against any entity specified in subdivision one of this section more than one year after the cause of action arose". Thus, the Court does not have discretion to allow a late notice of claim after one year from the date the cause of action accrued. (The exception referencing §3813[2] relates to tort actions, which are governed by the one year and 90-day statute of limitations set forth in General Municipal Law §50-i, and which is not applicable to the present action).

As heretofore stated, the only accrual date set forth in either the proposed notice of claim or the complaint is April 14,

2010. Since the instant cross-motion was served on August 17, 2012, over two years and four months after said accrual date, the instant application is untimely.

In his affidavit in support of the cross-motion, dated August 14, 2012, Kostas Domenikos, president of plaintiff, states that "Plaintiff's Causes of Action arose in or around April 2010 and continued through and including October 28, 2010 to date." Apparently, plaintiff is now alleging October 28, 2010 as the last date for accrual of its causes of action, even though no such claim is set forth in its proposed notice of claim. However, even that date is one year and 10 months prior to the service of the instant cross-motion.

The addition of the phrase "to date" after the last date of October 28, 2010 is nonsensical, and this Court does not interpret said phrase as an averment by plaintiff that the last accrual date of its alleged causes of action is the present date. In any event, the e-mail correspondence annexed to the cross-moving papers indicates that Domenicos sent an e-mail to one Mohammed Mirza on October 28, 2010 stating that all outstanding requisitions have been submitted and inquiring when he could expect payment. A breach of contract cause of action accrues when the contractor's damages are ascertainable, which is when the work is substantially completed or a detailed invoice of the work performed is submitted to the DOE (see Justin Electrical Inc. v Board of Educ. Of Shenendehowa Cent. School Dist., 221 AD 2d 836 [3rd Dept 1995]). Therefore, plaintiff's own submissions establish that its cause of action for breach of contract, even if it had such a cause of action against the DOE, could not have arisen after October 28, 2010. In any event, the actual accrual dates, which must have been before October 28, 2010, cannot be ascertained since plaintiff has failed to set forth the dates when it performed work and when bills were submitted for payment. Lastly, an e-mail dated February 17, 2011 by Mirza states that the DOE paid plaintiff. Therefore, the latest possible accrual date for plaintiff's cause of action for account stated was February 17, 2011, which date is almost one year and four months prior to the instant application for leave to serve a late notice of claim.

Therefore, since the proposed notice of claim is insufficient on its face and since, in any event, the instant cross-motion for leave to serve a late notice of claim is untimely, that branch of the cross-motion for leave to serve a late notice of claim in the form annexed to the cross-moving papers must be denied.

The Court need not reach, and will not decide, the issues of whether plaintiff states a cause of action for breach of contract, account stated or unjust enrichment.

Finally, since the complaint is dismissed, that branch of the cross-motion for leave to amend the caption to add All Mechanical Corp. as a party defendant is denied.

Dated: September 13, 2012

KEVIN J. KERRIGAN, J.S.C.