

Start El., Inc. v City of New York

2012 NY Slip Op 33312(U)

January 9, 2012

Sup Ct, NY County

Docket Number: 118261/09

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BRANSTEN
Justice

PART 3

START ELEVATOR, INC.

INDEX NO. 118261/09

MOTION DATE 9/28/11

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

CITY OF NEW YORK

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
_____	1
_____	2
_____	3,4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 1-09-12



HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 3

START ELEVATOR, INC.,

Plaintiff,

Index No. 118261/09

Motion Seq. No. 001

Motion Date: 9/28/11

-against-

THE CITY OF NEW YORK and THE NEW YORK
CITY DEPARTMENT OF CORRECTION,

Defendants.

BRANSTEN, J.:

In this action to recover payment owed, defendants The City of New York (“City”) and The New York City Department of Correction (the “DOC”) (together, “defendants”) move, pursuant to CPLR 3211 (a) (1), (2), and (7), for an order dismissing the complaint.

BACKGROUND

Plaintiff Start Elevator, Inc. (“plaintiff”) installs, repairs and maintains elevators. In June 2000, plaintiff entered into a contract (the “Contract”) with the DOC, pursuant to which plaintiff was to repair elevators and dumbwaiters located at various DOC facilities (the “Project”).

It appears that the DOC was not satisfied with plaintiff’s work. In May 2003, the DOC and plaintiff met to address the DOC’s concerns with plaintiff’s work. The parties agreed upon a corrective action plan, pursuant to which plaintiff was to complete three specific items that were outlined in a letter, dated May 7, 2003, from the DOC to plaintiff.

See 04/21/10 Victor Aff., Ex. A. The DOC warned that plaintiff would be in default if it failed to complete the outstanding items by June 13, 2003, and that plaintiff would be responsible for all expenses incurred in hiring another contractor to complete the Project.

See id.

By letter, dated December 4, 2003, the DOC advised plaintiff that it failed to complete two out of three outstanding items from the May 7, 2003 letter, and that plaintiff was required to pay the DOC a total of \$71,104.95 in liquidated damages and costs. *See* 04/21/10 Victor Aff., Ex. A.

On November 26, 2008, plaintiff filed a notice of claim (the “Notice of Claim”) with the City’s Comptroller office (“Comptroller”). Plaintiff’s Notice of Claim alleged that the City breached the Contract for failure to pay plaintiff for work done on the Project. Plaintiff sought \$216,352.42 (the “Claimed Amount”) for unpaid work, plus interest. *See id.*, Ex. B.

In February 2009, plaintiff advised the DOC in writing that it did not receive a response to the Notice of Claim from the Comptroller, and that the DOC owed plaintiff the Claimed Amount for work on the Project. *Id.*, Ex. C.

By letter dated March 23, 2009, the Comptroller requested plaintiff provide additional information in order to evaluate its claim. 07/08/10 Gogel Aff. in Opp., Ex. 3. The same month, plaintiff provided various documents related to the Project. *Id.*, Ex. 4. Apparently, plaintiff received no response from the Comptroller.

In January 2010, plaintiff commenced this action. Plaintiff pleads three causes of action. Plaintiff does not label its cause of action; the court infers that the claims are quasi-contractual in nature. Plaintiff seeks the Claimed Amount plus interest. *See* 04/21/10 Victor Aff., Ex. E.

Defendants moved to dismiss plaintiff's complaint on the grounds that: (1) the complaint fails to state a cause of action; (2) the court lacks subject matter jurisdiction because plaintiff has failed to exhaust its administrative remedies; and (3) the DOC is not a "suable" entity. Defendants argued that the dispute resolution provisions of the New York City Procurement Policy Board Rules ("PPB Rules") are incorporated in the Contract by reference, govern the Contract and that the Contract and PPB Rules provide the exclusive means for resolving disputes via a three-step administrative process, which plaintiff did not follow. The administrative review process (the "ADR") culminates in a petition to the Contract Dispute Resolution Board ("CDRB"), whose decision can be reviewed in a CPLR article 78 proceeding. Plaintiff had not filed a petition with the CDRB.

Plaintiff cross-moved for an order directing defendants to render an evaluation and decision on plaintiff's claim.

On September 2, 2010, the parties appeared for an oral argument on the motion and the cross-motion before this court. The court set a control date of December 7, 2010.

In November 2010, plaintiff filed a petition with the CDRB, of which the court was advised. On February 28, 2011, the CDRB dismissed plaintiff's petition because it was time-barred (the "CDRB Decision").

On April 14, 2011, by way of an order to show cause, plaintiff commenced a special proceeding, captioned *In the Matter of Start Elevator, Inc. v. The City of New York, The New York City Department of Correction, The Contract Dispute Resolution Board and The New York City Office of Administrative Trials and Hearings*, Index No. 104620/2011, for judicial review of the CDRB Decision ("Article 78 Proceeding").

DISCUSSION

Defendants argue that plaintiff has not exhausted its administrative remedies prior to commencing this action. The Contract outlines a dispute resolution procedure which involves the ADR, a three-step administrative review process. *See* Contract, Article 51. The Contract also incorporates the Rules of the Procurement Policy Board ("PPB Rules"),¹ which provide for the same three-step administrative process. *See* Contract, Article 51, § 1; *see also* 9 RCNY 4-09.

The ADR starts with a vendor/supplier presenting its dispute, by way of a notice of dispute, to the Agency Head. Contract, Article 51, § 4(a). The Agency Head is to render a

¹ PPB Rules "apply to the procurement of all goods, services, and construction to be paid for out of the City treasury or out of monies under the control of or assessed or collected by the City." 9 RCNY 1-02 (a).

decision, which can be presented for review to the CDRB. *Id.*, § 4(c), (d). However, before petitioning the CDRB, the vendor/supplier “must first present its claim to the Comptroller for his or her review, investigation, and possible adjustment.” *Id.*, § 5. If the Comptroller does not settle or adjust the claim within 45 or 90 days following the receipt of all the materials, the vendor/supplier may then petition the CDRB. *Id.*, § 7. The CDRB’s decision is final and may be reviewed by way of a CPLR Article 78 proceeding. *Id.*, § 7(f).

There is no dispute that plaintiff did not petition the CDRB prior to commencing this action. In the Article 78 Proceeding, the court has held that the CDRB properly dismissed plaintiff’s petition as time-barred.

“It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law.” *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978); *see also Matter of Podolsky v. Daniels*, 21 A.D.3d 559, 559 (2d Dep’t 2005). “The exhaustion rule, however, ... need not be followed, for example, when an agency’s action is challenged as either unconstitutional or wholly beyond its grant of power, . . . when resort to an administrative remedy would be futile[,] . . . or when its pursuit would cause irreparable injury.” *Watergate II Apartments*, 46 N.Y.2d at 57 (internal citation omitted); *see also Matter of Community Related Servs., Inc. (CRS) v. Novello*, 41 A.D.3d 323, 323 (1st Dep’t 2007).

Plaintiff here contends that petitioning the CDRB prior to commencing this action would have been futile. Plaintiff bases its argument on the fact that defendants did not

provide any response to plaintiff's claims, even after it provided the requested documents to the Comptroller. Additionally, plaintiff claims that further pursuit of administrative remedies would have caused it irreparable injury, because it has not been paid for services performed starting in August 2000, and that further delay in payment would harm its "business and economic health." Gogel Aff. Opp., ¶ 14.

Plaintiff's arguments, however, are unavailing. As to Plaintiff's first argument, the Contract and the PPB Rules explicitly provide that: the Comptroller may not issue a determination. The Comptroller's failure to respond does not prejudice a vendor/supplier from proceeding along the three-step administrative review process, and the time limitations to do so still apply. *See* Contract, Article 51, §§ 2, 7; *see also* 9 RCNY 4-09(b); (g). Plaintiff does not explain, nor present any evidence that would show, how the lack of response from the Comptroller, a contractually and statutorily provided for possibility, prevented it from petitioning the CDRB. The CDRB is an entity that is separate from the Comptroller (*see* Contract, Article 51, § 6; *see also* 9 RCNY 4-09 [f]), and the lack of response from the latter does not automatically translate into futility of petitioning the former. Plaintiff also has not shown that the CDRB has a long-standing policy that would render plaintiff's petition futile. *Cf. Lehigh Portland Cement Co. v. New York State Dep't of Env'tl. Conservation*, 87 N.Y.2d 136, 141 (1995).

As to plaintiff's second argument, it appears that plaintiff itself contributed to the delay in resolving its claims. In particular, after the DOC advised plaintiff in December 2003

that plaintiff was in default and that plaintiff was required to pay the DOC liquidated damages and costs. Despite this notification, plaintiff did not attempt to resolve its claims via the ADR until November 2008, or almost five years later, when it filed the Notice of Claim with the Comptroller.

Additionally, plaintiff appears to not have properly followed the contractually and statutorily prescribed ADR process. *See* Contract, Article 51, §§ 4, 5, 7; *see also* 9 RCNY 4-09(d), (e), (g). Plaintiff was supposed to first petition the DOC and then have the Comptroller review its claim. Instead, plaintiff first filed the Notice of Claim with the Comptroller. Having not received a response from the Comptroller, plaintiff then wrote to the DOC. This failure to properly follow the ADR process, to develop a proper record, and to first obtain a decision by the DOC, may explain the delay in defendants' response. Accordingly, it appears that plaintiff has contributed substantially to the delay in resolving its claims.

Finally, plaintiff does not explain how its financial viability would have been jeopardized had it petitioned the CDRB. Therefore, plaintiff's argument of irreparable harm fails.

Accordingly, plaintiff has failed to exhaust administrative remedies available to it prior to commencing this action, and the exceptions to the remedy exhaustion doctrine do not apply. In light of this determination, the court need not address defendants' remaining

arguments that the complaint fails to state a cause of action or that the DOC is not a suable entity. Therefore, defendants' motion to dismiss is granted.

Plaintiff's cross motion pertains to substantive issues of plaintiff's claim. In light of the determination that plaintiff has failed to exhaust its administrative remedies, the court may not consider plaintiff's claims.

ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants The City of new York and The New York City Department of Correction to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that plaintiff's cross motion is denied.

Dated: New York, New York
January 09 2012

ENTER



Hon. Eileen Bransten, J.S.C.