

**Dart Mech. Corp. v City of New York**

2017 NY Slip Op 30478(U)

March 19, 2017

Supreme Court, New York County

Docket Number: 651023/2012

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH  
*Justice*

PART 54

Index Number : 651023/2012  
DART MECHANICAL CORP.  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE 6/24/13  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 3-11  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 17-19  
Replying Affidavits \_\_\_\_\_ No(s) 22-28

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

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

Dated: 8/20/13

**SHIRLEY WERNER KORNREICH**  
*[Signature]*  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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DART MECHANICAL CORP.,

Plaintiff,

-against-

CITY OF NEW YORK and NEW YORK CITY  
DEPARTMENT OF SANITATION,

Defendants.

-----X

SHIRLEY WERNER KORNREICH, J.:

Index No. 651023/2012

**DECISION & ORDER**

This action arises out of a 2001 contract between plaintiff Dart Mechanical Corp. (Dart) and the City of New York for an HVAC project done in connection with the construction of two garages for use by the Sanitation Department in Brooklyn. Dart commenced this action in 2012, seeking delay damages allegedly caused by the City or its agents. Defendants move to dismiss, claiming that the action is time-barred. Plaintiff opposes. For the reasons that follow, the court grants the motion and dismisses the case.

*I. Background*

*A. Contract Schedule and Payment*

In May 2001, the City requested bids for the construction of two garages in Brooklyn to be used by the Department of Sanitation, and on June 22, 2001, Dart was awarded the contract for the installation of HVAC systems at the two sites for a contract price of \$11,644,000 (complaint ¶¶ 5–6). The contract, written on the City’s standard form from October 2000, sets forth the procedures governing the parties’ relationship (affidavit of Linda Cavallari, sworn to on July 26, 2012, exhibit B [Contract]).

Under the original project schedule, Dart was to have commenced field work on February 21, 2002 (complaint ¶ 10). The Contract called for Dart to substantially complete its work by a date set forth in an appendix attached to the contract (Contract § 14.1). Dart could apply for an extension of time pursuant to the procedures set forth in Article 13 of the Contract; otherwise, failure to meet the project deadlines would leave Dart subject to liquidated damages (*id.* at §§ 13, 15.1).

As the work progressed, Dart could submit requisitions for partial payment of the contract price, based on an estimate of the quantity and value of the work done during a given period (*id.* at § 42). Upon substantial completion of its work, Dart was to submit a payment requisition for the balance of the contract price, less twice the amount deemed necessary to fully complete the work and the amount set aside as security for Dart's future maintenance obligations (*id.* at §§ 44.3, 24.2). This substantial completion payment requisition had to include, among other things, a request for an extension of time if the work had not reached substantial completion by the Contract deadline (*id.* at § 44.2). If Dart completed the work behind schedule, no payment would be forthcoming until Dart's time extension request was reviewed and "acted upon" (*id.* at § 44.3). For substantial completion to be achieved, two conditions had to be fulfilled: (i) inspection of Dart's work by the designated Engineer and issuance by him of a written determination that the work was substantially complete; and (ii) issuance by the Engineer of a punch list, after consulting with Dart, which punch list would set forth the unfinished items with deadlines for each item's completion (*id.* at §§ 14.2.1–2). Once these conditions were met, Dart's work would be deemed substantially complete, and the Commissioner of the Sanitation Department or his representative would issue a certificate of substantial completion (*id.* at §§ 14.2, 2.1.6).

*B. Notice Provisions for Claims by Dart Against City*

The Contract contained a number of provisions governing the assertion of claims by Dart against the City. Disputes involving the Engineer's determination of the scope of the work, the meaning of the contract documents, the amounts due on extra work or disputed work, or the conformity or acceptability of the work, were subject exclusively to the dispute resolution procedure outlined in Article 27 (*id.* at § 27.1). For other damages claims, the Contract imposed an obligation on Dart to give notice by submitting to the Commissioner a detailed, verified statement of any such claim within 45 days of the alleged injury and to continue to supply such statements every 30 days thereafter "for as long as such damages are incurred" (*id.* at § 30.1). Identical notice provisions applied to claims for damages caused by delay (*id.* at § 11.1.2).<sup>1</sup> As part of its substantial completion payment requisition, Dart was obligated to provide the City with a final, verified statement of "any and all alleged claims against the City and any dispute resolution procedures . . . in any way connected with or arising out of this Contract," including those claims which had already been detailed in previous statements (*id.* at § 44.2.1). While Dart was required to make its books, records and personnel available for inspection and examination upon notice by the City, nowhere did the Contract require the City to consider Dart's claims or provide a mechanism, procedure or timeline for doing so, and the remittance of the substantial completion payment was not contingent on the resolution of the claims reported in the payment requisition (*see id.* at §§ 30, 44.2.1 [a], 44.3). The Contract provided that Dart's failure to provide the City with timely notice of a claim or to allow the City to conduct discovery would constitute a waiver or release of any such claim (*id.* at §§ 30.1, 30.4, 44.2.1 [a]). Finally, any claim for breach of contract

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<sup>1</sup> Curiously, Dart also agreed to "make no claim for damages for delay" and "that all it may be entitled to on account of any such delay is an extension of time" (Contract § 13.10).

not otherwise subject to one of the dispute resolution procedures had to be commenced within six months of the issuance of the certificate of substantial completion, unless it arose out of events occurring after that date (*id.* at § 56.2).

*C. Dart's Substantial Completion Payment Requisition*

As noted, Dart was originally to have commenced field work on February 21, 2002 (complaint ¶ 10). Initially, it was anticipated that the physical work on the garages would be completed by December 29, 2004, and that the contract would be fully completed by April 28, 2005 (*id.* at ¶ 11). However, due to circumstances such as the discovery of contaminated soil at the sites, various stop work orders were issued; Dart was not given full access to the site until March 2003 (*id.* at ¶ 25). Further delay was occasioned by problems with the electrical work and the fire alarm system (*id.* at ¶ 28). Dart claims to have been damaged by these delays in the amount of \$2,598,843 (*id.* at ¶ 37).

In a letter dated December 27, 2007, addressed to Dart, the Chief Engineer of the Sanitation Department, Danny Walsh, advised that Dart's work had been deemed substantially complete as of December 6, 2007, 952 days after the originally scheduled completion date (affirmation of Elaine Windholz, June 29, 2012, exhibit E; complaint ¶ 30). Delays in the approval of prior, partial payment requisitions held up Dart's submission of the substantial completion payment requisition, and Dart was unable to submit its substantial completion payment requisition before March 2010 (Cavallari affidavit, ¶¶ 12–15). Along with the requisition, as required by Article 44, Dart submitted a time extension request and a particularized statement of its delay damages claim, the claim asserted herein (*id.* at ¶ 15). Upon reviewing the requisition, the City apparently took the position that certain damages claims that Dart had included had not been preserved under the

Contract's notice provisions, and requested a written acknowledgment from Dart that the granting of the time extension would not be construed as a recognition of those claims, which the City believed were waived (*id.* at ¶¶ 20, 23, exhibit S). This change was made, and the City approved Dart's payment requisition for substantial completion in early February 2011 (*id.* at ¶ 24, exhibit S). This action was commenced more than a year later, on March 30, 2012. Dart seeks compensation for the damages it allegedly incurred as a result of the project's delay.

## II. Standard

On a motion to dismiss the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 NY3d 491 [2009]; *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [citing *McGill v Parker*, 179 AD2d 98, 105 (1992)]; *Mazzai v Kyriacou*, 98 AD3d 1088, 1090 (2d Dept 2012); see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 [1998]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames, id.* [citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro*, 60 NY3d at 491).

“However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” (*Skillgames*, 1 AD3d at 250 [citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994)]).

On a motion to dismiss an action as time-barred, it is the burden of the defendant to “establish, *prima facie*, ‘that the time in which to commence an action has expired. The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls

within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies” (*Romanelli v Disilvio*, 76 AD3d 553, 554 [2d Dept 2010] *quoting Teixeira v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 418–19 [2d Dept 2007]).

### III. Discussion

The City argues that this action is time-barred under the Contract’s limitations provision, which required all damages actions to be commenced within six months of the issuance of the certificate of substantial completion. The City claims that the December 27, 2007 letter from Mr. Walsh was the certificate and that any action for delay damages should have been commenced by June 2008. As the present action was not commenced until March 2012, the City argues, it falls well outside the limitations period and cannot be maintained.

Dart raises a number of arguments in opposition. First, Dart contends that it could not have sued for its delay damages until the City finished processing its substantial completion payment requisition in early 2011, as any suit prior to such time would have been dismissed for lack of ripeness. However, it must be remembered that the payment requisition was only for the remittance of the substantial completion payment, defined as the unpaid balance of the contract price, less certain reserves for final completion payments and maintenance. As noted before, while the Contract required Dart to put the City on notice of any potential claims it had, it does not appear to contemplate that the substantial completion payment would include payment for those claims: rather, the notice requirements appear to be for informational purposes (*see* Contract § 44.3).<sup>2</sup> Indeed, the Contract explicitly provided that even the final payment to Dart upon Dart’s

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<sup>2</sup> While it is true that claims *not* included with the requisition would be deemed waived, it does not follow from this that the requisition needed to be submitted *and* fully processed before any such claims could be asserted in court. The Contract contains no such provision.



completion of the punch list items would exclude any claims made by Dart, and that Dart's acceptance of such final payment would not waive "any claims . . . which are contained in the verified statement filed with [Dart's] substantial and final requisitions" (Contract §§ 45.3, 46.1). In other words, payments under the Contract were unrelated to any potential damages claim by Dart, and the process for obtaining any such payment was not the procedure for the resolution of any such claim. There would have been no ripeness issue if Dart had chosen to commence suit for its alleged delay damages before receiving the remainder of the contract price, because the suit would have been unconnected to any pending payment requisition.

Dart's argument of waiver or estoppel against the City fails for similar reasons. Plaintiff cites to the City's request for additional information, resubmission or revisions to the payment requisition, without notifying plaintiff that the claims were time-barred, as proof that the City had waived the limitations period and should be estopped from asserting this defense. However, "[w]aiver is an intentional relinquishment of a known right and should not be lightly presumed" (*Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 968 [1988]). It is well-established that even an insurer's request for documentation regarding an insured's claim does not waive or toll a contractual limitations period (*id.* [insurer's investigation of claim after expiration of limitations period was not waiver]; *Blitman Constr. Corp. v Ins. Co. of N. Am.*, 66 NY2d 820, 823 [1985]). Here, then, even if the requisition *had* stood as a demand for payment of the damages claim (a position which has no basis in the Contract) the City's request for information regarding any such claims would not have served to waive the limitations defense. This is all the more true here, where the inclusion of the damages claim information merely served to apprise the City of its possible future liabilities before paying out the balance of the contract price. A bureaucracy's


passion for a tidy file should not be confused with a considered judgment on that file's contents.

Dart's other arguments are equally unavailing. It is not enough for plaintiff to allege that it did not receive the certificate of substantial completion before June 2008, when the limitations period supposedly expired. Rather, to raise an issue of fact and prevent dismissal, plaintiff must address whether it received the certificate or knew of its issuance six months before *filing the action*, a point on which plaintiff is silent. Further, as plaintiff was never restricted from suing for damages before being paid, there is no support for plaintiff's contention that the contractual limitations period violates Section 34 of the Lien Law. Finally, contrary to plaintiff's arguments, a limitations period of six months is not unreasonable (*see Cab Assocs. v City of New York*, 32 AD3d 229, 232 [1st Dept 2006]; *Grace Indus., Inc. v Dept. of Transp.*, 22 AD3d 262, 263 [1st Dept 2005] [both enforcing four month limitations periods]). Accordingly it is

ORDERED that the motion of defendants City of New York and New York City Department of Sanitation to dismiss the complaint of plaintiff Dart Mechanical Corp. is granted, and the Clerk of the Court, upon service of a copy of this order with notice of entry, is directed to enter judgment dismissing the action by plaintiff Dart Mechanical Corp. against the City of New York and the New York City Department of Sanitation, with prejudice, and with costs and disbursements to the defendants as taxed by the Clerk.

Dated: August 20, 2013

ENTER:



J.S.C.