

**New York City Hous. Auth. v Spectrum Contr.
Group, Inc.**

2014 NY Slip Op 30568(U)

March 6, 2014

Sup Ct, NY County

Docket Number: 450992/2010

Judge: Marcy S. Friedman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY FRIEDMAN, J.S.C.

_____ x
NEW YORK CITY HOUSING AUTHORITY,

Plaintiff,

Index No.: 450992/2010

- against -

DECISION/ORDER

SPECTRUM CONTRACTING GROUP, INC.,

Motion Sequence 004

Defendant.

_____ x

In this breach of contract action, plaintiff New York City Housing Authority (NYCHA) alleges that defendant Spectrum Contracting Group, Inc. (Spectrum) breached a construction contract and a release agreement by performing defective work on a community center at the Polo Grounds Towers housing development.

By order on the record on May 16, 2013, this court granted NYCHA’s application for judgment by default as to liability against Spectrum on the first cause of action (breach of the construction contract) and the second cause of action (breach of the change order release agreement) pleaded in the Amended Verified Complaint. By order dated May 21, 2013, this court referred the issue of damages to a Special Referee to hear and report. NYCHA moves to confirm the report and recommendation of the Special Referee and for an award of pre-judgment interest.

On July 23, 2013, Special Referee Jeremy Feinberg conducted a hearing at which Spectrum defaulted. NYCHA presented testimony from Nicholas Maranzano, Program Director

for the Manhattan Program Unit for the Capital Projects Division of NYCHA, and Manolda Sylvester Maloney, Deputy Director of the Accounts Payable Division of NYCHA. In total, the testimony spanned approximately 137 pages of transcript. In addition, NYCHA offered 58 exhibits into evidence demonstrating the damages sustained. (Report at 142.) Those exhibits included, but were not limited to, the contracts, payment requisitions for remediation work, and proof of payment by NYCHA.

The Special Referee found the testimony of the witnesses and the documents to be credible and sufficient to support NYCHA's claim for damages. (Report 142-143.) The Special Referee found that NYCHA "offered proof to show that they paid \$233,615 to HAKS Engineers & Land Surveyors to investigate and correct Spectrum's errors and paid an additional \$912,366.92 to A.J.S. Project Management hired as a result of the competitive bidding process to repair and improve the conditions at the Polo Grounds site" after Spectrum's defective work. (Report at 142.) In addition, NYCHA "offered proof that Spectrum had breached a settlement agreement the parties had entered into in 2009 pursuant to which [NYCHA] paid Spectrum \$841,500 to settle certain claims of delay to which [NYCHA] is now entitled repayment because of the breach of that contract." (Report at 143.) The Special Referee recommended that NYCHA be awarded \$1,987,481.92 in damages and, as additional damages, the actual cost of the transcript of the hearing before him. (*Id.*) NYCHA submitted the invoice of the court reporter stating that the cost of the transcript was \$504. (Marchisotto Aff. Ex. 5.) The Report is silent as to an award of pre-judgment interest.

It is well settled that "the function of a referee [is] to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility. Generally, courts will not

disturb the findings of a referee so long as the determination is substantiated by the record. The recommendations of a special referee are entitled to great weight because, as the trier of fact, he has an opportunity to see and hear the witnesses and to observe their demeanor.” (Poster v Poster, 4 AD3d 145 [1st Dept 2004], rearg denied 3 NY3d 605; Rezzadeh v Lucas, 253 AD2d 698 [1st Dept 1998].) Thus, “the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility.” (Nager v Panadis, 238 AD2d 135, 135-136 [1st Dept 1997]; United States Trust Co. of New York v Olsen, 194 AD2d 481 [1st Dept 1993]; Pittoni v Boland, 278 AD2d 396 [2d Dept 2000].)

Applying these precepts, the court finds that the Special Referee’s recommendations are supported by the record. The court accordingly accepts the Special Referee’s recommendations to award the following damages: \$1,145,981.92 on the first cause of action for breach of the construction contract and \$841,500 on the second cause of action for breach of the change order release agreement.

NYCHA also seeks an award of pre-judgment interest on the damages incurred as a result of Spectrum’s breaches. An award of prejudgment interest “upon a sum awarded because of a breach of performance of a contract” is not discretionary. (CPLR 5001[a].) Prejudgment interest at the statutory rate of 9% “shall be computed from the earliest ascertainable date the cause of action existed” or “upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date” when “damages were incurred at various times.” (CPLR 5001[b], 5004.) The earliest ascertainable date in contract actions arises when the breach occurred and the claim accrued, not from the finding of liability. (Brushston-Moira Cent. Sch.

Dist. v Fred H. Thomas Assoc., P.C., 91 NY2d 256, 262 [1998].)

Here, the Special Referee made no finding as to when the breaches occurred, and NYCHA concedes that it is “unclear” as to what the first ascertainable date is. (Memo. In Support at 8.) As a result, NYCHA seeks an award of pre-judgment interest on damages arising from Spectrum’s breach of the construction contract (first cause of action) as of the date that each payment was made to remediate those damages. (Memo. In Support at 8-10.) Alternatively, NYCHA seeks an award as of July 9, 2011, the “midway date” of NYCHA’s first and last payments as a “reasonable intermediate date.” (Memo. In Support at 11.) NYCHA admits that it cannot determine when it sustained its damages from Spectrum’s breach of the change order release agreement (second cause of action) and requests that the court award pre-judgment interest from the date of commencement of the action. (Memo. In Support at 7-8.)

The court declines to order interest from each remediation payment for the breach of the construction contract and finds that the July 9, 2011 is a reasonable intermediate date, especially as the damages continued to be incurred after the instant action was commenced on July 30, 2010. (See CPLR 5001[b]; Hanover Data Servs. v Arcata Natl. Corp., 115 AD2d 403, 404 [1st Dept 1985].) NYCHA should be awarded pre-judgment interest on the damages for the first cause of action in the amount of \$1,145,981.92 from July 9, 2011. With respect to the damages from the second cause of action, NYCHA offers no possible intermediate date, and, therefore, the date of commencement is an appropriate date for calculation of interest. (Delulio v 320-57 Corp., 99 AD2d 253, 255 [1st Dept 1984].) NYCHA should be awarded pre-judgment interest on the damages for the second cause of action in the amount of \$841,500 from July 30, 2010.

It is accordingly hereby ORDERED that NYCHA’s motion is granted to the following

extent: The report of Special Referee Feinberg, dated July 23, 2013, is confirmed to the extent of approving his recommendation to award the damages set forth in this decision, dated March 6, 2014; and it is further

ORDERED that judgment is awarded to plaintiff New York City Housing Authority against defendant Spectrum Contracting Group, Inc. in the amount of \$1,987,481.92, with interest on \$1,145,981.92 at the statutory rate from July 9, 2011, and with interest on \$841,500 at the statutory rate from July 30, 2010, and costs and disbursements as taxed by the Clerk; and the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
March 6, 2014

ENTER



MARCY FRIEDMAN, J.S.C.