

**Arnell Constr. Corp. v New York City Sch. Constr.
Auth.**

2018 NY Slip Op 33950(U)

November 26, 2018

Supreme Court, Queens County

Docket Number: 700787

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN IA Part 10
Justice

FILED
DEC - 4 2018
COUNTY CLERK
QUEENS COUNTY

Arnell Construction Corporation, x
Plaintiff,

Index
Number 700787 2018

- against -

Motion
Date July 30, 2018

New York City School Construction Authority,
Defendant.

Motion Seq. No. 2

x

The following numbered papers read on this motion by defendant New York City School Construction Authority (defendant), for an order dismissing plaintiff Arnell Construction Corporation's (plaintiff) complaint pursuant to CPLR 3211 (a)(1), (2), (5) and (7).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	EF 21, 22-35
Answering Affidavits - Exhibits	EF 36-43
Reply Affidavits	EF 44-46

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

This is an action to recover damages arising out of the performance of a written contract between the parties (Contract No. C000013129), for general construction services in the renovation of an existing building and construction of a new, three-story building at Public School 106, located at 1514 Olmstead Avenue, in Bronx County. On or about August 7, 2014, plaintiff filed with defendant a Notice of Claim for damages, costs and expenses incurred relating to the installation of 27 additional caissons at defendant's directive. On or about September 14, 2015, plaintiff subsequently filed a second Notice of Claim for damages in connection with unforeseeable delays.

Plaintiff commenced the instant action sounding in damages for breach of contract due to 1) defendant's alleged failure to pay for labor, materials, work, equipment and services provided by plaintiff for the installation of 27 additional caissons at the premises at defendant's directive, totaling \$451,000.00, and 2) due to defendant allegedly causing unforeseeable delays and interferences with plaintiff's work and failing to pay plaintiff for the resulting damages and costs, totaling \$809,394.23, and for an extension of time of 131 calendar days to obtain substantial completion pursuant to the written agreement.

Defendant has now moved, pursuant to CPLR 3211 (a)(2), to dismiss plaintiff's complaint. CPLR 3211 (a)(2) provides that a party may move to dismiss an action on the ground that "the court has not jurisdiction of the subject matter of the cause of action." However, after a careful review of defendant's motion papers, the court has determined that inasmuch as defendant has failed to adequately address this branch of its motion, defendant is not entitled to the relief sought pursuant to CPLR 3211 (a)(2).

Next, the court will turn to the branches of defendant's motion to dismiss plaintiff's complaint pursuant to CPLR 3211 (a)(1), (5) and (7). CPLR 3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence..." "To successfully move to dismiss a complaint pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d 899, 900 [2d Dept 2013], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453 [2d Dept 2000]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Lakhi Gen. Contractor, Inc. v N.Y. City Sch. Const. Auth.*, 147 AD3d 917 [2d Dept 2017]).

CPLR 3211 (a)(5) provides that a party may move for dismissal on the ground that "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds." CPLR 3211 (a)(7) provides that a party may move to dismiss an action on the ground that "the pleading fails to state a cause of action." "On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; CPLR 3026; see *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]).

In general, "[t]he court is limited to 'an examination of the pleadings to determine whether they state a cause of action'" (*Dolphin Holdings, Ltd. v Gander & White Shipping*,

Inc., 122 AD3d 901, 902 [2d Dept 2014], quoting *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; see *Fedele v Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 AD3d 965, 967 [2d Dept 2016]). Furthermore, on a CPLR 3211 (a)(7) motion, “[w]hether the plaintiff can ultimately establish the allegations is not part of the calculus” (*Etzion v Etzion*, 62 AD3d 646, 651 [2d Dept 2009][internal quotes omitted]; see *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Aberbach v Biomedical Tissue Servs., Ltd.*, 48 AD3d 716, 717–718 [2d Dept 2008]).

The court notes that while defendant has moved to dismiss plaintiff’s complaint pursuant to CPLR 3211 (a)(1), (5) and (7), it has failed to clearly address its arguments in its motion papers to each of these particular sections. Therefore, the court will proceed with an examination of what it appears defendant’s arguments are in relation to each of plaintiff’s causes of action and each section of the CPLR that defendant has moved pursuant to. With regard to plaintiff’s first cause of action sounding in damages for defendant’s alleged failure to pay for labor, materials, work, equipment and services provided by plaintiff for the installation of 27 additional caissons at the premises at defendant’s directive, totaling \$451,000.00, defendant has argued that this cause of action is time-barred since it was commenced outside of the one-year limitation set forth in Public Authorities Law § 1744 (2).

Public Authorities Law § 1744, entitled “Claims and actions against the authority,” provides in section (2), that:

“No action or proceeding for any cause whatever, other than the one for personal injury, death, property damage or tort, which shall be governed by subdivision one of this section, relating to the design, construction, reconstruction, improvement, rehabilitation, repair, furnishing or equipping of educational facilities, shall be prosecuted or maintained against the authority or any member, officer, agent, or employee thereof, unless (i) it shall appear by and as an allegation in the complaint or moving papers, that a detailed, written, verified notice of each claim upon which any part of such action or proceeding is founded was presented to the board within three months after the accrual of such claim, that at least thirty days have elapsed since such notice was so presented and that the authority or the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof, and (ii) the action or proceeding shall have been commenced within one year after the happening of the event upon which the claim is based; provided, however, that nothing contained in this subdivision shall be deemed to modify or supersede any provision of law or contract specifying a shorter period of time in which to commence such action or proceeding, or to excuse compliance with any other conditions required by contract to be

satisfied prior to the commencement of such action or proceeding. In the case of an action or special proceeding for monies due arising out of contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied.”

“It is well settled that a contractor’s claim accrues when its damages are ascertainable” (*C.S.A. Contr. Corp. v New York City School Const. Auth.*, 5 NY3d 189, 192 [2005]). “[D]etermination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, ‘it generally has been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted’” (*id.*, quoting *New York City School Constr. Auth. v. Kallen & Lemelson*, 290 AD2d 497 [2d Dept 2002]).

After a careful examination of the documents and evidence contained in the record, the court has determined that defendant has failed to satisfy its burden. Inasmuch as Public Authorities Law § 1744 (2), provides that the accrual of an action for monetary damages arising out of a contract “shall be deemed to have occurred as of the date payment for the amount claimed was denied,” in light of the early state of the proceedings and the limited record before the court, defendant has failed to demonstrate, upon these papers, when plaintiff’s first cause of action accrued and, thus, whether the first cause of action for defendant’s alleged failure to pay plaintiff \$451,000.00, is time-barred.

As to plaintiff’s second cause of action sounding in damages that defendant allegedly caused through unforeseeable delays and defendant’s alleged interference with plaintiff’s work and for failing to pay plaintiff for the resulting damages and costs, totaling \$809,394.23, and for an extension of time of 131 calendar days to obtain substantial completion pursuant to the written agreement, defendant has argued that this cause of action is time barred, that plaintiff has failed to comply with the requirements of Public Authorities Law § 1744 (2) and (3), and that plaintiff failed to comply with the written agreement’s notice of claim requirement.

In regard to the branch of defendant’s motion made pursuant to CPLR 3211 (a)(1), after a careful review of the evidence contained in the record, based upon a review of the documents submitted under the standard for a motion made pursuant to CPLR 3211 (a)(1), including the copy of the pleadings, a notice of dispute dated August 5, 2014, a notice of dispute dated September 14, 2015, the certificate of substantial completion dated October 2016, a verified notice of exceptions to general release dated November 11, 2016, a general release dated January 24, 2018, along with the accompanying schedule of exceptions to the general release, and correspondence between the parties, defendant has failed to satisfy its burden on this branch of its motion (*see Martin v New York Hosp. Med. Ctr. of Queens*,

34 AD3d at 650; *Nevin v Laclede Professional Prods.*, 273 AD2d at 453). The documentary evidence, on its face, does not “resolve[] all factual issues as a matter of law, and conclusively dispose[] of the plaintiff’s claim[s]” for the claims in the amounts of \$451,000.00, and \$809,394.23 (*Nevin v Laclede Professional Prods.*, 273 AD2d at 453). Therefore, defendant is not entitled to the relief sought on the branch of its motion made pursuant to CPLR 3211 (a)(1).

Defendant has also argued that plaintiff’s second cause of action is time-barred under Public Authorities Law § 1744 (2). Similar to the court’s above determination, after a careful examination of the documents and evidence contained in the limited record, the court has determined that defendant has failed to demonstrate, upon these papers, when the cause of action accrued and, thus, whether plaintiff’s second cause of action is time-barred. Therefore, defendant is not entitled to dismissal pursuant to CPLR 3211 (a)(5).

As to the branch of defendant’s motion made pursuant to CPLR 3211 (a)(7), after a careful reading of the allegations contained in the complaint, under the standard of review pursuant to CPLR 3211 (a)(7), and affording plaintiff the benefit of every favorable inference, the court has determined that the facts, as have been alleged in the complaint in this case, are sufficient to state a cause of action sounding in breach of contract to recover damages arising from defendant’s allegedly causation of unforeseeable delays, defendant’s alleged interference with plaintiff’s work and failure to pay plaintiff for the resulting damages and costs, totaling \$809,394.23, and for an extension of time of 131 calendar days to obtain substantial completion pursuant to the written agreement.

Defendant has further argued that the notice of claim for plaintiff’s second cause of action does not contain all the information required by Public Authorities Law § 1744 (3), which provides the following:

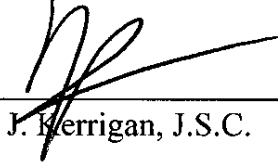
“The notice of each claim presented pursuant to subdivision two of this section must set forth in detail with respect to such claim; (i) the amount of the claim; (ii) a specific and detailed description of the grounds for the claim, relating the dollar amount claimed to the event purportedly giving rise to the claim and indicating how the dollar amount is arrived at; and (iii) the date of the event allegedly underlying the claim.”

However, inasmuch as the plaintiff’s monetary claims were not fully ascertainable until substantial completion of the work, taking into consideration the evidence submitted on this motion, which has shown that plaintiff supplemented its claim for monies due on its second cause of action when such monies did become ascertainable, and since defendant has

failed to demonstrate prejudice as a result of such supplementation, defendant is not entitled to dismissal pursuant to CPLR 3211 (a)(7).

Accordingly, defendant's motion is denied in its entirety.

Dated: November 26, 2018



Kevin J. Ferrigan, J.S.C.

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