

Judlau Contr., Inc. v MTA Capital Constr. Co.

2020 NY Slip Op 31599(U)

May 28, 2020

Supreme Court, New York County

Docket Number: 157781/2019

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. W. FRANCO PERRY PART IAS MOTION 23EFM

Justice

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JUDLAU CONTRACTING, INC.,

Plaintiff,

INDEX NO. 157781/2019

MOTION DATE 09/26/2019

MOTION SEQ. NO. 001

- v -

MTA CAPITAL CONSTRUCTION COMPANY,
METROPOLITAN TRANSPORTATION AUTHORITY, NEW
YORK CITY TRANSIT AUTHORITY

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

This Article 78 proceeding was commenced by Petitioner Judlau Contracting, Inc., against the Metropolitan Transportation Authority (“MTA”), MTA Capital Construction Company (“MTACC”), and the New York City Transit Authority (“NYCTA”) (collectively “Respondents”). Petitioner challenges a June 5, 2019 determination made by the Metropolitan Transportation Authority’s Contractual Disputes Resolution Board (“CDRB”) that transferred the parties’ underlying dispute to the Chief Engineer (“CE”) on the grounds that the underlying dispute primarily involved technical issues rather than contractual ones.

Before the Court is Petitioner’s August 12, 2019 Order to Show Cause asking this court 1) to compel MTACC to refer the dispute to the CDRB; 2) to compel CDRB to determine the threshold contractual issues; 3) to compel MTACC to refer the dispute back to the CE after CDRB’s determination of those contractual issues; and 4) to enjoin the CE from issuing a final determination before the CDRB determines those threshold issues. (NYSCEF Doc No. 12.)

Respondents have opposed the motion (NYSCEF Doc No. 23) and the parties appeared for oral argument on September 26, 2019. (NYSCEF Doc No. 24.)

BACKGROUND

The parties entered into a contract wherein Petitioner was to reconstruct the Cortlandt Street Subway Station for the MTA, while MTACC acted in a managerial capacity. (NYSCEF Doc No. 2, the “Contract”.) The Contract gives MTACC Engineer Daniel Creighton the ultimate authority in determining all questions of the value, acceptability and fitness of the Petitioner’s reconstruction work and Petitioner’s fulfillment of its obligations under the contract. (*Id.* at 45.) Article 8.03 outlines the dispute resolution procedure that constitutes Petitioner’s “sole means for challenging any determination, order or other action of the Engineer[.]” (*Id.*) The provision indicates that disputes relating in whole or in primary part to technical issues shall be determined by the Chief Engineer, while all other disputes shall be determined by the CDRB. (*Id.* at 46.)

The instant dispute stems from a request for a time extension submitted by Judlau on May 22, 2018. Judlau prepared a Time Impact Analysis (“TIA”) in support of its request, which stated that the project suffered over 10 months of impactable delays primarily due to Additional Work Order #8 and Bulletin #2. (NYSCEF Doc No. 17 at 2.) Judlau contended that these two items, the former of which regarded a differing site condition and the latter of which regarded design changes made by MTACC, caused necessary delays that entitled Judlau to a minimum time extension of 410 days. (*Id.* at 5.)

On November 26, 2018, Engineer Creighton issued a determination granting Judlau 315 days of excusable time, 71 days of which were deemed impactable. (NYSCEF Doc No. 4 at 2.) Judlau filed an initial notice of dispute with the MTA on December 6, 2018 (NYSCEF Doc No. 19) and submitted its complete statement to the CDRB on April 17, 2019, arguing that the

Engineer's determination must be set aside because the dispute required the determination of four threshold issues of pure contract interpretation that should have first been resolved by the CDRB before the dispute went to the Engineer. (NYSCEF Doc No. 5 at 1-2.) Those issues are:

1. What methodology does the contract require for determining whether a change order caused a delay to the critical path of the project?
2. Once JCI demonstrates that the critical path of achieving substantial completion of the work is delayed by a change order, does MTACC have to prove that an unexcused delayed work activity is also on the critical path of achieving substantial completion for that unexcused delayed work activity to constitute a concurrent delay?
3. What are JCI's contractual obligations to mitigate an excusable delay? Specifically, is JCI required to mitigate an excusable delay without compensation if the mitigation will cost more money?
4. Is MTACC required to pay for an acceleration if there is at least an excusable delay to the project and rather than granting a time extension up to the date of the delay, the agency directs the achievement of a substantial completion date that is earlier than the date the project would otherwise have been completed due to the excusable delay?

(*Id.*)

CDRB Arbiter Isabel Guerra determined that the dispute related in whole or in primary part to technical issues and referred the dispute to the Chief Engineer (the "Jurisdictional Determination"). (NYSCEF Doc No. 3.)

Petitioner commenced this Article 78 proceeding on August 8, 2019 and filed its order to show cause shortly thereafter, seeking the relief detailed above. (NYSCEF Doc No. 12.) Petitioner argues that the Jurisdictional Determination must be vacated because it was arbitrary and capricious, it ignored determinative facts, it conflicted with the intention of the parties in forming the contract, and it erroneously referred the dispute to the Chief Engineer even though the Arbiter failed to identify technical issues. (NYSCEF Doc No. 10.)

Respondents oppose the order to show cause, arguing that the Jurisdictional Determination is not subject to Article 78 review because it is not a final determination, Petitioner has failed to

exhaust its administrative remedies, and that the determination was not arbitrary or capricious. (NYSCEF Doc No. 23.)

DISCUSSION

“In reviewing an administrative agency determination, the . . . court must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious.” (*Matter of Brookford, LLC v New York State Div. of Hous. & Community Renewal*, 31 NY3d 679, 684 [2018], quoting *Matter of Gilman v New York State Div. of Housing & Community Renewal*, 99 NY2d 144, 149 [2002].) However, a proceeding under Article 78 “shall not be used to challenge a determination which is not final or can be adequately reviewed by appeal to a court or to some other body or officer[.]” (CPLR 7801 [1].)

Administrative actions as a rule are not final “unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.” (*Chicago & S. Air Lines v Waterman Corp.*, 333 US 103, 113 [US 1948].) To determine if agency action is final, therefore, consideration must be given to “the completeness of the administrative action” and “a pragmatic evaluation [must be made] of whether the ‘decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.’” (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 519 [1986], quoting *Williamson County Regional Planning Commn. v Hamilton Bank*, 473 US 172, 192–193 [US 1985].)

...
Indeed, an agency’s erroneous assertion of jurisdiction may ultimately never cause any real injury [citations omitted]. To allow immediate article 78 review of such jurisdictional challenges, therefore, would unnecessarily interfere with the agency process and waste judicial resources. Accordingly, they should be reviewed by a court only after a final determination- which might effectively render the dispute academic- is reached by the agency.

(*Essex County v Zagata*, 91 NY2d 447, 453-56 [1998].)

During oral argument before this court, counsel for Petitioner argued that the CDRB Arbiter’s Jurisdictional Determination was a final determination and separate from the underlying substantive issue of Petitioner’s entitlement to a time extension, which is still pending before the Chief Engineer. (NYSCEF Doc No. 24 at 6.) Petitioner acknowledged the possibility that the

Chief Engineer could provide answers to the four “threshold” contractual questions posed by Petitioner, but argued that such a determination would be coming from “an arbiter without the appropriate contract interpretation experience making its determination on contract interpretation issues[.]” (*Id.*)

The court finds that the Jurisdictional Determination does not amount to a “final” determination as envisioned by Article 78 because the harm alleged by Petitioner, which, again, is the mere possibility of its contractual issues being determined by an arbiter that it alleges lacks requisite experience to make such a determination, is not actual or concrete. Petitioner’s jurisdictional challenge is the same kind discussed in *Essex County*, wherein the Court of Appeals held that an agency’s mere assertion of jurisdiction over a dispute did not constitute a final decision because the “real injury” was still contingent upon other events coming to pass. (*Essex County*, 91 NY2d at 455.) Likewise, here, it could be the case that the Chief Engineer might ultimately determine the four “threshold” contractual issues adeptly and in such a way as to resolve all of Petitioner’s qualms both with the underlying dispute and the jurisdictional dispute, which would render any decision made by this court moot, waste judicial resources, and constitute unnecessary interference with the administrative process. Thus, although the Jurisdictional Determination “may constitute a definitive agency determination, it did not inflict the type of ‘concrete injury’ required for a finding of finality.” (*Id.*)

Accordingly, it is hereby

ORDERED that the application is denied and the Petition is dismissed.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

5/28/2020

DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE