

**Vikrant Contr. & Bldrs., Inc. v New York City Hous.
Auth.**

2020 NY Slip Op 33271(U)

October 2, 2020

Supreme Court, New York County

Docket Number: 654367/2019

Judge: Carol R. Edmead

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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. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

Justice

-----X

VIKRANT CONTRACTING AND BUILDERS, INC.

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

-----X

INDEX NO. 654367/2019

MOTION DATE 9/24/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

ORDERED that the motion, pursuant to CPLR 3211 (a) (1), of the defendant New York City Housing Authority (motion sequence number 001) is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that counsel for defendant shall serve a copy of this Order along with Notice of Entry on all parties within twenty (20) days of entry.

MEMORANDUM DECISION

In this breach of contract action, the defendant New York City Housing Authority (NYCHA) moves to dismiss the complaint of the plaintiff Vikrant Contracting and Builders, Inc. (Vikrant) pursuant to CLR 3211 (a) (1) (motion sequence number 001). For the following reasons, the motion is granted and this action is dismissed.

BACKGROUND

Vikrant is a New York-licensed construction company that contracted with NYCHA to perform certain renovation/repair work at a NYCHA-managed, 16-building, low-income, public housing property known as the Linden Houses Development, which is located in the County of Kings, City and State of New York. *See* verified complaint, ¶¶ 1-4. The parties specifically executed an agreement on April 13, 2016, pursuant to which NYCHA engaged Vikrant to perform a project known as the Exterior Restoration at Linden Houses (the contract). *Id.*; notice of motion, Fields affirmation, ¶¶ 3-6; exhibit 2. The relevant notice provisions of the contract are found in Article III, § 33 (entitled “Special Conditions”), and in paragraph 31 of the annexed Form HUD-5370 (entitled “General Conditions for Construction Contracts - Public Housing Programs),” which respectively provide that:

“(a) If [Vikrant] claims that any instructions of [NYCHA], by drawings or otherwise, involve Extra Work entailing extra cost, or claims compensation for any damages sustained by reason of any act or omission of [NYCHA], or of any other persons, or for any other reason whatsoever, [Vikrant] shall, within twenty (20) days after such claim shall have arisen, file with [NYCHA] written notice of intention to make a claim for such extra cost or damages, stating in such notice the nature and amount of the extra cost or damages sustained and the basis of the Claim against [NYCHA].

“(b) The filing by [Vikrant] of a notice of claim ... within the time limited herein, shall be a condition precedent to the settlement of any claim or to [Vikrant]’s right to resort to any proceeding or action to recover thereon, and failure to do so shall be deemed to be a conclusive and binding determination on [Vikrant]’s part that he/she has no claim against [NYCHA] for compensation for Extra Work or for compensation for damages, as the case may be, and shall be deemed a waiver by [Vikrant] of all claims for additional compensation or for damages.

* * *

“(e) [NYCHA]’s decision shall be final unless [Vikrant] (1) appeals in writing to a higher level in [NYCHA] in accordance with [NYCHA]’ policy and procedures, (2) refers the appeal to an independent mediator or arbitrator, or (3) files suit in a court of competent jurisdiction. Such appeal must be made within (30 unless otherwise indicated) days after receipt of [NYCHA]’s decision.”

Id., notice of motion, exhibit 2.

On February 16, 2018, NYCHA’s construction manager sent an email to Vikrant’s project manager which stated that NYCHA had determined that Vikrant’s periodic bills for asbestos removal at some Linden Houses buildings used an improperly high rate of work per square foot, and notified Vikrant that NYCHA had decided to issue a “credit change order” to recalculate Vikrant’s asbestos removal bills at a lower rate of work per square foot, and thereby correct Vikrant’s overbilling. *See* notice of motion, Fields affirmation, ¶¶ 4-10; exhibit 4. That same day, Vikrant’s project manager responded an email that stated that Vikrant did not agree with either NYCHA’s lower work per square foot rate, or with NYCHA’s decision to impose a credit for past overbilling, but asserted that Vikrant would continue performing asbestos removal work at the new rate “under protest.” *Id.*; exhibit 5. NYCHA sent Vikrant the “credit change order” to lower its bill on March 15, 2018. *Id.*, Fields affirmation, ¶ 10; exhibit 6. Vikrant thereafter sent NYCHA a letter on September 4, 2018 that challenged the amount of the credit that NYCHA had imposed, and asserted that Vikrant actually had a claim against NYCHA for unpaid asbestos removal work calculated by the original higher work per square foot rate. *Id.*, ¶¶ 11-14; exhibit 7. NYCHA responded in letters dated November 2, 2018 and December 21, 2018, the latter of which rejected Vikrant’s assertions and denied Vikrant’s claim. *Id.*; exhibits 8, 9. Vikrant finally served NYCHA with a notice of claim pursuant to § 33 of the contract on January 15, 2019. *Id.*; exhibit 10. NYCHA asserts that this notice is untimely. *Id.*

Vikrant later commenced this action on July 31, 2019 by filing a summons and verified complaint that sets forth one cause of action for breach of contract. *See* verified complaint. Rather than file an answer, NYCHA submitted the instant motion to dismiss the complaint on October 18, 2019. *See* notice of motion. The parties completed their submissions by late January 2020; however, a short time thereafter the Covid-19 national pandemic caused the court to suspend its operations indefinitely. At this time, sufficient court functions have been restored to permit this matter to be addressed (motion sequence number 001).

DISCUSSION

Generally, when evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2016), *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). However, the Court of Appeals recognizes that a "CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, . . . may be appropriately granted . . . where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 at 326, *quoting Leon v Martinez*, 84 NY2d 83, 88 (1994).

Here, NYCHA asserts that the documentary evidence shows that: (1) Vikrant's notice of claim was untimely pursuant to § 33 (a) and (b) of the contract; and (2) Vikrant's complaint was also untimely pursuant to paragraph 31 of the Form HUD-5370 that is annexed to the contract; and concludes that Vikrant's breach of contract claim must therefore be dismissed pursuant to CPLR 3211 (a) (1). *See* defendant's mem of law at 3-9. Vikrant disputes both assertions. The court will examine them in turn.

Subsection 33 (a) of the contract provides that, in the event of a dispute between the parties “by reason of any act or omission” by NYCHA, Vikrant “shall, within twenty (20) days after such claim shall have arisen, file with [NYCHA] written notice of intention to make a claim.” *See* notice of motion, exhibit 2. Subsection 33 (b) of the contract provides that Vikrant’s “filing . . . of a notice of claim . . . within the time limited herein, shall be a condition precedent to . . . [Vikrant]’s right to resort to any proceeding or action,” and that Vikrant’s failure to file a timely notice of claim “shall be deemed to be a conclusive and binding determination . . . that [Vikrant] has no claim against [NYCHA].” *Id.* NYCHA asserts that Vikrant’s claim accrued on February 16, 2018 (when its construction manager emailed Vikrant about NYCHA’s decision to re-compute compensation for asbestos removal a lower rate of work per square foot formula and to impose a credit for past overbilling), and notes that Vikrant did not file a proper notice of intent to make a claim regarding this act until September 4, 2018. *See* defendant’s mem of law at 7. The court notes that the documentary evidence supports NYCHA’s assertions, and believes that that evidence speaks for itself. *See* notice of motion, exhibits 4-7.

Vikrant nevertheless argues that: 1) “NYCHA did not issue ‘instructions’ to Vikrant” pursuant to § 33 (a) of the contract; 2) that, even if NYCHA’s February 16, 2018 email did constitute an “instruction,” Vikrant’s contemporaneous response that it would proceed with asbestos removal work “under protest” constituted “timely notice of its intent to make a claim”; 3) discovery is required to ascertain the parties’ interpretation of the emails; and 4) Vikrant was not required to submit a formal “notice of claim,” but rather only a “notice of its intent to make a claim.” *See* plaintiff’s mem of law at 7-13. NYCHA replies that Vikrant cited no case law to support any these assertions. *See* defendant’s reply mem at 4-9. The court notes that the Appellate Division, First Department, has long and consistently upheld the notice provisions of

similar NYCHA construction contracts, and ruled that contractors' claims against NYCHA must be dismissed where they fail to submit their claims on specifically designated "notices of claim," and where they fail to set forth either the nature or the amount of their claims in the notices. *See e.g., Universal Constr. Resources, Inc. v New York City Hous. Auth.*, 176 AD3d 642, 643 (1st Dept 2019), *citing Hi-Tech Constr. & Mgt. Servs. Inc. v Hous. Auth. of the City of N.Y.*, 125 AD3d 542, 542 (1st Dept 2015); *Matter of Intercontinental Constr. Contr., Inc. v New York City Hous. Auth.*, 173 AD3d 453, 454 (1st Dept 2019), *citing Metropolitan Bridge & Scaffolds Corp. v New York City Hous. Auth.*, 138 AD3d 423 (1st Dept 2016); *Centennial El. Indus., Inc. v New York City Hous. Auth.*, 129 AD3d 449, 450 (1st Dept 2015). Here, the documentary evidence conclusively shows that Vikrant did not submit a notice of claim that complied with these requirements until September 4, 2018, which was more than 20 days after NYCHA's February 16, 2018 or its March 15, 2018 "credit change order." *See* notice of motion, exhibits 4-7. Therefore, the court rejects Vikrant's arguments that assert that it was either not required to provide a notice of claim or that the notice it provided was sufficient.

NYCHA also argues for dismissal pursuant to paragraph 31 of the contract's Form HUD-5370 attachment, which provides that a decision by NYCHA to enforce the contract in a way that leads to a dispute "shall be final unless [Vikrant] . . . files suit in a court of competent jurisdiction . . . within (30 . . .) days after receipt of [NYCHA]'s decision." *See* notice of motion, exhibit 2. NYCHA asserts that the documentary evidence shows that it responded to Vikrant's notice of claim with the December 21, 2018 denial letter, but that Vikrant did not commence this action until more than 30 days afterward on July 31, 2019 (Vikrant's time to file actually expired on January 21, 2019). *See* defendant's mem of law at 8-9; verified complaint; notice of motion, exhibit 9. Vikrant responds that paragraph 31 is ambiguous because it refers both to "filing suit"

and “appeal” and that its 30 day filing requirement is therefore unenforceable. *See* plaintiff’s mem of law at 13-15. NYCHA replies that there is no ambiguity, and that HUD drafted paragraph 31 to impose a filing requirement in cases where an administrative appeal procedure is available and in cases where it is not. *See* defendant’s mem of law at 8-10; defendant’s reply mem at 10. NYCHA avers that its “policy and procedures do not provide for appeal of the Contracting Officer’s decision to a higher level in NYCHA,” or “for an appeal to an independent mediator or arbitrator.” *Id.* The court observes that Vikrant itself admitted this point. *See* plaintiff’s mem of law at 15. The court is also mindful of the rule that it ““may not by construction add or excise terms, nor distort the meaning of the terms used and thereby make a new contract for the parties under the guise of interpreting the writing.”” *Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 156 (1st Dept 2016), *quoting Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004). Therefore, the court rejects Vikrant’s “ambiguity” argument as unfounded, and concludes that Vikrant did violate the 30-day complaint-filing requirement set forth in paragraph 31 of the contract’s Form HUD-5370 attachment.

Accordingly, as a result of both of the foregoing findings, the court concludes that NYCHA’s motion should be granted pursuant to CPLR 3211 (a) (1), and that Vikrant’s sole cause of action for breach of contract should be dismissed, because NYCHA has demonstrated that that claim and this action are both time-barred by the documentary evidence herein.

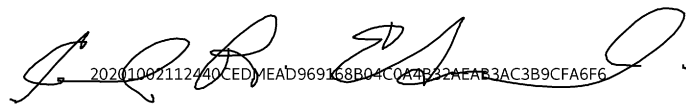
CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 3211 (a) (1), of the defendant New York City Housing Authority (motion sequence number 001) is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed

by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that counsel for defendant shall serve a copy of this Order along with Notice of Entry on all parties within twenty (20) days of entry.



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10/2/2020
DATE

CAROL R. EDMED, J.S.C.

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