

Picone/Schiavone/Frontier-Kemper/Dragados, J.V. v City of New York
2021 NY Slip Op 32842(U)
December 8, 2021
Supreme Court, New York County
Docket Number: Index No. 656662/2020
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART 53

Justice

-----X

PICONE/SCHIAVONE/FRONTIER-KEMPER/DRAGADOS,
J.V.,

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 656662/2020

MOTION DATE 02/24/2021

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, 23, 24, 25, 26

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and as set forth on the record (12.8.21), the City's motion to dismiss the plaintiff's second cause of action must be granted. The City issued an Article 44 Certificate of Substantial Completion (the **Article 44 Certificate**; NYSCEF Doc. Nos. 19 & 20) on September 21, 2015 together with a punch list indicating that the work was complete subject to an inspection of the punch list items when the punch list was complete and the plaintiff commenced this lawsuit on December 1, 2020 — nearly 4 and 1/2 years after the Article 56 six month agreed upon statute of limitations period has expired (*D. Gangi Contracting Corp. v City of New York*, 186 AD3d 450 [2d Dept 2020]). The punch list here did not “denominate a ‘final inspection report’” (*Cf. J.A. Electric, Inc. v City of New York*, 971 NYS2d 71 [Sup Ct Queens Cnty 2013], *aff'd* 119 AD3d 652 [2d Dept 2014]). *Pavarini McGovern, LLC v City of New York*, Index 654832/2016 (Sup Ct NY Cnty. Apr 24, 2016) also does not suggest a different result. In that case, the City issued an Article 14 notice and the court held that an Article 14 notice with a punch list could not constitute an Article 44 certificate. It is beyond cavil that

Michael Borsykowsky, an Assistant Commissioner, was a duly authorized representative of the Commissioner (15 RCNY 19-10; *see also, Picone/WDF, JV v City of New York*, 2021 NY App Div Lexis 2147, at *1 [1st Dept 2021]). For the avoidance of doubt, *Picone/WDF, JV v City of New York* which upon a motion to reargue granted the City's motion to dismiss also does not suggest a different result. In that case, the court granted the motion to reargue and held that the City properly issued its Article 44 notice of completion and dismissed the claim. Upon the record before the court, the Article 44 Certificate was issued following the DEP's Article 14 inspection (McCluskey Ex. C1; NYSCEF Doc. No. 21) and with a punch list indicating that the work was complete subject to inspection of the punch list items. This is almost a mirror image of the certificate of substantial completion issued in the *D. Gangi* case. The plaintiffs never challenged the punch list pursuant to Article 27 and can not five years later now complain that it was inadequate because the dates for completion of the punch list items were left to the plaintiff to submit. For the avoidance of doubt, Article 14.2.2 required the plaintiff to provide the dates for the punch list, which they did not do. It is only if the City does not agree with the dates that the City sets the dates. Additionally, among other things, the plaintiff accepted the benefits of substantial completion as the substantial completion payment was paid without the 5% retainage. The court has considered the plaintiff's remaining arguments and finds them unavailing. Thus, the motion to dismiss the plaintiff's second cause of action must be granted.

Accordingly, it is

ORDERED that City of New York's motion to dismiss the plaintiff's second cause of action is granted; and it is further

ORDERED that Defendants are ordered to serve their answer by January 18, 2022; and it is further

ORDERED that Parties are to serve discovery demands on or before February 18, 2022; and it is further

ORDERED that Parties to serve responses on or before March 18, 2022; and it is further

ORDERED that Parties are to provide an ESI protocol on or before April 4, 2022; and it is further

ORDERED that document discovery to be completed by August 30, 2022; and it is further

ORDERED that Parties will provide a deposition schedule by September 22, 2022; and it is further

ORDERED that Parties will complete depositions on or before December 30, 2022; and it is further

ORDERED that Parties will provide an expert discovery schedule on or before January 10, 2023; and it is further

ORDERED that expert discovery to be completed by April 10, 2023; and it is further

ORDERED that NOI is to be filed by April 27, 2023, with any dispositive motions to be filed within 30 days.


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12/8/2021
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE