WDF, Inc. v City of New York (AWT2 Carbon Addition Facilities Project)
2023 NY Slip Op 33299(U)
September 21, 2023
Supreme Court, New York County
Docket Number: Index No. 652478/2019
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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WDF, INC.

Plaintiff,

- v -

THE CITY OF NEW YORK (AWT2 CARBON ADDITION FACILITIES PROJECT),

Defendant.

INDEX NO. 652478/2019

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 102, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and for the reasons set forth on the record (9.22.23), the Plaintiff's motion for summary judgment (Mtn. Seq. No. 002) is granted and the Defendant's motion for summary judgment (Mtn. Seq. No. 003 is denied.

Simply put, the Plaintiff has met its prima facie burden of coming forward with evidence that it is entitled to summary judgment and the Defendant has failed to raise a triable issue of fact. The record before the Court establishes a course of conduct between the parties as to how requisition requests were made and negotiated including that a pencil draft was submitted, comments were made and incorporated and then generally payment would be due and made. With respect to the Substantial Completion outstanding requisition request itself, as discussed, the Plaintiff accepted

the comments that it received and resubmitted the draft invoice for any further comments. None were received and yet no payment was made. At oral argument, the Defendant conceded that the record was bereft of any evidence that any issues of fact exist or any question that could be put to a fact finder as to why this had not occurred except that the cover email which had the requisition request attached having incorporated all of the Defendant's comments used the word "draft". This is insufficient. As such, the Plaintiff is entitled to statutory interest on the Substantial Completion Payment due under the Contract as of January 17, 2020.[1]

More specifically, the parties entered into a contract dated as of January 15, 2014 (the **Contract**; NYSCEF Doc. No. 67) pursuant to which the Plaintiff agreed to perform certain labor and furnish certain equipment and materials for a public improvement project. Pursuant to Article 44 of the Contract, when the work was substantially completed but not entirely completed, the Commissioner would issue a certificate of substantial completion (*id.*, § 44.1). The Plaintiff would then issue a substantial completion requisition, which would include a final verified statement of any claims against the Defendant, a final approved punch list, and, if required, a request for a substantial or final extension of time (*id.*, § 44.2). The Commissioner would then issue a voucher for a payment, less certain deductions and less twice the amount that the Commissioner considered necessary to complete the work (the **Substantial Completion Payment**), as a partial and not final payment (*id.*, § 44.3). After the Commissioner issued a certificate of substantial completion, the only payments that would be made to the Plaintiff were the Substantial Completion Payment and the Plaintiff's requisition that were properly filed prior to the date of substantial completion (*id.*, § 44.4).

[1] The second and third causes of action were previously discontinued by stipulations of partial discontinuance (NYSCEF Doc. Nos. 58, 64).

The Commissioner issued a certificate of substantial completion effective as of June 1, 2018 (NYSCEF Doc. No. 68). On October 12, 2018, the Defendant issued a final punch list (NYSCEF Doc. No. 69). On October 8, 2019, the Plaintiff submitted a request for a final extension of time with a verified bill of particulars (NYSCEF Doc. No. 70). On January 17, 2020, the Plaintiff submitted the substantial completion requisition for payment (NYSCEF Doc. No. 73). The email chain on which the Substantial Completion Requisition was sent indicates that various changes were made by the Plaintiff in response to comments from the Defendant, and the final email on January 17, 2020 said "Please see attached SC Draft Req. changes as per below for your review and comment" (*id.*, at 1). It is not disputed that the Defendant did not give additional comments on the substantial completion requisition. It is also not disputed that the Defendant has not made the Substantial Completion Payment.

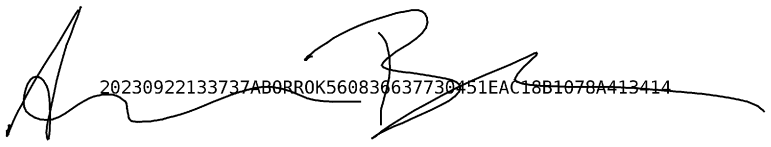
The Defendant's argument that the substantial completion requisition was a "draft" or was otherwise deficient fails. The record firmly establishes a course of conduct between the parties pursuant to Article 44.2 including that the Plaintiff revised the Substantial Completion Requisition incorporating the Defendant's comments and that the Defendant when given the opportunity to make further comment declined to do so such that the Defendant can not now years later claim the Plaintiff failed to meet a technical requirement of the contract when no such technical requirement had been previously imposed to demanded by the Defendant. Thus, the Plaintiff is entitled to payment pursuant to the Substantial Completion Requisition.

The Defendant is not correct that the Plaintiff is not entitled to prejudgment interest based on the fact that the Contract is subject to the Rules of the Procurement Policy Board (**PPB**) (NYSCEF Doc. No. 67, §§ 5.2, 43.1). Even though the PPB Rules apply to the Contract, the PRB Rules require payment of a substantial completion payment sixty days after the IRA (PPB Rules, § 4-06[c][2][iii]), which is the date when the field engineer certifies on the payment requisition that the work has been accepted (*id.*, § 4-06[b]). The Defendant never certified the payment requisition and can not therefore claim the benefit of the PPB Rules to avoid paying prejudgment interest. The Plaintiff is therefore entitled to prejudgment interest pursuant to CPLR 5001. However, the Plaintiff is not correct that it is entitled to prejudgment interest from the date of substantial completion, *i.e.*, June 1, 2018. The Defendant was not obligated to pay the amounts due pursuant to the Substantial Completion Requisition until it was submitted, which occurred on January 17, 2020. Thus, prejudgment interest runs from January 17, 2020 and not June 1, 2018.[2]

It is hereby ORDERED that the Plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the Defendant's motion for summary judgment is denied; and it is further

ORDERED that the Plaintiff shall serve judgment on notice.



9/21/2023

[2] For completeness, the Court notes that Defendant's argument that the Plaintiff did not explicitly preserve its right to seek statutory interest in its request for an extension of time pursuant to Section 13.8.2 of the Contract fails because such interest is provided by statute as a matter of law and is not a separate right that needed to be preserved.

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE