

Maric Mech., Inc. v New York City Hous. Auth.

2023 NY Slip Op 33974(U)

November 9, 2023

Supreme Court, New York County

Docket Number: Index No. 154837/2023

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

MARIC MECHANICAL, INC.

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

-----X

INDEX NO. 154837/2023

MOTION DATE 11/01/2023

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, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant's motion to dismiss is granted.

Background and Facts

This action arises out of a construction contract between plaintiff, Maric Mechanical, Inc ("Maric") and defendant, The New York City Housing Authority ("NYCHA"). On September 3, 2021, NYCHA issued a bid request soliciting bids to replace the Boilers at the Ravenswood Houses in Queens. As part of its bid request, NYCHA provided record drawings of the Project site. NYSCEF Doc. No. 7. On June 21, 2022, NYCHA awarded the Contract to Maric. According to Maric, the drawings and specifications provided by NYCHA showed "40 shoring towers supporting the temporary boilers that would be needed during the project." NYSCEF Doc. No. 33. Maric alleges that after the contract was awarded and work began, Maric became aware that 166 shoring towers needed to be installed, at an increase cost of over \$600,000. Maric submitted a change order to NYCHA which was denied. Maric then commenced this action seeking compensation for what it alleges it is owed for extra work outside of the original project scope.

NYCHA now moves to dismiss pursuant to CPLR § 3211(a)(7) and (a)(1), arguing first, that the bid drawings and contract documents explicitly disclaim complete accuracy and specifically require the contractor to do their own due diligence in assessing the site conditions. Second, NYCHA asserts Maric cannot recover for “extra” shoring work because the lump sum agreed to in the contract included all shoring work required to complete the project, not a specified number of shoring structures. Finally, NYCHA argues Maric’s claim should be dismissed because it failed to timely file a notice of claim, a condition precedent to filing suit here pursuant to the parties’ contract. Maric opposes, arguing that it is entitled to payment for the cost of the extra shoring structures because NYCHA’s bid drawings were inaccurate and under the contract documents it is entitled to an equitable adjustment for its extra work. Maric further argues that their notice of claim was timely.

Standard of Review

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *Leon v. Martinez*, 84 NY2d 83 [1994]. On a motion to dismiss the court “merely examines the adequacy of the pleadings”, the court “accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff’s claim.” *Davis v Boenheim*, 24 NY3d 262, 268

Under CPLR Rule 3211(a)(1) documentary evidence provides a basis for dismissing a cause of action “where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goseh v. Mutual Life Ins. Co. of NY*, 98 N.Y.2d 314, 326 [2002].

Discussion

In support of its motion to dismiss, NYCHA argues that it explicitly advised all bidders the contract drawings were for informational purposes and may not have completely reflected existing site conditions. NYCHA points to Section 02 41 19 1.7A of the contract which states,

“Information regarding existing construction or conditions is based on available record drawings which may or may not truly reflect existing conditions. Such information is included on the assumption that it may be of interest to the Contractor, but the Engineer, Owner and their consultants do not assume responsibility for its accuracy or completeness. . . The Contractor shall accept the condition of the site and structures as found. The Engineer and Owner assume no responsibility for condition of site or structures nor the continuation of the condition existing at time of bidding or thereafter.”

NYSCEF Doc. No. 6.

Additionally, NYCHA asserts that pursuant to the contract, Maric had an affirmative duty, prior to bidding on the contract, to verify the existing structural conditions against the contract drawings and become fully acquainted with existing site conditions and the nature of the work to be done.

In relevant part the contract provides,

“Condition of Structure 1. The Contractor for the work of this Section shall be held to have visited the site, examined the premises, determined for himself the existing conditions, character of equipment and facilities needed for the performance of the work, and all matters which may in any way affect the work before submitting a bid.”

NYSCEF Doc. No. 6.

As such, NYCHA asserts that it is not responsible for the additional cost because Maric failed to comply with pre-bid contractual requirements, and thus it waived its claim for alleged extra work relating to alleged inaccuracies or errors in the Contract drawings.

Moreover, NYCHA asserts that pursuant to the parties’ contract, Maric cannot sustain a claim for the “extra” shoring work because all shoring work was included in the lump sum contract price. NYCHA points to §3.4(B) of the contract which provides, “Shoring 1. Design,

provide, erect and maintain necessary temporary shoring, bracing, framing or support...2.

Construction and adequacy of the shoring shall be the entire responsibility of the Contractor...”

NYSCEF Doc. No. 6. Therefore, NYCHA argues that Maric cannot claim for extra work because the work was work expressly within the scope of the agreed upon contract work.

In response to NYCHA’s arguments, Maric asserts the contract does not allow NYCHA to change the project after the bids were received without making an equitable adjustment to the contract price. In support of its position Maric cites to Section 29(D) of Form HUD-5370, the Contract General Conditions document which provides,

“If any change under this clause causes an increase or decrease in the Contractor’s cost of, or the time required for the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing...”

Maric alleges this section is applicable here because the scope of the work changed after the contract bid, and thus it is entitled to the equitable adjustment. Additionally, Maric argues that regardless, the contract documents are ambiguous as to whether changes in the NYCHA drawings that required the Contractor to perform extra work required an adjustment to the contract price and because NYCHA is the drafter of the Contract Documents, where there may be an ambiguity, it is properly construed against the drafter.

As explained above, although when reviewing a motion to dismiss the court is required to accept the alleged facts as true and give all favorable inferences to plaintiff, the court shall not ignore clear documentary evidence that contradicts plaintiff’s position. Here, the Court finds that even accepting all of Maric’s factual allegations as true, the documentary evidence clearly disputes Maric’s claims.

Maric’s claim is based on the premise that the site drawings were inaccurate because they showed the need for 40 shoring towers but upon starting the work it became clear to Maric 160

shoring towers were needed. Yet, pursuant to the clear terms of the parties' contract, this difference does not constitute extra work or a change in the scope of work. The contract specifically provides that the drawings provided by NYCHA "may not truly reflect existing conditions" and further that NYCHA does not "assume responsibility for its accuracy or completeness...The Contractor shall accept the condition of the site and structures as found." Thus, the sole basis of Maric's claim is refuted by documentary evidence.

In *Savin*, the Fourth Department explained, "where the contract contains positive representations as to conditions, substantially amounting to a warranty, recovery may be had, but if the parties intended the contractor to rely upon its own investigation, no recovery for extra work may be had, absent a showing of fraud or misrepresentation as to existing conditions." *Savin Bros, Inc. v. State*, 405 NYS2d 516 (1978). Here, there was no warranty, and alternatively there was a clear disclaimer indicating that the drawings may not be accurate and requiring the contractor to conduct their own site visit. Absent an allegation that NYCHA acted fraudulently or misrepresented the conditions to prevent Maric from ascertaining the true site conditions, Maric's claim must fail.

Moreover, while Maric asserts that NYCHA cannot "change the project" without issuing an equitable adjustment, here the documentary evidence shows that the contract was not changed. While Maric cites to Section 29(D) of Form HUD-5370, as the City accurately points out, Section 29(A) of Form HUD-5370 provides that the provision applies where the City changes the scope of work. Here, that the contract specifies that Maric is to be responsible for "all shoring work," and not a specified amount of shoring work plainly refutes Maric's assertions that NYCHA changed the scope of the project work. New York Courts have repeatedly held that where a contract involves a lump sum payment for all work, the contractor cannot seek an

equitable adjustment or claim for extra work in work that was included in the original scope.

Novair Mechanical Corp. v. Universal Management & Contracting Corp., 81 A.D.3d 909

[2011]; *Cipico Const., Inc v. City of New York* 279 A.D.2d 416 [2001]; *TADCO Const. Corp v.*

Dormitory Authority of State., 93 A.D.3d 619 [2012].

Therefore, for the reasons set forth above, the Court grants NYCHA’s motion to dismiss. For this reason the Court does not address the issue of whether Maric’s Notice of Claim was timely submitted.

Accordingly, it is hereby

ADJUDGED that the motion to dismiss is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment of dismissal accordingly.

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LYLE E. FRANK, J.S.C.

11/9/2023

DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE