Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Colonial Roofing Construction Co., Inc. d/b/a Colonial General Construction,

Plaintiff,

- against -

New York City School Construction Authority,

Defendants.

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Index Number: 14536/06

Motion Date: 1/11/11

Motion Cal. Number: 4

Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion by defendant for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Memorandum of Law	5-6
Affidavit in Opposition-Exhibits	7-9
Plaintiff's Memorandum of Law	10-11
Reply	12

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendant, New York City School Construction Authority (SCA) for summary judgment dismissing the complaint is granted solely to the extent that all claims asserted in the complaint relating to breach of the contracts for work to the Graphic Arts and Communications High School in New York County (Contract No. C000008906) and to P.S. 29Q in Queens County (Contract No. C000008853) are dismissed. In all other respects, the motion is denied.

This is an action for breach of six contracts entered into between the parties from 1998 to 2003 for the performance of construction work at six schools: P.S. 87Q in Queens County (Contract No. KBF/H), P.S. 189K in Kings County (Contract No. C000007768), P.S. 140M in New York County (Contract No.

C000007777), Graphic Arts and Communications High School in New York County (Contract No. C000008906), P.S. 29Q in Queens County (Contract No. C000008853) and P.S. 22K in King County (Contract No. C000008986).

The SCA moves for summary judgment upon the grounds that plaintiff failed to serve a timely notice of claim, the action is barred by the statute of limitations and plaintiff's causes of action relating to the Graphic Arts and Communications High School and P.S. 29Q contracts were settled pursuant to a prior settlement agreement entered into between the parties on July 25, 2003.

Plaintiff filed a notice of claim with the SCA on February 7, 2006, asserting breach of contract with respect to all of the above contracts upon the grounds that the SCA refused to pay the contract balances and retainage, failed to issue change work orders for additional costs incurred in connection with the performance of the contracts and failed to make payment for change orders agreed upon and approved by the SCA. The underlying action was commenced on June 30, 2006.

Pursuant to Public Authorities Law §1744(2), a prerequisite to commencement of an action or proceeding against the SCA is the service upon it of a notice of claim within three months after the cause of action accrues. Moreover, said section also provides that an action must be commenced against the SCA within one year after "the happening of the event upon which the claim is based", i.e., when the cause of action accrues.

A cause of action against the SCA generally accrues when the work for which plaintiff is seeking compensation is substantially completed (see C.S.A. Contracting Corp. v New York City School Const. Authority, 5 NY 3d 189 [2005]; Bri-Den Const. Co., Inc. v New York City School Const. Authority, 55 AD 3d 649 [2nd Dept 2008]). Therefore, the date when the cause of action accrues is generally the date substantial completion is declared on a certificate of substantial completion (see D&L Assocs., Inc. v New York City School Const. Authority, 69 AD 3d 435 [1st Dept 2010]). In the present matter, plaintiff executed certificates of substantial completion for all of the subject contracts declaring that substantial completion was achieved on the following dates: November 1, 1998 for the P.S. 87Q contract, May 10, 2000 for the P.S. 189K contract, July 10, 2000 for the P.S. 140M contract, December 26, 2002 for the Graphic Arts and Communications High School contract, May 12, 2003 for the P.S. 29Q contract and May 25, 2003 for the P.S. 22K contract. Therefore, the SCA argues, the notice of claim filed seven years, three months and six days after substantial completion of the P.S. 87Q contract, five years, eight

months and 28 days after substantial completion of the P.S. 189K contract, five years, six months and 28 days after substantial completion of the P.S. 140M contract, three years, one month and 12 days after substantial completion of the Graphic Arts and Communications High School contract, two years, eight months and 26 days after substantial completion of the P.S. 29Q contract and two years, eight months and 13 days after substantial completion of the P.S. 22K contract, is untimely as to all said claims and the action commenced on June 30, 2006 is also barred by the one-year statute of limitations.

However, the date when a cause of action accrues may vary based upon the particular set of facts of a given case (see C.S.A. Contracting Corp. v New York City School Const. Authority, supra). The reason why the date of substantial completion is generally the date when the cause of action accrues is because that is the date when payment is generally due. It is axiomatic that a cause of action for breach of contract premised upon failure to pay the sums due under the contract cannot accrue until the date when payment is due. The SCA has failed to include in its moving papers the full contract documents setting forth the terms and details of payment under the contracts. The Court cannot assume, as counsel for the SCA apparently believes that it should, that full payment under the contracts and, therefore, that plaintiff's causes of action, accrued on all the subject contracts on the dates that the certificates of substantial completion were executed. Counsel for the SCA does not state and does not show that payment under the contracts was due on the date of substantial completion.

Plaintiff annexes to its opposition papers a copy of the SCA's "General Conditions" which is part of the contract documents of all SCA contracts. Said document provides, inter alia, that the balance due under the contract is payable when all the work is substantially complete, less four times the value of any remaining work to be completed or corrected. Payment for the remaining items of work are to be made when the remaining work is completed and a notice of final acceptance is delivered to the contractor that the contractor's obligations under the contract have been completed. Counsel for the SCA fails to set forth whether there was any additional work to be completed after the dates of substantial completion and, if so, when that work was completed, what the value of that work was and when it was payable.

Plaintiff alleges that the SCA requested numerous additional work on these contracts subsequent to their substantial completion dates and also contends that the subject contracts were modified by an agreement and stipulation of settlement entered into between the parties on April 1, 2004, which provided that the SCA may withhold

payment of the contract balances after substantial completion and pay them "some time after substantial completion" and, therefore, that plaintiff's causes of action did not accrue on the date of substantial completion.

The April 1, 2004 agreement was entered into as a result of the failure of plaintiff to pay prevailing wages to its workers on SCA contracts. Veap Sela, plaintiff's president, pled guilty to mail fraud in connection with his failure to pay prevailing wages in 1998 and 1999 and was sentenced on April 1, 2003 in the United States District Court the Eastern District of New York for mail fraud in connection therewith. On August 14, 2003, plaintiff entered into a monitorship agreement with the SCA's Office of the Inspector General whereby a monitor was appointed over plaintiff to prevent future integrity issues on SCA contracts. Subsequently, after an audit, the monitor discovered, and issued a report to the Office of the Inspector General, that plaintiff failed to pay the supplemental portion of prevailing wages to its employees on its public works contracts in 2000, 2001, 2002 and 2003 and that plaintiff submitted false certified payrolls to the SCA.

Pursuant to the April 1, 2004 agreement, plaintiff, inter alia, acknowledged that it was in default and material breach of all of its contracts with the SCA, agreed to withdraw its prequalification to do business with the SCA, agreed not to seek or perform work for the SCA for five years and agreed to be entered into the New York City VENDEX. It also agreed to waive its right to any funds owing from all of its SCA contracts. In addition, plaintiff agreed to pay restitution to its workers for failing to pay them prevailing wages. The total prevailing wage restitution to its workers on its SCA contracts was $724,500. Said restitution sum would be paid from an escrow account funded from the proceeds of the sale of certain properties owned by plaintiff ans Sela and from remaining funds in plaintiff's contracts with the SCA. The monitor was appointed as the escrow agent.

Paragraph 6 of the April 1, 2004 agreement provides:

> In furtherance of this Agreement and Settlement, Colonial waives its rights, if any, to any and all monies which are or may be due to Colonial for any reason whatsoever from all of its SCA contracts, including but not limited to contracts: C000009094, C000009093, C000009087, C000008986, C000008906, C000008853, C000008725, C000007777, C000007768 and C000007328. All funds remaining in Colonial's contracts with the SCA will

> be used to complete the contracts, including without limitation, the payment of liens. Colonial shall remain responsible to provide and execute all documentation required by the contracts, including without limitation, warranties, guarantees, regulatories, as-built drawings, certificates of occupancy, etc. All monies remaining after Final Completion of each of the contracts specified in this Paragraph 6 ("Remaining Funds") shall be transferred to the SCA Office of the Inspector General ("OIG") to be utilized to make prevailing wage restitution described in Paragraph 4 above. If, after funding the Prevailing Wage Escrow account described in Paragraph 10 below to the amount of $745,500 and after deduction of all expenses incurred in connection with the restitution, there are any excess Remaining Funds, such Remaining Funds shall be transferred to Colonial.

Sela, in his affidavit in opposition, avers that Colonial transferred to the escrow account on August 29, 2005 a check in the sum of $724,500 and a check in the sum of $35,000, out of the proceeds of the sale of its warehouse. Copies of said checks are annexed to the opposition papers. Plaintiff contends that the SCA failed to transfer the remaining funds of the contracts to the escrow account, the escrow agent failed to give plaintiff an accounting and that the excess remaining funds were never transferred to plaintiff. Therefore, argues plaintiff, the contracts were modified so as to provide for completion of the contracts and payment of excess remaining funds to plaintiff subsequent to the dates of substantial completion. It is not possible to pinpoint, however, and plaintiff does not state, when the alleged breach occurred under the terms of the April 1, 2004 agreement. The Court notes that the escrow agreement annexed to the opposition papers states that the escrow agent will retain any sums remaining in the escrow account after disbursement of the restitution sums to the claimant employees until December 31, 2004, after which time those remaining funds will be paid to the SCA. However, the evidence presented is that plaintiff did not fund the escrow account until August 29, 2005. No evidence is presented by the SCA as to what the escrow account consisted of, how much of it comprised remaining funds under the contracts, when restitution to the claimant employees was made and liens satisfied out of it and what, if any, excess remaining funds there were. Indeed, the SCA did not even make reference to the April 1, 2004 agreement because it is of the opinion that said agreement is irrelevant.

The essence of plaintiff's opposition is that the last

sentence of paragraph 6 of the April 1, 2004 agreement provided that plaintiff would be paid the excess remaining funds after payment of the restitution to the employees. Therefore, the record, on this motion, raises issues of fact as to how much money was in the escrow account, when restitution was made from the funds in the escrow account, what, if any, excess funds remained after payment of restitution, and when payment of those funds was due to be made to plaintiff. The SCA, pointing to the first sentence of that paragraph, merely argues that plaintiff waived any claim to those same residual funds. The SCA's argument is without merit. An interpretation wherein a specific contract provision is nullified by a prior clause in the same paragraph would render the provision meaningless and violate the principles of contract construction which dictate that a contract provision not be interpreted in a manner that would render it meaningless or create an absurd result.

The Court notes that although the last sentence of paragraph 6 of the April 1, 2004 agreement provides that any remaining funds be transferred to plaintiff, the escrow agreement indicates that such funds be transferred to the SCA. Moreover, the Court notes that the last sentence of paragraph 6 also states that the escrow account shall be funded in the sum of $745,500, a sum that is unrelated to the April 1, 2004 agreement and the escrow agreement, which both call for the funding of the escrow account in the sum of $724,500. The Court, however, may not presume that the last sentence of the agreement reflects a drafting error and that the parties actually meant to say that the remaining funds, if any, would be transferred to the SCA, not plaintiff. No argument is made by the SCA and no evidence is proffered by affidavit or otherwise that there was a drafting error. Rather, counsel for the SCA merely argues that the intended interpretation of this sentence was that it indeed provided that the remaining funds would be transferred to plaintiff but that said provision was waived in the same paragraph.

However, notwithstanding the April 1, 2004 agreement, the Court finds that plaintiff's causes of action relating to the Graphic Arts and Communications High School and P.S. 29Q contracts were settled pursuant to a prior settlement agreement entered into between the parties on July 25, 2003.

Pursuant to said settlement agreement, all claims under the Graphic Arts contract were settled for the payment to plaintiff of $500,000 and all claims under the P.S. 29Q contract were settled for the payment of $300,000. Said agreement was in full settlement of any and all claims, including claims for extra or additional work. Two change work orders were executed on July 29, 2003 in which the parties agreed that these change orders represented a final settlement of all claims and extinguished all claims of

plaintiff with respect to these two contracts. Therefore, even though the April 1, 2004 agreement references these contracts, it is clear that the provisions of that agreement, to the extent that payment of any excess remaining funds for the completion of the contracts would be transferred to plaintiff, do not relate to the Graphic Arts and P.S. 29Q contracts. Plaintiff's only opposition in this regard is Sela's averment that he was coerced into agreeing to the terms of the stipulation because he was afraid that he would be arrested and believes that plaintiff was targeted for "blowing the whistle on SCA corruption." No evidence of coercion or duress was proffered so as to raise an issue of fact in this regard. Indeed, Sela was, in fact, arrested, tried and convicted of mail fraud in connection with prevailing wage violations and admits to same in the April 1, 2004 agreement.

Accordingly, the motion is granted solely to the extent that all claims asserted in the complaint relating to breach of the Graphic Arts and P.S. 29Q contracts are dismissed. In all other respects, the motion is denied.

Dated: February 7, 2011

KEVIN J. KERRIGAN,J.S.C.