

NEW YORK COURT OF APPEALS

**C.S.A. Contracting Corp. v. New York City School Construction
Authority**

5 N.Y.3d 189 (N.Y. 2005) · Decided July 6, 2005

OPINION

GRAFFEO, J.

OPINION OF THE COURT Graffeo, J. The issue here is whether plaintiff C.S.A. Contracting Corp. timely filed a notice of claim pursuant to Public Authorities Law § 1744 (2) in this breach of contract action seeking payment from defendant New York City School Construction Authority for work it performed.

Under the facts and circumstances of this case, we conclude that the notice of claim was not timely because it was not submitted within three months of the accrual of the claims. In 1993, the New York City School Construction Authority (SCA) and plaintiff entered into a contract in which SCA agreed to pay plaintiff \$1 million to perform asbestos abatement work at various city schools.

The project included asbestos removal at PS 29 in Staten Island. On December 3, 1993, plaintiff submitted a request for payment for extra work performed at PS 29 in the amount of \$151,994.96. SCA apparently approved the request in February 1994, but two months later informed plaintiff that it would not remit payment for the PS 29 job because it determined that plaintiff had overcharged for abatement work at another work site—Bushwick High School.

On May 9, 1994, plaintiff purportedly served a notice of claim on SCA seeking monies it contended were owed under its contract. Plaintiff subsequently issued a notice of dispute on June 30, 1994 requesting to mediate its payment claim with SCA.

After mediation failed to resolve the conflict, plaintiff submitted a notice of claim dated September 21, 1994. This notice of claim sought the payment of \$595,850 for three categories of work performed by plaintiff: asbestos abatement at PS 29, additional costs incurred in the removal of asbestos from heights in excess of 14 feet, and wet cleaning and encapsulation expenses.

Plaintiff commenced this breach of contract action against SCA in April 1995 to recover damages for the claims outlined in its notice of claim, alleging that it had furnished SCA with notice in June 1994 and again in September 1994.

In its answer, SCA interposed an affirmative defense that plaintiff had failed to properly serve a notice of claim. SCA also counterclaimed for the alleged overpayment for work performed at

Bushwick High School. *192At trial, plaintiff was unable to submit documentary evidence corroborating the service of a notice of claim in May 1994. Its former corporate president testified that all work at PS 29 was completed before December 1993.

At the close of plaintiffs case, SCA moved to dismiss the complaint for failure to present a timely notice of claim. Supreme Court granted the motion and dismissed the complaint, holding that plaintiff did not submit a notice of claim within three months of the accrual of its claims.

The court also severed SCA's counterclaim. The Appellate Division affirmed. We granted plaintiff leave to appeal and now concur that plaintiffs complaint must be dismissed. Section 1744 (2) of Public Authorities Law provides, in part: "No action or proceeding for any cause whatever, other than the one for personal injury, death, property damage or tort... relating to the design, construction, reconstruction, improvement, rehabilitation, repair, furnishing or equipping of educational facilities, shall be prosecuted or maintained against [SCA]... unless (i) it shall appear by and as an allegation in the complaint or moving papers, that a detailed, written, verified notice of each claim upon which any part of such action or proceeding is founded was presented to the board within three months after the accrual of such claim...." A timely notice of claim is a condition precedent to maintaining an action against SCA, and the plaintiff has the obligation to plead and prove that its notice of claim was served within three months after the accrual of its claim (see generally *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 547 [1983]; *Rogers v Village of Port Chester*, 234 NY 182, 185 [1922]).

It is well settled that a contractor's claim accrues when its damages are ascertainable (see *Matter of Board of Educ. of Enlarged Ogdensburg City School Dist. [Wager Constr. Corp.]*, 37 NY2d 283, 290 [1975]). Although the determination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, "it generally has been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted" (*New York City School Constr.*

Auth. v Kallen & Lemelson, 290 AD2d 497 [2d Dept 2002] [internal quotation marks and citations omitted]). Here, plaintiff completed its work at PS 29 some time before December 1993, and finished its rehabilitation project entirely *193by the close of 1993. Plaintiff also submitted a detailed invoice for work done at PS 29 on December 3, 1993.

Therefore, plaintiffs claims were ascertainable and accrued by the end of 1993.* Even assuming plaintiff served a notice of claim in May 1994 or that its June 1994 notice of dispute could be viewed as a proper notice of claim, it failed to present statutorily-mandated notice within three months of the accrual of its claims.

Thus, the courts below properly dismissed the complaint. Plaintiff argues that its claims should be deemed to have accrued, at the earliest, when SCA denied payment in April 1994. In support of

this argument, plaintiff notes that the Legislature has adopted this rule in Education Law § 3813 (1), which applies to claims against school districts.

In 1992, the Legislature amended Education Law § 3813 (1) to provide: “In the case of an action or special proceeding for monies due arising out of contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied” (L 1992, ch 387).

Thus, instead of using the date that damages are ascertainable under the Wager analysis, the three-month notice of claim time period is not triggered until the board of education denies payment. Section 1744 (2) of the Public Authorities Law—in existence at the time of the amendment—was not, however, similarly amended, and we decline plaintiffs invitation to engraft such a provision onto that statute.

Any such change should come from the Legislature. Accordingly, the order of the Appellate Division should be affirmed, with costs. Plaintiffs former corporate president testified that SCA initially refused to pay any contractor for wet cleaning and encapsulation costs, but that, at some point “[l]ater on,” it changed its posture in a letter and allowed such costs.

Plaintiff did not place this correspondence in evidence or otherwise offer testimony as to the date of this change in position. Even if, as plaintiff suggests, the date of such change in position constituted the accrual date for this category of work claimed, plaintiff failed to satisfy its burden of establishing that its September 1994 notice of claim—the only notice that mentioned wet cleaning and encapsulation costs—was submitted within three months of the alleged modification by SCA regarding work eligible for payment.