

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH DEPARTMENT

Rifenburg Construction, Inc. v. State

90 A.D.3d 1498 (4th Dep't 2011) · Decided December 23, 2011

SUMMARY

The New York Appellate Division considers the State’s motion for summary judgment concerning claims by a construction contractor for compensation for extra work on a Department of Transportation project. The court held that the contractor’s failure to comply with contractual notice and reporting requirements defeated its claims for extra traffic-control and survey work, but triable issues remained regarding bridge construction costs and quantity underruns. The court also upheld the denial of summary judgment on the contractor’s claim for interest based on allegedly untimely final payment and dismissed the contractor’s cross appeal.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Department
WRITING FOR THE COURT	Fahey, J.P.; Garni, J.; Sconiers, J.; Gorski, J.; Martoche, J.
JURISDICTION	New York
DECIDED	December 23, 2011
DISPOSITION	other
PROCEDURAL POSTURE	The State appealed from an order of the Court of Claims denying portions of its motion for summary judgment dismissing the first through fourth and seventh causes of action in Rifenburg Construction's claim for compensation for extra work and interest. Rifenburg filed a cross appeal.
STANDARD OF REVIEW	Summary judgment is proper when the movant establishes entitlement to judgment as a matter of law and the opposing party fails to raise a triable issue of fact.
PRECEDENTIAL VALUE	published appellate memorandum; precedential under New York law
PARTIES	State v. Rifenburg Construction, Inc.

TOPICS

construction law

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summary judgment

conditions precedent

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PRACTICE AREAS

construction law

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civil procedure

QUESTIONS PRESENTED

1. Whether the State was entitled to summary judgment dismissing claims for extra traffic-control and survey work because Rifenburg failed to comply strictly with contractual notice and reporting requirements.
2. Whether triable issues of fact precluded summary judgment on Rifenburg's claim for additional bridge-construction costs allegedly caused by Department of Transportation design errors despite an untimely notice.
3. Whether triable issues of fact existed regarding Rifenburg's knowledge of quantity underruns and changes that allegedly supported a claim for additional compensation.
4. Whether the State was entitled to summary judgment dismissing the claim for interest under State Finance Law § 179-f based on the asserted timeliness of its final payment.
5. Whether Rifenburg's cross appeal had to be dismissed because Rifenburg was not aggrieved by the order.

HOLDINGS

1. Contract provisions requiring prompt notice and documentation of claims for additional compensation are conditions precedent to suit or recovery, and express conditions must be literally performed; substantial performance is insufficient. Strict noncompliance generally waives the claim for additional compensation.
2. The State was entitled to summary judgment dismissing the third and fourth causes of action because Rifenburg failed to comply with the contract's notice and reporting requirements and did not raise a triable issue of fact.
3. Summary judgment was properly denied on the first cause of action because, although the State established an untimely claim under the contractual notice provisions, Rifenburg submitted evidence creating a factual issue concerning the Department of Transportation's knowledge of design errors and indications that Rifenburg would be compensated.
4. Summary judgment was properly denied on the second cause of action because Rifenburg raised triable issues of fact as to whether it knew or should have known of the quantity underruns in light of numerous project additions and deletions.
5. The State was not entitled to summary judgment dismissing the seventh cause of action for interest under State Finance Law § 179-f because the 18-month period between acceptance of the work and written notice of missing documentation was not excluded when calculating the timeliness of final payment.

6. Rifenburg's cross appeal was dismissed because Rifenburg was not aggrieved by the order denying the State's motion.

KEY QUOTATIONS

“Express conditions must be literally performed; substantial performance will not suffice”” (90 A.D.3d at 1498)

“Failure to strictly comply with such provisions generally constitutes waiver of a claim for additional compensation”” (90 A.D.3d at 1498)

FACTUAL BACKGROUND

The New York State Department of Transportation contracted with Rifenburg Construction to reconstruct 6.9 miles of Route 332, including widening the road and building two bridges, at a cost exceeding \$26 million. After the project was completed, Rifenburg sought additional compensation for extra traffic-control work, survey work, bridge construction costs allegedly caused by design errors, quantity changes and underruns, and interest based on allegedly late final payment. The contract required prompt notice of extra-work claims and daily force-account-work reports, with strict compliance.

PROCEDURAL HISTORY

After completing a New York State Department of Transportation road reconstruction project, Rifenburg commenced an action in the Court of Claims seeking compensation for extra work under the construction contract and interest on allegedly untimely final payment. The Court of Claims denied portions of the State's summary-judgment motion. The Appellate Division modified the order by granting summary judgment dismissing the third and fourth causes of action, affirmed the denial of summary judgment as to the first, second, and seventh causes of action, and dismissed Rifenburg's cross appeal because it was not aggrieved.

DISPOSITION

other

CASES CITED

- A.H.A. Gen. Constr. v. New York City Hous. Auth., 92 N.Y.2d 20, 30-31, 33-34 (1998), rearg. denied, 92 N.Y.2d 920 (1998)
- Sicoli & Massaro v. Niagara Falls Hous. Auth., 281 A.D.2d 966 (2001)
- Tug Hill Constr. v. County of Broome, 270 A.D.2d 755, 756 (2000)
- MHR Capital Partners LP v. Presstek, Inc., 12 N.Y.3d 640, 645 (2009)
- Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 86 N.Y.2d 685, 690 (1995)
- Fahs Rolston Paving Corp. v. County of Chemung, 43 A.D.3d 1192, 1194 (2007)
- Bat-Jac Contr. v. New York City Hous. Auth., 1 A.D.3d 128 (2003)
- Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980)
- Weichert v. Shea, 186 A.D.2d 992 (1992)

OPINION

PER CURIAM.

Memorandum: The New York State Department of Transportation (DOT) entered into a contract with claimant for the reconstruction of 6.9 miles of Route 332 in Farmington (hereafter, project). The project involved expanding the road from two to four lanes and building two new bridges at a cost of over \$26 million. Following completion of the project, claimant commenced this action seeking compensation for extra work under the terms of the contract.

As limited by its brief, defendant appeals from an order insofar as it denied those parts of defendant's motion for summary judgment dismissing the first through fourth and seventh causes of action. With respect to the first through fourth causes of action, defendant contends that it is entitled to judgment as a matter of law based on the strict notice and reporting requirements contained in the construction contract.

Those contract provisions require claimant, inter alia, to provide prompt notice to DOT of any request for payment for "extra work" that it performs and to submit "a daily summary of FORCE ACCOUNT WORK done on the contract." The contract requires "[s]trict compliance" with the notice provisions and "compliance" with the record-keeping provisions. Contract clauses that "require the contractor to promptly notice and document its claims made under the provisions of the contract governing the substantive rights and liabilities of the parties... are... conditions precedent to suit or recovery" (A.H.A.

Gen. Constr. v New York City Hous. Auth., 92 NY2d 20, 30-31 [1998], rearg denied 92 NY2d 920 [1998]; see Sicoli & Massaro v Niagara Falls Hous. Auth., 281 AD2d 966 [2001]; Tug Hill Constr. v County of Broome, 270 AD2d 755, 756 [2000]). "[A] condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises' " (MHR Capital *1499Partners LP v Presstek, Inc., 12 NY3d 640, 645 [2009], quoting Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 690 [1995]). "Express conditions must be literally performed; substantial performance will not suffice" (MHR Capital Partners LP, 12 NY3d at 645). "Failure to strictly comply with such provisions generally constitutes waiver of a claim for additional compensation" (Fahs Rolston Paving Corp. v County of Chemung, 43 AD3d 1192, 1194 [2007]; see also Bat-Jac Contr. v New York City Hous.

Auth., 1 AD3d 128 [2003]). We agree with defendant that the Court of Claims erred in denying those parts of its motion with respect to the third and fourth causes of action. We therefore modify the order accordingly. Those causes of action seek compensation for extra work performed for controlling and protecting traffic during the project and for performing survey work, respectively.

According to claimant, the extra work was necessitated by the numerous changes made by DOT during the project. The traffic control and survey work were fixed cost items under the contract for which claimant was entitled to extra compensation only where additions to the project exceeded 25% of the original bid price.

In support of its motion, defendant established that claimant did not comply with the notice and reporting requirements of the contract, and claimant failed to raise a triable issue of fact in opposition (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Claimant's assertion that the numerous changes made by DOT during the project made it extremely difficult to calculate the extra traffic control and survey costs does not justify claimant's failure to comply with the notice and reporting requirements of the contract.

Those requirements are expressly designed to alert defendant to cost over-runs at the earliest possible time in order to allow it to take steps to avoid such extra expenses in the interest of protecting the public fisc (see *A.H.A. Gen. Constr.*, 92 NY2d at 33-34).

We further conclude, however, that the court properly denied the motion with respect to the first and second causes of action. The first cause of action seeks compensation for the extra costs involved in construction of the bridges, which claimant alleges were necessitated by design errors on the part of DOT. Defendant met its initial burden on the motion with respect to that cause of action by establishing that claimant breached the contract notice provisions inasmuch as it failed to make a timely claim for additional compensation.

In opposition to the motion, however, claimant submitted evidence demonstrating not only that DOT was aware of the design errors but that DOT prepared documents during the project suggesting that claimant would be compensated for the extra work in question. *1500The second cause of action seeks compensation "for significant changes to and under[-]runs in the quantity of work" estimated by DOT in the project specifications.

Defendant met its initial burden on the motion with respect to that cause of action by establishing when such under-runs occurred and that, by failing to provide timely notice of its request for additional compensation, defendant did not satisfy a condition precedent for such request.

We conclude, however, that claimant raised triable issues of fact whether it knew or should have known of those under-runs given the numerous additions and deletions to the quantity of work in the project, including the additional construction of three-quarters of a mile of water line. Further, the court properly denied that part of defendant's motion with respect to the seventh cause of action, seeking payment of interest pursuant to State Finance Law § 179-f on the ground that DOT's final payment under the contract was untimely.

Defendant contends that it is entitled to summary judgment dismissing that cause of action because its final payment was timely in light of claimant's delay in submitting all of the

documentation necessary for that payment to be issued.

We reject that contention. Defendant accepted the work of the project on November 24, 2003 but did not provide written notice to claimant of the missing documentation until August 3, 2005. We conclude that the 18-month period in question is not excluded for purposes of calculating the timeliness of defendant's final payment (see 2 NYCRR 18.13).

Finally, claimant is not aggrieved by the order denying defendant's motion, and thus its cross appeal must be dismissed (see *Weichert v Shea*, 186 AD2d 992 [1992]; see generally CPLR 5511).
Present — Fahey, J.P., Garni, Sconiers, Gorski and Martoche, JJ.