[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN PART 11
Justice

Omni Contracting Company, Inc.

INDEX NO.: 603811/08

Plaintiff,

- v -

City of New York, PMS Construction Management Corp, et als

MOTION DATE:

MOTION SEQ. NO.: 002

MOTION CAL. NO.:

Defendant.

The following papers, numbered 1 to ____ were read on this motion to/for dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

Dated: June 5, 2012

J.S.C.

Check one: [X] **FINAL DISPOSITION** [ ] **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 11

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OMNI CONTRACTING COMPANY, INC.,

Plaintiff,

–against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION (Contract No. 20020009141, Project No. LCN005NEW), and PMS CONSTRUCTION MANAGEMENT CORP.,

Defendants.

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Index No.: 603811/08
Mot. Seq. 002

MADDEN, J.:

This action arises out of a trade contract between defendant PMS Construction Management Corp. (PMS), as construction manager, and plaintiff Omni Contracting Company, Inc. (Omni), as trade contractor in connection with a municipal construction project at the SoHo Branch public library, owned and operated by the City of New York (City). Omni seeks to recover against the City and PMS for alleged delay damages. By Decision and Order dated September 27, 2010 (Jaffe, J.), the City of New York was dismissed as a defendant in this action. PMS now moves, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the complaint's sole cause of action for breach of contract on the basis of fraudulent inducement, written release, and the "no damages for delay" and notice provisions in the parties' contract.

FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

On January 18, 2002, the City, through its Department of Design and Construction (DDC), entered into a contract with PMS for construction management and other related services for various city-wide capital construction projects on libraries and cultural institutions (CM

Agreement) (Strauss Affirm., Ex. C). As construction manager, PMS was responsible for all aspects of the SoHo library project, including soliciting bids from qualified contractors through a competitive bidding process, awarding and entering into contracts with them to perform the work, and coordinating and supervising the required work (CM Agreement, § 10.2).

It is undisputed that PMS entered into an agreement dated June 25, 2004 with Omni for general construction work at the SoHo library (the Trade Contract) for a price of $3,507,371. The terms of the Trade Contract required that Omni's work be commenced and completed by October 30, 2005. However, the project was delayed, and Omni substantially completed its work on October 30, 2006. The total change orders amounted to $1,002,496.

The verified complaint dated March 20, 2009 alleges a single cause of action for breach of contract against both the City and PMS, by which Omni seeks $499,243.70 in delay damages, on the ground that its performance was prevented or waived by the defendants' actions in impeding and preventing it from completing its work by the project deadline (Complaint, ¶ 17). In March of 2010, PMS moved to dismiss the complaint on several grounds, one being that Omni fraudulently induced the Trade Contract by virtue of false misrepresentations on the VENDEX questionnaire[1] submitted with its bid documents. PMS relied on three trial court decisions in which complaints by Omni for delay damages on other City projects were dismissed on the basis of the same VENDEX questionnaire, namely *Omni Contr. Co., Inc. v City of New York*, Sup Ct, Queens County, Sept. 25, 2009, Kerrigan, J., index No. 30640/08; *Omni Contr. Co., Inc. v City of New York*, Sup Ct, NY County, Nov. 13, 2009, Smith, J., index No. 603812/08; and *Omni*

[1]VENDEX is an acronym for Vendor Information Exchange, a database maintained by the Mayor's Office of Contract Services to facilitate determinations by City agencies as to whether a bidder is responsible.

Contr. Co., Inc. v City of New York, Sup Ct, NY County, March 5, 2010, Kern, J., index No. 105634/07. In response, Omni claimed that these decisions were wrongly decided, and that appeals from each of the orders had been filed. At the oral argument of this motion before Justice Jaffe on August 3, 2010, the parties agreed that PMS's fraudulent inducement defense must be decided by the court before any of PMS's other grounds for dismissal are considered, and Justice Jaffe determined that judicial economy warranted a stay of PMS's motion pending a decision on Omni's appeals. *See* Decision and Order dated September 27, 2010, at 12.

By letter dated November 11, 2011, counsel for Omni advised the court[2] that Justice Kerrigan's dismissal had been affirmed by the Second Department and that leave to appeal to the Court of Appeals had been denied (*Omni Contr. Co., Inc. v City of New York*, 84 AD3d 763 [2d Dept], *lv denied* 17 NY3d 716 [2011]). Both sides agree that PMS's motion should now be decided.

DISCUSSION

Fraudulent Inducement

PMS contends that Omni made fraudulent misrepresentations about its history of prior investigations by the New York State Department of Labor for underpayment of prevailing wages on the VENDEX questionnaire that it submitted during the bidding on the Trade Contract. Because the City successfully raised this as a defense against Omni in the other cases, PMS contends that the instant complaint must be dismissed on the basis of collateral estoppel.

There are two necessary requirements to invoke the doctrine of collateral estoppel: (1)

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[2]The action was transferred out of Justice Jaffe's City part after the City was dismissed from the case, and the action was randomly re-assigned to this part.

"the identical issue necessarily must have been decided in the prior action and be decisive of the present action;" and (2) "the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (citations omitted)" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *see also Shanley v Callanan Indus.*, 54 NY2d 52, 55 [1981]; *Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d 334 [1st Dept 2006]). "[M]utuality of parties is not required" (*Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 415 [1st Dept 2011]), and it is not necessary that the "cause of action" be the same in order for collateral estoppel to apply (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *see also Ventur Group, LLC v Finnerty*, 80 AD3d 474, 475 [1st Dept 2011]).

The issue that was decided in these other cases, and now by the Second Department, was whether dismissal of Omni's contract claims against the City was warranted based on the defense that the City was fraudulently induced by the false statements in the VENDEX questionnaire to award the contracts to Omni. The Second Department ruled that Omni acted with intent to deceive the City, and the City was thereby injured to the extent that it was "unable to make an informed decision as to which contractor was in fact the lowest responsible bidder" (*Omni Contr. Co., Inc. v City of New York,* 84 AD3d at 764).

Omni argues that collateral estoppel does not apply, because it was the City that successfully raised this defense in the other actions, and there has not been a single published opinion in a construction case where a private entity like PMS has been able to dismiss a contractor's complaint on this ground. In this court's view, the fact that Omni entered into the Trade Contract with PMS, and not the City, directly is not dispositive as to whether the Trade Contract was fraudulently induced. The complaint itself alleges that PMS was "acting on behalf

of the Commissioner DDC and defendant NYC" when it entered into the Trade Contract with Omni and that Omni was being paid with City funds (Complaint, ¶¶ 6, 8). The VENDEX questionnaire states that its purpose is to make sure that the City obeys the mandate of the New York City Charter to do business only with responsible companies (*see* Strauss Affirm., Ex. G, at 1), and PMS was charged with that responsibility in its role as construction manager for the City. Article 2.1 of the CM Agreement provides that PMS's obligations with respect to the bidding out of trade contracts are subject to the Rules of the Policy Procurement Board of the City of New York (PPB Rules) (Strauss Affirm., Ex. C, at 4), and the Trade Contract itself provides that it is subject to the PPB Rules (*id.*, Ex. D, at C-4). Section 2-08 of the PPB Rules requires that New York City public works contracts be awarded to "responsible prospective contractors only," reflecting the mandate of General Municipal Law § 103 (1) that requires all municipal contracts involving an expenditure of $20,000 to be awarded to "the lowest responsible bidder." According to the affidavit of PMS's president, PMS relied on Omni's VENDEX disclosures in awarding the Trade Contract to Omni (Stevens Aff., ¶ 7). Thus, PMS was also injured by the false statements in the VENDEX questionnaire by its inability to make an informed decision as to which contractor was, in fact, the lowest responsible bidder on the SoHo library project.

The competitive bidding laws and ordinances "evince a strong public policy of fostering honest competition in order to obtain the best work or supplies at the lowest possible price," and "should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest" (*Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 192-93 [1968]). Omni cannot be allowed to avoid the consequences of its false misrepresentations regarding its violations of state labor laws simply because the City chose to

act through a private construction manager with respect to the SoHo library project. Omni admits that PMS was acting on behalf of the City when it awarded the Trade Contract to Omni and that Omni was being paid by City funds. In addition, the documentary evidence establishes that the bidding process was subject to the PPB Rules which require truthful answers on the VENDEX questionnaire regarding whether Omni was a responsible bidder, and thus PMS has standing to raise fraudulent inducement to Omni's claim for breach of the Trade Contract.

Omni also contends that factual issues exist as to whether the City waived this defense by continuing to award Omni work on other projects subsequent to discovering, and with full knowledge of, the alleged fraud, citing *Vanderbilt Group, LLC v Dormitory Auth. of State of N.Y.* (51 AD3d 506 [1st Dept 2008]). Omni claims that its waiver argument was summarily rejected by the other courts on the ground that a municipal defendant cannot waive a defense which is founded upon grounds of public policy.

Justice Kerrigan did not summarily reject Omni's waiver argument. To the contrary, he ruled first that the *Vanderbuilt Group* case was distinguishable on the facts.

> "There, the Appellate Division, First Department, held that the evidence raised an inference that the Authority was aware of plaintiff's false statements made in response to the Authority's request for proposals and investigated them before executing the contract. . . . In contrast, the record on the instant motion is devoid of any evidence that would raise an inference that the City knew of Zihenni's false statements prior to executing the contract. The contention of counsel for Omni that further discovery is needed to determine when the City acquired knowledge that Zihenni made false statements in the VENDEX questionnaires fails to raise an issue of fact."

(*Omni Contr. Co., Inc. v City of New York, supra*, at 6). Here, too, the Trade Contract was entered into June of 2004, work commenced in or about August of 2004 (Complaint, ¶ 14), and substantial completion was achieved sometime in October of 2006, well before "early 2007"

when Omni's president, Haleem Zihenni, claims the City learned of the false statements in the VENDEX questionnaire (Zihenni Aff., ¶ 24).

Justice Kerrigan also ruled that "public policy mandates that contracts fraudulently procured in violation of General Municipal Law §103 may not be enforced either in contract or equity" (*Omni Contr. Co., Inc. v City of New York, supra*, at 6). That holding applies equally here even though PMS, and not the City, was the contracting party since this is a public works contract.

Accordingly, PMS has standing to assert fraudulent inducement as a complete defense to Omni's claim for delay damages. There are, however, two other independent grounds for dismissal of Omni's complaint.

No Damages For Delay Provisions in the Trade Contract

Article 11 of the Trade Contract provides:

> **"DELAYS AND EXTENSION OF TIME**
> 11.1 If the Subcontractor shall be delayed in the commencement, prosecution or completion of the Work or shall be obstructed or hindered in the orderly progress of the Work by any act, neglect or default of the Construction Manager, the Owner, the Architect, another contractor or subcontractor or by any cause acknowledged by [Construction Manager] to be beyond the control of the Subcontractor, then the time fixed for completion of the Work may be extended for a period equivalent to the period of the delay incurred by the Subcontractor as determined by the [Construction Manager]; but no extension shall be granted unless a claim in writing therefor is presented to the [Construction Manager] within seventy-two (72) hours of the start of such delay, obstruction or hindrance. The Subcontractor expressly agrees not to make and hereby waives, any claim for damages on account of any delay, obstruction or hindrance for any cause whatsoever, including but not limited to the aforesaid causes, and agrees that its sole right and remedy in the case of any delay, obstruction or hindrance shall be an extension of the time fixed for completion of the Work"

(Strauss Affirm., Ex. D, at 6). In addition, Article 13 (g) of the Supplementary Conditions

states:

> "No Damage for Delay - The Contractor agrees to make no claim for damages for delay in the performance of this Contract occasioned by any act or omission to act of CM and/or the City or any of their representatives, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the Work as provided herein"

(*id.*, at C-10). These are classic "no damages for delay" provisions found in many construction contracts, and are enforceable by the courts (*Universal/MMEC, Ltd. v Dormitory Auth. of State of N.Y.*, 50 AD3d 352, 353 [1st Dept 2008]; *Commercial Elec. Contrs., Inc. v Pavarini Constr. Co. Inc.*, 50 AD3d 316, 318 [1st Dept 2008]; *T.J.D. Const. Co. v City of New York*, 295 AD2d 180 [1st Dept 2002]).

Exceptions to enforcement of these clauses exist for delays caused by bad faith or willful, malicious, or grossly negligent conduct, uncontemplated delays, unreasonable delays that constitute an intentional abandonment of the contract, and delays resulting from the breach of a fundamental obligation of the contract (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]). However, a "plaintiff[] seeking to invoke one of the exceptions to the enforceability of a 'no damages for delay' clause face a 'heavy burden'" (*LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d 485 [1st Dept 2012], quoting *Dart Mech. Corp. v City of New York*, 68 AD3d 664 [1st Dept 2009]). Any causes for delay that are specifically mentioned in the parties' contract are considered contemplated (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d at 309-310; *LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d at 486; *North Star Contr. Corp. & Tern Star v City of New York*, 203 AD2d 214, 214-15 [1st Dept 1994]).

Omni argues that its claim for delay damages cannot be dismissed on a pre-answer

motion to dismiss the complaint, because the complaint expressly pleads that defendants were "grossly negligent" (Complaint, ¶ 17), and alleges that defendants "intentionally delayed, hindered, impeded, and prevented plaintiff in the timely performance and completion of its work." *Id.* However, the specific causes for the delay are identified as:

> --inaccurate, inappropriate, unworkable, and/or defective plans, specifications, and surveys;
> --a plethora of increased scope of work and/or design changes;
> --failing to obtain necessary permits required to commence the work;
> --failing to issue appropriate change orders when extra work was encountered;
> --failing to coordinate the various contractors;
> --interrupting and suspending Omni's work; and
> --causing plaintiff to perform its work out of sequence

(Complaint, ¶ 17). Omni also relies on a letter dated May 17, 2007 from DDC to the Comptroller's Office regarding Omni's delay claim, in which DDC stated that Omni was required to work out of sequence, due to errors, omissions, and changes by the New York Public Library and its architectural consultant (*see* Angel Affirm., Ex. 7).

In *LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.* (91 AD3d 485, *supra*), the same exact language of a "no damages for delay" clause was held to bar a claim for delay damages by a trade contractor whose work was delayed by 27 months due to "faulty architectural drawings." The Appellate Division, First Department held that even if the City and/or PMS knew or should have known of the alleged defects in the drawings prior to entering into the trade contract at issue in that case, "such facts constitute merely 'inept administration or poor planning,' which does not negate application of the 'no damages for delay' provisions" (*id.* at 486, citing *Commercial Elec. Contrs., Inc. v Pavarini Constr. Co., Inc.*, 50 AD3d at 317-18, and *T.J.D. Constr. Co. v City of New York*, 295 AD2d at 180).

All of the reasons outlined in the complaint for the one-year delay of Omni's work stem from "any act, neglect or default of the Construction Manager, the Owner, the Architect, [or] another contractor" (Trade Contract, § 11.1). Omni's claim for delay damages is barred by the express terms of the Trade Contract.

Written Release

Omni's claim for delay damages is also barred by a series of written releases entitled "Waiver and Releases of Lien" executed by Omni's president during the period February 2005 and August 2007 (*see* Strauss Affirm., Ex. C). The last release, dated August 24, 2007, provides, in pertinent part, that Omni "does forever release, waive, and discharge PMS and DDC from any an all causes of action, suits, debits, accounts, damages, encumbrances, judgments, claims and demands whatsoever, . . . against PMS or DDC, by reason of delivery of material and/or performance of work relating to the construction of the Project, but only for materials delivered and work performed through the 1st day of October, 2006." This last release also states:

> "The undersigned hereby acknowledges that it has received payment in full, less retainage, for all deliveries of materials to and/or for all work performed in connection with the Project through the 1st day of October, 2006, and the undersigned hereby affirms that there are no outstanding claims against PMS or DDC in connection with this Project"

(Strauss Affirm., Ex. C).

It is undisputed that Omni's president signed this last release even though Omni had filed a claim for delay damages with the City five months earlier on March 2, 2007. "[A]bsent fraudulent inducement or concealment, misrepresentation, mutual mistake or duress, a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim that is the subject of the release" (*Diontech Consulting, Inc. v New York City Hous. Auth.*,

78 AD3d 527, 528 [1st Dept 2010]). Omni argues that its delay claim was "carved out" from this release, and presents the court with another release entitled "Final Release" dated November 13, 2008 which specifically notes and excepts the delay damages claim from its terms. However, nothing in the August 24, 2007 release mentions the delay claim, and Omni's attempt to "carve out" its delay claims from the scope of the Final Release well after it had already released those claims in writing is of no legal significance.

CONCLUSION AND ORDER

Since three independent grounds exist that bar Omni's claim for delay damages, it is unnecessary to consider PMS's remaining grounds for dismissal of the complaint.

It is hereby

ORDERED that the motion of defendant PMS Construction Management Corp. to dismiss the complaint as against it (motion seq. 002) is granted and the complaint is dismissed with costs and disbursements to defendant PMS Construction Management Corp. as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 5, 2012

FILED

JUN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

J.S.C.

[* 13]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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