

**Bovis Lend Lease (LMB) Inc. v Lower Manhattan  
Dev. Corp.**

2016 NY Slip Op 31404(U)

July 22, 2016

Supreme Court, New York County

Docket Number: 603243/2009

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 54

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BOVIS LEND LEASE (LMB) INC.,

Plaintiff,

-against-

Index No.: 603243/2009

LOWER MANHATTAN DEVELOPMENT  
CORPORATION,

**DECISION & ORDER**

Defendant.

-----X  
BOVIS LEND LEASE (LMB), INC.,

Third-Party Plaintiff,

-against-

ARCH INSURANCE COMPANY,

Third-Party Defendant.

-----X  
SHIRLEY WERNER KORNREICH, J.

Motion Sequences 014 and 015 are consolidated for disposition.

*I. Motion & Cross-Motions before the Court*

Plaintiff/Third-Party Plaintiff, Bovis Lend Lease (LMB), Inc., n/k/a, Lend Lease (US) Construction LMB, Inc. (Bovis), and defendant/counter-claim plaintiff, Lower Manhattan Development Corporation (LMDC), jointly move, pursuant to CPLR 2221 and 3217(b), to renew their motion for court approval of a voluntary discontinuance with prejudice of Bovis' claims against LMDC and LMDC's counterclaims against Bovis. Motion Sequence 014. Their prior motion (Motion Sequence 013) was denied by this court's decision and order entered on January

25, 2016 (January Decision) because they had not put the Settlement agreement in the record.<sup>1</sup> Surety/third-party defendant, Arch Insurance Company (Arch), opposes and cross-moves to renew the portion of its cross-motion for summary judgment that was denied by the January Decision. The ground for Arch's current cross-motion is that the Settlement now before the court involves Galt/Arch and therefore, its consent to the Settlement was required. Its right to consent was an argument that was squarely addressed and rejected by the January Decision, due to questions of fact about Arch's bad faith in failing to consent and contribute to the Settlement.

Arch moves by separate motion (Motion Sequence 015), to reargue the January Decision, on the ground that the court should have granted summary judgment dismissing what remained of the third-party complaint because now that Bovis and LMDC have settled, there will never be a judgment beyond final appeal in the main action that would trigger Arch's liability to Bovis under the Companion Contract, ¶¶ 4 and 4(b). Again, this issue was squarely addressed by the January Decision, which found that only ¶4(b) required a judgment beyond final appeal and that Arch could still be liable to Bovis, pursuant to ¶4. Bovis opposes.

For the reasons that follow, the joint motion of Bovis and LMDC to approve the discontinuance with prejudice of the main action is granted, and Arch's motion and cross-motion are denied.

### *I. Background*

Briefly, Bovis was hired by LMDC, pursuant to the Prime Contract, for the abatement and deconstruction of a building located at 130 Liberty Street, New York, NY, formerly known

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<sup>1</sup> The reader's familiarity with the January Decision and this court's decision and order dated April 16, 2015, entered on April 21, 2015 (SJ Decision, Dkt 657) is assumed, terms defined in those opinions have the same meaning here, and the facts will be repeated only as necessary. The SJ Decision determined the post-note of issue summary judgment motions of Arch and Bovis in the third-party action.

as the Deutsche Bank Building, that was badly damaged and contaminated by the 9/11 terrorist attack on the World Trade Center. Arch was the surety for The John Galt Corporation (Galt), a subcontractor of Bovis, pursuant to two Trade Contracts. After the cost of the work greatly escalated, in February 2007, LMDC and Bovis entered into the Supplemental Contract, in which they agreed to fund the completion of the work with advances, and to litigate their dispute as to whether Bovis was entitled to payment for extra work after the work was completed. This action is that Litigation. Contemporaneously with the Supplemental Contract, Arch, Galt, Bovis and its sureties entered into the Companion Contract, which governed Arch's obligation to make advances and the circumstances under which it would have to pay Bovis for amounts it paid to LMDC under the Supplemental Contract, and if the Litigation were settled.

While Galt was working on the site in August 2007, a tragic fire occurred, in which two New York City firefighters lost their lives. Bovis terminated Galt's Trade Contracts. Subsequently, Galt was convicted of second degree reckless endangerment for disconnecting the standpipe that supplied water to the building.

The SJ Decision denied Bovis' cross-motion on the third-party complaint which sought a ruling that Arch's liability to indemnify Bovis, pursuant to the Companion Contract, was coextensive with Bovis' liability to LMDC pursuant to the Supplemental Contract. This court ruled that it was not, because there was an issue of fact as to whether monies Arch was obligated to pay "on account of Galt's Work," pursuant to the Companion Contract, included all of Bovis' Work as defined in the Prime Contract between it and LMDC.

In the SJ Decision, this court dismissed Bovis' third third-party claim against Arch for breach of Arch's Bonds; part of the first third-party claim for indemnification for breach of the Trade Contracts, which Arch guaranteed pursuant to the Bonds; and part of the second third-

party claim for breach of contract for breach of ¶3 of the Companion Agreement for amounts Arch agreed to advance.

The January Decision granted part of Arch's cross-motion for summary judgment, dismissing the portion of Bovis' first third-party claim for indemnification for any judgment obtained by LMDC on its counterclaims, pursuant to ¶4(b) of the Companion Contract, which governed when Arch would be required to contribute to a judgment beyond final appeal, as set forth in ¶6(b) of the Supplemental Contract. The January Decision held that Arch could not be liable, pursuant to ¶4(b), because there never would be a judgment beyond final appeal due to the Settlement.

However, the balance of Arch's cross-motion for summary judgment was denied in the January Decision. Arch also had sought summary judgment on the ground that Bovis settled with LMDC without its written consent, in violation of the Companion Contract. This court ruled that without a copy of the Settlement, it could not determine whether it involved Galt/Arch, a precondition to its right to written consent. In addition, this court held that there were questions of fact as to whether Arch acted in bad faith when it withheld its consent. The January Decision held that, pursuant to ¶4 of the Companion Contract, Arch's obligation to indemnify Bovis did not require a judgment beyond final appeal.

Finally, the January Decision denied Bovis' motion for summary judgment, which sought rulings that: 1) Arch waived its right to consent to the Settlement by denying liability under the Companion Contract; 2) Arch was bound by any good faith Settlement between LMDC and Bovis; and 3) Arch breached the covenant of good faith and fair dealing implied in ¶4 of the Companion Contract, when it refused to participate in settlement negotiations. This court ruled that Bovis was not entitled to summary judgment because it had not shown that it paid money

under the Settlement on account of Galt's Work, and there were questions of fact as to whether Arch's refusal to contribute to the settlement was in bad faith, when it was based on its position that Galt's Work was less than Bovis' Work, an issue of fact identified by the SJ Decision.

### *III. Discussion*

The motion by LMDC and Bovis to discontinue the main action with prejudice is granted. “[O]rdinarily a party cannot be compelled to litigate, and absent special circumstances, discontinuance should be granted. *Tucker v Tucker*, 55 NY2d 378, 383 (1982). Nonetheless, denial of a motion to discontinue is permissible or obligatory where it will cause prejudice or other improper consequences. *Id.*, 383-384.

The court can perceive no reason not to exercise its discretion to put to rest this now seven-year litigation, when Bovis and LMDC have agreed to a compromise. Arch, the only party opposing, has made no showing of prejudice. Arch argues only that its written consent was required because the Settlement involved Galt's Work. However, it refused to consent. That was its choice. Its lack of consent does not prove prejudice, especially in light of the questions of fact as to whether it waived its right to consent due its bad faith. *See, Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 74 AD3d 32, 39 (1st Dept 2010) (indemnitor bound by good faith settlement because it repudiated claim within scope of indemnification provision). In addition, ¶4 of the Companion Contract requires Arch to indemnify Bovis for damages on account of Galt's Work in excess of a Settlement that Bovis was prepared to accept.

Turning to Arch's motions, Arch continues to ignore that its obligations under ¶4 did not require a judgment beyond final appeal. Paragraph 4 of the Companion Contract required Arch to indemnify Bovis for the “outcome” of this Litigation; to be “bound by the result” to the extent

that it involved Galt's Work; and to indemnify Bovis for any damages in excess of a settlement

Bovis was prepared to accept on account of Galt's Work.<sup>2</sup>

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<sup>2</sup> Paragraph 4 of the Companion Contract provided:

4. With respect to the Litigation described in par. 6 of the LMDC Agreement [Supplemental Contract], Galt agrees to be a co-plaintiff with Bovis.... Galt and Arch acknowledge that they are united in interest as against LMDC with respect to the Dispute to be resolved in the Litigation. In this regard, such parties agree that Bovis and its selected counsel shall take the lead and shall control the prosecution, handling and litigative decisions involved in the Litigation, including settlement discussions regarding the issues presented in the Litigation. Bovis... shall permit Arch and counsel of Arch's choice to jointly participate with Bovis ... and its counsel, to the extent reasonable and appropriate, in ... (e) decisions with respect to offers of compromise or settlement, or responses to such offers. Bovis shall not dispose of, settle or compromise any claim that involves Galt/Arch, nor shall it reject or respond to any offer of compromise or settlement of any claim that involves Galt/Arch received from or communicated by LMDC, without ... (b) prior written consent of Arch and its counsel. ***In the event Arch does not agree to a settlement that Bovis is prepared to accept, then Arch shall indemnify Bovis for all damages suffered in excess of the result that would have obtained if the settlement had been accepted.*** Each party shall bear and be responsible for its own counsel fees and expenses incurred in connection with the Litigation, provided however, that nothing contained herein shall be considered a waiver of any rights of recovery that Bovis may have under Article 11 of the Trade Contracts. ***With respect to the outcome of the Litigation, Galt/Arch and Bovis agree to be bound by the result, and insofar as the determinations involve Galt's Work, Galt/Arch shall be bound to Bovis to the same extent that Bovis is bound to LMDC, and Bovis shall be bound to Galt to the same extent that LMDC is bound to Bovis. ....***

Paragraph 4(b) provided:

***(b) In the event that Bovis is required to make payment to LMDC under paragraph 6(b) of the [Supplemental Contract], Galt shall be responsible to repay Bovis, or to pay to LMDC at Bovis' direction, all amounts that Bovis owes LMDC on account of Galt's Work.***

There is a difference between ¶¶ 4 and 4(b); only the latter requires a judgment beyond final appeal. A settlement is an outcome. The trial of the third-party action will determine whether Galt's Work was the same as Bovis' Work under the Prime Contract and the amount Bovis paid to LMDC as part of the Settlement on account of Galt's Work. Finally, as previously noted, there are questions of fact as to whether Arch acted in good faith when it refused to consent to the Settlement. Accordingly, it is

ORDERED that the joint motion (Motion Sequence 014) by BOVIS LEND LEASE (LMB) INC., and the LOWER MANHATTAN DEVELOPMENT CORPORATION to discontinue the main action with prejudice is granted; the main action is discontinued with prejudice; and the cross-motion to renew by ARCH INSURANCE COMPANY is denied; and it is further

ORDERED that the motion (Motion Sequence 015) by ARCH INSURANCE COMPANY to partially reargue the decision on its cross-motion on Motion Sequence 013 is denied; and it is further

ORDERED that the third-party action is severed and continued; and it is further

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Paragraph 6(b) of the Supplemental Contract provided:

***(b) If [Bovis] obtains a judgment - final beyond appeal in the Litigation which establishes that [Bovis] was not entitled to be paid an amount equal to or greater than the total of all amounts paid by LMDC pursuant to this Agreement for the Gross Cleaning (the "Total Gross Cleaning Payments"), then [Bovis] shall repay to LMDC ... an amount equal to the difference between the Total Gross Cleaning Payments (other than any amounts which are non-refundable under this Agreement) and the amount of [Bovis]' final entitlement to payment for all of the Gross Cleaning as established in the Litigation. ...***

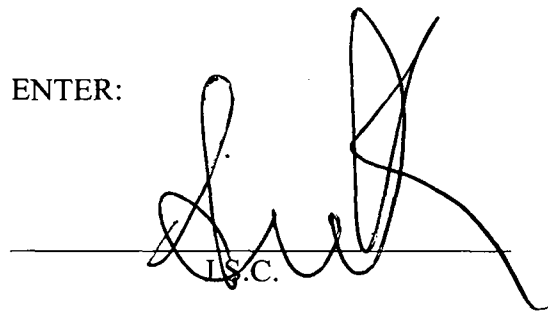


ORDERED that the caption is hereby amended to reflect the discontinuance of the main action, and the continuance of the severed third-party action, and that all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that counsel for Bovis shall serve a copy of this order with notice of entry upon the County Clerk at cc-nyef@nycourts.gov and the Clerk of the Trial Support Office at trialsupport-nyef@nycourts.gov, who are directed to mark the court's records to reflect the change in the caption herein and the severance.

Dated: July 22, 2016

ENTER:

A handwritten signature in black ink, appearing to read 'Shirley', is written over a horizontal line. Below the line, the letters 'J.S.C.' are printed.

**SHIRLEY WERNER KORNREICH  
J.S.C**