SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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E.W. HOWELL CO., LLC and HOWARD ROWLAND,

Plaintiffs, Index No. 653551/2015

- against -

THE CITY UNIVERSITY CONSTRUCTION FUND, PHILIP A. BERRY, WELLINGTON Z. CHEN, NOEL N. HANKIN, ROBERT MEGNA, BENNO C. SCHMIDT, JR., MICHAEL M. WALSH, DR. MARCELLA MAXWELL, HILL INTERNATIONAL, INC. AND WESTCHESTER FIRE INSURANCE COMPANY,

Defendants.

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Hon. C. E. Ramos, J.S.C.:

In motion sequences 003 and 004, plaintiffs E.W. Howell Co., LLC ("Howell") and its President Howard Rowland move pursuant to CPLR 2221 to reargue this Court's prior determination dated March 29, 2016. Howell and Rowland commenced this action seeking: (1) a declaration that the contract between Hill International, Inc. ("Hill") and The City University Construction Fund ("CUCF") is illegal, null and void, (2) a declaration that an article of a subcontract between Howell and Hill is unenforceable, and (3) awarding Howell damages in an amount to be determined. Defendants Hill and Westchester Fire Insurance Company ("Westchester") moved to dismiss the complaint pursuant to CPLR 3211(a)(1), (2) and (7). Defendants CUCF and members of its Board of Trustees (the "CUCF Board") also moved to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7). The CUCF Board is comprised of defendants Philip A. Berry, Wellington Z. Chen, Noel N. Hankin,

Robert Megna, Benno C. Schmidt, Jr., Michael M. Walsh, and Dr. Marcella Maxwell. This Court had previously granted both motions in their entirety.

For the reasons set forth below, this Court grants leave to reargue, and upon reargument adheres to its prior determination.

Background

According to the complaint, CUCF is a public benefit corporation administered by the CUCF Board (Verified Complaint, ¶¶ 3, 4). CUCF provides facilities for the City University of New York ("CUNY"), and supports its educational purposes (Affidavit of Schaffer for Motion to Dismiss ["Schaffer Aff."], ¶ 2). CUCF was involved in a project to construct a performing arts center addition at CUNY's Brooklyn College (the "Project") (*id.* at ¶ 5). In September 2008, CUCF issued a request for proposals to provide construction management services for the Project (*id.* at ¶ 5). CUCF received proposals from several firms, including Hill and Howell (*id.*). CUCF then evaluated the proposals and selected contractors to submit detailed proposals (Verified Complaint, ¶ 25).

CUCF ultimately selected Hill to be the Project's contractor, and entered into a construction contract with Hill on February 26, 2010 (the "Contract") (Schaffer Aff. at ¶ 6). CUCF was permitted to use State funds to pay Hill under the Contract (Verified Complaint, ¶ 23). CUCF required Hill to provide a bond

guaranteeing payment to all persons furnishing labor or materials to Hill or its subcontractor, in compliance with State Finance Law § 137 (*id.* at ¶¶ 31, 32). Westchester issued Payment Bond No. K09342352 to Hill, conditioned upon Hill paying any lawful claims for work, labor, services, materials and supplies provided to Hill (*id.* at ¶ 33).

In January 2012, CUCF advertised a public solicitation for bids for the Project's construction work through Hill (Schaffer Aff. at ¶ 8). Howell submitted a bid for the construction work and was selected (*id.* at ¶ 9). In July, 2012, Howell entered into a subcontract with Hill (the "Subcontract") (*id.*). The Subcontract requires disputes to be resolved exclusively pursuant to Article 29 of the Subcontract (Affirmation of Pallas for Motion to Dismiss ["Pallas Aff."], ¶ 4).

Article 29.1.1 of the Subcontract contains a mandatory dispute resolution provision, as follows:

> "all claims, controversies or disputes the Contractor may have against Hill...to the extent permitted by law, shall be resolved exclusively by the procedure set forth in this Article ... The Contractor and its Subcontractors and suppliers grant Hill the right to resolve any claims, controversy, or dispute between or amongst them arising under or related to the Agreement, their subcontract, or the Project" (*id.* at Ex. B).

Article 29 of the Subcontract purports to make both Hill, the Executive Director, and the Vice Chancellor of CUNY, the arbiters of any disputes (*see id.*). Article 29.5 of the Subcontract also

provides that, if the contractor disagrees with the final written decision according to the dispute resolution procedure, the only remedy is an appeal pursuant to CPLR Article 78 (*id.*).

In October 2015, while the Project was substantially underway, Howell commenced this action against CUCF and the CUCF Board, Hill, and Westchester by filing a complaint that asserted eight causes of action in lieu of pursuing procedures set forth in Article 29 of the Subcontract (*id.* at ¶ 31).

In the First Count of the complaint, Howell alleged that the Contract is illegal, null and void because the Contract was awarded to Hill in violation of State Finance Law § 123-b, Education Law § 6281, and General Municipal Law §§ 101, 103 (Verified Complaint, ¶¶ 37-43). Howell and Rowland maintained their standing in this cause as citizen taxpayers of New York (*id.* at ¶¶ 38, 39). In the Second Count, Howell alleged Article 29 of the Subcontract is void and unenforceable because Hill has a conflict of interest created by its status as an Article 3A Trust Fund Trustee and the Contract between CUCF and Hill is void (*id.* at ¶¶ 44-48). From Third Count to Seventh Count, Howell sought payments from Hill in relation to the Subcontract for an undetermined amount, which Hill has failed to pay (*id.* at ¶¶ 49-68). In the Eighth Count, Howell sought payment from Westchester for the undetermined amount not paid by Hill (*id.* at ¶¶ 69-71).

In December 2015, Hill and Westchester moved to dismiss the

complaint in its entirety (Motion 001) (NYSCEF Doc. No. 13). CUCF and the CUCF Board also moved to dismiss claims asserted against them (Motion 002) (NYSCEF Doc. No. 21). Howell and Rowland moved for summary judgment on both motions (NYSCEF Doc. No. 39, No. 42). On March 29, 2016, this Court granted both motions to dismiss, on the grounds that CUCF is not a state actor under the State Finance Law, the claims are not asserted under the Lien Law, and a defense of laches barred Howell's claims (NYSCEF Doc. No. 81).

Discussion

In motion sequence 003, plaintiffs move to reargue Motion 001 on the grounds that Article 29 of the Subcontract is void and unenforceable as a matter of law and their claim against Westchester is not subject to that provision of the Subcontract. In motion sequence 004, plaintiffs move to reargue Motion 002 on the grounds that Howell's motives to challenge the Contract are irrelevant as a matter of law and the defense of laches was not available.

CPLR 2221(d)(2) provides that a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Reargument does not allow an unsuccessful party to argue again the questions previously decided or to assert new arguments different from the original arguments (*William P. Pahl Equip.*

Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992]).

In support of motion sequence 003, plaintiffs argue that Article 29 of the Subcontract is void and unenforceable as a matter of law and their claim against Westchester is not subject to that provision of the Subcontract. The argument is identical to their previous, unsuccessful argument on the motion to dismiss. Howell fails to identify any matter of fact or law overlooked or misapprehended by this Court in accordance with CPLR 2221(d)(2).

Moreover, *Am. Architectural, Inc. v Marino*, 109 AD3d 773 (2nd Dept 2013), the case cited by Howell to support their argument, is distinguishable. There, a construction subcontract contained a dispute resolution procedure that designated the contractor as the sole arbiter of all disputes thereunder (109 AD3d at 774). The court narrowly held that a dispute resolution procedure would be void to the extent that it impedes a party's right to sue under the Lien Law and the State Finance Law (*id.* at 775). Here, Howell did not possess a mechanic's lien, and the claims asserted against Hill are not asserted under the Lien Law or the State Finance Law rendering the case inopposite to the facts herein. Otherwise, Howell fails to persuade this Court that Hill's role as arbiter renders Article 29 of the Subcontract unenforceable.

In motion sequence 004, Howell also fails to identify any

fact or law that was overlooked or misapprehended by the Court in its prior determination. Previously, the Court found that the doctrine of laches estopped Howell from bringing this action because Howell waited nearly six years to challenge the Contract's illegality.

The defense of laches warrants a dismissal regardless of Howell's motives as a citizen taxpayer or as a subcontractor. In *Saratoga County Chamber of Commerce v Pataki* (100 NY2d 801, 816 [2003]), the court stated that a defense of laches is an equitable bar that requires a showing of "a lengthy neglect or omission to asset a right and the resulting prejudice to an adverse party." The defense of laches is available even when an action is brought within the statute of limitations (see *id.*).

In opposition to the prior dismissed motion, Howell cited *Saratoga County* to argue that laches is not available in an action challenging an illegal public contract. First, the Court rejects Howell's contention that the court in *Saratoga County* determined that a defense of laches was not available because the action challenged an illegal public contract (*see* 100 NY2d 801 at 816). Rather, the court stated that the action was not barred by laches because "the prejudice caused by a loss of expected profit based on a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches" (*id.* at 818).

Here, in contrast, CUCF and Hill entered into the Contract

to construct the Project in February 2010, while Howell lost on bidding for the Contract. Howell had the opportunity to challenge the procurement process at that time. However, Howell did not challenge the legality of the Contract, and later entered into the Subcontract related to construction of the Project with Hill in July 2012. CUCF and Hill sufficiently established that they will suffer prejudice because the Contract was awarded nearly six years ago, and work has begun nearly five years ago and is ongoing. A substantial amount of work has already been performed pursuant to the Contract and the Subcontract.

Therefore, this Court's order granting motions to dismiss need not be disturbed.

Accordingly, it is

ORDERED that the motion for leave to reargue is granted, and on reargument, the Court adheres to its prior decision, hereby granting defendants' motions to dismiss the complaint and denying plaintiffs' motions for summary judgment.

Dated: November 1, 2016

ENTER:

J.S.C.
CHARLES E. RAMOS