SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

----------x

L & L PAINTING CO., INC.,

Plaintiff,

- against -

ODYSSEY CONTRACTING CORP.,

Defendant,

Index No.: 105126/2008
Motion Seq. No. 008, 009
Motion Date: 4/7/2014

- and -

FEDERAL INSURANCE COMPANY,

Counterclaim-Defendant.

----------x

BRANSTEN, J.:

This action arises out of a dispute between plaintiff L & L Painting Co., Inc. ("L&L") and defendant Odyssey Contracting Corp. ("Odyssey") over payment for Odyssey's work on the Queensboro Bridge Repainting Project. L&L alleges three causes of action for breach of contract, and Odyssey asserts six counterclaims for breach of contract, breach of the duty of good faith and fair dealing, and conversion.

In motion sequence number 008, L&L and additional counterclaim-defendant Federal Insurance Company ("Federal") seek summary judgment, dismissing the counterclaims asserted against them. In motion sequence 009, Odyssey separately moves

for partial summary judgment in the amount of $3,083,294.66 for unpaid work; for dismissal of L&L's first and third causes of action; and, for sanctions against L&L for spoliation of evidence. The motions are consolidated for purposes of their disposition.

For the reasons that follow, L&L and Federal's motion for summary judgment is granted in part and denied in part, while Odyssey's motion is denied.

I. Background

In or around January 2004, L&L was awarded a $167 million contract by the New York City Department of Transportation ("City") to perform work on the Queensboro Bridge Repainting Project, also referred to as the Queensboro Bridge Protective Coating project (the "Project"). *See* L&L's Statement of Undisputed Facts, and Odyssey's Response, ¶¶ 1-2; Odyssey's Statement of Undisputed Facts, ¶ 1. L&L was the prime contractor on the Project, and Federal was its payment bond surety. In March 2004, L&L and Odyssey entered into a subcontract pursuant to which Odyssey was to perform paint removal and re-painting work on the Project for the price of $37,400,000. *See* Affirmation of Charles Fastenberg ("Fastenberg Affirm.") Ex. 7 ("Subcontract"); *id.* Ex. 8 (March 2, 2004 Letter from L&L to Odyssey).

The parties do not dispute that Odyssey's work on the Project was divided into four phases; however, they dispute whether the four phases were covered by one

subcontract or four separate subcontracts. Odyssey submits copies of four subcontracts, all dated March 3, 2004, which include the same provisions, but were executed at different times. *See* Affidavit of Theodore Kartofilis in Support of Odyssey's Motion ("Kartofilis Aff.") Exs. Y-BB. L&L, while acknowledging that there were separate subcontract documents for each phase, contends that the separate agreements were created "for accounting purposes" only, and that there was just one subcontract between the parties. *See* Affidavit of Scott Earl in Support of L&L's Motion ("Earl Aff.") ¶ 5. For purposes of the instant motions, however, L&L assumes, as will the Court, that there were four separate subcontracts. In July and August 2005, two subcontract amendments, or change orders, also were executed for additional containment work. *See* Kartofilis Aff. Ex. Y (Subcontract Amendment and Subcontract Amendment #2).

Odyssey's work, which included installing shielding and containment systems, removing old paint, and applying new paint, was performed at different locations on the bridge. These locations were identified by "panel points" along the Queensboro Bridge, and by "bays," the sections of the bridge between the panel points. The main truss spans of the bridge have 123 panel points, which divide the bridge into 122 bays. The parties agree that the four subcontracts corresponded with, and divided Odyssey's work into, the following phases: I and IIA included panel points 77-123 (and tower 4); IIB included panel points 30-47; III included panel points 1-30 (including tower 1); and IV included

panel points 47-77. *See* Odyssey's Statement of Undisputed Facts, and L&L's Response, ¶¶ 4, 5.

For each phase, Odyssey's work started with designing and installing a shielding system to protect motorists and pedestrians, and a containment system to protect the environment. Once this was done, Odyssey removed old paint and applied new paint. After the City's engineer approved the new paint system, Odyssey removed the containment system and touched up areas that could not be painted while the containment system was in place. The shielding system could be removed only after the touch-up work was approved by the City's engineer. *Id.* ¶ 6.

A. *Subcontract Payment Provisions*

Section 3 of the subcontracts, pertaining to payment, set out the total amount to be paid by L&L for the work identified in each subcontract. Specifically, section 3 provided that, in order to receive "progress payments," Odyssey was to submit to L&L, on a monthly basis, an invoice for work done during the prior month, together with a "Billing Breakdown Form AIA G702-G703" and an executed waiver of lien form. *See* Fastenberg Affirm. Ex. 7. Section 3(b) further provided that partial payments were to be made to Odyssey each month in an amount equal to 95 percent of the value of the quantity of work performed, as estimated by the City or the City's representative, and "[n]o partial payment

. . . shall operate as approval or acceptance of" Odyssey's work. *Id.* With respect to final payment, the subcontracts provided that "[u]pon complete performance of this Subcontract by the Subcontractor and final approval and acceptance of Subcontractor's Work by the Owner, the Contractor will make final payment to the Subcontractor of the balance due to it." *Id.* § 3(c). The extra containment work done by Odyssey, pursuant to the written change orders, was billed separately from the base subcontract work.

As required by the subcontracts, Odyssey prepared and submitted monthly invoices to L&L. Odyssey's invoices did not include the specific amounts owed; instead, they were spreadsheets, breaking down and identifying work completed and approved for payment. *See e.g.* Fastenberg Affirm. Ex. 13. The spreadsheets set out, in grid format, each item of work to be performed at each panel point between 1 and 123, and indicated the date when each item of work was completed and approved for payment by the City. *See id.*; Odyssey's Statement of Undisputed Facts ¶ 13; L&L's Statement of Undisputed Facts ¶¶ 10-12. L&L then prepared invoices for the approved items of work, based on a calculation of City-approved unit costs for each item of work, and submitted the invoices to the City for payment. L&L provided copies of the invoices to Odyssey, with a "translation," or back-up notes, showing the progress payment amount due for each month. *See* Odyssey's Statement of Undisputed Facts ¶¶ 16-17. Pursuant to the

subcontracts, monthly progress payments were to be paid to Odyssey seven days after L&L received such payments from the City. *See* Fastenberg Affirm. Ex. 7 § 3(b).

B. *Payment Dispute*

Odyssey claims, however, that the City paid L&L for work performed by Odyssey but L&L did not pay Odyssey. That is, although Odyssey received progress payments, it claims that it did not receive the full amounts due on its invoices. According to Odyssey, because it was not receiving proper payments, its business relationship with L&L began to deteriorate in early 2008. *See* Kartofilis Aff. ¶ 55.

In February 2008, Odyssey sought payment from L&L of $1,379,265.93, for work performed through December 2007 on the first three phases of the Project, which Odyssey claimed was underbilled. *See* Earl Aff. Ex. F. L&L responded by requesting that Odyssey identify the specific items of work for which it had not been paid. *See id.* Ex. G. After a meeting in late March 2008 did not resolve the payment issue, Odyssey advised L&L, by letter dated April 1, 2008 ("April 1 letter"), that it was terminating the four subcontracts with L&L due to L&L's failure "to make full and timely payments to Odyssey . . . for work performed." (Fastenberg Affirm. Ex. 9.) In its letter, Odyssey also informed L&L that, "[n]otwithstanding the fact that the termination is effective immediately, [it] will remove its equipment and materials from the site after completion

of the punch list-work on subcontracts I, IIA, IIB and III." *Id.* On April 2, 2008, Odyssey's attorney wrote to L&L ("April 2 letter"), claiming that L&L owed Odyssey $5,980,657.12, for work done under all four subcontracts, change order work and retainage, extra work, and other miscellaneous items. *See* Fastenberg Affirm. Ex. 11.

The parties subsequently met again on April 7, 2008. When Odyssey refused to retract its April 1 letter, L&L, by letter dated April 8, 2008 ("April 8 letter"), declared Odyssey in default of the subcontracts and directed Odyssey to discontinue its work and remove all employees from the work site. *See* Fastenberg Affirm. Ex. 12. L&L commenced this action the next day, on April 9, 2008, seeking damages for breach of contract, including about $16 million for the cost of completing Odyssey's work. Odyssey, in its counterclaims, seeks more than $6 million for unpaid contract work, and additional amounts for extra work and delay damages.

II. Discussion

It is well-settled that to prevail on a motion for summary judgment, the moving party must make a prima facie showing of its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once such a showing has

been made, to defeat summary judgment, the opposing party must demonstrate, also by producing evidentiary proof in admissible form, that genuine triable issues of fact exist. *See Alvarez*, 68 N.Y.2d at 324; *Zuckerman*, 49 N.Y.2d at 562. The evidence must be viewed in a light most favorable to the nonmoving party, and the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *See Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007); *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957). As courts have repeatedly noted, "[i]t is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)." *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012) ("issue-finding, rather than issue-determination, is the key to the procedure").

A. *First Counterclaim (Breach of Contract - Unpaid Contract Work)*

The first counterclaim alleges that L&L failed to pay Odyssey $6.25 million in contract balances for work completed during the first three phases of the Project,[1] including $1,054,480.71 for containment work, as well as mobilization payments and release of retainage amounts. L&L seeks dismissal of this counterclaim, arguing that

[1]It is not disputed that, as of April 8, 2008, the contractual relationship between the parties was terminated, and Odyssey did not complete work under the fourth subcontract.

Odyssey was paid for all work invoiced by Odyssey. Further, L&L maintains that any contract balance and retainage fees were to be paid only after: (1) substantial completion of the work was certified by the City, which did not occur until more than a year after Odyssey left the Project, or (2) after final acceptance of the work by the City, which did not occur until more than two years after Odyssey left. In its motion, Odyssey seeks partial summary judgment on the first counterclaim in the amount of $1,054,480.71, for the unpaid containment work.

1. Parties' Arguments Regarding Payment

In support of its motion, L&L submits documents and deposition testimony related to the requirements and procedures for payment under the subcontracts. L&L contends that the evidence – including the spreadsheets prepared by Odyssey, invoices prepared by L&L, and L&L's worksheets showing how line item costs were allocated – demonstrates that it paid Odyssey for all work that was invoiced by and due to Odyssey. In his affidavit, Scott Earl, L&L's Vice President, attests that a review of the spreadsheets submitted by Odyssey and the statements and invoices prepared by L&L, indicating the amounts due and the calculations based on the unit costs used to determine the amount due, demonstrate that, as of April 1, 2008, no payments were outstanding to Odyssey other than the contract balance to be paid upon substantial completion of the Project. *See*

Earl Aff. ¶¶ 8-12. Earl also asserts that Odyssey never identified any specific item of work for which it did not receive payment. *Id.* ¶¶ 14-15.

Odyssey takes a different view of these couments. Relying on the same documents submitted by L&L, including spreadsheets and invoices, Odyssey contends that it is, and was in April 2008, still owed payments for work performed under the subcontracts. *See* Kartofilis Aff. ¶¶ 36, 43, 48, 54. Odyssey does not identify which specific, invoiced work was not paid for; instead, Odyssey claims that the total payments to it, when added and compared to payments to L&L, and to another subcontractor doing some of the same work as Odyssey, were less than what it was entitled to, and do not correspond to the percentage of work that it completed. In short, Odyssey contends that L&L requisitioned the City for 92.89% of L&L's contracted amount for containment work but did not pay Odyssey the same 92.89% of its subcontracted amount for the containment work. *Id.* ¶¶ 33-34.

More particularly, as Theodore Kartofilis, Odyssey's Vice President, explains it: In March 2008, L&L billed the City for 92.89% of the prime contract amount ($38 million) for containment work. The line item amount allocated to Odyssey for this work was $16,106,800, for all four subcontracts. Another subcontractor, Alpha, also did containment work, and its contracted amount for this work was $10,419,955. Based on its calculations, which included combining the line item amounts for Odyssey and Alpha,

applying 92.89% to that amount, and dividing the resulting amount between Alpha and Odyssey, Odyssey concluded that it was underpaid for containment work by at least $1,054,480.71. *See* Kartofilis Aff. ¶¶ 28-36.

As Odyssey notes, however, the March 2008 requisition for Odyssey's containment work indicates that Odyssey completed 81.76% of its containment work. While Odyssey argues that it was entitled to a larger percentage of the containment work line item amount, Odyssey does not claim that its March 2008 spreadsheet shows that it performed more than 81.76% of the containment work as of the March 2008 requisition, and Odyssey does not identify or explain what, if any, errors existed in its spreadsheets, or in L&L's invoices, as to the percentage of work completed at that time. *See id.* ¶¶ 26-27, 36, 21; Fastenberg Affirm. Ex. 22 at 62 (Stavros Semanderes Deposition Tr.).

Further, to the extent that Odyssey argues that all calculations of the value of its work were wrong because the unit cost pricing was wrong, *see* Fastenberg Affirm. Ex. 22 at 160-161, 164-165, 166-167, 169, 183 (Kartofilis Deposition Tr.), such an argument does not, by its own acknowledgment, demonstrate that it was underpaid. Odyssey's President, Stavros Semanderes, testified that the breakdown of payments for different aspects of project work, i.e., for containment, blasting, and painting, was unfair to Odyssey, and it should have received more for the containment work.Stavros Semanderes Deposition Tr. at 63-64. As Semanderes also testified, however, Odyssey's disagreement

with the unit costs does not form the basis for its claim here. *Id.*, at 65; *see also* Semanderes Aff. in Opp. ¶ 17 n.3.

In view of the above, and considering all the evidence, neither side has demonstrated its entitlement to summary judgment on the first counterclaim. Despite its rather elaborate computations purporting to show what it is owed for the containment work, Odyssey has not established as a matter of law that it was not paid for that work. L&L likewise has not clearly established that Odyssey was paid all that it was entitled to under the subcontracts. As of March 2008, L&L apparently agreed that some amount was owed to Odyssey. *See* Kartofilis Aff. ¶ 47; *see also id.* Ex. NN. While L&L now argues that the amount due as of March 28, 2008 was not due until substantial and final completion of Odyssey's work, *see* Earl Aff. in Opp. ¶¶ 16-17, even assuming that Odyssey was not entitled to final completion costs and retainage fees until the Project was certified as substantially completed and finally accepted, the Project work has now been both certified and accepted, and issues of fact remain as to whether and what amounts may be owed to Odyssey as a result.

2. L&L's Termination Arguments

L&L also argues that Odyssey is not entitled to any final contract or retainage payments because it terminated the subcontracts on April 1, 2008, and abandoned the

Project prior to substantial completion of its work. In opposition, and in support of its summary judgment motion, Odyssey claims that L&L, not Odyssey, breached the subcontracts both by refusing to pay Odyssey and by directing Odyssey to leave the work site, without providing Odyssey an opportunity to cure any alleged default, as required by the subcontracts. Odyssey moves, on that basis, to dismiss L&L's causes of action seeking completion costs and other damages for bad faith breach of contract.

Section 6(c) of the subcontracts provides that, if Odyssey fails to perform or becomes unable to perform its work under the subcontracts, "and the failure is not attended to within fifteen (15) days and corrected in thirty (30) days, after written request by the Contractor to the Subcontractor, the Contractor . . . [may] terminate the Subcontract for default and take over and complete the performance of this Subcontract at the expense of the Subcontractor." *See* Fastenberg Affirm. Ex. 7.

"Generally, where parties agree on a termination procedure, the clause must be enforced as written." *J. Petrocelli Constr., Inc. v. Realm Elec. Contractors, Inc.*, 15 A.D.3d 444, 446 (2d Dep't 2005) (citing *A.S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 382 (1957) (other citations omitted)). However, "[a]s a matter of equity, a party who has indicated that she will not abide by the terms of the contract will not be heard to demand its specific performance." *Stadtmauer v. Brel Assocs. IV, L.P.*, 270 A.D.2d 59, 60 (1st Dep't 2000). Thus, "'[o]nce it becomes clear that one party will not live up to the

contract, the aggrieved party is relieved from the performance of futile acts, such as conditions precedent.'" *J. Petrocelli Constr., Inc.*, 15 A.D.3d at 446 (quoting *Allbrand Discount Liquidators., Inc. v. Times Sq. Stores Corp.*, 60 A.D.2d 568, 568 (2d Dep't 1977); *see Stadtmauer*, 270 A.D.2d at 60. Further, when a subcontractor abandons the work site prior to completion of its work, it waives any right to notice of termination or an opportunity to cure. *See Kleinberg Elec., Inc. v. E-J Elec. Installation Co.*, 111 A.D.3d 410, 410-411 (1st Dep't 2013).

L&L argues that Odyssey repudiated the subcontracts and abandoned its work both in the April 1 letter expressly terminating the subcontracts and through its subsequent refusal to retract the termination. Accordingly, L&L asserts that it was not obligated to provide an opportunity to cure because it would have been futile. L&L further contends that it offered Odyssey an opportunity to cure at a meeting on April 7, 2008 but that Odyssey rejected the offer by refusing to rescind its April 1 letter, providing the basis for L&L to direct Odyssey to leave the site.

"[W]hen a party repudiates contractual duties prior to the time designated for performance and before all of the consideration has been fulfilled, the repudiation entitles the nonrepudiating party to claim damages for total breach." *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 462-463 (1998). The repudiation, however, "must be unequivocal, definite, and final", and evidenced by "an unqualified

and clear refusal to perform with respect to the entire contract." *Joseph P. Carrara & Sons, Inc. v. A.R. Mack Constr. Co.*, 89 A.D.3d 1190, 1191 (3d Dep't 2011); *Children of Am. (Cortland Manor), LLC v. Pike Plaza Assoc., LLC*, 113 A.D.3d 583, 584 (2d Dep't 2014). "Whether such a repudiation took place is a factual determination [and] heavily dependent upon a determination of whether "a breaching party's words or deeds are unequivocal." *Fonda v. First Pioneer Farm Credit, ACA*, 86 A.D.3d 693, 695 (3d Dep't 2011) (internal citation omitted).

Odyssey's April 1 letter clearly stated that it was terminating all four subcontracts, effective immediately. The Letter also stated that it would complete its work on the first three subcontracts. *See* Fastenberg Affirm Ex. 9. The parties do not dispute that Odyssey did continue to work at the site until it was directed to leave by L&L. Semanderes testified that the April 1 letter was sent as a "wake-up call" to make L&L understand that Odyssey "meant business" and wanted to get paid, and that it was not advising L&L that Odyssey had stopped or intended to stop working. *See* Fastenberg Affirm. Ex. 10 at 100-101 (Semanderes Deposition Tr.). Semanderes also testified that Odyssey continued working after the April 1 letter was sent, and had a large workforce in place, and its actions showed that it was not terminating its work. *Id.* at 104-105; *see also* Kartofilis Aff. ¶¶ 65, 68. Although L&L submits an affidavit of Vice President Anthony Maracic, "not[ing]" that, after April 1, 2008, Odyssey continued to work but "was

engaged in removal of its tools and equipment and demobilization in furtherance of its termination," such conflicting testimony raises credibility issues not properly resolved on a summary judgment motion. *See* Maracic Aff. in Opp. ¶ 3.

***

Thus, triable issues of fact exist with respect to whether Odyssey repudiated the subcontracts and whether L&L failed to comply with the subcontracts' termination procedure. *See Petrocelli Constr., Inc.*, 15 A.D.3d at 446. Triable issues of fact also remain, therefore, as to whether L&L may seek completion costs. *See Kleinberg Elec., Inc.*, 111 A.D.3d at 411 (if a subcontractor breaches before completing performance, the contractor is entitled to recover cost-to-complete damages from the subcontractor). Accordingly, the parties' cross-motions for summary judgment on this counterclaim are denied.

B. *Second, Fifth and Sixth Counterclaims (Breach of Contract - Delay Damages and Extra Work)*

The second counterclaim alleges that L&L breached the subcontracts by failing to accurately and timely present Odyssey's plans and work to the City for approval and/or payment, to coordinate the Project work, to timely approve its work, and to provide access to the work site, causing delays costing about $6 million. *See* Amended Answer

and Counterclaims ¶¶ 53-57. The fifth counterclaim seeks $1.4 million for extra work following a fire on the bridge, which Odyssey alleges was caused by L&L's negligence. *Id.* ¶¶ 80-82. The sixth counterclaim alleges L&L misrepresented plans and designs for work on the south outer roadway portion of the Project, causing delays and extra work in the amount of $2,473,450. *Id.* ¶¶ 85-87.

1. Delay Damages Counterclaims

L&L contends that the delay damages sought in the second and sixth counterclaims are barred by section 7(a) of the subcontracts. Section 7(a) provides that Odyssey cannot recover damages or additional compensation for delays or interference with its performance caused by acts of the City, L&L, or other subcontractors, except to the extent that L&L is entitled to recover such compensation from the City and "then only to the extent of any amount that [L&L] may, on behalf of [Odyssey] recover from [the City] for such delays." *See* Fastenberg Affirm. Ex. 7 at § 7(a). L&L also contends that the extra work damages sought in the fifth and sixth counterclaims are precluded, pursuant to section 19(a) of the subcontracts, by the City's determination that these claims were not compensable as extra work. In addition, L&L contends that any extra work claims, as well as any delay claims, in the second, fifth and sixth counterclaims, must be dismissed because no change orders were executed, as required by the subcontracts.

Generally, a contract "clause which exculpates a contractee from liability to a contractor for damages resulting from delays in the performance of the latter's work is valid and enforceable." *Corinno Civetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297, 309 (1986); *see Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 384 (1983). Certain exceptions to the general rule are recognized, however, and "even with such a clause, damages may be recovered for: (1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract." *Corinno Civetta Constr. Corp.*, 67 N.Y.2d at 309; *see Bovis Lend Lease (LMB), Inc. v. Lower Manhattan Dev. Corp.*, 108 A.D.3d 135, 147 (1st Dep't 2013); *Aurora Contrs., Inc. v. West Babylon Public Lib.*, 107 A.D.3d 922, 923 (2d Dep't 2013).

"Because the exculpatory clause is specifically designed to protect the contractee from claims for delay damages resulting from its failure of performance in ordinary, garden variety ways, delay damages may be recovered in a breach of contract action only for the breach of a fundamental, affirmative obligation the agreement expressly imposes on the contractee." *Corinno Civetta Constr. Corp.*, 67 N.Y.2d at 313; *see Harrison & Burrowes Bridge Constructors, Inc. v. State of New York*, 42 A.D.3d 779, 782 (3d Dep't

2007) (also noting that claim cast as extra work claim was really delay claim and was within the category of delay damages precluded by contract clause). Thus, "a party seeking to invoke any of the exceptions to the general rule that no damages for delay clauses are enforceable bears a heavy burden." *Bovis Lend Lease (LMB), Inc.*, 108 A.D.3d at 147 (citing *LoDuca Assoc., Inc. v. PMS Constr. Mgmt. Corp.*, 91 A.D.3d 485, 485 (1st Dep't 2012)); *see also Dart Mech. Corp. v. City of New York*, 68 A.D.3d 664, 664 (1st Dep't 2009).

"The 'uncontemplated delay' exception only applies if the claimant can demonstrate that 'the delays were wholly unanticipated.'" *Premier-New York, Inc. v. Travelers Prop. Cas. Corp.*, 20 Misc. 3d 1115(A), at *11 (Sup. Ct. N.Y. Cnty. 2008) (quoting *Matter of Manshul Constr. Corp. v. Board of Educ. of City of New York*, 160 A.D.2d 643, 644 (1st Dep't 1990)); *see Blue Water Envtl., Inc. v. Inc. Vill. of Bayville, N.Y.*, 44 A.D.3d 807, 810 (1sr Dep't 2007). "Delays are not considered uncontemplated when they 'are reasonably foreseeable, arise from the contractor's work during performance, or . . . are mentioned in the contract.'" *Bovis Lend Lease (LMB), Inc.*, 108 A.D.3d at 147 (quoting *Corinno Civetta Constr. Corp.*, 67 N.Y.2d at 310). Further, a no damages for delay clause encompasses "delays caused by inept administration or poor planning, . . . or a failure of performance resulting from ordinary negligence, as distinguished from gross negligence." *Plato Gen. Constr. Corp./EMCO Tech Constr.*

Corp., JV, LLC v. Dormitory Auth. of State of New York, 89 A.D.3d 819, 823 (2d Dep't 2011); *see Commercial Elec. Contactors, Inc. v.. Pavarini Constr. Co., Inc.*, 50 A.D.3d 316, 317-318 (1st Dep't 2008); *Blue Water Envtl., Inc.*, 44 A.D.3d at 810; *Buckley & Co. v. City of New York*, 121 A.D.2d 933, 934 (1st Dep't 1986).

Here, Odyssey seeks delay damages based largely on allegations that L&L caused delays by not properly managing the Project, not expediting the approval process, not protecting it from overzealous inspections by the City, and by misrepresenting plans and designs. As Odyssey's Vice President testified at his deposition, delays were caused by the City's inspectors, who were "over-inspecting" the work. *See* Fastenberg Affirm. Ex. 23 at 85-87, 91 (Kartofilis Deposition Tr.) Odyssey's President, Stavros Semanderes, testified that "overzealous" inspectors caused delays by making Odyssey repeat work, by prohibiting venting of the containment for heat relief for the workers, and by keeping workers off the site based on misinterpreting blood lead levels. *See id.* Ex. 23 at 114-17 (Semanderes Deposition Tr.); *see also* Semanderes Aff. in Opp. ¶ 59 & Ex. EEEE (May 25, 2006 Letter). Semanderes also testified that delays were caused by L&L's failure to coordinate the Project work when there was another unrelated project going on at the site, which interfered with Odyssey's access to its work, and that delays and extra work were caused by L&L's misrepresentation of the plans and designs for the south outer roadway work. *See* Fastenberg Affirm. Ex. 23 at 119; Semanderes Aff. in Opp. ¶ 56.

The record thus shows that the delays of which Odyssey complains were largely attributable to acts of the City and its representatives, and the conduct of L&L amounts to no more than "ordinary, garden variety" planning or contract administration problems, and does not exempt Odyssey's claim from the subcontracts' no damages for delay provision. *See Commercial Elec. Contrs., Inc.*, 50 A.D.3d at 317-318; *Bat-Jac Contractors, Inc. v. New York City Hous. Auth.*, 1 A.D.3d 128, 129 (1st Dep't 2003); *S.N. Tannor, Inc. v. A.F.C. Enters.*, 276 A.D.2d 363, 364 (1st Dep't 2000); *Martin Mech. Corp. v. P. J. Carlin Constr. Co.*, 132 A.D.2d 688, 689 (2d Dep't 1987). Moreover, Odyssey neither identifies nor otherwise addresses which specific delays allegedly caused by L&L were uncontemplated or represented a breach of a fundamental, affirmative obligation expressly imposed on L&L by the subcontract. *See Dart Mech. Corp.*, 68 A.D.3d at 664.

2. Repair Damages Claims

Odyssey's extra work claims in the fifth and sixth counterclaims seek damages for, respectively, repairing and re-doing work following the October 2005 fire at the Project site, and for outer roadway work. L&L argues that these claims are barred by section 19(a) of the subcontracts because Odyssey's claims were presented by L&L to the City and were denied by the City's Contract Dispute Resolution Board ("CDRB"), whose

determinations were upheld on appeal. Odyssey contends that the fire claim is not precluded by the CDRB decision because Odyssey was not a party to the administrative proceeding, and the CDRB did not determine the issues in this action.

Section 19(a) of the subcontracts provides:

> In case of any disputes between Subcontractor and the Contractor, Subcontractor agrees to be bound to Contractor to the same extent that Contractor is bound to Owner both by the terms of the Prime Contract and by any and all decisions or determinations made thereunder by the party or board as authorized in the Prime Contract. . . . [When Prime Contract contains a disputes clause] Subcontractor agrees to be bound by the procedure and final determinations as specified in any such Disputes clause . . . . Should the Owner determine [after Contractor submits Subcontractor's claim for extra work compensation] that the work is not an extra, and awards no payment for such . . . the Subcontractor agrees to accept such determination . . . [and shall] be bound by the determination of the Owner; or in the event of an appeal or suit, by determination in said appeal or suit."

See Fastenberg Affirm. Ex. 7.

Section 1(b) of the subcontracts, incorporating by reference all of the terms and conditions of the Prime Contract, similarly provides that "[t]he intent of the parties is that, with respect to the Work, . . . Subcontractor shall be . . . bound by the same terms, conditions, and procedures that govern Contractor's relationship with the Owner, including, but not limited to . . . the Dispute Resolution Procedure." *Id.* Section 11(f) of the subcontracts further provides that "the Subcontractor assumes toward the Contractor all obligations and responsibilities that the Contractor assumes toward the Owner . . . set

forth in the Prime Contract, insofar as applicable, generally or specifically, to Subcontractor's work." *Id.*

The parties do not dispute that L&L presented Odyssey's claims for extra work related to the fire to the City and, pursuant to the dispute resolution procedures set forth in the Prime Contract, an administrative hearing was held before the CDRB. The CDRB denied the claims for extra compensation for replacing and repairing work damaged by the fire, finding that, regardless of whether the City or L&L may have caused the fire, L&L had an "an absolute obligation" under the Prime Contract to protect the finished and unfinished Project work against any damage and, in the event of such damage, to replace or repair such damage. The CDRB decision was upheld in an Article 78 proceeding in this court, and on appeal by the Appellate Division, First Department. *See* Fastenberg Affirm. Ex. 28 at 7, 8 *(L&L Painting Co., Inc. v. Dept.. of Transp.*, OATH Index No. 280/08 (Feb. 8, 2008), *aff'd* Index No. 107877/08 (Sup. Ct. N.Y. Cnty. Nov. 10, 2008), *aff'd* 69 AD3d 517 (1st Dept 2010)).

Odyssey nonetheless argues that the CDRB decision does not apply to it because section 19(a) applies only to claims against the City, and the issues in the administrative proceeding were limited to L&L's rights as against the City, whereas here Odyssey is asserting claims against L&L for negligence in failing to protect the site from fire or take steps to extinguish or contain the fire. *See* Odyssey's Memo of Law in Opp. at 22. The

extra work claims Odyssey is asserting against L&L, however, seek the same damages sought on its behalf by L&L against the City, and Odyssey makes no argument that it objected to L&L's submission of its claims for extra work to the City, or otherwise sought to distinguish claims for extra work against the City from claims for extra work against L&L. The Court thus concludes that the CDRB determination that the extra work was not compensable is final with respect to Odyssey's extra work claims.

Although Odyssey also argues that its fifth counterclaim against L&L is based in negligence, and as such was not addressed in the CDRB proceeding, Odyssey cannot maintain a tort claim where it has not demonstrated, or even alleged, a legal duty breached by L&L that is independent of the contract. *See Bristol-Myers Squibb, Indus. Div. v. Delta Star, Inc.*, 206 A.D.2d 177, 179 (4th Dep't 1994). Further, the only damages sought by Odyssey are contractually based economic losses, which generally do not provide a basis for a tort action in New York. *See Cedar & Washington Assocs., LLC v. Bovis Lend Lease LMB, Inc.*, 95 A.D.3d 448, 449 (1st Dep't 2012); *see also 532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 289 (2001); *Roundabout Theatre Co. v. Tishman Realty & Constr. Co.*, 302 A.D.2d 272, 272-273 (1st Dep't 2003).

As Odyssey offers no opposition to L&L's argument that the outer roadway claims also were determined by the CDRB after L&L submitted them to the City, and in view of

the above findings, the court does not reach L&L's other grounds for dismissal of the second, fifth and sixth counterclaims.

C. *Third Counterclaim (Conversion)*

The third counterclaim alleges that Odyssey owned personal property on the Project site, including files, books, magazines, keys, construction materials, supplies, vehicles and equipment, which was taken and converted by L&L to its own use. *See* Counterclaims ¶¶ 60-66.

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (2006); *see State of N.Y. v. Seventh Regiment Fund*, 98 N.Y.2d 249, 259 (2002). To establish a cause of action for conversion, a plaintiff must demonstrate "'legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights.'" *Hamlet at Willow Creek Dev. Co., LLC v. Northeast Land Dev. Corp.*, 64 A.D.3d 85, 113 (2d Dep't 2009) (citations omitted); *see Goldberger v. Rudnicki*, 94 A.D.3d 1047, 1047-1048 (2d Dep't 2012).

L&L argues that the conversion counterclaim must be dismissed because Odyssey has failed to identify the property allegedly converted. Odyssey, in opposition, asserts that documents submitted, and L&L itself, through the deposition testimony of Vice President Anthony Maracic, have identified Odyssey's materials, equipment and tools left on the site, including "a few trucks, [and] a couple of blast pots." *See* Georgoulis Affirm. in Support of Odyssey's Motion Ex. G at 189-191 (Maracic Deposition Tr.); *see id.* Ex. LLLL (Material and Equipment Inventory, dated April 11, 2008). This evidence is sufficiently specific, even if Odyssey has not identified which items on the inventoried list were converted, to raise triable issues of fact as to what, and whether, identifiable property owned by Odyssey was converted. *High View Fund, L.P. v. Hall*, 27 F. Supp. 2d 420, 429 (S.D.N.Y. 1998), on which L&L singularly relies, and which addresses, in the context of an action for the conversion of money, the need to identify a specific fund, does not warrant a different conclusion.

D. *Fourth Counterclaim (Breach of Duty of Good Faith and Fair Dealing)*

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. . . . [which] embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*,

98 N.Y.2d 144, 153 (2002) (quoting *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995)). This implied covenant will be enforced, however, "only to the extent it is consistent with the provisions of the contract." *Phoenix Capital Invs. LLC v. Ellington Mgmt. Grp., LLC*, 51 A.D.3d 549, 550 (1st Dep't 2008).

Further, "[a] cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract." *Hawthorne Grp., LLC v. RRE Ventures*, 7 A.D.3d 320, 323 (1st Dep't 2004); *see Tag 380, LLC v. ComMet 380, Inc.*, 40 A.D.3d 1, 8 (1st Dep't 2007). Accordingly, a claim for breach of the implied covenant will be dismissed as duplicative if it arises from the same facts which form the basis for the breach of contract claim. *See Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dep't 2010); *Deer Park Enters., LLC v Ail Sys., Inc.*, 57 A.D.3d 711, 712 (2d Dep't 2008); *Canstar*, 212 A.D.2d at 453.

Odyssey alleges that L&L breached its duty of good faith and fair dealing by, among other things, misrepresenting to the City and to Odyssey the amount and value of the work done by Odyssey, misrepresenting to Odyssey conditions on the project, acting to avoid or delay making payment to Odyssey, interfering with Odyssey's work and failing to cooperate with Odyssey's performance of the work. *See* Counterclaims ¶¶ 69-

75. As the same conduct and resulting damages are also alleged in the breach of contract counterclaims, the fourth counterclaim will be dismissed as duplicative. *See TAG 380, LLC*, 40 A.D.3d at 8 (misrepresentation claim duplicative as duty to inform intrinsically related to performance of contract); *Park v. Soho Room Grp., LLC*, 39 Misc.3d 1242(A) (Sup. Ct. N.Y. Cnty. 2013) (breach of implied covenant dismissed where alleged misrepresentations also pleaded as part of breach of contract claim); *see also Manas v. VMS Assoc., LLC*, 53 A.D.3d 451, 454 (1st Dep't 2008) (fraud claim dismissed as duplicative where damages alleged were sought under breach of contract claim).

E. *Seventh Counterclaim (Against L&L and Federal for Payment on Bond)*

For reasons stated above with respect to the first counterclaim, dismissal of the seventh counterclaim is denied.

F. *Odyssey's Motion for Partial Summary Judgment*

The branch of Odyssey's motion seeking summary judgment for unpaid contract and extra work in the amount of $3,083,294.66 is denied, for reasons stated above with respect to L&L's motion to dismiss the counterclaims. Similarly, the branch of Odyssey's motion seeking dismissal of L&L's first and third causes of action for breach of contract and completion costs, is denied.

1. Spoliation

Odyssey also moves for sanctions against L&L for spoliation of evidence, based on L&L's failure to preserve emails, from late March and early April 2008, from the personal email accounts of certain management employees. Odyssey asserts that although L&L was required to produce all email correspondence regarding Odyssey's work on the Project, it did not produce emails from the personal email accounts of Project Manager Scott Earl, Vice President Anthony Maracic, and Quality Control and Safety Officer Oscar Gonzalez, although they used their personal email accounts for business purposes while working on the Project. *See* Georgoulis Affirm. in Support ¶¶ 31-35, 37-39; *see also* March 24, 2014 Oral Argument Tr. at 27-29. Odyssey contends that L&L's duty to preserve the subject emails arose at the latest on April 9, 2008, when it commenced the instant lawsuit, and a litigation hold should have been implemented on or before that date, but was not. Odyssey has been advised by L&L's attorney that the emails in question can no longer be obtained. Georgoulis Affirm. in Support ¶ 34.

Under New York law, spoliation sanctions may be available "where a litigant, intentionally or negligently, disposes of crucial items of evidence . . . before the adversary has an opportunity to inspect them." *Kirkland v. N.Y. City Hous. Auth.*, 236 A.D.2d 170, 173 (1st Dep't 1997), "thus depriving the party seeking the sanction of the means for proving his claim [or defense]." *Baldwin v. Gerard Ave., LLC*, 58 A.D.3d 484, 485 (1st

Dep't 2009); *see Kantor v. 75 Worth St., LLC*, 118 A.D.3d 622, 623 (1st Dep't 2014). "A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 45 (1st Dep't 2012) (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003); *see also Ahroner v. Israel Discount Bank of N.Y.*, 79 A.D.3d 481, 482 (1st Dep't 2010). A "culpable state of mind" includes ordinary negligence. *Voom HD Holdings LLC*, 93 A.D.3d at 45. "Spoliation sanctions . . . are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a [claim or] defense." *Standard Fire Ins. Co. v. Fed. Pac. Elec. Co.*, 14 A.D.3d 213, 218 (1st Dep't 2004).

The obligation to preserve relevant evidence is triggered when a party "reasonably anticipates litigation," that is, when a party "is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." *VOOM HD Holdings LLC*, 93 A.D.3d at 43; *see Zubulake*, 220 F.R.D at 218. Once the duty to preserve attaches, a party "must

suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake*, 220 F.R.D. at 218; *accord VOOM HD Holdings LLC*, 93 A.D.3d at 41; *see also Green v. McClendon*, 262 F.R.D. 284, 289 (S.D.N.Y. 2009). In the context of electronic evidence, "the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is necessary for a party facing litigation to take active steps to halt that process." *VOOM HD Holdings LLC*, 93 A.D.3d at 41.

In this case, there is no dispute that L&L had an obligation, at least upon the filing of this lawsuit, to preserve evidence, including management employees' email correspondence related to Odyssey's work on the Project. This obligation arose no later than April 9, 2008, when L&L commenced this action, and perhaps earlier in April, when, by its own acknowledgment, litigation could have been anticipated. *See* Aquino Affirm. in Opp. ("Aquino Aff.") ¶ 20. L&L does not dispute that there was no litigation hold in place on April 9, 2008, and it does not explain what, if any, steps it otherwise took or was advised to take to preserve potentially relevant electronically stored documents. *See Green*, 262 F.R.D. at 290 (noting obligation of counsel to advise client).

L&L contends, however, that sanctions are not warranted because destruction of the documents was not intentional or willful, and Odyssey has not demonstrated the

relevance of the documents or how it was prejudiced by the loss of the emails. The emails at issue, transmitted through personal email accounts not connected to L&L's main office computer network, apparently were deleted by an automatic delete feature. Aquino Aff. ¶ 12. L&L's counsel attests that L&L made numerous efforts to retrieve the missing emails, as well as emails from the personal accounts to L&L's main office. Further, L&L contends that emails to the City were available from other sources and have been provided to Odyssey. *Id.* ¶¶ 12, 15-19. L&L further asserts that no litigation was anticipated prior to receipt of Odyssey's April 1, 2008 letter terminating the subcontracts. *Id.* ¶ 20.

With respect to the relevance requirement for spoliation sanctions, "the courts have found that relevance of the destroyed evidence can be inferred when it is shown that such evidence was destroyed in bad faith or as the result of a party's grossly negligent conduct." *Ahroner*, 2009 WL 2135164, at *10 (Sup. Ct. N.Y. Cnty. 2009), *aff'd* 79 A.D.3d 481 (1st Dep't 2010). While "[t]he intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence; when the destruction of evidence is merely negligent, . . . relevance must be proven by the party seeking spoliation sanctions." *Voom HD Holdings LLC*, 93 A.D.3d at 45.

Contrary to Odyssey's apparent argument, relying on *Pension Comm. of Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010),

the failure to implement a litigation hold does not, by itself, demonstrate gross negligence. As the First Department recently made clear, the "per se rule apparently articulated in *Pension Comm.*" has been disapproved by the Second Circuit in *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012), *cert denied* 133 S. Ct. 1724 (2013), and "has never, to our knowledge, been adopted by a New York state appellate court." *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 118 A.D.3d 428, 432 (1st Dep't 2014).

As the court found in *Chin*, rejecting the notion that a failure to institute a "litigation hold" constitutes gross negligence per se, "'the better approach is to consider [the failure to adopt good preservation practices] as one factor' in the determination of whether discovery sanctions should issue." 685 F.3d at 162 (citation omitted). Moreover, even a finding of gross negligence does not, in all cases, obviate the need to demonstrate the relevance of the evidence sought. *See Green*, 262 F.R.D. at 291; *see also Chin*, 685 F.3d at 162 ("finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction").

Further, "[t]he determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the court and is assessed on a case-by-case basis." *Jankovic v. Concorde Condo. Corp.*, 2012 WL 2003711, at *6 (Sup. Ct. N.Y. Cnty. 2012); *see Cuevas v. 1738 Assoc., LLC*, 96 A.D.3d 637, 638 (1st Dep't 2012); *Scarano v.*

Bribitzer, 56 A.D.3d 750, 750 (2d Dep't 2008); *see generally Ortega v. City of New York*, 9 N.Y.3d 69, 76 (2007). "In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness. The burden is on the party requesting sanctions to make the requisite showing." *Duluc v. AC & L Food Corp.*, 119 A.D.3d 450, 451-452 (1st Dep't 2014) (internal citations omitted).

Here, while the court finds that L&L was negligent in failing to institute a litigation hold or otherwise act in a timely manner to preserve the emails in question, the facts do not support a finding of bad faith or gross negligence against L&L. Nor has Odyssey made an adequate showing of the relevance of the missing emails to its remaining counterclaims or how they would support its defenses; its reliance on the presumption of relevance is insufficient to establish a right to sanctions. *See Pegasus Aviation I, Inc.*, 118 A.D.3d at 435-436. Odyssey also offers no evidence to refute L&L's assertion that it did not anticipate litigation prior to being informed by Odyssey that it was terminating the subcontracts. The branch of Odyssey's motion which seeks sanctions for spoliation is, therefore, denied.

III. Conclusion

Accordingly, it is

ORDERED that the motion of L&L and Federal is granted to the extent that the second, fourth, fifth, and sixth counterclaims are dismissed, and the motion is denied with respect to the first, third, and seventh counterclaims; and it is further

ORDERED that defendant Odyssey's motion for summary judgment is denied; and it is further

ORDERED that counsel are directed to appear for a pretrial conference in Room 442, 60 Centre Street, on December 9, 2014, at 10 a.m.

Dated: New York, New York
September 25 2014

ENTER:

Hon. Eileen Bransten, J.S.C.