

**Judlau Contr., Inc. v City of New York**

2017 NY Slip Op 31913(U)

September 7, 2017

Supreme Court, New York County

Docket Number: 654362/16

Judge: Gerald Lebovits

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

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JUDLAU CONTRACTING, INC.,

Plaintiff,

-against-

Index No. 654362/16

THE CITY OF NEW YORK,

Defendant.  
-----x

*Peckar & Abramson, P.C.*, New York (Christopher M. Bletsch of counsel) for plaintiff.  
*Zachary W. Carter*, Corporation Counsel of the City of New York, New York (Benjamin L. Miller of counsel) for defendant.

GERALD LEOVITS, J.:

Defendant, The City of New York, moves for dismissal of the complaint pursuant to CPLR 3211 (a) (1), (a) (2) and (a) (7). This is a breach of contract action. Plaintiff Judlau Contracting, Inc. commenced this action seeking \$1,828,714.58 in damages due to delays arising from a construction contract (Contract) with defendant, administered by the New York City Department of Transportation (DOT). In the Contract designated as Contract No. 2014-1429180, DOT Contract HBX-1152, plaintiff agreed to provide labor and materials for the rehabilitation of the Bryant Avenue Bridge over Amtrak and CSXT, in the borough of the Bronx (hereinafter, the Project).

In November 2013, defendant, acting through DOT, issued a Notice to Bidders requesting bids for the Contract. The Notice to Bidders informed prospective bidders that the Contract was part of defendant's Delay Damages Pilot Program, which allowed contractors to recover damages based upon specific delays incurred as a result of certain acts or omissions by City agents, such as

DOT. After submission of all bids, plaintiff was ultimately chosen as the contractor for the Project. The Contract was executed on June 20, 2014.

Upon the completion of the Project, plaintiff filed a Notice of Claim with the Comptroller of the City of New York, setting forth its claims. Plaintiff alleges that it was insufficiently paid by defendant for its services under the Contract, and that defendant breached the Contract by unreasonably delaying its work and interfering with its operations. Specific actions allegedly included a failure to coordinate and ensure timely closure of the water valves, a failure to provide flaggers during approved track outages, and the unanticipated imposition of night work restrictions. Because of such alleged actions or omissions by defendant, plaintiff contends that it incurred additional and increased costs of labor, supervision, equipment, materials, field costs and overhead. Thus, plaintiff seeks a recovery of these expenses from defendant.

Defendant moves for dismissal of the complaint on the grounds that this court lacks subject matter jurisdiction over this action, as plaintiff's claims must be resolved pursuant to the alternative dispute resolution mechanism provided in the Contract; and that plaintiff failed to state a cause of action for delay damages, because the relief sought is not compensable pursuant to Article 11.5 of the Contract.

Defendant argues that Article 27 of the Contract provides an alternative forum to resolve disputes involving extra work and other claims, and that this forum is the agreed-upon exclusive means for resolving certain types of claims arising from the Contract. Stating that courts have traditionally deferred to contractual alternative dispute proceedings, defendant argues that this court should dismiss this action so that plaintiff can comply with the contractual procedure pursuant to Article 27 (*see* copy of City of New York Standard Construction Contract, exhibit 6).

Defendant also argues that plaintiff does not state a cause of action for delay damages, and that the Contract conclusively denies recovery of its claim. Article 11.5 provides that certain delay damages are “compensable,” provided they are not caused by the acts or omissions of any third parties, including public/governmental bodies (other than City agencies), utilities, or private enterprises who are “disclosed in the contract documents”; or by any “situation which was within the contemplation of the parties at the time of entering into the Contract.”

Defendant contends that the damages sought by plaintiff were the result of third parties, such as Amtrak, which failed to provide track outages and flag crews during the performance of the Project. Defendant avers that during the course of another project, involving the rehabilitation of the Bruckner Expressway Bridge (the Bruckner Project), of which plaintiff was a major contractor, there were also delays caused by track outages. Subsequently, plaintiff brought a suit against defendant over the Bruckner Project, seeking delay damages (*see* copy of Complaint of Judlau v. City of New York [Bruckner Bridge], exhibit 3). Although that action was ultimately settled, and occurred prior to the commencement of the recent Project, defendant argues that plaintiff knew it was possible that the railroads would not be able to provide flagging crews and/or track outages at all times during plaintiff’s work schedule.

Defendant asserts that, as the delays related to this action were caused by third party entities specifically disclosed in the contract documents, such resultant damages are not recoverable. Moreover, another alleged source of delay, the failure to shut down a water main, was one contemplated in the Contract, which, according to defendant, exculpates defendant from any claim to damages resulting from the failure to shut down a main (*see also* copy of New York City Standard Water Main Specifications, exhibit 9).

Defendant concludes that the documentary evidence provided with its motion papers shows that plaintiff lacks a cause of action for delay damages, and that defendant is entitled to a dismissal.

Plaintiff opposes the motion and contends that the damages it is seeking are compensable pursuant to the Contract. Plaintiff states that some aspects of its Project work were required to be performed over or near railroad tracks or other property owned or operated by Amtrak or CSXT. Plaintiff claims that support services from these entities, in the form of flaggers and track outages, were occasionally required. Plaintiff argues that defendant was obligated to oversee and guarantee support services on plaintiff's behalf, so that plaintiff had appropriate access to said property for the duration of the Project. Plaintiff contends that defendant was responsible for some of the delays, due to its failure to compel Amtrak or CSXT to provide the aforesaid services (*see* Plaintiff's Coordination Correspondence, exhibit 15).

Plaintiff also disputes the claim that the delays, particularly the outages, were within the contemplation of the parties at the time the Contract was executed. With respect to the Bruckner Project, plaintiff argues that defendant recognized its responsibility for train access delays when it settled plaintiff's suit. Plaintiff contends that it is not seeking damages for extra work and, thus, does not have to comply with Article 27 of the Contract.

In reply, defendant disputes plaintiff's interpretation of the Contract, arguing that, under agreements with Amtrak and CSXT, it had no authority to compel these entities to provide flaggers or outages for its contractors, or to ensure that plaintiff had access to property owned or operated by them during the Project period. According to defendant, the Contract documents explicitly stated that outages and flaggers were subject to availability from the entities, and that

defendant was unable to guarantee their availability (*see* copy of City Agreements with Rail Corporations, exhibit 16).

Regarding the settlement agreement which concluded the Bruckner Project lawsuit, defendant argues that the settlement terms did not include any acknowledgment of liability for delays on its part (*see* copy of Settlement Agreement between City of New York and Judlau, exhibit 17).

CPLR 3211 allows defendants to move for the dismissal of the complaint prior to serving their answers. To prevail on a CPLR 3211 (a) (1) motion to dismiss, a moving party must show that the documentary evidence conclusively refutes plaintiff's allegations (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]). A motion under CPLR 3211 (a) (2) concerns whether the court has subject matter jurisdiction over the action. A court lacks subject matter jurisdiction over an action if "the matter before the court [i]s not the kind of matter on which the court ha[s] the power to rule." (*Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 203 [2013]). A motion under CPLR 3211 (a) (7) involves whether a plaintiff has made out a sufficient cause of action against a defendant. When assessing the adequacy of a complaint in light of such a motion, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]). The motion will be denied where factual allegations in a complaint, taken together, manifest any cause of action cognizable at law (*see Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]).

Regarding subject matter jurisdiction, this court has broad jurisdiction and can entertain

an action such as this one. However, in reviewing the Contract, the court finds that it must abide by Article 27, which concerns the resolution of disputes of the kind commenced here. Article 27.1.2 provides that the article is applicable to disputes about “the interpretation of contract documents.” Contract documents are defined, in Article 2 of the Contract, as various parts of the Contract, including Article 11, which concerns delay damages. This action is primarily about the proper interpretation of delays which are subject to recoverable damages. The parties dispute the concept of “compensable delays,” as provided in Article 11.4 of the Contract.

This is a dispute that is appropriate for Article 27, which provides an alternative dispute procedure for dispute resolution. Accordingly, plaintiff must file a Notice of Dispute with the relevant City agency (Article 27.4). If unsatisfied with the decision, plaintiff may appeal to the Comptroller (Article 27.5), and then, to the Contract Dispute Resolution Board (Article 27.6). Thereafter, plaintiff, having exhausted its administrative remedies, can commence an Article 78 proceeding in this court.

The courts have traditionally deferred to alternative dispute resolutions (*see Laquila Constr. v New York City Tr. Auth.*, 282 AD2d 331, 332 (1<sup>st</sup> Dept 2001)). Because the parties agreed to this procedure upon executing the Contract, the court shall dismiss this action for plaintiff to comply with the terms of Article 27.

Accordingly, it is

ORDERED that the motion of defendant The City of New York to dismiss the complaint is granted and the complaint is dismissed in its entirety, with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

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ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: September 7, 2017



J.S.C.

**HON. GERALD LEBOVITS**  
**J.S.C.**