Bovis Lend Lease (LMB), Inc. v Lower Manhatten Dev. Corp.
2018 NY Slip Op 30972(U)
May 18, 2018
Supreme Court, New York County
Docket Number: 603243/2009
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54

Justice

Index Number : 603243/2009
BOVIS LEND LEASE (LMB), INC.,
vs.
LOWER MANHATTAN
SEQUENCE NUMBER : 016
MOTION IN LIMINE

INDEX NO. _____
MOTION DATE 5/11/18
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 872-894, [redacted]
Answering Affidavits — Exhibits _____ **No(s).** 923-927
Replying Affidavits _____ **No(s).** 918-919, 945-948

Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/18/18

SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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BOVIS LEND LEASE (LMB), INC., Index No.: 603243/2009

Plaintiff, **DECISION & ORDER**

-against-

LOWER MANHATEN DEVELOPMENT CORPORATION,

Defendant.

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BOVIS LEND LEASE (LMB), INC.,

Third-Party Plaintiff,

-against-

ARCH INSURANCE COMPANY,

Third-Party Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 016, 017, and 019 are consolidated for disposition.

Third-party defendant, Arch Insurance Company (Arch), moves for an order precluding third-party plaintiff, Bovis Lend Lease (LMB), Inc. (Bovis), from offering evidence at trial relating to any of the claims that have been dismissed in this action. Seq. 016. Arch separately moves for partial summary judgment on its counterclaim against Bovis. Seq. 017. Bovis opposes both motions and moves for partial summary judgment on damages. Seq. 019. Arch opposes. For the reasons that follow, Arch's motions are granted in part and denied in part, and Bovis' motion is denied.

I. Background

This case has been the subject of numerous, lengthy decisions by this court and the Appellate Division. The facts recited herein are limited to those pertinent to the instant motions.

In short, this case concerns construction work performed on the former Deutsche Bank Building, located at 130 Liberty Street in lower Manhattan (the Building). The Building had been damaged by the terrorist attacks of September 11, 2001 and had to be demolished. Lower Manhattan Development Corporation (LMDC) purchased the building in 2004. In October 2005, LMDC entered into a contract with Bovis, as general contractor, to remove toxic materials and deconstruct the Building. In February 2006, Bovis entered into two subcontracts with The John Galt Corporation (Galt): (1) a $25 million contract for deconstruction; and (2) a $33.5 million[1] contract for the abatement of toxic material (the Abatement Agreement) (collectively, the Galt Contracts). Galt's obligations under both contracts were guaranteed by two performance bonds (the Bonds) issued by Arch. "Each of the Bonds provides that, in the event of Galt's default, breach, and/or failure in performance, Arch is liable to complete or pay the excess cost to complete [the Galt Contracts], and for all other damage to Bovis flowing from Galt's default. Each Bond expressly incorporates all the terms of the underlying [the Galt Contracts]." Dkt. 928 at 7.[2] The guaranteed obligations include article 6.2 of the Galt Contracts' general conditions, which "provides in the event of Galt's termination for cause Galt shall pay Bovis, in addition to the excess costs to complete the remaining Work, all losses sustained or incurred by Bovis and LMDC," and Galt's indemnity obligations under article 11. *See id.* at 7-8.

Things quickly became far more expensive than originally anticipated due to the sensitivity of the work (the finding of what appeared to be fragments of human remains) and resulting regulatory demands. Abatement became lengthy and time-consuming. This impelled

[1] The contract price was subsequently increased to $35 million pursuant to a change order.

[2] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

the parties to enter into two additional agreements dated as of February 5, 2007, the Supplemental Agreement (Dkt. 903) and the Companion Agreement (Dkt. 904). "The Supplemental Agreement was between Bovis and LMDC and set forth how those two parties would fund the abatement costs above $35 million. As set forth in the Supplemental Agreement, Bovis and LMDC agreed to defer their litigation over the ultimate liability for the additional abatement costs until after the Project was completed (the "LMDC" Litigation)." Dkt. 894 at 10 (citations omitted).

"[T]he Companion Agreement was a settlement agreement,[3] which immediately resolved and settled the dispute regarding Arch's liability for abatement costs above the $35 million adjusted price in [the Abatement Agreement]." Dkt. 894 at 11. "Arch's ultimate liability for the additional abatement costs was established and fixed at an amount equal to: (a) a calculated portion of the abatement costs over and above $35 million (§3 of the Companion Agreement), (b) 50% of any judgment awarded in favor of LMDC in the LMDC Litigation (§4(b) of the Companion Agreement), and (c) a calculated portion of sums paid LMDC to settle the LMDC Litigation." *Id.* "[By virtue of decisions that have been issued in this action,] Arch [no longer has] liability for any claims related to any of these [abatement] costs." *Id.*

While Galt was performing its work, in August 2007, a fire occurred in which two firefighters died. This resulted in Galt's termination and eventual criminal conviction for reckless endangerment. *See People v John Galt Corp.*, 113 AD3d 537, 537-38 (1st Dept 2014) ("During the course of abatement work being performed in the Deutsche Bank Building's

[3] Bovis disputes this and contends that the Companion Agreement was an interim funding agreement. As discussed herein, not only is this contention false, but it has long been the law of the case (a decision of this court affirmed by the Appellate Division) that the Companion Agreement settled Arch's abatement liability. This holding, therefore, cannot be challenged by Bovis.

basement, defendant's foreman directed another worker employed by defendant to remove a 42-foot section of the building's standpipe, notwithstanding that the foreman was aware that the standpipe was necessary to provide water to firefighters in the event of a fire, thereby creating a substantial risk of serious physical injury to another person."). The costs to complete "Galt's Work" (the scope of which has been determined to be a question of fact)[4] were substantial,[5] especially due to the severity of the fire.

On October 23, 2009, Bovis commenced this action by filing a complaint against LMDC; it filed an amended complaint on June 4, 2010. *See* Dkt. 3.[6] On March 2, 2011, LMDC filed

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[4] *See Bovis I, infra*, 143 AD3d at 599 ("As for Bovis's claim under the Companion Agreement, which limits the scope of Arch's liability thereunder by reference to 'Galt's Work,' and 'costs incurred by Galt,' the court correctly found that issues of fact exist as to whether, as Bovis argues, the scope of Bovis's work was coextensive with the scope of Galt's work. For example, the agreement obligated Bovis to maintain a second hoist to be erected by another contractor. Moreover, the limitation on Arch's liability to 'costs incurred by Galt,' found in paragraph 3(a) of the agreement, was omitted from the contemporaneously executed 'Supplemental Agreement' concerning Bovis's liability to LMDC.")

[5] Bovis claims to have paid another contractor in excess of $100 million. Since the court is denying Bovis' summary judgment motion under *Brill v City of New York*, 2 NY3d 648 (2004), the court will not opine on which portion of that money relates to non-abatement costs (since, as discussed herein, Arch is not liable for any other costs). The court notes, however, that even were the court to consider Bovis' motion, it would find that there clearly are questions of fact as to damages. A discussion as to why this is so would be extensive. It is omitted due to the motion clearly being violative of *Brill*.

[6] On June 23, 2010, LMDC moved to dismiss. The court decided that motion in a decision dated May 9, 2011, as modified by order dated April 5, 2012 (which, unlike the remainder of the decisions addressed below, is not particularity relevant to the instant motions). *See* Dkts. 28, 78. On May 28, 2013, that decision was modified by the Appellate Division to grant dismissal of the claim for delay damages, and otherwise affirmed. *See Bovis Lend Lease (LMB), Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 150 (1st Dept 2013). It should be noted that virtually all of the court's decisions have been the subject of reargument motions, which the court omits from its discussion unless relevant to the instant motions.

counterclaims against Bovis. *See* Dkt. 25.[7] On December 21, 2012, Bovis filed a third-party complaint against Arch that asserted three causes of action (of which only a portion of the first, for breach of the Bonds, remains). *See* Dkt. 89. After extensive discovery, Bovis filed a Note of Issue on November 15, 2013, requesting a jury trial.[8] *See* Dkt. 141. On March 6, 2014, the parties filed six motions for summary judgment. Seq. Nos. 006-011. All but two of those motions (Seq. Nos. 006 & 011) were mooted after Bovis and LMDC settled. *See* Dkts. 653-656. By order dated April 16, 2015, the court decided the remaining two motions, which concerned Arch's liability under the Bonds and the Companion Agreement. *See* Dkt. 657 (the April 2015 Decision) at 1-2.

In the April 2015 Decision, the court: (1) granted summary judgment to Arch by dismissing Bovis' claims against it under the Bonds; (2) denied Bovis' motion for summary judgment; and (3) granted Arch's cross-motion "solely to the extent that [its] liability under §3 of the Companion [Agreement] is limited to costs incurred by Galt, which never met the $65 million threshold." *See id.* at 33. On October 25, 2016, the Appellate Division modified the April 2015 Decision only with respect to Bovis' claims against Arch for breach of the Bonds. *See Bovis Lend Lease (LMB) Inc. v Lower Manhattan Dev. Corp.*, 143 AD3d 597 (1st Dept 2016) (*Bovis I*). Critically, ***Bovis was granted summary judgment on its cause of action for breach of the Bonds***. *See id.* at 598. Hence, the trial on this claim will only determine damages.

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[7] LMDC sought "damages for (a) extended duration costs, (b) carrying charges, (c) abatement costs, (d) environmental monitoring costs, (e) scaffold rental costs, (f) costs arising out of the August 18, 2007 fire, (g) costs arising out of the cutting of the standpipe, and (h) all payments made by LMDC under the Supplemental Agreement ("LMDC's Counterclaims")." Dkt. 894 at 11.

[8] Sensibly, at oral argument on the instant motions, the parties indicated their willingness to discuss proceeding on a bench trial. *See* Dkt. 969 (5/9/18 Tr.). They have not, as of yet, formally committed to doing so.

Meantime, on May 27, 2015, Bovis and LMDC filed a joint motion to discontinue the claims they had asserted against each other. Seq. 013. On June 2, 2015, Arch cross-moved for summary judgment, seeking dismissal of all of the claims asserted against it by Bovis. *See* Dkt. 717. On June 17, 2015, Bovis cross-moved for partial summary judgment, arguing that Arch is bound by the settlement between Bovis and LMDC. *See* Dkt. 734. By order dated January 21, 2016, the court: (1) denied the voluntary discontinuance of Bovis and LMDC without prejudice, with leave to renew upon submission of their settlement; (2) granted partial summary judgment to Arch only "on the portion of Bovis' first, third-party cause of action for indemnification for any judgment obtained by LMDC on its counterclaims against Bovis"; and (3) denied Bovis' cross-motion. *See* Dkt. 795 (the January 2016 Decision) at 10. In denying Bovis' cross-motion, the court noted that while there was good cause under *Brill* to file a subsequent summary judgment motion on certain issues "based on the newly-minted Settlement," there was no good cause to effectively reargue matters that the April 2015 Decision "resolved … adversely to Bovis"[9] because "Bovis is not entitled to a second bite at the apple [i.e., regarding Arch's indemnification not being coextensive with Bovis' liability to LMDC]." *See id.* at 3.

On February 26, 2016, Arch moved for reargument, and Bovis and LMD moved to renew their motion for voluntary discontinuance. Seq. Nos. 014 & 015. By order dated July 22, 2016, the court (1) denied Arch's motion for reargument and renewal; (2) granted the motion by Bovis and LMDC to discontinue their claims with prejudice; and (3) severed the third-party action, i.e., the claims between Bovis and Arch. *See* Dkt. 859 (the July 2016 Decision) at 7-8. On August 8, 2017, the Appellate Division reversed the court's denial of Arch's motion to renew, and granted

[9] As discussed herein, Bovis again seeks summary judgment on issues either previously decided or on issues that it could have (but did not) raise in its original summary judgment motion.

Arch's motion for summary judgment. *See Bovis Lend Lease (LMB), Inc. v Arch Ins. Co.*, 153 AD3d 432 (1st Dept 2017) (*Bovis II*). The Appellate Division explained:

> Under paragraph 4 of the [Companion Agreement], Bovis was required to obtain Arch's consent to the settlement of the claims and counterclaims asserted by and against Bovis and [LMDC], in order to seek indemnification from Arch. Bovis's contractual remedy in the event of Arch's refusal to consent to a settlement, whether or not such refusal was reasonable, was to be indemnified by Arch "for all damages suffered in excess of the result that [Bovis] would have obtained if the settlement had been accepted." By entering, contrary to the plain terms of the Companion Agreement, into a settlement with LMDC to which Arch had refused to consent, **Bovis breached the Companion Agreement and forfeited its right to the contractual remedy for Arch's refusal to consent to a settlement acceptable to Bovis**, whether or not Arch withheld its consent in good faith. Accordingly, Arch is entitled to summary judgment dismissing Bovis's third-party claim against it.

Bovis II, 153 AD3d at 432-33 (emphasis added).

Accordingly, the Appellate Division ruled that due to its breach, Bovis forfeited its right to assert claims against Arch under the Companion Agreement. Specifically, Bovis lost the right to recover from Arch a portion of the damages under the Bonds that were indisputably recoverable prior to the execution and breach of the Companion Agreement – abatement costs. That is because, as Arch correctly avers, "the Companion Agreement was a settlement agreement, which immediately resolved and settled the dispute regarding Arch's liability for abatement costs above the $35 million adjusted price in Galt's Abatement Subcontract." *See* Dkt. 894 at 11. The court issued a holding to this effect on page 21 of the April 2015 Decision, where the court explained that the Companion Agreement recites that the parties intended to "***resolve*** their disputes" regarding abatement costs above the $35 million. *See* Dkt. 884 (Companion Agreement) at 2 (emphasis added). The court further held that the "Companion Agreement covered all of the abatement costs above $35 million, and not just the abatement

costs incurred by Galt prior to its termination by Bovis." Dkt. 894 at 17; *see* April 2015 Decision at 27.

These holdings were undisturbed by the Appellate Division in *Bovis I*. Indeed, the Appellate Division affirmed this court's interpretation of the Companion Agreement. *See Bovis I*, 143 AD3d at 599 (holding that this court correctly found in the April 2015 Decision that the Companion Agreement "**limits the scope of Arch's liability**" for "Galt's Work" under the Bonds) (emphasis added). Moreover, in a portion of the July 2016 Decision not addressed (i.e., not modified) by *Bovis II*, this court confirmed that the January 2016 Decision had, in fact, dismissed Bovis' claim under paragraph 4(b) of the Companion Agreement. *See* July 2016 Decision at 4. Since paragraph 4(b) of the Companion Agreement governs Bovis' right to recover from Arch abatement costs above $35 million, and since the dismissal of Bovis' claims under the Companion Agreement is the law of the case, Bovis' claim to recover abatement costs is out of the case. Consequently, the argument the Bovis currently proffers – that it may recover abatement costs under the Bonds above $35 million – is foreclosed by (1) this court's prior decision holding that such claim arises under the Companion Agreement; and (2) the Appellate Division's dismissal of Bovis' claims under the Companion Agreement in *Bovis II*.[10] Ergo, on Bovis' only remaining claim for breach of the Bonds, on which it was granted summary judgment on liability, it may only recover damages from Arch in the amount of its non-

[10] Indeed, as argued by Arch, it would be Kafkaesque were this otherwise. Simply put, the settlement of the abatement claims in the Companion Agreement capped what Bovis could recover from Arch. Bovis has been found by the Appellate Division to have violated this settlement – the Companion Agreement – and can no longer collect under it. Bovis, having been found to have breached the settlement agreement, cannot now circumvent the ruling and collect abatement costs (the subject of the settlement) in a greater amount than it would have acquired had the agreement not been breached.

abatement costs.[11] Likewise, as the Appellate Division held in *Bovis II*, Bovis is foreclosed from recovering costs covered by LMDC's Counterclaims, which are governed by the Companion Agreement, by virtue of Bovis' claims under the Companion Agreement being dismissed. *See Bovis II*, 153 AD3d at 432.

Nonetheless, there are triable issues of fact regarding whether Bovis' own alleged negligence limits its recovery. While there may well be admissions in the record concerning Bovis' negligence, the prior summary judgment motions did not decide whether Bovis was negligent or the legal implications of such a finding. *See* Dkt. 894 at 22-26. Had the parties wanted summary judgment on these issues, nothing prevented them from seeking it on the prior motions. Nothing set forth in the decisions of this court or the Appellate Division changed the landscape on these issues, and, thus, there is no good cause under *Brill* to permit a pre-trial ruling at this time. *See Brill*, 2 NY3d at 653 (where there is no good cause for late summary judgment motion, the case should proceed to trial "where a motion to dismiss after plaintiff rests or a request for a directed verdict may dispose of the case during trial.").

Likewise, it is far too late to seek pre-trial rulings on all other damages issues. There is no reason these issues could not have been raised on the prior summary judgment motions. To be sure, a final determination of liability had not yet been issued. Nonetheless, parties routinely seek partial or conditional summary judgment on damages prior to an adjudication of liability.

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[11] *See* Dkt. 948 at 5 ("To be clear, Arch does not dispute that [*Bovis I*] reinstated certain claims Bovis had under the Bonds for non-abatement costs. Nor does Arch contend that the Companion Agreement resolved all of its potential liability in this litigation. Rather, Arch maintains that the Companion Agreement governed and resolved the discrete categories of damages identified by this Court and the Appellate Division in the Court Decisions: namely, excess abatement costs and the claims resolved by the LMDC settlement. Bovis' remedy for pursuing those costs was through its claims under the Companion Agreement - claims which were dismissed in their entirety. That is the law of the case governing this litigation.").

That the parties' appeal of their liability has now been determined is not good cause to seek summary judgment, for the first time, on the proper calculation of damages.

That said, the court reiterates that the only reason it has opined on the limits of Bovis' damages on its claim under the Bonds is because of the parties' fundamental disagreement regarding the scope of the rulings of this court and the Appellate Division. Without this clarification, it would have been impossible to conduct an orderly trial, as the parties would effectively be trying two different cases. By contrast, aside from the court's ruling on the scope of the damages Bovis may recover under the Bonds, there simply is no good cause to address, for the first time, whether either party is entitled to further partial summary judgment on damages.

Finally, a word on the nomenclature used by Arch in styling its first motion (Seq. 016) – namely, as a "***preliminary*** motion *in limine*." *See* Dkt. 894 at 30 (bold added for emphasis). Leaving aside whether that is a proper order under the CPLR, the court's rulings in this decision require an important caveat – that the court is not ruling that any particular piece of evidence or testimony is excluded from trial. First of all, the court does not know what the parties will seek to introduce at trial. Moreover, without knowing the exact *purpose* for which a party may wish to introduce certain evidence, it is impossible to decide whether certain high-level categories (of the sort proposed by Arch) warrant absolute exclusion. For instance, since Bovis' negligence will be an issue at trial, it is unclear what evidence will be introduced on that subject.[12] To be sure, there may well be large swaths of the considerable evidence in this case that, for reasons explained in Arch's moving brief, are irrelevant at this juncture. But in a vacuum, without knowing the exact scope of all of the evidence that is subsumed in these categories and without

[12] It should be noted that if the parties agree to a bench trial, their evidentiary disputes will be easier to resolve since there will no concern about prejudicing or confusing the jury.

knowing the purpose for which such evidence will be sought to be introduced, the court simply cannot make an informed decision on what to exclude.

However – and this is a ***big*** however – the court is extremely concerned about Bovis' willingness to relitigate issues that have been decided (as they have done yet again on the instant motions). Bovis is strongly cautioned that the court will not tolerate this continued practice during the pre-trial process (especially since a new Justice will be trying the case).[13] Its proffered evidence must be confined to the scope of the case as set forth herein. Failure to follow this directive may result in a sanction, including summary rejection of its *in limine* motions. At this juncture, there should be no question as to the proper scope of the trial. The court will not tolerate further attempts to muddy the waters. According it is

ORDERED that Arch "preliminary motion *in limine*" is construed as a motion for clarification and, as such, is granted only to the extent that Bovis' damages on its remaining claim against Arch for breach of the Bonds, on which it was granted summary judgment on liability, shall exclude all damages that would have been recoverable under the Companion Agreement, namely excess abatement costs and damages for claims resolved in the LMDC settlement; and it is further

ORDERED that the parties' motions for partial summary judgment (Seq. 017 & 019) are denied under *Brill,* 2 NY3d 648; and it is further

[13] Lest the parties view this as an opportunity to change the court's view of issues that have been decided, they should be disabused of that notion. In other words, for once, the parties must exercise restraint and not file a motion for reargument. Any issues with this decision should be taken up with the Appellate Division.

ORDERED that a telephone conference will be held on June 21, 2018 at 3:30 pm, to discuss the scheduling of a pre-trial conference.

Dated: May 18, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C