

<b>Judlau Contr., Inc. v City of New York</b>
2018 NY Slip Op 31080(U)
May 22, 2018
Supreme Court, New York County
Docket Number: 654362/16
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: 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 Lebovits, J.

Plaintiff Judlau Contracting, Inc. (Judlau) moves to reargue a motion to dismiss brought by defendant City of New York (City). This court dismissed this action on the ground that the issue raised in the action — damages for delays in plaintiff's performance in a construction project — should be subject to an alternative-dispute resolution as provided in the parties' construction agreement, before being litigated here. Plaintiff argues in its motion that the court erred in dismissing this suit because the issue was expressly excluded from alternative-dispute resolution. Plaintiff contends that the issue was properly before this court. Upon the granting of its motion, plaintiff seeks the denial of defendant's motion to dismiss. Defendant agrees with plaintiff that the motion to reargue should be granted, but states that its motion should also be granted and the complaint dismissed.

**BACKGROUND**

This is a breach of contract action. Plaintiff commenced this action seeking damages because of delays arising from a construction contract (Contract) with defendant. Under the Contract, 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).

The Contract included a "Delay Damages Pilot Program" which allowed contractors like plaintiff to recover damages based on specific delays incurred as a result of certain acts or omissions by agents of defendant, such as the Department of Transportation (DOT). Once the Project was completed, plaintiff filed a Notice of Claim with the Comptroller of the City, setting forth its claims, declaring that defendant breached the Contract by unreasonably delaying its work and interfering in its operations. Specific actions alleged in the complaint included that defendant failed to coordinate and ensure timely closure of the water valves and to provide flaggers during approved track outages, and that there was an unanticipated imposition of night work. According to plaintiff, these actions resulted in additional costs of labor, supervision,

equipment, materials, field costs, and overhead. Plaintiff sought recovery of these expenses. When defendant denied reimbursement, plaintiff commenced this litigation.

Before answering the complaint, defendant moved for dismissal on the ground that plaintiff failed to state a cause of action. Defendant also relied on the Contract as documentary evidence. Defendant stated that some of plaintiff's claims were for extra work it had performed. Defendant argued that any extra work claims were subject to alternative-dispute resolution pursuant to the Contract. Regarding delay damages, defendant addressed the Contract, referring to Article 11.5, which provides that certain delay damages are "compensable," provided they are not caused by the acts or omissions of any third parties, including public and/or government 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 entering into the Contract." Defendant argued that the delays mentioned by plaintiff in its Notice of Claim, were not compensable because the delays were not caused by defendant, but by Amtrak and CSXT, which failed to provide flaggers and approve track outages. In addition, defendant argued that all delays mentioned by plaintiff were within the contemplation of the parties at the time of the Contract's execution, and are not compensable.

In opposition, plaintiff sought to refute defendant's interpretation of Article 11.5, contending that the delays were compensable or that an issue of fact regarding the nature of the delays precluded dismissal of the complaint.

The court cited Article 27 of the Contract, which provided an alternative forum to resolve such disputes as the subject dispute, and dismissed the action pending a determination by said forum.

Now, plaintiff moves to reargue the prior motion based on the court's alleged misinterpretation of the Contract.

The granting of a motion for reargument is within the sound discretion of the court which decided the prior motion, provided the movant shows that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). In its motion, plaintiff cites Article 11.8, which provides that delay issues are not subject to alternative forum resolution. The court grants the motion to reargue based on its misinterpretation of the Contract. Article 11.8 provides: "Determinations under this Article 11 are not subject to the jurisdiction of the Contract Dispute Resolution Board pursuant to the dispute resolution process set forth in Article 27."

Plaintiff refers to that part of the complaint which defendant asserted was a claim for extra work and was subject to alternative-dispute resolution. Plaintiff stated that it clarified this claim to defendant, regarding this claim as one for an outstanding contract balance. Plaintiff argues that the claim was for approved base contract work and already approved extra work. Because there are no open extra work claims, plaintiff avers that this issue is moot.

Defendant, through its counsel, supports the motion to reargue the earlier motion. Defendant acknowledges that any unpaid and approved contract balance sums would be paid in the normal course, with the absence of any disputed extra work claims. Defendant contends that upon reargument, its motion to dismiss should be granted based on the grounds raised in its motion papers.

The court finds no opposition to the motion to reargue. The motion is hereby granted.

The court will now consider whether this action should continue: whether plaintiff has a meritorious claim for recovering delay damages pursuant to the Contract. The court will rely on the earlier papers of the parties related to the motion to dismiss. In its interpretation of the Contract, defendant argued it was not solely responsible for the delays, citing Article 11.4.1, and that the railroad entities, Amtrak and CSXT, were responsible for providing access of their property to plaintiff. Defendant also argued that the delays were contemplated by the parties at the time of the execution of the Contract (Article 11.4.1.7). In opposition, plaintiff argued that defendant breached a fundamental obligation of the Contract (Article 11.4.1.9) by not negotiating with Amtrak and CSXT to provide access of their property to plaintiff for plaintiff to perform in timely manner. Plaintiff denied contemplating these delays, claiming that the cancellation of an access permit by Amtrak and CSXT was not foreseeable.

The parties are primarily relying on the proper interpretation of the Contract, along with other documents that have been incorporated into it. In order 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) (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 accept the allegations as true and determine whether the allegations manifest any cause of action cognizable at law (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Defendant cites Article 11.4.1 of the Contract which provides, in pertinent part:

“The Contractor [plaintiff] agrees to make claim only for additional costs attributable to delay in the performance of this Contract ... occasioned solely by any act or omission to the act of the City listed below. The Contractor also agrees that delay from any other cause shall be compensated, if at all, solely by an extension of time to complete the performance of the Work.”

The main delay alleged in the complaint concerns the failure of Amtrak and CSXT to provide track outage or flagging crews when plaintiff needed them for its work. As a result, plaintiff experienced delays in performance. Plaintiff notified DOT of these and other delays via letters sent after the delays occurred. While plaintiff insisted that defendant was responsible for dealing with the railroads and should have arranged for them to provide access for plaintiff, defendant contended that it could not guarantee the access because the Contract explicitly

provided that outages and flaggers were, at all times, subject to availability based upon Amtrak and/or CSXT's own operations. Thus, neither outages nor flaggers were guaranteed at any time.

The agreements between defendant and the railroads provide contractors with access to their property and the availability of certain support services to facilitate this access. The Amtrak agreement, for example, provides:

“Upon [satisfaction of certain preconditions], the Company [Amtrak] will cooperate with the City, Contractors and Consultants to provide the the Support Services in accordance with the City’s schedule. However, the City acknowledges that use of the Company right of way and other property is greatly restricted by the amount of train traffic using the Company tracks and adjacent railroad tracks, that only very limited track outages are available, and these outages must be shared and/or rationed among all potential projects . . . . The Company and the City agree to cooperate and to require their contractors to cooperate so as to coordinate their respective schedules in an effort to avoid delay of the Project. However, the City acknowledges that the Company has other work commitments and demands that may preclude the Company from performing the Support Services hereunder to the schedule most advantageous to the City, Contractors, and Consultants.” (Article 2(B) (4), Amtrak Master Agreement)

The agreement with CSXT is similar. As plaintiff stated in its opposition papers, it sought a permit to enter upon the property of Amtrak and CSXT. This permit provided that the railroads did not guarantee the availability of any track outage at any particular time and that plaintiff’s work must be performed in a manner not to interfere with their operations.

Based on the documentary evidence, the court finds that defendant, though contracted to Amtrak and CSXT to provide support services for its contractors for the duration of their projects, could not assure these services as these were conditioned upon the railroads’ own schedules, which could change at any time. The evidence indicates that defendant did not breach a fundamental obligation of the Contract between the parties. Moreover, the Contract provides that delays caused solely by defendant’s acts or omissions were deemed compensable. In this case, defendant was not solely responsible for these delays.

The other major delay noted in the complaint concerned defendant’s alleged failure to coordinate and ensure timely closure of the water valves. Plaintiff contended that the unavailability of the watermain shutdown on a few occasions resulted in the unavailability of the project site and delays in work. Defendant argued that this delay was not compensable, citing Article 11.4.1.7 and specifying that the delay was contemplated by the parties at the time of the Contract’s execution. Defendant referred to Article 5.02.3 of the Standard Water Main Specifications, incorporated by reference into the Contract, which provides, in part:

“Shutdowns of any portion of the water service, to make connections with existing mains, shall be made only with the consent of the Engineer . . . . If, on account of failure to shut down any main due to any difficulty encountered or to any act or omission on the part of the City, the work of connection is delayed, no other claim will be allowed the Contractor for such delay, except an extension of the time specified for the performance of the work herein provided equal to the time which may have been lost by such delay.”

The court finds that, because this provision was present on the execution of the Contract, plaintiff, in its capacity as a party to the Contract, had contemplated this occurrence and any delays related to the failure of water main shutdowns were not compensable pursuant to the Contract.

Accordingly, it is

ORDERED that the motion of plaintiff Judlau Contracting, Inc. for leave to reargue defendant City of New York’s motion to dismiss is granted; and it is further

ORDERED that, upon reargument, the court adheres to its prior order (on motion sequence no. 001) in granting defendant’s motion to dismiss but dismisses the case on other grounds; and it is further

ORDERED that the complaint is dismissed in its entirety, with costs and disbursements as taxed by the Clerk of the Court, upon a presentation of a bill of costs; and it is further

ORDERED that defendant must serve a copy of this decision and order on the County Clerk’s Office, which is directed to enter judgment accordingly.

Dated: May 22, 2018



J.S.C.

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