SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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EPIPHANY CONSTRUCTION SERVICES, LTD.,
Plaintiff,

-against-

WALISON CORP.,
Defendant.

Index No.: 653188/2015

Mot. Seq. No. 002

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WALISON CORP.,
Third-Party Plaintiff,

-against-

AEGIS SECURITY INSURANCE COMPANY
Third-Party Defendant.

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MELISSA A. CRANE, J.S.C.:

On September 23, 2015, plaintiff Epiphany Construction Services, LTD., ("Epiphany"), commenced this action against defendant Walison Corp. ("Walison"), to recover for a breach of two subcontracts. On October 14, 2015, Walison answered with counterclaims, and filed a third-party complaint to recover from a performance bond that third-party defendant Aegis Security Insurance Company ("Aegis") issued.

On January 11, 2018, the court heard oral argument on defendant's partial motion for summary judgment on counts two, four, five, seven, and eight of plaintiff's complaint. The court, on the record, dismissed count five for breach of the covenant of good faith and fair dealing. The court, also on the record, declined to dismiss count seven, unjust enrichment, and count eight, quantum merit. The court reserved its decision on counts two and four, for breach of the subcontracts seeking delay damages. This decision now addresses those remaining counts, two and four, under CPLR 3212(e).

Background

In June 2014, defendant Walison entered into two agreements with the owner 280 East Burnside Associates, L.P. ("280 East Burnside") to serve as the general contractor for ground-up construction projects in the Bronx (collectively, the "Projects"). The Burnside Project was a thirteen story 40-unit apartment building located at 280 East Burnside Avenue (the "Burnside Project") (Rajput Aff, sworn to on May 5, 2017, ¶ 4, attached to Walison's Motion). The Walton Project was an eleven story 50-unit apartment building located at 2247 Walton Avenue (the "Walton Project") (Rajput Aff, sworn to on May 5, 2017, ¶ 5, attached to Walison's Motion). The Projects were located a few blocks from one another and had a similar construction timeline (Rajput Aff, sworn to on May 5, 2017, ¶ 6, attached to Walison's Motion).

In September 2014, Walison, as general contractor, contracted with plaintiff Epiphany, a subcontractor, to perform concrete work on the Projects (Rajput Aff, sworn to on May 5, 2017, ¶¶ 7, 8, attached to Walison's Motion).[1] Specifically, the Subcontracts provided that Epiphany would perform excavation, cast in place concrete, and foundation work for the Projects. Epiphany would work in accordance with the drawings and specifications incorporated into each subcontract (Walison's Motion, Exh L and M [*see* Exh A and B within exhibits]).

Shortly after Epiphany commenced work on the Projects, Walison and Epiphany had disputes over costs for extra work that Epiphany performed and change work orders. Epiphany, by two letters (the "Delay Letters") dated May 8, 2015, claimed Walison owed Epiphany at least $20,438 for the Burnside Project, and $58,114 for the Walton project, for "*costs incurred by Epiphany for delays, disruptions, interferences, idle equipment and forms, winter work and loss*

[1] A September 26, 2014, dated subcontract was executed by the parties for the Burnside Project (Rajput Affidavit, Exhibit M). An October 20, 2014, dated subcontract was executed by the parties for the Walton Project (Rajput Affidavit, Exhibit N). (Collectively the "Subcontracts")

production caused by Walison on the Walton Project" [Emphasis added] (Lio Aff, sworn to June 16, 2017, ¶ 16; Exh J and K attached to Epiphany's Aff in Opp).

Epiphany alleges that the additional costs were incurred for two reasons: "(1) the unanticipated discovery that the entire foundation for the Burnside project needed to be completely redesigned due to unforeseen subsurface geological conditions; and (2) the issuance of numerous stop work orders on the Projects based on, *inter alia*, Walison's failure to provide adequate site fencing or site safety coordinators, which it refused to timely remediate" (Lio Aff, sworn to June 16, 2017, ¶ 8, attached to Epiphany's Aff in Opp). Epiphany also provides copies of emails exchanged with Walison (Lio Aff, sworn to June 16, 2017, ¶ 14; Exh I attached to Epiphany's Aff in Opp). The emails describe a delay in soil inspections and for weather conditions. Epiphany also issued an itemization of their delay claims (Lio Aff, sworn to June 16, 2017, ¶ 14; Exh J, K attached to Epiphany's Aff in Opp). Walison refused to compensate Epiphany for those additional costs.

Walison contends that the parties "met to resolve Epiphany's claims for purported change order work under the respective Subcontracts," and "Epiphany even agreed to return to the Projects to continue with its Subcontract work" (Walison's memo of law, p.3). However, almost immediately after, Epiphany demobilized its workforce and abandoned both Projects, despite a prior agreement to return to work on the Projects (*id.*). A complete deterioration in Walison and Epiphany's relationship followed.

On April 27, 2015, Walison served Epiphany with default notices, claiming that Epiphany failed adequately to staff the job site and failed to remediate defective work at the Projects Walison's Motion, Exhs N, Q, R, S). On May 8, 2015, Epiphany issued delay claims to Walison, demanding additional compensation for costs incurred because Walison, *inter alia*, failed to adequately staff safety coordinators and to schedule a soil inspection (Walison's Motion, Exhs O,

P). Epiphany further alleged that Walison's actions resulted in stop work orders and delays. On May 21, 2015, Epiphany filed the first of four liens against Walison (Walison's Motion, Exhs, V, W, X, Y, and Z).[2] On July 28, 2015, Walison served a formal termination notice for the Burnside and Walton Projects on Epiphany (Walison's Motion, Exh U).

Discussion

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], lv dismissed 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

At the crux of this decision is whether the no-damage-for-delay clause in the two subcontracts applies, or whether Epiphany's damages are outside the scope of the clauses, because the delays were uncontemplated, or a result of the general contractor, Walison's, gross negligence.

Courts have found no-damage-for-delay clauses valid and enforceable (*see Corinno Civetta*

[2] As of May 5, 2017, Epiphany's liens against the Burnside Project total $174,704.10, while liens of $2,060.90 remained filed against the Walton project (Walison's Memo, Exhibits V, W, X, Y, and Z).

Constr. Corp. v City of New York, 67 NY2d 297, 309 [1986]; *Universal/MMEC, Ltd. v Dormitory Auth of State of NY*, 50 AD3d 352, 353 [1st Dept 2008]). Exceptions to enforcement of these clauses exist for delays: (1) that are the result of the contractee's bad faith or its willful, malicious, or grossly negligent conduct; (2) uncontemplated; (3) so unreasonable they constitute an intentional abandonment of the contract; or (4) were the result of the contractee's breach of a fundamental obligation under the contract (*id.*). A party seeking to recover under any of these four exceptions bears a "heavy burden" of proof (*see LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d 485 [1st Dept 2009]; *Dart Mechanical Corp v City of New York,* 68 AD3d 664 [1st Dept 2009] [no-damage-for-delay clause upheld despite a 32-month delay, the court finding that the contract provision evidenced a contemplated delay, no gross negligence, and plaintiff waived delay damage claim when it did not comply with the contract's notice provisions]).

Walison argues that Article 5, titled "Delays and Disruptions," of the Subcontracts, bars Epiphany's delay claims (Walison's Memo, Exhs M and L). Section 5.1 in the Subcontracts[3] states that Epiphany assumed all risks of delay and waived its right to seek monetary damages. Rather, if there is a delay, Epiphany is only entitled to an extension of time. Section 5.1 provides, in relevant, part that:

> Should Subcontractor be delayed, disrupted, obstructed, hindered or interfered with in the commencement, prosecution or completion of the Work for any reason (including without limitation, the acts, omissions, negligence or default of Contractor, another contractor or subcontractor, Architect or Owner) by any fires, casualties, adverse weather conditions, strikes or other labor actions, governmental directives or orders, extraordinary conditions due to war or government actions, or any other cause outside the control and responsibility of Subcontractor, then Subcontractor shall be entitled to such extension of time as is obtained by Contractor from Owner, and an extension of time *only*, and in no event shall Subcontractor be entitled to damages.

[3] For our purposes, the Burnside and Walton Subcontracts are identical with respect to Section 5.1 and 5.2.

Section 5.2 of the Subcontracts provides that:

> Subcontractor expressly waives and releases all claims or rights to recover (i) lost profits on Work not performed; (ii) overhead (including home office overhead); and (iii) any other indirect damages, costs or expenses in any way arising out of or related to this Agreement, including the breach thereof by Contractor, delays, charges, acceleration, loss of efficiency or productivity disruptions and interferences with the Work.

Walison further argues that, even if the court found that Epiphany established an exception to the enforceability of the no-damages-for-delay clause, Epiphany did not comply with the contract's notice provision. The relevant part of Section 5.1 states:

> Subcontractor ... shall not be entitled to any extension of time unless Subcontractor: (1) notifies Contractor in writing of the cause or causes of such delay…within forty eight (48) hours after Subcontractors first knowledge of the occurrence of the conditions giving rise to such event and provides sufficient information to enable Contractor to request a time extension from Owner pursuant to the Prime Contract and Contract Documents, (2) provides in the written notice the dates upon which each such cause of delay…ended and the number of days attributable to each such cause, (3) demonstrates that it could not have anticipated or avoided such delay…and; (4) has used all available means to minimize the consequences there.

(Walison's Motion, Exhs M and L).

Epiphany asserts that the second and fourth causes of action "have nothing to do with delays experienced on the Projects, but instead relate exclusively to the denial of access to rental equipment and additional or changed work that Epiphany was required to perform" (Epiphany's Aff in Opp, p. 5). Specifically, Epiphany argues "the claims underpinning Epiphany's second and fourth causes of action are set forth in Epiphany's letters to Walison, dated May 8, 2015, and include, *inter alia*: (1) increased equipment costs incurred after *stop work orders* were issued…(ii) increased equipment costs incurred when Epiphany was prevented from accessing or removing rental equipment from the Projects after Walison failed to provide a *safety coordinator* for the Projects…" [emphasis added] (Epiphany's Aff in Opp, p. 4).

The court finds Epiphany's arguments unavailing. Walison's alleged failure to provide a safety coordinator, and to comply with safety demands on site, resulted in the Projects' delay and stop work orders. It follows, then, that Epiphany seeks recovery on costs incurred by that delay. Section 5.1 of the Subcontracts explicitly states "[s]hould Subcontractor be delayed…by governmental directives or orders…in no event shall Subcontractor be entitled to damages (Walison's Memo, Exhs M and L). Epiphany could not perform work because Walison delayed in assigning safety coordinators, and that led to repeated stop work orders. The question then becomes whether Walison's alleged failure to lift stop work orders and ensure presence of site safety coordinators on the Projects, rises to gross negligence.

Walison did not act in bad faith, or "actively interfere" with Epiphany's completion of the Projects. In fact, stop work orders are common on construction projects and in the industry (*see* Walison's Reply Aff, Lio Tr. Exh. AA, 62.20-63.16).

> Q. Okay. And were there any occasions where Epiphany was prevented from performing work as a result of a stop work order issued on a project?
> A. Not that I recall.
> Q. It never happened prior to the Burnside project?
> A. To us, no.
> Q. Have you ever heard of it happening within the industry?
> A. Yes.
> Q. Was it shocking when a stop work order was issued on the Burnside Project?
> A. No.
> Q. Is this something that happens from time to time in Construction?
> A. Time to time.

Epiphany contends that Walison "[issued] … numerous stop work orders on the Projects based on, *inter alia,* Walison's failure to provide adequate site fencing or site safety coordinators, which it refused timely to remediate…[and] mismanaged the Projects by, *inter alia*, failing to have appropriate personnel on site to advise Epiphany and other subcontractors on these issues, and failing timely to answer Requests for Information and other questions posed to Walison (*see* Lio

Affidavit, sworn to June 16, 2017, ¶¶ 8, 9, attached to Epiphany Aff in Opp). However, "[I]nept administration" or "poor planning" do not evince bad faith (*see Advanced Automatic Sprinkler Co., Inc., v Seaboard Sur. Co.,* 139 AD3d 424 [1st Dept 2016]; *Plato General Construction Corp v Dormitory Authority of State of New York*, 89 AD3d 819 [2nd Dept 2011]; *Harrison v Burrowes Bridge Constructors, Inc. v State*, 42 AD3d 779 [3rd Dept 20017]; compare to *Kalish v Jericho,* 58 NY2d 377 [1983]).

Finally, Walison demonstrates that Epiphany contemplated the delays that occurred at the Projects, including the revisions to the construction drawings due to subsurface conditions. A no-damages-for-delay clause includes "those delays that are reasonably foreseeable, arise from the contractor's work during performance, or which are mentioned in the contract" (*see Corinno Civetta Constr Corp*, 67 NY2d at 310). Delays due to subsurface conditions are not uncontemplated (*see Blau Mech. Corp. v City of New York,* 158 AD2d 373 [1st Dept 1990] [no-damages-for-delay clause enforceable as contemplated where a change order called for additional excavation because subsurface conditions deviated from what was shown on contractor's plans]). Epiphany is a subcontractor that specializes in concrete superstructures, including the excavation of materials like bedrock. Epiphany should have reasonably foreseen a delay resulting from subsurface conditions, especially based on their working knowledge with excavation and concrete foundations. Therefore, the court dismisses plaintiff's counts two and four for breach of contract seeking damages for delays because it is barred by the no-damage-for-delay clause.

Accordingly, it is hereby

ORDERED that the court grants defendant's partial motion for summary judgment as to causes of action two, four, and five, but otherwise denies the motion; and it is further

ORDERED that the court declined to dismiss causes of action seven and eight on the record on January 11, 2018. Causes of action one, three, and six are not at issue in this motion; and it is further

ORDERED that the parties are directed to appear for a status conference on September 17, 2018 at 10:00 am in the courtroom at 71 Thomas Street, Room 304, New York, NY.

Dated: 6/25/2018

ENTER:

HON. MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.