| **Arnell Constr. Corp. v New York City Sch. Constr. Auth.** |
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| 2018 NY Slip Op 31866(U) |
| July 13, 2018 |
| Supreme Court, Queens County |
| Docket Number: 712005/2017 |
| Judge: Ernest F. Hart |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ERNEST F. HART IA PART ____

ARNELL CONSTRUCTION CORPORATION,

Plaintiff,

-against-

THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendants.

Index Number 712005 2017

Motion Date March 16, 2018

Motion Seq. No. 1

The following papers read on this motion by defendant New York City School Construction Authority (SCA) for an order dismissing the complaint pursuant to CPLR 3211(a)(1)(2)(5) and (5), on the grounds that the contract between the parties contains a no damages for delay clause that bars recovery of the purported damages resulting from alleged delays, and that timely notice of the condition causing the delay was not given by plaintiff to SCA, as required by the contract.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits-Memorandum of Law-RJI... | EF 8-16 |
| Opposing Affirmation-Exhibits-Memorandum of Law..... | EF 20-23 |
| Reply Memorandum of Law-Appendix 1 and 2 ..... | EF 24-26 |

Upon the foregoing papers the motion is determined as follows:

Plaintiff Arnell Construction Corp. (Arnell) was the successful bidder on a project for defendant SCA to provide general construction services for new Pre-K renovation at PK 66R located at 1625 Forest Avenue, Staten Island, New York, 10302. The contract was awarded to Arnell December 29, 2014, and provided for the payment of $30,624,000.00 for said services. The SCA issued a notice to proceed work on January 5, 2015. The contract documents and notice to proceed required that Arnell substantially complete the project by

August 6, 2016. The SCA issued a certificate of substantial completion dated September 16, 2016, stating that Arnell had achieved substantial completion of the work on September 2, 2016.

Arnell filed a notice of claim dated December 1, 2016, pursuant to Public Authorities Law §1744, and sought estimated payments of $1,529,476.44, for "additional costs incurred as a result of delays and impacts encountered on the PK 66R" project. Arnell asserted that through no fault of its own, its work was delayed and/or impacted and that it was prevented from substantially completing the project by August 6, 2016, as required; that the SCA issued approximately 74 Change Orders, "from shortly after the inception of the Project work proceeding and ongoing to this date; and that no time extensions were granted for the Substantial Completion date of August 6, 2016 to September 2, 2016, a total of 27 consecutive calendar dates. Arnell asserted that due to "further uncontemplated interferences and disruptions to the progress of its work and belated SCA directed changes to the scope of its work, it was prevented from substantially completing the Project by August 2, 2016." It was also asserted that notwithstanding SCA's declaration of substantial completion on September 2, 2016, "due to continued delays, impacts and SCA-directed extra work, Arnell's last day of physical work on the Project is unknown...".

Arnell commenced the within action on August 29, 2017, and alleges a single cause of action for "Breach of Contract-Delay Damages". Arnell alleges in its complaint that it encountered delays and impacts throughout the Project, which prevented it from achieving substantial completion by August 2, 2016, due to design changes, stop work orders and unforeseen or latent field conditions. It is alleged that the SCA issued approximately 74 change orders for design changes after the Notice to Proceed, continuing up to and after the declaration of substantial completion. The complaint sets forth a "partial list of significant delays, impacts and/or SCA-directed change orders" that plaintiff alleges prevented it from substantially completing the project by August 2, 2016, including a list of 24 separate NODS. Arnell also seeks to recover damages for additional costs due to the cancellation of steel deliveries, and unspecified unresolved change orders.

Plaintiff alleges that the "impacts to its work and scheduled activities were critical and had a cumulative effect of extending the time for completion" and that the "critical path days of impact resulted in 41 calendar days of delay for which Arnell is seeking an extension of time and additional compensation". It is alleged that "[a]side from the time lost from the date Arnell first discovered each design problem (initiating a RFI)" to the issuance of the NOD, it "incurred additional time to draft, submit and obtain approvals for new shop drawings, procure and schedule materials and perform the physical change work".

Plaintiff also alleges that as it was mandated to reach substantial compliance by August 6, 2016, and if not met it would be assessed liquidated damages of up to $5,500 per calendar day, it was "compelled and/or directed via NODs to perform overtime work including evenings and weekends which were not required by its Contract, to make up for reduced Contract time remaining until the Substantial Completion date." It is alleged that said "compressed work schedule caused Arnell, through no fault of its own, to incur premium time labor costs, over and above the regular or contractual shift hourly wage, plus additional labor costs associated with the performance of extended workdays and work weeks."

The complaint alleges that Arnell filed its notice of claim on December 1, 2016, and that although the parties engaged in discussions they were unable to resolve the matter.

The SCA, in the within pre-answer motion to dismiss, asserts that Arnell's single claim for breach of contract and delay damages is barred as a matter of law, as the General Conditions of the subject contract contains a no damage for delay clause, and Arnell failed to give SCA timely notice of the condition causing the delays alleged in the complaint, as required by Section 8.02 of the contract's General Conditions.

Plaintiff, in opposition to the within motion, has submitted an affidavit from its president Harold Zarember, a copy of the certificate of substantial completion, a copy of the notice of claim dated December 1, 2106, a request for additional costs dated November 30, 2016, with supporting documents, a request for additional costs dated August 22, 2017, with supporting documents. It is asserted that the two-day notice provision relied upon by the SCA is not a condition precedent to suit or recovery, that the complaint alleges that Arnell complied with all notices and requirements under the contract, and that the lack of such notice does not effect a waiver of Arnell's claims.

Mr. Zarember, in his affidavit, asserts that the damages alleged by Arnell are not barred by the contract's exculpatory clause, because the SCA's conduct was un-contemplated by Arnell; the SCA's conduct amounted to a material breach of the SCA's fundamental obligations under the parties' contract; and the SCA willful, reckless and/or grossly negligent conduct wrongfully interfered with and disrupted Arnell's work at the Project. In addition, it is asserted that plaintiff's complaint seeks to recover damages for costs incurred to accelerate work at the Project and for unresolved change orders, which it asserts are not delay damages.

Mr. Zarember asserts that the SCA wrongfully interfered with and disrupted Arnell's performance of its work under the subject contract by, among other things, issuing 74 NODs, consisting of additional design directives and change orders "which significantly increased and altered the scope, composition and nature of the work performed by Arnell in connection

with the Project, without granting a single extension of time in which to perform such drastically changed and/or added work". He further asserts that Arnell is still unable to complete the project as the SCA has not obtained the necessary approvals from the Department of Buildings for the Builders Pavement Plan. It is asserted that as a result, Arnell has been prevented from applying for a Certificate of Occupancy and planting trees on the street, forcing it to incur substantial costs and expenses for each day it remains idle on the site.

Mr. Zarember argues that the SCA interfered with and disrupted Arnell's performance of the contract by "wrongfully denying and/or limiting Arnell's access to the project during normal working hours", directing it to stop work on several occasions, cancelling material deliveries at the site, and "failing to timely and/or respond to and resolve Arnell's requests for information and change orders". Mr. Zarember asserts that SCA's wrongful conduct, as alleged in the complaint, was un-contemplated and unforeseeable, and amounted to a fundamental breach of SCA's duty not to interfere with Arnell's performance of the contract.

It is asserted that Arnell's contemplated performance of the contract was expressly based upon the scope, design, sequencing and schedule set forth in the contract , and not the alleged expanded scope later directed by the SCA through substantial design changes and NODs, which are alleged to have severely impacted Arnell's access to the project and sequencing of the work. It is asserted that "nearly all of the directives issued by the SCA were the result of the SCA's own defect or deficient design, technical instructions and/or directions". In particular, he claims that NOD 8, described in the complaint as "Exterior Wall Furring", was extra work that Arnell was required to perform in accordance with Bulletin 6; that said change directive completely altered the scope and composition of the construction of the exterior walls, and substantially interfered with and impacted the sequencing and scheduling of Arnell's work under the contract; that NOD 8 was continuously revised and superceded by the SCA throughout the course of the project through related NODs and bulletins; and that although NOD 8 was issued on or about June 11, 2015, the NODs relating to the exterior walls were not finalized until the SCA issued NOD 82 on July 10, 2017, nearly a year after the anticipated substantial completion date.

Mr. Zarember asserts that Arnell did not contemplate that the SCA would constantly revise the scope and nature of the exterior walls at the project or that the changes and additional directives would not be complete until nearly a year after the substantial completion date fixed in the contract, and that as a result Arnell was forced to incur substantial additional costs, expenses and damages "to both (1) accelerate its work in an effort to perform all work by the substantial completion date set forth in the Contract and (2) continue with its work after it was unforeseeably forced to remain at the Project over a year after such substantial completion date." It is asserted that said wrongful conduct by the SCA

was un-contemplated and unforeseeable and amounted to a breach of SCA's fundamental duty not to interfere with Arnell's performance of the contract.

Mr. Zarember asserts that after the August 2, 2016 substantial completion date, the SCA continued to issue NODs, which drastically altered and expanded the nature and scope of Arnell's work, and makes specific reference to 12 NODs issued between September 15, 2016 and July 10, 2017. He asserts that it was un-contemplated that the SCA would continue to issued NODs which significantly expanded and/or changed Arnell's work over a year after the Project was substantially complete and interfered with its final completion of the Project.

Mr. Zarember alleges that the SCA was obligated under the subject contract (i) to provide correct and accurate information for the design of the Project which Arnell could rely upon in entering and performing the contract; (ii) not to interfere with or disrupt Arnell's performance of the contract; and (iii) timely provide information, technical responses and direction in response to Arnell's requests for information and submissions to the SCA. He claims that the SCA breached its fundamental obligations "by wrongfully interfering with Arnell's performance of the Contract and preventing Arnell from completing the Project by substantially altering and expanding the scope and composition of Arnell's work under the Contract, which was also occasioned stop work orders, restricted and/or limited site access and cancelled material deliveries by the SCA". In particular, Mr. Zaremeber states that on February 4, 2015 Arnell filed a Request for Information (RFI) with the SCA regarding "certain information and data that was necessary for Arnell to proceed with its work in a timely manner", and that the SCA did not issue a final response to said RFI until July 10, 2017. It is asserted that Arnell routinely communicated with the SCA each of the cited conditions and/or changes, in accordance with the contract's provisions.

Mr. Zarember claims that as a result of the SCA's alleged wrongful conduct, Arnell "suffered monetary damages consisting of (i) its extended general conditions costs incurred during the extended time of the Project from the original Contract Substantial Completion date of August 6, 2016 to the date that its work on the Project was actually substantially completed and (ii) the additional costs and expenses incurred by Arnell to accelerate the work under the Contract in a compressed schedule in an effort to meet the initial substantial completion date".

Defendant SCA, in its reply, asserts that Arnell has essentially conceded that it violated Section 8.02 of the contract by failing to give the SCA timely written notice of a condition causing or threatening to cause a delay, requiring the dismissal of the complaint.

In considering a motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) based on documentary evidence, dismissal is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter

of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Lakhi Gen. Contr., Inc. v NY City Sch. Constr. Auth.*, 147 AD3d 917, 918-919 [2d Dept 2017]; *Sabre Real Estate Group, LLC v Ghazvini*, 140 AD3d 724 [2d Dept 2016]; *Mawere v Landau*, 130 AD3d 986, 987 [2d Dept 2015]). On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must accept all facts as alleged in the complaint to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2d Dept 2010]). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), . . . the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Agai v Liberty Mut. Agency Corp.*, 118 AD3d 830, 832[2d Dept 2014]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Lakhi Gen. Contr., Inc. v NY City Sch. Constr. Auth.*, 147 AD3d at 918-919; *T. Mina Supply, Inc. v Clemente Bros. Contr. Corp.*, 139 AD3d 1040, 1041 [2d Dept 2016]).

Section 8.02 of the General Conditions of the contract provides that: "The Contractor agrees to make no claim for increased costs, charges, expenses or damages for delays in the performance of this Contract, or for delays or hindrances from any cause whatsoever, and agrees that any such claims shall be fully compensated for by an extension in the time for Substantial and/or Final Completion of the Work. Should the Contractor be or anticipate being delayed or disrupted in performing the Work hereunder for any reason, it shall promptly, and in no event more than two (2) business days after the commencement of any condition which is causing or threatening to cause such delay or disruption, notify the SCA in writing of the effect of such condition, stating why and in what respects the condition is causing or threatening to cause such delay or disruption. Failure strictly to comply with this notice requirement shall be sufficient cause to deny Contractor a change in Schedule and to require it to conform to the Schedule then in effect."

"A 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 and is not contrary to public policy if the clause and the contract of which it is a part satisfy the requirements for the validity of contracts generally" (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309[1986]; *see Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385[1983]; *Lakhi Gen. Contr., Inc. v NY City Sch. Constr. Auth.*, 147 AD3d at 919; *Aurora Contractors, Inc. v West Babylon Public Library*, 107 AD3d 922, 923[2d Dept 2013]; *Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos, LLP v Island Props., LLC*, 38 AD3d 831, 833,[2d Dept 2007]). However, "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) un-contemplated 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. v City of New York*, 67 NY2d at 309; *see Blue Water Envtl., Inc. v Inc. Vil. of Bayville, N.Y.*, 44 AD3d 807, 809-810 [2d Dept 2007], *lv denied* 10 NY3d 713 [2008]; *Aurora Contractors, Inc. v West Babylon Public Library*, 107 AD3d at 923; *Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos, LLP v Island Props., LLC*, 38 AD3d at 833). "Plaintiffs seeking to invoke one of the exceptions to the enforceability of a 'no damages for delay' clause face a 'heavy burden'" (*LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d 485 [1st Dept 2012] *citing Dart Mech. Corp. v City of New York*, 68 AD3d 664 [1st Dept 2009]). A "no damages for delay" clause applies to delays which are "reasonably foreseeable, arise from the contractor's work itself during performance, or others specifically mentioned in the contract" (*Peckham Road Co. v State of New York*, 32 AD2d 139, 141[3d Dept 1969], *affd* 28 NY2d 734 [1971]; *Blue Water Envtl., Inc. v. Incorporated Vil. of Bayville, N. Y.*, 44 AD3d at 810).

Here, plaintiff, has failed to allege any facts in the verified complaint, or as supplemented by the affidavit of its president Harold Zarember, which, if credited, demonstrate that the delays were un-contemplated, so unreasonably that they constitute an intentional abandonment of the contract, or resulted from the SCA's breach of a fundamental obligation of the contract. The complaint's conclusory allegations, as well as Mr. Zarember's affidavit, are insufficient to support a claim that the SCA's alleged conduct alleged was the result of gross negligence or willful misconduct. Plaintiff's claims that the work was performed out of sequence, were poorly coordinated, and plagued by design changes, at most, amount to "inept administration or poor planning" and does not negate the application of the "no damages for delay provisions", and does not, as plaintiff contends, evince bad faith or gross negligence on the SCA's part (*see WDF Inc. v Trustees of Columbia Univ. in the City of N.Y.*, 156 AD3d 530 [1st Dept 2017]*; Lakhi Gen. Constr. Inc. v New York City School Constr. Auth.*,147 AD3d at 919; *Weydman Elec. Inc. v Joint Sch. Constr. Bd.*, 140 AD3d 1605 [4th Dept 2016], *lv to appeal dismissed* 28 NY3d 1024 [2016]; *Advanced Automatic Sprinkler Co., Inc. v Seaboard Sur. Co.*, 139 AD3d 424, 425 [1st Dept 2016]; *J. Petrocelli Const., Inc. v Morgani Group, Inc.*, 137AD3d 1082, 1082-1083 [2d Dept 2016]; *Tougher Indus., Inc. v Dormitory Auth. of the State of NY,* 130 AD3d 1393, 1395[3d Dept 2015]; *Bovis Lend Lease [LMB]. Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135 [1st Dept 2013]; *LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d at 486; *Commercial Elec. Contrs., Inc. v Pavarini Constr. Co., Inc.*, 50 AD3d 316, 317-318 [1st Dept 2008]; *Blue Water Envtl., Inc. v Incorporated Vil. of Bayville, N.Y.*, 44 AD3d at 810).

In addition, plaintiff's allegations are insufficient to support its claim that defendant SCA breached a fundamental, affirmative obligation of the contract (*see Corinno Civetta Constr. Corp.*, 67 NY2d at 313; *Weydman Elec., Inc. v Joint Schs. Constr. Bd.*, 140 AD3d at 1607).

Finally, plaintiff does not allege, nor does it claim, that it complied with the two-day notice provision set forth in Section 8.02 of the General Conditions to the contract. Therefore, plaintiff cannot assert a claim for breach of contract based upon the failure to grant it a change in schedule with respect to the contract's substantial or final completion of the work.

In view of the foregoing, defendant's motion to dismiss the complaint, is granted.

Dated: July 13, 2018

J.S.C.