

Tyrek Hgts. Erectors, Inc. v WDF, Inc.

2018 NY Slip Op 33124(U)

November 8, 2018

Supreme Court, New York County

Docket Number: 650690/2012

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
TYREK HEIGHTS ERECTORS, INC.,

Plaintiff,

-against-

Index No.
650690/2012

WDF, INC., FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, ZURICH AMERICAN INSURANCE
COMPANY, NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA, TRAVELERS
CASUALTY AND SURETY COMPANY OF AMERICA,
THE NEW YORK CITY TRANSIT AUTHORITY

Defendants.

-----X
Hon. C. E. Ramos, J.S.C.:

In motion sequence 005, the plaintiff Tyrek Heights Erectors, Inc. ("Tyrek") moves pursuant to CPLR 2221 to reargue and renew this Court's decision, filed February 15, 2018 (the "Decision") dismissing Tyrek's nineteenth and twentieth causes of action in it's amended complaint (the "Complaint") (NYSCEF #252).

Factual Background

Briefly, this action arises out of two construction projects for the rehabilitation of certain train stations on the Far Rockaway Line (the "Projects") owned by the New York City Transit Authority ("NYCTA").

The first Project involved the rehabilitation of five stations (the "5 Station Project") and the second Project involved the rehabilitation of three other stations on the Far Rockaway Line (the "3 Station Project", collectively, the

"Projects"). The defendant WDF, Inc. ("WDF") was retained as the general contractor and Tyrek was retained as a subcontractor on the Projects.

On August 12, 2009, WDF and Tyrek entered into six subcontracts pursuant to which Tyrek was to perform certain work and supply certain materials in connection with the Projects (collectively, the "Subcontracts"). Tyrek alleges that WDF conducted itself in bad faith by deliberately and intentionally undermining and impeding Tyrek's performance. WDF also purportedly made numerous misrepresentations about Tyrek, its performance, and pricing, and wrongfully terminating certain Subcontracts.

On November 27, 2018, oral argument was held on Tyrek's motion for partial summary judgment on its first through fourth causes of action and to dismiss WDF's first through fourth counterclaims ("MS 003"), and WDF's motion for partial summary judgment dismissing the fifth through fourteenth, nineteenth, and twentieth causes of action.

This Court heard oral argument and denied Tyrek's motion for partial summary judgment and granted WDF's motion for partial summary judgment dismissing the fifth through tenth and the twentieth causes of action. The portion of Tyrek's nineteenth cause of action pertaining to the 5 Station Project was dismissed, and the portion pertaining to the 3 Station Project

was held in abeyance pending settlement negotiations with the NYCTA on the 3 Station Project (NYSCEF #250).

On March 7, 2018, Tyrek filed the instant motion seeking leave to reargue and renew this Court's decision. Tyrek contends that the Court overlooked certain facts in dismissing the nineteenth and twentieth causes of action. In addition, Tyrek argues that renewal of the twentieth cause of action is warranted because additional facts have now come to light, that would change this Court's prior determination.

Discussion

The motion to reargue the nineteenth and twentieth causes of action is denied in its entirety. "A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

Tyrek alleges in its nineteenth cause of action alleged that WDF acted in bad faith by fabricating a basis to terminate Tyrek from the Projects, which resulted in Tyrek suffering additional costs, lost profits, escalation costs, and delay damages.

Tyrek alleges that the Court overlooked the affidavit

testimony of Miguel "Mike" Aponte (the "Aponte Affidavit") and Jay Dier, which Tyrek submitted in support of its motion in making its determination. However, the transcript of the oral argument of the underlying motions, clearly demonstrates that this Court carefully reviewed the affidavit testimony. that:

"I looked through [Aponte's] Affidavit and at the very paragraphs you referred to. And they didn't back up your statements at all" (tr. 11/27/17, 37:7-9)

"You have to come up with something a little more specific than to say, well, he intentionally and specifically delayed my work" (*id.* at 38:9-11)

"You have to give me something of substance. You can't simply say it was deliberate...It has to be gross negligence or willful misconduct" (*id.* at 45:10-15)

The transcript also demonstrates that the Court gave Tyrek the benefit of every possible inference and analyzed the contents of the affidavits within the context of Tyrek's own arguments when it concluded that Tyrek had failed both to establish bad faith or raise a triable issue as to WDF's bad faith:

"Let's assume that this was a deliberate attempt to slow down the work in order to shift blame over to the power line. That's not bad faith. [WDF], the general contractor, is asserting a claim for damages for delay against the [NYCTA] based on that power line. And they're trying to get everything--their strategy is to try and get everything included... That's not bad faith. It may have been a mistake, it may not have worked, but that's not bad faith" (*id.* at 45:24-46:5)

"Because it has to be bad faith or gross negligence... they had a strategy. Whether it was smart or not, going to work or not, I don't know, but this wasn't in my view a deliberate attempt to hurt your client. They were trying to get the NYCTA to pay for this" (*id.* at 46:13-20).

Tyrek's twentieth cause of action alleged that WDF breached the contract by failing to escalate Tyrek's delay claims related to the 5 Station Contract in the AWO #13 re-sequencing change order.

Tyrek's motion to reargue the twentieth cause of action merely rehashes the same arguments made in the prior. In the Decision, this Court granted WDF summary judgment finding that Tyrek's failure to submit the claims pursuant to the Subcontract were fatal to it's claim for damages related to the 5 Station Contract. Under the Subcontracts, WDF's obligation to submit the claims to the NYCTA arises only upon the submission of a claim by Tyrek in accordance with its terms.

Tyrek's motion seeking leave to renew the twentieth cause of action must be denied because Tyrek fails to provide a valid excuse for not submitting these documents in the underlying motion. "Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application" (*Foley* at 568). Furthermore, there are no "new facts or information which could not have been readily and with due diligence made part of the original motion" (*id.*).

Tyrek's motion for leave to renew seeks the submission of three documents as additional evidence. The first is a letter from Tyrek to WDF, dated January 4, 2011 stating that Tyrek has escalation costs (Spitalnak Aff., Ex. A). The second is letter

from WDF to NYCTA, dated January 12, 2011 (the "WDF Letter") (*id.* at Ex. B; NYSCEF #238). In its third submission, Tyrek submits a detailed calculation of its impact and escalation costs (the "Calculations") (*id.* at Ex. C).

As a threshold matter, the WDF Letter was submitted with the underlying motion and therefore cannot be properly considered within the context of a motion to renew (*compare* NYSCEF #238 with Spitalnik Aff., Ex. B). In addition, the Calculations are undated and it is unclear if the document was created for the purposes of litigation or during the normal course of business (*id.* at Ex. C).

Notwithstanding the above, the documents themselves fail to corroborate the testimony in the Aponte Affidavit, specifically that WDF directed Tyrek to delay the submission of its claims. In fact, the WDF Letter addressed to NYCTA establishes that WDF was aware of Tyrek's claims and was awaiting further information from Tyrek. Tyrek did not establish in the prior motion any basis for this Court to conclude that notice to WDF of the claim was sufficient to trigger WDF's obligation to escalate Tyrek's claims under the Subcontracts. Furthermore, neither letter provides the detailed information that would be required in order for WDF to escalate the claim to the NYCTA.

The Subcontracts provide that WDF may submit a subcontractor's claims to the NYCTA "provided however (I) the

Subcontractor has timely submitted to the Contractor all notices and claims required by the Subcontract and Prime Contract..." (MS 003, Exs. 17-22, Article 8). It is undisputed that Tyrek did not submit its claims as required by the Subcontracts.

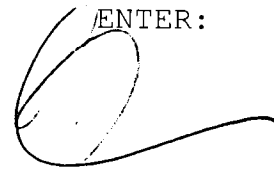
Tyrek's claims related to the 3 Station Project, which were escalated by WDF, shall remain held in abeyance pending the outcome of WDF's settlement with the NYCTA on those claims.

Accordingly, it is

ORDERED that the motion to reargue and renew is denied in its entirety.

Dated: November 8, 2018

ENTER:



J. S. C.

CHARLES E. RAMOS