

**Federated Fire Protection Sys. Corp. v 56 Leonard Str., LLC**

2019 NY Slip Op 32010(U)

July 2, 2019

Supreme Court, New York County

Docket Number: 651209/2016

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

FEDERATED FIRE PROTECTION SYSTEMS CORP.,
Plaintiff,

- v -

56 LEONARD STREET, LLC, 56 LEONARD LLC, LEND LEASE
(US) CONSTRUCTION LMB INC.

Defendant.

INDEX NO. 651209/2016
MOTION DATE N/A
MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 103, 104, 105 were read on this motion to/for DISMISS

This action arises out of a construction project located at 56 Leonard Street, New York, New York. Pursuant to the parties' trade contract, plaintiff Federated Fire Protection Systems Corp. was to perform certain fire protection work at the construction project. Affidavit Gerald S. Bianco sworn to on November 6, 2018, Exh. A. On July 1, 2015, defendants allegedly terminated the contract on the grounds of plaintiff's alleged default. Amended Verified Complaint, ¶ 91. Plaintiff then commenced this action seeking, inter alia, damages for wrongful termination of the contract and for breach of contract.

By order dated August 21, 2018, this court granted in part defendant Lendlease's motion for leave to renew its motion to dismiss and dismissed plaintiff's fifth cause of action and all claims of delay damages based on plaintiff's failure to provide factual allegations in the verified complaint to support its conclusory claims that the alleged delays fell within one of the exceptions to the no-damages-for-delay rule set forth in Corinno Civetta Constr. Corp. v. City of New York, 67 NY2d 297, 309 (1986). However, the court granted plaintiff leave to file an amended complaint within twenty days.

On September 10, 2018, plaintiff filed an amended verified complaint which amplifies its prior pleadings and in which plaintiff, alleges, in relevant part that its delay in performing its work was caused by: defendants' failure to make certain permit related filings and failure to address violations which prevented the project from timely securing permits (Amended Complaint, ¶¶ 27-29, 34, 36); delays by the project's concrete subcontractor to pour concrete floors, including the subcontractor walking off the project (Amended Complaint, ¶¶ 37-40, 42, 45-46); defendant Lendlease's failure to provide a schedule to plaintiff for the project (Amended Complaint, ¶¶ 50-53, 59); defendant Lendlease's directive to plaintiff, in contravention of the contract, to begin installing piping prior to completion of top rack installation by the drywall contractor (Amended Complaint, ¶¶ 60, 63, 67); defendant Lendlease's directive to a subcontractor to install the curtain wall for the project from the interior, rather than the exterior, of the building, resulting the disruption of plaintiff's work (Amended Complaint ¶¶ 68, 70, 72); and defendants' issuance of change orders and revisions to remedy flaws in the initial project design (Amended Complaint, ¶¶ 74, 80).

Defendant Lendlease (US) Construction LMB, Inc. now moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the fifth cause of action in the amended complaint for breach of contract and any other claims seeking delay damages based on the express provisions in the parties' contract which prohibit any such claims. The parties' contract expressly provides that plaintiff is not entitled to recover any damages for delay in the work caused by: the "failure to act, direction, order, neglect, delay or default of" defendant Lendlease or any other contractor employed upon the project, or "by changes in the Work." Bianco Aff., Exh. A, ¶ 19.6. Further, paragraph 19.8 of the contract "emphasized that no monetary recovery may be obtained by the Contractor for delay." *Id.* at ¶ 19.8. Finally, in paragraph 19.9, it was "specifically agreed by

[plaintiff] that under no circumstances will [it] look to or make any claim . . . for the consequences of any delay resulting from the directions given or not given by [defendant Lendlease] including scheduling and coordination of the work or resulting from Architect/Engineer's preparation of drawings and specifications or review of shop drawings." *Id.* at ¶ 19.9. Thus, the contract contains several provisions which expressly prohibit plaintiff from seeking damages for any delay in the performance of the work.

It is well-established that "[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 . . ." *Corinno Civetta Construction Corp. v. City of New York*, 67 N.Y.2d 297, 309 (1986). 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) unanticipated 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 obligations of the contract. *Id.* "Plaintiffs seeking to invoke one of the exceptions to the enforceability of a 'no damages for delay' clause face a 'heavy burden.'" *LoDuca Associates, Inc. v. PMS Const. Management*, 91 A.D.3d 485, 485 (1st Dep't 2012).

Essentially, under the principle of *Corinno Civetta*, a "no damage for delay" clause in a contract operates to bar delay claims to the extent that such delays were within the contemplation of the parties at the time they entered the contract. Thus, delays caused by inept administration or poor planning, a failure of performance by defendant in ordinary ways, or a failure of performance from ordinary negligence, have been held to be within the scope of the clause. *Plato General Const. Corp. v. Dormitory Auth. of State*, 89 A.D.3d 819, 823 (2d Dep't 2011) (citing

cases). Further, possible causes for delay specifically mentioned in the contract are, by definition, contemplated. *LoDuca*, 91 A.D.3d at 485.

Here, plaintiff's allegations are insufficient to show that the delays fall within one of the *Corinno Civetta* exceptions. With respect to plaintiff's allegations concerning defendants' delay in making permit related filings and addressing violations, this conduct constitutes poor planning and administration of the project and is thus barred by the no-damages for delay clause in the contract. *Plato Gen.*, 89 A.D.3d at 824. Likewise, plaintiff's allegations regarding the concrete subcontractor and defendants' directives to begin installing piping without the top rack and to install the curtain wall in the interior of the building (Amended Complaint, ¶¶ 37-40, 42, 45-46, 60, 63, 67, 68, 70, 72) were also delays contemplated by the contract, which expressly excludes delay damages caused by defendant Lendlease's directives to subcontractors and the scheduling and coordination of work. *Bianco Aff.*, Exh. A., ¶¶ 19.6, 19.9. Plaintiff's allegations that its work was delayed because defendant Lendlease failed to provide adequate schedules (including CPM schedules) for the progress of the work (Amended Complaint, ¶¶ 50-53, 59) are insufficient to fall within the exceptions to the no-damages-for-delay rule. *WDF Inc. v. Trustees of Columbia Univ. in City of New York*, 156 A.D.3d 530 (1st Dep't 2017) (upholding dismissal of delay damages caused by, *inter alia*, failure to issue CPM schedules); Affirmation of Jonathan H. Kruk dated November 6, 2018, Exh. C (Verified Complaint in WDF action brought by plaintiff's affiliate, ¶¶ 47, 48) and Exh. D (Decision and Order in WDF action, p. 11 of 14); *see also WDF, Inc. v. Trustees of Columbia Univ.*, 170 A.D.3d 518, 518 (1st Dep't 2019) (affirming denial of plaintiff's motion to amend claim for delay damages based on similar allegations as allegations were within the contemplation of the broad no-damages-for-delay clause in the contract). Moreover, such allegations merely constitute "inept administration and poor planning"

which does not negate the application of the “no damages for delay” provisions. *LoDuca Associates v. PMS Const. Mgmt.*, 91 A.D.3d 485, 486 (1st Dep’t 2012).

Finally, plaintiff’s allegations that its work was delayed due to defendants’ issuance of change orders (Amended Complaint, ¶¶ 74, 80) was the type of delay contemplated by the contract, which contains express provisions regarding change orders. *Bianco Aff.*, Exh. A, Article 19; *see Plato General Const.*, 89 A.D.3d at 824. Indeed, the “no damages for delay” provision itself expressly contemplates such delays and states that plaintiff is not entitled to recover damages for any delay caused by “changes in the Work.” *Bianco Aff.*, Exh. A., ¶ 19.6.

Thus, the motion to dismiss any claims for delay damages must be granted as plaintiff is precluded from seeking such damages by the express provisions of the contract.

Plaintiff’s request for leave to file a second amended complaint must be denied as plaintiff has failed to include a proposed amended pleading. *Parker Waichman LLP v. Squier, Knapp & Dunn Communications*, 138 A.D.3d 570 (1st Dep’t 2016). Accordingly, it is

ORDERED that the motion is granted and plaintiff’s fifth cause of action and any claims for delay damages are dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a ~~compliance~~ conference on 08/08, 2019, at 9:30 AM.

7/2/19  
DATE

  
PAUL A. GOETZ, J.S.C.

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION

GRANTED  DENIED  GRANTED IN PART  OTHER

APPLICATION:  SETTLE ORDER  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE