Mammoet USA N., Inc. v New York Wheel Owner LLC
2021 NY Slip Op 32390(U)
November 15, 2021
Supreme Court, New York County
Docket Number: Index No. 656224/2020
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49M

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MAMMOET USA NORTH, INC.,MAMMOET AMERICAS HOLDING, INC.,

Plaintiffs,

- v -

NEW YORK WHEEL OWNER LLC,NEW YORK WHEEL MEZZ, LLC,NEW YORK METROPOLITAN REGIONAL CENTER, L.P. II

Defendants.

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INDEX NO. 656224/2020

MOTION DATE 05/04/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 24, 25, 26, 27, 28, 29, 30, 31, 38, 47, 55

were read on this motion to/for DISMISS.

In this action arising out of a failed project to design and build a giant observation wheel, defendant New York Wheel Owner LLC ("New York Wheel") moves, pursuant to CPLR 3211(a)(1) and (7) to dismiss count three of the complaint. Plaintiff Mammoet USA North, Inc. ("MUSA") opposes the motion.

Background

New York Wheel acted as the developer of a project to build a giant observation wheel (the "Wheel" or the "Project"), in Staten Island on land owned by the City of New York and leased to New York Wheel (NYSCEF # 2, ¶ 1). On March 5, 2014, New York Wheel entered into a design-build agreement ("DBA") with Mammoet-Starneth LLC, referred to as the Design Build Team ("DBT"), under which DBT agreed to design and build the Wheel (*id.*; NYSCEF # 2, ¶ 1; NYSCEF # 27). The DBA was subsequently amended on December 11, 2014 (NYSCEF # 28) and on May 18, 2015 (NYSCEF # 29).

In exchange for DBT's work, New York Wheel agreed to pay DBT "a lump-sum, fixed price of $145 million" i.e., "the Contract Sum" (NYSCEF # 27, § 6.1). As defined "the Contract Sum" was "inclusive of all costs necessarily incurred by the [DBT] in the proper performance of the Work" (i.e., to design and build the Wheel) (*id.*, § 8.1). In addition to making payments to DBT for the Work, New York Wheel

was obligated to perform preliminary work on the Project, including building the foundation for the Wheel known as the "Pad" *(id.,* §§ 1.2, 1.3).

The DBA provides that the parties could increase the Contract Sum through a notice and "change order" procedure which could be utilized in the event of either a "change[ ] in Work" or in response to an "Unavoidable Delay" (*id.*, § 9.1). The procedure requires DBT "to make a claim for an increase in the Contract sum...within 21 days after the [DBT] became aware or should have become aware of the occurrence or event or circumstances giving rise to such a claim, failing which, [DBT] shall waive such claim" (*id.*, § 9.6.1).

Section 5.2.2 addresses instances when acts of New York Wheel delayed or hindered DBT's Work on the Project. Specifically, it provides that:

> Should [DBT] be obstructed, hindered or delayed in the commencement, prosecution or completion of the Work, to the extent caused by or due to reason of: (i) any act, failure to act, direction, directive, order, delay or default of Developer [i.e. New York Wheel] ...(ii) use or occupation by Developer of any part of the Site or the Work contrary to the terms of this Agreement ... the Design Build Team shall be entitled to an equitable adjustment to the Contract Sum to the extent that an event, circumstance, occurrence, condition or other issue constitutes any of the foregoing Unavoidable Delays reasonably demonstrably gives rise to additional Project related costs ... all such extension of the Contract Time and such adjustments in the Contract Sum shall be effected by Change Orders entered into in accordance with Article IX of this Agreement.

(*id.*, § 5.2.2).

Shortly after the parties entered into the DBA, the Project ran into difficulties and in 2017, New York Wheel filed an action in the United States District Court for the Southern District of New York against DBT, its members and various companies associated with DBT asserting claims for breach of contract, fraudulent inducement and breach of a guarantee (the "Federal action"). DBT asserted various counterclaims against New York Wheel, including for breach of contract. While the Federal action was pending, DBT filed for bankruptcy and MUSA took assignment of DBT's claims against New York Wheel. Of relevance to this motion, in his Decision and Order dated August 6, 2020, Hon. Jesse M. Furman dismissed DBT's breach of contract counterclaims against New York Wheel based on his finding that DBT waived these claims by failing to invoke the change order procedures set forth in the DBA to recover damages (*New York Wheel Owner LLC v Mammoet Holding, B.V.*, 481 F Supp 3d 216, 243-248 [SD NY 2020]).

In November 2020, Judge Furman dismissed the Federal action for lack of subject matter jurisdiction after it was disclosed that diversity was lacking. As a result, the litigation arising out of the Project is now before this court. In addition to this action, New York Wheel has filed an action titled *New York Wheel Owners LLC v Mammoet Holding B.V.*, Index No. 656661/2020.

In the instant action, plaintiffs assert seven counts against the various defendants (NYSCEF # 2). New York Wheel moves to dismiss the third count asserted against it by MUSA which seeks to recover damages for costs due under § 5.2(c) of the Second Amendment of the DBA based on its failure to timely complete the preliminary construction work on the Wheel Pad and turn over the construction site to the DBT by the required Outside Turnover Date of March 15, 2016 (*id.*, ¶¶ 77-83, 195-202).

New York Wheel argues that as found by Judge Furman regarding the same claim asserted in the Federal action,[1] dismissal of count three is warranted as it is undisputed that DBT did not comply with the contractual notice and change order procedures provided under the DBA and therefore any claim by MUSA, as DBT's assignee, for delay damages has been waived.

MUSA counters that as the Federal action was dismissed without prejudice for lack of subject matter jurisdiction, Judge Furman's decision is a nullity and should not be considered by this court.[2] In addition, MUSA argues that contrary to holding in the Federal action, it was not required to follow the change order procedures to recover damages for New York Wheel's delay in completing its preliminary work and turning over the Site to DBT. In particular, MUSA contends that DBA §§ 9.6.1 and 5.2.2 apply only to claims seeking an increase in the Contract Sum or an extension of the Contract Time, and have no bearing on the damages for increase costs sought in count three.

In support of its position, MUSA relies on § 5.2 (c) of the Second Amendment of the DBA, which provides that:

> In the event that Site Turnover is not fully achieved by the Outside Site Turnover Date ..., then the [DBT] shall be entitled to the following: (i) an equitable extension of the Contract Time and the Substantial Completion Date, (ii) a per diem cost adjustment calculated in accordance with Schedule A attached hereto for certain identified components, (iii) a payment of One Hundred Twenty Five Thousand U.S. Dollars ($125,000.00) per week of delay of the Outside

[1] Specifically, count three in this action was asserted as counterclaim count four in the Federal action.

[2] While Judge Furman's decision is not binding on this court, the court has taken into account his analysis in assessing the parties' positions on this motion.

> Site Turnover Date, and (iv) additional, substantiated and reasonably incurred costs resulting from this delay and which are not covered by Schedule A.

(NYSCEF # 29, § 5.2[c])

MUSA argues that because this section contains no reference to increases in the Contract Sum, but rather only to specific costs and amounts that DBT is to be paid in the event the New York Wheel does not timely turnover the Site, the change order procedure is inapplicable. MUSA further argues that a contrary interpretation is precluded by the doctrine of *expressio unius est exclusio alterius* (the specific mention of one thing implies the exclusion of others) and would constitute an impermissible limitation of contractual remedies under New York law (citing *Terminal Cent. v Modell & Co.*, 212 AD2d 213, 218 [1st Dept 1995] [a limitation on contract remedies "will not be implied and to be enforceable must be clearly, explicitly and unambiguously expressed").

MUSA alternatively argues that to the extent § 5.2(c) is ambiguous as to whether the change order procedure is a prerequisite to its recovery of costs and delay damages based on New York Wheel's failure to timely turnover the Site, discovery and extrinsic evidence is necessary to determine the intent of the section.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference'" (*Morgenthow & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]).

It is well established that "when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms" (*W.W.W. Assocs., Inc. v. Giancontieri*, 77 NY2d 157, 162 [1990]; *see South Rd. Assocs., LLC v Intl. Bus. Machines Corp.*, 4 NY3d 272, 277 [2005]). A written contract should be read as a whole to give each clause its intended purpose, and "[p]articular words should be considered, not as if isolated from the context, but in the light of the obligations as a whole and the intention of the parties as manifested thereby" (*Matter of Stravinsky*, 4 AD3d 75, 81 [1st Dept 2003] [internal citation and quotation omitted]; *Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 144 [1st Dept 2008]). Thus, a court should interpret a contract "so as to give full meaning

and effect to material provisions" and so as not to "render any portion meaningless" (*Beal Savings Bank v Sommer*, 8 NY3d 318, 324-325 [2007], quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]). And, "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*Greenfield v Phillies Records, Inc.*, 98 NY2d 562, 569 [2002]).

Under these principles, the court finds that § 5.2 (c) cannot be interpreted to exclude it from the notice and change order procedures provided under the DBA for recovery of damages resulting from New York Wheel's breaches of the DBA. In reaching this conclusion, the court notes that although § 5.2 (c) provides for certain costs and damages in the event New York Wheel fails to timely turnover the Site to the DBT and makes no reference to an increase in the "Contract Sum" or the required change order procedures to obtain such an increase, the meaning of this section must be considered in light of the DBA as whole. Significantly, under the DBA, the term "Contract Sum" is broadly defined to include "all costs necessarily incurred by the [DBT] in the proper performance of the Work" (citing NYSCEF # 27, § 8.1.1). Moreover, § 5.2.2 provides that damages for costs caused by New York Wheel's breaches – including its "use and occupation of any part of the Site or the Work contrary to the terms of this Agreement" – are to be compensated by an increase in the Contract Sum, which is available only if the change order procedure is followed. Moreover, § 5.2 (c) does not contain any specific language indicating an intent to exclude Site turnover delay costs from notice and change order procedures.

Next, contrary to MUSA's argument, the doctrine *expressio unius est exclusio alterius,* which "dictates that the specific mention of one thing implies the exclusion of others" (*UMG Recordings, Inc. v Escape Media Grp., Inc.*, 107 AD3d 51, 58-59 [1st Dept 2013]), is inapplicable. While § 5.2 (c) specifically refers to certain costs and damages and not to an increase in Contract Sum, these costs and damages fall within the DBA's broad definition of the Contract Sum. Regarding MUSA's argument that the notice and change order procedures constitute a prohibited limitation of contractual remedies, such argument is without merit as these procedures do not limit MUSA's remedies, but instead create a prerequisite to obtaining such remedies (NYSCEF #27, §§ 19.2.1, 19.2.6). Finally, § 5.2 (c) does not give rise to any ambiguity requiring the consideration of extrinsic evidence.

Accordingly, as the change order procedures apply to MUSA's claim for damages for costs resulting from New York Wheel's alleged failure to timely turn over the Site, the failure to comply with these procedures waives recovery under count three (NYSCEF #27, § 9.6.1), and the motion to dismiss this count is granted.

Conclusion

In view of the above, it is

ORDERED that defendant New York Wheel Owner LLC's motion to dismiss count three is granted, and this count is dismissed; and it is further

ORDERED that defendant New York Wheel Owner LLC shall answer the complaint within 20 days of filing of notice of entry.

This constitutes the Decision and Order of the court.

11/15/2021
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE