SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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A.T.J. ELECTRICAL CO. INC., NORTH STAR MECHANICAL CORP. and ROCKMORE CONTRACTING CORP.,

Plaintiffs,

–against–

HILL INTERNATIONAL, INC. and THE CITY OF NEW YORK,

Defendants.

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DECISION & ORDER

INDEX NO. 654882/2018

MOT. SEQ. 003

HON. NANCY M. BANNON, J.S.C.

In this action arising from a public improvement construction contract, defendant Hill International, Inc. (Hill), the general contractor, moves pursuant to CPLR 3212 for summary judgment dismissing the complaint filed by plaintiff subcontractors A.T.J. Electrical Co., Inc. (ATJ), North Star Mechanical Corp. (NSM), and Rockmore Contracting Corp. (Rockmore) (collectively, Subcontractors), and for discharge of the Subcontractors' liens (Liens). Subcontractors oppose the motion. For the following reasons, the motion is granted in part.

I. BACKGROUND

The subject construction contract was executed in regard to the renovation of El Museo Del Barrio (El Museo) located at 1230 5th Ave. in Manhattan (the Project), a project that began in 2007. Hill was retained by the New York City Department of Design and Construction (DDC), a department of the defendant City of New York (the City), as general contractor for the Project pursuant to a construction contract (Prime Contract) (Prime Contract, NYSCEF Doc. No. 1 ["NYSCEF] 106). Hill subsequently retained the Subcontractors to perform certain work for

the Project pursuant to three public works subcontracts with ATJ (the ATJ Contract), NSM (the NSM Contract), and Rockmore (the Rockmore Contract) (collectively, the Subcontracts, and together with the Prime Contract, Contracts) (Subcontracts, NYSCEF 107-109).

Subcontractors allege the DDC and Hill were responsible for overseeing and managing the Project, including scheduling, payments, responding to requests for information and proposed change orders, and providing access to the Project (Complaint, NYSCEF 1, ¶ 13). The plan for the Project contemplated gradually shifting staff, equipment, and furnishings to permit the required construction and renovation without significantly interrupting the operations of El Museo (*id*. at ¶ 14).

Subcontractors allege that as a result of mismanagement by the DDC and Hill at the outset, they were unable to commence work as planned due to their inability to obtain access to the various work sites at the Project (*id*. at ¶ 15). This led to massive delays resulting in additional costs for materials, offsite storage insurance, managerial staff, central office expenses, and increased prevailing wages, among other various costs (*id*. at ¶ 17). Furthermore, the defendants' failure to properly coordinate the staging and shifting of El Museo employees resulted in significant unplanned work stoppages (*id*. at ¶ 19) and defective shop drawings, and the lack of access forced Subcontractors to perform the work in an inefficient piecemeal fashion (*id*. at ¶ 21).

The Subcontractors allege the following delays caused their damages: (1) a change in the fence design to accommodate an artwork installation that prevented access to the Project site, (2) a change order for work in the Northern corridor, (3) a re-design of a slab in the temporary ADA corridor, (4) a delay in asbestos abatement work due to extended occupancy requirements, and (5) a delay in demolition work caused by the discovery and subsequent preservation of

historically significant Grueby Tile in the walls of the lobby (Drazic Affidavit, NYSCEF 64, ¶ 6-8, 11-12, 14-16; Van Eron Affidavit, NYSCEF 65, ¶ 6-8, 15, 17, 21-24; Vaz Affidavit, NYSCEF 66, ¶ 6-8, 11-12, 14-17).

Subcontractors commenced this action asserting six causes of action for breach of the Subcontracts (first, second, third) and foreclosure of their Liens (second, fourth, sixth). Subcontractors allege that Hill intentionally breached the Subcontracts by: (1) causing delays to the Project that were uncontemplated, (2) failing to provide access to the Project site, (3) acting in bad faith and actively interfering with the Subcontractors' ability to perform the work as required under the Subcontracts, and (4) failing to process change orders and disburse payments in a timely manner (Complaint, NYSCEF 1, ¶¶ 32, 35, 46-49, 60-63).

In the instant motion, Hill moves for summary judgment dismissing the Complaint arguing that the Subcontractors' claims are barred in whole or in part by: (1) the statute of limitations, (2) lien waivers executed by Subcontractors, (3) the Subcontractors' failure to resolve their claims administratively, (4) the no-damages-for-delay clauses in the Contracts, and (5) the failure to comply with the lien law. The Subcontractors oppose the motion.

Based on the "no-damages-for-delay" clauses of the subject contracts, the motion is granted to the extent that the complaint is dismissed as against defendant Hill and the Liens shall be discharged to the extent they seek amounts related to delay damages.

II. LEGAL STANDARD

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64

NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The facts must be viewed in the light most favorable to the non-moving party. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012); Garcia v J.C. Duggan, Inc., 180 AD2d 579 (1st Dept. 1992). Once the movant meets his burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See Vega v Restani Constr. Corp., supra.

III. DISCUSSION

A. Statute of Limitations

As a threshold matter, Hill argues that Rockmore's claim seeking costs for labor and materials provided as of September 5, 2012, or earlier, is time-barred because the action was not commenced until October 2, 2018, which is beyond the six-year statute of limitations for breach of contract (CPLR 213 [2]). Rockmore counters that it submitted its request for equitable adjustment (REA) on December 7, 2012, and it is undisputed that the claim is still pending before the Office of the Comptroller. Rockmore contends that because it submitted its request within six years of the date of commencement of this action, its claim is timely.

"A claim against a municipality accrues when such entity refuses to either make payment or attempt to resolve the dispute" (*Matter of City of White Plains v City of New York*, 63 AD2d 396, 403 [2d Dept 1978]). It is undisputed that Rockmore's claims are still pending before the Office of the Comptroller and have not been rejected (Zaretsky Affidavit, NYSCEF 105, ¶ 25). Even if Rockmore's claims were constructively rejected, such rejection could only occur after the submission of the REA on December 7, 2012 and would still be timely under the six-year

statute of limitations for breach of contract. Thus, summary judgment based on expiration of the statute of limitations is denied.

B. Lien Waivers

Hill contends that Rockmore and ATJ waived the damages they seek by routinely executing lien waivers during the term of the Project, which provide that the Subcontractors released, waived, and discharged "any and all causes of action, suits, debts, accounts, damages, encumbrances, judgments, claims and demands whatsoever, in law or equity" against Hill or DDC for work related to the Project as of a certain date (Lien Waivers, NYSCEF 110-111, p. 2).

Subcontractors argue that Hill routinely conditioned payment upon the execution of the purported waiver and releases. Subcontractors have submitted an email wherein Hill states that "I will let you know when I receive the original [waiver] and mail out Rockmore's check" (Email, NYSCEF 190, p. 2, 4). The email is sufficient to raise a triable issue of fact as to whether the purported waiver and releases should be construed as receipts rather than a release and waiver of additional claims (*West End Interiors v Aim Constr. & Contr. Corp*., 286 AD2d 250, 252 [1st Dept 2001] ["[w]here a waiver form purports to acknowledge that no further payments are owed, but the parties' conduct indicates otherwise, the instrument will not be construed as a release"]).

C. Administrative Resolution

Hill argues that Subcontractors are contractually bound to resolve their claims pursuant to the administrative procedures outlined in Article 29 of the Prime Contract, which require the claims to be reviewed initially by the DDC, then the Office of the Comptroller, and finally by the

Contract Dispute Resolution Board (Prime Contract, NYSCEF 160 § 29.4-29.7). The determination by the Contract Dispute Resolution Board is final and subject only to judicial review through a CPLR Article 78 proceeding (Prime Contract, NYSCEF 160 § 29.7.6).

Hill concedes that those provisions of the Prime Contract were not specifically incorporated into the Subcontracts and are not generally incorporated by reference under New York law (*Navillus Tile, Inc. v Bovis Lend Lease LMB, Inc*., 74 AD3d 1299, 1302 [2d Dept 2010] ["incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor"]). However, Hill argues that Subcontractors' course of conduct demonstrates that Subcontractors agreed to modify the Subcontracts to incorporate the administrative procedures into the Subcontracts and waive seeking judicial resolution of their claims.

The Subcontractors counter that they only submitted the REAs at the direction of Hill but did not intend to waive their rights to litigate their claims in the event that the administrative procedures were unsuccessful (Drazic Affidavit, NYSCEF 64, ¶ 33-35; Van Eron Affidavit, NYSCEF 65, ¶ 47; Vaz Affidavit, NYSCEF 66, ¶ 27).

Hill fails to conclusively establish that the Subcontractors intended to waive their rights to litigate their claims by submitting their claims in accordance with Article 29 of the Prime Contract (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006] ["waiver should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection"] [internal quotation marks and citation omitted]). Therefore, a triable issue of fact has been raised that precludes the granting of summary

judgment on the basis that Subcontractors agreed to waive their claims (*id*. ["Generally, the existence of an intent to forgo such a right is a question of fact"]).

D. Delay Damages

"On a motion for summary judgment, a defendant seeking to dismiss a cause of action to recover damages arising from a delay bears the initial burden of demonstrating *prima facie* that none of the exceptions to the damages for delay clause are present," upon doing so, the burden then shifts to the plaintiff to raise a triable issue of fact (*MLB Constr. Servs., LLC v Dormitory Auth. of the State of N.Y.*, 194 AD3d 1140, 1143 [3d Dept 2021], lv to appeal dismissed, 37 NY3d 1046 [2021][internal quotation marks omitted]).

Hill argues that the broad language of the exculpatory provisions of the Contracts bar recovery of damages arising from delays and limit any compensation for the delays to extensions of time only. As stated in the Prime Contract:

> 19.2 No Damage for Delay: The Contractor agrees to make no claim for damages **for delay in the performance of this Contract occasioned by any act or omission to act of the City or any of its representatives**, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work as provided herein

(Prime Contract, NYSCEF 20, § 19.2 [**emphasis added**]).

Furthermore, the Subcontracts provide that "the provisions of the [Prime Contract], addenda, amendments and other documents forming a part of the [Prime Contract] are hereby incorporated into this Agreement with the same force and effect as though set forth in full herein" (Subcontracts, NYSCEF 21-23, § 9.1).

Moreover, each of the Subcontracts contain provisions that bar the recovery of damages arising from delays in the Project, which provide that:

> The SUBCONTRACTOR agrees to prosecute the work continuously and diligently and no charges or claims for damages shall be made by it for **any delays or hindrances from any cause whatsoever during the progress of any portion of the work specified in this Contract**. Time extensions will be granted only for excusable delays that arise from unforeseeable causes beyond the control and without the fault or negligence of the SUBCONTRACTOR, including but not restricted to, acts of God, acts of the public enemy, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of SUBCONTRACTOR. The SUBCONTRACTOR must provide written notice of the force majeure event within two (2) business days of such event

(Subcontracts, NYSCEF 21-23, § 3.3 [**emphasis added**]).

"With regard to delay damages, a contract clause that bars a contractor from recovering damages for delay in the performance of a contract by a contractee are generally valid and enforceable and will prevent recovery of damages resulting from a broad range of reasonable and unreasonable conduct by the contractee if the conduct was contemplated by the parties when they entered into the agreement" (*Framan Mech., Inc. v State Univ. Constr. Fund*, 182 AD3d 947 [3d Dept 2020] [internal quotation marks omitted]). "The rule is not without its exceptions, however, and even exculpatory language which purports to preclude damages for all delays resulting from any cause whatsoever are not read literally" (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]). "Thus, even broadly worded exculpatory clauses…are generally held to encompass only those delays which are reasonably foreseeable, arise from the contractor's work during performance, or which are mentioned in the contract" (*id*. at 310). "[E]ven 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) uncontemplated 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.*, 67 NY2d at 309).

Hill argues that Subcontractors' REAs demonstrate that the delays were not attributable to Hill's bad faith or gross negligence and arose from inept administration or poor planning, which falls within the Contracts' exculpatory clause (*S.N. Tannor, Inc. v A.F.C. Enters.*, 276 AD2d 363, 364 [1st Dept 2000]). To be sure, the REAs provide that the delays arising from the fence were a result of permitting issues, El Museo's changes to the design of the fence to accommodate the display of artwork, the late submission of construction fence shop drawings, and the delayed installation of the fence (REAs, NYSCEF 114, p. 1 NYSCEF 127, p. 2; NYSCEF 130 p. 2).

The Northern corridor delay was caused by "a lack of information and clarifications from the architect with respect to Bulletin #2" (REAs, NYSCEF 127 p. 3; NYSCEF 130, p. 3). The ADA corridor was also delayed by "unresolved issues between the architect and the material manufacturer" relating to the slab re-design (REAs, NYSCEF 114 p. 2; NYSCEF 127 p. 4; NYSCEF 130, p. 4; Van Eron Aff., NYSCEF 65 ¶ 18). In addition, the delays related to the asbestos abatement work in the gallery portion of El Museo were due to the extension of the occupancy requirements, which in turn, delayed the re-design of the slab in the ADA corridor (REAs, NYSCEF 114, p. 2; NYSCEF 127 p. 4; NYSCEF 130, p. 4).

The delays stemming from the discovery of the Grueby Tile arose because the architect "needed time to review the tile with the Arts Commission" (REAs, NYSCEF 114, p. 3; NYSCEF 127 p. 4-5; NYSCEF 130, p. 5). Although the allegations in the Complaint and the affidavits submitted by Subcontractors recite the exceptions set forth in *Corinno*, Subcontractors fail to provide specific facts sufficient to raise a triable issue that an exception to the exculpatory

provisions in the Contracts applies, and fail to establish that Hill's conduct "smacks of intentional wrongdoing" or "betokens a reckless indifference to the rights of others" to raise a triable issue of bad faith or gross negligence (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]).

Furthermore, the affidavits submitted by Subcontractors attributing the various delays to DDC or its representatives, such as the Art Commission, do not support a conclusion that the delays were not contemplated (Drazic Affidavit, NYSCEF 64, ¶¶ 6, 8, 11, 12, 15; Van Eron Affidavit, NYSCEF 65, ¶¶ 6, 12, 15-18, 22; Vaz Affidavit, NYSCEF 66, ¶¶ 6, 8, 11, 12, 15). The exculpatory provision in the Prime Contract specifically bars delay claims arising from any act of the City or its representatives (Prime Contract, NYSCEF 20, § 19.2). The potential for delays arising from decisions by the City were specifically mentioned in the exculpatory provision in the Prime Contract, and thus, were contemplated (*LoDuca Assoc., Inc. v PMS Const. Mgt. Corp*., 91 AD3d 485, 485 [1st Dept 2012]). While the Contracts' provisions do not expressly identify all the delays that occurred, such as DDC's decision to redesign the fence and its decision to salvage and preserve the Grueby Tile, the delays nonetheless fall squarely within the contemplated claims that may arise due to actions by the City (*Buckley & Co., Inc. v City of New York*, 121 AD2d 933, 934 [1st Dept 1986] ["Thus, while the conditions themselves may not have been anticipated, the possibility, however unlikely, of their arising was contemplated and addressed by the parties in their agreement"]).

In addition, the Prime Contract contemplated potential delays related to changes in the occupancy requirements because DDC had the right "to take over, use, occupy or operate any part of the completed Work" and that "the Contractor will not in any way interfere with or object to the use the use, occupation or operation of such Work by the City" (Prime Contract, NYSCEF

106, §§ 20.1). Subcontractors fail to raise triable issues that Hill abandoned the Project or breached a fundamental obligation of the Subcontracts.

Finally, Subcontractors argue that summary judgment is premature because discovery has not been completed. However, a motion for summary judgment cannot be defeated by the mere hope that discovery will uncover sufficient evidence to warrant a denial of the motion (*Guerrero v Milla*, 135 AD3d 635, 636 [1st Dept 2016]; *Reyes v Park*, 127 AD3d 459 (1st Dept 2015) *Alcaron v Ucan White Plains Housing Dev. Fund Corp.*, 100 AD3d 431 (1st Dept 2012). "[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." *Green v Metropolitan Transp. Auth. Bus Co.*, 127 AD3d 421 423 (1st Dept 2015). Subcontractors have not done so. Moreover, there has already been ample time for discovery, and Subcontractors have nonetheless failed to offer any evidence that would defeat Hill's motion for summary judgment.

E. Lien Law

In light of the granting of summary judgment, the portion of the Liens seeking delay damages should be discharged and the Liens should reflect "the amount due or to become due" under the Subcontracts (Lien Law § 5).

While Hill correctly argues that ATJ's lien is defective for failure to include the due date pursuant to Lien Law § 12 (*Bluff Point Stone Co. v United States Fid. & Guar. Co.*, 180 AppDiv 832, 834 [3d Dept 1917]), summary discharge of the lien in its entirety is not warranted. The record does not indicate any prejudice that would preclude a motion for amendment to include the due date pursuant to Lien Law § 12-a (*Matter of Thomas J. Dorsey, Inc*., 240 AppDiv 1005, 1006 [2nd Dept 1933]).

IV. CONCLUSION

Accordingly, it is

ORDERED that the branch of the motion by defendant Hill International, Inc., that seeks summary judgment is granted and the complaint is dismissed as to that defendant, and it is further

ORDERED that the branch of the motion of defendant Hill International, Inc. which seeks to discharge the plaintiffs' liens is granted to the extent that the liens shall be discharged insofar as they seek amounts related to delay damages, and that branch of the motion is otherwise denied, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

DATED: December 21, 2021

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON