| **AWL Indus., Inc. v New York City Hous. Auth.** |
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| 2023 NY Slip Op 32899(U) |
| August 11, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 655908/2021 |
| Judge: Lucy Billings |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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AWL INDUSTRIES, INC., Index No. 655908/2021

Plaintiff

- against - DECISION AND ORDER

NEW YORK CITY HOUSING AUTHORITY,

Defendant

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LUCY BILLINGS, J.S.C.:

In September 2016 defendant awarded to plaintiff a contract to restore defendant's Carlton Manor housing development after damage from Superstorm Sandy. Plaintiff claims defendant breached the contract and covenant of good faith and fair dealing implied in every contract by failing to pay $2,000,000 for extra work, causing plaintiff another $500,000 in consequential damages, and delayed the restoration, costing plaintiff another $3,000,000 and entitling plaintiff to an extension of time to complete the contracted work. Defendant maintains that plaintiff waived all these claims by failing to comply with the contract's notice of claim procedures, which required written notice to defendant of the basis for plaintiff's claim and the nature and extent of its costs or other damages within 20 days after the claim arose, as a condition precedent to any lawsuit for recovery against defendant.

On the merits, defendant raises several more defenses. The claimed extra work was within the scope of the contract, which authorized defendant's Contracting Officer to reject requested change orders, barring a claim of bad faith or unfair dealing for their rejection; in the contract plaintiff waived any claim for delay; and plaintiff failed to comply with the contract's procedures for requesting an extension of time. Finally, defendant points out that the complaint's claim for $500,000 in consequential damages was omitted in plaintiff's original summons with notice.

For these reasons, defendant moves to dismiss the complaint based on documentary evidence and the complaint's failure to state a claim. C.P.L.R. § 3211(a)(1) and (7). For defendant to obtain dismissal based on documentary evidence, it must be authenticated, admissible, conclusive, and irrefutable. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d 169, 175 (2021); Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc., 30 N.Y.3d 572, 601 (2017); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Ostojic v. Life Med. Tech., Inc., 201 A.D.3d 522, 523 (1st Dep't 2022). None of the alleged contract documents or notices of claim by plaintiff on which defendant principally relies is attached to the complaint or authenticated on personal knowledge. Clarke v. American Truck

& Trailer, Inc., 171 A.D.3d 405, 406 (1st Dep't 2019); Kenneth J. v. Lesley B., 165 A.D.3d 439, 440 (1st Dep't 2018); B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017); AQ Asset Mgt. LLC v. Levine, 128 A.D.3d 620, 621 (1st Dep't 2015). Defendant's attorney, who does not attest to any personal knowledge of the execution of any documents or their receipt from plaintiff, simply attaches them to her affirmation. While she might have authenticated copies of any public documents that she compared with the originals, she does not do so. C.P.L.R. § 2105.

I. NOTICE OF CLAIM PROCEDURES

Even if the court considers the contract documents, plaintiff raises factual questions regarding its compliance with the contract's notice of claim procedures. According to defendant, the contract provided that plaintiff was to submit all claims for extra work entailing extra costs, for damages because of defendant's act or omission, or for any other reason in writing to defendant's Contracting Officer within 20 days after the claim accrued, or otherwise plaintiff waived the claim. Plaintiff's request for a change order, negotiations with defendant, or its knowledge of plaintiff's claim through other means did not satisfy or relieve plaintiff from this requirement. Hi-Tech Constr. & Mgt. Servs. Inc. v. New York City Hous. Auth., 125 A.D.3d 542, 542 (1st Dep't 2015); S.J. Fuel Co., Inc. v. New

York City Hous. Auth., 73 A.D.3d 413, 413-14 (1st Dep't 2010). Defendant maintains that plaintiff's notices of claim on the dates alleged in the complaint were untimely and, if the court considers the notices of claim defendant presents, they fail to specify plaintiff's damages.

Relying on the contract documents defendant presents, plaintiff points to a provision for the contractor to file written notice of intention to make a claim before filing a notice of claim with defendant's Contracting Officer. Plaintiff alleges that defendant instituted its E-Builder System, through which defendant instructed plaintiff to file defendant's Potential Change Order form electronically, which all defendant's project personnel, managers, and executives received.

The Potential Change Order form defines "a claim" as: "A change order that is the result of a settlement of disputed work or a claim." Aff. of Amanda McLoughlin Ex. 32, at 2. This definition is ambiguous, as it is susceptible of at least three different constructions.

First, it may mean that "a claim" is: (1) "A change order that is the result of a settlement of disputed work or" (2) "a claim." This construction, however, defines "a claim" as "a claim" in the second alternative.

Second, the definition may mean that "a claim" is: "A change order that is the result of" (1) "a settlement of disputed

work or" (2) "a claim." Plaintiff adopts this construction. Third, the definition may mean that "a claim" is: "A change order that is the result of a settlement of" (1) "disputed work or" (2) "a claim." Defendant adopts this construction. Both these constructions are more reasonable than the first and, even according to defendant's version, define a claim as an actual, rather than potential, change order that results from a prior exchange between the parties, which the filing of a Potential Change Order form may initiate.

In fact, defendant's contract specifications define a "Potential Change Order Request" as: "A proposal to change the Contract in response to either an Owner Initiated Change or a Contractor Initiated Change." Aff. of Robert Pavlovich Ex. E § 1.03(A). Those specifications further provide that "the Contractor may initiate a claim by submitting a Potential Change Order Request to the Authority's Representative." Id. § 1.06(A).

The affidavit by plaintiff's President explains that when plaintiff used defendant's E-Builder System and completed its Potential Change Order form, the form did not ask for the amount of plaintiff's claimed damages. Only after defendant approved the Potential Change Order as a change order did the E-Builder System provide an opportunity to specify the amount claimed, because only after defendant's approval do the parties negotiate the price of the extra work.

Thus plaintiff demonstrates that it provided defendant written notice of plaintiff's intention to make a claim by filing a Potential Change Order form through defendant's E-Builder System and that, according to the contractual provisions cited above, the Potential Change Order did not become a claim until defendant approved or disapproved the Potential Change Order. If defendant approved the Potential Change Order, it converted to a change order, and the parties negotiated the payment to plaintiff for the extra work. If defendant disapproved the Potential Change Order, it converted from an intention to make a claim to a claim, and at that point plaintiff filed a notice of claim with defendant's Contracting Officer.

While this stepwise Potential Change Order procedure may allow a contractor to postpone initiation of a claim to a time of the contractor's choosing, this possibility is a product of defendant's own contract specifications that defendant is free to alter to eliminate this possible result. The contractor's interest in additional compensation may be incentive enough for the contractor not to postpone unduly the initiation of a claim. In the inadmissible record presented here, defendant points to no specification of when a claim accrues other than the disapproval of a Potential Change Order. At that point, moreover, the procedure does permit defendant to act promptly to make necessary adjustments, avoid unnecessary expense, and mitigate damages.

See A.H.A. Gen. Constr. v. New York City Hous. Auth., 92 N.Y.2d 20, 34 (1998); Universal Constr. Resources, Inc. v. New York City Hous. Auth., 192 A.D.3d 470, 472 (1st Dep't 2021).

II. COSTS FOR EXTRA WORK

Defendant's documentary evidence also fails to establish conclusively that plaintiff's claimed extra work was within the contract's scope.

A. Crawl Space

Plaintiff claims its costs for extra work to clean raw sewage spillage in the Carlton Manor crawl space and for protective gear to protect against exposure to the unsanitary conditions that continued during 2018 and 2019. Plaintiff claims that it filed a Potential Change Order December 6, 2018, proposing to clean the crawl space, which would entail the use protective gear. On February 21, 2019, defendant disapproved the Potential Change Order, indicating that the condition of the crawl space did not necessitate extra work. On February 28, 2019, according to E-Builder System procedures, plaintiff filed a Request for Information regarding whether defendant had cleaned the crawl space. On March 6, 2019, defendant responded that it cleaned the crawl space in October 2016, conceding that it had not cleaned the space after plaintiff's claimed spillages in 2018 through 2019. Although plaintiff concedes it did not file a notice of claim until May 2, 2019, more than 20 days later,

plaintiff insists that, as the spillages continued, its claim continued to accrue.

The disputed notice of claim procedures do not conclusively determine whether a claim continues to accrue as long as the conditions to be addressed by plaintiff's proposed extra work continue. Defendant points to no contractual provision that would have barred plaintiff from filing a Potential Change Order months after December 2018, after a later spillage, triggering defendant's later disapproval on the same basis as its February 2019 disapproval amplified in March 2019, the 2016 cleaning, rendering timely a notice of claim in May 2019 or later. The current record is inadequate to penalize plaintiff for bringing an unsanitary condition to defendant's attention earlier than plaintiff might have, timing that demonstrates no prejudice to defendant.

Assuming the contract required plaintiff to replace damaged waste piping in the Carlton Manor crawl space, defendant maintains that it owed no obligation to clean sewage spillage there and that protective gear was part of plaintiff's contractual obligations. Defendant further maintains that, in any event, defendant did clean the crawl space after every sewage spillage, which is consistent with plaintiff's claim, based on defendant's contract bidding documents, that cleaning the crawl space was to be performed pursuant to a contract separate from

the contract between the parties here. Defendant's unauthenticated hearsay notice to plaintiff that the crawl space, in another contractor's opinion, was "suitable for re-occupancy" after asbestos abatement in October 2016 does not conclusively establish that the crawl space was in fact free from unsanitary conditions and safe to occupy without protective gear in 2018. McLoughlin Aff. Ex. 9, at 5.

Whether replacement of waste piping inevitably causes raw sewage spillage that plaintiff was to expect when it undertook the piping work in the contract is also not a question that the contract or defendant's notice, id., conclusively answers. Certainly the spillages that occurred in 2018-2019 were unobservable and changed conditions from when the parties entered their contract. Defendant's contract specifications contemplate that changed conditions would be a basis for a Potential Change Order to initiate a claim. Pavlovich Aff. Ex. E § 1.06(A).

B. Temporary Relocation of Water Pipes

Assuming the contract required plaintiff to build a mezzanine in the Carlton Manor boiler room, defendant maintains that it owed no obligation to relocate the water pipes temporarily when they interfered with plaintiff's work on the mezzanine, and plaintiff's claim for the cost of relocating the pipes was part of plaintiff's contractual obligations. Defendant does not contend that plaintiff's notice of claim for this extra

work was untimely.

Those obligations defendant relies on are to provide temporary utilities to continue utility service during work on the new mezzanine, to remove material that interfered with a new installation, and to reinstall piping that plaintiff removed to install new work. Those contractual provisions do not conclusively establish that providing temporary utilities to continue utility service during work equates to relocating water pipes temporarily when they interfere with work. Nor does plaintiff seek the costs to reinstall piping that plaintiff voluntarily removed. Plaintiff seeks its costs to remove piping that plaintiff claims it was not obligated to remove in the first instance and that plaintiff removed only because defendant refused to do so. The unauthenticated contract drawing note on which defendant relies for plaintiff's obligation to remove piping that interfered with plaintiff's work suggests that the note applies to demolition. Defendant presents no admissible document establishing that plaintiff's need to relocate water pipes temporarily or any of its construction of the mezzanine involved demolition.

Moreover, plaintiff points out that the contract drawings on which defendant relies do not reveal piping that interfered with the mezzanine platform to be installed in the boiler room, so that plaintiff could have anticipated the need to remove piping

during this installation when bidding for the contract. The piping thus was another unobservable condition when the parties entered their contract. Defendant's contract specifications contemplate that such latent conditions also would be a basis for a Potential Change Order to initiate a claim. Pavlovich Aff. Ex. E § 1.06(A).

C. Removal of Underground Boulders and Concrete

Plaintiff seeks its extra costs to break up and haul away boulders and large slabs and chunks of concrete during its excavation work. Although defendant contends that plaintiff's notice of claim for this extra work was untimely, plaintiff shows that defendant disapproved plaintiff's Potential Change Order for this work October 30, 2019, and plaintiff filed its notice of claim November 18, 2019, less than 20 days later.

Assuming the contract included the several specifications on which defendant relies requiring plaintiff to remove and dispose of all material and obstructions it encountered during excavation and providing that the subsurface soil might be filled with concrete boulders and concrete slabs and chunks, plaintiff again points to defendant's contract drawings. Despite the specifications on which defendant relies, the drawings do not reveal the enormous foundation debris from previous, undisclosed structures at the project site, so that plaintiff could have anticipated the magnitude of the obstructions plaintiff would

encounter when bidding for the contract. The court may not resolve, as a matter of law, the alleged conflict between the specifications' text versus the drawings and whether together they gave plaintiff adequate notice or instead concealed the work entailed under the contract.

D. Roof

Plaintiff seeks its extra costs to correct leaks that occurred during its removal and replacement of the Carlton Manor roof. Defendant contends that plaintiff's notice of claim for this extra work was untimely. Plaintiff shows the defendant disapproved plaintiff's Potential Change Order for this extra work December 10, 2019, and insists that its notice of claim filed January 7, 2020, was timely.

Defendant does not show how it transmitted its disapproval December 10, 2019, or how the 20 days to file a notice claim are calculated. Defendant does not even contend that it followed any regular procedure for transmitting its disapprovals or denials. While plaintiff filed its requests and notices electronically, defendant does not show that it filed its disapprovals or denials electronically. If it mailed its disapproval of plaintiff's Potential Change Order, and the 20 days runs from plaintiff's receipt, or the 20 days were business days and not calendar days, the 20 days would extend after December 30, 2019, and as late as January 7, 2020.

Defendant relies on at least three inadmissible documents in an attempt to show that plaintiff's work caused the leaks. First, defendant presents its unsworn, uncertified nonconformance reports, without any foundation for their admissibility as business records. McLoughlin Aff. Ex. 17; C.P.L.R. § 4518(a); Buffington v. Catholic Sch. Region of Northwest & Southwest Bronx, 198 A.D.3d 410, 411 (1st Dep't 2021); Doe v. Intercontinental Hotels Group, PLC, 193 A.D.3d 410, 411 (1st Dep't 2021); HSBC Bank USA, N.A. v. Greene, 190 A.D.3d 417, 418 (1st Dep't 2021). Second, defendant presents an unauthenticated agreement by plaintiff to remove the defective roofing caused by plaintiff's poor work and to reinstall the roof. McLoughlin Aff. Ex. 16. Third, defendant presents unauthenticated further correspondence from plaintiff admitting its poor work. Id. Ex. 19.

Even were these documents in admissible form, they are not conclusive in the face of plaintiff's claim, also memorialized in defendant's exhibits, that plaintiff did not cause the leaks that necessitated reinstallation of the roof, and a defectively constructed storage shed on the roof before plaintiff commenced its work was the source of the leaks. Id. Ex. 16. Plaintiff's President attests that its work did not involve the storage shed, and there was standing water below the shed's raised floor. Defendant fails to explain how plaintiff's awareness of the shed

in November 2018 shows that plaintiff caused the leaks, when defendant maintains that plaintiff completed the roof reinstallation in July 2018. Id. Defendant certainly does not show that the standing water underneath the shed was an observable condition when the parties entered their contract. To the extent defendant maintains that plaintiff's roof installation was defective in other respects, such defects are based on hearsay from the roofing manufacturer. Id. Ex. 17.

E. Soil Bearing Capacity

When plaintiff applied to the New York City Department of Buildings (DOB) for a permit to use a crane, the application required plaintiff to provide information about the soil bearing capacity. 1 R.C.N.Y. § 3319-01. Plaintiff claims defendant was responsible for certifying this information and seeks the extra costs of certifying it when defendant did not provide the certification. Although defendant contends that plaintiff's notice of claim was untimely, plaintiff shows that defendant disapproved plaintiff's Potential Change Order for this work January 21, 2020, and plaintiff filed its notice of claim February 10, 2020, 20 days later.

1 R.C.N.Y. § 3319-01(g)(2)(iv)(A) required that the project's "registered design professional of record" certify that the design professional had reviewed the loads imposed on any structure. The regulation further required that the "crane or

derrick notice engineer" certify that the engineer had accounted for the ground, subsurface, and other site conditions in submitting the plans that formed part of the permit application, 1 R.C.N.Y. § 3319-01(g)(2)(vi)(A), and certify that the crane "in all proposed conditions of loading . . . will not exceed the bearing capacity of the ground or subsurface." 1 R.C.N.Y. § 3319-01(g)(2)(vi)(B)(2).

Even if, according to defendant, the contract required plaintiff to obtain all necessary permits and perform all tasks incidental to obtaining permits, plaintiff was not obligated to perform incidental tasks that were impossible for plaintiff to perform. The contract specifications and conditions on which defendant relies do not specify whether the project's "registered design professional of record" was plaintiff's or defendant's design professional or whether the crane "notice engineer" was plaintiff's or defendant's crane engineer. If plaintiff was to operate a crane, plaintiff needed a crane operator, but defendant's evidence does not disclose whether such an operator was an engineer, let alone the "notice engineer" that the regulation contemplates.

Defendant admits that it retained an engineer of record for the Carlton Manor project. Plaintiff identifies defendant's project engineer of record as Langan Engineering, which provided a geotechnical report, but it failed to include the soil bearing

capacity required by the rigger for the crane matting. A reasonable interpretation of the contract would not necessarily require plaintiff to register another design professional of record or retain another "notice engineer" if defendant already had registered a design professional or designated a "notice engineer." As long as plaintiff obtained the information regarding the loads imposed, the site conditions of loading, and the ground and subsurface bearing capacity, it was reasonable to expect that defendant's registered design professional or "notice engineer" would certify the information: precisely what plaintiff's President attests plaintiff asked of defendant, but it refused.

F. Replacement of Steam Traps and Piping

Plaintiff seeks its extra costs for replacing steam traps and piping in the crawl space because that work was to be performed pursuant to contracts separate from the parties' contract here. Although defendant contends that plaintiff's notice of claim was untimely, plaintiff shows that defendant disapproved plaintiff's Potential Change Order for this work April 1, 2020, and plaintiff filed its notice of claim April 20, 2020, less than 20 days later.

Assuming the contract here required plaintiff to install new insulation on steam piping and associated valves and to remove corroded piping, as defendant maintains, those contractual

requirements do not conclusively establish that installing new insulation on steam piping and valves equates to replacing steam traps and piping. Nor do those contractual requirements conclusively establish that removing corroded piping equates to replacing steam traps or piping.

G. Generator Fire Alarm Disconnect Switch

Defendant purchased a natural gas engine generator for the project that, according to defendant, plaintiff was to install under their contract. Defendant contends that plaintiff's installation of the generator included purchasing and installing a fire alarm disconnect switch, because the contract required plaintiff to supply all labor, materials, and equipment to install the generator. The switch shut off the generator in the event of a fire, so that function in itself raises a factual question whether the switch was integral to the generator's initial installation, as opposed to its safe use under extraordinary and hazardous conditions.

Plaintiff also claims defendant's obligation to provide the generator was to include the switch, because it was an auxiliary component under the contract to be supplied with the generator, and seeks the extra costs to purchase and install the switch. Although defendant contends that plaintiff's notice of claim for these costs was untimely, plaintiff shows that defendant disapproved plaintiff's Potential Change Order for these costs

July 2, 2020, and plaintiff filed its notice of claim July 19, 2020, less than 20 days later. Defendant further contends, however, that the switch (1) was not an auxiliary component, but cites no contract provision that so specifies, and (2) was a device separate from the generator, which indicates the switch was not equipment included in the installation of the generator. Thus defendant's motion in itself raises factual questions whether the switch was within plaintiff's contractual obligations.

The contract drawings on which defendant relies to show that the contract expressly required plaintiff to provide a fire alarm disconnect switch for the generator, even were the drawings admissible, merely show such a switch as a component of the generator and not necessarily that that switch was plaintiff's obligation to provide, nor that it was the only fire alarm disconnect switch for the project. Plaintiff points to the admission by defendant's engineer of record that Huntington Power Equipment was to provide the generator's fire alarm disconnect switch, McLoughlin Aff. Ex. 26, and insists that plaintiff's contract requirement was to provide a fire alarm disconnect switch for the fire alarm system, rather than for the generator.

H. Vacuum Pump

Assuming the parties' contract required plaintiff to install a new boiler system, defendant maintains that the contract also

required plaintiff to remove the vacuum pump that was part of the old boiler system. Again, plaintiff points to the contract drawings showing that the old vacuum pump's removal was to be performed pursuant to a separate contract. Plaintiff therefore seeks the extra costs for undertaking that removal. Although defendant contends that plaintiff's notice of claim was untimely, plaintiff shows that defendant disapproved plaintiff's Potential Change Order for this work March 1, 2020, and plaintiff filed its notice of claim March 15, 2020, less than 20 days later.

Defendant's further contentions undermine its position regarding the contract requirement. On the one hand defendant contends that the parties' contract required plaintiff to remove the old vacuum pump as part of plaintiff's installation of the new boiler system. On the other hand defendant contends that the removal was not part of the installation, but was to occur after the new system was installed and operational.

I. Costs Due to COVID-19

Finally, plaintiff seeks its extra costs for complying with governmental directives and restrictions on its ability to perform its work due to the COVID-19 pandemic. Plaintiff claims it filed a Potential Change Order for these extra costs November 11, 2020, which defendant disapproved December 2, 2020. Although plaintiff concedes it did not file its notice of claim until December 30, 2020, again defendant fails to show when the

20 days to file the notice of claim began to run; whether they were business days and not calendar days, in which event plaintiff's notice of claim was timely; or that the claim did not continue to accrue as the pandemic restrictions continued.

Even assuming the contract conditions required plaintiff's compliance with applicable laws, ordinances, codes, regulations, rules, and safety standards, these conditions do not conclusively encompass the "directives" to which the complaint refers. Defendant surmises that they refer to Executive Orders, but the complaint does not so specify. The answer to this question must await a bill of particulars. In opposition to defendant's motion, plaintiff does refer to new DOB safety standards, but plaintiff's main claim relates to defendant's own Notice of Moratorium suspending construction work.

Defendant also points to plaintiff's agreement to bear the costs of any difficulties from the "elements," McLoughlin Aff. Ex. 4, at 41, and of adequate protection for plaintiff's workers. Id. at 8. "Elements" is susceptible of several definitions, but disease is not among them. A reasonable interpretation of the requirement to provide adequate protection for workers would be limited to protection against the usual hazards of the work, which would not include the spread of a virus during a pandemic.

J. New Gutter and Drainage System

Defendant does not address plaintiff's claim for extra work in adding a new gutter and drainage system for the roof penthouse, other than contending that plaintiff's notice of claim was untimely. Plaintiff shows, however, that defendant disapproved plaintiff's Potential Change Order for this work April 22, 2021, and plaintiff filed itts notice of claim May 3, 2021, less than 20 days later.

III. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

Plaintiff claims defendant breached the covenant of good faith and fair dealing implied in every contract, by rejecting plaintiff's proposed change orders for extra work that defendant's construction manager or engineer of record had approved. According to defendant the contract authorizes only defendant's Contracting Officer, not its construction manager or engineer of record, to change contract terms; requires defendant's written order to treat work as extra work; and provides that no agent or employee of defendant may waive the requirement for the Contrcting Officer's order.

Plaintiff's claimed breach of the covenant of good faith and fair dealing not only would contravene the contract, assuming it provides as defendant maintains, Cherry Operating LLC v. CPS Fee Co. LLC, 216 AD.3d 544, 545 (1st Dep't 2023); Baker v. 16 Sutton Place Apt. Corp., 110 A.D.3d 479, 480 (1st Dep't 2013), but is

indistinguishable from plaintiff's claim for the costs of extra work and thus duplicative. New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 318 (1995); Rosetti v. Ambulatory Surgery Ctr. of Brooklyn, LLC, 125 A.D.3d 548, 549 (1st Dep't 2015); Mill Fin., LLC v. Gillett, 122 A.D.3d 98, 104-105 (1st Dep't 2014); Netologic, Inc. v. Goldman Sachs Group, Inc., 110 A.D.3d 433, 434 (1st Dep't 2013). Therefore the court grants defendant's motion to dismiss plaintiff's claim for breach of the covenant of good faith and fair dealing based on the complaint's allegations and without reliance on defendant's inadmissible documents. C.P.L.R. § 3211(a)(7).

IV. DAMAGES FOR DELAY

Relying once again on the unauthenticated contract, defendant points to plaintiff's agreement (1) not to claim damages for delay caused to its performance of the contracted work, (2) that its sole remedy would be an extension of time to complete its work, and (3) that plaintiff was required to submit a request for any extension accompanied by a "time impact analysis." McLoughlin Aff. Ex. 4, at 214. No admissible document, however, conclusively establishes either that plaintiff submitted no requests for an extension with a time impact analysis or that defendant granted all such requests. If plaintiff submitted the required request and analysis, and defendant failed to act on the request or denied it without

justification, such conduct might breach defendant's contractual obligation, barring its enforcement of the contractual provision disallowing claims for delay. Alloy Advisory, LLC v. 503 W. 33rd St. Assocs., Inc., 195 A.D.3d 436, 436 (1st Dep't 2021).

Moreover, exceptional circumstances may bar defendant's enforcement of a contractual waiver of damages for delay caused to plaintiff's performance of the contracted work. At least two exceptions may apply to defendant's actions about which plaintiff complains: (1) delays caused by defendant's willful or grossly negligent conduct and (2) uncontemplated delays. Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y.2d 297, 309 (1986). While plaintiff bears the burden ultimately to prove one of these exceptions, upon defendant's motion to dismiss plaintiff's claim for damages due to delay, defendant bears the burden to eliminate the potentially applicable exceptions. No documentary evidence, even were it admissible, eliminates these exceptions. In fact, the delay caused by the COVID-19 pandemic may be the paradigmatic uncontemplated delay.

V. CONSEQUENTIAL DAMAGES

Finally, defendant maintains that the complaint's claim for $500,000 in consequential damages must be dismissed because plaintiff's summons with notice omitted that claim. Plaintiff's summons with notice claims damages based on its four grounds for relief, breaches of contract and the covenant of good faith and

fair dealing, quantum meruit, and an account stated, "in a sum to be determined at trial, but not less than $5,000,000." McLoughlin Aff. Ex. 1. Thus, even if the complaint claims damages totalling $5,000,000 exclusive of consequential damages, the prior claim for "not less than $5,000,000" contemplates damages exceeding that amount. While the complaint may fail to support consequential damages for other reasons, they do not include an omission in plaintiff's summons with notice. In an abundance of caution, at this stage plaintiff also may amend its complaint without permission. C.P.L.R. § 3025(a).

VI. CONCLUSION

For all the reasons explained above, the court grants defendant's motion to dismiss the complaint's claim for breach of the covenant of good faith and fair dealing, but otherwise denies defendant's motion. C.P.L.R. § 3211(a)(1) and (7). Other than plaintiff's waiver of claims by failing to comply with the contract's notice of claim procedures, defendant does not even address the complaint's quantum meruit and account stated claims, which may be viable substitutes if the breach of contract claim fails.

Defendant must establish its defenses by admissible evidence through a motion for summary judgment or at trial. Defendant

shall answer the remaining claims in the complaint within 30 days after entry of this order. See C.P.L.R. § 3211(f).

DATED: August 11, 2023

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C