

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DIPIZIO CONSTRUCTION COMPANY, INC.

Plaintiff

MEMORANDUM
DECISION

vs.

Index No. 1203/09

NIAGARA FRONTIER TRANSPORTATION
AUTHORITY

Defendant

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **HISCOCK & BARCLAY, LLP**
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CURRAN, J.

Defendant Niagara Frontier Transportation Authority (“NFTA”) has moved to dismiss the first cause of action based on documentary evidence pursuant to CPLR 3211 (a) (1) and for failure to satisfy contractual conditions precedent to suit. Defendant also has moved to dismiss certain portions of the third cause of action based on documentary evidence under

CPLR 3211 (a) (1) and for failure to state a cause of action under CPLR 3211 (a) (7). Plaintiff has cross-moved for leave to conduct limited discovery to ascertain additional facts relating to defendant's motion to dismiss.

BACKGROUND

On July 8, 2004, the parties entered into a contract ("Contract") for completion of a runway construction and rehabilitation project at the Buffalo Niagara International Airport in the amount of \$25,587,000.00. At the time of contract execution, the schedule was based on a flight check date of August 15, 2005 and a project completion date of October 28, 2005 (Complaint ¶ 11). Work began in the late summer of 2004 and ceased in October 2004 for the winter. In the spring of 2005, a labor strike involving the operating engineers began. The strike was settled in June 2005, but limited work progressed during that year. Due to the strike and a redesign of the runway extension, the original schedule for project completion could not be met (Complaint ¶ 12).

The parties executed a change order in February 2006 ("Change Order 15") under which they agreed to modify the schedule so that the project would be completed by August 1, 2006. Change Order 15 also increased the contract amount by \$640,000.00.

Plaintiff alleges that although it completed its project work by August 1, 2006, it encountered "unforeseen conditions, unanticipated delays, inefficiencies and interferences, which forced DiPizio to constructively accelerate by continually rescheduling work, performing out of sequence work and adding manpower and equipment" (Complaint ¶ 15). Plaintiff further alleges that it requested an extension of time on a number of occasions and that the defendant unreasonably denied those requests (Complaint ¶¶ 16-17). As a result of the "numerous

problems, disruptions, changes and unforeseen conditions encountered, DiPizio was forced to constructively accelerate its work and it suffered damages in excess of \$2,800,000.00” (Complaint ¶ 21).

According to the defendant, plaintiff submitted several written claims to the NFTA seeking “acceleration” damages of \$1,010,182.00 (2/26/07 letter - Ex. H to Perla Aff.); fuel cost increases of \$385,499.33 (10/28/05, 1/3/07 & 2/27/07 letters - Ex. J to Perla Aff.); and asphalt cost increases of \$919,480.30 (10/28/05, 1/3/07 & 2/27/07 letters - Ex. J to Perla Aff.).

On August 10, 2007, the parties executed a letter agreement whereby they agreed to mediate all unresolved claims submitted by plaintiff as of that date. Defendant also agreed as follows: “Regarding the claims that have been presented by DiPizio to the NFTA, the NFTA will waive/not pursue any defense that may exist regarding the timely submission or prosecution of those claims by DiPizio and will address the claims on a substantive basis” (Ex. K to Perla Aff.).

Mediation was unsuccessful. This action was commenced on February 2, 2009. The Complaint has four (4) causes of action:

- (1) breach of contract for the NFTA’s refusal to extend the contract time and to reimburse DiPizio for loss of productivity expenses (\$2,800,000.00);
- (2) breach of contract for payment of the balance of the contract (\$29,990.64);
- (3) extra work and increased material costs (\$1,245,687.45); and
- (4) overhead and profit on the extra work/materials (\$719,112.54).

PROCEDURAL STANDARDS

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the sole criterion is whether the pleading states a cause of action, and if in the four corners of the complaint “factual allegations are discerned which taken together manifests any cause of action cognizable at law, a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We 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 within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]).

On a motion to dismiss pursuant to CPLR 3211 (a) (1), dismissal “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002], citing *Leon*, 84 NY2d at 88). Dismissals under this section are rare and typically involve “a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based” (Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:10).

THE COMPLAINT

The first cause of action, which incorporates all of the preceding paragraphs in the Complaint, alleges as follows:

“DiPizio requested compensation and extensions of time for loss of productivity caused by unforeseen conditions, which requests were denied by the NFTA.”

“The NFTA’s refusal to extend the contract time and to reimburse DiPizio for loss of productivity expenses, despite due demand having been made therefore, constitutes a breach of its obligation under the contract and has resulted in damages to DiPizio in excess of \$2,800,000.00 plus interest, costs and attorneys’ fees.”

(Complaint ¶¶ 31 & 32).

The third cause of action demands damages for “extra work performed and costs incurred” (Complaint ¶ 42). Specifically, plaintiff demands to be compensated for “unforeseen and unreasonable price increases” (Complaint ¶ 40 [k]) and for “increased material costs” (Complaint ¶ 41).

PARTIES’ CONTENTIONS

Defendant seeks dismissal of the first cause of action arguing that the “constructive acceleration” theory alleged therein is barred by either Change Order 15 and/or Article 59 of the General Conditions to the Contract (“Article 59”). Defendant further asserts that the first cause of action fails because plaintiff has not and cannot allege it satisfied conditions precedent to bringing that claim. As to the third cause of action, defendant argues that the Contract does not contain an “escalator clause” thereby prohibiting plaintiff from seeking damages for increased prices and material costs. Defendant’s motion under CPLR 3211 (a) (1) and (a) (7) is therefore premised solely on the language of the Contract.

Plaintiff counters that Change Order 15 does not preclude its “constructive acceleration” theory because the acts giving rise to that claim occurred after the execution of the change order. Plaintiff also maintains that Article 59 does not negate the first cause of action because plaintiff seeks damages based upon unforeseen conditions and upon defendant’s unreasonable refusal to extend the contract’s deadline, and not for delay damages. With respect to the third cause of action, plaintiff concedes that there is no “escalator clause” in the Contract but maintains that the increased material costs are directly related to the acceleration claim in the first cause of action which arose after execution of Change Order 15. Plaintiff has therefore made clear that the claim for increased material costs in the third cause of action stands or falls with the first cause of action.

ANALYSIS

The first cause of action is founded on the allegation that the harm to plaintiff was “caused by unforeseen conditions” (Complaint ¶ 31). The theory for seeking redress of this harm is “breach of its [defendant’s] obligations under the contract” (Complaint ¶ 32). The breaches of the Contract alleged in the first cause of action are: (1) defendant’s unreasonable denial of plaintiff’s requests for an extension of the Contract deadline (Complaint ¶ 17); and (2) defendant’s refusal to pay additional compensation for “the numerous problems, disruptions, changes and unforeseen conditions encountered” by plaintiff which forced it “to constructively accelerate its work” (Complaint ¶ 21). Plaintiff characterizes this cause of action as one for “constructive acceleration” (Domagalski Aff. ¶ 7).

The Court agrees with plaintiff that the first cause of action is not barred by Change Order 15. While that document extended the Contract’s completion deadline and

enabled an earlier start date to ensure timely completion, it does not encompass the extra “accelerated” work which plaintiff seeks to be compensated for in the first cause of action. The extra “accelerated” work was performed after Change Order 15 was executed and defendant has made no showing that the extra “accelerated” work was contemplated by Change Order 15. Moreover, any effort to make such a showing would raise factual issues not resolvable on this motion to dismiss.

Preliminarily, the Court notes that plaintiff has alleged a breach of Article 59 claiming that defendant unreasonably withheld its consent to an extension of the Contract’s deadline. The parties have not briefed the issue of whether a reasonableness standard should be implied into the Contract and the Court will not address that issue. Rather, the parties have charted their own course by focusing solely on whether Article 59 applies as a “no damage for delay” clause.

With respect to whether the first cause of action is barred by Article 59, the issue as framed by the parties is whether the damages sought are for “constructive acceleration” or for “delay.” If the former, according to plaintiff, the damages flow from defendant’s breach of the Contract by unreasonably refusing to extend the contract’s deadline and in failing to compensate plaintiff for extra work caused by unforeseen conditions encountered after Change Order 15 was executed. If the latter, according to defendant, the first cause of action must be dismissed because plaintiff has not alleged any basis for “additional compensation” allowed under Article 59 and because Article 59 otherwise exculpates defendant from the “delay” damages sought.

Defendant characterizes Article 59 as a “no damage for delay” clause and asserts that the Court of Appeals decision in *Corinno Civetta Construction Corp. v City of New York* (67 NY2d 297 [1986]), is controlling. However, Article 59 is not the broad exculpatory clause that was present in that case but is a more specific type of that clause which seeks to limit plaintiff’s remedies to procuring an extension of time from the defendant (for the reasons expressly identified in the Contract) and to “additional compensation” (as limited by the circumstances expressly described in Article 59). Other than receiving an extension of the Contract’s deadline and/or “additional compensation,” plaintiff is precluded by Article 59 from any other remedy to compensate it for “additional costs for delay, inefficiency or interferences.”

Plaintiff urges that its “constructive acceleration” theory negates the application of Article 59 as a “no damage for delay” clause because it seeks “acceleration” damages which, plaintiff asserts, are distinguishable from “delay” damages.¹ Plaintiff argues that, while its “constructive acceleration” theory has not been accepted or rejected by any New York court, the theory has been accepted elsewhere (*see James Corp. v North Allegheny School Dist.*, 938 A2d 474 [Pa 2007], *rearg denied* 2008 Pa Commw LEXIS 47 [Pa Commw Ct 2008]). The theory appears to have been recognized first by the federal Court of Claims (*see e.g. Siefford v Housing Auth. of City of Humboldt*, 192 Neb 643, 647, 223 NW2d 816, 819 [1974]; *Fraser Constr. Co. v United States*, 384 F3d 1354, 1360-1361 [2004]). The state courts are not uniform in their treatment of the theory (*see e.g. Siefford*, 192 Neb at 649; *Reynolds Bros., Inc.*

¹ Plaintiff has not asserted that its first cause of action seeks the “additional compensation” allowed under the limited circumstances set forth in Article 59.

v Commonwealth, 412 Mass 1, 8, 586 NE2d 977, 981 [1992]; *Contracting & Material Co. v City of Chicago*, 64 Ill 2d 21, 349 NE2d 389 [1976]).

The Court concludes that the damages sought by plaintiff are in fact “delay” damages and that the distinction between “delay” and “acceleration” sought to be made by plaintiff has been specifically rejected by the Court of Appeals in *Corinno Civetta*. There, the Court of Appeals held as follows:

All delay damage claims seek compensation for increased costs, however, whether the costs result because it takes longer to complete the project or *because overtime or additional costs are expended in an effort to complete the work on time*. It is of no consequence that the obstruction, whatever its cause, occurs during the term of the contract or afterwards or whether it disrupts the contractor’s anticipated manner of performance or extends his time for completion. The claims are claims for delay and the exculpatory clause was drafted and included in the contract to bar them.

67 NY2d at 313-314 (emphasis added).

Under this language, the Court of Appeals characterized the type of acceleration damages sought here as delay damages. The Court of Appeals also has never recognized an acceleration claim of the type asserted here. Further, another member of the Commercial Division, Justice Scheinkman, has recently concluded that acceleration damages are in fact delay damages which may be subject to a “no damage for delay” clause in a construction contract (*Century-Maxim Constr. Corp. v One Bryant Park, LLC*, 23 Misc 3d 1120[A], 2009 NY Slip Op 50858[U] [Sup Ct, Westchester County 2009]). This Court concurs in this regard with Justice Scheinkman.

Due to the way in which the parties have framed their debate on this key issue, the Court is compelled to grant the motion to dismiss the first cause of action. However, based on the wording of the Complaint, it is not clear whether plaintiff also is claiming in the first cause of action that it is entitled to: (a) “Extra Work” damages under Article 22 of the Contract; (b) “additional compensation” under Article 59 of the Contract (and perhaps thereby seeking damages for “Differing Site Conditions” under Article 23 of the Contract); (c) damages incurred from unanticipated delays as allowed by *Corinno Civetta*; and/or (d) damages based on one of the exceptions set forth in *Corinno Civetta*. The Court will therefore allow plaintiff leave to replead the first cause of action, if it so chooses, within ten (10) days of the date of the Order upon this decision with service of notice of entry to specify whether it is seeking damages under any or all of these theories. Furthermore, because of plaintiff’s concession that the additional material costs asserted in the third cause of action are tied to the theory in the first cause of action, any claim for additional material costs in the third cause of action is dismissed for the reasons herein with leave to replead as described above. Plaintiff’s cross-motion for discovery is denied as moot.

Settle Order.

DATED: December 18, 2009

HON. JOHN M. CURRAN, J.S.C.