

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

	x	
MARIC MECHANICAL INC.		Index Number <u>26814</u> 2005
- against -		Motion Date <u>December 5,</u> 2007
THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK		Motion Cal. Number <u>33</u>
	x	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 10 read on this motion by the defendant, the Dormitory Authority of the State of New York, for partial summary judgment dismissing the third and fourth causes of action asserted against it.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-2
Answering Affidavits - Exhibits.....	3
Reply Affidavits.....	4
Other (Statements of Material Facts, Memoranda)..	5-10

Upon the foregoing papers it is ordered that the motion is granted. (See the accompanying memorandum.)

Dated: February 19, 2008

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

<hr/>	X	INDEX NO. 26814/05
MARIC MECHANICAL INC.		MOTION SEQ. NO. 1
- against -		MOTION DATE: 12/5/07
THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK		BY: KITZES, J.
<hr/>	X	DATED: February 19, 2008

The defendant, the Dormitory Authority of the State of New York (DASNY), has moved for partial summary judgment dismissing the third and fourth causes of action asserted against it.

In or about 2000, defendant DASNY solicited bids from contractors willing to undertake renovation work at Powdermaker Hall, Queens College. The project required the installation of a new facade, new roof, new interiors, new plumbing systems, new electrical systems, and new heating, ventilation, and air conditioning equipment. Defendant DASNY eventually awarded prime contracts to Trataros Construction, Inc. for the general construction work, Stivan Plumbing & Heating, Inc. for the plumbing work, Inter Connection Electric, Inc. for the electrical work, and plaintiff Maric Mechanical, Inc. for the heating, ventilation, and air conditioning work (HVAC work).

Plaintiff Maric entered into a contract dated February 2, 2000 with defendant DASNY to perform the HVAC work for a price of

\$9,777,000, and the contractor promised to complete its work by September 1, 2002. Section 11.02 of the General Conditions of the Contract provides: "No claims for increased costs, charges, expenses or damages of any kind shall be made by the Contractor against the Owner [DASNY] for any delays or hindrances from any cause whatsoever; provided that the Owner, in the Owner's discretion, may compensate the Contractor for any said delays by extending the time for completion of the Work as specified in the Contract." Paragraph D of Section 13.01 of the General Conditions provides: "Should the Contractor sustain any damage through any act or omission of any other contractor having a contract with the Owner or through any act or omission of any Subcontractor of said contractor, the Contractor shall have no claim against the Owner for said damage." Paragraph F of Section 13.01 of the General Conditions provides: "The owner cannot guarantee the responsibility *** or performance of any Contractor. The Contractor acknowledges these conditions and shall bear the risk of all delays ***." The contract also provides for certain payments to plaintiff Maric upon its execution of a release in favor of DASNY.

Defendant DASNY hired Walsh Construction Company and its affiliates (collectively Walsh) to serve as the construction manager for the project, and Walsh created a "Project Baseline Schedule" which called for the overall completion of the project on January 9, 2003. To insure the timely completion of the project,

(1) DASNY kept a full-time project manager on the site, (2) representatives of DASNY's Engineering Services Office inspected the work on a regular basis, (3) Walsh kept three to seven on-site construction professionals working at the project, (4) Walsh conducted 133 coordination meetings with the prime contractors between February, 2000 and December, 2002, (5) Walsh held special meetings with Trataros in the spring and summer of 2002, (6) Walsh eventually held regular weekly meetings with Trataros, and (8) Walsh issued schedule updates based on actual progress in the field.

Nevertheless, the project encountered delays, such as a five month delay before Queens College made Powdermaker Hall available for renovation, and the work was not substantially completed until August 15, 2003. Defendant DASNY attributes much of the delay to the slow performance of the general construction work by Trataros and its subcontractors. In the summer of 2002, DASNY informed Traveler's Insurance Company, the surety for Trataros, about the slow performance of the contractor's work, and Traveler's began meeting with DASNY, Walsh, and Trataros. In or about February, 2003, Traveler's hired Vertex Engineering Services, Inc. to aid in the completion of the general construction work, and Vertex subsequently assumed full responsibility for the completion of the general construction work.

Despite DASNY's measures in regard to Trataros, plaintiff Maric complains that DASNY did not find Trataros to be in default of its contractual obligations soon enough. According to the plaintiff, "by the time DASNY terminated Trataros in February 2003, 119.4% of the project time had elapsed and Trataros had only completed 79.85% of its work." Maric alleges that because of delays in performance by Trataros it had to adjust its own performance, thereby incurring increased expenses.

In March, 2004, after the substantial completion of plaintiff Maric's work, the contractor filed a claim for \$1,374,625 with Walsh and DASNY seeking compensation for damages allegedly resulting from delays on the project. Plaintiff Maric's statement in support of its claim alleged, inter alia, that: "1. DASNY did not have the building available for construction as per the prebid schedule, 2. DASNY's general contractor did not enclose the building by the winter of 2002 ***, 3. DASNY's general contractor failed to timely cut and/or relocate beams ***, 4. DASNY's general contractor failed to timely complete millwork ***, 5. DASNY's general contractor overloaded its manpower in the spring of 2003 ***, 6. DASNY's general contractor delayed constructing the mechanical equipment rooms ***." DASNY denied the claim because it was largely based on delays caused by Trataros. (Maric now also alleges that the delays occurred because, inter alia, DASNY and Walsh failed to coordinate the work of prime contractors and failed

to administer the project properly.) Despite the filing of a claim against DASNY, on or about December 17, 2004, Maric executed a Release Form for Reduction of Retainage absolving DASNY of all claims of liability except for \$106,753.54, representing the balance of retainage after payment of the pending retainage reduction acquisition. Maric now claims that the release was mistakenly executed.

Plaintiff Maric began this action on or about December 14, 2005. The complaint alleges, inter alia, that defendant DASNY and plaintiff Maric agreed on an upward adjustment of the contract price to \$10,739,271.21 and that defendant DASNY has paid \$10,631,878.49, leaving a balance owed of \$107,392.72. The first cause of action seeks to recover that sum. The second cause of action seeks to recover \$47,680.22 for extra work. The third cause of action seeks damages in the amount of \$1,868,257 because of alleged construction delays. The fourth cause of action seeks damages in the amount of \$2,023,329.94 for the "reasonable value" of Maric's work.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (Alvarez v Prospect Hospital, 68 NY2d 320, 324.) Defendant DASNY successfully carried that burden in regard to the third cause of action. A contractual

clause which exculpates a party from liability to a contractor for damages resulting from delays in the performance of the latter's work is generally valid, enforceable, and not contrary to public policy. (See, Corinno Civetta Const. Corp. v City of New York, 67 NY2d 297; Blue Water Environmental, Inc. v Incorporated Village of Bayville, 44 AD3d 807; Harrison & Burrowes Bridge Constructors, Inc. v State of New York, 42 AD3d 779; Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos, LLP v Island Properties LLC, 38 AD3d 831.) In the case at bar, Section 11.02 of the General Conditions of the Contract and Paragraphs D and F of Section 13.01 of the General Conditions of the Contract exculpated defendant DASNY from liability to plaintiff Maric for damages arising from delays in the performance of its work. Defendant DASNY also showed prima facie that no exceptions to the general rule apply in this case. (See, Blue Water Environmental, Inc. v Incorporated Village of Bayville, supra.) The burden on this motion shifted to plaintiff Maric to produce evidence showing that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, supra.) Plaintiff Maric failed to carry this burden. Despite a no damages for delay clause, a contractor may still recover damages for "(1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) un contemplated 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 Const. Corp. v City of New York, supra, 309; Blue Water Environmental, Inc. v Incorporated Village of Bayville, supra; Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos, LLP v Island Properties LLC, supra.) Plaintiff Maric failed to raise a genuine issue of fact concerning any of these grounds. (See, Landis & Gyr Powers, Inc. v Berley Industries, Inc., 298 AD2d 435.) It is true that Section 10.01 of the contracts entered into by DASNY and the prime contractors provides in relevant part: "In the event that any provision of the Contract is violated by the Contractor *** the Owner may serve written notice upon the Contractor and upon the Contractor's surety, if any, of the Owner's intention to terminate the Contract ***. If the violation or delay shall not cease or arrangements satisfactory to the Owner shall not be made, the Contract shall terminate upon the date so specified by the Owner." (Emphasis added.) Since Section 10.01 is written in permissive, not mandatory, language, there is no merit in Maric's argument that DASNY's forbearance in terminating Trataros for delays was uncontemplated. DASNY's power to terminate pursuant to Section 10.01 was a discretionary right, which, if exercised, could have caused further project delays, and the clause contains no guarantee to Maric about how the right would be applied. The court notes in this connection Tippetts-Abbett-McCarthy-Stratton v New

York State Thruway Authority (18 AD2d 402, affd 13 NY2d 1091) where the appellate courts found that the plaintiff supervising contractor did not carry its heavy burden of showing that no possible exercise of reasonable judgment or course of fair dealing in regard to the prime contractor excused the Authority from imposing a contractual penalty upon the prime contractor for delay. Finally, the delay in the start of the project attributable to the college did not amount to gross negligence on the part of DASNY or to a breach of a fundamental obligation under the contract. The project baseline schedule took into account the initial hold on interior construction until the college vacated the hall, and, the plaintiff failed to submit evidence sufficient to raise a genuine issue of fact concerning whether, under all of the circumstances of this case, the delay in vacating the building had serious consequence.

In regard to the fourth cause of action, the existence of a contract covering the dispute between the parties bars a claim based on quantum meruit. (See, Alamo Contract Builders, Inc. v CTF Hotel Co., 242 AD2d 643.)

Accordingly, the motion is granted.

Short form order signed herewith.

J.S.C.