

Metropolitan Steel Industries, Inc. v Perini Corporation

2004 NY Slip Op 30157(U)

November 30, 2004

Supreme Court, New York County

Docket Number: 0104341/2002

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HERNAN CAHN

PRESENT: _____

PART 49

0104341/2002

METROPOLITAN STEEL INDUSTRIES

VS
PERINI

SEQ 7

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 8/13/04

MOTION SEQ. NO. 007

MOTION CAL. NO. 28

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

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Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

Dated: 11/30/04

HERNAN CAHN

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-----X
METROPOLITAN STEEL INDUSTRIES, INC. d/b/a
STEELCO,

Plaintiff,

-against-

Index No. 104341/02

PERINI CORPORATION, AMERICAN HOME
ASSURANCE COMPANY, FIDELITY AND
DEPOSIT COMPANY OF MARYLAND and
LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

-----X
PERINI CORPORATION,

Plaintiff,

-against-

Third Party Index No. 104341/02

STV, INCORPORATED,

Third Party Defendants.

-----X
CAHN, J.

This action and third-party action arise from the design and construction of a multi-storied bus depot located on 100th Street in New York City (the Project), owned and operated by the New York City Transit Authority (the NYCTA).

Plaintiff Metropolitan Steel Industries, Inc. d/b/a Steelco commenced this action against defendant/third-party plaintiff Perini Corporation and defendants American Home Assurance Company, Fidelity and Deposit Company of Maryland, and Liberty Mutual Insurance Company, Perini's sureties, for breach of contract, seeking to recover the unpaid balance due on its contract work, as well as for certain additional and extra work it rendered in connection with

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the Project.

Defendants now move for partial summary judgment dismissing Steelco's claims for damages based on alleged Project delays, on the basis of a "no damage for delay" provision contained in Steelco's subcontract, as well as in the prime contract¹, CPLR 3212.

FACTS

In October 1999, the NYCTA solicited bids for the award of a contract for the design and construction of the bus depot.

Perini was the successful bidder, and on May 1, 2000, it entered into a contract with the NYCTA for the design and construction of the Project (the Prime Contract). Perini served as the general contractor. Steelco was the structural steel subcontractor. Pursuant to the Prime Contract, Perini agreed to complete the Project for a price of approximately \$90,000,000.

Perini then entered into a subcontract with Steelco, pursuant to which Steelco was to furnish the goods and services, for the fabrication and erection of structural steel and a metal deck necessary for construction of the Project, for \$9,630,000 (the Steelco Subcontract). Although Steelco commenced its work on the Project in August 2000, negotiations were conducted between Steelco and Perini over the next eight months regarding the terms and conditions of the Steelco Subcontract. The Steelco Subcontract was not finalized until February 15, 2001.

Pursuant to the Steelco Subcontract, the parties thereto agreed that Steelco was not entitled to any extra compensation as a result of delay, pursuant to a no-damage-for-delay

¹ Although defendants also originally moved for partial summary judgment dismissing counts I through III of third-party defendant STV, Incorporated's counterclaim, they withdrew that portion of the motion by stipulation.

clause, which reads as follows:

Subcontractor shall not be entitled to any extra compensation for any suspension, delay or acceleration not specifically allowed and paid for by Owner.

Steelco Subcontract, § 4.2 (Aff. of Joseph Ertle, Exh B).

Perini alleges that it has not received any compensation from the NYCTA for delays on the Project, and has rendered payment in full to Steelco for the subcontract work, less retention (Aff. of Joseph Ertle, ¶ 12).

The Steelco Subcontract by its terms expressly incorporated all applicable provisions of the Prime Contract into the Steelco Subcontract (Steelco Subcontract, § 1.2). The Prime Contract also contains a no-damage-for-delay clause, which provides that:

Except as otherwise specifically provided by for in Article 2.07(b) of this Contract, [Steelco] agrees to make no claim for compensation or damages for delay of any kind in the performance of this Contract on behalf of itself, subcontractors or suppliers whether occasioned by any act or omission of [Perini] or any of [Perini's] representatives (whether it is an Excusable Delay within the meaning of Article 2.05 or otherwise) and [Steelco] agrees that any such claim shall be compensated for solely by an extension of time to complete performance of the Work as provided in Article 2.05. In this regard, [Steelco] alone hereby assumes the risk of such delay, including, without limitation: delays in processing or approving shop drawings, samples or other submittals; or the failure to render determinations, approvals, replies, inspections or test of the Work, in timely manner. Notwithstanding any provision of [Art. 2.07(b)], [Steelco] shall not be entitled to compensation or damages for delay of any kind relating to the delay of an intermediate milestone date (if such date(s) are provided for in the Contract Documents).

Prime Contract, § 2.07 (a) (Ertle Reply Aff., Exh D).

Steelco commenced work on the Project in August 2000. By September 2000,

Steelco began sending correspondence to Perini, complaining that STV was not providing accurate structural steel designs and that, as a result, Steelco's work was being delayed. Steelco advised Perini that it would hold it liable for costs incurred as a result of the delay.

In March 2001, Steelco commenced erection of the structural steel. On November 15, 2001, Perini terminated Steelco, and completed Steelco's remaining work. To date, Perini has paid Steelco \$10,700,000 for its work on the Project.

On March 1, 2002, Steelco commenced this action against Perini, seeking contract damages based on certain outstanding Steelco-prepared change order requests, of which approximately 11 are for alleged delay damages. The essence of Steelco's claim for delay damages is grounded on the contention that, during the performance of the Steelco Subcontract, Perini was responsible for "inappropriate acts, omissions, delays and interferences" which "substantially altered, changed, modified and interfered with [its work] causing delay, inefficiency and additional cost to plaintiff in the performance of the work" (Complaint, ¶ 14). Steelco further alleges that Perini "delayed, interfered with and rescheduled" Steelco's "shop fabrication and erection work" resulting in extra work to Steelco, and otherwise interfered with Steelco's performance (see id., ¶¶ 110, 138, 150, 154, 158, 164). Steelco seeks delay damages in the amount of \$2,400,000.

DISCUSSION

It is well-settled that no-damage-for-delay clauses are enforceable in New York (Corinno Civetta Constr. Corp. v City of New York, 67 NY2d 297 [1986]; Kalisch-Jarcho, Inc. v City of New York, 58 NY2d 377 [1983]). In support of its motion for partial summary judgment, Perini contends that, pursuant to the no-damage-for-delay clause contained in the

Steelco Subcontract, Steelco is barred, as a matter of law, from asserting any claims against Perini that are based on delay.

In opposition, Steelco argues that the Steelco Subcontract does not contain a no-damage-for-delay provision because Section 4.2 of the Steelco Subcontract: (1) fails to contain the type of exculpatory language considered by the Corinno Civetta Court; (2) specifically contemplates Steelco being paid for its delay damages; and (3) is ambiguous and should be construed against Perini. However, Steelco's arguments with respect to Section 4.2 are irrelevant, because the Prime Contract's no-damage-for-delay provision was specifically incorporated by reference into the Steelco Subcontract. Where, as here, the subcontract incorporates "by reference the 'no damage for delay' clause contained in the prime contract ... this clause [is] enforceable against [plaintiff] to bar its recovery for delay damages" (Peter Scalamandre & Sons, Inc. v Village Dock, Inc., 187 AD2d 496, 497 [2d Dept 1992], lv denied 81 NY2d 710 [1993]; see also Burt Welding & Automotive Repair Inc. v U.W. Marx Inc., 272 AD2d 737 [3d Dept 2000] [no-damage-for-delay provision incorporated by reference into subcontract barred subcontractor's claim for delay damages]).

The Prime Contract's no-damage-for-delay clause quoted herein is almost identical to the exculpatory clauses at issue in Corinno Civetta and Kalisch-Jarcho (see Corinno Civetta Constr. Corp. v City of New York, supra, 67 NY2d at 308, n 1; Kalisch-Jarcho, Inc. v City of New York, 58 NY2d 377, supra [same]). As such, the Prime Contract's no-damage-for-delay clause bars the delay claims asserted by Steelco in this action (see id.). This is not to say, that the no-delay damages clause contained in the Steelco Subcontract, would not itself bar such damages.

Steelco also contends that, although a no-damage-for-delay clause is generally enforceable, it does not erect an absolute bar to the granting of such damages. There are four exceptions to a no-damage-for-delay clause:

Generally, even 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) unanticipated 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. Corp. v City of New York, *supra*, 67 NY2d at 309.

Steelco argues that its claims are exempt from the no-damage-for-delay provision because the delays at issue were: (1) caused by Perini's breach of a fundamental obligation expressly imposed upon Perini by the Steelco Subcontract; (2) were not contemplated at the time Steelco entered into the Steelco Subcontract; and (3) were caused by Perini's bad faith, willful misconduct or gross negligence. Steelco, however, fails to raise a genuine issue of material fact with respect to these contentions.

First, Steelco argues that the delay resulted from Perini's fundamental breach of an affirmative obligation expressly imposed upon it by the Steelco Subcontract. In Corinno Civetta, the Court of Appeals addressed the issue of what type of conduct constitutes a "fundamental" breach of a contract that would render a no-damage-for-delay clause unenforceable. After noting that this exception should only be "applied to an exceptionally narrow range of circumstances," the Court stated that:

Because the exculpatory clause is specifically designed to protect the contractee from claims for delay damages resulting from its failure of performance in ordinary, garden variety ways, delay

damages may be recovered in a breach of contract action **only for the breach of a fundamental, affirmative obligation the agreement expressly imposes on the contractee.**

Corinno Civetta Constr. Corp. v City of New York, *supra*, 67 NY2d at 313 [emphasis added]; see also Earthbank Co., Inc. v City of New York, 172 AD2d 250, 250 [1st Dept], appeal denied 78 NY2d 855 [1991]).

Steelco fails to raise a genuine issue of fact regarding Perini's alleged breach of a fundamental, affirmative obligation expressly imposed upon it by the Steelco Subcontract. Steelco does not identify any provision of the subcontract that expressly imposed on Perini any of the affirmative obligations that Steelco alleges Perini breached, and, a perusal of the subcontract does not reveal any such affirmative obligations.

Accordingly, Steelco has failed to raise any issues of material fact regarding Perini's alleged fundamental breach of an affirmative obligation expressly imposed on it by the subcontract, and its delay claims are thus dismissed.

Steelco also argues that its delay claims are based on delays that were not contemplated when it entered into the Steelco Subcontract. Specifically, it contends that it was not provided with the agreed upon access to the Project site, and that the site was not prepared properly for steel erection. Consequently, it argues, Steelco, and Midlantic, its steel erection subcontractor, were unable to perform erection of the steel as scheduled, sequenced and bid.

In determining whether this exception is applicable, a court must determine what delays were contemplated by the parties before they entered into the contract. Defendants present evidence that, at the time Steelco entered into the subcontract on February 15, 2001, it was fully aware of the conditions upon which its delay claims are based. Indeed, as set forth in Steelco's

opposition papers, all of Perini's alleged acts of delay, negligence and willful misconduct set forth by Steelco in opposition to the instant motion occurred before February 15, 2001 (see Aff. of Stephen Hynes, ¶¶ 6-23). As such, Steelco was aware of the alleged acts of negligence and misconduct before it entered into the Steelco Subcontract on February 15, 2001. Accordingly, Steelco is precluded from asserting that it was unaware of these delays before it entered into the Steelco Subcontract.

Moreover, many of the events upon which Steelco's delay claims are based – the re-scheduling of Steelco's work, a crowded work site, changes to Steelco's sequences of work, coordination of work with other subcontractors, and excavations for seismic steel girders – were specifically contemplated by the Steelco Subcontract and the Prime Contract. For instance, the Steelco Subcontract contemplated that Perini would revise the Project schedule as necessary, and as the work progressed, and that Steelco would have to comply with Perini's instructions to suspend, delay or accelerate its subcontract work (see Steelco Subcontract, § 4.2 [attached to Ertle Aff. as Exh B]). The Steelco Subcontract further contemplated that Steelco's work may be interfered with by Perini and other subcontractors working on the Project, and that the Project site might be congested (see id., § 4.4).

Steelco's assertion that it never contemplated changes to its schedule or sequence of work on the Project when it entered into the subcontract is also directly refuted by the rider to the Steelco Subcontract, Exhibit A, which expressly noted that:

[Steelco] recognizes that this is a design/build project and understands and acknowledges that this Agreement was negotiated and accepted on the basis of preliminary and/or conceptual plans listed in the Steelco Proposal of August 7, 2000 which do not fully show and/or describe all work necessary for the compliance with

the intent of the Contract. [Steelco] understands and agrees that the preliminary plans and specifications will be supplemented by and/or replaced by final plans and specifications prepared by [STV]. [Steelco] agrees that its work and materials will conform to such final plans and specifications.

Steelco Subcontract, at 18-19. The Prime Contract's general conditions further provide that Perini "shall have broad discretion in scheduling the Project (Prime Contract, General Conditions, Art. 2.03 [a]) [Ertle Reply Aff., Exh C]). Similarly, the Midlantic Purchase Order also provides that "[s]chedule of erection shall be at such times or times and sequences as required by Owner, [Perini] and [Steelco]" (see Midlantic Purchase Order, Rider B, No. 7 [Reply Aff. of Jeffrey R. Seaman, Esq., Exh C]). In addition, the foundation plan for the structural steel specifically notes that the foundations for multiple seismic steel beams were located fifteen feet below grade and would therefore require excavation (see Ertle Reply Aff., ¶¶ 10-11).

Moreover, the contemporaneous correspondence between Perini and Steelco demonstrates that, while Steelco and Perini were continuing to negotiate the terms and conditions of the subcontract, Steelco was fully aware of all "changes" to the Project, which it now asserts were not contemplated (see Steelco letter to Perini (the Panariello Letter), dated January 18, 2001 [Ertle Reply Aff., Exh A]). The Panariello Letter demonstrates that, while Steelco was negotiating the subcontract, it was aware of: (1) changes to the commencement and sequence of steel erection; (2) multiple change orders in which "major dollars" were involved; and (3) the existence of both MTA changes and Perini changes (see id.).

Accordingly, Steelco has failed to raise issues of material fact in support of its allegations that the delays it encountered were not contemplated by it when it entered into the subcontract on February 15, 2001 (see *Visconti Corp. v LaBarge Bros. Co., Inc.*, 272 AD2d 948

[4th Dept], lv denied 95 NY2d 766 [2000]). “[W]here, as here, the conduct was specifically contemplated by the parties when they entered into the agreement,” the no-damage-for-delay clause precludes recovery of delay damages (North Star Contr. Corp. v City of New York, 203 AD2d 214, 214-215 [1st Dept 1994]; accord A.R. Mack Constr. Co., Inc. v Central Square Central School Dist., 278 AD2d 839 [4th Dept 2000], lv denied 96 NY2d 712 [2001]; see also Teddy Giannopoulos General Contr., Inc. v New York City Housing Auth., 260 AD2d 253, 253 [1st Dept 1999] [denying petitioner’s claims for delay damages where “all of the delays petitioner points to were of a type contemplated by the contract”]).

Steelco has also failed to raise a material issue of fact in support of its allegations regarding Perini’s claimed gross negligence or willful misconduct. Although an exculpatory clause will not exonerate a party from its acts of gross negligence or willful misconduct, a determination of gross negligence requires a finding of something more than active interference, i.e., willfulness, maliciousness, or bad faith (see Kalisch-Jarcho, Inc. v City of New York, 58 NY2d 377, supra). Steelco has failed to satisfy its evidentiary burden to provide evidence demonstrating Perini’s alleged gross negligence or misconduct.

Steelco submits the affidavit of Stephen Hynes, its Executive Vice President, in which Hynes asserts that Perini’s gross negligence is demonstrated by its ongoing excavation and foundation work while Steelco was erecting steel, and its insistence that Steelco commence its steel erection operation, despite knowing that the site was not ready to accommodate such an operation.

Notably, Steelco never previously asserted that its work was delayed due to Perini’s gross negligence in either the complaint, its responses to Perini’s discovery demands, or

during any of the depositions of Steelco fact witnesses. Moreover, the record reveals that Steelco was aware of the conditions of the site before it entered into the subcontract. These recent allegations do not constitute the type of intentional acts of malice that constitute gross negligence or willful misconduct (see id.).

In any event, Steelco has failed to provide any evidence of Perini's malice or willful misconduct regarding the scheduling or sequencing of Perini's work, and Hynes' conclusory allegations amount to nothing more than mere speculation. Because the record contains no evidence of willful misconduct or "conduct by [Perini] so grossly negligent as to constitute a predicate for a delay damage claim in the face of the contract's broad exculpatory clause," Steelco cannot avoid the contractual bar to such damages (Buckley & Co. v City of New York, 121 AD2d 933, 934 [1st Dept 1986], appeal dismissed 69 NY2d 742 [1987]; see Bat-Jat Contracting, Inc. v New York City Hous. Auth., 1 AD3d 128 [1st Dept 2003]).

The Court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that defendants' motion for partial summary judgment is granted and Steelco's claims for delay damages are dismissed; and it is further

ORDERED that the remainder of the action shall continue.

Dated: November 30, 2004

ENTER:

HERMAN CAHN

J.S.C.

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