

**Grace Industries, Inc. v New York City Department of  
Transportation**

2004 NY Slip Op 30248(U)

July 19, 2004

Supreme Court, New York County

Docket Number: 604011/99

Judge: Herman Cahn

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: HERMAN CAHN  
*Justice*

PART 49

Grace Industries  
- v -  
Nyc Dept. of Transportation

INDEX NO. 604011/99  
MOTION DATE 7/29/03  
MOTION SEQ. NO. 001  
MOTION CAL. NO. 9

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

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

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

FILED

JUL 23 2004

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: July 19, 2004

*Herman Cahn*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

-----X  
GRACE INDUSTRIES, INC.,

Plaintiff,

-against-

Index No. 60401 1/99

NEW YORK CITY DEPARTMENT OF  
TRANSPORTATION AND CITY OF NEW YORK,

Defendants.

-----X  
HERMAN CAHN, J.

Motion sequencenumbers 001 and 002 are consolidated for disposition.

In motion sequence 001, plaintiff Grace Industries, Inc. moves for partial summary judgment on the first, third, fifth, and sixth causes of action of the complaint. In motion sequence 002, defendants City of New York and the New York City Department of Transportation (DOT) move for summary judgment dismissing the complaint, based on the contractual statute of limitations, the alleged failure of plaintiff to comply with various contract provisions, and the failure to state a claim, CPLR 3211 and 3212.

**The Facts:**

This action arises out of a contract between Grace and defendant City, acting through DOT, Contract No. HBX646 and HBX649 (together referred to herein as the Contract). The Contract is for the reconstruction of both the Melrose Avenue bridge over the Conrail Port Morris Branch, and the East 165th Street bridge over the Metro-North Coinmuter Railroad, Harlem Division, in the Bronx, New York (the Project).

In February 1992, defendants advertised for submission of bids for the Project. On April

20, 1992, plaintiff submitted a bid of \$7,967,330.80 for the reconstruction of both bridges. The Contract was awarded to Grace, as the lowest responsible bidder. Grace executed the agreement on **April 7, 1992**, and DOT signed on April 27, 1992.

**Phase I of the Project:**

Thereafter, on June 22, 1992, DOT issued a “notice to proceed,” directing Grace to commence **work** on Phase I on October 5, 1992, the 165th Street bridge restoration. On September 29, 1992, DOT advised Grace that it was rescinding the original notice to proceed, because DOT had not as yet registered both the resident engineer and construction support service consultant contracts. DOT indicated that these contracts would not be registered until December 1992, at which time a revised notice to proceed would be issued.

On October 2, 1992, Grace responded by advising that unless it was permitted to commence work by December 1, 1992, it would deliver formal notice terminating the Contract. On October 16, 1992, DOT responded that it would do everything in its power to meet the December 1, 1992 date. Then, on November **18**, 1992, DOT issued a new notice to proceed, directing Grace to commence work on December 7, 1992.

Grace did not seek to terminate the agreement; instead it commenced work on phase I of the Project at the 165th Street bridge site. On February **4**, 1995, the work on the 165th Street bridge was satisfactorily completed and accepted by the City, concluding Phase I of the Project.

The Melrose bridge site was not yet available, so Grace demobilized its equipment and disbanded its crew.

**Phase II of the Project:**

The City was in the process of gaining access to the Melrose bridge site when the bidding

took place in 1992. The bid documents indicated that the process of gaining access to the site might take **up** to two years from the notice to proceed. Previously, in February 1992, DOT had filed the necessary property acquisition applications required to obtain maintenance and construction easements to allow reconstruction of the Melrose Avenue bridge.

However, in August 1993, American Pen Corp. (Pen), the owner of certain property located beneath the Melrose Avenue bridge, commenced an action against the City, DOT, and Grace, American Pen Corp. v City of New York, **Index** No. 21544/93, in Bronx Supreme Court. The complaint in the Pen action alleges that the City, DOT, and Grace had trespassed on Pen's property and deposited huge amounts of debris there, and placed vehicles and machinery on the land. Pen sought damages of \$75 million **and** a permanent injunction, directing abatement of the nuisance and removal of the items from the property. The defendants in the action answered denying liability, and cross-claimed against each other for indemnification. The City tried unsuccessfully to settle the litigation and to purchase the subject property from Pen. Thereafter, in order to obtain the necessary access to perform the Melrose Avenue bridge work, the City was forced to bring condemnation proceedings against Pen, to acquire title to the property.

On December 7, **1994**, while the City **was** attempting to obtain access to the job site, Grace wrote to DOT asserting that it was exercising its rights under the Contract to withdraw from Phase II, the repair of the Melrose Avenue bridge, because two years had elapsed since the issuance of the revised notice to proceed and access had not been obtained. DOT responded by letter dated December **15**, 1994, advising that the Contract, only permitted the City to delete the Melrose Avenue bridge portion from the Contract, and not Grace, and that DOT did not wish to delete the work. On **January** 3, 1995, Richard Sheridan, Grace's vice president conceded that

DOT had the unilateral right to delete the Melrose bridge portion of the project, and “that it was not our intent to usurp the authority of the Department in this matter.”

Finally, the condemnation proceeding was concluded, and the City obtained title to the subject properties on May 1, 1995. It was then able to provide the necessary access to the work site for the Melrose Avenue bridge reconstruction. On May 8, 1995, DOT ordered Grace to commence work on Phase II, on May 16, 1995.

Grace’s president, Richard Grace, wrote to DOT Commissioner Elliot Sander, acknowledging receipt of the order to commence work. He indicated that Grace “will, of course, proceed with the work.” The letter also indicated that

because of the unanticipated and inordinate delay of such work by the City beyond the maximum two-year delay period from the date of the notice to proceed expressly provided under the contract, the unit prices can no longer be deemed applicable.

The letter further stated that

[i]n order to protect our rights **and** those of the City, we intend to submit daily time **and** material statements for signature by the City’s engineer. Should we not arrive at an agreed price for the work, we will expect to be paid for the cost of work plus a markup of ten percent for overhead, plus ten per cent for profit.

DOT responded, by letter dated July 18, 1995, as follows:

[t]his Department does agree that the land acquisition required to commence work on the Melrose Avenue Bridge was delayed and acknowledges your right to seek compensation as a claim against the City and **as** such, we will sign daily time and material statements.

Thereafter, on August 4, 1995, Grace again wrote to DOT stating “[w]e are hopeful that . . . NYCDOT will reconsider its position and agree to compensate us properly in the manner

outlined in our letter of May 19, 1995.”

Work on the project continued. The City made progress payments to Grace, based on the Contract unit prices, and not on the time and material records.

On June 19, 1997, Grace requested a final inspection for “Substantial Completion,” to occur July 28, 1997. The inspection was performed by DOT, accompanied by Grace personnel, on July 29, 1997. Upon conclusion of the inspection, the Contract was declared substantially completed. On July 31, 1997, Grace was officially notified that the Contract had been declared substantially completed as of July 29, 1997.

On December 18, 1998, plaintiff filed a claim, including a bill of particulars and six volumes of records, with DOT setting forth its claimed damage resulting from defendants’ alleged breach of contract as the result of various delays encountered on the Project. The New York City Comptroller’s office, by letter dated December 29, 1998, responded to the claim as follows:

Please be advised that the subject dispute arises from alleged contract delays and, as such, is not subject to the Dispute Resolution provisions of Contract Number 9236822 and Section 7-05 of the Procurement Policy Rules. Consequently, we will proceed with the investigation pursuant to the authority granted to this Office under Section 93 (i) of the City Charter.

**The Within Action:**

On December 17, 1999, plaintiff commenced this action by filing a summons with notice. On January 5, 2000, defendants served a notice of appearance and demand for complaint. The parties agreed to hold the service of a complaint in abeyance, pending possible adjustment of the claim by the Comptroller’s Office. After several extensions, plaintiff served the instant

complaint on January 31, 2001.

The complaint contains 15 causes of action. Twelve seek damages in the amount of \$4,039,197.29, arising out of project delays. The other three seek lesser amounts. The causes of action are as follows: (1) breach of contract for failing to timely issue the notice to proceed, failing to timely make available the Melrose bridge project site, failing to prepare accurate plans and specifications, failing to compensate Grace for all authorized and conceded extra work performed, and breach of the implied covenants of good faith **and** fair dealing; (2) breach of a contract modification found in the letters, dated May 19, 1995 and July 18, 1995, which converted the Contract from a unit price to time and material payment scheme; (3) breach of the new agreement, regarding time and material as the basis for payment found in the same letters; **(4)** breach of the novation found in the letters to the same effect; (5) quantum meruit; (6) claim for **extra**, changed, protested, or disputed work; **(7)** return of contract retainage held as trust funds; (8) account stated, in the amount of \$133, 517.52; (9) breach of contract with respect to payment of contract retainage; (10) breach of the implied covenant of good faith; (11) an account stated, based on time and material cost of the contract in the sum of \$4,039,197,29; (12) fraud and gross negligence, in that the bid documents contained false representations as to the time required to acquire the right to access the property adjoining the Melrose Avenue bridge; (13) the City abandoned the Contract by not obtaining access to the Melrose Bridge in timely fashion; **(14)** the City intentionally interfered with the completion of the Contract based on the same conduct; and (15) breach of an equitable contract with respect to the Melrose Avenue bridge portion of the Project, which requires payment on time and material basis in fairness to the contractor.

Defendants pleaded several affirmative defenses including, inter alia, the contractual statute of limitations, the no delay damages clause contained in the Contract, lack of compliance with Contract provisions regarding statement of claims, as well as failure to state a cause of action.

**The Statute of Limitations Defense:**

Defendants contend that, under Article 53 of the Contract, entitled “Claims and Actions,” all actions must be brought within four months of accrual, which is the date of substantial completion, and that this action is untimely, as it was commenced two years after the substantial completion date of July 29, 1997, Phillips Construction Co. v City of New York (61 NY2d 949 [1984]). Plaintiff argues that defendants have waived the defense of statute of limitations by not raising it in their answer, and that the defendants are relying on the unamended provision of the Contract, that was increased to six months by subsequent amendment. In addition, plaintiff alleges that when the right to final payment is subject to a condition, such as the Comptroller’s investigation and audit and determination whether to pay, accrual of the action occurs upon the fulfillment of the condition, and that the action would only accrue once the Comptroller refused to issue the check, which occurred after the summons with notice had been filed, John A. Kassner & Co. v City of New York (46 NY2d 544 [1979]).

Plaintiff is incorrect that the defense of statute of limitations was waived by failing to raise it in the answer. A review of defendants’ answer indicates that defendants preserved the defense of statute of limitations by pleading it as the fourth affirmative defense. Plaintiff is also in error regarding amendment of the contractual statute of limitations. The purported amendment does not reference this Contract, as the article and page numbers referenced in the amendment do

not correspond to the appropriate page and article numbers of the Contract. The purported amendment apparently applies to a different contract entirely.

The applicable statute of limitations is found in Article 53 of the Contract, which reads in pertinent **part** as follows:

No action shall lie or be maintained against the City by the Contractor upon any claims based upon this Agreement unless such action be commenced within four (4) months after the date of filing in the Office of the Comptroller of the City of the certificate for the final payment hereunder, or within four (4) months of the termination or conclusion of this Agreement, or within four (4) months after the accrual of the Cause of Action whichever first occurs.

The question that must first be answered is when the action accrued. Did it accrue on the date of substantial completion, as argued by defendants, or did it accrue upon the satisfaction of a condition precedent, the completion of **an** audit, **as** posited by plaintiff? An examination of Article **42** of the Contract indicates that an investigation and audit by the Comptroller are not conditions precedent to the issuance of a final payment, **as** alleged by plaintiff. Here, the investigation and audit were not undertaken as part of the Contract procedures for final payment, but rather under the Comptroller's powers to resolve claims against the City, as provided for in the City Charter. This audit under the authority of the City Charter has no impact ~~on~~ the accrual date of the action, because the audit is not mandated by the Contract. Consequently, the accrual date for the action is the date of substantial completion, in this case, July 29, 1997, see, Phillips Construction Co. v City of New York, 61 NY2d 949, supra; 645 First Avenue Manhattan Co. v Silhouette Drywall Systems, Inc., 212 AD2d 394 (1st Dept 1995).

The accrual of the action, the date of substantial completion, is the earliest of the three

options from which to measure the applicable period of limitations. The other two options had not even occurred when this action was commenced in 1999. Since no legal action was instituted until two years after the accrual date, all claims premised upon the Contract are time-barred under Article 53.

However, the court, before it may dismiss the contract claims, must first consider whether the shortened limitations period of Article 53 is unenforceable, **as** a matter of public policy, because the contractual limitations period is unreasonably abbreviated, Planet Constr. Corp. v Board of Education of the City of New York, 7 NY2d 381 (1960). A contractually shortened limitations period has long been approved and applied for municipal construction contracts. Top Quality Wood Work Corp. v City of New York, 191 AD2d 264 (1st Dept 1993). Soviero Bros. Contracting Corp. v City of New York, 286 App Div 435 (1st Dept 1955), affd 2 NY2d 924 (1957). In the absence of duress, fraud or misrepresentations, provisions as short as 90 **days** have been enforced. Wayne Drilling and Blasting, Inc. v Felix Industries, Inc., 129 AD2d 633 (2d Dept 1987). No allegations of fraud or duress are presented in this case such as to warrant denial of enforcement of the shortened limitations period, to which plaintiff a sophisticated business voluntarily agreed.

The first, seventh, ninth, tenth, **and** thirteenth causes of action are all contract claims that are subject to the shortened statute of limitations, and must be dismissed as time-barred. The remaining causes of action are dismissible for failure to state a claim, or are barred by other Contract provisions.

**The Claim of Amended Contract or Novation:**

The second, third, and fourth causes of action for breach of an amended contract, breach

of a new agreement, or on the theory of a novation, respectively, are all premised upon an exchange of letters. The first letter is dated May 19, 1995, from Richard Grace to DOT Commissioner Sander, and the second is dated July 18, 1995, from Frederick L. Pascopella, DOT Chief Bridge and Roadway Officer to Grace. Plaintiff alleges that these two letters, when read together modify the original Contract from payment on a unit price basis to payment on a time **and** material basis. One of the problems with the claim is that the letters do not establish a meeting of the minds as to the proposed new payment terms. Nowhere in the Pascopella letter does the City acquiesce to Grace's demand to change the payment terms of the original Contract to a time and material basis. The DOT letter merely agrees to have the City engineer sign-off on daily time and material statements. This fact is confirmed in plaintiff's letter of August 4, 1995, which requests that the City reconsider its refusal to adopt the previously proposed scheme to make payments on the basis of time **and** material. The August 4, 1995 letter, contrary to plaintiff's present position that there had been a change in payment terms effected, indicates that plaintiff was well aware that the City had not acceded to its request to reformulate the method of payment. As such, the request for reconsideration constitutes an acknowledgment that the City never agreed to provide payment on the basis of time **and** material. This admission by plaintiff that the City did not agree to the compensation terms proposed, negates the factual premise underlying plaintiff's second, third, and fourth causes of action.

Further, the Contract, itself, in Article 25A, requires that "[a]ny construction contract increase . . . that cumulatively exceed[s] the greater of 10% or \$50,000 shall be approved in writing by the [Mayor's] Office of Construction." There are no allegations that the requisite approval was obtained. Therefore, there is no proof of the purported modified agreement, nor of

a new agreement, nor of a novation presented. These three causes of action, therefore, should also be dismissed.

Likewise, the eleventh cause of action, for an account stated, suffers from the same infirmity, and it, too, must be dismissed. It is premised on the same underlying agreement to convert the Contract from a unit price contract to a time and material payment system. Since there was never a meeting of the minds on this underlying issue, there can be no basis for an account stated, which requires the assent of the City as to the basis for the payment terms, before any bill rendered to the City can be viewed as an account stated. Martin H. Bauman Associates, Inc. v H & M International Transport, Inc., 171 AD2d 479 (1st Dept 1991).

**Quantum Meruit Claim:**

In the fifth cause of action, for quantum meruit, plaintiff seeks the fair and reasonable value of the work, labor, and services performed, **and** materials furnished, because the delays resulting from the City's failure to provide access to the construction sites had the adverse effect of creating higher labor and material costs **than** originally contemplated by plaintiff when it bid on the Contract. Defendant contends that this is just another species of delay damage claim precluded by Article 13 of the Contract, and that, in any event, the existence of a valid contract covering the subject matter of the dispute bars the action.

Article 13 of the Contract provides as follows:

H. 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.

Identical provisions in other City contracts have been construed by the Court of Appeals as to create a bar to any claim against the City for delay damages except in very limited circumstances. Corinno Civetta Construction Corp. v City of New York, 67 NY2d 297 (1986); Kalisch-Jarcho, Inc. v City of New York, 58 NY2d 377 (1983). This provision reflects the parties' intent to have the contractor bear the cost of delays caused by the City. Id. at 749.

Plaintiff alleges in the complaint various theories of recovery which seek to obtain compensation for the increased costs of labor and materials resulting from the delays encountered as a result of the conduct of the City and its representatives. All of the 15 causes of action in the complaint, except for the seventh, eighth, and ninth are delay claims denominated as some other cause of action. The Court of Appeals in Corinno Civetta has held that, even if the claim is denominated under a different theory but seeks delay damages, it is subject to the parties' agreement in Article 13 that the remedy for delay would be an extension of time, rather than damages.

Corinno Civetta carves out four exceptions to the bar against delay damages. The exceptions where damages will still be available are:

- (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, 67 NY2d at 309.

Grace has the burden of establishing that the delays claimed in the complaint fall within one of the enumerated exceptions. It has not met this burden.

In Kalisch-Jarcho, Inc., v City of New York, 58 NY2d 377, 385, the Court of Appeals

defined the type of situations in which the bad faith, willful misconduct, or gross negligence exception would be applicable

when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit.

There is no evidence that the City's conduct reached the level of bad faith defined in Kalisch-Jarcho v City, supra, so as to warrant a finding that the City acted in bad faith or was willful, malicious, or grossly negligent. At best the City's failure to proceed with the contract resulted from "ordinary negligence" that "fall[s] well within the scope of the . . . exculpatory clause." Buckley & Co. v City of New York, 121 AD2d 933 (1st Dept 1986), appeal dismissed 69 NY2d 742 (1987).

Whether a delay is contemplated by the parties will depend upon if it is reasonably foreseeable, if it is due to circumstances mentioned in the contract, or it arises from the contractor's work performing the contract. Corinna Civetta Construction Corp. v City of New York, 67 NY2d 297, 310, supra. Here, the delay regarding the Melrose bridge portion of the Project was specifically mentioned in the bidding documents, and was anticipated because, at the time the Contract was bid, the City did not have access to the property, The notice to bidders provides as follows:

Property acquisition for reconstruction of the Melrose Avenue bridge is in progress as the contract goes to Bid. The successful bidder shall be permitted to work only on the East 165th Street portion of the project until the acquisition process is completed. At that time authorization will be given by the NYCDOT to

proceed on the Melrose Avenue portion of the project. This acquisition process may take as long as two years to complete from the notice to proceed.

In the event that the acquisition process cannot be successfully completed, the NYCDOT reserves the right to delete from the contract the items and quantities of work which are directly related to the Melrose Avenue bridge. The successful bidder shall not be entitled to compensation as a result of this delay or possible exclusion of the Melrose Avenue bridge portion of the project from the contract.

Defendants contend that this provision indicates that the delays occasioned by the acquisition process were clearly contemplated by the parties. Plaintiff argues that this provision only covers a two-year period of delay from the notice to proceed, and that damages for delay beyond the two years is what is sought in this action. Defendants maintain that the two years cited in the provision must be read in context, and serve as an estimate, and not a promise. **A** similar provision, in North Star Contracting Corp. v NYC Transit Authority (Sup Ct, NY County, April 16, 1991, DeGrasse, J., Index No.14258/88), was found, when read in context, to be an estimate, and the court held that the delay thereunder was, in fact, contemplated. Taking the entire provision into consideration, the same result should occur here. The bid documents served as a warning that the City did not have access to the property, and that the process of acquiring it might take some time. The delay attributable to that process was clearly contemplated by the parties in their Contract.

For the abandonment exception to apply, plaintiff must establish that the delays are so unreasonable as to constitute a relinquishment of the Contract with the intention of never resuming it. Corinno Civetta Construction Corp. v City of New York, 67 NY2d 297, 312-13, supra. Plaintiff does not demonstrate that the City intended to never resume the contract. **A**

review of the correspondence makes it clear that, while the work was delayed the City always expected the plaintiff to commence work shortly upon the City's obtaining the appropriate and necessary contracts for Phase I, and ownership of the property for Phase II. Once these events occurred, the City expected Grace to complete the work, and Grace did so. There was no abandonment,

Plaintiff has not established the breach by the defendants of a fundamental, affirmative obligation imposed on them expressly under the agreement. Id., at 313. Since the notice to bidders sets forth an estimate of the time needed to acquire the property, and provides its own remedy for failure to do so, there is no express obligation of the Contract that has been breached, since such delay was contemplated by the parties.

Plaintiff has failed to demonstrate that this case falls within one of the exceptions to the no damages-for-delay clause. Article 13 controls what claims may be allowed. That being so, an action in quasi contract for quantum meruit, which negates the express terms of the Contract, cannot stand. Clark-Fitzpatrick, Inc. v Long Island Rail Road Co. (70 NY2d 382, 389 [1987]).

Plaintiff did not timely rescind the Contract, but rather, after the purported breach, continued to perform to completion, receiving progress payments on the way. Once plaintiff has accepted the benefits of the Contract, any "assertion of a repudiation of the contract is nullified." Tibbetts Contracting Corp. v O & E Contracting Co., 15 NY2d 324, 338 (1965). In the absence of a rescission or repudiation of the Contract, plaintiff may not use quantum meruit to circumvent, and "a court will not make an inference of any implied agreement which is destructive of, the express terms of the parties' contract." North Star Contracting Corp. v City of New York, 203 AD2d 214, 215 (1st Dept 1994). The fifth cause of action, for quantum meruit,

is therefore dismissed.

**Gross Negligence and Fraud Claim:**

The twelfth cause of action, for fraud or gross negligence, must be dismissed. The fraud alleged consists of the representation that the acquisition of the Melrose Avenue bridge property would be accomplished within two years, that it was known to be false at the time it was made and which was relied upon by plaintiff to set the price of its bid. Plaintiff does not state this claim with the requisite particularity required by CPLR 3016 (b). In particular, plaintiff fails to assert facts to support its conclusion that the City knew that it could not acquire the property in timely fashion when it entered into the Contract. In fact, the documents indicate that several attempts were made to obtain an easement, then a legal action to prevent the performance of the Contract was commenced by a third party, and that settlement overtures were declined. Had any of these attempts been successful, the property could have been available in timely fashion. Defendants did not meet the expectations of their estimate as to the time for completion of the property acquisition. At worst, this is a failure to perform the written Contract, clearly a contract claim, and not an action for fraud.

To maintain an action for fraud or misrepresentation, where a contract has also been alleged to have been breached, plaintiff must allege that (1) there is a duty separate from, or independent of, those imposed by the contract; (2) the misrepresentation is collateral or extraneous to the contract; or (3) special damages are sought which were caused by the misrepresentation, and are unrecoverable as contract damages. Krantz v Chateau Stores of Canada Ltd., 256 AD2d 186 (1st Dept 1998). Plaintiff does not satisfy any of these criteria. The fraud claim must be dismissed, since the only fraud alleged relates to the breach of contract.

Noli-Linear Trading Co. v Braddis Associates, Inc., 243 AD2d 107 (1st Dept 1998).

**Intentional Interference with Contract:**

The fourteenth cause of action, for intentional interference with contract, suffers from the same malady. Plaintiff cannot convert a breach of contract into a tort claim without pleading and establishing the additional necessary facts set forth above. Moreover, a party to a contract, or one acting on its behalf, cannot, in any event, interfere with its own contract. Tri-Delta Aggregates, Inc. v Goodell, 188 AD2d 1051 (4th Dept 1992), lv denied 82 NY2d 653 (1993).

In addition, defendants also contend that all of the claims for delay damages, whether denominated as such, are subject to Articles 42 and 53 of the Contract. Specifically, defendants assert that, in order to state a claim, Article 53 requires that plaintiff comply with the notice procedures set forth in Article **42**, and that plaintiff has not done so, warranting dismissal. Plaintiff has argued that it has complied with these provisions, or alternative procedures, as agreed to by the parties. Grace points to the agreement to provide daily time and material statements that were signed-off on by the City Engineer, as superceding these requirements.

Article 53 provides, in pertinent **part**, as follows:

No claim against the City for damages for breach of contract or compensation for extra **work** shall be made or asserted in any action or proceeding at law or in equity, unless the contractor shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims all as hereinbefore provided.

Article **42** requires that the contractor submit with the final payment requisition a verified statement of claims, and reads as follows:

The Contractor must submit a final verified statement of any and all alleged claims against the City, in any way connected with or arising

out of this contract . . . setting forth with respect to each such claim the total amount thereof, the various items of labor and materials included therein, and the alleged value of each such item; and if the alleged claim be one for delay, the alleged cause of each such delay, the period or periods of time, giving the dates, when the contractor claims the performance of the work, or a particular part thereof, was delayed, **and** an itemized statement and breakdown of the amount claimed for each such delay.

On October 27, 1997, Grace filed with DOT a request for a final extension of time, which included a verified bill of particulars setting forth Grace's claims against the City. This verified bill of particulars does not comply with Article 42 in several important respects. This action seeks to recover damages for three delays -- the delay in the initial notice to proceed, the delay in the property acquisition of the Melrose Avenue bridge site, and the winter weather shutdown. The bill of particulars does not distinguish between the various delays, but rather, lumps all the delays into the Melrose bridge portion of the project, and lumps all the damages into a total cost claim related only to the work on the Melrose Avenue bridge.

Article 42 requires that each delay should have been separately stated, giving the specific dates that work was unable to proceed, and including an itemized breakdown of the amounts claimed for each specific delay. No attempt was made to comply with this procedure. In fact, the information provided by plaintiff in the bill of particulars is misleading, in that it attributed Phase I delay to Phase II of the Contract.

**As** noted above, the City directed the plaintiff to submit daily time and material statements to the City engineer, who then signed-off on them. This additional procedure does not convert the written Contract from its unit price basis to a time and material contract. Nowhere **did** the City agree in writing to waive the provisions of Article 42. Plaintiff was required to

---

To recap, each of the 15 causes of action is dismissed for one or more reasons cited above.

Accordingly, it is

ORDERED that plaintiffs motion for partial summary judgment is denied; and it is further

ORDERED that the defendants' motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 19, 2004      ENTER:

*Ann Cole*  
J.S.C.      FILED

JUL 23 2004  
COUNTY CLERK'S OFFICE  
NEW YORK