

**ADC Contracting & Construction, Inc. v Town of
Southampton**

2004 NY Slip Op 30267(U)

July 28, 2004

Supreme Court, Suffolk County

Docket Number: 31308-02

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

ADC CONTRACTING & CONSTRUCTION, INC.,

MOTION DATE: 4-16-04
SUBMITTED: 5-19-04
MOTION NO.: 002- MOT D

Plaintiff,

-against-

KUSHNICK & ASSOCIATES, P.C.
Attorneys for the Plaintiff
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Melville, New York 11747

THE TOWN OF SOUTHAMPTON, VINCENT
CANUSCIO, PATRICK A. HEANEY, LINDA A. KABOT,
STEVE KENNEY, DENNIS A. SUSKIND, CAROLYN
ZENK, all in their individual capacities as members of the
Town Board of the Town of Southampton, CRAIG
FULLER, in his individual capacity and his official
capacity as the Town Comptroller of the Town of
Southampton, RICHARD J. BLOWES, in his individual
capacity as the Town Management Services Administrator
of the Town of Southampton,

O'BRIEN & O'BRIEN, LLP
Attorneys for the Defendants
168 Smithtown Blvd.
Nesconset, New York 11767

Defendants,

_____ X

Upon the following papers numbered 1 to 22 read on this motion for partial summary judgment; Notice of Motion and supporting papers 1-12; Notice of Cross Motion and supporting papers 13-20; Answering Affidavits and supporting papers ; Replying Affidavits and supporting Papers 21-22; it is,

ORDERED that the motion (#002) by defendants for an order pursuant to CPLR 3212 granting them partial summary judgment is decided as follows.

Plaintiff commenced this action to recover damages arising from a construction contract with defendant Town of Southampton to perform certain general construction for the Town of Southampton Animal Shelter located in Red Creek Park, Hampton Bays, NY. Plaintiff filed its notice of claim, dated April 23, 2002, against defendant Town, pursuant to Town Law §65, seeking

monies allegedly due and owing on the contract and changes performed by plaintiff. Defendants seek partial summary judgment dismissing that portion of plaintiff's first cause of action which seeks compensation for alleged extra work and the remaining causes of action, including the claim for punitive damages and the claims asserted against defendants in their individual capacities.

Plaintiff's first cause of action is for breach of contract, including claims for change orders and extras; the second cause of action is for breach of contract/delay expenses; the third cause of action is for breach of contract/surety damages; the fourth cause of action is for breach of contract/retainage; the fifth cause of action is for tortious violation of Article 3-a of the New York State Lien Law; the sixth cause of action is for fraud and misrepresentation; the seventh cause of action is for fraudulent inducement to contract; the eighth cause of action is for breach of quasi contract/unjust enrichment; the ninth cause of action is for an account stated; the tenth cause of action is a breach of the implied covenant of good faith and fair dealing; and the eleventh cause of action is for an accounting.

Plaintiff argues that many of the problems with the construction project can be traced to the Town's decision to act as its own general contractor. The Town entered into separate contracts with the plaintiff as a construction contractor, a plumbing contractor and an electrical contractor.¹ Therefore, it was the Town's responsibility to supervise and coordinate the various trades. Plaintiff argues that the Town's representatives lacked the requisite experience and qualifications for commercial construction which resulted in, among other things, interference and hindrance in its ability to orderly and efficiently perform under the contract, as well as lack of coordination among and between the various trades. The lack of supervision and coordination resulted in delays as well as additional work, which increased plaintiff's costs. Plaintiff states that the extra work or changed work was performed at the direction of the Town's representatives. Sometimes the signed written change orders were negotiated and exchanged, and sometimes the written change order was anticipated but then did not materialize.

Defendants' initial argument is that plaintiff's notice of claim is insufficient because it contains only the breach of contract claims and not any of the tort claims. It is well-settled that a breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated; such duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract (*Clark-Fitzpatrick, Inc. v Long Island Rail Road Co.*, 70 NY2d 382, 512 NYS2d 653 [1987]). Here, the Court finds that plaintiff's causes of action sounding in fraud, fraudulent inducement to contract and unjust enrichment are based upon the defendants' breach of the contract and "no wrong independent of the contract has been demonstrated" or alleged (*Walter H. Poppe General Contracting v Town of Ramapo*, 280 AD2d 667, 721 NYS2d 248 [2001]).

Plaintiff alleges that a portion of the funds allocated to the construction of the Animal

¹ The Town's exhibit "c" encompasses hundreds of pages of proposals, bids, and contract language. Its initial title is Contract No. 1- General Construction. The court assumes that this unsigned document is the contract at issue.

Shelter were in the form of private donations which were not received by the Town as of the date that the bids were accepted and contracts were entered into. Plaintiff alleges this represents a violation of Article 3-a of the Lien Law. Further, plaintiff argues that this lack of pre-contract funds may invalidate the contract, thereby making quantum meruit, an account stated, and an accounting, appropriate remedies. Plaintiff also alleges that the Town knew that an adequate segregation of funds had not occurred and that there was a distinct possibility that any successful bidder would not receive full payment. Therefore, plaintiff argues when the Town solicited bids and awarded the contract to ADC, said behavior constituted fraud, collusion, material misrepresentation and/or fraudulent inducement to contract. Plaintiff relies upon this argument to assert that punitive damages may, therefore, lie against the Town and the individual defendants.

However, “the State and its political subdivisions are not subject to punitive damages” (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co., supra* at 389; *Sharapata v Town of Islip*, 56 NY2d 332, 452 NYS2d 347 [1982]). Moreover, plaintiff has not alleged that defendants “made unauthorized, illegal, unjustified and improper payment(s) and diversion of trust funds by operation of law,” and that the defendants diverted the statutory trust funds in violation of Lien Law §77. The Court is unpersuaded by plaintiff’s argument that the general provision of §77 (3)(a) (ix) which provides for “such other relief as to the court may seem necessary and proper” would permit an award of punitive damages. Further, plaintiff’s allegations do not rise to the level of malicious or outrageous conduct or a wrong to the general public sufficient to support a claim for punitive damages (*Zurich Ins. v Shearson Lehman Hutton*, 84 NY2d 309, 316, 618 NYS2d 609 [1994]; *Pearlman v Friedman Alpren & Green LLP*, 300 AD2d 203, 750 NYS2d 869, [2002]; *but see, Sabol & Rice, Inc. v Poughkeepsie Galleria Co.*, 147 Misc2d 641, 557 NYS2d 253 [1990] *affd* 175 AD2d 555 [1991]).

Plaintiff’s allegations and complaint, considered as a whole, allege wrongdoing of the individual defendants amounting to failure to obtain promised change orders, a lack of expertise and experience in commercial construction and coordination of trades, and failure to properly and timely obtain permits and donations. These wrongdoings, if established, consisted of nonfeasance or a failure to execute a duty owed to their principal, the Town, for which they are not liable to third parties (*Walter H. Poppe Gen. Constr., Inc. v Town of Ramapo, supra*). Accordingly, plaintiff’s tort-based causes of action, numbers five through eleven, are dismissed, as well as so much of the complaint as asserts causes of action against the individual members of the Town Board, the Town Comptroller and the Town Management Services Administrator.

Breach of Contract/Delay Damages

The contract provides at pages 19-20:

8. EXTENSIONS OF TIME, NO WAIVER

If the Contractor shall be delayed in the completion of his work by reason of unforeseeable

causes beyond his control and without his fault or negligence, including but restricted to, acts of God or of the public enemy, fires, floods, epidemics, quarantine restrictions, strikes, riots, civil commotion or freight embargoes, the period herein above specified for completion of his work shall be extended by such time as shall be fixed by the Owner.

No such extension of time shall be considered a waiver by the Owner of its right to terminate the Contract for abandonment or delay by the Contractor as hereinafter provided, or relieve the Contractor from full responsibility for performance of his obligations hereunder.

Where Contractor is prevented from completing work due to a delay beyond his control, *an extension of the time to complete the specific task shall be Contractor's sole and exclusive remedy for such a delay.* In no event shall Owner be liable to Contractor, any subcontractor or supplier [or] any other person or organization for damages arising out of or resulting from delays caused by or within the control of the contractor or delays beyond the control of the contractor. (emphasis added)

It is well settled that clauses in construction contracts which bar contractors from recovering damages for delay in the performance of the contract are generally valid and enforceable (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309, 502 NYS2d 681 [1986]). There are exceptions to this general rule, and a clause which purports to preclude damages for all delays resulting from any cause whatsoever will not be read literally (*id.* at 309). Therefore, even where a contract includes a provision barring damages for delay, "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" (*id.*). However, the gravamen of plaintiff's delay allegations relate to defendants' "poor planning and scheduling" which amounted to, at worst, "inept administration within the scope of the no-damages-for-delay clause" and, as such, fall within the exculpatory provisions in the contract (*T.J.D. Constr. Co. v City of New York*, 295 AD2d 180, 743 NYS2d 111 [2002]; *S.N. Tannor, Inc. v A.F.C. Enterprises, Inc.*, 276 AD2d 363, 714 NYS2d 273 [2000]). Accordingly, plaintiff's second cause of action for breach of contract/delay damages is also dismissed.

Breach of Contract/Additional Work

Defendants' argue that plaintiff failed to comply with conditions precedent in that plaintiff failed to execute a written change order or written modification based upon alleged discrepancies in the specifications and, therefore, is not entitled to payment for any additional work.

Section 01250 of the contract provides for contract modification procedures. It provides for minor changes at subsection 1.3 and proposal requests at 1.4 as follows.

A. Owner-Initiated Proposal Requests: Architect will issue a detailed description of proposed changes in the Work that may require adjustments to the Contract Sum or the Contract Time.

* * *

2. Within 14 days after receipt of Proposal Request, submit a quotation estimating cost adjustments to the Contract Sum and the Contract Time necessary to execute the change.

B. Contractor-Initiated Proposals: If latent or unforeseen conditions require modifications to the Contract, Contractor may propose changes by submitting a request for a change to the Project Coordinator.

* * *

1.5 CHANGE ORDER PROCEDURES

A. On Owner's approval of a Proposal Request, Architect will issue a Change Order for signatures of Owner and Contractor.

1.6 CONSTRUCTION CHANGE DIRECTIVE

A. Construction Change Directive: Architect or Project Coordinator may issue a Construction Change Directive. Construction Change Directive instructs Contractor to proceed with a change in the Work, for *subsequent inclusion* in a Change Order. (emphasis added)

While defendants have offered proof that plaintiff did not comply with all the provisions of the notice and documentation requirements, the contract did not explicitly require plaintiff to strictly comply with its terms, nor did it include a provision prohibiting estoppel or waiver on the part of the Town (*G. De Vincentis & Son Constr., Inc. v City of Oneonta*, 304 AD2d 1006, 1008, 759 NYS2d 216 [2003]; *A.H.A. Gen. Constr. Inc. v New York City Hous. Auth.*, 92 NY2d 20, 677 NYS2d 9 [1998]). Moreover, while an exculpatory clause will not be enforced when, "in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing" (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385, 461 NYS2d 746 [1983]), the standard for excusing a condition precedent is different. A condition precedent is linked to the implied obligation of a party not to "do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Kirke La Shelle Co. v Paul Armstrong Co.*, 263 NY 79, 87 [1933]). Thus, "a party cannot insist upon a condition precedent, when its non-performance has been caused by himself" (*Young v Hunter*, 6 NY 203, 207 [1852]; see also, *Arc Elec. Constr. Co. v George A. Fuller Co.*, 24 NY2d 99, 104, 299 NYS2d 129 [1969]), and a party to a contract "cannot rely on the failure of another to

perform a condition precedent where he has frustrated or prevented the occurrence of the condition" (*Kooleraire Serv. & Installation Corp. v Board of Educ.*, 28 NY2d 101, 106, 320 NYS2d 46 [1971]). Here, the plaintiff has submitted written correspondence with defendants and testimony from defendants' examinations before trial sufficient to raise questions of fact as to whether defendant Town had actual knowledge of plaintiff's additional work claims and whether defendants, through the conduct of its agents, waived its right to insist upon strict compliance (*G. De Vincentis & Son Constr., Inc. v City of Oneonta, supra*; *A.H.A. General Constr. Inc. v New York City Hous. Auth., supra*).

Accordingly, defendants' motion for summary judgment as to this issue is denied, and plaintiff's first, third and fourth causes of action are severed and shall continue (*see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Fabbricatore v Lindenhurst Union Free Sch. Dist.*, 259 AD2d 659, 686 NYS2d 822 [1999]).

DATED: July 28, 2004

HON. ELIZABETH HAZLITT EMERSON
J. S.C.