

Metropolitan Steel Industries, Inc. v Perini Corporation

2005 NY Slip Op 30147(U)

March 14, 2005

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

PRESENT: Cahn
Justice

PART 4am

Metropolitan Steel Industry

INDEX NO.

104341/02

MOTION DATE

1/10/05

MOTION SEQ. NO.

009

MOTION CAL. NO.

- v -

Peoni Corporation Et al

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

FILED

MAR 15 2005

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS REFERRED IN ACCORDANCE
WITH THE ORDER AND
RECOMMENDATION OF THE JUSTICE... ..

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 3/14/05

Hen Col
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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.

FILED
MAR 15 2005
NEW YORK
COUNTY CLERK'S OFFICE

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. Plaintiff Metropolitan Steel Industries, Inc. d/b/a Steelco initiated 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. The action is for breach of contract, seeking to recover the unpaid balance of its contract work, as well as certain additional and extra work it rendered in connection with the Project.

By decision and order dated November 30, 2004, this Court granted Perini's motion for partial summary judgment, and dismissed Steelco's claims for delay damages, on the ground that Section 2.07 (a) of the Prime Contract between Perini and the NYCTA constituted a no-damages-for-delay provision, which barred Steelco's recovery of any delay damages.

In the Decision, this Court specifically rejected Steelco's claim that Section 4.2 of its subcontract with Perini does not constitute a no-damage-for-delay provision, holding that any arguments with respect to Section 4.2 were irrelevant, because the Prime Contract's no-damage-for-delay clause, which was specifically incorporated by reference into the Subcontract, unequivocally barred the delay claims asserted by Steelco in this action. The Court also rejected Steelco's arguments that its claims were 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 Subcontract; (2) were not contemplated at the time Steelco entered into the Subcontract; and (3) were caused by Perini's bad faith, willful misconduct or gross negligence, on the ground that Steelco failed to raise a genuine issue of material fact with respect to these contentions.

Steelco now moves for reargument and renewal of the prior motion, CPLR 2221 (d) and (e).

A motion for reargument is addressed to the sound discretion of the court, and may be granted upon a showing that the court overlooked or misapprehended the facts or law, or misapplied any controlling principle of law (see McGill v Goldman, 261 AD2d 593 [2d Dept 1999]; Opton Handler Gottlieb Feiler Landau & Hirsch v Patel, 203 AD2d 72 [1st Dept 1994]). It is not designed to provide the unsuccessful party with successive opportunities to again argue the

very issues previously decided (see William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 [1st Dept], lv dismissed in part, denied in part 80 NY2d 1005 [1992]; Bliss v Jaffin, 176 AD2d 106 [1st Dept 1991]; Foley v Roche, 68 AD2d 558 [1st Dept 1979]).

The motion for reargument is denied. Steelco's moving papers do not identify anything overlooked or misapprehended by the Court that justifies granting leave to reargue. Rather, Steelco's papers merely restate the same arguments already rejected by the Court, or set forth new arguments that are not appropriate for resolution on reargument.

In support of its motion for reargument, Steelco once again argues, as it did in its original opposition papers, that its claims for damages resulting from delay are not barred either by Section 2.07 (a) of the Prime Contract, or Section 4.2 of the Subcontract. Moreover, repeating the very same arguments that were raised in its prior opposition papers, Steelco once again contends that Perini's summary judgment motion should have been denied, because the facts underlying Steelco's claims for delay damages fall within three of the four exceptions to the general enforceability of a no-damage-for-delay provision, as enunciated by the Court of Appeals in Corinno Civetta Constr. Corp. v City of New York, 67 NY2d 297 [1986]). Thus, Steelco merely rehashes the same arguments that were originally presented, and rejected on the prior motion, which is insufficient to grant a motion for reargument (see Pro Brokerage, Inc. v Home Ins. Co., 99 AD2d 971 [1st Dept 1984]; Foley v Roche, 68 AD2d 558, supra). In any event, Steelco fails to demonstrate that the Court overlooked or misapplied any controlling principle of law in granting the cross motion for summary judgment (see CPLR 2221 [d] [2]; Daluise v Sottile, ___ AD3d ___, 2005 WL 469315 [2d Dept 2005]; Armstead v Morgan Guar. Trust Co. of New York, 13 AD3d 294 [1st Dept 2004]).

Steelco also advances several new arguments in support of its motion for reargument. To give just a few examples, Steelco now contends, for the first time, that its delay claims are actually changes to its scope of work, and should therefore be treated as “Changes,” which are compensable under Paragraph 5 of the Steelco Scope of Work Rider, and that its inefficiency claims are not time related, and therefore, not barred by the no-damage-for-delay provisions of the Subcontract.

Steelco also asserts that the Court overlooked the fact that Perini breached the affirmative obligations expressly imposed upon Perini pursuant to two sections of the Subcontract: (1) Paragraph 3(A)(1) of the Steelco Scope of Work Rider; and (2) Specification Section 5A, ¶ 1.3(b). In its original opposition papers, however, Steelco never argued that Perini’s breach of a fundamental affirmative obligation was based upon these two provisions, and it did not even provide the Court with a copy of Specification Section 5A.

Steelco further asserts, for the first time, that the Court overlooked Perini’s alleged bad faith and gross negligence, as demonstrated by a letter from the NYCTA dated August 4, 2000, and by Perini’s willful withholding of information regarding the ongoing development of the Project foundation and curtain wall.

However, these arguments are completely devoid of merit, as a motion for reargument is not a vehicle for parties to “advance arguments different from those tendered on the original application” and “may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion” (Foley v Roche, 68 AD2d, at 568; see also CPLR 2221[d]; 85-10 34th Ave. Apartment Corp v Nationwide Mut. Ins. Co., 283 AD2d 604 [2d Dept 2001]; Rubinstein v Goldman, 225 AD2d 328 [1st Dept], ly

denied 88 NY2d 815 [1996]). Moreover, Steelco offers no reasons why these arguments were not raised in its original motion papers (see Hua Nan Commercial Bank, Ltd. v Albicocco, 270 AD2d 265 [2d Dept 2000]).

Steelco's motion for leave to renew is also denied. "It is well-settled that a motion for leave to renew must be supported by new or additional facts which, although in existence at the time of the prior motion, were not known to the party seeking renewal, and, consequently, not made known to the court" (Brooklyn Welding Corp. v Chin, 236 AD2d 392, 392 [2d Dept 1997], citing Foley v Roche, 68 AD2d 558, *supra*; see also Palmer v Toledo, 266 AD2d 268 [2d Dept 1999]). Such new facts must be material to the outcome of the proceeding (see Cerro v Washington County Bd. Of Supervisors, 270 AD2d 679 [3d Dept], appeal dismissed 95 NY2d 887 [2000]; Town of Poestenkill v New York State Dept. of Environmental Conservation, 229 AD2d 650 [3d Dept 1996]).

Where new or additional facts contained in a renewal motion were known to the movant at the time the original motion was made, the renewal evidence must be accompanied by a valid explanation for failing to present those facts at that time (see Miller v Fein, 269 AD2d 371 [2d Dept], lv dismissed 95 NY2d 887 [2000]). The absence of a valid explanation for failing to present the renewal facts at the time of original motion is grounds for denial (see Natale v Jeffrey Samel & Assocs., 264 AD2d 384 [2d Dept 1999]).

Steelco seeks leave to introduce two project records and two interrogatory responses that were not submitted on the prior motion, contending that such documents raise material issues of fact that warrant denial of Perini's motion for summary judgment. Steelco asserts that these "new" documents were not submitted with its original opposition because, due

to the “nature of motion practice in New York,” it was not readily apparent that such documents were even necessary until after Steelco received Perini’s reply papers (Steelco’s Mem of Law, at 6). Specifically, Steelco argues that Perini’s initial moving papers were deceptively brief, having merely relied upon the express language of the no-damage-for-delay provision of the Steelco Subcontract, but that Perini’s reply papers were far more thorough and extensive. Steelco argues that it was not, however, permitted to rebut these detailed arguments with the documents it now seeks to submit, because the CPLR prohibits a sur-reply.

The Court rejects Steelco’s explanation for its failure to submit the documents with its original opposition papers. If this excuse were accepted by the Court, the Court would be required to grant leave to renew to the opposing party in every such motion.

Accordingly, the motion to renew is denied, as the new documents that Steelco seeks to submit were readily available on the original motion (see CPLR 2221 [e] [2]; Dahlin v Paladino, 14 AD3d 647 [2d Dept 2005]), and Steelco does not offer a reasonable justification for not presenting such documents on the prior motion (see CPLR 2221 [e] [3]; Interpublic Group of Companies v National Union Fire Ins. Co. of Pittsburgh, PA, 8 AD3d 169 [1st Dept 2004]; Aviles v San Rafael Cooperativa de Ahorro y Credito, 7 AD3d 431 [1st Dept], lv dismissed 4 NY3d 739 [2004]).

In any event, even if the Court were to consider these documents, it would adhere to the prior determination, as Steelco fails to demonstrate that the new facts would have warranted a different result (see Kaufman v Kunis, 14 AD3d 542 [2d Dept 2005]; Herrera v Matlin, 4 AD3d 139 [1st Dept 2004]).

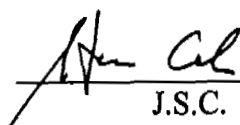
The Court has considered the remaining claims, and finds them to be without

merit.

Accordingly, the motion for reargument and renewal is denied. The foregoing constitutes the order and decision of this Court.

Dated: March 14, 2005

ENTER:



J.S.C.

FILED
MAR 15 2005
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