

Trocom Constr. Corp. v City of New York

2006 NY Slip Op 30588(U)

December 15, 2006

Supreme Court, New York County

Docket Number: 603566/03

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER

PART 5

Index Number : 603566/2003

TROCOM CONSTRUCTION

vs
CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 _____

sur reply
Cross-Motion: Yes No

PAPERS NUMBERED	
_____	<u>1, 2, 3</u>
_____	<u>2, 3</u>
_____	<u>4, 5</u>
_____	<u>6, 7</u>

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 22 2006
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 12/15/06

Eileen A. Rakower
EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 5

-----X
TROCOM CONSTRUCTION CORP.,

Plaintiff,

Index No.
603566/03

- against -

Decision and Order

THE CITY OF NEW YORK,

FILED
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Defendant.
-----X
HON. EILEEN A. RAKOWER

Trocom Contruction Corp. ("Trocom") entered into a contract with The City of New York ("City") wherein Trocom was to perform soil borings to locate and determine the size of underground voids and backfill those voids. Pursuant to the agreement, Trocom asserts that the contract provided for incentive payments for early completion. Trocom was not eligible for a \$600,000 incentive for work completed on a portion of the project. Trocom asserts it was damaged in this amount, because City was solely responsible for the disqualifying delays.

Trocom made a second claim for additional work it performed as a result of City's modifications to the originally proposed boring operations. That claim was severed from the delay claim, and adjudicated before the Contract Dispute Resolution Board ("CDRB"). Ultimately, the claim for additional work was resolved by a determination granting Trocom additional compensation totaling \$185,360.42.

City now moves for summary judgment pursuant to CPLR 3212, dismissing Trocom's claim for \$600,000. Trocom cross moves for summary judgment, alleging that there exist no issues of material fact, and it is entitled to judgment as a matter of law.

To grant summary judgment it must clearly appear that no material and triable issue of fact exists. The party opposing the motion must demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue.

The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

The parties provide the standard construction contract between them, acknowledged by Trocom on January 17, 2001 and acknowledged by the Commissioner of Deeds on January 29, 2001, which called for reconstruction of Avenue of the Americas from West 56th Street to Central Park South for a total amount of \$10,445,770.46. That contract contained provisions for incentive payments. Specifically, these included \$10,000 per day up to a maximum of \$600,000 for early completion of work by Trocom on the East side of Sixth Avenue and a similar incentive for early completion of work on the West side of Sixth Avenue. Trocom received the \$600,000 maximum bonus for its early completion of the work on the East side of Sixth Avenue.

Pursuant to the terms of the contract, the incentive was payable if relevant work was completed within 30 consecutive calendar days from placement of maintenance and protection of traffic devices. Trocom concedes that it failed to meet this 30-day deadline, and thus, was not paid the \$600,000 lump-sum additional payment for the West side work. However, Trocom argues that the work delay was caused by City's Department of Design and Construction ("DDC"). Essentially, Trocom urges that it was deprived of this incentive by City's "bad faith, willful, malicious or grossly negligent conduct."

Specifically, City required additional work to be done, boring through boulders, delaying completion. Not only was the boring through boulders not anticipated in the original agreement, but the equipment necessary to proceed was ultimately modified as well. This requirement that Trocom bore through boulders was the subject of litigation before the CDRB.

The objective of contract interpretation is to determine "what is the intention of the parties as derived from the language employed" *Hartford Accident & Indemnity Co. v. Wesolowski*, 33 N.Y.2d 169, 171-172, 350 N.Y.S.2d 895, 305 N.E.2d 907. Clear and unambiguous terms should be understood in their plain, ordinary, popular and non-technical meaning. Where the language is plain and unambiguous, extrinsic circumstances should not be considered to determine the intention of the parties (*Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 459, 161 N.Y.S.2d 90, 141

N.E.2d 590; *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 77, 430 N.Y.S.2d 179)." *Lopez v. Fernandito's Antique, Ltd.*, 760 N.Y.S.2d 140 (A.D. 1st Dept. 2003)

Trocom claims that the delays in completing the West side work were occasioned by negotiations with City regarding how the work should proceed. Contrary to the provisions of the contract itself, Trocom was instructed to bore through boulders, which necessitated using an alternative means of executing the project not contemplated by the standard form agreement. The CDRB concluded that such changes were compensable as additional work under the contract. Trocom now seeks damages for the delay which precluded it from earning the incentive bonus.

City argues first that Trocom cannot attempt to collect the incentive bonus by way of delay damages. Secondly, Trocom is not entitled to the bonus as it did not complete the work within the time strictly specified in the contract.

The contract at section 13.10 specifically states that:

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 all it may be entitled to on account of any such delay is an extension of time to complete performance of the Work as provided herein.

Trocom claims that there are four exceptions to a "no damage for delay" clause:

a) delays caused by the contractee's [here, the City] bad faith or willful, malicious or grossly negligent conduct; b) delays unanticipated by the parties; c) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee; and d) delays resulting from the contractee's breach of a fundamental obligation of the contract. *Corinno Civetta Construction Corp. v City of New York*, 67 NY2d 297, 309, 502 NYS2d 681, 686 (1986) . . . (Carbone Affirmation paragraph 13).

It argues that changing the terms of the contract to require Trocom to bore through boulders as opposed to avoiding them was unreasonable and grossly negligent.

[* 5]

The question of whether Trocom was required to bore through boulders was the subject of a contract dispute settled by the CDRB. The panel found:

The language in the contract specifications reasonably led the contractor to the conclusion that boulders would not necessarily have to be penetrated in order to complete the requirements to obtain soil samples and videotape the subsurface conditions. Thus the instruction to the contractor to bore through the boulders was a contract change which required additional compensation.

The background underlying the changes is important. The dispute arose when Trocom's original subcontractor, Universal, began boring into the surface, with the objective specified in the contract, that it would bore holes 4 inches in diameter and 30 feet deep. Where Universal encountered an obstruction, it abandoned the hole and declared it a "false start." City objected to declaring these holes false starts and insisted that Universal penetrate the resistance. Trocom, in the midst of the controversy over whether the contract required it to bore through boulders or start new holes, changed subcontractors. The new subcontractor convinced the City to allow it to use different equipment than that specified in the contract, and City abandoned the requirement that Trocom videotape the subsurface conditions.

The determination of the CDRB settles the issues argued and decided therein. Thus, the City's insistence that Trocom bore through boulders, forego videotaping, and use equipment different from that designated in the original contract constituted a change in the contract. That change, it might be said, was not contemplated by the original contract, and therefore, falls into one of the four exceptions, namely, b) delays unanticipated by the parties.

The exception is based on the concept of mutual assent . . . It can hardly be presumed . . . that the contractor bargained away his right to bring a claim for damages resulting from delays which the parties did not contemplate at the time . . . Thus, even broadly worded exculpatory clauses, such as the one at issue in these actions, are generally held to encompass only those delays which are reasonably foreseeable, arise from the contractor's work during performance, or which are mentioned in the contract. *Corinno* at 310.

Trocom argues that "it [the City] did not allow Trocom to timely make the necessary modifications to its boring operations, which would have allowed it to

* 6]
achieve completion of the Westside Work within 30 consecutive calendar days. Thus, as compensation for this delay, Trocom asserts it is entitled to the incentive it received for completion of the Eastside work, or the maximum of \$600,000.

Trocom's assessment that it was damaged by the delays of the City to the extent of the maximum amount of the incentive is speculative. Trocom provides the affidavit of its Vice President, Anthony J. Santoro, who uses the work completed on the East side of the street to provide a statistical basis to project the time it would have taken Trocom to complete the West side work had there been no interference from City. However, it is evident that delays can also be occasioned by availability of equipment, manpower, subcontractor failures, and elements unique to the area where the work is being performed. For example, the work on the East side required drilling 95 boreholes as compared to the work on the West side, which required 182 boreholes (Warnett affidavit, paragraph 26).

City provided the affidavit of Donald Warnett, a Professional Engineer, who was the resident engineer on this project. Noting attached manpower logs, available equipment, and field orders, he concluded that "Trocom's failure to supply adequate manpower and equipment resulted in delays that precluded its timely completion." It is not enough to assume Trocom would have proceeded with the same ease and efficiency on the West side work as it did on the East side work.

The incentive provision of Section HW-900(1) states in pertinent part:

An incentive will be authorized to the Contractor only if the work of the Contract, including all change order work, receives a determination of substantial completion, as defined in Paragraph 6, below, prior to the scheduled substantial completion date, as defined in Paragraph 2, below. No incentive will be authorized in the event substantial completion of the work of the Contract occurs after the scheduled substantial completion date, regardless of delays, including delays attributable to the City, with the exception of delays specified in Paragraph 2, below.

It cannot be said that Trocom earned the incentive. The main objective of the incentive was to minimize the adverse impact on local residents and businesses on 6th Avenue. There is no evidence that Trocom made any efforts at the time of the delays to preserve its opportunity to earn the incentive. Once the maintenance and protection of traffic devices were put in place at the onset of the work, City had a strong interest in the work proceeding expeditiously.

Trocom claims that City acted in bad faith by implementing changes to the way the work was to be done. Trocom argues that in doing so, City breached the contract. However City abandoned the videotaping required under the contract in order to move the work along. Trocom cannot claim a breach when it acquiesced to the changes and performed under the "new agreement" to the extent that it completed the West side work and then went on to complete the East side work with the maximum incentive bonus. Also, Trocom pursued its remedy of being compensated for the change orders pursuant to the contract after the changes which it now urges were made in bad faith.

Even if the "no damages for delay" clause does not bar Trocom from seeking damages for the delays occasioned by City's interference, Trocom cannot make a claim for the incentive as the measure of those damages. It has already been proven that changes not contemplated in the original contract were made and Trocom was compensated for its additional work. City has demonstrated and Trocom concedes that Trocom did not complete the work within the time necessary to earn the incentive; and therefore, the objectives of establishing the incentive were not met. The incentive provision does contemplate change order work. A plain reading of the incentive provision renders Trocom's claim without merit.

Wherefore it is hereby

ORDERED that Trocom's motion for summary judgment is denied, and it is further

ORDERED that City's cross motion for summary judgment is granted, and the case is dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment in favor of the City of New York, dismissing this action.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: December 15, 2006

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DEC 22 2006
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COUNTY CLERK'S OFFICE


EILEEN A. RAKOWER, J.S.C.