[* 1]

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

PRESENT: LOWE PART 56

Index Number : 600234/2006

SPIDER

VS

A.J.PEGNO CONSTRUCTION CORP

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. 600234/06

MOTION DATE 3/21/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 23 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS [illegible] IN ACCORDANCE
WITH A[illegible] MEMORANDUM
DECISION

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

Dated: 4/17/07

RICHARD LOWE III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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SPIDER, A DIVISION OF SAFEWORKS, LLC,

Index No: 600234/06

Plaintiff

-against-

DECISION AND ORDER

A.J. PEGNO CONSTRUCTION CORP./ TULLY CONSTRUCTION, INC., JOINT VENTURE, FEDERAL INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Defendants

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RICHARD B. LOWE III, J:

Plaintiff Spider, a Division of Safeworks, LLC ("Spider") brings the instant action against Defendants A.J. Pegno Construction/Tully Construction, Inc, Joint Venture ("Pegno"), Federal Insurance Company, St. Paul Fire and Marine Insurance Company, and United States Fidelity and Guaranty Company (collectively "the Insurers") for breach of contract. In the instant motion, Spider moves pursuant to CPLR 3212 for partial summary judgment, dismissing Pegno's counterclaims asserted against it. [1]

[1] In a footnote within its Memorandum of Law, Spider asserts that Pegno's counterclaim should also be dismissed pursuant to CPLR 3016(b) and CPLR 3211. However, its Notice of Motion only states that it is moving for partial summary judgment pursuant to CPLR 3212; it does not state additional grounds for the counterclaim's dismissal. Accordingly, this Court will not address the arguments contained in the footnote.

BACKGROUND

Pegno is a joint venture comprised of A.J. Pegno Construction Corp. and Tully Construction Corp. Both companies are organized under New York law and have their places of business in Queens County.

Pegno entered into an agreement with the New York City Department of Environmental Protection ("DEP") to perform work at their Newtown Creek Water Pollution Control Plant in Queens County. The Insurers provided DEP with a payment bond in order to assure the latter that all parties supplying services to Pegno in connection with the job would get paid.

Spider is a limited-liability company organized under Washington-State law, and authorized to do business in New York. On or about April 27, 2004, Spider entered into a contract with Pegno. Pursuant to it, Spider was responsible for the design, supply, installation, and dismantling of a scaffolding system. Pegno would use the system at the Newtown Creek site in order to access two eight-story digester tanks.

Spider designed and tested the system. With Pegno's approval, Spider manufactured it and delivered it to the project site in May 2005. Between May and August 2005, Spider invoiced Pegno for the system's rental. After it began to use it, Pegno contended that the system contained a number of deficiencies that made it unsuitable for its purposes. Accordingly, in August 2005, Pegno terminated the contract with Spider.

On January 25, 2006, Spider commenced the instant action against Pegno and the Insurers to recover unpaid balances, derigging costs, damages, and attorneys' fees. Pegno answered the complaint, and asserted counterclaims against Spider that it was the latter who was

in breach because it designed a scaffold that contravened the contract's terms. The counterclaim seeks damages that, upon information and belief, will exceed $2,000,000.00.

Spider avers that the Pegno's counterclaim is for consequential damages, which are expressly barred by the contract's terms and conditions. It also contends that Pegno's claims for breach of warranties are prohibited by the contract. Accordingly, it now moves for partial summary judgment to dismiss the counterclaim from this action.

DISCUSSION

To obtain summary judgment, the movant must establish its cause of action "sufficiently to warrant the court as a matter of law in directing judgment' in its favor (*CPLR 3212 [b]*), and it must "set forth evidence that there is no factual issue" requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). To defeat a summary judgement motion, the opposing party must "show facts sufficient to require a trial of any issue of fact" (*CPLR 3212 [b]*).

Direct v. Consequential Damages

Here, Spider proffers a copy of the contract to support its contention that Pegno waived any claims for consequential damages connected thereunder. It reads, in relevant part:

> GENERAL PROVISIONS. . .(9) Limitations. In no event, whether as a result of breach of contract, warranty, tort (including negligence) or otherwise, shall Seller or its suppliers be liable for any special, consequential, incidental, or penal damages including, but not limited to, loss of profit or revenues, loss of use of the products or associated equipment, damage to associated equipment, cost of capital, cost of substitute products, facilities, services or power, down time costs, or claims of Buyer's customers for such damages. . .

(*Kennelley Aff'd, Exhibit D at page 8*)

Where the parties have plainly expressed their intent in writing, the meaning of the writing is to be determined as a matter of law on the basis of it alone. (*See, Chimart Assoc. v Paul*, 66 NY2d 570, 572 [1986].) "Clear and complete writings should generally be enforced according to their terms. . ." (*Collins v E-Magine, LLC,* 291 AD 2d 350 [1st Dept 2002].) Here, the contract plainly provides that Pegno would not hold Spider liable for any incidental or consequential damages that may result from the scaffolding's lease and use.

Consequential damages are indirect and provide restitution to the non-breaching party for additional losses incurred resulting from the breach. Direct damages are those that compensate an aggrieved party for the value of the promised performance.(*See, Aetna Cas & Sur Co v Kidder, Peabody, & Co.,* 246 AD 2d 202 [1st Dept 1998].)

Here, the contract provides that

> This is a complete turn key proposal with Spider responsible to supply, install, and dismantle the equipment described to provide access for two digester tanks. . .and to repeat the process four times. . .
>
> Spider would handle the initial setup at the assembly area and the final dismantle of each scaffold at each tank location. . .

(*Notice of Motion, Ex D*)

Spider's contractual obligation was to design, rig, and lease the scaffolding system to Pegno. In order for Spider to succeed in the instant motion, it must demonstrate as a matter of law that Pegno's alleged damages "stem from the losses incurred. . in its other dealings" and not directly from Spider's alleged failure in fulfilling its promises contained in the contract. (*Full-Bright Indus Co Ltd v Lerner Stores Inc.,* 1995 WL 413473 [SDNY].)

Spider submits documents from Pegno, and argues that they demonstrate that the damages plead in the counterclaim arise not from their alleged breach, but elsewhere. In response to a discovery request in a letter dated August 17, 2006, Pegno's counsel wrote

> . . .there are no job documents related to the damages alleged in the counterclaim. . . The dollar amount claimed is [Pegno's] litigation evaluation of the damages it will incur resulting from its position that [Spider] breached the agreement.

(*Notice of Motion, Ex R*)

In further support that the damages plead were allegedly consequential, Spider submits the following:

• Pegno's electrician had not furnished power to the Newtown Creek site. (*Id, Ex J*)

• Pegno's letter to its subcontractor, Titan, accusing it of causing "considerable delay to the project" and contending that its "operations have damaged the pins needed. . ." (*Id, Ex L*)

• A memo that states that Titan "made a significant modification to the work sequence. (*Id, Ex N*)

These documents "cannot resolve as a matter of law" the question of whether the damages plead in Pegno's counterclaim are consequential. (*See, Andre v Pomerov,* 35 NY 2d 361 [1974].) Pegno's counsel's statement that the monetary amount plead is an *evaluation* of the expected damages incurred does not conclusively prove that they were consequential *or* direct. Nor does the fact that the power was not furnished in a timely manner or that Titan the subcontractor may have been negligent in some of *its* obligations demonstrate that the damages plead are incidental to Spider's alleged breach. "Expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman, supra*) Spider's aversion that the

aforementioned documents prove conclusively that the asserted counterclaims are for consequential damages is, in fact, unsubstantiated.

Although Spider fails in its burden "to set forth evidence that there is no factual issue", [2] this Court will nevertheless discuss Pegno's opposition to the motion. Pegno avers that the damages plead are direct, and therefore not barred by the contract.. In furnishes the affidavit of Michael Tuculescu, Pegno's Assistant Project Manager at the Newtown Creek site, to support its contention. Tuculescu attests that

> the scaffolding was not only not suitable for the purpose intended, but its use caused serious damages to the digester tank work. In addition to oral complaints by me and other [Pegno] job personnel, many letters were sent pointing out the problems.

(*Tuculescu Aff'd at page 2, ¶ 4*)

The specific problems that allegedly occurred are:

• The wheels did not have a large enough diameter so that platform cross beams were hitting and breaking the stainless steel clip angles..

• The steel cables became frequently entangled.

• The platforms were designed erroneously.

• The rubber wheels were too hard and too narrow and could imprint tracks on the cladding.

(*Id, Ex A*)

The attestation that there were problems with the scaffolding system that Spider designed, installed, and leased to Pegno lend support to the latter's contention that the damages are direct. Indeed, defects in the system's design are not incidental to Spider's contractual obligations; they go directly to the promises made.

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[2] See, Forest, *supra.*

Furthermore, attached to the Tuculescu affidavit is the basis for "the direct and specific additional costs that [Pegno] had to and will incur because of Spider's breaches. . ." (*Id, at page 2*) This list includes

- Safeway Services, Inc
- Hertz Equipment Rental
- Price Equipment - Boom lifts
- United Rentals - Booms and Lifts
- Distribution and Installation of Fuel Oil

(*Id, Ex B*)

In reply, Spider avers that this is the first time it learned of Pegno's counterclaim's foundation. Moreover, it argues that the contract specifically prohibits Spider from asserting claims for the cost of substitute products. To be sure, the contract indeed prevents such claims. (*See, Kennelley Aff'd, supra*) Here, Spider proffers the affidavit of David Voeller, Spider's former President and Chief Executive Officer. He attests that

> The Safeway Service costs are for a different scaffolding system and the various crane costs claimed therein are, similarly, alleged to be for auxiliary "substitute products.". . .

(*Voeller Aff'd at page 2*)

Tucukescu attests that the damages were direct, and indeed identifies problems that go to the crux of Spider's contractual duties. On the other hand, Voeller attests that Pegno's basis for the counterclaims, as attested in the Tucukescu Affidavit, are for substitute products, a claim barred by the contract. Here, two individuals with competency in the construction business attest

to the nature of the asserted counterclaims. Because of these dueling contentions, neither one can conclusively be determined to be correct as a matter of law at this juncture. Accordingly, Spider's motion for partial summary judgment on Pegno's counterclaim is denied.

Conspicuous Waiver Provisions

Pegno additionally argues that even if the counterclaims plead are found to be consequential, an issue of fact remains as to the contractual provision's validity barring said claims. The majority of this contract pertains to the lease of a good, the scaffolding system, and is therefore governed by Article 2A of the Uniform Commercial Code ("Article 2A")

In order to exclude or modify both the warranty of merchantability and the warranty of fitness for a particular purpose, it must be in writing and must be conspicuous. (*UCC 2A-214(2)*) A term is conspicuous when it is written so the reasonable person to whom it operates against should have notice of it. (*UCC 1-201(10)*)

Here, Pegno pleads in its counterclaim that

> By reason of the plaintiff's misrepresentations and *breaches of its warranties,* [Pegno] has suffered damages in an amount to be hereafter determined. . .

(*Complaint at page 4, ¶ 23, emphasis added*)

The contract, however, provides that

> (9) Lessor makes no warranty hereunder and all warranties express, implied, or statutory including without limitation, warranties of merchantability or fitness for a particular purpose are hereby specifically excluded and disclaimed. . .

(*Kennelley Aff'd, Ex D at page 8*)

Furthermore, this warranty exclusion is drafted in a size-7 typeset and, in actuality, reads as follows:

(9) Lessor makes no warranty hereunder and all warranties express, implied, or statutory including without limitation, warranties of merchantability or fitness for a particular purpose are hereby specifically excluded and disclaimed. . .

Pegno avers that this contract provision was not conspicuous, which therefore renders it invalid. [3] Spider argues that Pegno is a sophisticated business entity, and therefore had reasonable notice of the disclaimer despite its smaller font-size.

"The test [as to whether a writing is conspicuous], accordingly, is whether a reasonable person would notice the disclaimer when its type is juxtaposed against the rest of the agreement." (*Commercial Credit Corp v CYC Realty, Inc* 102 AD 2d 970 [3rd Dept 1984].) Whether a particular warranty disclaimer is conspicuous is to be determined by the court. (*Id*) An important factor to consider is the sophistication or naivete of the party to whom it operates against. (*See, Gilbert & Bennett Manufacturing Co v Westinghouse Elec Corp,* 22 UCC Rep Serv 920 [1977]; *Velez v Craine & Clarke Lumber Corp,* 41 AD 2d 747 [2nd Dept 1973], *rev'd on other grounds,* 33 NY2d 117)

Here, page 8 of the contract contains the warranty-breach disclaimer. This entire page, which also includes the disclaimer for consequential damages, is in type 7 font-size. The rest of the contract, however, is in the standard type 10-12 font size. Under the general guidelines, this disclaimer is inconspicuous because it is not printed in a "different, larger, or contrasting type or color." (*Mill Printing and Lithographing Corporation v Solid Waste Management System, Inc,* 65 AD 2d 590 [2nd Dept 1978].) Indeed, this font size is *significantly smaller than the contract's previous seven pages*. Notwithstanding, it cannot escape from this Court's analysis that Pegno is

[3] Pegno also contends that the contractual provision disclaiming consequential damages is invalid because it was also drafted in type 7 font. However, Article 2A does not require that such disclaimers be conspicuous to the reasonable person. Accordingly, the discussion here pertains only to the warranty-breach disclaimer.

an experienced contractor, engaged in the construction business. Pegno's representative signed the contract directly beneath the disclaimer.

The determination must be based on the totality of the circumstances. To be sure, Pegno is a sophisticated business entity, as discussed *supra,* and would be cognizant of warranty-breach disclaimers. However, Spider, the contract's drafter, wrote it in such a style that the section pertaining to the limitations was substantially smaller than the other provisions. Furthermore, the disclaimer is far removed from the general requirements that it be drafted in a manner that sets it apart from the reminder of the contract. Indeed, a *smaller* font size does not distinguish the disclaimers within the agreement. Accordingly, the disclaimer is not conspicuous, and Pegno may proceed with its breach-of-warranty claim.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Spider's motion for partial summary judgment is denied.

This shall constitute the Court's decision and order.

Dated: April 17, 2007

ENTER:
RICHARD B. LOWE III

RICHARD B. LOWE, III, J.S.C.