[*1]

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

PRESENT: **Charles Edward Ramos** PART 53

Index Number : 601029/2007
WORTH CONSTRUCTION CO., INC.
vs
TRC ENGINEERS, INC.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ 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

is decided in accordance with accompanying memorandum decision and order.

FILED
OCT 29 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/18/07

HON. CHARLES E. RAMOS, J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
----------X
WORTH CONSTRUCTION CO., INC.,

Plaintiff, Index No. 601029/07

-against-

TRC ENGINEERS, INC. TRC ENVIRONMENTAL CORPORATION, and TRC COMPANIES,

Defendants.
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Charles Edward Ramos, J.S.C.:

Defendants TRC Engineers, TRC Environmental Corporation, and TRC Companies (collectively "TRC") move pursuant to CPLR 3211 (a)(1) and (7), to dismiss the complaint of plaintiff, Worth Construction Co., Inc. ("Worth").

According to the complaint, on December 6, 2000, TRC, as contractor, and Worth, as subcontractor, executed a time-of essence Standard Form of Agreement (the "Subcontract") which incorporated provisions from the Exit Strategy Contract[1] (the "ESC"), for the purposes of abating, demolishing, and decommissioning three properties owned by Consolidated Edison Company of New York, Inc. ("Con Ed"). At issue is when the performance of the Subcontract would commence.

Pursuant to the Subcontract, TRC was to deliver the property located at 700 First Avenue, New York, New York ("Waterside Plant") to Worth on March 1, 2003. However, the Waterside Plant was not delivered to Worth until May 23, 2005.

On March 26, 2007, Worth filed a complaint against TRC

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[1] ESC executed in May 2000, between TRC, as contractor, and Con Ed, as owner.

seeking damages of over $9 million dollars for breach of the Subcontract executed between the parties.

Worth alleges in the complaint that: (1) TRC's failure to deliver the Waterside Plant by March 1, 2003, unreasonably delayed Worth's ability to complete the performance of the Subcontract; (2) the Waterside Plant was not delivered until May 23, 2005, a delay of 27 months that constitutes a breach of TRC's fundamental obligations under the Subcontract and constitutes "Owner Delay," allowing recovery of damages; and (3) this delay constitutes an "uncontemplated delay," for which damages are recoverable, regardless of the exculpatory language in the Subcontract.

TRC moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint. TRC does not dispute the delay, but, it argues the parties contemplated the possibility of a delay and incorporated a no-damage-for-delay clause into the agreement during the execution of the Subcontract.

When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff "the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. *Id.* The motion must be denied if from the pleadings' four corners "factual allegations are discerned which

taken together manifest any cause of action cognizable at law." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

"Dismissal under CPLR 3211(a)(1) is warranted 'only if the documentary evidence submitted conclusively established a defense to the asserted claims as a matter of law.'" *Leon supra* at 88.

Historically, a no-damage-for-delay clause is enforceable and valid. *Kalisch-Jarcho, Inc. v New York*, 58 NY2d 377, 384 (1983). The clause shields a contractee from contractors seeking damages for delays in performance. *Corinno Civetta Constr. Corp. v New York*, 67 NY2d 297, 309 (1986).

However, *Corinno Civetta* acknowledged the exceptions to the rule. Where there is broad exculpatory language purporting to preclude all damages regardless of cause, recovery for damages will be allowed for:

> "(1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract." *Id.* at 309.

In the complaint Worth alleges TRC breached a fundamental obligation of the Subcontract when it failed to deliver the Waterside Plant to Worth by March 1, 2003, and the delays caused by late delivery were uncontemplated, which entitles Worth to delay damages pursuant to the Subcontract.

Relying on the Subcontract, TRC counters that delivery was to be fixed by written notice and Worth's recovery is limited to the demobilization and remobilization costs.

Both parties disagree as to the interpretation of provision 9.1 of the Subcontract, which sets the commencement date of the work. TRC asserts that the provision is clear on its face, while Worth argues this provision sets the commencement date according to Exhibit M of the Subcontract. The provision at issue provides:

> "9.1 The Subcontractor's date of commencement is the date from which the Contract Time of Paragraph 9.3 is measured; it shall be the date, set forth in Exhibit M to the Prime Contract ["ESC"], *unless* a different date is state below or *provision is made for the date to be fixed in a notice to proceed issued by Contractor*. The date of commencement shall be established by a written notice to proceed issued by the Contractor to the Subcontractor. The parties acknowledge and agree that Contractor may issue the notice to proceed in phases..."

The Subcontract is clear on its face. There can be no dispute that the parties intended for the commencement date to be established by written notice, and not the date set forth in Exhibit M of the ESC. Even though the ESC refers to Exhibit M for the delivery date, Worth is not a party to the ESC. While Con Ed may owe a duty to TRC to deliver the Waterside Plant by March 1, 2003, TRC only has a duty to deliver the premises to Worth by a date set forth in a written notice.

In order to sustain a cause of action for breach of contract, the complaint must state: (1) formation of a contract between the parties, (2) breach of the contract by defendant's failure to perform, and (3) resulting damages. *See* 2 NY PJI 4:1

Worth alleges in its complaint: (1) pursuant to the Subcontract TRC was required to deliver the Waterside Plant by March 1, 2003 (2) TRC's failure to deliver the Waterside Plant by

March 1, 2003, (3) $9 million dollars in resulting delay damages.

Based on the Subcontract, TRC has no obligation to deliver the Waterside Plant to Worth by March 1, 2003. Therefore, there is no breach of contract for failure to deliver by that date. The complaint must be dismissed.

Alternatively, TRC argues that the complaint is also defective for failure to state damages. Worth seeks to recover damages resulting from the late delivery. TRC argues that the Subcontract unambiguously limits Worth to the demobilization and remobilization costs only. Worth seeks more.

The parties disagree as to the remedies in the event of "Owner Delay," as defined in Section 1 of the ESC which states:

> "(bb) 'Owner Delay' means Delay in the performance of the Site Work caused by or resulting from:
>
> (i) failure of Client [Con Ed] to comply in a timely manner with any of its covenants in Section 6..."

Located in Section 6 of the ESC, are Con Ed's covenants, the most relevant being:

> "(a) To deliver possession of each Property to TRC in accordance with the schedule in Exhibit 'M'..."[2]

Worth argues that the above statements entitle Worth to recover for damages from "Owner Delay," when read with the Supplemental General Conditions to the Subcontract ("SGC"). Provision 8.3.4 of the SGC states:

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[2] March 1, 2003 is the date listed in Exhibit M of the ESC, but the ESC was executed by TRC and Con Ed, not Worth. The Subcontract, fixes the commencement date by written notice.

> "8.3.4 Except as provided in Paragraphs 8.3.1 through 8.3.3 above, Contractor [Worth] shall be precluded from making any claim for recovery of damages or extension of the Contract Time for delays, other than 'Owner Delays'."

However, TRC argues that even if there is Owner Delay, Worth limited its remedies to the demobilization and remobilization costs only, as stated in provision 5(b) of the Subcontract Rider ("Rider"):

> "*(b) In the event of Owner Delay...Contractor shall be entitled to compensation from Client [Con Ed] in an amount equal to the actual costs (without profit) incurred by Contractor and its Subcontractors to demobilize and remobilize their forces as a result of such Owner Delay, but in no event shall TRC, Contractor and all Subcontractors be entitled to compensation in excess of $60,000 for demobilization and $40,000 for remobilization in any single instance of Owner Delay or $300,000 in the aggregate for all remobilization and demobilization costs as a result of all Owner Delays.* Except for the reimbursement described in the preceding sentence and extensions of time under this Section: (i) Contractor alone hereby specifically assumes the risk and Loss-and-Expense of all delays in the Work (or the performance thereof) of any kind of duration whatsoever, whether Owner Delay or otherwise, whether or not within the contemplation of the parties and where foreseeable or unforeseeable, and *(ii) Contractor agrees to make no claim for damages for Delay and agrees that any such claim shall be compensated for solely by an extension of time to complete performance of the Work as provided in this Section. Contractor shall have no cause of action under any theory of quasi-contract or quantum meruit by reason of any Delay of any kind or duration whatsoever. Contractor agrees that the reimbursement for demobilization and remobilization costs described above and an extension (or extensions) of time under this Section for Owner Delay shall be Contractor's exclusive remedies for Delay in performance of the Work." (emphasis added)*

Clear and complete writings should generally be enforced according to their terms. *Vt. Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470 (2004). No-damage-for-delay clauses, are

generally enforceable and valid. *See Corinno Civetta*, 67 NY2d at 309 (enforcing similar no-damage-for-delay clauses). The delays in *Corinno Civetta*, were due to a moratorium on street openings and subsurface obstructions. Since both delays were contemplated and incorporated into the contract by the parties, the delay damages were non-actionable. In *Peckham Road Co. v State*, the delays were caused by late delivery of the premises. However, the contract intentionally left the delivery date open, therefore delay damages were barred because the commencement date was unspecified. *Peckham Road Co. v State*, 32 AD2d 139, 143 (1st Dept 1969).

The provision limiting Worth's remedies is clear on its face. Worth cites Section 8.3.4 of the SGC, which does not preclude Worth from making a claim as a result of Owner Delay. Rather, Worth's remedies are unambiguously limited to recovery of the demobilization and remobilization costs by Section 5(b) of the Rider. Therefore, Worth's complaint is defective because it seeks damages in excess of the demobilization and remobilization costs.

The parties disagree to whether the uncontemplated delay exception to the no-damage-for-delay clause is applicable here. Worth alleges in its complaint that the delays were uncontemplated by the parties. Even where there is broad exculpatory language purporting to preclude all damages regardless of cause, recovery for damages will be allowed for uncontemplated delays. *Id.*

TRC counters that the parties not only contemplated this precise delay, but the Subcontract specifically provides for it. Therefore the exception does not apply. Specifically, TRC references Subcontract provision 6(a)(iii), which states:

> "To the fullest extent permitted by law, Contractor agrees to indemnify, defend...and hold harmless Owner, the Site Developer, TRC...from and against all Loss-and-Expense, arising out of or in any way connected with...(iii) any action by any governmental authority with jurisdiction arising out of or related to the Work..."

Documentary evidence establishes that the delays were caused by the New York Public Service Commission (the "NYSPC"), which has the specific power of "general supervision of all gas corporations and electric corporations" and "all gas plants and electric plants." Public Service Law § 66 [1]. The NYSPC order, issued May 20, 2004, prohibited Con Ed from transferring the Waterside Plant until East River Station was a commercially operable replacement. The NYSPC is expressly endowed with "all powers necessary or proper to enable it to carry out the purposes of" the Public Service Law. Public Service Law § 4 [1].

The inclusion of a provision specifically addressing the delays as a result of a governmental authority demonstrates the parties' contemplation of possible delays by the NYPSC. If contemplated by the parties, delay damages are non-actionable. Contemplated delays include: (1) delays caused by the contractor, (2) reasonably foreseeable delays, or (3) delays specifically addressed in the contract. *Shore Bridge Corp. v State*, 186 Misc. 1005, 1013 (Ct. Cl. 1946).

In a letter from TRC to Con Ed, dated December 12, 2005 ("TRC Letter"), TRC seeks damages from Con Ed's delay in the delivery of the Waterside Plant to TRC on the basis that it was an uncontemplated delay.

Alternatively, Worth argues that TRC is barred from taking the position that the delay was contemplated when it has taken a contrary position elsewhere. Worth attempts to use the TRC letter as an admission by TRC that the delays were uncontemplated, but the TRC letter is inapplicable here. Worth mirrors TRC's arguments, but, TRC's claims are based on the ESC, while Worth's claims are based on the Subcontract. The date of commencement set forth in the ESC is March 1, 2003, but the date of commencement set forth in the Subcontract is not fixed. Unlike TRC, which had an expectation of delivery by March 1, 2003 from Con Ed, Worth cannot argue the delays were uncontemplated when the date to start work was unknown and no written notice was issued until May 2005.

TRC's seemingly contradictory position that the delay was contemplated, at least by Worth and TRC in Subcontract is permissible because different contracts are involved.

Accordingly, it is

ORDERED, that TRC's motion to dismiss the complaint is granted.

Dated: October 18, 2007

HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.