SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

TROMEL CONSTRUCTION CORP.,

INDEX No. 011484/05

Plaintiff,

MOTION DATE: Sept. 14, 2007
Motion Sequence # 003

-against-

COUNTY OF NASSAU,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Reply Affirmation X
Memorandum in Support..... X
Memorandum of Law in Opposition..... X
Reply Memorandum in Support..... X

This motion, by defendant, pursuant to CPLR 2221, for an order permitting reargument and renewal of its prior motion for summary judgment, together with an order pursuant to CPLR 3025 granting defendant leave to serve an amended answer containing the affirmative defense of failure to comply with Article XLIII of the parties' contract, and further, pursuant to CPLR 3212, granting summary judgment on its new affirmative defense, is **granted** in part and **denied** in part.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly

overlooked or misapprehended by the court in determining the prior motion . . . [CPLR 2221(d)]. It is not designed to allow a litigant to propound the same arguments the Court has already considered, but to point out controlling principles of law or fact that the Court may have overlooked (**Simon v Mehryari**, 16 AD3d 664, 2nd Dept., 2005). No basis for reargument has been shown by defendant herein. Consequently, leave to reargue is **denied**.

The County seeks leave to amend its answer to add an affirmative defense based upon Article XLIII , after this Court made a specific finding in its order dated June 22, 2007, that the County had waived this affirmative defense. While the standard for amendment is a liberal one, the Court has found no case where amendment was granted after, instead of concurrently with, summary judgment determinations. However, since the only precedent for denial of leave to amend following summary judgment involves cases where summary judgment was granted (**Seavey v James Kendrick Trucking, Inc**., 4 AD3d 119, 1st Dept. 2004; **Reznick v Tanen**, 162 AD2d 594, 2nd Dept.,1990; **Buckley & Co., Inc. v City of New York**, 121 AD2d 933, 1st Dept. 1986), lv app dsmd, 69 NY2d 742 (1987), instead of where summary judgment was denied, as here, the Court shall not give preclusive effect to the prior determination as a matter of *res judicata* or collateral estoppel.

Leave to amend an answer to include an affirmative defense may be freely granted in the absent of prejudice or surprise (CPLR 3025; **Myung Soon Kim v Hyunchul Chong**, 8 AD3d 456, 2nd Dept., 2004). Mere lateness is not a barrier to a proposed amendment (**Edenwald Contr. Co., Inc. v City of New York**, 60 NY2d 957, 959, 1983). There can be no surprise to plaintiff, as the proposed affirmative defense is based on a provision in the parties' contract. Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment (**Whalen v Kawasaki Motors Corp**., 92 NY2d 288, 293, 1998). Plaintiff fails to specifically allege any such prejudice. Under these circumstances, defendant is granted leave to amend its answer to allege plaintiff's failure to comply with provision XLIII of the contract.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination," together with "a reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221(e); **Olsen v County of Nassau**, 14 AD3d 706, 2nd Dept., 2005). The rule is a flexible one and the court has discretion to grant renewal upon facts known to the movant at the time

of the original motion (**Wilder v May Department Stores Co.**, 23 AD3d 646, 2nd Dept., 2005). Here, based upon the County's new affirmative defense of failure to comply with Article XLIII of the contract, renewal is **granted**.

Upon renewal, the County argues that the failure to comply with Article XLIII is fatal to plaintiff's claims for payment. Plaintiff argues that reliance upon Article XLIII was waived by the County, not simply as a matter of pleading but also as matter of conduct.

Waiver may be accomplished by such conduct or failure to act as to evince an intent not to claim the purported advantage, and is generally a question for the trier of fact (**Bono v Cucinella**, 298 AD2d 483, 2nd Dept., 2002; ***Dice v Inwood Hills Condominium***, 237 AD2d 403, 2nd Dept., 1997). Plaintiff's president avers that he entered into an agreement with James Olive, Nassau's Director of Environmental Operations and Division Head of Sanitation and Water Supply on behalf of the County. He alleges that the County agreed that all issues regarding delay would be dealt with at the end of the project. He offers the letter dated August 1, 1997(part of plaintiff's Exhibit 3), from Mr. Olive to Electric Co. Inc. (one of the contractors on the project) in support of this claim.

The letter states:

The County acknowledges your right to submit a Notice of Claim for damages resulting from the extensive delays on the above referenced project. However, it is not the County's policy to address claims regarding a job during the course of the project.

The County recommends that you continue to research and document all relate [sic] costs incurred by you and these issues will be addressed and hopefully resolved at the end of the job, as is the County's standard procedure.

The County objects, and relies upon Articles XXVII, No Estoppel, and XXVIII, No Waiver of Rights. The County's reliance upon Article XXVII is misplaced because that provision concerns any claim that the County may have for damages, not claims against the County. While Article XXVIII, in pertinent part, states that "any extension of time" shall not "operate as a waiver of any provisions of this contract" and "nor shall any waiver of any breach of this Contract be held as a waiver of any other subsequent breach," it is

possible that a contractual prohibition against waivers may be waived by conduct (see e.g., **T.S.-Seedman's, Inc. v Elata Realty Co.**, 72 NY2d 1024, 1027, 1988). A contract once made can be unmade, and express contractual prohibitions may be waived (**Rose v Spa Realty Associates**, 42 NY2d 338, 343, 1977).

While the County is correct that a completely integrated contract precludes extrinsic proof to add to or vary its terms (**Primes Intern. Corp. v Wal-Mart Stores Inc.**, 89 NY2d 594, 1997), there has been no showing, in this case, that the parties' contract is integrated.

Under all of the extraordinary circumstances of this case, where a contract to be completed in one and one-half years took nine years to complete, and the County has failed to point to any kind of a merger clause in the contract documents, the Court finds that plaintiff has raised a triable issue of fact as to whether the County's conduct may be found to constitute a waiver of its rights found in Articles XLIII and XXVIII . Based on the foregoing, upon renewal , the County's prior motion for summary judgment must be **denied**.

Dated NOV 21 2007

J.S.C.

ENTERED

NOV 26 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE