

**Metropolitan Steel Industries, Inc. v Perini Corporation**

2007 NY Slip Op 34374(U)

February 6, 2007

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: HERMAN CAIN  
Justice

PART 49

Metropolitan

INDEX NO. 10484102

MOTION DATE 9/19/06

- v -

MOTION SEQ. NO. 016

Perini

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 \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE  
NEW YORK COUNTY

FEB 16 2007

FILED

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE .....

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

Dated: 21 6 07

[Signature]

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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**  
FEB 1 2002  
COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

This action and third-party action arise from the design and construction of a multi-storied bus depot located on 100<sup>th</sup> Street in New York City (the Project), owned and operated by the New York City Transit Authority (the NYCTA).

Plaintiff, Metropolitan Steel Industries, Inc. d/b/a Steelco (Steelco), brings this breach of contract action against defendant/third-party plaintiff Perini Corporation (Perini) and Perini's sureties, defendants American Home Assurance Company, Fidelity and Deposit Company of Maryland, and Liberty Mutual Insurance Company. Plaintiff seeks to recover the unpaid balance due on account of its contract work, as well as for certain additional and extra

work it rendered in connection with the Project.

Defendants now move for an order, finding that Steelco's claims identified as X-22A, X-23 and X-32A were dismissed pursuant to this Court's order dated November 30, 2004. As set forth below, defendants' motion is granted.

### FACTS

Perini entered into a contract with the NYCTA for the design and construction of the Project (the Prime Contract). Perini served as the general contractor. Perini then entered into a subcontract with Steelco, pursuant to which Steelco agreed to fabricate and erect the Project's structural steel for the lump sum price of \$9,630,000 (the Steelco Subcontract). The Prime Contract contains a "no-damage-for-delay" clause, which was incorporated by reference into the Steelco Subcontract. The Steelco Subcontract also contains a "no-damages-for-delay" clause, pursuant to which Steelco was precluded from asserting any delay damages against Perini.

Steelco was terminated from the Project in November 2001. In March 2002, it commenced the instant action against Perini, and asserted that it was entitled to additional compensation for the performance of certain extras and for various delays and inefficiencies caused by Perini. In the complaint's first cause of action, Steelco alleges that "Perini caused . . . delays and interferences resulting in the scope of [Steelco's] work being substantially altered, changed, modified and interfered with, causing delay, inefficiency and additional cost to [Steelco] in the performance of the work" (Complaint, ¶ 14). Steelco further alleges that Perini "delayed, interfered with and rescheduled" Steelco's "shop fabrication and erection work" resulting in extra work to Steelco, and otherwise interfered with Steelco's performance (see id., ¶¶ 110, 138, 150, 154, 158, 164).

Although the complaint refers to various change orders (X-1 through X-49), the relevant claims set forth in the complaint were based upon Steelco's change order that were categorized into two main groups: extra work claims and delay claims. The Steelco delay claims are generally identified in the complaint by allegations that the claims were caused by: (1) the rescheduling of Steelco's work (X-22, ¶ 86; X-23, ¶ 90; X-28A, ¶ 110; X-31A, ¶ 122; X-43, ¶ 150; X-44, ¶ 154; X-45, ¶ 185; and X-47, ¶ 164); or (2) Perini's interference with Steelco's work (X-29, ¶ 114; X-32A, ¶ 126; and X-37, ¶ 138).

Through discovery demands and motion practice, Perini sought a complete accounting from Steelco of its delay and extra work claims. Steelco, however, did not provide any detail for its claims, beyond asserting in its supplemental interrogatory answers that the lump sum value of its Change Orders X-1 through X-49 was \$3,926,828. Subsequently, Perini determined that the Steelco change order proposals identified in the complaint as X-22A, X-23, X-28A, X-29, X-31A, X-32A, X-37, X-43, X-44 and X-45 were delay claims. The complaint assigned the following value to these delay claims:

<u>Delay Claim</u>	<u>Value</u>	<u>Complaint ¶</u>
X-22A	\$44,285	¶ 88
X-23	\$34,378	¶ 92
X-28A Rev.	\$1,451,325	¶ 112
X-29	\$17,674	¶ 116
X-31A	\$179,609	¶ 124
X-32A	\$55,966	¶ 128
X-37	\$5,854	¶ 140
X-43	\$147,637	¶ 152
X-44	\$174,505	¶ 156
X-45	\$204,729	¶ 160
X-47	<u>\$154,585</u>	¶ 166
Total:	\$2,470,820	

In May 2004, Perini submitted a motion to this Court for an order dismissing all of Steelco's delay claims based upon the contractual "no-damage-for-delay" clauses. Perini's moving papers specifically identified the Steelco delay claims that were the subject of the summary judgment motion in the following manner:

Although the Steelco Complaint refers to each and every one of its change order proposals (X-1 through X-49), the relevant claims set forth in Steelco's Complaint appear to be based on Steelco's outstanding 27 change order proposals, which can be categorized into two main groups: (a) those change order proposals regarding Steelco's claims for additional compensation for certain items of additional work allegedly performed by Steelco; and (b) those change order proposals regarding Steelco's claim for delay damages which allegedly have an aggregate value of approximately \$2,400,000. Due to Steelco's failure to provide discovery regarding a full, accurate and complete accounting of its claims, it cannot be precisely determined which of the 27 outstanding change order proposals represent Steelco's claims for delay damages. As best Perini can assess, Change Order Proposals Nos. X-22A, X-23, X-28A, X-29, X-31A, X-32A, X-37, X-43, X-44, X-45 and X-47 represent Steelco's claims for delay damages.

Perini's 5/28/04 at 3-4 (Seaman Aff, Exh G). Steelco's opposition papers did not contest Perini's identification of these 11 claims as delay claims, but instead, attempted to re-categorized these claims as inefficiency claims.<sup>1</sup>

On November 30, 2004, this Court issued an order dismissing the 11 Steelco change order requests that sought the recovery of alleged delay damages (the Dismissal Order). Pursuant to the Dismissal Order, the Court held that:

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<sup>1</sup> On November 24, 2004, after Perini's motion to dismiss the Steelco delay claims was fully briefed, Steelco revised Claims X-44 and X-45, and increased the value of X-44 to \$358,068, and the value of X-45 to \$964,362. As a result, the alleged value of the Steelco delay claims was increased from \$2,470,820 to \$3,414,016.

On March 1, 2002, Steelco commenced this action against Perini, seeking contract damages based on certain outstanding Steelco-prepared change order requests, **of which approximately 11 are for alleged delay damages**. The essence of Steelco's claim for delay damages is grounded on the contention that, during the performance of the Steelco Subcontract, Perini was responsible for "inappropriate acts, omissions, delays and interferences" which "substantially altered, changed, modified and interfered with [its work] causing delay, inefficiency and additional cost to plaintiff in the performance of the work" (Complaint, ¶ 14). Steelco further alleges that Perini "delayed, interfered with and rescheduled" Steelco's "shop fabrication and erection work" resulting in extra work to Steelco, and otherwise interfered with Steelco's performance (*see id.*, ¶¶ 110, 138, 150, 154, 158, 164). **Steelco seeks delay damages in the amount of \$2,400,000.**

Dismissal Order, at 4 (emphasis added). As demonstrated by the language of the order, the scope of the Dismissal Order encompassed 11 of the Steelco change order claims that had an approximately value of \$2,400,000. The Court's identification of those 11 Steelco claims is identical to the 11 Steelco claims worth approximately \$2,400,000 that were identified in Perini's moving papers.

On December 3, 2004, Steelco moved for reargument of the Dismissal Order. In its motion, Steelco argued that neither Perini nor the Court specified which of the Steelco claims were dismissed. Steelco further argued that only four, not 11, its claims sought delay damages (X-43, X-44, X-45 and X-47), and that the other claims were inefficiency damages and were not precluded by the Steelco Subcontract.

Subsequently, the Court issued an order, dated March 15, 2005, in which it denied Steelco's motion for reargument (the Reargument Order). In rendering this decision, the Court rejected Steelco's argument that "its inefficiency claims are not time related and therefore, not barred by the no-damage-for-delay provisions of the Subcontract" (Reargument Order, at 4).

In April 2005, the trial of the Steelco extra work claims was referred to Justice Marilyn Shafer. At the commencement of the trial, Perini objected to Steelco introducing into evidence or referring to its change order proposals X-22A, X-23 and X-32A. Based on the Dismissal Order's holding that all of Steelco's claims for additional costs caused by the rescheduling or the less efficient performance of Steelco's work, were delay/inefficiency claims prohibited by the no-damages-for-delay clauses, Perini asserted that the X-22A, X-23 and X-32A claims were dismissed by the Dismissal Order.<sup>2</sup> Therefore, they should not be referred to at the trial.

Despite the fact that this Court had already twice ruled that Perini was entitled to summary judgment dismissing the said 11 Steelco claims, Steelco argued to Justice Shafer that it was entitled to submit its three claims identified as X-22A, X-23 and X-32A to the jury on the ground that these claims were not delay claims, and had not been specifically dismissed by the Dismissal Order. Based upon Steelco's representation, Justice Shafer reserved decision on the matter until after the trial.

In April 2005, the jury rendered a verdict in favor of Steelco and awarded it damages, in part for Steelco claims X-22A, X-23 and X-32A. Perini then submitted a post-trial motion to Justice Shafer, in which it requested that the jury's award of damages regarding claims X-22A, X-23 and X-32A be set aside, based upon the Dismissal Order.

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<sup>2</sup> Steelco claim X-22A was a claim for additional costs incurred by Steelco as a result of the rescheduling of Steelco's erection work (see Seaman Aff, Exh K). Steelco claim X-23 was for additional costs incurred by Steelco as a result of the rescheduling of Steelco's erection work (see id., Exh L). Steelco claim X-32A was for additional costs incurred by Steelco as a result of it having to perform erection work in a less efficient manner than originally planned (see id., Exh M).

[\* 8 ]

In response, Steelco represented to Justice Shafer that this Court failed to identify which of the 11 Steelco change order requests were dismissed as delay claims, and that only 6 Steelco claims (X-28A, X-37, X-43, X-44, X-45 and X-47) were actually dismissed by the Dismissal Order.

On March 28, 2006, Justice Shafer issued an order that resolved the post-trial motions, in which she noted that:

Perini further asserts that the jury verdict with respect to Change Order Proposals X-22A, X-23 and X-32A should be set aside because these are “delay claims” which were dismissed by a prior order issued by Justice Cahn. While the plain language of Justice Cahn’s decision dated November 30, 2004 dismissed all proposals for delay claims, it fails to hold that Change Order Proposals X-22A, X-23 and X-32A were in fact delay claims. Should [Perini] seek clarification of Justice Cahn’s decision, [Perini] may seek its relief before Justice Cahn.

3/28/06 Order, at 8-9 (Seaman Aff, Exh O).

On November 10, 2005, the First Department affirmed the Dismissal Order.

Metropolitan Steel Indus., Inc. v Perini Corp., et al., 23 AD3d 205 (1st Dep’t 2005).

### **DISCUSSION**

Perini now moves for an order holding that Steelco’s claims X-22A, X-23 and X-32A were dismissed by the Dismissal Order. The motion is granted. Because this Court has already issued two orders confirming the dismissal of the 11 Steelco claims identified by Perini as delay claims, the dismissal of claims X-22A, X-23 and X-32A is the law of the case. As such, it could not have been placed before the jury in this action.

This Court’s decisions, which effectively dismissed Change Order Proposals X-22A, X-23 and X-32A, among others, as delay claims, is the law of the case.

The Court notes that in a decision dated January 30, 2007, the Appellate Division ruled that the introduction of claims X-22A and X-23 in evidence "was error insofar as those estimates constituted delay claims previously dismissed in an order affirmed by this court . . . and those claims are hereby rejected." Metropolitan Steel Indus., Inc. v Perini, Corp. et al., \_\_\_ AD3d \_\_\_ (1st Dep't 2007), 2007 NY App. Div. LEXIS 877, AT \* 5 (1st Dep't Jan. 30, 2007).

Accordingly, defendants' motion is granted, and an order will be issued modifying the Dismissal Order by clarifying that Steelco claims X-22A, X-23 and X-32A were part of the 11 Steelco delay claims that were previously dismissed.

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

Accordingly, it is


ORDERED that defendants' motion is granted, and this Court's Order November 30, 2004 Order is modified as follows, with the italicized language added:

Accordingly, it is

ORDERED that defendants' motion for partial summary judgment is granted and Steelco's claims for delay damages *identified as claims X-22A, X-23, X-28A, X-29, X-31A, X-32A, X-37, X-43, X-44 and X-45* are dismissed.

Dated: February 6, 2007

ENTER:

  
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J.S.C.

FILED  
FEB 7 2007  
COUNTY CLERK  
NEW YORK COUNTY OFFICE