

**R&J Constr. Corp. v E.W. Howell Co.,
Inc.**

2008 NY Slip Op 31660(U)

May 30, 2008

Supreme Court, Nassau County

Docket Number: 9300-06/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

R&J CONSTRUCTION CORPORATION,

Plaintiff,

INDEX No. 9300/06

MOTION DATE: April 11, 2008
Motion Sequence # 001

-against-

E.W. HOWELL CO., INC.,

: Defendant.

The following papers read on this motion:

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

This motion, by defendant E. W. Howell Co., Inc., for an order pursuant to CPLR 3212 awarding partial summary judgment dismissing plaintiff's Second, Third and Fourth Causes of Action is **granted** and the Second, Third and Fourth Causes of Action are **dismissed**.

Plaintiff R&J Construction Corp. (R&J) entered into a carpentry subcontract for the civil court renovation and addition in Riverhead, New York (the Agreement).

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Defendant E. W. Howell Co., Inc. (Howell), the prime general contractor for the County of Suffolk, State of New York, terminated R&J 's services by letter dated February 14, 2006.

R&J commenced this action for breach of contract on June 8, 2006. The First Cause of Action seeks sums due and owing for work ending 1/31/06 in the amount of \$138,461. The Second Cause of Action seeks damages in the amount of \$406,108, including consequential damages and lost profits for intentional bad faith wrongful termination. The Third Cause of Action seeks \$534,569 for breach of the covenant of good faith and fair dealing, and the Fourth Cause of Action seeks \$534,569 for the intentional prevention of plaintiff's performance. Howell seeks dismissal of the Second through Fourth causes of action based upon exculpatory clauses in the Agreement which preclude the recovery of consequential damages and lost profits.

Under the Agreement, R&J was subject to termination for either cause or convenience, and the recovery of consequential damages and lost profits disallowed. If R&J was terminated for cause it was subject to damages for additional costs to complete the subcontract. In the event that a court of competent jurisdiction found the termination was not for cause, the Agreement provides that the termination "will be deemed converted to a termination for convenience and the Subcontractor's remedy for wrongful termination shall be limited to the recovery of payments permitted for termination of convenience . . . " Upon conversion R&J would no longer be liable for additional costs to complete. It would, however, be limited to recovery for services rendered prior to termination based on a clause which provides that the "Contractor shall not be responsible for damages or for loss of anticipated profits on Work not performed on account of any termination, whether for convenience or for cause."

R&J contends that the foregoing exculpatory clause of the Agreement precluding the recovery of consequential damages and lost profits is not enforceable based upon Howell's intentional bad faith wrongful termination, breach of the covenant of good faith and fair dealing, and prevention of plaintiff's performance.

Limitation of liability clauses have been denied enforcement under certain conditions, for example, in the case of a contractor who demanded \$6 million to approve certain alterations. The agreement between the parties did not allow for such exorbitant sums, and the "unwarranted" demands were held tantamount to extortion; enforcement was denied based upon the contractor's "malice and bad faith" (**Banc of America**

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Securities LLC v. Solow Bldg. Co. II, L.L.C., 47 AD3d 239, 1st Dept., 2007). The court noted that "truly culpable, harmful conduct" was not protected, while mere "intentional nonperformance of the Agreement motivated by financial self-interest" did not qualify as culpable or harmful (*supra* at p 247). The court found that the exclusion was a narrow one covering only "willful, wanton or grossly negligent acts" (*supra*).

Enforcement has also been denied based upon conduct "wilfully intended to inflict harm" (Metropolitan Life Ins. Co. v. Noble Lowndes Intern., 84 NY2d 430, 439, 1994); active interference with and prevention of completion of work in the time specified in the contract, and delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct (Martin Mechanical Corp. v. P.J. Carlin Const. Co., 132 AD2d 688, 2d Dept., 1987; see also, Novak & Co., Inc. v. New York City Housing Authority, 108 AD2d 612, 1st Dept., 1985, *app dsmd* 65 NY2d 637, 1985).

Here, the complaint alleges that Howell requested R&J to commence Sheetrock installation within the week of January 24, 2006. R&J notified Howell on the 24th that open items prevented commencement of the installation. The parties met on January 27, 2006 to determine the status of the project. The complaint alleges that during the meeting "it was discovered" that many items R&J brought to Howell's attention over the prior months had not been addressed. Howell told R&J to commence the work and if it did not start immediately, Howell would hire a competitor to complete the work starting January 30th. The meeting is alleged to have culminated in a physical altercation between a senior executive of Howell and R&J's executive vice president.

Based upon a failure to man the job since January 24th, Howell issued a three day notice to R&J on Friday February 10, 2006. R&J responded by advising that it would be ready to commence and have the appropriate number of carpenters on site on Monday morning February 13th. Brian Cuff of R&J arrived at the site without workmen or tools at 6:30 a.m. No R&J laborers had arrived by 8:00 a.m. and Brian Cuff was escorted off the premises.

There is a factual dispute regarding the events of Monday morning the 13th, with R&J alleging that its men were delayed by a severe snowstorm of the 12th and that Howell prevented R&J from performing under the Agreement. Howell avers that R&J's foreman arrived and said that he did not know if his men were coming, and that all other trades working that day arrived timely notwithstanding the weather. After offering R&J

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one more chance to appear and complete its work under the Agreement, Howell gave R&J a notice of termination for cause. By letter dated February 14, 2006 R&J was terminated for failing to appear with a crew ready to commence work Monday morning in accordance with the notices of February 10th and 13th.

The events between January 24th and February 14th leading up to the termination of R&J are also characterized differently in a series of letters between the parties.

A letter from R&J dated January 30, 2006 states that after the events of January 27 it would be best if the "two companies part". R&J advised that it would demobilize and leave one carpenter on the premises to "facilitate a smooth transition out." Howell's letter dated 2/10/06 indicates that it did not agree to allow R&J to abandon the worksite, and refers to a meeting of February 7th where Howell attempted to accommodate R&J in several ways, including acknowledging a personality conflict between R&J's vice-president Joseph Ferrara and Howell's senior executive Paul O'Rourke, and offering to remove O'Rourke from the project. Howell noted that R&J had already started to remove its equipment from the site, and stated that "it was plain to see that any solution other than allowing you to walk away from your obligations would not be acceptable to you." (Exhibit F). The letter stated that R&J "willfully refused to perform the work" and Howell gave three days notice stating, "R&J is in breach of its subcontract and has three (3) days from the date hereof to properly man the project and complete all work so as to avoid any further delays to the project . . . [upon] your failure to comply with this notice to cure . . . it is our intention to remove R&J Construction Co., Inc. from the project . . . "

R&J's reply letter dated February 10th states that under the proposal to remove Paul O'Rourke from the project, in order to "mitigate damages" R&J agrees "to properly man the Riverhead project as of Monday morning . . . and at the same time requests that the additional million dollars EW Howell was willing to pay another contractor (to complete the project) . . . be added to R&J's subcontract to complete the project." The letter states that R&J will have the appropriate number of carpenters Monday morning." The additional million dollars was refused, and only Brian Cuff appeared at the scheduled work time Monday.

By letter faxed February 13th, R&J advised Howell that it had been prevented from working when Brian Cuff was escorted from the premises notwithstanding that R&J's men were en route. R&J declared the dismissal malicious, and stated that R&J

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would "now take all necessary legal steps." In response Howell, also by letter faxed the 13th, disputed the events of Monday, averring that R&J's foreman Brian Cuff advised Howell that "no additional manpower was scheduled. Mr. Cuff was there to receive delivery of tools only." The letter avers that R&J misinterpreted Howell's frustration for malice. However, due to delays, Howell declared "[t]ime is of the essence as to your obligation to complete the work . . . in the event of R&J's failure to comply with this letter and the Notice of Default that was issued on February 10, 2006 to cure . . . and properly man the project . . . it is our intention to remove R&J from the project, in which event we shall hold R&J fully liable for any and all damages . . .

By letter dated February 14th Howell noted that R&J refused to man the project despite the letter of February 13th allowing it to do so, and that R&J was "removed from the project effective immediately".

Howell avers that even if R&J's version of events is taken as true, Howell is entitled to summary judgment as there was no truly culpable, grossly negligent, or intentionally harmful conduct on Howell's part, and therefore the exculpatory clause limiting damages is enforceable.

A review of the correspondence from R&J, identifying its work and delay related complaints, reveals that it was the conduct of other trades and construction delays which were the subject of R&J's discontent. R&J's correspondence also often takes a discordant tone (Exhibit 4 - R&J calls Howell's statement "absolutely ridiculous"; Exhibit 5 - "you continue to cloud the issue"). R&J complains of "floors flooded with standing water" while at the same time complaining that holes drilled in the masonry allowing water to drain damaged its stored equipment (Exhibit 5 and 11). R&J appears to make demands upon Howell to control the conduct of other trades (Exhibit 11) and to have certain preparations at the worksite before it would commence the Sheetrock.

None of the evidence submitted, whether letters between the parties or deposition testimony or affidavits, show any conduct on the part of Howell which can be characterized as the sort of intentional culpable conduct necessary to deny enforcement of the limitation of damages clause. The failure of trades or subcontractors, other than the prime contractor, to timely furnish services required for the work of other subcontractors to commence does not constitute gross negligence on the part of the contractor (**Novak & Co., Inc. v. New York City Housing Authority**, 108 AD2d 612, 613, 1st Dept., 1985, *appeal dsmd* 65 NY2d 637, 1985).

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Given the delays in commencement of the Sheetrock construction and the need to avoid further delay, and given the opportunity afforded R&J to commence work on February 14th notwithstanding its failure to be ready at the normal starting time of 7:00 a.m. on the 13th, the termination for cause cannot be deemed malicious, whether or not it had merit, particularly after R&J received a three day notice. Nor can Howell be said to have intended harm or intentionally prevented R&J from completing its work.

R&J makes one additional argument, that the clause allowing for conversion of a firing for cause to a firing of convenience (hereafter referred to as the "conversion clause") is in conflict with, and renders meaningless, an additional clause which requires mediation as a condition precedent to litigation.

The terms of the Agreement are not ambiguous and are not in need of interpretation. Contrary to R&J's contention, there is no "irreconcilable conflict" between the conversion clause and the mediation term (see, Consolidated Gas Supply Corporation v. Matula, 36 NY2d 790, 1975, affirming 42 AD2d 656, 3d Dept., 1973).

R&J argues that mediation is useless if the outcome is predetermined that the damages are limited. While R&J is correct, that its ability to collect consequential damages is predetermined, R&J gave its assent to that contract clause, in essence waiving consequential damages. "The common business practice of limiting liability by restricting or barring recovery by means of an exculpatory provision, 'although disfavored by the law and closely scrutinized by the courts' is accorded judicial recognition where it does not offend public policy" (Banc of America Securities LLC v. Solow Bldg. Co. II, L.L.C., 47 AD3d 239, 244, 1st Dept., 2007).

Permitting a conversion of a termination for cause to a termination for convenience offers a benefit to R&J. If fired for cause, R&J is subject to liability for any costs incurred by Howell to complete its obligations under the Agreement. If mediation is successful, there is no need for litigation. If mediation is not successful, R&J has the ability to succeed in avoiding payment of the costs to complete by showing that the termination was without cause. In such a case, R&J avoids liability for the cost to complete and may recover for services provided. Thus, both terms under the Agreement can operate without completely negating the other, and there is no irreconcilable conflict.

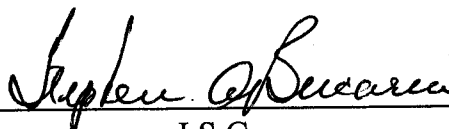
R&J's reliance upon Banc of America Securities LLC v. Solow Bldg. Co. II, L.L.C., (47 AD3d 239, 1st Dept., 2007) is misplaced. There liability was limited to

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specific performance and was rejected based upon the landlord's malicious demand for \$6 million to secure approvals needed by the tenant. The case does not stand for the proposition that a clause providing for conversion of a termination for cause to a termination for convenience should not be enforced. In the matter *sub judice* Howell's conduct was not so egregious so as to support denial of enforcement. Indeed, when a physical altercation rendered R&J's performance difficult, Howell agreed to remove the offending party from the worksite. Accordingly, under all of the foregoing circumstances, the motion for partial summary judgment is **granted**.

A Certification Conference is scheduled for June 16, 2008 at 9:30 a.m. in Chambers of the undersigned.

Dated MAY 30 2008


J.S.C.

ENTERED

JUN 12 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE