[* 1]

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

PRESENT: HON. PAUL G. FEINMAN PART 52

Index Number : 116018/2006
DART MECHANICAL
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 116018/2006
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO. 4

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 6
Answering Affidavits — Exhibits	7-8
Replying Affidavits	9 - 10

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED
OCT 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/10/08

J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X

DART MECHANICAL CORP.,

Plaintiff,

against

THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF SANITATION,

Defendants.
----------X

Index Number 116018/2006
Mot. Seq. No. 001

DECISION AND ORDER

Appearances: **For Plaintiff:**
Tunstead & Schechter
By: Michael D. Ganz, Esq.
500 North Broadway, Suite 101
Jericho, NY 11753
(516) 822-4400

For City of New York:
Michael A. Cardozo, Esq.
Corporation Counsel of City of N.Y.
By: Carol J. Hsu, Esq.
100 Church Street
New York, NY 10007
(212) 788-1312

Papers considered in review of this motion for summary judgment:

Papers	**Numbered**
Amended Notice of Motion and Affidavit of Delano Walsh in Support of Defendants' Motion	1
Defendant's Memorandum of Law in Support of Motion	2
Affirmation in Support of Motion and Affidavits Annexed	3
Exhibits to Affidavit of Delano Walsh in Support of Motion	4, 5
Plaintiff's Affirmation in Opposition to Motion and Affidavit of Douglas Karol	7
Plaintiff's Memorandum of Law in Opposition to Motion	8
Affidavit in Further Support of Defendant's Motion	9
Defendant's Reply Memorandum of Law	10

PAUL G. FEINMAN, J.:

The City of New York and New York City Department of Sanitation (collectively referred to herein as "the City" and/or "defendants") move pursuant to CPLR 3212 for summary judgment dismissing the complaint on the grounds that they did not cause delays to the project, and that any alleged damages suffered by plaintiff was the result of plaintiff's failure to comply with the required contract notice. In opposition, plaintiff Dart Mechanical Corp. argues that there are triable issues of fact that preclude the Court from granting defendants' motion for

summary judgment. For the reasons set forth below, defendants' motion for summary judgment is granted and the complaint dismissed.

Background

On May 13, 1999, plaintiff Dart Mechanical Corp., a heating, ventilation and air conditioning (HVAC) contractor, (hereinafter "Dart") submitted a bid to the New York City Department of Sanitation (hereinafter "DSNY") to provide labor and materials relating to the construction of the New Annex Building for Queens Sanitation District 7 in College Point, New York (hereinafter "the Project") (Aff. of Delano B. Walsh in Supp. of Mot. [hereinafter "Walsh Aff"], Ex. A). On June 21, 1999 DSNY awarded Dart the HVAC contract in the amount of $3,637,000, and on August 4, 1999, Dart entered into a contract with DSNY by the City of New York to provide labor and materials for the Project (hereinafter "Contract") (Walsh Aff., Ex. A; Affm. in Opp. to Mot. ¶ 4).

The Contract contains numerous provisions, including the exculpatory clauses of Articles 12 ("Coordination with Other Contractors [Revised]") and 13 H ("No Damages for Delay"). Article 12 provides, in relevant part, that:

> *The City shall not, however, be liable for any damages suffered by this Contractor by reason of the other Contractor's failure to promptly comply with the directions so issued by the Engineer, or by reason of another Contractor's default in performance,* it being understood that the City does not guarantee the responsibility or continued efficiency of any Contractor.
>
> ***
>
> Should the Contractor sustain any damage through any act or omission of any other Contractor having a Contract with the City for the performance of work upon the site or of work which may be necessary to be performed for the proper prosecution of the work to be performed hereunder, or through any act or omission of a subcontractor of such Contract, *the Contractor shall have no claim against the City for such damage, but shall have a right to recover such damage from the other Contractor* under the provision similar to the

> following provisions which have been or will be inserted in the contracts with such other Contractors.

(Walsh Aff., Ex. A, Art. 12) (emphasis added).

Article 13 H ("No Damages for Delay") provides, in its entirety, that:

> The Contractor agrees to make no claim for damages for delay in the performance of this Contract occasioned by any act or omission to act of the City or any of its representatives, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work as provided herein.

(Walsh Aff., Mot., Ex. A, Art. 13).

Further, Articles 11, 13 E.2, 42 and 53 of the Contract contain notice and documentation provisions. Article 11 ("Notice of Conditions Causing Delay") in relevant part, reads as follows:

> Within five days after the commencement of any condition which is causing or may cause delay in completion, including conditions for which the Contractor may be entitled to an extension of time, the Contractor must notify the Engineer in writing of the effect, if any, of such condition upon the previously approved progress schedule, *and must state why and in what respects, if any, of such condition upon the previously approved progress schedule, and must state why and in what respects, if any, the condition is causing or may cause such delay.* Failure to strictly comply with this requirement... shall constitute a waiver by the Contractor, of any and all claims for damages for delay arising therefrom.

(Walsh Aff., Ex. A, Art. 11) (emphasis added).

Article 13 E.2 ("Application for Extension of Time") provides that a contractor's application of extension for delay in completion of work must also set forth, among other things, the following:

> (a) the *nature of each alleged cause of delay* in completing the work;
> (b) the *date upon which each such cause of delay began and ended* and the number of days attributable to each such cause; and
> (c) a statement that the Contractor waives all claims except for those delineated in the application, and the particulars of any claims which the Contractor does not agree to waive.

(Walsh Aff., Ex. A, Art. 13) (emphasis added).

Article 42 ("Final Payment") requires a contractor to submit verified statement of any claims it may have against the City, and where the causes of action is for delay, to plead with specificity the circumstances surrounding such delay. Article 42 provides, in relevant part, that:

> After completion and final acceptance of the work, the Contractor shall submit all required certificates and documents, together with a requisition for the balance claimed to be due under the Contract, less the amount authorized to be retained for maintenance... The Contractor must also submit with the final requisition a final verified statement of any and all alleged claims against the City, in any way connected with or arising out of this Contract...*and if the alleged claim be one for delay, the alleged cause of each such delay, the period or periods of time, giving the dates when the Contractor claims the performance of the work, or a particular part thereof, was delayed, and an itemized statement and breakdown of the amount claimed for each such delay...* The Contractor is warned that unless such claims are completely set forth as herein required, the Contractor upon acceptance of the final payment, pursuant to Article 44 hereof, will have waived any such claims.

(Walsh Aff., Ex. A, Art. 42) (emphasis added).

Article 53 - ("Claims and Actions Thereon") highlights the importance of the notice and reporting provisions. It prevents a contractor from asserting a cause of action against the City in the absence of strict compliance. Article 53 provides, in relevant part, that:

> No claim against the City for damages for breach of contract or compensation for extra work shall be made or asserted in any action or proceeding at law or in equity, unless the Contractor shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims...

(Walsh Aff., Ex. A, Art. 53).

In addition to the Contract with Dart for HVAC construction services, DSNY also contracted with three other prime contractors to provide services on the Project; Santa Fe Construction, Inc. (hereinafter "Santa Fe") was the general contractor; Franco Belli Plumbing &

Heating and Sons, Inc., ("hereinafter "Belli") was the plumbing contractor and CAD Electric Corp. (hereinafter "CAD") was the electrical contractor (Aff. of Douglas Karol in Opp. to Mot. [hereinafter "Karol Aff."] ¶ 5; Affm. in Opp. to Mot. ¶ 8).

DSNY entered into a management services contract with O'Brien Kreitzberg, Inc. (hereinafter "OBK") as its Construction Manager (Walsh Aff. ¶ 5; Affm. in Opp. to Mot. ¶ 5). OBK's function was to supervise and control the performance of the work on DSNY's behalf, which included coordinating, overseeing and monitoring scheduling of the work (Affm. in Opp. of Mot. ¶ 5). Anthony Aguero, a professional engineer, licensed in the State of New York, was OBK's project manager for the entire construction phase (Walsh Aff. ¶ 5; Karol Aff. ¶ 3).

DSNY also contracted with the LIRO Group (hereinafter "Liro") as its Critical Path Method (hereinafter "CPM") scheduling consultant to develop and maintain CPM monthly scheduling reports (Walsh Aff. ¶ 6). The CPM consultant was responsible for assisting the scheduling of the Project by compiling information from each contractor into a schedule that accurately reflects the manner in which the prime contractor intends to perform its work in compliance with its contract requirement (Walsh Aff. ¶ 7, Ex. A). According to Dart, DSNY also entered a contractual agreement with Goncha Karlsberger P.C., a professional architect to provide services, including reviewing all of the prime contractors' submissions and shop drawings, requests for information, requests for change orders and other related items (Karol Aff. ¶ 4).

On November 9, 1999, DSNY furnished Dart with an Order to Commence Work, which stated, in part, that "the date for the commencement of all work on this contract was November 15, 1999 and the time for the completion of the work on this contract was November 24, 2002 a

total of 1095 consecutive calendar days in accordance with Schedule "A" of the contract, plus the 10-day allowance in Article 8 of the Agreement"(Karol Aff. ¶ 6, Ex. 3).

Progress Meetings, with attendance by DSNY, OBK, Liro, and all four prime contractors, began on November 23, 1999 and were generally held every four weeks (Walsh Aff. ¶ 8). The meeting participants were requested to review the items and advise the Project Manager of any errors or omissions (Walsh Aff. ¶ 8). In addition to the monthly Progress Meetings, monthly CPM Update Meetings began after the CPM baseline schedule was established in August 2000 (Walsh Aff. ¶ 9).

According to the City, Santa Fe, the general contractor, and USF&G, its bonding agent, were responsible for all delays of the Project (Walsh Aff. ¶ 10). One of Santa Fe's first acts of delay was its failure to obtain the appropriate permit from the New York City Department of Buildings to begin construction (Walsh Aff. ¶ 11). Despite having knowledge of how to obtain the necessary permit, Santa Fe sent a Notice of Delay letter to the Project Manager on December 15, 1999, in which it claimed an inability to obtain any work permits related to the Project (Walsh Aff. ¶ 12). Santa Fe did not obtain the foundation permit until February 8, 2000 (Walsh Aff. ¶ 12). Santa Fe also failed to properly and timely submit information to Liro, the CPM consultant, as required by the contract (Walsh Aff. ¶¶ 15, 18, Ex. L). Additionally, Santa Fe hindered the development of the CPM schedule by failing to provide Liro with dates for procurement items requiring long lead times which must be ordered in advance (Walsh Aff. ¶ 22).

In a letter dated May 2, 2000, Aguero, OBK's project manager, notified Santa Fe that it was responsible for the delays in completing the CPM base line schedule (Walsh Aff. ¶ 22, Ex.

O). As a result of Santa Fe's delays, excavation did not begin until June 14, 2000 (Walsh Aff. ¶ 23). Santa Fe did not comply with the time frames for submitting a recovery schedule and did not submit the required shop drawings for the proposed de-watering and sheeting systems (Walsh Aff. ¶¶ 30-41).

By Notice of Delay Letter dated July 3, 2001, Belli, the plumbing contractor, informed DSNY that its work on the underground piping had been delayed (Walsh Aff. ¶ 43, Ex. T). From August 7, 2001 through September 7, 2001, Belli delayed the Project by thirteen (13) working days, the first delay by a contractor other than Santa Fe (Walsh Aff. ¶ 45). During this same thirty day period, Santa Fe delayed the Project another ten (10) working days, and at this time was directly responsible for approximately 100 lost work days (Walsh Aff. ¶¶ 45, 46). From September 2001 to March 2002, Santa Fe's failure to provide information and inactivity resulted in the loss of many more work days (Walsh Aff. ¶¶ 49-53). According to Dart, in or about 2001, during the course of the Project, DSNY's project manager Dave Dinney died, and DSNY did not utilize a new project manager to oversee the Project (Karol Aff. ¶ 9).

Around April 2003, Santa Fe began causing significant delays to the Project once again with regard to painting the garage (Walsh Aff. ¶¶ 66-70). In a letter dated June 10, 2003, DSNY alerted Santa Fe's bonding company to its concern about Santa Fe's failure to progress the work and invited the bonding company to attend a meeting with DSNY in June 2003 (Walsh Aff. ¶ 71, Ex. Z). Also, on June 26, 2003, the DSNY Agency Chief Contracting Officer (hereinafter "ACCO"), Ronald Blendermann, sent Santa Fe a Notice of Intent to Default letter in which it notified Santa Fe that it had committed acts of default under the contract and that Santa Fe was responsible for the Project being 331 calendar days behind schedule. Blendermann also

informed Santa Fe that it had "been performing minimal work which has impacted the other three prime contractors and the completion date" (Walsh Aff. ¶ 72, Ex. B). Between July 30, 2003 and August 31, 2003, Santa Fe was responsible for loss of an additional twenty-seven (27) days (Walsh Aff. ¶¶ 79-81).

On September 10, 2003, the DSNY ACCO sent a letter to Santa Fe declaring the contractor to be in default of the Contract (Walsh Aff. ¶ 84, Ex. GG). On September 12, 2003, the DSNY ACCO sent a revised Notice of Default to Santa Fe and a letter to USF&G, Santa Fe's bonding company, requesting it to "commence and diligently perform the work specified in the Contract, including physical site work within twenty-five business days after this notice" (Walsh Aff. ¶¶ 84, 85, Exs. B & HH). On November 10, 2003, DSNY directed USF&G to commence completion of Santa Fe's portion of the project on November 12, 2003 (Walsh Aff. ¶ 92, Ex. HH). USF&G refused to begin completion of the work, and advised DSNY that it would not take any action until after a judicial determination resolved the Article 78 proceeding brought by Santa Fe against DSNY seeking to set aside the default determination (Walsh Aff. ¶ 92).

On November 26, 2003, Santa Fe's Article 78 petition was denied (Walsh Aff. ¶ 93, Ex. LL). USF&G then agreed to complete Santa Fe's work and began negotiating with contractors and subcontractors to resume work (Walsh Aff. ¶¶ 93, 94). USF&G's decision to wait for a judicial determination of the Article 78 petition resulted in nearly two months where no activity was made with respect to the general contractor's work (Walsh Aff. ¶ 93). USF&G made various commitments, including having the Project site cleaned and physical work at the site recommenced by January 5, 2004 (Walsh Aff. ¶ 93, Ex.HH). As a result of Santa Fe's default,

the Project lost another forty-two (42) work days due to rescheduling of USF&G's anticipated start date, and by January 2005, approximately 215 additional work days were lost (Walsh Aff. ¶¶ 94-108, Ex. G). In or about November 2004, Dart agreed with DSNY's finding that the general contractor was responsible for delays to the overall Project (Affm. in Supp. of Mot. ¶ 24). Dart specifically stated that the "General Contractor was at fault resulting in their Termination Impact on Dart's Contract" (Walsh Aff., Vol. IV, Ex. JJ).

Dart avers that it submitted verified statements of its damages and informed DSNY of its claim for impact and delay damages (Karol Aff. ¶ 11). According to defendants, Dart did not submit verified statement of damages to DSNY at any time prior to November 2002 (Affm. in Supp. of Mot. ¶ 28). The verified statements of damages submitted by Dart did not provide any information as to any specific "interference, obstruction, disruption or delay, as required by Article 11 of the Construction Agreement (Affm. in Supp. of Mot. ¶ 29).

During the course of the Project, Dart submitted and was granted five partial time extensions by DSNY (Karol Aff. ¶ 11; Affm. in Supp. of Mot. ¶32). Dart was responsible for the delay period between the time that Santa Fe achieved substantial completion on April 22, 2005 and the time that Dart received substantial completion on July 21, 2005 (Walsh Aff. ¶ 115, Ex. D). The City concedes that there were instances where the City's architect took longer than the customary two to four weeks to review drawings and submittals (Walsh Aff. ¶ 125). The records produced by the City also indicated that Dart delayed various submissions for several months, including sheet metal drawings that were necessary to the development of the Integrated Drawings (Walsh Aff. ¶ 125). On August 11, 2005, Dart submitted a claim book consisting of summaries of additional costs, a background of claim for damages, charts and

tables relating to delay and wage escalation analyses and various contract-related documents, including correspondence in connection with its application for a final extension of time for processing its substantial completion/partial payment (Affm. in Supp. of Mot. ¶ 36, Ex. K). This claim book did not contain information regarding the period or periods of time, or the dates when Dart claims that the performance of the work of a particular part of the work, was delayed, as is required under Article 42 (Affm. in Supp. of Mot. ¶ 37).

In a Time Delay Analysis statement dated April 10, 2006, OPK's project manager, Tony Aguero, stated that "Dart did not delay the project by delaying the submission of their As-built Drawings. On the contrary, Dart helped the project by completing work out of sequence" (Karol Aff. ¶ 16, Ex. 24). The Project, however, was delayed a total of 971 calendar days beyond the original scheduled completion date of November 24, 2002 (Walsh Aff. ¶ 3).

Procedural History

On October 26, 2006, Dart commenced this suit by summons and complaint to recover damages it allegedly incurred as a result of delays to the Project. Dart asserted a single cause of action for breach of contract, stating that defendants' alleged actions and inactions severely impacted and delayed Dart's schedule and the performance of its work (Compl. ¶¶ 14, 19). Dart also alleged that the delay to its schedule and planned sequence of work was the result of defendants' grossly negligent conduct in managing the Project and their inadequate management of the prime contractors (Compl. ¶¶ 15, 20). Dart further alleged that these delays were not contemplated by Dart at the time of its bid on the Project (Compl. ¶ 21). Dart now seeks to recover its increased costs in excess of $1.3 million due to defendants' alleged breach of contract (Compl. ¶¶ 23-27).

After a note of issue was filed, defendants City of New York and New York City Sanitation Department moved for summary judgment. Defendants seek dismissal of the complaint on the grounds that, (1) they did not cause delays to the Project, (2) Dart failed to comply with the contractual notice requirements pertaining to its alleged damages for delay, and (3) the express terms of the Contract preclude Dart's recovery for damages for delay (Amd. Not. of Mot.). Dart opposes the motion.

Parties' Contentions

Defendants first argue that they are entitled to summary judgment because under the provisions of Article 12 of the Construction Agreement Dart may not recover damages against the City for delays caused by another contractor (Defs. Memo of Law, pp. 2-3). Defendants contend that Article 12 is an exculpatory clause, which provides that when a delay in the Project is caused by an act or omission of another contractor, the City shall not be liable for the resulting damage (Defs. Memo of Law, p. 3). Thus, under this contractual provision, defendants are not liable to Dart, and Dart cannot make a claim against defendants for "failing to ensure" the timely performance of the general contractor (Defs. Memo of Law, p. 4).

In opposition, Dart argues that defendants should not prevail on their motion for summary judgment, since triable issues of fact exist as to whether the provisions contained in Article 12 of the Contract preclude Dart's impact and delay damage claims (Dart Memo of Law, p. 3). Dart contends that it is undisputed that the parties' Contract is governed by General Municipal Law Section 101, commonly known as the "Wicks Law," and argues that defendants violated this law by requiring prime contractors to coordinate their own work (Dart Memo of Law, p. 3). Dart also contends that defendants' allegations that Santa Fe caused every single day

of delay is without support, since Holchendler, the DSNY Director of Construction, acknowledged, and DSNY's own documents indicate that Santa Fe was not the exclusive source of the Project delays (Dart Memo of Law, p. 6; Karol Aff., Exs. 17, 35 p. 54).

Defendants next argue that Dart's failure to strictly comply with the notice and documentation provisions contained in Articles 11, 13, 42 and 53 of the Construction Agreement requires dismissal of its claims (Defs. Memo of Law, p. 5). According to defendants, compliance with Articles 11, 13, 42 and 53 are a precondition to commencement of an action against the City (Defs. Memo of Law, p. 8). They contend that Dart waived its delay claims by not complying with the notice provision of Article 11 of the Contract. Defendants state that while Dart and its subcontractors submitted letters to DSNY during the course of the Project alleging various delays by the general contractor, the letters made no reference to or claim that any of the delays affected the previously approved progress or CPM schedule as required by Article 11 (Defs. Memo of Law, p. 5; Aff. of Jacob Holchendler in Further Supp. of Mot. [hereinafter "Holchendler Aff."] ¶ 26).

Defendants also contend that Dart waived its delay claims under Article 13 E.2 of the Contract by asking for and receiving extensions of time (Defs. Memo of Law, p. 6). According to defendants, none of Dart's five applications for partial time extensions satisfy the notice and documentation requirements outlined in Article 13 E.2 of the Contract (Defs. Memo of Law, p. 6). Defendants maintain that even if Dart could not ascertain the end date of an alleged delay at the time it submitted its partial time extension requests, Dart failed to identify the start date of any of its construction activities that were allegedly delayed (Holchendler Aff. ¶ 30).

Defendants further contend that Dart's failure to comply with Articles 42 and 53 of the

Agreement also constitutes a waiver of its delay claims (Defs. Memo of Law, p. 7). Specifically, defendants argue that Dart's failure to submit a verified statement of claims that complies with the provision of Article 42 resulted in a waiver of the delay claims that it now pursues (Holchendler Aff. ¶ 34). They also argue that the plain language of Article 53 reiterates a contractor's strict compliance with the notice provisions elsewhere in the Contract and thus, precludes Dart's claim for breach of contract (Defs. Memo of Law, p. 7).

Dart argues that DSNY's assertion that, Dart's non-compliance with the notice provisions in Articles 11, 13, 42, and 53 of the Contract bars Dart's impact and delay claims against DSNY, is "untrue and improper"in light of DSNY's actions and inactions in this matter (Dart Memo of Law, p. 17). Dart contends that it complied with the notice requirements of Article 11 by submitting verified statements of claim which stated its claims in the most detail ascertainable during the Project (Dart Memo of Law, p. 18). Dart insists that the impact and extent of its damages were not ascertainable until it completed its work (Dart Memo of Law, p. 18).

Finally, defendants argue that Dart's claim for delay damages are barred by the explicit language of the no-damages- for- delay clause of Article 13 H of the Contract (Defs. Memo of Law, p. 10). Defendants argue that Dart's single cause of action for increased costs due to defendants' alleged breach of contract is really a claim for delay, even if it is not explicitly so characterized (Defs. Memo of Law, p. 10). They contend that Dart's claim for delay is evidenced by Dart's various allegations that defendants "actions and failures to act resulted in Dart being declared substantially complete...a total of 970 calendar days after the scheduled completion date," and that "delays to Dart's schedule and planned sequence of work caused by

the City and DSNY were not contemplated by Dart at the time of Dart's bid" (Defs. Memo of Law, p. 11). They contend that Dart has the burden of establishing that the delay falls within one of the four exceptions to the no-damages-for-delay clause (Defs. Memo of Law, p. 11).

In response, Dart argues that issues of fact exist as to whether the exculpatory clause provisions contained in Article 13 H of the Contract preclude Dart's delay and impact damage claims because its claims fall under New York's four recognized exceptions to the no-damages-for-delay clause (Dart Memo of Law, p. 9). Dart contends that delay of an additional thirty-two (32) months to a thirty-six (36) month contract for the completion of Dart's work was wholly uncontemplated thus, the exculpatory clause does not bar its claims (Dart Memo of Law, pp. 11- and the other prime contractors for the Project by issuing notices to proceed, but then refusing to timely terminate Santa Fe's contract until nearly one year after the original completion date (Dart Memo of Law, pp. 13-14).

Additionally, Dart contends that DSNY acted in bad faith in informing Dart that it could not make a claim for damages for delay although the law provides for a contractor to make such claims (Dart Memo of Law, p. 15). Dart also argues that DSNY breached a fundamental obligation of the Contract when it delayed the prime contractors' ability to complete the Project building for nearly three years, including when DSNY failed to timely terminate Santa Fe or even notify Santa Fe's surety of a problem with Santa Fe's performance (Dart Memo of Law, p. 16).

Legal Analysis

Summary judgment is proper when there is no genuine issue of material fact upon which the court could find for the non-moving party (*Alvarez v Prospect Hosp.*, 68 NY 320, 324 [1986]). It is a drastic remedy that should not be granted if there is doubt as to whether a triable

issue exists (*Gilson v Metropolitan Opera*, 5 NY3d 574, 578 [2005]). Issue finding as opposed to issue determination is the function of a court on a motion for summary judgment (*Karian v G&L Realty, LLC*, 32 AD3d 261, 269 [1st Dept. 2006]). The moving party must produce evidence to conclude that summary judgment should be granted in its favor (*Shaw v Time-Life Records*, 38 NY2d 201, 207 [1975]). The evidence will be construed in the light most favorable to the non-moving party (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], citing *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 US 574, 587 [1986]). Once the moving party has met its burden, and demonstrates its entitlement to summary judgment, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring trial (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

Summary judgment on a contract claim is appropriate only when the contract language is plain and unambiguous, and can be construed without reference to extrinsic circumstances or evidence (*Union Switch & Signal, Inc. v City of New York*, 1994 WL 570789, *2, 1994 US Dist. LEXIS 14688, *4-*5 [SD NY, Oct. 17, 1994]). To establish a claim for breach of contract under New York law, a plaintiff must allege four elements: (1) formation of a contract between the parties; (2) performance by the plaintiff; (3) non-performance by the defendant; and (4) resulting damage to the plaintiff (*Bonnie & Co. Fashions v Bankers Trust Co.*, 945 F. Supp. 693, 711 [SD NY 1996]).

Defendants' motion seeking summary judgment centers primarily on two issues: (1) whether the no-damages-for-delay exculpatory clause in the Contract bars Dart's recovery for delay damages against the City, and (2) whether Dart's alleged failure to comply with the notice and documentation requirements in the Contract constitutes a waiver of its delay claims.

I. No-Damages-For-Delay

A no-damages-for-delay clause exculpates a contractee from liability to a contractor for damages resulting from delays in the performance of the contractor's work. The general rule is that a no-damages-for- delay exculpatory clause is valid and enforceable and is not contrary to public policy if both the clause and the contract, of which it is a part, satisfy the requirements for a valid contract (*see Kalisch-Jarcho, Inc., v City of New York*, 58 NY2d 377, 384 [1983]). However, this rule is not absolute, and damages may be recovered 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 contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract" (*Corinno Civetta Constr. Corp. v New York*, 67 NY2d 297, 309 [1986]).

1. Gross Negligence/Bad Faith

An exculpatory clause will not be enforced when, "in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing" (*Kalisch-Jarcho*, 58 NY2d at 385). However, "strong public policy considerations favor scrutiny of claims of bad faith when offered by contractors to excuse noncompliance with notice and reporting requirements in public contracts" (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 34 [1998]).

Here, Dart argues that the City's failure to timely terminate Santa Fe, the general contractor on the Project, constituted gross negligence and demonstrated willful misconduct, and at the very least, raises triable issues of fact as to the City's bad faith. The Court is

unpersuaded. While Dart alleges that the City acted with gross negligence in managing the Project, it has not succeeded in presenting any proof on this basis to demonstrate the existence of a material issue of fact warranting trial. The law is clear that to defeat the exculpatory clause [in Article 13H], a contractor must do more than engage in "the facile use of the expression gross negligence" (*Commercial Elec. Contractors, Inc.*, __AD3d__, 2004 NY Slip Op 51155, *4 [1st Dept., June 28, 2004], quoting *Sol E. Feldman Furs Inc. v Jewelers Protection Services, Ltd.*, 134 AD2d 171, 172 [1st Dept. 1987]).

In this case, the evidence demonstrates that the City proceeded in good faith to expedite completion of the Project. Not only did the City contract for the services of a Construction Manager to supervise and control the performance of the contractor's work, but it also hired a Critical Path Method scheduling consultant to develop and maintain monthly reports and to ensure that each prime contractor intended to perform its work in compliance with their respective contract requirements. In addition to participating in monthly progress meetings, the City also required monthly CPM update meetings to help facilitate the efficient operation and scheduling of the Project.

Early in the Project's construction, the City and OBK's project manager informed Santa Fe of the contractor's delays in completing the CPM schedule and directed the contractor to proceed with the work. When it became apparent to the City that Santa Fe continuously demonstrated an unwillingness to adhere to schedules and progress the work, the City alerted Santa Fe's bonding company to its concern and invited the bonding company to attend one of the Project meetings. The City also sent Santa Fe a Notice of Intent to Default in which it notified Santa Fe that it had committed acts of default under the contract. Ultimately, on

September 10, 2003, the City declared the contractor to be in default of the contract. These actions indicate the City's sustained efforts to progress the work of the delaying prime contractor.

The fact that the City did not terminate Santa Fe at an earlier juncture does not diminish the significant and meaningful efforts of the City to progress Santa Fe's work (*see e.g., Norelli & Oliver Constr. v State of New York,* 32 NY2d 809, 809 [1973] [finding that the State was not responsible for the delays of the site contractor, noting that "there were sustained efforts and pressures by the State to progress" the contractor's work]). The City's decision to default a contractor is discretionary,[1] and any delay in doing so may conceivably amount to an error in judgment. However, it strains all reason to assert that the City's delay in terminating the general contractor is, in and of itself, sufficient to constitute gross negligence or evidence bad faith (*but cf., Gemma Construction Co. v City of New York*, 246 AD2d 451, 452 [1st Dept. 1998] [denying summary judgment where the City's failure to obtain building permits, provided inaccurate site specifications, and its failure to timely correct a hazardous condition was tantamount to a showing of bad faith]).

Here, Dart's allegations of gross negligence and bad faith lack substance and amount to nothing more than conjecture and speculation (*see e.g., Grullon v City of New York*, 297 AD2d 261, 263-264 [1st Dept. 2002] [stating that mere surmises, suspicions or conjectures that are unsupported by evidence are insufficient to raise a material issue of fact, and thereby defeat summary judgment]). Thus, in the absence of proof in admissible form, the court cannot invalidate the no-damages for-delay clause or otherwise find a triable issue of fact on this ground.

2. Uncontemplated Delays

Dismissal of a delay claim on summary judgment is appropriate only where there is no question that the delay in issue is within the contemplation of the exculpatory clause (*see Honeywell, Inc., v City of New York*, 108 AD2d 125, 128-129 [1st Dept. 1985], affm'd 67 NY2d 297, 316 [1986], citing *Corinno*, 67 NY2d at 315). Recovery of damages resulting from a broad range of reasonable and unreasonable conduct by the contractee will be precluded if the conduct was contemplated by the parties at the time of the agreement (*Kalisch-Jarcho*, 58 NY2d at 384-385). A delay is contemplated where, although the conditions causing the delay "themselves may not have been anticipated, the possibility, however unlikely, of their arising was contemplated and addressed by the parties in their agreement" (*Blau Mechanical Corp. v City of New York*, 158 AD2d 373, 374-375 [1st Dept. 1990], quoting *Buckley & Co. v City of New York*, 121 AD2d 933, 934 [1st Dept. 1986]).

If the alleged delays were reasonably foreseeable under a project's particular circumstances, or were discussed in the contract, damages arising from those delays are barred (*see Corinno*, 67 NY2d at 310; *see also Peckham Rd. Co. v State of New York*, 32 AD2d 139, 141 [3d Dept. 1969], *affm'd* by 28 NY2d 734 [1971]). "When an owner uses multiple co-prime contractors to construct a project, the risk of poor performance, and/or inactivity, by other co-primes is foreseeable, and within the parties' contemplation" (*Premier-New York, Inc., v Travelers Property Casualty Corp.*, 2008 NY Misc. LEXIS 4865, *32-*33 [Sup. Ct. NY County, July 8, 2008].

Turning to the facts of this case, the extant record does not support a finding that the delays at issue were uncontemplated. Quite the contrary. Dart, in its correspondence to the City,

and its affidavits to the court, acknowledged that the significant delays to the Project were attributable to Santa Fe. Article 12 of the parties contract recognized the very fact that delays may be caused by other contractors who fail to promptly comply with the engineer's directives or who otherwise default in performance of their contract. Article 12 also relieves the City from liability for such delays or non-performance of other contractors, since the City neither guarantees or assumes responsibility for the efficiency of its contractors in adhering to approved work schedules. The very inclusion by the City, and acceptance by the plaintiff, of this exculpatory clause in the contract is independent proof that the parties considered and provided for the possibility of its occurrence. As such, delays by other contractors in the performance of their work cannot be deemed uncontemplated by the parties at the time of their agreement (*see e.g., Gottlieb Contr., Inc. v City of New York*, 86 AD2d 588, 589 [1st Dept. 1982]).

In *Gottlieb,* the contracted work was not completed until more than one year after the scheduled completion date and required over 1100 additional man hours (86 AD2d at 589). The trial court held the City responsible for the delays, notwithstanding the exculpatory clause in the contract (86 AD2d at 589). On appeal, the Appellate Division held that with the exception of a ten (10) week period of delays attributable to plaintiff, the delays in completing the work were the result of the "other prime contractors' inaction, faulty performance and defaults under their contracts" (86 AD2d at 589) The Appellate Division stated that these types of delays are all within the contemplation of the exculpatory clause (86 AD2d at 589).

Dart's further assertion that a delay of an additional thirty-two (32) months to a thirty six (36) month contract for the completion of its work is uncontemplated is simply not supported by case law. Courts have not ruled that delays are uncontemplated simply because they

substantially increase the time required for completion of the contract (*see e.g., Corinno Civetta*, 67 NY2d at 307 [2 year delay in completion of a 3 ½ year contract was not uncontemplated]; *Buckley & Co. v New York*, 121 AD2d 933, 933 (1986) [eight year delay in two year contract was not uncontemplated]; *Blau Mechanical*, 158 AD2d at 374 [709 day delay in completion of 730-day contract was not uncontemplated].

Here, it is clear that Dart's assertion that, the project delays were uncontemplated because the City failed to terminate Santa Fe's contract at an earlier point in time, is tantamount to allegations of poor contract administration that is subject to the bar of the exculpatory provision (*see Bat-Jac Contracting*, 1 AD3d at 129; *see also, T.J.D. Constr. Co. v City of New York*, 295 AD2d 180 [1st Dept. 2002] [stating that "even if defendant should have anticipated such unsatisfactory test results by reason of information it had prior to the contract, and failed to take adequate 'account thereof, at worst the poor planning and scheduling of which plaintiff complains amounted to no more than inept administration' within the scope of the no-damages-for-delay clause"]).

While the Court is not unsympathetic to Dart's circumstances regarding the allegedly increased costs it incurred, the project delays by other prime contractors is not an uncontemplated delay where the conduct was contemplated by the parties at the time of the agreement (*see e.g.. Matter of Manshul Constr. Corp.*, 160 AD2d 643, 644 [1st Dept. 1990] [stating that demonstration of increased costs as a result of delay does not, in and of itself, meet the requirement of a "wholly unanticipated" delay], *citing Corinno*, 67 NY2d at 313-314. It should be noted that due to the provisions in Article 12 of the Contract, Dart's action for damages arising out of the project delays lie against the contractor responsible for such delays.

3. Abandonment

"To avoid the risk of the exculpatory clause and recover on the ground of abandonment, a contractor must establish that the contractee is responsible for delays which are so unreasonable that they connote a relinquishment of the contract by the contractee with the intention of never resuming it" (*Corinno*, 67 NY2d at 312-313, citing *Kalisch-Jarcho*, 58 NY2d at 386, n. 8).

Here, the City argues that the Project, albeit delayed, was completed. The evidence does not demonstrate any action on the part of the City to suggest that it had any intention of ever abandoning the Project (*cf.*, *Abax Incorporated v New York City Housing Authority, et al,* 282 AD2d 371, 373 [1st Dept. 2001] [finding that a delay period of over 600 days, including a substantial period during which the Contract Manager suspended the work "is sufficiently indicative of delays beyond the contemplation of the contracting parties or of an abandonment by the contractee"]).

Manifestly, the City's efforts to complete the Project as soon as possible, in the face of a prime contractor whose numerous delays created a strain on all others involved, are shown by the many project and update meetings held, as well as the various correspondences to the contractor informing it of its responsibility under the Contract. Even after Santa Fe's default, the City urged the remaining contractors to perform their work as to avoid any further delays in completing the Project. Dart itself achieved substantial completion on July 21, 2005. However, the Court notes that Dart does not allege that the no-damages-for-delay clause should be invalidated on the ground that the City's conduct was so unreasonable as to constitute an abandonment of the Project.

4. Breach of a Fundamental Contractual Obligation

Delay damages may be recovered in a breach of contract action only where there is a breach by the City of a 'fundamental, affirmative obligation expressed in the agreement (*Earthbank Co., Inc. v City of New York*, 172 AD2d 250, 250 [1st Dept.] *appeal denied* 78 NY2d 855 [1991]). In *Corinno*, the Court of Appeals held that:

> Because the exculpatory clause is specifically designed to protect the contractee from claims for delay damages resulting from its failure of performance in ordinary, garden variety ways, delay damages may be recovered in a breach of contract action *only* for the breach of a fundamental, affirmative obligation the agreement *expressly imposes on the contractee*.

(*Corinno*, 67 NY 2d at 313) (emphasis added).

Applying these principles to the case at bar, Dart asserts that the City breached a fundamental obligation of the contract, thus, its delay claims are not precluded by the no-damages-for-delay clause. The Court rejects Dart's contention that the City's inadequate management of the prime contractors and failure to "timely" terminate Santa Fe's contract evidences the City's breach of a fundamental obligation of the Contract. Dart has not pointed to a single express affirmative obligation, in the numerous provisions of the parties' rather extensive contract, that the City breached (*see Corinno* at 493 [holding that plaintiff's failure to identify affirmative obligation express in contract that city allegedly failed to perform warranted dismissal of plaintiff's delay claims due to no-damage-for-delay clause]). Instead, Dart makes only vague allegations that are unsupported by the law. Again, the decision to terminate a contractor is at the discretion of the City, and nothing in the Contract requires the City to terminate any contractor in any particular time frame.

Notably, during the course of the Project, Dart was granted five partial time extensions

and was responsible for the delay period from about May 2005 until it achieved substantial completion on July 21, 2005. Likewise, the City concedes that there were instances where its own architect took longer than the customary two to four weeks to review drawings and submissions. Additionally, the plumbing contractor's difficulties resulted in the loss of approximately thirteen (13) working days. Nevertheless, neither party attributes any significant delay of the Project to any entity other than Santa Fe (*but cf., Trocom Constr. Corp. v. City of New York*, 51 AD3d 533, 535 [1st Dept. 2008] [finding considerable evidence in the record that the delays in the work were attributable in large part to defendant City]). These types of relatively short delays are often customary in construction projects of this magnitude, and cannot be generally characterized as "inadequate management."

II. Compliance with Contractual Notice Requirements

The court now addresses the issue of whether Dart's non-compliance with the notice and reporting requirements of the contract constitutes a waiver of its claims against the City for delay damages.

Under New York law, "where it becomes clear that one party will not live up to a contract, the aggrieved party is relieved from the performance of futile acts or conditions precedent" (*Sunshine Steak, Salad & Seafood, Inc., v W. I. M. Realty, Inc.*, 135 AD2d 891, 892 [3d Dept. 1987]; *see also, Special Situations Fund III, L.P. v Versus Tech.*, 227 AD2d 321, 321 [1st Dept. 1996]). Contractual notice and reporting provisions are conditions precedent to suit or recovery (*see Oppenheimaer & Co. v Oppenheim*, 86 NY2d 685, 690 [1995]). These contractual notice provisions are "common in public works projects, provide public agencies with timely notice of deviations from budgeted expenditures or of any supposed malfeasance,

and allow them to take early steps to avoid extra or unnecessary expense..." (*A.H.A. Gen. Constr.*, 92 NY2d at 33-34). However, the law is well-settled that "a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition" (*Kooleraire Service & Installation Corp. v Board of Education*, 28 NY2d 101, 106 [1971]). Notwithstanding, in the absence of proof that the alleged misconduct impaired the ability to comply with the contractual undertakings, summary judgment must be granted (*A.H.A. Gen. Constr.*, 92 NY2d at 34).

In *A.H.A. Gen Constr.*, respondent contractor brought suit against the New York City Housing Authority for breach of contract. The Appellate Division, First Department, denied the Authority's motion for summary judgment, finding that although the contractor had not complied with notice and reporting requirements, an issue of fact remained as to the Authority's bad faith in performing the contract (92 NY2d at 30). On appeal, the Appellate Division found that the Authority's alleged misconduct with respect to a few provisions (of a contract that was largely performed by both parties) was *not* so severe as to excuse the contractor's non-compliance with contractual notice and reporting requirements (*A.H.A.*, 92 NY2d at 33-34; *see also*, *MRW Constr. Co. v City of New York*, 223 AD2d 473, 473 [1st Dept. 1996] [finding summary judgment proper regardless of whether the cause of action is one for extra work, disputed work or delay damages where plaintiff failed to prove strict compliance with notice requirements]).

Here, as discussed earlier in this decision, a thorough review of the evidence does not demonstrate that the City engaged in any acts of misconduct in its management of the Project. Dart's failure to strictly comply with the notice and documentation provisions of Articles 11,

13E.2., 42 and constitutes a waiver of its delay claims. Article 53 makes clear that no claim against the City for damages for breach of contract shall be made where the Contractor has failed to strictly comply with the notice requirements of the Contract. In the absence of some misconduct on the part of the City relating to the contractor's work, these provisions must be strictly interpreted.

Assuming *arguendo*, that the notice defect were to be ignored, Dart nonetheless waived any right, under the exculpatory clause of Article 12 of the Contract, to sue the City for delay damages caused by Santa Fe. Moreover, the City's conduct pertaining to the management of the Project, and/or its alleged failure to terminate the prime contractor on the Project does not fit into any of the exceptions to the no-damages-for-delay clause of Article 13H. Therefore, defendants have succeeded in making a prima facie showing of their entitlement to judgment as a matter of law. The plaintiffs have failed to rebut the showing and the action must be dismissed. Accordingly, it is

ORDERED that the motion by Defendants City of New York and New York City Department of Transportation for summary judgment is granted and the complaint is dismissed together with costs and disbursements to the defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: October 10, 2008
New York, New York

Paul G. Feinman
J.S.C.

Pt 52 D&O_116018_2006_001