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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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KIEWIT CONSTRUCTORS, INC. / TULLY CONSTRUCTION CO. INC., JV,

Plaintiff,

- against -

AMERICAN BRIDGE MANUFACTURING COMPANY,

Defendant.

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Index No 603396/2007

DECISION AND ORDER

RICHARD B. LOWE III, J.:

Plaintiff Kiewit Constructors, Inc./Tully Construction Co. Inc., JV, ("KT") moves, pursuant to CPLR §§ 3101(d) and 3025, to strike defendant American Bridge Manufacturing Company's ("ABM") expert disclosure of Roy L. Wilson, P.E. ABM cross-moves, pursuant to CPLR § 3025(b), for leave to amend its counterclaims in to assert a claim for delay damages.

BACKGROUND

This litigation arises out of a contractual dispute between ABM and KT in connection with the reconstruction and rehabilitation of the 145th Street Bridge Over Harlem River (the "Project"). The parties entered into the Material Contract (the "Subcontract") on April 1, 2004, for the fabrication and delivery of the principal structural steel components of the swing span assembly of the bridge. KT was the prime contractor pursuant to a contract (the "Prime Contract") with the New York City Department of Transportation ("DOT"). ABM completed performance of its work in February 2007.

On October 11, 2007, KT filed suit against ABM alleging breach of the Subcontract and seeking damages in the amount of approximately $3.3 million. KT's alleged damages are

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primarily based on ABM's delays and failure to comply with the deadlines in the Subcontract. On December 7, 2007, ABM served an answer denying that it had breached the Subcontract and alleging four separate counterclaims including: contract balance (for approximately $2.1 million), quantum meruit (for approximately $2.1 million), breach of contract (for approximately $2.1 million), and lien foreclosure (for approximately $2.1 million). ABM's counterclaims, according to KT,[1] included no factual allegation that ABM had been delayed by KT, DOT, or any agents of KT, or that it suffered damages as a result of such delays. Furthermore, according to KT, ABM made no demand for a time extension to the Subcontract completion date.

In support of its cross-motion, ABM submits a copy of the Subcontract, which specifically refers to the Prime Contract. The Subcontract states:

> In the event Subcontractor's performance of this Subcontract is delayed or interfered with by acts of Owner, Contractor or other subcontracts, or by other events for which Subcontractor *is entitled to a time extension under the terms of the Prime Contract*, Subcontractor *may request an extension of the time for the performance* of the same, as hereinafter provided, but shall not be entitled to any increase in the compensation as a consequence of such delay or interference, except to the extent that the Prime Contract entitles Contractor to compensation, and then only to the extent of any amounts that Contractor may, on behalf of Subcontractor, recover from Owner for such delay.

(Affirmation of Albert McKee ["McKee Aff"], Ex E, Subcontract Section 7(a) [emphasis added])[2].

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[1] None of the submissions concerning KT's motion to strike the expert disclosure and ABM's cross-motion for leave to submit a Second Amended Complaint included a copy of ABM's Original Complaint or its First Amended Complaint.

[2] KT states that the Subcontract attached to the McKee Aff is not the agreement entered into by KT and ABM on April 1, 2004. According to KT, the form date indicates that it is a 2005 version. According to KT, the version attached as Ex 1 to the Affidavit of Wayne Thomas is the copy of the contract executed on April 1, 2004 between the parties. After reviewing all the terms quoted herein in both versions submitted, there are no material

Section 7(b) of the Subcontract provides there will be "No allowance for an extension of time for any cause whatsoever shall be claimed by, or granted to, Subcontractor unless Subcontractor shall have made *written request* upon Contractor for such extension within forty-eight (48) hours after the event giving rise to such request" (McKee Aff, Ex E, Subcontract Section 7(b) [emphasis added]).

The Subcontract further states:

> For changes in the Prime Contract that have been initiated by Owner, for acts or omissions of the Owner and for defects in the Prime Contract, Subcontractor shall submit any claims it may have, including notice thereof, for adjustment in the price, schedule or other provisions of the Subcontract to Contractor in writing in sufficient time and form to allow Contractor to process such claims within the time and in the manner provided for and in accordance with the applicable provisions of the Prime Contract.

(McKee Aff, Ex E, Subcontract Section 5(b)).

Article 30.1 of the Prime Contract sets forth the notice and documentation requirement referenced in Subcontract Section 4(a):

> If the Contractor shall claim to be sustaining damages by reason of any act or omission of the City or its agents, it shall submit to the Commissioner within [45] days from the time such damages are first incurred, and every [30] days thereafter for as long as such damages are incurred, verified statements of the details and the amounts of such damages, together with documentary evidence of such damages.

(Affidavit of Wayne Thomas Ex B, the "Prime Contract")

On December 18, 2007, eleven days after ABM filed its Answer, KT filed a request for judicial intervention in order to get discovery underway. On January 18, 2008, KT served ABM with interrogatories. Interrogatory Nos 41 through 44 requested ABM to "[p]rovide an

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differences among the relevant provisions. For purposes of convenience, the Court will continue to refer to the provisions within the Subcontract submitted by ABM.

accounting for the damages claimed" in each of ABM's four counterclaims. On July 2, 2008, ABM provided responses including spreadsheets that detailed ABM's counterclaims, which were based upon the unpaid contract balance being withheld by KT under the terms of the Subcontract.

On February 14, 2008, counsel appeared for the preliminary conference, following which the parties exchanged document and e-discovery productions. On April 4, 2008, KT filed an amended complaint lowering the damages it sought to $2.8 million. On June 3, 2008, ABM filed its first amended answer to the amended complaint, in which, according to KT, ABM did not amend its counterclaims or damages. On April 29, 2008, ABM issued subpoenas to several subcontractors involved in the Project.

On May 1, 2008, during a compliance conference, the Court (Herman Cahn, J.)[3] executed a commission for an out of state subpoena. The parties advised the Court that they were interested in mediating the claim.

On May 28, 2008, KT served a deposition notice on ABM concerning its counterclaims. On June 25, 2008, ABM issued six additional subpoenas, to a total of 14. On July 17, in light of the pending mediation, Justice Cahn directed that each party would be allowed to take one deposition regarding the issue of damages. All other depositions were placed on hold pending the outcome of the mediation. After an unsuccessful attempt at mediation, held on October 14, 2008, the parties recommenced depositions.

Between December 10, 2008 and May 22, 2009, twenty-three fact depositions were

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[3] Following Justice Cahn's retirement from the New York Supreme Court in February 2009, the instant matter was transferred to this Court.

taken. This included the deposition of seven current or former employees of the DOT (or DOT's consultants) that had been subpoenaed by ABM. Depositions were taken of the sole individual currently employed by ABM and associated with the Project – ABM Plant Manager Jon Young ("Young") – as well as other ABM management personnel who oversaw the Project but were no longer employed by ABM. KT alleges that none asserted the factual allegations or damages ABM now sets forth in its newly issued expert disclosure.

On May 12, 2009, and within a week of the scheduled completion of discovery, ABM disclosed in Part I of its supplemental response to KT Interrogatory No 8 that it intended to introduce at trial the testimony of Roy L. Wilson, P.E. ("Expert Disclosure"). The Expert Disclosure states that Wilson will testify that ABM incurred additional costs of approximately $2.8 million "directly attributable to the delays by KT and/or its principal and/or agents" ("New Claim"). KT asserts that the New Claim is based upon factual allegations and claimed damages that ABM never before asserted in its counterclaim pleadings, and that ABM failed to plead or disclose either the theory or amount of damages even though ABM had to know of its cost overruns and the factors that caused the newly calculated damages in 2005 and 2006 – long before ABM asserted its counterclaims in December 2007 and long before ABM provided KT any notice of its delay claim on May 12, 2009. KT then moved to strike the ABM's Expert Disclosure to the extent that it introduces new facts, legal theories, and additional damages.

ABM asserts that as discovery proceeded, and before its close on May 18, 2009, ABM concluded that the extraordinary costs it incurred in performing its work on the Project were, in the end, attributable to KT and/or its principal and/or its other agents. ABM explains that while it was aware that it had lost money on the Project – in that it knew that it has estimated/budgeted

$3.6 million for its costs to do the work and it ultimately spent over $6.4 million to complete – not until discovery had been conducted, including depositions, that those cost overruns were determined not to be the result of some self-inflicted injury by ABM. In addition to opposing KT's motion, ABM cross-moves to amend its answer to assert a fifth counterclaim alleging, *inter alia*, that due to an inordinate amount of changes by the DOT to many of the contract drawings, and the lengthy request for information ("RFI") process, a 36-month delay between the planned or contract date and the completion date for all approved shop drawings, caused significant cost overruns causing delay damages of approximately $2.8 million (¶¶ 31-40, "Proposed Counterclaim").

ABM argues that its consultant, Wilson, was able to conclude that ABM had expended roughly $2.8 million in additional, hard costs due to the delays of KT and/or its principal and/or its agents after reviewing the record developed through discovery, including a review of the RFI logs, shop drawing logs, correspondence, as well as deposition testimony.

DISCUSSION

"[W]here there is a variance between the pleadings . . . and the proof adduced at trial, the trial court has the power to exercise its discretion and permit amendment of the pleadings to conform them to the evidence, absent a showing of prejudice to the opposing party" (*Sharkey v Locust Valley Marine, Inc.*, 96 AD2d 1093, 1094-1095 [2d Dept 1983], *motions to dismiss appeal granted* 61 NY2d 669 [1983] [citations omitted]). "A variance is prejudicial where the matters pleaded are such that an adversary could not have been reasonably expected to have prepared for the variance at trial" (*id.*, *citing* CPLR 3025). "Where there is such a variance an adverse party has the right to insist upon the primacy of the [pleadings]" (*id.* [citations omitted]).

As such, the Court maintains the discretion to strike the testimony of a party's expert when the testimony goes beyond the scope of the allegations contained in the party's pleadings and raises allegations of new claims or theory of damages (*see Ciriello v Virgues*, 156 AD2d 417, 419 [2d Dept 1989]; *Palchik v Eisenberg*, 278 AD2d 293, 294 [2d Dept 2000]).

On the other-hand, it is well settled that, pursuant to CPLR § 3025(b), leave to amend will be freely granted, absent prejudice or surprise to the opposing party (*Sheets v Liberty Alliances, LLC*, 37 AD3d 170 [1st Dept 2007]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352 [1st Dept 2005]). "The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances" (CPLR § 3025[c]).

In order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*see Watts v Wing*, 308 AD2d 391 [1st Dept 2003]; *Davis & Davis, P.C. v Morson*, 286 AD2d 584 [1st Dept 2001]). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Ancrum v St. Barnabas Hosp.*, 301 AD2d 474 [1st Dept 2003]; *Davis & Davis, P.C.*, 286 AD2d 584). A motion to amend "must be supported by an affidavit of merits and other evidentiary proof that could properly be considered upon motion for summary judgment" (*Walden v Nowinski*, 63 AD2d 586, 586-587 [1st Dept 1978], *citing Cushman & Wakefield v David*, 25 AD2d 133 [1st Dept 1966]; *see also American Theatre for the Performing Arts, Inc. v Consolidated Credit Corp.*, 45 AD3d 506 [1st Dept 2007]). If the party seeking amendment cannot include affidavits that "unequivocally make out a prima facie basis for the claim or defense or other matter now sought to be added, . . . neither the court's nor the other side's time

should be wasted by entertaining the motion" (McKinney's CPLR Rule 3025; *see also Long v Long*, 281 AD2d 324, 325 [1st Dept 2001]; *Peretich v City of New York*, 263 AD2d 410, 411 [1st Dept 1999]; *Silver v Equitable Life Assurance Soc.*, 168 AD2d 367, 369 [1st Dept 1990]; *Briggs v New York City Transit Authority*, 132 AD2d 451 [1st Dept 1987]).

Additionally, "[w]hen an amendment to a pleading or a bill of particulars is sought at or on the eve of trial, judicial discretion in allowing such amendment should be discrete, circumspect, prudent and cautious " (*Kassis v Teacher's Ins. and Annuity Ass'n*, 258 AD2d 271, 272 [1st Dept 1999] [citations omitted]).

In this matter, as explained below, ABM's own arguments illustrate that it was aware of the facts upon which its Proposed Counterclaim is predicated before it completed performance in early 2007. ABM fails to offer a reasonable excuse as to why ABM did not move for leave to amend until after the deadline this Court set for the close of discovery and after more than twenty party and non-party depositions were taken. As a result of ABM's delay in seeking to amend its counterclaims, KT will be prejudiced if ABM's cross-motion is granted.

As noted in Affidavit of John Bidosky, III, dated July 13, 2009 (the "Bidosky Aff"), submitted by ABM, it maintained all the information necessary to plead the Proposed Counterclaim back in 2006. According to Bidosky, as early as December 8, 2005, ABM expressed concerns over the impact of design changes. During that period of time, KT requested further documentation concerning the impact of design changes. Such documentation would be ABM's schedule, the design changes ABM received, and ABM's amended schedule as a result of design changes. These should have been in ABM's possession by the time the parties discussed this issue in 2005.

The same holds true to ABM's references to deposition testimony from current and former employees who, as ABM alleges, implied or discussed delay damages. This is testimony from its own employees saying they had knowledge of delay damages as a result of change orders ABM received during the pendency the Project. Thus this information was within ABM's control at the outset of this litigation.

Furthermore, ABM's supposed affidavit of merit is insufficient to justify amending the complaint at this stage. The only non-attorney affidavit included in its moving papers was Bidosky's affidavit which predominantly discusses ABM's delay in raising the Proposed Counterclaim and whether KT should have been aware that delay damages were an issue in this case. Discussion of the merits of the Proposed Counterclaim is limited and couched with conclusory language, including:

> "ABM was not able to begin fabrication as originally scheduled, and that even after fabrication began there were continuing delays in allowing the process to proceed in a uniform, coherent fashion, ABM was not able to utilize its facilities in the most cost-effective manner" (Bidosky Aff ¶ 15).
>
> "It is ABM's position that had there not been so many design changes, that had the approval process not become so delayed, and that had the Project been better managed by KT, the fabrication schedule, and therefore the shop time and labor costs, would not have been adversely impacted, ABM could have in the end completed the work within its estimate budget" (Bidosky Aff ¶ 16).

Bidosky's affidavit is insufficient as it does not provide any evidence that could be "considered upon [a] motion for summary judgment" (*Walden*, 63 AD2d at 586-587). Bidosky's affidavit does nothing more than restate ABM's newly minted "position".

Upon examination of the relevant agreements (the Subcontract, which was submitted in support of ABM's cross motion, and the Prime Contract, which is referred to in the Subcontract), ABM has failed to plead a *prima facie* case for delay damages as ABM did not give the required

notice and documentation. Satisfying the notice and documentation requirements is part of the *prima facie* case for damages under the agreements (*see A.H.A. General Const., Inc. v New York City Housing Authority*, 92 NY2d 20, 30 [1998] [explaining that notice and documentation provisions are conditions precedent to suit or recovery]; *F. Garofalo Elec. Co., Inc. v New York University*, 270 AD2d 76, 80 [1st Dept 2000]).

The Prime and Subcontract both require written notice for changes or delays that would give rise to claims for delay damages. ABM would have had full knowledge and possession of any requests for time extensions. In fact, only ABM was in possession of its schedule and the shop hour and cost reports, as well as design change orders. All this was information within ABM's control before litigation started, and should have been referred to prior to its last-minute Proposed Counterclaim.

Of additional concern is the method employed by ABM in attempting to increase its alleged damages by almost $3 million less then one week before the Note of Issue was to be filed. This was not a situation where ABM sought leave to amend its answer and counterclaims; rather, it appears that ABM tried to sneak in these additional damages and add a cause of action through its expert disclosure report. It appears that ABM tried to surprise KT with these last minute damages and did so less than one week before the Court ordered Note of Issue deadline, which could have precluded KT from an opportunity to request discovery on the new claim. Moving forward now on this new claim will require further depositions of current and former employees from both parties, as well as the DOT, at a significant expense to both parties.

Discovery in this matter was complete, the Note of Issue was due on May 18, 2009, and KT was prepared to certify the case as ready for trial. Without ABM's delays in seeking leave

to amend, this Court would have set a trial date at the pre-trial conference previously scheduled for July 29, 2009. A trial date will be further delayed if leave to amend is granted at this time (*L. B. Foster Co. v Terry Contracting, Inc.*, 25 AD2d 721, 721-722 [1st Dept 1966] [absent a compelling excuse, trial postponement alone was sufficient reason to deny leave to amend]). Not only has ABM failed to offer a compelling excuse, but it has failed to submit a sufficient affidavit of merit and failed to satisfy the Subcontract's conditions required to bring a claim for delay damages (*Ancrum*, 301 AD2d at 474; *Davis & Davis, P.C.*, 286 AD2d 584).

KT's motion to strike ABM's Expert Disclosure is granted to the extent that any reference to damages resulting from a delay caused by KT, it's principals or agents, or the DOT, must be stricken from the disclosure in order to conform with ABM's pleadings (*see Morris*, 49 AD3d at 828).

Plaintiff is directed to file the Note of Issue by October 23, 2009 and the parties are directed to appear for a second pre-trial conference on October 29, 2009 at 9:30 a.m., not 2:30 p.m. as previously scheduled.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion to strike defendant's expert disclosure is granted to the extent that any reference to damages resulting from a delay caused by KT, it's principals or agents, or the DOT, are to be stricken from the disclosure in order to conform with ABM's pleadings; and it is further

ORDERED that defendant's cross-motion to amend its answer and counterclaims to add a counterclaim for delay damages is denied.

This constitutes the decision and order of the Court.

Dated: October 7, 2009

ENTER:

RICHARD T. LOWE III

J.S.C.

FILED
OCT 29 2009
COUNTY CLERK'S OFFICE
NEW YORK