

<b>Franco Belli Plumbing &amp; Heating &amp; Sons, Inc. v City of New York</b>
2010 NY Slip Op 30100(U)
January 11, 2010
Supreme Court, New York County
Docket Number: 108331/08
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK  
J.S.G. Justice

PART 2

Francis Belli Plumbing  
  
- v -  
City of New York

INDEX NO. 108331/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 061  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance  
with the accompanying decision.

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

**FILED**  
JAN 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/11/10

Law  
**LOUIS B. YORK**  
J.S.G.

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: IAS PART 2

-----X  
FRANCO BELLI PLUMBING AND HEATING  
AND SONS, INC.,

Plaintiff,

-against-

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

Defendants.

-----X  
HON. LOUIS B. YORK, J.S.C.:

Index No.: 108331/08  
DECISION/ORDER

**FILED**  
JAN 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

In this breach of contract action, defendants move for summary judgment to dismiss the complaint (motion sequence number. For the following reasons, this motion is granted.

**BACKGROUND**

Plaintiff Franco Belli Plumbing and Heating and Sons, Inc. (Belli) is a New York State licensed corporation that engages in plumbing contracting work. . The co-defendants are the City of New York (the City), a municipal corporation, and the New York City Department of Sanitation (DSNY), a division thereof.

In 1999, the City, through DSNY, solicited bids for contracting work to be performed as part of the construction of the New Annex Building for Queens Sanitation District 7 in College Point, New York (the project). . Because DSNY is designated as a "public owner" of the site encompassing Queens Sanitation District 7, the project was governed by General Municipal Law § 101 (the Wicks Law), which controls the manner in which contractors are selected, and many of the terms of their employment contracts. DSNY first hired non-party O'Brien Kreitzberg, Inc. (OBK) as its construction manager/engineer to supervise and control the performance of the work,

including the coordination and oversight of contractors and the monitoring of scheduling. .

DSNY next hired non-party the LiRo Group (LiRo) as its "critical path method scheduling consultant" (CPM consultant), to develop and maintain CPM monthly scheduling reports.

DSNY thereafter hired non-party Santa Fe Construction, Inc. (Santa Fe) as the general contractor, as well as three prime contractors: Belli, for plumbing; non-party Dart Mechanical Corp. (Dart) for HVAC, and non-party CAD Electric Corp. (CAD) for electrical work. Finally, DSNY hired non-party consultants Goncher Karlsberger, P.C. (Karlsberger), an architect, and Mariano D. Molina (Molina), a mechanical/electrical consultant (together, the design consultants).

Belli executed its contract with DSNY (the Belli contract) on August 4, 1999. *Id.*, ¶ 15.

The pertinent portions of Belli contract provide as follows. With respect to work delay claims:

Article 12 - Coordination With Other Contractors (Revised)

During the progress of the work, other Contractors may be engaged in performing other work or may be awarded contracts for additional work on this project. In that event [Belli] shall coordinate the work to be done hereunder with the work of such other Contractors and [Belli] shall fully cooperate with such other contractors and shall carefully fit its own work to that provided under other Contracts as may directed by the Engineer.

\*\*\*

The City shall not, however, be liable for any damages suffered by [Belli] 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 [Belli] 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, [Belli] 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.

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Article 13 H - No Damages for Delay

[Belli] 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.

*Id.*; Holchendler Affidavit, Exhibit A at AG - 6, 7 (pages not numbered). With respect to the prerequisite notice for any claims:

Article 11 - Notice of Conditions Causing Delay

Within five days after the commencement of any condition which is causing or may cause delay in completion, including conditions for which [Belli] may be entitled to an extension of time, [Belli] 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 [Belli], of any and all claims for damages for delay arising therefrom.

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Article 13 E.2 - Application for Extension of Time

In addition, the application for an extension of time shall set forth in detail:  
(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 [Belli] waives all claims except for those delineated in the application, and the particulars of any claims which [Belli] does not agree to waive.

\*\*\*

Article 42 - Final Payment

After completion and final acceptance of the work, [Belli] 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... [Belli] 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 [Belli] 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... [Belli] is warned that unless such claims are completely set forth as herein required, [Belli] upon acceptance of the final payment, pursuant to Article 44 hereof, will have waived any such claims.

\*\*\*

Article 53 - Claims and Actions Thereon

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 [Belli] shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims...

Belli alleges that Santa Fe and the design consultants both caused delays on the project by failing to perform their own work in a timely manner. Belli also alleges that DSNY breached the Belli contract by “actions and omissions to act” that included, among other things, failing to timely obtain building permits, failing to ensure timely performance of work by the other prime contractors and design consultants and/or to replace those parties, and failing to adequately manage the scheduling of the project, with the result that Belli suffered significant money damages. For their part, defendants argue that Belli’s claims impermissible because they are either expressly barred by the “no damages for delay” provisions of the Belli contract, or deemed waived for failure to comply with the notice provisions of that contract.. . The court notes that Belli states that it completed its work on the project on May 4, 2005.

Belli commenced this action on June 10, 2008 by serving a complaint that sets forth causes of action for: 1) breach of contract for failure to pay increased costs; 2) breach of contract for failure to pay the balance of the contract price; 3) breach of contract for failure to pay amounts

due pursuant to an approved change work order; and 4) breach of contract for failure to pay for extra work. Defendants served an answer setting forth fourteen affirmative defenses on July 9, 2008. Defendants now move for summary judgment to dismiss the complaint.

#### DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1<sup>st</sup> Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues. *See e.g. Andre v Pomeroy*, 35 NY2d 361 (1974); *Pirrelli v Long Island R.R.*, 226 AD2d 166 (1<sup>st</sup> Dept 1996). However, the court's reluctance to employ summary judgment "only serve[s] to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated'." *Blechman v I.J. Pacer's and Sons, Inc.*, 186 AD2d 50, 51 (1<sup>st</sup> Dept 1992), quoting *Andre v Pomeroy*, 35 NY2d at 364. Here, the court finds that defendants are entitled to summary judgment dismissing the complaint.

As previously mentioned, all four of Belli's causes of action sound in breach of contract. Pursuant to New York State law, "the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it." *Eden Temporary Services, Inc. v House of*

*Excellence*, 270 AD2d 66, 67 (1<sup>st</sup> Dept 2000), quoting *Paz v Singer*, 151 AD2d 234, 235 (1<sup>st</sup> Dept 1989). Here, defendants argue first that Belli's claims must fail because the "no damages for delay" provisions set forth in Articles 12 and 13 of the Belli contract preclude Belli from establishing the element of breach. *See* Defendants' Memorandum of Law in Support of Motion, at 3-5. Belli responds that there are triable issues of fact as to whether the aforementioned provisions have that effect, because New York State law recognizes four exceptions to the rule that "no damages for delay" provisions are generally enforceable. *See* Plaintiff's Memorandum of Law in Opposition, at 9-17. Defendants reply that none of those four exceptions is applicable to the provisions in the Belli contract. *See* Defendants' Reply Memorandum, at 6-13. After careful consideration, the court agrees with defendants.

As this court (Feinman, J.) observed in the related case *Dart Mechanical Corp. v The City of New York* ( Index Number 116018/2006), [Civ Ct NY Cty 2008]

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 N.Y.2d 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) unanticipated 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 N.Y.2d 297, 309 [1986]).

Along with Belli, Dart was one of the three prime contractors on the project, and the "no damages for delay" provisions that were included in Dart's contract with DSNY were identical to those contained in the Belli contract. Further, in its case, Dart had submitted evidence of delays to the

project that it claimed were caused by Santa Fe's performance (and non-performance of its work), and by DSNY's failure to supervise and control the work. Although Dart argued that this evidence satisfied each of the four exceptions to the general rule favoring enforcement of "no damages for delay" clauses, Justice Feinman found that the exceptions were not applicable, and dismissed Dart's complaint against the City and DSNY. Very recently, the Appellate Division, First Department, upheld Justice Feinman's dismissal. *See Dart Mechanical Corp. v City of New York*, 2009 WL 5125225, 2009 NY Slip Op. 09703 (1<sup>st</sup> Dept 2009). The Appellate Division specifically held that:

The record shows that the primary responsibility for the delay lay with another contractor, that defendants retained a construction manager and a scheduling consultant to set and maintain a schedule for completion, that regular progress and scheduling meetings were held, and that defendants and their representatives repeatedly requested that the delinquent contractor adhere to the schedule and perform the necessary work. This evidence raises no issue of fact as to defendants' bad faith or gross negligence. Nor was the delay unanticipated, as evidenced by several contract provisions. Further, plaintiff failed even to allege any breach of a "fundamental, affirmative obligation" expressly imposed on defendants [internal citations omitted].

2009 WL 5125225, \* 1. Here, the court must reach the same conclusion.

The first exception, which involves delays caused by bad faith or willful, malicious, or grossly negligent conduct, is inapplicable here because, as in the *Dart* case, the evidence shows that defendants had hired a construction manager (OBK) and a CPM consultant (LiRo) to set and maintain a schedule for completion, had held regular progress and scheduling meetings, and had repeatedly requested that Santa Fe adhere to the schedule and timely perform its work. *See* Notice of Motion, Holchendler Affidavit in Support, Exhibits A-V. Belli's only support for its claim that defendants acted in "bad faith" are its own conclusory statements which are insufficient to defeat

a motion for summary judgment. *Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 (2004). Thus, the court concludes that there is no evidence of negligence or bad faith by defendants..

The second exception, which involves “uncontemplated delays,” is inapplicable here, because the provisions of the Belli contract cited *supra* (which are identical to those in Dart’s contract) specifically refer to the possibility of work delays by other contractors, and set in place a mechanism for Belli to respond to them. Thus, the delays that Belli complains of cannot be said to be uncontemplated

The third exception, which involves unreasonable delays amounting to an abandonment of the contract, is inapplicable here because there is no evidence that defendants ever abandoned or intended to abandon the project. Instead, as was the case in *Dart*, defendants have presented evidence that held many project and update meetings, sent a quantity of correspondence to Santa Fe reminding it of its contractual obligations and demanding that Santa Fe meet them, and engaged the other prime contractors to perform certain of Santa Fe’s work so as to ameliorate delays to the project. Thus, the court concludes that there is no evidence of abandonment

Finally, the fourth exception, which involves “breaches of fundamental obligations,” is not applicable here either. As the Court of Appeals noted in *Corinno Civetta Constr Corp. v City of New York* (67 NY2d 297, 313 [1986])

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 [emphasis added].

Here, Belli has failed to identify any provision of the Belli contract that expressly imposes any

such fundamental obligation. Instead, Belli asserts that defendants had a “fundamental obligation to terminate Santa Fe.” However, this is merely another conclusory statement that is insufficient to support summary judgment. *Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d at 383, *supra*.

As a result of the foregoing, the court finds that defendants have adequately demonstrated there is no triable issue as to whether Belli’s causes of action are barred by the “no damages for delay” provisions of the Belli contract. Accordingly, the court finds that defendants’ are entitled to summary judgment dismissing Belli’s complaint on this ground

The second branch of defendants’ motion seeks summary judgment dismissing the complaint on the ground that Belli waived its claims against them by failing to strictly comply with the notice provisions of the Belli contract. Defendants specifically object to the “final extension of contract time” application that Belli submitted on May 28, 2008, which, they assert, violated Article 13 E.2 of the Belli contract by failing to specify: 1) the nature of the claimed delays; 2) the dates of said delays ; and 3) whether or not Belli agreed to waive its claims for said delays. Belli responds that these assertions are untrue. The court notes that defendants’ reply papers did not address the notice issue at all. The court also notes, upon perusing Belli’s “final extension of contract time” application, that Belli did appear to comply with the aforementioned notice provision by specifically describing and dating the claimed work delays. Thus, the court must reject defendants’ notice argument. Nevertheless, for the reasons discussed above, the court concludes that defendants’ motion should be granted..

#### DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

