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SHORT FORM ORDER

INDEX No. 05-4345
CAL No. 10-01512OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 12-30-10 (#008)
MOTION DATE 1-27-11 (#009 & #010)
ADJ. DATE 3-3-11
Mot. Seq. # 008 - MotD
009 - XMD
010 - XMD

AURORA CONTRACTORS, INC., Plaintiff, - against - WEST BABYLON PUBLIC LIBRARY, BEATTY HARVEY & ASSOCIATES LLP and SULLIVAN & NICKEL CONSTRUCTION COMPANY, Defendant.	GOETZ FITZPATRICK LLP Attorney for Plaintiff One Pennsylvania Plaza New York, New York 10119 HOLLANDER & STRAUSS, LLP Attorney for Defendant West Babylon Public Library 40 Cutter Mill Rd, Ste 203 Great Neck, New York 11021 L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P. Attorney for Defendant Beatty Harvey & Assoc. 1001 Franklin Avenue, Room 300 Garden City, New York 11530 WESTERMANN SHEEHY KEENAN LLP Attorney for Sullivan & Nickel 333 Earle Ovington Blvd. #702 Uniondale, New York 11533

Upon the following papers numbered 1 to 50 read on this motion summary judgment/impose sanctions/partial summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 15, 16 - 24 ; Answering Affidavits and supporting papers 25 - 41; 42 - 47 ; Replying Affidavits and supporting papers 48 - 50 ; Other party's memorandum of law ; it is,

ORDERED that the motion by defendant West Babylon Public Library for summary judgment in its favor dismissing the complaint against it is determined as follows; and it is

ORDERED that the cross-motion by plaintiff Aurora Contractors Inc., for, *inter alia*, leave to serve a late notice of claim and for the imposition of costs and sanctions against defendant West Babylon Public Library is denied; and it is further

ORDERED that the cross-motion by defendant Beatty Harvey & Associates for summary judgment in its favor dismissing the second cause of action contained in the complaint is denied.

This breach of contract action arises from a renovation project at defendant West Babylon Public Library ("WBPL"). Plaintiff, Aurora Contractors, Inc. was the general contractor, defendant Beatty Harvey & Associates ("BHA") was the architect, and defendant Sullivan & Nickel Construction Company ("SNC") was the construction manager for the project. As part of the project, panels were installed on a portion of the exterior of the building by a subcontractor hired by plaintiff. After the installation, WBPL complained that the panels were cracked, chipped, discolored or misaligned. In January 2005, WBPL notified plaintiff that the panels needed to be replaced and, if the plaintiff did not proceed within seven days, WBPL would have the work performed at plaintiff's expense. The panels were replaced by a different contractor in 2007 and the old panels were discarded. Plaintiff's complaint alleges, among other things, that WBPL failed to pay it all sums due under the terms of the renovation agreement, including the costs of the extra work it performed. The complaint also alleges causes of action for negligence and professional malpractice against BHA. In particular, the complaint alleges BHA breached its duty to WBPL by failing to provide it with adequate architectural services, thereby causing plaintiff, a third-party beneficiary of the agreement, to incur damages for additional and unapproved work that it was required to perform to complete the project.

WBPL now moves for summary judgment in its favor dismissing plaintiff's complaint against it on the grounds plaintiff failed to join the West Babylon Union Free School District as a necessary party to the action, and failed to file a notice of claim prior to commencing its action. Alternatively, WBPL asserts plaintiff's claims for "delay damages" and damages for extra work it performed are precluded by the terms of the renovation agreement. Plaintiff opposes the motion, arguing a triable issue exists as to whether it is entitled to damages for the costs of delayed and extra work it performed during the project. Specifically, plaintiff alleges it incurred damages as result of uncontemplated extra work it performed during the project, such as the removal of landscaping and fencing, the "touching up" of temporary walls built during the project, the changes to the color of doors and frames installed throughout the building, and the painting and insulating of a curved metal portion of the library's ceiling. Plaintiff also alleges it incurred delay damages as a result of the remediation of unforseen contaminants on the grounds of the work site, WBPL's failure to timely secure access to areas of the work site, unforseen revisions to the design of the roof of the building after plaintiff commenced its work, and BHA's alleged willful refusal to provide plaintiff with information necessary for its completion of the shoring of the building.

BHA also moves for partial summary judgment in its favor dismissing plaintiff's second cause of action seeking damages for costs incurred as a result of the construction delays and the additional work plaintiff performed due to BHA's alleged architectural malpractice. In opposition, plaintiff argues BHA's motion should be denied, as it was made more than 120 days after filing of the note of issue and is not addressed to the same causes of action or predicated on arguments identical to those contained in WBPL's timely motion. Plaintiff, which concedes it did not file a notice of claim prior to commencing its action,

also cross-moves for leave to serve a late notice of claim, and for a judgment in its favor pursuant to 22 NYCRR § 130-1.1 imposing costs and sanctions against WBPL.

Paragraph 4.3.3 of the General Conditions of the Contract for Construction states, in pertinent part, that "[c]laims by either party must be made within 21 days after occurrence of the event giving raise to such claim or within 21 days after the claimant first recognizes the condition giving rise to the claim." Paragraph 4.3.8 states "[i]f the contractor wishes to make claim for increase in contract time, written notice as provided herein shall be given. The contractor's clam shall include an estimate of cost and probable effect of delay . . . [i]n the case of a continuing delay only one claim is necessary." Paragraph 4.3.7 states that "[i]f the Contractor wishes to make a claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work . . . If the contractor believes additional costs is involved for reasons including but not limited to (1) a written interpretation from the architect, (2) an order by the Owner to stop work where the contractor was at fault . . . or other reasonable grounds, claim shall be filed in accordance with the procedure established herein." Further, Paragraph 7.1.1. states "[c]hanges in work may be accomplished after execution of the contract, and without invalidating the contract, by change order, construction change directive or order for minor change in the work," and paragraph 7.5 of the supplementary general conditions of the construction agreement states that "[n]o changes in work are to be undertaken without the full understanding and written consent of both the Owner and Architect." Paragraph 8.3.4 of the Supplementary General Conditions further states that "[t]he Prime Contractors hereby expressly assume[s] the risk of all delays to the work and waive[s] all claims for damages or additional payment for delays to the work, provided however, that the Contract Schedule shall be extended for excusable delays, i.e., delays referred to in Section 8.3.1."

Initially, the Court notes that WBPL has failed to reference any statutory authority or relevant case law in support of its proposition that it is entitled to the protection of the notice of claim provision contained in Educational Law § 3818. While ***Julie Grasso v Schenectady County Public Library***, 30 AD3d 814, 817 NYS2d 186 (3d Dept 2006), and ***Bovich v East Meadow Public Library***, 16 AD3d 11, 789 NYS2d 511 (2d Dept 2005), extended the applicability of the notice of claim provision contained in County Law § 52 for the purpose of actions commenced against public libraries closely tied to local municipalities, neither of these cases address the scope of Education Law § 3813 or its applicability to any entities other than those specified in the statute. Rather, Education Law §.3813 has been held to apply only to "action[s] or special proceeding[s] . . . relating to [school] district property or claim[s] against the district, or involving its rights or interests" (***Phaler v Hicks***, 71 AD2d 820, 821, 419 NYS2d 394 [4th Dept 1979]; *see* ***Ruocco v Doyle***, 38 AD2d 132, 327 NYS2d 933 [2d Dept 1979]). Indeed, a review of the statute's legislative history reveals that Education Law § 3813 restates former Education Law § 835-a, which was specifically enacted for school districts as an equivalent to numerous municipal statutes that limited the time to commence actions against municipalities (*see* ***H&J Floor Covering Inc. v Board of Educ. of City of N.Y.***, 66 AD2d 588, 413 NYS2d 414 [2d Dept 1979]).

In addition, the West Babylon Union Free School District is not a necessary party to this action (*see* ***Bovich v East Meadow Pub. Lib.***, *supra*). CPLR 1001 (a) defines necessary parties as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." As the West Babylon Union Free School District is not a party to the subject renovation contract and has no

direct financial interest in the outcome of the proceeding in terms of potential liability for plaintiff's breach of contract claim, its is not an indispensable party to this action (*see e.g.* ***Bovich v East Meadow Pub. Lib.***, *supra*; ***Phoenix Capital & Mgt. Corp. v Board of Assessors***, 153 AD2d 697, 545 NYS2d 274 [2d Dept 1989]).

It is well-settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]).

The common law elements for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (*see* ***Furia v Furia***, 116 AD2d 694, 498 NYS2d 12 [2d Dept 1986]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see* ***W.W.W. Assoc., Inc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]; ***Costello v Casale***, 281 AD2d 581, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]). Thus, where a question of intent is determinable by written agreements, the question is one of law for the court (*see* ***Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.***, 32 NY2d 285, 344 NYS2d 925 [1973]). However, where the intent of the parties must be determined by disputed evidence or inferences outside the written agreement, a question of fact is presented (*see* ***Ashland Mgt. v Janien***, 82 NY2d 395, 604 NYS2d 912 [1993]; ***Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.***, *supra*).

Notice provisions in a construction contract requiring a contractor to supply a notice of claim prior to commencement of an action is considered a condition precedent and will be strictly enforced (*see* ***A.H.A. Gen. Constr. v New York City Hous. Auth.***, 92 NY2d 20, 677 NYS2d 9 [1998]; ***Kingsley Arms, Inc. v Sano Rubin Constr. Co., Inc.***, 16 AD3d 813, 791 NYS2d 196 [3d Dept 2005]). Failure to comply with such a provision generally constitutes waiver of a claim for additional compensation related to extra work or delay costs (*see* ***Dinotech Consulting, Inc. v New York City Hous. Auth.***, 78 AD3d 527, 911 NYS2d 32 [1st Dept 2010]; ***Kingsley Arms, Inc. v Sano Rubin Constr. Co., Inc.***, *supra*; ***MRW Constr. Co. v City of New York***, 223 AD2d 473, 636 NYS2d 344 [1st Dept 1996]). Nevertheless, such clauses may not be invoked to bar damages for: (1) delays caused by the protected party'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 (*see* ***Corino Civetta Constr. Corp. v City of New York***, 67 NY2d 297, 309-312, 502 NYS2d 681[1986]; ***Abax Inc. v N.Y. City Hous. Auth.***, 282 AD2d 372, 723 NYS2d 490 [1st Dept 2001]). Thus, a defendant seeking to dismiss a cause of action to recover damages arising from a delay bears the initial burden of demonstrating *prima facie* that none of the exceptions to the

"damages for delay" clause are present (*see* ***Fowler, Rodriguez, Kings Mill, Flint, Gray & Chalos, LLP v Island Props., LLC***, 38 AD3d 831, 833 NYS2d 146 [2007]).

Here, WBPL made a *prima facie* showing of entitlement to judgment in its favor by submitting the affidavit of its director which avers that plaintiff failed to file notices for such claims in accordance with the requirements of the parties' agreement (*see* ***Kingsley Arms, Inc. v Sano Rubin Constr. Co., Inc.***, *supra*). However, plaintiff's submissions in opposition raise material triable issues of fact as to whether plaintiff complied with the notice requirement of the contract, and whether such claims are exempted from the arbitration clause outlined in paragraph 4.3.5 of the General Conditions (*see* ***Southeast Mech. Corp. v Board of Educ. of Carmel Cent. School Dist.***, 49 AD3d 858, 854 NYS2d 481 [2d Dept 2008]; ***Abax, Inc. v Lehner McGovern Bovis, Inc.***, 8 AD3d 92, 718 NYS2d 149 [1st Dept 2004]; ***G. De Vincentis & Son Constr., Inc. v City of Oneonta***, 304 AD2d 1006, 759 NYS2d 216 [3d Dept 2003]). In particular, plaintiff submitted copies of proposed change orders regarding the removal of landscaping and a fence, the "touching up" of temporary walls built during the project, changes to the color of doors and frames installed throughout the building, and the painting and insulating of a curved metal portion of the library's ceiling. While correspondence exchanged by the parties indicates defendants denied some of the plaintiff's requests for proposed work orders, the denials consist of vague and conclusory claims that the proposed extra work was excluded by the contract. Plaintiff's submissions also include letters acknowledging the dispute between the parties regarding the extra work performed, as well as statements purporting to continue performance of the extra work under protest. Where, as in this case, the intent of the parties must be determined by disputed evidence or inferences outside the written agreement, triable issues exists as to whether or not the proposed extra work was prohibited by the terms of the construction contract (*see* ***Ashland Mgt. v Janien***, *supra*; ***Mallad Constr. Corp. v Count Fed. Sav. & Loan Assn.***, *supra*).

As for the branch of WBPL's motion seeking dismissal of plaintiff's claim to recover the cost of extra work it performed under an agreement it would clean up the work site and be reimbursed by other subcontractors on the project, the affidavit of plaintiff's Vice President, Joseph Koslow, asserts that SNC's principal agreed that WBPL would reimburse those costs if the subcontractors failed to pay plaintiff for its performance. Plaintiff's submissions include a letter, dated April 9, 2003, requesting such payment from WBPL on the basis the subcontractors failed to make any payments for the clean up costs it incurred. Plaintiff also proffered excerpts of the deposition of SNC's principal, wherein he testified that plaintiff's claim for clean up costs were legitimate and unresolved. While the parties' agreement contains a proscription against oral modifications, such proscriptions do not prohibit executed oral modifications undertaken by the parties during the course of the construction project (*see* ***Rose v Spa Realty Assoc.***, 42 NY2d 338, 397 NYS2d 922 [1977]).

With regard to the branch of WBPL's motion seeking to dismiss plaintiff's claim for delay costs, WBPL made a *prima facie* showing of entitlement to judgment in its favor dismissing the portions of plaintiff's complaint seeking delay damages related to unforseen revisions to the library's roof and delays related to completion of the shoring of the building. In both instances the alleged delays were foreseeable and occurred as a result of inept administration, and any damages related to these delays are not recoverable as they fall within the exculpatory provision of the construction agreement (*see* ***Blue Water Envt'l., Inc. v Incorporated Vil. of Bayville***, *supra*; ***S.N. Tannor, Inc. v A.F.C. Enters.***, 276 AD2d 363, 714 NYS2d 273 [1st Dept 2000]). WBPL also established its entitlement to summary judgment dismissing plaintiff's

request for delay damages related to the remediation of subsurface contaminants in the Library's drainage pools. The uncontemplated delay exception to a "no delay damages" clause only applies where its is clear that the issue that caused the delay was not contemplated by the parties (*see* ***Blue Water Envtl., Inc. v Incorporated Vil. of Bayville***, 44 AD3d 807, 843 NYS2d 681 [2d Dept 2007]). "If the delay or obstruction is within the contemplation of the parties at the time the contract is entered into the 'no damage' clause will be valid and enforceable unless the delay was caused by conduct constituting active interference with the contractor's performance" (***Peckham Road Co. v State***, 32 AD2d 139, 142, 300 NYS2d 174 [3d Dept 1969]). Here, paragraph 4.3.6 of the General Conditions specifically addresses claims for unknown or concealed subsurface conditions at the work site. Thus, summary judgment dismissing plaintiff's claim for uncontemplated delay damages related to the removal of unforseen subsurface contaminants is granted (*see* ***Corino Civetta Constr. Corp. v City of New York***, *supra*; ***Kalisch-Jarcho, Inc. v New York***, 58 NY2d 377, 461 NYS2d 746 [1983]).

With regard to the branch of WBPL's motion seeking to dismiss plaintiff's claim for delay costs related to its alleged failure to timely secure areas of an adjacent property necessary for the completion of the work, the obligation to furnish the contractor with an unobstructed work site is implied in every construction contract (*see* ***Fehlhaber Corp. v State***, 65 AD2d 119, 410 NYS2d 920 [3d Dept 1978]; ***Peckham Road Co. v State***, *supra* at 141). Furthermore, delays in furnishing access to all areas of the work site are actionable if they are not within the contemplation of the parties (*see* ***Fehlhaber Corp. v State***, *supra*). Notwithstanding WBPL's contention that it was not obligated to provide plaintiff access to the adjacent property, by letter dated October 8, 2001, plaintiff informed WBPL that access to the adjacent property was essential to continued work on the building's foundation. Despite plaintiff's request for such access, it is undisputed that WBPL failed to obtain a permit from the Town of Babylon in a timely manner, resulting in a five-week delay to the completion of the project. Therefore, triable issues exists as to whether such failure was a breach of a fundamental obligation of the contract, and, if so, whether plaintiff is entitled to damages for delay costs it incurred as a result of such failure (*see* ***Fehlhaber Corp. v State***, *supra*; ***Peckham Road Co. v State***, *supra*).

As for plaintiff's cross-motion, the branch of the cross-motion seeking leave to serve a late notice of claim pursuant to Education Law § 3813 in relation to its breach of contract action against the WBPL is denied, as moot. Similarly, the branch of the cross-motion seeking the imposition of costs and sanctions against the WBPL is considered under 22 NYCRR § 130-1.1 and is denied. The Court finds that WBPL's assertion of a defense based upon plaintiff's violation of Education Law § 3813 did not constitute frivolous conduct as that term is defined in 22 NYCRR § 130-1.1 (c).

As for BHA's untimely cross-motion for partial summary judgment in its favor dismissing plaintiff's second cause of action to recover damages for additional costs it incurred as a result of BHA's alleged architectural malpractice, CPLR 3212 (a) provides that a motion for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Moreover, in considering an untimely cross-motion based upon on allegedly identical issues, the Court's search of the record is limited to those causes of action or

issues that are the subject of the timely motion (*see* ***Dunham v Hill Co. Constr. Co.***, 89 NY2d 425. 654 NYS2d 335 [1996];***Whitehead v City of New York,*** 79 AD3d 858, 913 NYS2d 697 [2d Dept 2010]). Here, BHA concedes that its motion was made more than 120 days after the filing of the note of issue, and fails to demonstrate good cause for the delay. Moreover, BHA's cross-motion, which seeks dismissal of plaintiff's second cause of action for professional malpractice predicated upon plaintiff's alleged status as a third-party beneficiary of BHA's agreement with WBPL, is not based upon issues nearly identical to those raised in WBPL's motion (*see* ***Tapia v Predential Richard Albert Realtors***, 79 AD3d 735, 911 NYS2d 919 [2d Dept 2010]; ***Podlaski v Long Is. Panelling Ctr. of Centereach, Inc.***, 58 AD3d 825, 837 NYS2d 109 [2d Dept 2009]; ***Bickelman v Herill Bowling Corp.***, 49 AD3d 578, 853 NYS2d 383 [2d Dept 2008]). Accordingly, BHA's cross-motion for summary judgment in its favor dismissing plaintiff's second cause of action is denied.

Dated: June 21, 2011

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION