

WDF, Inc. v City of New York

2011 NY Slip Op 32988(U)

November 14, 2011

Supreme Court, New York County

Docket Number: 602330/2005

Judge: Cynthia S. Kern

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

CYNTHIA S. KERN

PRESENT: _____ J.S.C.

PART 52

Index Number : 602330/2005
WDF, INC.
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. 602330/05
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

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 annexed decision.

FILED

NOV 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/14/11

CK
CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

FILED

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NEW YORK
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Index No. 602330/05

DECISION/ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
WDF, INC.,

Plaintiff,

-against-

THE CITY OF NEW YORK (Jamaica WPCP
Contracts 2G and 2P),

Defendant.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

Plaintiff WDF, Inc. ("WDF") commenced the instant action to recover damages incurred when defendant the City of New York (the "City") allegedly failed to meet its contractual obligations. The City now moves to amend its answer to add an affirmative defense of waiver and release and to add a counterclaim for a declaration that WDF's previously filed claim against the City is deemed withdrawn. The City also moves for partial summary judgment dismissing the complaint with respect to one of the two contracts (JA-2G) at issue. WDF cross-moves for partial summary judgment on its claim under the same contract and to dismiss the City's sixth affirmative defense. For the reasons set forth more fully below, the City's motion to amend its

answer is granted, as is its motion for partial summary judgment. WDF's cross-motion for partial summary judgment and to dismiss the City's sixth affirmative defense is denied.

The relevant facts are as follows. The Department of Environmental Protection ("DEP") awarded a contract known as JA-2G to WDF on May 25, 2004 as part of a two-phase upgrade of the Jamaica Water Pollution Control Plant. WDF was also awarded a contract known as JA-2P for plumbing work on part of the project. DEP did not issue a Notice to Proceed (necessary for WDF to start work) until April 13, 2005. On or about April 18, 2005, WDF filed a Notice of Claim with DEP and the New York City Comptroller, demanding \$12 million for an alleged breach of the JA-2G contract. WDF alleged that the price of materials and labor had gone up in the intervening period and that it was accordingly damaged by the delay in starting the project.

Subsequently, the parties negotiated change order JA-2G-87, which added additional work to the contract, gave WDF more time to complete certain parts of the contract and, in exchange, included the following waiver and release clause:

Based on the new contract milestones established in BNR Change Order JA-2G-87, the Contractor [WDF] agrees to withdraw any of the Contractor's previous claims filed against the City demanding damages for delay, and waive any such claims to delay damages which the contractor may have resulting from the work performed prior to the date of registration (or execution) of BNR Change Order JA-2G-87.

This clause is the subject of the instant motion.

As an initial matter, the City's motion to amend its answer to add the defense of waiver and release is granted. Pursuant to CPLR § 3025, leave to amend a pleading should be freely given unless the pleading is devoid of merit or will result in undue prejudice or surprise to the other party. *See McCaskey, Davis and Associates, Inc. v New York City Health and Hospitals*

Corp., 59 NY2d 755 (1983). The decision whether to permit the amendment is within the court's discretion. See *Edenwald Contr. Co. v City of New York*, 60 N.Y.2d 957 (1983). In the absence of significant prejudice, courts have allowed answers to be amended to add the defense of release or waiver. See *Edenwald*, 60 N.Y.2d 957 and *Ficorp Ltd. v Gourian*, 263 A.D.2d 392 (1st Dept 1999). In the instant case, plaintiff would not be significantly prejudiced by the amendment. WDF also argues that the amendment lacks merit. However, as will be seen below, that is not the case. Accordingly, the City's motion to amend its answer to add the defense of waiver and release is granted.

The City is also entitled to partial summary judgment dismissing WDF's claim arising out of the JA-2G contract based on the delay in commencing the project as the waiver and release clause is unambiguous on its face. It is a well settled rule of law that when an agreement is a clear and complete document it should be enforced according to its terms and "[e]vidence outside the four corners of the document . . . is generally inadmissible to add or vary the writing." *W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157, 162 (1990). The waiver and release clause clearly states that the Contractor "agrees to withdraw any of the Contractor's previous claims filed against the City demanding damages for delay..." Based on this unambiguous language, WDF has agreed to withdraw the claim filed against the City demanding \$12 million in damages caused by the City's alleged delay in allowing WDF to start the work.

The unambiguous waiver and release clause contains two separate agreements contained in two separate clauses: an agreement to "withdraw" already filed claims and an agreement to "waive" any other claims for damages due to delay resulting from the work performed prior to a certain date. WDF's argument that both clauses are modified by the phrase "which the contractor

may have resulting from the work performed prior to the date of registration (or execution) of [the Change Order]" is without merit. The reason that there are two parts to the clause, each using different verbs, is that they apply to different claims. The first applies to claims already filed, such as the one at issue here, while the second applies to those not yet filed. WDF argues that the only claims withdrawn or waived are those arising from "work performed" and that therefore, the release only applies to delays arising after the Notice to Proceed was issued. However, that phrase modifies only the waiver clause, which applies to any claims WDF may have that have not yet been filed against the City.

Accordingly, the City's motion for partial summary judgment dismissing WDF's claim as to contract JA-2G on the grounds that the claim is barred by the release and waiver executed by WDF is granted. WDF's cross-motion for summary judgment on the claim under the same contract is therefore denied. The City's request for a declaratory judgment declaring WDF's April 18, 2005 Notice of Claim with respect to the JA-2G contract to be deemed withdrawn is granted. Furthermore, WDF's cross-motion to dismiss the City's sixth affirmative defense based on Article 13 of the JA-2G contract, the "no damages for delay" clause, is denied as moot as the claim based on that contract has been dismissed. This constitutes the decision, judgment and order of the court.

Dated: 11/10/11

FILED

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J.S.C.