

**Bovis Lend Lease (LMB) Inc. v Lower Manhattan
Dev. Corp.**

2011 NY Slip Op 33686(U)

May 9, 2011

Sup Ct, NY County

Docket Number: 603243/09

Judge: Shirley Werner Kornreich

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

SHIRLEY WERNER KORREICH

PART 54

Index Number : 603243/2009 J.S.C.
 BOVIS LEND LEASE [LMB], INC.,
 vs
 LOWER MANHATTAN
 Sequence Number : 001
 DISMISS DEFENSE

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

4, 5, 6, 7-13
 17, 18, 19, 20
 26, 27

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the amended decision.

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

Dated: 5/9/11

[Signature]
 SHIRLEY WERNER KORREICH
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 54

-----x
BOVIS LEND LEASE (LMB) INC.,

Plaintiff,

-against-

Index No.: 603243/09
DECISION & ORDER

LOWER MANHATTAN DEVELOPMENT
CORPORATION,

Defendant.

-----x
Shirley Werner Kornreich, J.

Defendant Lower Manhattan Development Corporation (LMDC) moves for an order, pursuant to CPLR 3211 (a), dismissing with prejudice the second through seventh claims in the amended complaint and dismissing without prejudice or staying the remaining claim, pending Final Completion of the construction project at issue.

This action arises out of the construction contract regarding the abatement and deconstruction of the former Deutsche Bank building, located at 130 Liberty Street in lower Manhattan. The Deutsche Bank building sustained significant damage as a result of the September 11, 2001 terrorist attacks on the World Trade Center. Several years after the attacks, in August 2004, the building's owner, Deutsche Bank AG, sold the damaged building to LMDC. LMDC, a subsidiary of New York State Urban Development Corporation, was created on December 17, 2001 to coordinate the remembrance, revitalization, and rebuilding efforts in lower Manhattan after the attacks. It purchased the building to decontaminate and deconstruct it, and to redevelop the site as part of the World Trade Center Memorial and Redevelopment Plan.

On October 20, 2005, LMDC entered into an abatement and deconstruction contract with

plaintiff Bovis Lend Lease LMB, Inc.(Bovis), as general contractor and construction manager, to decontaminate and deconstruct the building (the Contract) (Exhibit A to Amended Complaint). Under the Contract, plaintiff was responsible for the “planning, engineering, maintenance, cleaning, abatement and removal of interior materials, building deconstruction and disposal of removed materials, site work and all other Work required in connection with the deconstruction of the building and structures” (the Project) (*id.*, Contract, Introductory Statement, at I). The removed materials included materials containing asbestos, World Trade Center dust materials, and, as was subsequently discovered in March 2006, potential human remains. The Contract required plaintiff to abate the building in accordance with all “Legal Requirements,” as that term was defined in the Contract and as detailed in the Contract specifications and approved Deconstruction Plan. “Legal Requirements” were defined as:

- (a) any statute, ordinance, code, law, rule, regulation, permit, agency notice or order, approval, consent decree, order, decision, determination, or other written requirements, standard or procedure enacted, adopted or applied by any Governmental Authority, or any administrative or judicial interpretation thereof . . .
- . (b) for the avoidance of all doubt, all Environmental Laws; and . . . (e) the Deconstruction Plan. As used in this Agreement, actions taken “in order to comply with any Legal Requirement,” or actions “necessary to comply with any Legal Requirement” shall include actions taken in order to meet a Legal Requirement in the absence of a written order or other such directive mandating such actions. For the avoidance of doubt, as set forth elsewhere in this Contract, [Plaintiff] must comply with all Legal Requirements in undertaking and completing the Work and all means and methods relating thereto

(Exhibit A to Amended Complaint, Contract, General Conditions, Art. 1, at 4-5).

Plaintiff was responsible for developing all means and methods for completing the Project by March 2007. The Contract was for a lump sum amount of \$74,839,869.00, which was increased, pursuant to subsequent contract amendments, to approximately \$81 million.

On February 13 and 21, 2006, plaintiff entered into two subcontracts with The John Galt

Corporation (Galt), for the performance of all decontamination and deconstruction obligations under plaintiff's Contract with LMDC. Galt agreed to perform the decontamination work for \$29 million, and the deconstruction work for \$33.5 million. This resulted in an amendment to the Contract, which among other things, amended the completion date to June 9, 2007.

Plaintiff alleges that, during the course of performing the Contract, it became apparent that the work was going to be much more expensive due to outside regulatory interference, changed work methods imposed by government regulators, and other causes beyond the control of plaintiff. On March 24, 2006, after potential human remains were discovered on the roof of the building, LMDC asked the regulators or governmental authorities, including the United States Environmental Protection Agency, the New York State Department of Labor, the New York State Department of Environmental Conservation, the New York City Department of Environmental Protection, and OSHA (Contract, Annex 6, Scope of Work, Section II [3], at 6) (collectively referred to as the Regulators), to participate in a visual inspection process for clearing of abatement work areas. This had never been done before under ICR 56, an applicable abatement regulation, or any other standard (Affidavit of James Abadie in Opposition, ¶ 45). Plaintiff alleges that the presence of the Regulators on the site went from less than five days per month to daily, and that these Regulators were disregarding established standards of cleanliness under applicable codes for new and ever-changing standards of cleanliness that were, according to plaintiff, time-consuming, expensive, and irrational (*id.*, ¶¶ 47-57). Plaintiff claims that the unanticipated costs and extreme regulatory interference went beyond the contemplation of the parties at the time the Contract was entered into.

Due to these unanticipated costs and circumstances, LMDC issued Change Order No. 1,

for \$1.5 million, to partially account for these changes as Extra Work under the Contract (*id.*, ¶¶ 57-58). The Change Order indicated that the justification for it were: the revised inspection standards, since the “Regulators raised an issue regarding the cleaning protocol required before non-porous materials could be considered uncontaminated”; and the cleaning protocol enforced during this time period reduced productivity and resulted in additional costs (Affidavit of James Abadie in Opposition, Exhibit 6). Moreover, LMDC issued Change Order No. 2 for an additional \$1.5 million, regarding “[u]nforeseen conditions regarding mechanical equipment cleaning and regulator involvement [resulting] in additional costs” (Abadie Aff., ¶¶ 59-61 and Exhibit 7 annexed thereto). Change Order No. 2, however, was later withdrawn as part of the negotiations of the parties leading up to the execution of a supplemental agreement.

On February 5, 2007, plaintiff, its sureties and LMDC entered into a Supplemental Agreement (Exhibit B to Amended Complaint) to establish a funding mechanism to pay for abatement cost overruns. In this agreement, LMDC agreed to pay \$9.7 million above the adjusted value of Galt’s abatement contract and agreed to advance an additional \$28.3 million towards completion of the abatement work (the Advances). It also agreed that the parties would share equally in cleaning costs in excess of \$40 million. The amounts paid, including the Advances, only included “Actual Costs,” defined as direct costs of gross cleaning, including labor, materials, permitting fees and costs, trucking, an engineer, equipment rental, insurance, utility costs, and supplies, without markup (*id.*, ¶ 2 [f] and [g]). The Supplemental Agreement further provided that plaintiff would maintain a full and adequate workforce to prosecute the work as expeditiously, continuously, and diligently as possible to achieve Deconstruction Completion by December 31, 2007 (*id.*, ¶ 5). The parties further agreed to forego interim

arbitration as provided in the Contract for compensation disputes, but if they were unable to resolve the disputes through negotiation, they agreed to resolve them through litigation commenced within 45 days after Final Completion (*id.*, ¶ 6).

On March 2, 2007, plaintiff submitted a Time Extension Request (TER) to LMDC, detailing the delays encountered on the Project from March 2006 through February 2007. The TER asserted that the delays constituted Excusable Delay under the Contract and sought an extension of time for completion of the Project to June 3, 2008 (Abadie Aff., ¶ 66 and Exhibit 8 annexed thereto). In the TER, plaintiff indicated that the “overriding and most significant delay” was the hyper-critical activity of the Regulators inspecting the Project, which level of scrutiny and resulting impediment to the construction means and methods, was unforeseen and unprecedented (*id.*). LMDC never responded to the TER (Abadie Aff., ¶ 72).

After the Supplemental Agreement was executed, plaintiff and Galt continued to work on the Project, but several serious construction accidents at the site slowed progress of the work (*see* Defendant’s Memorandum of Law, at 13 and n 9). Most seriously, on August 18, 2007, a seven-alarm fire broke out in the building, causing the tragic deaths of two New York City firefighters (Amended Complaint, ¶ 11). The New York City DOB issued a “stop work order” for the Project for over eight months, through April 30, 2008 (Abadie Aff., ¶ 77). On August 28, 2007, plaintiff terminated Galt for cause (*id.*, ¶78).

After the fire, LMDC directed plaintiff to de-couple the abatement and deconstruction activities for the Project, requiring that the abatement be completed before any deconstruction work was commenced (*id.*, ¶ 81). On January 8, 2008, plaintiff and LMDC entered into an amendment to the Contract (the January 8 Letter Agreement) (Exhibit D to Amended

Complaint). In this letter agreement, the parties reaffirmed the Contract and Supplemental Agreement, and LMDC approved the use of LVI Environmental Services, Inc. to continue Galt's work. LMDC agreed to pay plaintiff's actual general conditions costs from January 2008 through to completion of the Project, but indicated that incremental insurance costs resulting from fire delay could not be billed as general conditions (January 8 Letter Agreement, Exhibit D to Amended Complaint, ¶ 4). LMDC also backcharged plaintiff \$10 million in partial satisfaction of plaintiff's liability for fire-related expenses, and LMDC reserved the right to recover against plaintiff for all of its fire-related expenses and damages in a subsequent action (*id.*, ¶ 6).

On September 10, 2009, plaintiff notified LMDC that the abatement phase of the Project had been completed. On November 16, 2009, LVI commenced deconstruction activity at the Project.

On April 23, 2010, plaintiff and LMDC entered into a letter agreement that converted payment for the general conditions costs of deconstruction work only under the Contract, into a lump sum payment of \$12,743,625 (Exhibit F to Amended Complaint). It also provided that the Contract, Supplemental Agreement, and, except as modified therein, the January 8 Letter Agreement, remain unchanged and in full force and effect.

The Project was completed shortly after January 31, 2011. Plaintiff has been paid approximately \$70 million of the \$81 million Contract. Additionally, it has been paid approximately \$80 million under the Supplemental Agreement and the January 8 Letter Agreement, of which \$28.3 million was the Advance, which plaintiff may be obligated to repay.

Plaintiff asserts seven claims in its amended complaint. The first claim, which is not

challenged on this motion, seeks a declaratory judgment regarding the interim arbitration provision of the Contract. In the second claim, under the Supplemental Agreement, plaintiff: 1) seeks judgment that it is entitled to retain all amounts paid by LMDC for actual costs of gross cleaning during the abatement phase; and 2) seeks to recover its costs incurred for changes in the scope of work, for acceleration and delay, for unanticipated and changed Project conditions, for unpaid costs incurred for site-specific general conditions, and for home office overhead and profit. The third claim, also for breach of contract, seeks recovery, under both the Contract and the January 8 Letter Agreement, of: a profit percentage identified in the schedule of values and certain general conditions costs, including insurance costs under both the Contract and January 8 Letter Agreement; actual general conditions costs incurred; profit; and refund of backcharges in LVI's performance of the abatement work. The fourth and fifth claims seek to recover for Extra Work, and Acceleration, respectively. The sixth claim seeks recovery for unjust enrichment, for reformation and in quantum meruit. The seventh claim seeks indemnity from LMDC for any amounts Galt recovers from plaintiff.

LMDC now moves to dismiss the second through seventh claims on the grounds of failure to state a claim and documentary evidence (CPLR 3211 [a] [1] and [7]). It also seeks to dismiss without prejudice or stay any remaining claims pending Final Completion of the deconstruction of the Building.

Discussion

The motion to dismiss is granted to the extent that damages for changes in the scope of work, changed project conditions and acceleration in the second claim are dismissed. All damages except refund of backcharges withheld in the third claim are dismissed, and the fourth

through seventh claims are dismissed with prejudice. The branch of the motion seeking to dismiss without prejudice or to stay any remaining claims, is denied as moot.

“The scope of a court’s inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed” (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 [1st Dept 2003]). The court’s task is to determine whether the complaint states a cause of action. The motion will be denied if, within the four corners of the pleading, factual allegations are discerned which, taken together, manifest a claim cognizable at law (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). The complaint will be liberally construed, and the court will accept as true all facts in the complaint and in plaintiff’s submissions in opposition to the motion (*id.* at 152). Plaintiff will be accorded the benefit of all possible favorable inferences (*id.*). “However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration” (*Franklin v Winard*, 199 AD2d 220, 220 [1st Dept 1993] [internal citation omitted]; *see* CPLR 3211 [a] [1]). “Dismissal under CPLR 3211 (a) (1) is warranted ‘only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law’” (*511 West 232nd Owners Corp.*, *supra* quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Second Claim

LMDC challenges most, but not all, elements of damages sought by plaintiff in the second claim under the Supplemental Agreement. It does not challenge plaintiff’s request for all amounts it paid for actual costs of gross cleaning, refunds on amounts withheld as backcharges by LMDC, and interest on late payments. It argues, however, that the remainder of the damages

sought are barred by the plain terms of the Contract. Specifically, it asserts that the Contract bars plaintiff from asserting claims against LMDC for amounts in excess of the fixed lump agreed to therein. LMDC points to Contract provisions in which plaintiff expressly assumed the risk of additional regulatory scrutiny and agreed to comply with the most stringent requirements at no extra cost to LMDC. It urges that damages from changes in the scope of work are barred by plaintiff's explicit agreement that no changes to the Deconstruction Plan would constitute Extra Work for which it could receive additional compensation.

LMDC further argues that the Contract contains a no-damages-for-delay clause, which unambiguously precludes additional compensation for any delays of "any kind whatsoever, whether foreseeable or unforeseeable," and provides that plaintiff's sole remedy with respect to any excusable delay, which is explicitly defined, is an extension of time, not an increase in money paid (Contract, General Conditions, Art. 14, at 22). With regard to damages for acceleration, LMDC maintains that plaintiff could not allege that it performed according to the schedule, nor could it allege that LMDC demanded that plaintiff accelerate the work in advance of the CPM schedule, considering that the Project was completed long after the June 2007 completion date. Plaintiff's request for damages for unanticipated and changed Project conditions and site-specific general conditions, likewise, are barred by the Contract, according to LMDC, because plaintiff agreed that it had examined the site, agreed to bear the risk of the Contract Assumptions in which it repeatedly acknowledged the possibility of unanticipated conditions, and affirmed that it would not seek additional compensation for foreseeable and unforeseeable conditions. Finally, with regard to profit and overhead, LMDC contends that these damages are prohibited by the terms of the Supplemental Agreement, which bars plaintiff from

any claim to retain funds advanced or paid by LMDC above "Actual Costs," and expressly excludes any profit. The Contract only permits recovery of profit if the work performed constituted Extra Work.

The motion is granted with regard to the second claim only to the extent that damages for changes in the scope of the work, changed project conditions, and acceleration are dismissed. The damages plaintiff seeks in this claim are to retain the Advanced Funds and overhead and profit on those amounts, as well as other unpaid amounts of Actual Costs and general conditions costs, all under the Supplemental Agreement. With regard to the Advanced Funds, plaintiff asserts that it is seeking to recover costs it incurred for changes in the scope of the work, due to acceleration, delay and changed Project conditions (Amended Complaint, ¶ 52).

With respect to changes in the scope of the Work, these damages are barred by the clear terms of the Contract. In Section II (A) (2) © of Annex 6 of the Contract, entitled Scope of Work, plaintiff agreed to comply with the Deconstruction Plan, and that:

Any and all changes to the Deconstruction Plan, or any approved portions thereof, require LMDC's advance written permission and the approval of the applicable Governmental Authorities. No such changes may be requested without LMDC's advance consent and written approval. No such changes shall be deemed Extra Work

(Amended Complaint, Exhibit A, contract, Annex 6, Section II [A] [2] [c]). In the Contract definitions, the parties explicitly agreed that Extra Work means work required by a written Change Order issued by LMDC which adds substantial scope or program to the Scope of Work. Pursuant to the Scope of Work and the provision regarding Extra Work, plaintiff was aware of and assumed the risk that the Deconstruction Plan might be amended over the course of time. Plaintiff accepted that risk by the lump sum payment in the Contract. These provisions clearly

provided that additional costs in connection with a change to the Scope of Work are not recoverable unless LMDC issued a written change order with respect thereto. While LMDC had issued Change Order Number 1, which plaintiff was compensated for and is not at issue, plaintiff here is seeking additional costs incurred for changes in the scope of work that were not subject to a written change order. These damages are barred by the Contract.

Similarly, plaintiff's request for costs incurred due to unanticipated and changed project conditions is barred by the Contract's plain terms. Plaintiff agreed to perform the Contract for the lump sum payment without additional payments for changed site conditions. In the provision setting forth plaintiff's warranties, plaintiff represented and warranted:

That Contractor has carefully examined and analyzed the provisions and requirements of this Contract and inspected the Building, the Site, and the Building Contents; that from Contractor's own investigations Contractor has satisfied itself as to the nature of all things needed for the performance of this Contract, the general and local conditions and all other matters which in any way affect this Contract or its performance, . . . and that Contractor accepts and agrees to bear the risk of the Contract Assumptions

(*id.*, Contract, General Conditions, Article 30 [B], at 32-33). Plaintiff also accepted all conditions in the Building and otherwise at the Site, "whether or not such conditions were foreseeable, as they exist or may eventually be found to exist, and in whatever condition same may exist" (*id.*, Annex 5, Section II [A]). The definition of Extra Work specifically stated that it did not include "any Work required by reason of any conditions of any kind on the interior or exterior of the Building, whether or not foreseeable" (*id.*, Contract, General Conditions, Article 1, at 3). Further, in the Contract's Introductory Statement, plaintiff agreed that "[s]ubject to the terms and conditions of this Contract, Contractor shall bear the risk without extra compensation

of all conditions on the Project Site and on the exterior and interior of the Building, whether or not such conditions are foreseeable” (*id.*, Contract, Introductory Statement, at ii). These provisions, taken together, bar plaintiff from seeking additional compensation in the form of damages for changed Project conditions unless they were subject to a written change order.

Plaintiff’s damages claim for acceleration also is dismissed under the clear language of the Contract and the Supplemental Agreement. Article 13 of the Contract, entitled Acceleration, provides that:

If at any time the Work is not progressing in accordance with the CPM Schedule or if the work is likely to be delayed for any reason within the control of Contractor, or if LMDC otherwise desires to accelerate the Work for any reason, LMDC may give the Contractor Notice requiring Contractor to:

- 1) increase the number of workers and/or the amount or types of machinery, tools, equipment, or materials . . . ; and/or
- 2) schedule and conduct additional lawful work shifts

(*id.*, Contract, General Condition, Article 13, at 21). This Article went on to provide that the costs of additional labor, materials, tools, machinery and equipment, if any required by LMDC under the provision, was to be borne by plaintiff as part of the lump sum payment if it was “necessary or appropriate to maintain Contractor’s compliance with, and progress under, the CPM Schedule as updated pursuant to the Specifications immediately prior to the date of such acceleration; or . . . otherwise shall be borne by LMDC as Extra Work” (*id.*). The Contract, as amended initially provided for a Final Completion date of June 9, 2007.

In the Supplemental Agreement, the parties specifically stated that they “understand that it is of critical importance that the Building be completely deconstructed to ground floor grade and backfilled pursuant to the Contract . . . no later than December 31, 2007” (Amended

Complaint, Exhibit B, Supplemental Agreement, ¶ 1 [a]). The Supplemental Agreement further provided that “Contractor shall maintain a full and adequate workforce,” and that it shall maintain an amount as complies materially with that which was required pursuant to the CPM Schedule “to prosecute the Work as expeditiously, continuously, and diligently as possible in accordance with the requirements of the Contract” (*id.*, ¶ 5 [a] at 4-5).

Plaintiff’s claim for acceleration fails because it does not allege that it performed the work according to the CPM Schedule. The Work was not completed until after January 2011, long after the December 31, 2007 date. The December 2007 date was not an acceleration of the original March 2007 date, or even the amended June 2007 date. Contrary to plaintiff’s argument, an allegation that plaintiff complete the Project “as soon as possible sparing no effort or expense” (Amended Complaint, ¶ 74) could not constitute an order to accelerate under the Contract under these circumstances. To the extent that plaintiff’s acceleration damages are really damages for delay, such damages are addressed below. The cases plaintiff relies upon in arguing that there was a “constructive acceleration,” involving contractors contracting with the federal government, are unpersuasive.

First, in *Fraser Constr. Co. v United States*, (384 F3d 1354, 1366 [Fed Cir 2004]), the court held that the Army Corp of Engineer’s repeated emphasis to the contractor to adhere to the contract schedule was not notice to accelerate the contract. This case actually supports the conclusion that there has been no constructive acceleration in the instant case. As in *Fraser Constr.*, LMDC was requesting that plaintiff complete the Project more than six months beyond the completion date set forth in the Contract. Its request that plaintiff work toward that deadline diligently was not notice to accelerate the Contract. In *Ace Constructors, Inc. v United States* (70

Fed Cl 253, 281 [US Fed Cl 2006], *affd on other grounds* 499 F3d 1357 [2007]), unlike the instant contract, there was no provision in which the cost risks of meeting the original contract deadline were assumed by the contractor (*see* Contract, Article 13, at 21). In addition, in *Ace Constructors, Inc.*, the Army Corps of Engineers refused to grant a legitimate time extension to the contractor while threatening that liquidation damages would be assessed against it for failing to meet the completion date (*Ace Constructors, Inc., id.*). Plaintiff has not alleged such facts here. Thus, there is no basis for damages for acceleration, and that request is dismissed.

With regard to the remaining damages sought in the second claim, including delay, site-specific general conditions costs and profit and overhead under the Supplemental Agreement, dismissal is denied. Delay damages is based on the allegedly unprecedented interference of the Regulators in all aspects of the abatement process, which interference was completely outside the contemplation of either party and went far beyond the written requirements of the Contract or of any applicable code regulations. The complaint alleges that over five months after the Contract was entered into, on March 24, 2006, after potential human remains were discovered on the roof of the Building, LMDC invited and asked the Regulators to participate in a visual clearance inspection process for cleaning and clearing of abatement work areas and for materials removed from the Building. Plaintiff asserts that it is an experienced abatement contractor and was aware of what the prior contractor on this Project had been through with respect to regulatory control. It asserts that such Regulator, visual clearance inspections had never been performed before under Industrial Code Rule 56, the applicable written standard for abatement, or under any other existing written or established Legal Requirement or scientific standard. It urges that the nature and extent of the inspections, and the ever-changing standards of cleanliness that the Regulators

were requiring at each visit, completely changed the nature of the Contract work. Plaintiff asserts that the standard was so high that it was impossible to achieve and that no material taken from the Building could pass inspection. Therefore, LMDC instructed plaintiff to treat all metal being removed as asbestos-containing material (ACM), sending it to a landfill instead of selling it for scrap metal. This became the basis for Change Order No. 1.

Plaintiff also claims that there was a new “standard” imposed by the Regulators that if any debris of any origin over the size of a dime was found, then the entire area would fail and need to be re-cleaned. Plaintiff further claims that the Regulators required sheet rock to be treated as actual asbestos and concrete splatter to be removed from all structural columns, something which had never been done before. Additionally, it claims that the Regulators did not work on Fridays, so that an area ready for inspection on Thursday would not be inspected until Monday, and then it would fail because negative air units for containment would blow outside dust into the work area. Plaintiff contends that inspections were occurring daily, at different times of the days, and would take hours to complete, so that cleaning an area took months, whereas previously it took only several days (Abadie Opp. Aff., ¶¶ 45-58). Plaintiff alleges that it sought a change in the Contract in Change Order No. 2 to account for the increased costs associated with the Regulator inspections. This change order stated that unforeseen conditions regarding mechanical equipment cleaning and regulator involvement had resulted in additional work. LMDC, however, never paid plaintiff for Change Order No. 2 (*id.*, ¶¶ 59-62). Plaintiff also alleges that the Regulators’ physical inspections became more invasive. For example, they began drilling holes in the concrete floor slabs to look for dust. This, plaintiff alleges, was outside the Contract specifications, the Deconstruction Plan, and all existing Legal

Requirements. In sum, plaintiff pleads that unprecedented Regulator interference caused significant delays, engendered costs well above and beyond anything that could have been contemplated or anticipated by the parties (triple the original estimates), and resulted in completion over three years past the scheduled date.

However, as LMDC correctly contends, the Contract contains a no-damages-for-delay clause. In Article 14 of the General Conditions of the Contract, plaintiff agreed to “make no claim for damages for delay in the Work (or the performance thereof) of any kind whatsoever, whether foreseeable or unforeseeable, and agree[d] that any such claim shall be compensated for solely by an extension of time to complete the performance of the Work ” when the provisions regarding excusable delay allow such time extensions (Contract, General Conditions, Article 14, at 22).

It is well settled that no-damage-for-delay clauses are enforceable in New York (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]; accord *Universal/MMEC, Ltd. v Dormitory Auth. of State of N. Y.*, 50 AD3d 352 [1st Dept 2008]). Nonetheless, these clauses do not erect an absolute bar to the assertion of a claim for breach of contract due to conduct causing delay. “[E]ven exculpatory language which purports to preclude damages for *all* delays resulting from *any* cause whatsoever are not read literally” (*Corinno Civetta Constr. Corp.*, *supra* [citations omitted]).

There are four exceptions to a no-damage-for-delay clause:

Generally, even with such a clause, 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

(*id.*) With regard to unanticipated delays, “exculpatory clauses will not bar claims resulting from delays caused by the contractee if the delays or their causes were not within the contemplation of the parties at the time they entered into the contract” (*id.* at 309-310). This exception is based on mutuality of assent. That is, the contractor cannot be presumed to have bargained away its right to seek damages resulting from delay which the parties did not contemplate at the time. Thus, the clause can only encompass “delays which are reasonably foreseeable, arise from the contractor’s work during performance, or which are mentioned in the contract” (*id.* [citation omitted]).

Here, accepting the facts alleged in the complaint as true and according plaintiff the benefit of all favorable inferences, as this court must on a motion to dismiss pursuant to CPLR 3211 (*Leon v Martinez*, 84 NY2d at 87-88), the complaint adequately states a claim to recover damages, among other things, for unanticipated delays in the performance of the contract (*see Corinno Civetta Constr. Corp.*, 67 NY2d at 309-310; *Bovis Lend Lease LMB Inc. v GCT Venture, Inc.*, 6 AD3d 228 [1st Dept 2004]; *Eldor Contr. Corp. v County of Nassau*, 6 AD3d 654, 655 [2d Dept 2004]; *Tougher Indus. v Northern Westchester Joint Water Works*, 304 AD2d 822, 822-823 [2d Dept 2003]; *Abax Inc. v New York City Hous. Auth.*, 282 AD2d 372, 373 [1st Dept 2001]; *Clifford R. Gray, Inc. v City School Dist. of Albany*, 277 AD2d 843 [3d Dept 2000]; *J.J. Flannery, Inc. v Kerby Saunders, Inc.*, 173 AD2d 415 [1st Dept 1991]; *Martin Mech. Corp. v Mars Assoc.*, 158 AD2d 280, 281 [1st Dept 1990]; *see also Trataros Constr., Inc. v New York City Hous. Auth.*, 34 AD3d 451, 453 [2d Dept 2006]). Plaintiff has asserted that the delays were wholly unanticipated and were of a character and magnitude not ordinarily encountered or

anticipated by parties to a contract of this nature (*see Clifford R. Gray, Inc., supra*).

The unusual circumstances of the abatement process upon the discovery of human remains at the site, which occurred after the Contract was entered into, resulted in the unprecedented Regulator interference. Plaintiff has presented proof that the Regulators then began conducting daily inspections and applying new and ever-changing standards that it asserts were not based on any statute, code, or regulation. The resulting delays in attempting to meet these changing standards and re-cleaning areas, according to plaintiff's allegations, were significant – at the time of the Supplemental Agreement, 52 weeks of delay (*Abadie Aff.*, ¶ 68), and upon completion of the Project, more than three years after the December 2007 adjusted completion date. Moreover, plaintiff has alleged that this changed the nature of the work such that, for example, all steel had to be discarded instead of cleaned and salvaged, sheet rock had to be treated as asbestos, concrete had to be scraped off structural columns, and areas had to be cleaned and re-cleaned based on standards that continually changed. This not only caused delays, but resulted in significantly increased costs. The fact that in both Change Order No. 1 and No. 2, the parties were recognizing that delays from regulator interference were unanticipated and changed the work, supports plaintiff's allegations. Plaintiff's allegations are sufficiently indicative of unprecedented delays beyond the contemplation of the parties to survive this motion to dismiss (*see e.g. Bovis Lend Lease LMB Inc., supra* [delays of 2 ½ years were so unreasonable, and changes to contract so dramatic with value of work performed more than twice original price, fact issue raised as to whether delays went beyond contemplation of parties or constituted abandonment of contract]; *Tougher Indus., supra* [CPLR 3211 dismissal denied because of unanticipated delays]; *Abax Inc., supra* [600 days of delays, plus a period during

which contractee suspended work, is sufficiently indicative of delays beyond the contemplation of the parties]; *Clifford R. Gray, Inc., supra* [wholly unanticipated delays are beyond parties' contemplation]; *J.J. Flannery, Inc., supra* [in view of 25-month delay, court finds triable issue on whether delay clause applied]; *Martin Mech. Corp., supra* [whether recovery is barred by exculpatory clause raises questions of fact to be resolved at trial].

LMDC fails to point to a specific provision of the Contract demonstrating, as a matter of law, that the extent and nature of the delays at issue were within the contemplation of the parties (*see Corinno Civetta Constr. Corp.*, 67 NY2d at 309). Contrary to LMDC's argument, the definition of Legal Requirements in the Contract does not clearly cover the requirements the Regulators were imposing here. In the Contract, Legal Requirement includes "any statute, ordinance, code, law, rule, regulation, . . . or other written requirement, standard or procedure, . . . applied by any Governmental Authority" (Contract, General Conditions, at 5). While it also includes "actions taken 'in order to comply with any Legal Requirements' and "actions taken in order to meet a Legal Requirement in the absence of a written order," it is not clear that this includes actions required that are not based on statute, ordinance, code, law, rule, regulation or other written requirement, standard or procedure. Plaintiff asserts that the actions the Regulators were requiring were not based on written requirements, standards or procedures, and that the requirements were continually changing. Consequently, dismissal of plaintiff's delay damages claim is not warranted based on the documentary evidence, since this evidence does not resolve all factual issues as a matter of law or conclusively dispose of plaintiff's claim (*see Tougher Indus., Inc.*, 304 AD2d at 823).

Plaintiff's request for "site specific general conditions costs," which includes site

security, consultants, electric, and trailer rental, which plaintiff asserts were necessary to perform the Work (Abadie Opp. Aff., ¶¶ 85-91), is authorized under the Supplemental Agreement and the January 8 Letter Agreement. The Supplemental Agreement provides in the definition of Actual Costs, that such costs include labor, materials, “permitting fees and costs, trucking, one on-staff engineer for engineering relating to the gross cleaning, equipment rental (including crane), insurance, utility costs, and supplies” (Exhibit B to Complaint, Supplemental Agreement, ¶ 2 [g]). In the January 8 Letter Agreement, LMDC agreed to “pay general conditions beginning on the date that LVI [the subcontractor which replaced Galt] begins work on the site through the end of deconstruction in an amount reflecting the actual costs incurred,” and agreed that costs to carry the crane during abatement will be included in general conditions, but that fire-related incremental insurance costs cannot be billed as general conditions (Exhibit D to Amended Complaint, January 8 Letter Agreement, ¶ 4). The provision in the Contract upon which LMDC relies, regarding the plaintiff’s acceptance of the physical conditions of the site (Contract, Annex 5 at II “Building Conditions”), does not bar plaintiff’s claim for general conditions costs. As plaintiff correctly contends, the physical conditions of the site is entirely different from general conditions costs.

With regard to the profit and home office overhead damages sought, LMDC has failed to demonstrate that the Supplemental Agreement bars a claim for such damages. The purpose of the Supplemental Agreement was to reserve the parties’ rights regarding their disputes over whether LMDC owed plaintiff certain amounts as payment for Extra Work. The provision in the Supplemental Agreement to which LMDC points is paragraph 2 (f), in which the parties agreed that the amounts to be paid plaintiff were to be on an “Actual Costs” basis, without markup or

profit. It specifically provided that it was subject to paragraph 6 (e). In that subparagraph, the parties clearly reserved their rights to bring any claims against each other in a litigation to be filed by plaintiff within 45 days after completion of the abatement, including the right to prove and collect any “profit, overhead or other amounts to which Contractor may claim to be entitled” (Exhibit B to Complaint, Supplemental Agreement, ¶¶ 2[f] and 6 [e]). Hence, plaintiff’s claim for profit and overhead as damages under the Supplemental Agreement and the Contract is not barred by paragraph 2 (f) of the Supplemental Agreement. Whether plaintiff will be able to prove that these damages are recoverable under the Contract provisions regarding Extra Work or as delay damages, cannot be determined on this pre-answer motion to dismiss.

Third Claim

On plaintiff’s third claim, LMDC challenges plaintiff’s request for “costs of insurance” (Amended Complaint, ¶ 55) and “profit incurred through the completion of the abatement phase of the Project” (*id.*, ¶ 61) arguing they are barred by the January 8 Letter Agreement. Article 34 of the General Conditions addresses insurance costs. Plaintiff, there, agreed that “[a]s part of the Lump Sum, Contractor shall provide and maintain the insurance coverages specified in Schedule ‘I’ hereto.” Schedule I provides, in paragraph 3, that plaintiff “shall maintain all coverages of Required Contractor Insurance from the date of this Contract through Final Completion” (Contract, Schedule I at I-1). The January 8 Letter Agreement further provides that the “incremental insurance costs resulting from fire delay” could not be billed as general conditions. These provisions together warrant dismissal of plaintiff’s request for damages for “costs of insurance.” Plaintiff was to maintain insurance at its own expense, and it agreed not to bill incremental insurance costs related to the fire in its general conditions costs.

With regard to plaintiff's request for profit, in the January 8 Letter Agreement, LMDC agreed to pay "general conditions." There was no provision for additional profit (Amended Complaint, Exhibit D, January 8 Letter Agreement, ¶ 4). Therefore, there is no basis for plaintiff to recover such amounts under that agreement, and it is dismissed.

Plaintiff's request for a "refund of backcharges withheld," however, is not dismissed. The January 8 Letter Agreement provided that LMDC would backcharge plaintiff \$10 million against amounts invoiced by plaintiff for Galt's work performed before August 18, 2007, which would be used to satisfy plaintiff's indemnity to LMDC for fire-related expenses (*id.*, ¶ 5). In plaintiff's confirming letter, it specifically reserved its right, among others, "to contest the backcharge being assessed against project funds" as well as LMDC's right to prove additional fire-related expenses (Amended Complaint, Exhibit D, January 8 Letter Agreement). As a result, plaintiff may challenge the amount of the backcharges.

Fourth Claim

LMDC seeks dismissal of plaintiff's fourth claim for Extra Work under the Contract as barred by the terms of the Contract. It argues that plaintiff's allegations that it performed work in connection with Legal Requirements, including requirements regarding construction safety, changes in site conditions, and unidentified and unforeseen circumstances, are barred by the "Extra Work" provision of the Contract. LMDC asserts that plaintiff's allegations that certain changes in Legal Requirements warrant additional payment because they were unprecedented, unanticipated, and unreasonable, are barred by the Contract in which plaintiff agreed to perform the work in accordance with the most stringent requirements.

Dismissal is granted as to the fourth claim, because it is duplicative of the second claim.

Plaintiff seeks damages in this claim for the Extra Work caused by the delays resulting from Regulator interference (Amended Complaint, ¶ 63). These delay damages are part of the second cause of action, and as discussed above, are not dismissed and are subsumed in that second claim (*see Harrison & Burrowes Bridge Constructors, Inc. v State of N.Y.*, 42 AD3d 779 [3d Dept 2007] [extra work caused by the delay falls within the category of damages for delay]).

The remainder of the damages sought in this claim are dismissed. While plaintiff argues that Extra Work is defined in the Contract to include a “Statutory Change,” it fails to allege that any statutory changes occurred here. Then too, its allegation regarding “changes in site conditions and congestion” are barred by the Contract definition of Extra Work, which clearly states that Extra Work “does *not* include (without limitation) . . . (d) any Work required by reason of any conditions of any kind on the interior or exterior of the Building, whether or not foreseeable” and “(e) any changes in sequencing or site logistics required to maintain Contractor’s schedule” (Contract, General Conditions, at 3). Alleged changes in site conditions and congestion clearly fall within this exclusion from Extra Work. To the extent that plaintiff is seeking Extra Work damages for changes in the scope of the work, as discussed above with regard to the second claim, plaintiff clearly agreed that “[n]o such changes [to the Deconstruction Plan] shall be deemed Extra Work” (*id.*, Annex 6; Scope of Work, Section II [A] [2] [c], at 3). Its request for damages for “changes in the state of the art for construction safety” also is barred by the Contract Scope of Work provision, which provided that plaintiff must comply with all health and safety requirements related to the Project, including but not limited to all procedures to ensure compliance with applicable Legal Requirements” (*id.*, Section II [B] [3], *see also* Section II [B] [7] [Contractor solely responsible for health and safety of employees]).

Accordingly, the fourth claim is dismissed.

Fifth Claim

The fifth claim also is dismissed. This claim seeks to recover damages for LMDC's alleged acceleration of the Project by its directives that plaintiff "complete the Project work as soon as possible, sparing no effort or expense" (Amended Complaint, ¶ 74). As discussed above in the second claim, Article 13 of the General Conditions of the Contract, regarding acceleration provides that the acceleration costs are to be borne by plaintiff, as part of the Contract's lump sum payment, if and to the extent that the acceleration of the Work was necessary to maintain plaintiff's compliance with, and progress under, the CPM Schedule (Contract, Article 13 [A] [3]). Plaintiff fails to allege that it performed the Work according to the CPM Schedule, or that LMDC was demanding that it perform ahead of that schedule. Instead, LMDC was directing plaintiff to prosecute the work expeditiously and diligently, and meet a deadline many months after the Contract completion date. Ergo, there is no basis for damages for acceleration, and the fifth claim is dismissed.

Sixth Claim

To recover a claim in quantum meruit, the plaintiff must plead the performance of services in good faith, the acceptance of services by defendant, an expectation of compensation for the services, and the reasonable value of those services (*see Miranco Contr., Inc. v Perel*, 57 AD3d 956, 957-58 [2d Dept 2008]). Unjust enrichment, similarly, requires the plaintiff to allege that it conferred a benefit on defendant and that the defendant is obtaining the benefit without adequately compensating plaintiff for it (*see Smith v Chase Manhattan Bank, USA*, 293 AD2d 598, 600 [2d Dept 2002]). As argued by defendant, these claims in quasi-contract, are precluded

by the existence of a valid and enforceable written contract governing the subject matter of the dispute (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1st Dept 2004]; *West End Interiors v Aim Constr. & Contr. Corp.*, 286 AD2d 250, 252 [1st Dept 2001]).

Here, plaintiff's sixth claim clearly is precluded by the existence of the Contract, which is valid and enforceable, and covers its claims for damages. Indeed, in the Contract, plaintiff agreed that it "shall have no cause of action under any theory of quasi-contract or quantum meruit, by reason of any delay of any kind or duration whatsoever" (Contract, General Conditions, Article 14, at 22). It must be noted that plaintiff has fully performed the Contract, and has been paid in excess of \$150 million, pursuant to the terms of the Contract and the additional agreements the parties entered into in connection with this Project. Since there is no fraud or other circumstances so warranting, the Contract may not be avoided, and plaintiff's remedy is to sue upon the Contract for damages, as it has in its other claims (*see Buckley & Co. v City of New York*, 121 AD2d 933, 936 [1st Dept 1986], *appeal dismissed* 69 NY2d 742 [1987]). The sixth claim is dismissed.

Seventh Claim

Finally, LMDC seeks dismissal of the seventh claim for indemnity. In this claim, plaintiff claims entitlement to be indemnified for any and all amounts billed and unpaid for work performed by its subcontractor Galt for which plaintiff has been sued in an action by Galt. LMDC asserts that the Contract only contains an indemnity provision which runs in favor of LMDC and that there is no corresponding indemnity for plaintiff from LMDC. In Article 31 of the General Conditions of the Contract, plaintiff agreed to indemnify LMDC against all claims

described in subparagraphs A through O, including claims, losses, liabilities, or damages asserted by third persons, such as that of a subcontractor like Galt (Contract, General Conditions, Article 31, at 35-36). As LMDC correctly contends, there is no corresponding contractual indemnity running from LMDC to plaintiff.

To the extent that plaintiff urges that the Galt subcontract is a “pass through” contract, that is, that Galt assumed toward plaintiff all of the rights and obligations plaintiff assumed toward LMDC in the Contract, this still fails to provide a claim against LMDC here. In order for a contractor to prosecute a claim against the owner for the benefit of an injured subcontractor, the contractor must demonstrate that either in the subcontract or in a liquidating agreement, it agreed to sue the owner on behalf of the subcontractor and to turn over the sums to the subcontractor in satisfaction of the subcontractor’s claims (*see Schiavone Constr. Co. v Triborough Bridge & Tunnel Auth.*, 209 AD2d 598, 599 [2d Dept 1994]). The agreement must have three basic elements: (1) impose liability upon the general contractor for the subcontractor’s increased costs; (2) liquidate liability in the amount of the general contractor’s recovery against the owner; and (3) contain a provision for the “pass through” of that recovery to the subcontractor (*Bovis Lend Lease LMB, Inc. v GCT Venture, Inc.*, 285 AD2d 68, 70 [1st Dept 2001]; *see also North Moore St. Developers, LLC v Meltzer/Mandl Architects, P.C.*, 23 AD3d 27, 31-32 [1st Dept 2005]). The agreement must be an express, not implied, liquidation agreement (*see Barry, Bette & Led Duke Inc. v State of N.Y.*, 240 AD2d 54, 57 [3d Dept], *lv denied* 92 NY2d 804 [1998]). There is no allegation in the complaint, here, that in the Galt subcontract, or in another express liquidation agreement, plaintiff acknowledged its liability for Galt’s damages occasioned by LMDC, agreed to liquidate its liability to Galt in such amounts as may be recovered against LMDC, and agreed

to “pass through” that recovery to Galt (*see I.T.R.I. Masonry Corp. v State of N.Y.*, 21 AD3d 990 [2d Dept 2005] [claim dismissed because general contractor never entered into liquidating agreement]; *Mars Assoc. v New York City Educ. Constr. Fund*, 126 AD2d 178 [1st Dept], *lv dismissed* 70 NY2d 747 [1987] [no liquidating agreement]; *Travelers Cas. and Sur. Co. v Dormitory Auth. - State of New York*, 735 F Supp 2d 42, 73 & n 54 [SD NY 2010] [courts routinely dismiss pass-through claims in the absence of an admission of liability by the contractor creating a liquidating agreement]; *see also Bovis Lend Lease LMB, Inc., supra; Schiavone Constr. Co., supra*). Without these allegations, the “pass through” claim fails. Therefore, the seventh claim is dismissed.

The branch of LMDC’s motion seeking dismissal without prejudice or a stay pending Final Completion of the Project, is denied as moot. As LMDC conceded at oral argument of this motion, the Project was completed in the end of January 2011, and, therefore, there is no basis to dismiss without prejudice or to stay (Transcript of Oral Argument, January 11, 2011, at 5-6). Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that

1. damages for changes in the scope of work, changed project conditions, and acceleration in the second claim of the complaint are dismissed;
2. all damages except refund of backcharges withheld in the third claim are dismissed;
3. and the fourth through seventh claims are dismissed,

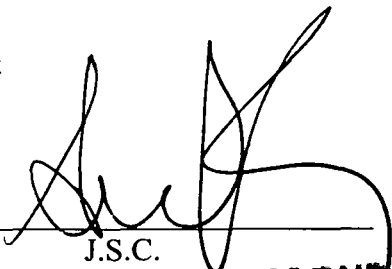
and is otherwise denied, and the branch of the motion seeking to dismiss without prejudice or to stay is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a conference in Part 54, Room 228, 60 Centre Street, on May 26, 2011, at 10:30 a.m.

Dated: May 9, 2011

ENTER:



J.S.C.
SHIRLEY WERNER KORNFREICH
J.S.C.