Grundman Mech. Sys. v Barr & Barr, Inc.
2013 NY Slip Op 30436(U)
March 4, 2013
Sup Ct, New York County
Docket Number: 601587-2009
Judge: George J. Silver
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[* 1]
SCANNED ON 3/5/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver — PART 10
Justice

FILED
MAR 05 2013
NEW YORK
COUNTY CLERK'S OFFICE

GRUNDMAN MECHANICAL SYSTEMS

- v -

BARR & BARR, INC.

INDEX NO. 601587-2009
MOTION DATE
MOTION SEQ. NO. 003

The following papers, numbered 1 to 6, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	No(s). 1, 2, 3
Answering Affirmation(s) — Affidavit(s) — Exhibits — Memorandum of Law	No(s). 4, 5
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 6

Upon the foregoing papers, the motion is decided as follows:

In this breach of contract action arising out of the construction of a nine-story addition to the Maimonides Medical Center ("Maimonides") in Brooklyn, New York ("the project"), defendants Barr & Barr, Inc. ("B&B") and Liberty Mutual Insurance Company (collectively "defendants") move pursuant to CPLR § 3212 for an order granting them summary judgment dismissing causes of action two through nine in plaintiff Grundman Mechanical Systems, Inc.'s ("Grundman") complaint. In the alternative, defendants move in limine for an order precluding Grundman from offering testimony or evidence relating to claims allegedly incurred as a result of delays allegedly caused by B&B, Maimonides, or Maimonides' design professionals.

In support of the motion, B&B argues that Grundman's causes of action for extra work, differing conditions, breach of representations and warranties, breach of contract, delay, breach of implied warranty, quantum merit and unjust enrichment, and cardinal change are nothing more than delay claims that are specifically barred by the "no damage for delay clause" in the subcontract between B&B and Grundman. More specifically, Grundman's complaint alleges that B&B improperly ordered Grundman to perform certain extra and additional work; that B&B required Grundman to provide materials and perform work substantially and materially more difficult than the work originally provided for in the subcontract; that as a result of B&B's misrepresentations, Grundman was compelled to provide materials and to perform work on the project substantially more difficult and different from that represented by B&B; that B&B provided Grundman with defective, inadequate and incomplete plans and specifications; that B&B failed to process change orders in a prompt fashion; that B&B failed to properly coordinate activities relating to the project; that B&B failed to approve shop drawings in a timely manner; that B&B unreasonably and improperly forced Grundman to perform work out of sequence; that B&B failed to make reasonable efforts to promptly resolve disputes; that B&B failed to properly administer the subcontract; that B&B actively and unreasonably interfered with Grundman's performance of its work; that B&B acted unreasonably in ordering Grundman to perform extra and additional work, and to supply additional materials other than those required by the subcontract; that B&B unreasonably and improperly ordered acceleration in Grundman's work schedule; that B&B unreasonably and improperly with held

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

1. Check one: ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

payments due Grundman; and that B&B failed to make payments for items as required by the subcontract.

B&B's senior vice president, Joseph Krug ("Krug") avers that B&B, a construction management company, entered into a contract with Maimonides on January 23, 2004 wherein it was agreed that B&B would manage the project and hire all subcontractors to perform work. B&B was issued notice to proceed on July 16, 2004 and most of the floors were completed by the end of 2007. However, the last of the nine floors was not completed until early 2009, nearly two years behind schedule. Krug claims that the delay in the completion of project was due to the redesign of the foundation and redesigns of HVAC and electrical work. On December 3, 2004, B&B and Grundman entered into a subcontract pursuant to which Grundman agreed to perform HVAC work at the project. Pursuant to Article 23 of the subcontract, B&B could require Grundman "to perform all Work on any floor or area at different times and/or intervals, including but not limited to Work on mock up rooms and other areas out of sequence if required." Article 23 further states that Grundman "may be required to leave out portions of its Work for temporary services, and return at a later date to complete the work. Comeback time will be at no additional cost [Maimonides] or [B&B]." Section 3.5 of Schedule C to the subcontract states that Grundman "is expected to be experienced and familiar with the requirements and conditions encountered during the building renovations of Hospital properties. One of these conditions encountered is the necessary performance of 'out of sequence work'". Article 32 of the subcontract states, in part, that Grundman "acknowledges that the progress of its Work may be adversely affected by the fact that the facility is operating and is open to the public and [Grundman] agrees to make no claim for additional costs or damages associated with any such related delays of inefficiencies." Article 30 of the subcontract states that in the event Grundman "is obstructed, re-sequenced or delayed in its performance of its Work by reason of the fault of [B&B], [Grundman] will be entitled to a reasonable extension of time." Article 30 further states the extension of time will be Grundman's sole remedy and that in no event will Grundman "be entitled to recover damages from [B&B] or [Maimonides] for any such obstruction, re-sequence or delay."

Krug avers that Grundman acted as a broker of the HVAC work and subcontracted virtually all of the HVAC work it was required to perform under the subcontract to other entities. According to Krug, Grundman had difficulty with many of these subcontractors and B&B and Maimonides consistently complained of Grundman's poor performance and lack of manpower. B&B terminated Grundman's subcontract by letter dated December 19, 2008 and the HVAC work was completed by another firm several months later. B&B contends that the delays set forth in Grundman's complaint and in its response to B&B's interrogatory number 19[1] are commonplace on major commercial construction projects and were fully contemplated by the parties at the time the subcontract as entered into.

In opposition, Grundman contends that summary judgment is inappropriate because its claims are specifically provided for by Article 8.3.3 of the General Conditions to the prime contract between B&B and Maimonides, which Grundman argues was specifically incorporated into its subcontract with B&B. Article 8.3.3 provides as follows:

> 8.3.3. Any act or failure to act that causes delay in the critical path of the Project Schedule and Contract Time, as the Contract Time may be adjusted by Change Order or Construction Change Directive, shall be allocated to one of three categories of delay for purposes of this Agreement.
>
> i. Delay caused by the intentional breach or gross negligence of the Owner shall be referred to as "compensable delay." The following shall not be

[1] In response to B&B's Interrogatory Number 19, Grundman states that all delays of the project were occasioned by B&B and Maimonides due to continual design changes and mismanagement during the course of the project.

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considered as intentional or grossly negligent breaches or acts; Owner's exercise of its rights to order Changes on accordance with the Contract Documents, regardless of the extent or number of such Changes . . . ; or the Owner's exercise of any of its rights or remedies under the Contract Documents, including insistence upon correction or re-execution of any defective work.

ii. Delay caused by the ordinary negligence of the Owner or any party for whom the Owner is responsible or any delay incurred not as a result of acts or omissions of either party to this Agreement shall be referred to as "no-fault delay." No-fault delays shall include the following: delay in the coordination, design, and completion of Contract Drawings; delay by the Architect in processing of Shop Drawings, samples or submitting in accordance with the Contract Documents; differing Site conditions; suspensions of the Work (for reasons other than the negligent or wrongful acts of the Contractor or those for whom the Contractor is responsible, which shall be considered "Contractor delay"); acts of God; acts of the public enemy, including sabotage; acts of the government (for reasons other than the negligent or wrongful acts of the Contractor or those for whom the Contractor is responsible, which shall be considered "Contractor delay"); restraint by the courts or public authority (for reasons other than the negligent or wrongful acts of the Contractor or those for whom the Contractor is responsible, which shall be considered "Contractor delay"); fires; floods; epidemics; strikes or other labor disputes (unless caused by the acts of the Contractor or any party for whom the Contractor is responsible in which event the strike or labor disruption shall be considered as a "Contractor delay"); freight embargoes; casualties or unusually severe weather.

iii. Delay caused by the failure to prosecute the Work in a reasonably diligent manner with an appropriate workforce or in accordance with the Project Schedule, or the negligent or wrongful acts of the Contractor or any party for whom the Contractor si responsible, including all Subcontractors, Sub-subcontractors and vendors engaged by any of them, shall be referred to as "Contractor delay."

Article 8.3.3 further provides that the contractor's remedies for compensable delay or no-fault delay "shall be limited to extension of time and (y) in the case of compensable delay, such other direct (but not consequential) damages incurred as a direct result of the compensable delay; and (z) in the case of no-fault delay, reimbursement of additional general Conditions expenses incurred as a direct result of the no-fault delay . . . ." The article also states that "the Contractor shall be responsible to the Owner for Contractor delays as provided in the Liquidated Damages provisions of the Contract Documents." Grundman contends that Article 8.3.3 provides a roadmap for recovery of the costs it claims resulted from the delay of the project. Grundman also argues that Article 8.3.3 renders the subcontract ambiguous, making summary judgment inappropriate. Alternatively, Grundman contends that if the "no damage for delay" clause relied upon by B&B is enforceable, Grundman's claims fall within one or more of the exceptions to the enforcement of the provision.

It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment (*Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). The burden then shifts to the opposing party, who must proffer evidence in admissible

form establishing that an issue of fact exists warranting a trial (*id.*). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*). B&B's submission satisfies its prima facie burden of establishing that causes of action two through nine of Grundan's complaint, although labeled something else, are in actuality claims for delay that are barred by the "no damage for delay" clause of the subcontract. The burden, therefore, shifts to Grundman to raise a triable issue of fact.

Article 8.3.3 of the prime contract does not raise such a question. Article 5.3.1 of the General Conditions to prime contract, entitled Subcontractual Relations, states, in pertinent part, that "[e]ach subcontract agreement shall preserve and protect the rights of the Owner under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to te Subcontractor, *unless specifically provided otherwise in the subcontract agreement*, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner" [emphasis added]. Thus, while the prime contract affords B&B certain remedies in addition to an extension of time, such as direct damages in the case of a compensable delay by Maimonides and General Conditions expenses in the event of a no-fault delay, the subcontract explicitly limits Grundman's remedy for a delay in the performance of work to a reasonable extension of time. The subcontract, therefore, is clear and unambiguous and must be enforced according to the plain meaning of its terms (*see Omansky v Whitacre*, 55 AD3d 373 [1st Dept 2008]).

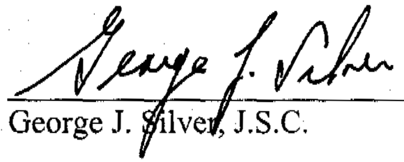
Because Article 8.3 of the General Conditions does not provide Grundman with a basis for recovering delay damages, Grundman bears the heavy burden of establishing that its claims fall within one or more of the exceptions to the enforcement of the "no damages for delay" provision contained in Article 30 of the subcontract (*see Dart Mech. Corp. v City of New York*, 62 Ad3d 664 [1st Dept 2009]). A clause which exculpates a contractee from liability to a contractor for damages resulting from delays in the performance of the latter's work is valid and enforceable and is not contrary to public policy if the clause and the contract of which it is a part satisfy the requirements for the validity of contracts generally (*Corinno Civetta Constr. Corp. v New York*, 67 NY2d 297, 493 NE2d 925, 502 NYS2d 681 [1986]). However, "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) 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" (*id.*). With respect to the first exception, Grundman has failed to present any evidence that the conduct alleged was the result of B&B's gross negligence or willful misconduct (*Commercial Elec. Constrs., Inc. v Pavarini Constr. Co.*, 50 AD3d 316 [1st Dept 2008]). Grundman's claim that the delay was the result of uncontemplated acts of mismanagement by B&B in the performance of its contractual duties as construction manager is unpersuasive. Article 30 of the subcontract specifically addresses delays in Grundman's work caused by B&B and expressly bars Grundman from recovering damages resulting from such delays. Since the alleged acts of mismanagement by B&B fall precisely within the contemplation of the exculpatory clause, they were, by definition, contemplated (*LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d 485 [1st Dept 2012]). While the length of delay is relevant on the issue of whether an exception to the general rule enforcing the "no damage for delay" clause applies, the 21 months Grundman alleges it was delayed does not transform the delay specifically contemplated by the parties in the subcontract into something uncontemplated (*id.*). To avoid the risk of the exculpatory clause and recover on the ground of abandonment, Grundman must establish that B&B was responsible for delays which are so unreasonable that they connote a relinquishment of the contract by B&B with the intention of never resuming it (*Corinno*, 67 NY2d at 312-313). It can not be said on the facts herein that the alleged delay by B&B was so unreasonable, particularly in light of Articles 23 and 32 of the subcontract, so as to constitute an intentional abandonment of the subcontract (*Commercial Elec. Constrs., Inc.*, 50 AD3d at 318). Moreover, that B&B did not intend to abandon the project is evidenced

by the fact that it hired another subcontractor, Matrix Mechanical, to complete the HVAC work that Grundman contracted to perform after Grundman's subcontract was terminated. Nor can it be said that the delay complained of was a result of a breach of a fundamental contractual obligation by B&B. At best, the conculsory assertions by Grundman's president that B&B failed to properly carry out it duties as construction manager amount to no more than inept administration by B&B and, as such, fall squarely within the subcontract's exculpatory clause (*S.N. Tannor, Inc. v A.F.C. Enters.*, 276 AD2d 363 [1st Dept 2000]).

Based upon the foregoing, it is hereby

ORDERED is order that defendants' motion is granted to the extent that causes of action two though nine of plaintiff's complaint are dismissed; and it is further

ORDERED that defendants' are to serve a copy of this order, with notice of entry, upon all parties within twenty days of entry.



George J. Silver, J.S.C.

Dated: 3\4\13
New York County

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