SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

SCHIAVONE CONSTRUCTION CO.

-v-

THE CITY OF NEW YORK

INDEX NO. 601632/00

MOTION DATE _____

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is by the defendant to dismiss the Complaint is GRANTED per the attached Decision and Order.

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

Dated: October 31, 2013

MELVIN L. SCHWEITZER J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

SCHIAVONE CONSTRUCTION CO.,	
Plaintiff,	Index No. 601632/00
-against-	DECISION AND ORDER
THE CITY OF NEW YORK (Reconstruction of 4th Avenue Bridge over L.I.R.R. & N.Y.C.T.A. B.M.T. Line,	Motion Seq. No. 001
Defendant.	

MELVIN L. SCHWEITZER, J.:

This action arises out of the contract for the Reconstruction of the 4th Avenue Bridge over the Long Island Railroad and New York City Transit Authority BMT Subway Line, Contract No. HBK-534, between Schiavone Construction Co. (Schiavone) and The City of New York (the City). This case involves causes of action for the remaining contract balance in the amount of $458,821.67 and delay damages in the amount of $3,621,815.40. Defendant brings a motion to dismiss pursuant to CPLR § 3211 (a) (1) and (a) (7).

Background

For purposes of this motion, the facts are as alleged in the Complaint. On or about November 10, 1994, the City, through its Department of Transportation (DOT), awarded Schiavone a general construction contract (the Contract) in the sum of $8,423,487.75 for the construction and improvement of the 4th Avenue Bridge over the Long Island Railroad and New York City Transit Authority BMT Lines located in Brooklyn (the Project).

As part of the Contract, the City published certain plans, specifications, drawings, addenda, and data (the Contract Documents) setting forth the work to be performed and the labor

and materials to be provided at the Project. The plaintiff relied upon the correctness of the Contract Documents.

The Contract commenced on January 13, 1995 and the work was to be completed in 820 consecutive calendar days with a scheduled completion date of April 11, 1997.

During the course of the performance of the Contract, the City directed Schiavone to perform certain additional and extra work not required of it under the terms of the Contract. Prior to the commencement of this action, the parties agreed to the value of the allowance items and the additional and extra work performed by Schiavone at the direction of the City and to the value of certain credits due to the City and the Contract amount was adjusted accordingly. The approved additional and extra work and credits agreed upon by the parties is in the amount of $1,819,207.65.

By reason of the performance of the work required pursuant to the terms of the Contract and of the additional and extra work and the final quantities, the value of which was agreed to by the parties, there became due and owing from the City to Schiavone, the sum of $9,370,139.24 (the Adjusted Contract Amount). Of the Adjusted Contract Amount due from the City to Schiavone, the City has paid Schiavone the sum of $8,911,317.57. There is a contract balance of $458,821.67, plus the release of bonds submitted by Schiavone in lieu of retainage, due from the City to Schiavone, no part of which has been paid or released, although duly demanded.

During the course of performance of the work, Schiavone discovered that the Contract Documents published by the City, and upon which Schiavone relied in submitting its bid and performing the work, were not properly prepared or reviewed and contained numerous errors and omissions requiring issuance of numerous Stop Work Orders, material changes in the scope of the work and the means and methods of performing the work and testing the material. Change

orders, to remedy the defective and incomplete nature of the Contract Documents, to provide corrective measures with respect to unforeseen subsurface conditions, to redesign the Project, and to mandate new testing requirements, materially changed the scope of the Contract and the means and methods of performing the work and testing the material and forced critical Contract work into restricted periods. Moreover, the Change Orders were not timely issued, approved or funded. The City further neglected and otherwise failed to properly supervise and administer the Contract.

All of the above (the alleged Acts and Omissions) allegedly caused the Contract work required to be performed by Schiavone to be materially and unreasonably delayed and disrupted and prevented performance of the work in the manner in which Schiavone and the Contract reasonably anticipated the work could and would be performed. The Acts and Omissions allegedly caused Schiavone to perform a substantial amount of work not contemplated under the Contract and of a nature and magnitude which evidences a cardinal change in the Contract and Project.

The delays, interferences, and disruptions to the performance of the Contract work, as a result of the Acts and Omissions, were not contemplated by the parties or by the Contract when it was executed, and/or were allegedly caused by the City's bad faith, willful, malicious, recklessly indifferent or grossly negligent conduct, and/or were so unreasonable that they constitute an intentional abandonment and/or a misrepresentation of the work required to be performed under the Contract and for the Project, as bid, and/or resulted from the City's breach of a fundamental obligation not found in the Agreement, and/or all of those things.

Schiavone alleges that, by reason of the above, the City materially breached the Contract and is indebted to Schiavone for damages in the amount of $3,621,815.40, no part of which has been paid although duly demanded.

Discussion

For the purposes of a CPLR 3211 (a) (7) motion to dismiss, the pleading is afforded a liberal construction. The court must accept all allegations set forth in the Complaint as true, with all reasonable inferences drawn in favor of the plaintiff. *See Skillgames, LLC v Brody,* 1 AD3d 247, 250 (1st Dept 2003); *see also Stichting Pensioenfonds ABP v Credit Suisse Group AG,* No. 653665/2011 (Sup Ct, NY Co, Nov 30, 2012). The court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *See e.g. Guggenheimer v Ginzburg,* 43 N.Y.2d 268, 275 (Ct App 1977). If "from the [pleading's] four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law," a motion to dismiss will fail. *Ackerman v 305 East 40th Owners Corp.,* 189 AD2d 665, 666 (1st Dept 1993).

For the purposes of a CPLR 3211 (a) (1) motion to dismiss, the evidence must be unambiguous, authentic, and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively

establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

1. Final Payment

The City's motion to dismiss is based entirely upon the City's contention that Schiavone's complaint must be dismissed because Schiavone waived its claims by failing to reserve its claims prior to "final payment" pursuant to Article 42 of the Contract, which provides,

> The Contractor must submit a final verified statement of any and all alleged claims against the City, in any way connected with or arising out of this contract...setting forth with respect to each such claim the total amount thereof, the various items of labor and materials included therein, and the alleged value of each such item; and if the alleged claim be one for delay, the alleged cause of each such delay, the period or periods of time, giving the dates, when the Contractor claims the performance of the work, or a particular part thereof, was delayed, and an itemized statement and breakdown of the amount claimed for each such delay...The Contractor is warned that unless such claims are completely set forth as herein required, the Contractor upon acceptance of the final payment, pursuant to Article 44 hereof, will have waived any such claims.

According to the language above, there is no claim waiver under Article 42 until such time as the contractor actually receives final payment. In order to prevail on its CPLR 3211 (a) (1) motion, the defendant must conclusively establish with utterly irrefutable qualifying "documentary evidence" that final payment was, in fact, issued.

The City argues that Schiavone waived the claims set forth in this action by failing to submit a verified statement of claims pursuant to Article 42 of the Contract. Article 42 provides that, in order to preserve its claims for potential litigation, the Contractor (Schiavone) must, upon acceptance of its final payment, submit a verified statement to the City setting forth any and all

claims, and for claims of delay, must include an itemized statement and breakdown of the amount claimed for each period of delay.

It is undisputed that in order for the alleged waiver contemplated by Article 42 to apply, the City must pay and Schiavone must accept final payment for its work under the Contract. As discussed in Schiavone's opposition papers and not disputed by the City, the contemplated claims waiver is not triggered unless final payment has occurred.

In order for the City to prevail on its CPLR 3211 (a) (1) motion, the City must "conclusively establish," as a matter of law, through qualifying "documentary evidence" that Schiavone actually received "final payment." *See Goshen v Mutual Life Ins Co of NY,* 98 NY2d 314, 326 (2002); *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner,* 96 NY2d 300, 303 (2001); *Leon v Martinez,* 84 NY2d 83, 88 (1994).

According to Schiavone, the City argued in its initial moving papers that it issued "final payment" to Schiavone, in the amount of $27,233.55, in March 2007 (the 2007 Final Payment). Yet despite the City's sworn admission in its moving papers that Schiavone was still owed contract funds as late as March 2007, Schiavone argues, the City now inexplicably contends that the "real" "final payment" was made six years earlier in March 2001 in the amount of $371,172.68 (the 2001 Final Payment).

In other words, Schiavone urges, the City asks this court to simply disregard its previous arguments and sworn testimony and to now rely upon wholly contradictory arguments and sworn testimony as a basis to dismiss Schiavone's Complaint. The City's new argument, Schiavone contends, adds additional Affidavits and Affirmations in an attempt to explain why the 2001 Final Payment was the "real" "final payment," despite the conspicuous absence of any explanation whatsoever as to why the three Affidavits, an Affirmation and twenty-three exhibits

previously submitted with the City's initial moving papers (stating that the 2007 Final Payment was the "final payment") were in error.

Nowhere in its original moving papers, affidavits, or exhibits, however, did the City indicate that final payment was issued to Schiavone in 2007, as Schiavone contends. In its original moving papers and other documents, the City repeatedly asserts that final payment was made and thereafter accepted on March 20, 2001. The confusion as to the "final payment," it seems, arises from an electronic transfer, the release of the $27,233.55 withholding, that was made on March 13, 2007, six years following the "final payment" that was made in 2001. According to the City, on March 13, 2001, Schiavone executed a notification to receive final payment which stated: "Receipt of a copy of the final voucher on the above contract is hereby acknowledged." Two days later, on March 15, 2001, final payment in the amount of $371,272.68 was issued to Schiavone by Check # AD 00151581815. A copy of the cancelled check for final payment shows that it was deposited by Schiavone on March 20, 2001.

In its briefs, affidavits, and exhibits, the City repeatedly attempts to clarify that all of the payments that occurred subsequent to the March 2001 final payment were not actually payments but releases of security withholdings, with final payment having already been made many years earlier in 2001. The money subsequently released to Schiavone, including the May 11, 2001 release of retainage held in bonds in the amount of $352,991.93, the February 1, 2007 release of remaining retainage in the amount of $84,268.13, and the March 13, 2007 audit release of $27,233.55 in prior withholdings, is irrelevant for the purposes of Article 42 analysis because these releases were not the final payment. By definition, retainage is money that is owed by a contracting party, but retained *until the final payment on a construction project is delivered.* The

final amount of retainage would not have been released unless the final payment had already been made, since such retainage is held as a guarantee until final payment occurs.

Schiavone's attempts to characterize these releases as inconsistencies and proof that final payment was never issued to Schiavone are misleading. The only relevant inquiry is whether Schiavone received final payment, as defined by the Contract, which it did on March 20, 2001. According to the submissions received by the court, the 2007 release of retainage was not the final payment, nor was it ever touted as such in any of the City's documents.

2. Verified Notice of Claim

However, it is irrelevant whether the 2001 payment or 2007 payment constitutes the "final payment" because Schiavone, even at the present date, has failed to point to a document that complies with the notice provisions of Article 42, in particular by providing an itemization and monetary breakdown of its alleged delay damages.

On or about October 16, 1998, Schiavone filed a Verified Notice of Claim and Certified Bill of Particulars to its Substantial/Final Time Extension Request with both the DOT and the New York City Comptroller's Office. Schiavone first states that these two documents fully satisfy the requirements of Article 42. Yet Schiavone later admits that such documents do not provide an itemization of its alleged delay damages but rather provide a total cost claim. Such total cost measure of damages is expressly prohibited by Article 42, which requires that damages be itemized and broken down by individual delay periods.

Indeed, Schiavone does not dispute that the Verified Notice of Claim and the Request for Substantial/Final Time Extension with Bill of Particulars do not satisfy the requirements of Article 42 but rather attempts to argue that it should be excused from compliance by asserting that it would be "impossible" to itemize its damages. In its brief Schiavone states: "Due to the

complexity of the Project and the interaction and cumulative impact of the delays and impacts encountered, … the quantum of Schiavone's damages was impossible to isolate on a single delay-causation to single delay-damage basis. Therefore, the Bill of Particulars attached to Schiavone's Notice of Claim quantified its damages on the Project the only way Schiavone could possibly do so, to wit, on a total cost basis."

According to Schiavone, the NYC Comptroller (the City) conducted an analysis of Schiavone's Verified Bill of Particulars and determined that the information provided by Schiavone was wholly adequate for claims purposes (the "Comptroller's Report"). In the Comptroller's report, the City stated (among other things) that the claim items were adequately defined and the claim items alleged in the Bill of Particulars have not been waived in previous time extension requests.

Article 42 of the Contract, which requires that damages be itemized and broken down by individual delay periods, sets forth the means agreed upon by the parties for the assessment of damages resulting from delays arising under the Contract.

The City correctly points out that Contract provisions limiting the method by which damages can be calculated are considered enforceable by the courts. *See M. Viaggio & Sons, Inc. v The City of New York*, 114 A.D.2d 939 (2d Dept 1985) ("It has long been recognized that parties to a contract may agree among themselves as to the damages which would be suffered upon a breach of contract. Such a stipulation will normally be enforced provided that it is not unconscionable nor contrary to public policy.") Furthermore, such provisions provide public entities "with timely notice of deviations from budgeted expenditures or of any supposed malfeasance, and allow them to take early steps to avoid extra or unnecessary expense, make any necessary adjustments, mitigate damages and avoid the waste of public funds. Such provisions

are important both to the public fisc and to the integrity of the bidding process." *See A.H.A. Gen. Constr., Inc. v New York City Hous. Auth.*, 92 NY2d 20, 33-34 (1998).

Recently, this court in *Schiavone Construction Co. v The City of New York*, Index No. 105519/2002, *6-*8 (Sup. Ct. N.Y. Co., January 5, 2012) held that Schiavone could not use the total cost method to calculate its damages and was limited to the terms of the Contract, which required itemization of damages. Relying on *Clark-Fitzpatrick*, the court stated,

> As was the case in *Clark-Fitzpatrick*, Schiavone has entered into an agreement whose express terms were reduced to writing. Although the Contract does not explicitly prohibit the use [of] a total cost method of calculation, it does demand that any claims for delay must be submitted in an itemized format. An itemized claim meeting the requirements of Schiavone's Contract would be inherently inconsistent with a claim for damages that has been calculated on a total cost basis. This is so, because if Schiavone must provide an itemized breakdown of any damages that it is to recover, it would only be able to recover for exact expenses that it can directly attribute to specific delays caused by the City.

By allowing Schiavone to use the total cost method of calculation, the court continued,

> The plaintiff would recoup its entire outlay regardless of whether it can demonstrate that a particular expenditure was caused by the City's delay. In order to protect itself from the potentially onerous results of having plaintiff calculate its damages on a total cost basis, the City placed a clause in the Contract requiring that all delay damages be broken down and itemized.

Schiavone Construction Co. v The City of New York, Index No. 105519/2002 at *6-*8. *See also Clark-Fitzpatrick, Inc. v Long Is. R.R.*, 70 NY2d 381, 389 (1987).

Furthermore, in *Grace Industries v New York City Dept of Transp.*, Index No. 604011/99 (Sup. Ct. N.Y. Co., July 22, 2004), *affd* 22 AD3d 262 (1st Dept 2005), the court in reviewing whether plaintiff complied with the identical provision at issue here, observed:

> This verified bill of particulars does not comply with Article 42 in several important respects. This action seeks to recover damages for three delays – the delay in the initial notice to proceed, the delay in the property acquisition of the Melrose Avenue bridge site, and the winter weather shutdown. The bill of

> particulars does not distinguish between the various delays, but rather, lumps all the delays into the Melrose bridge portion of the project, and lumps all the damages into a total cost claim related only to the work on the Melrose Avenue bridge. Article 42 requires that each delay should have been separately stated, giving the specific dates that work was unable to proceed, and including an itemized breakdown of the amount claimed for each specific delay. No attempt was made to comply with this procedure.

Here, as in the above cases, the relationship between Schiavone and the City is defined by a written agreement containing language that sets forth the criteria for bringing claims for delay damages arising from the Contract. Article 42 articulates specific procedures for preserving and documenting claims for delay damages. Allowing Schiavone now to avoid compliance with Article 42 would permit Schiavone to improperly rewrite the clear and unambiguous terms of the Contract to avoid a bargained-for requirement.

In other words, simply because Schiavone has articulated a facially plausible statement as to why it did not comply with the terms of the contract does not mean that the contract can be unilaterally rewritten by that party and that the court will enforce it as so rewritten. If the situation were as Schiavone alleges, and it was impossible for it to itemize the damages in compliance with Article 42, then it was incumbent on Schiavone to negotiate a formal waiver of Article 42 executed by the City containing such provisions as the City thought appropriate to protect its interests. Parties who attempt to excuse themselves from the terms of their contract after they have already failed to comply with its terms will not find a remedy in the court.

As a final point, the court finds that the Comptroller's Report which Schiavone says is proof that it complied with Article 42, or that the City some how waived compliance with Article 42 is not helpful to Schiavone. The Comptroller's Report has no bearing on this motion. The Request for Substantial/Final Time Extension with Bill of Particulars was plainly submitted for the purposes of obtaining a substantial/final time extension under Article 13. It was,

therefore, evaluated by the Comptroller's Office as part of contract administration for the sole purpose of granting or denying Schiavone's request for a substantial/final time extension. It was not evaluated for compliance with Article 42 for claims purposes. It is also clear from the face of the Comptroller's Report that it was filled out expressly for the purposes of granting a time extension.

Conclusion

Accordingly, it is hereby

ORDERED that The City's motion to dismiss is granted.

Dated: October 31, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER