

J. Petrocelli Contr., Inc. v The Morganti Group, Inc.

2014 NY Slip Op 31024(U)

April 14, 2014

Sup Ct, Suffolk County

Docket Number: 24643-2013

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY



Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 12-12-2013
Motion Submit Date: 12-17-2013
Motion Sequence No.: 001 MG **CASEDISP**

Final
 Non Final

_____ X
J. PETROCELLI CONTRACTING, INC.,

Plaintiff,

- against -

THE MORGANTI GROUP, INC.,
Defendant.

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This action arises out of a Subcontract Agreement (Subcontract) between defendant The Morganti Group, Inc. (Morganti), as construction manager, and plaintiff J. Petrocelli Contracting Inc. (Petrocelli) as contractor in connection with a municipal construction project (the Project) at the Kings County Criminal Court owned by the City of New York (City). Petrocelli seeks to recover against Morganti for alleged delay damages. Morganti now moves, pursuant to CPLR 3211(a)(1), (7) an (10), to dismiss the complaint in its entirety.

Background

On April 18, 2008, the City, through its Department of Design and Construction (DDC), entered into a contract with Morganti for construction management and other related services for the Project. Morganti entered into the Subcontract dated August 6, 2009, with Petrocelli for certain construction work at the Project for a price of \$13,186,000.00. Paragraph 6(a) of the Subcontract provides:

Subcontractor will proceed with the work in a prompt and diligent manner, in accordance with Construction Manager's schedule as reasonably amended from time to time. TIME IS OF THE ESSENCE. Subcontractor shall be entitled to additional compensation for compliance with schedule amendments only to the extent, if any, that the contract documents entitle Construction Manager to reimbursement. ***Construction Manager shall not be liable to Subcontractor for any damages resulting from delays caused by any entity.*** Subcontractor expressly agrees that apart from recovery from said entity, Subcontractor's exclusive remedy for delay shall be an extension of the time for performance of the Subcontractor's work.

(Emphasis added).

Petrocelli commenced the instant action on September 12, 2013. The Verified Complaint alleges, among other things, that Petrocelli entered into the Subcontract with Morganti in September 2009; that the Subcontract specified November 15, 2010, as the date the work was to be completed; and that it was understood and agreed by the parties that time was of the essence to complete the Project. Petrocelli further alleges that after work was commenced, substantial delays prevented it from working for extended periods of time and that the delays were not contemplated, foreseen, or the fault of Petrocelli. The Verified Complaint alleges specific delays regarding specific segments

of the Project that allegedly prolonged substantial completion until June 2013. Petrocelli alleges that the delays were caused by Morganti. Petrocelli also alleges, upon information and belief, that after it submitted a Proposed Change Order to Morganti regarding claims for delay, Morganti represented that due consideration and compensation would be provided to Petrocelli resulting from the Project's significant delay. Petrocelli claims that it continued its performance on the Project based upon Morganti's repeated assurances and representations. Upon completion of the Project, Petrocelli submitted a claim for \$4,248,005.14 in damages, which Morganti refused to pay.

The first cause of action alleges that Morganti breached the Subcontract by causing and creating substantial delays thereby failing to adhere to the "time is of the essence" provision in the Subcontract causing damages to Petrocelli in the sum of \$4,248,005.14. The second cause of action is for gross negligence by Morganti based on its allegedly egregious and/or willful conduct in causing and creating delays on the Project in excess of two years, thereby damaging Petrocelli in the sum of \$4,248,005.14. The third cause of action is for promissory estoppel based upon Morganti's alleged assurance to Petrocelli that damages would be assessed at the completion of the Project. Petrocelli claims that it relied on Morganti's promise, continued its work, and sustained delay damages of \$4,248,005.14. The fourth cause of action alleges that Morganti fraudulently induced Petrocelli to complete its work on the Project by repeatedly assuring Petrocelli that damages would be assessed as a result of the delays upon completion of the work, damaging Petrocelli in the sum \$4,248,005.14. The fifth and final cause of action alleges that Morganti breached the implied covenant of good faith and fair dealing by refusing to release damages for delays in the sum of \$4,248,005.15.

In support of its motion pursuant to CPLR 3211(a)(1), (7) and (10), Morganti argues, among

other things, (1) Suffolk County is an improper venue, (2) Petrocelli failed to name a necessary party, i.e. the City of New York, (3) the Subcontract contains a “no delay damages” provision which precludes the relief sought in the first cause of action for breach of contract, and (4) the remaining causes of action are duplicative of the breach of contract claim.

Petrocelli opposes the motion contending, among other things, that (1) the Subcontract does not contain a mandatory forum selection clause requiring this action to be brought only in Supreme Court, New York County, (2) the City of New York is not a necessary party as Petrocelli has not asserted any cause of action against it, (3) the “no delay damages” provision is not applicable because the delays were not contemplated, the delays were so unreasonable that they constitute an abandonment of the contract, and the delays were caused by Morganti’s bad faith and/or grossly negligent conduct. Finally, Petrocelli argues that the causes of action for gross negligence, promissory estoppel, fraudulent inducement, and breach of the implied covenant of good faith and fair dealing are not duplicative of the breach of contract claim.

Discussion

Morganti’s contention that this action should be dismissed because the Subcontract purportedly requires that any litigation arising from or under the subcontract be commenced in Supreme Court, New York County, is without merit. First, pursuant to paragraph 29 of the Subcontract, the parties merely consented to jurisdiction of the Supreme Court, New York County. The plain language of that paragraph demonstrates that it is not a mandatory forum selection clause. In any event, improper venue is not a jurisdictional defect requiring dismissal of the action (*Lowenbraun v McKeon*, 98 AD3d 655, 656 [2d Dept 2012]). Even if paragraph 29 of the Subcontract could be read as mandating commencement of any litigation arising from or under the

Subcontract in Supreme Court, New York County, the action was commenced in the proper court (Supreme Court) and, thus, not in an incorrect forum, but only in an improper county (*Id.*).

Morganti's contention that the complaint should be dismissed pursuant to CPLR 3211(a)(10) because Petrocelli failed to name the City of New York as a defendant is without merit. CPLR 1001 provides:

(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

"Necessary parties are persons 'who might be inequitably affected by a judgment in the action' and must be made plaintiffs or defendants" (*Censi v Cove Landings, Inc.*, 65 AD3d 1066, 1067 [2d Dept 2009]; *see, e.g. Martin v Ronan*, 47 NY2d 486 [1979][civil service employees whose employment status would be adversely affected by successful challenge to validity of policy or examination pursuant to which they appointed]; *Dudley v Kerwick*, 52 NY2d 542 [1981][in proceeding by landowners challenging property tax exemption granted by town assessor, exempt landowners were necessary parties]; *Jim Ludtka Sporting Goods, Inc. v City of Buffalo School Dist.*, 48 AD3d 1103 [4th Dept 2008][successful bidder a necessary party to unsuccessful bidder's challenge to bidding determination that could result in nullification of successful bidder's contract]; *Spence v Cahill*, 300 AD2d 992 [4th Dept 2002][landowners within well spacing unit necessary parties to proceeding challenging determination because successful challenge will adversely affect landowners' royalties]; *Romeo v New York State Dept. of Educ.*, 41 AD3d 1102 [3d Dept 2007][school district necessary party to proceeding to annul determination of Commissioner of

Education denying enrollment of children in school district]).

Here, Morganti has failed to make any showing that complete relief cannot be accorded between it and Petrocelli without the City of New York (“City”) or that the City might be inequitably affected by a judgment in this action. The fact that interpretation of the Subcontract between Morganti and Petrocelli may require referral to and interpretation of provisions of the contract between Morganti and the City, does not make the City a necessary party to this action.

Morganti’s motion to dismiss the first cause of action for breach of contract pursuant to CPLR 3211(a)(7) is granted. In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7):

The complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (citations omitted). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (citations omitted). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (citations omitted). While factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (citations omitted).

(Symbol Tech., Inc. v. Deloitte & Touche, LLP, 69 AD3d 191, 193-195 [2d 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 City of New York, 67 NY2d 297, 309 [1986]; see Kalisch-Jarcho, Inc. v City of New York, 58 NY2d 377, 385 [1983]; Aurora Contractors, Inc. v West Babylon Public Library, 107 AD3d 922, 923 [2d Dept 2013]; Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos, LLP v Island Props., LLC, 38 AD3d 831, 833 [2d Dept*

2007]). 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) 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” (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d at 309; see *Blue Water Envtl., Inc. v Inc. Vil. of Bayville, N.Y.*, 44 AD3d 807, 809-810 [2d Dept 2007]; *Aurora Contractors, Inc. v West Babylon Public Library*, 107 AD3d at 923; *Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos, LLP v Island Props., LLC*, 38 AD3d at 833). “Plaintiffs seeking to invoke one of the exceptions to the enforceability of a ‘no damages for delay’ clause face a ‘heavy burden’” (*LoDuca Assocs., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d 485 [1st Dept 2012] citing *Dart Mech. Corp. v City of New York*, 68 AD3d 664 [1st Dept 2009]).

Here, Petrocelli alleges in ¶ 40 of the Verified Complaint that “[t]he Project delays were caused among other things by: (a) Morganti’s failure to comply and enforce their own contract bid phasing plan; (b) Morganti’s review or issuance of change orders, constant revision of change orders, and execution of same; (c) Morganti’s failure to make the bid document phasing plan available to Petrocelli which materially affected the date for final completion; (d) differing Site conditions that were not known by Morganti but reasonably ascertainable by Morganti prior to bid requests; (e) numerous changes in the original scope of work provided for and agreed to by the parties as set forth in the bid and contract documents; (f) unanticipated delays by the parties; (g) unreasonable delays caused by the acts or omissions, including Morganti’s abandonment of the Project phasing plan, breaches of fiduciary duties, breaches of the implied covenant of good faith and fair dealing; and (h) Morganti’s breach of contract caused Petrocelli a complete loss of sequencing, continuity, and

anticipated profits.” These alleged causes for the delay, even if true, do not rise to the level of demonstrating bad faith or willful, malicious, or grossly negligent conduct on the part of Morganti. Rather, they show “‘inept administration or poor planning,’ which does not negate application of the ‘no damages for delay’ provisions” (*LoDuca Assocs., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d at 486; *Omni Contr. Co., Inc. v City of New York*, 35 Misc3d 1243[A], 2012 NY Slip Op 51128[U][Sup Ct NY County 2012]).

Nor are there any facts in the Verified Complaint, as supplemented by the affidavit of John Petrocelli, Jr. submitted in opposition to the instant motion, which, if credited, demonstrate that the delays were unanticipated, so unreasonable that they constitute an intentional abandonment of the contract by Morganti, or resulted from Morganti’s breach of a fundamental obligation of the contract. The fact that paragraph 6(a) of the Subcontract provided that, “TIME IS OF THE ESSENCE,” does not mean that delays were unanticipated. In fact, paragraph 6(a) also contains the “no damages for delay,” clause, the very existence of which indicates that delays were contemplated. Because Petrocelli’s allegations regarding the applicability of one or more of the recognized exceptions to the enforcement of the no-damages-for-delay clause are conclusory and consist of bare legal conclusions, its first cause of action for breach of contract is dismissed pursuant to CPLR 3211(a)(7).

For the same reasons, the second cause of action alleging that Morganti was grossly negligent in causing and creating substantial delays is also dismissed. This cause of action is duplicative of the first cause of action in that it simply reiterates the allegation that Petrocelli can recover delay damages because the delays were allegedly caused by Morganti’s gross negligence which, as stated above, has only been alleged in conclusory fashion. In any event, it is not properly pled here as a separate cause of action and is therefore dismissed.

Contrary to Petrocelli's contention, any and all damages it seeks in the third cause of action for promissory estoppel stem from the rights and obligations created by the Subcontract between the parties. Where, as here, there is a contract between the parties, a claim for promissory estoppel cannot stand (*see Susman v Commerzbank Capital Markets Corp.*, 95 AD3d 589, 590 [1st Dept 2012]; *Grossman v New York Life Ins. Co.*, 90 AD3d 990, 991-992 [2d Dept 2011]). Therefore, the third cause of action is dismissed.

The fourth cause of action for fraud in the inducement is also dismissed. A breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated, and the legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected with and dependent upon the contract (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 [1982]). “[A] misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud” (*Yenrab, Inc. v. 794 Linden Realty, LLC*, 68 AD3d 755, 758 [2d Dept. 2009] quoting *WIT Holding Corp. v. Klein*, 282 AD2d 527, 528 [2d Dept. 2001]). Where a fraud claim is based on an alleged breach of a contractual duties, and the allegations with respect to the purported fraud do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie (*Fromowitz v W. Park Assocs., Inc.*, 106 AD3d 950, 951 [2d Dept 2013]).

Here, Petrocelli argues that its fraud claim is independent of the breach of contract claim because it is based on Morganti's false representations, after it breached the Subcontract, that it would compensate Petrocelli for delay damages in connection with the work Petrocelli performed pursuant to the Subcontract. Even if Morganti made such representations, they are insufficient to

support a claim for fraud in the inducement as they are clearly not collateral to the contract and, at most, induced Petrocelli to continue performing its obligations under the Subcontract (*see East2West Constr. Co., LLC v First Republic Corp. of America*, — AD3d —, 2014 NY Slip Op 1098217 [4th Dept 2014][allegations that defendant induced plaintiff to enter into contract modification that defendant did not intend to honor failed to state fraud cause of action]).

Finally, the fifth cause of action for breach of the implied covenant of good faith and fair dealing is also dismissed. “A cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is ‘intrinsically tied to the damages allegedly resulting from a breach of contract’” (*Deer Park Enters., LLC v AIL Systems, Inc.*, 57 AD3d 711, 712 [2d Dept 2008] quoting *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]). Here, a review of the fifth cause of action leads to the inescapable conclusion that the alleged breach of the covenant of good faith and fair dealing is intrinsically tied to the damages allegedly resulting from the alleged breach of the Subcontract as the amount of damages allegedly sustained is exactly the same, i.e. \$4,248,005.14. Thus, it is clearly duplicative and, therefore, is dismissed. Accordingly, it is

ORDERED that the defendant’s motion (Mot. Seq. 001) pursuant to CPLR 3211 to dismiss the Verified Complaint is granted.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: April 4, 2014
Riverhead, New York



EMILY PINES
J. S. C.