

**N.J.D. Wiring & El., Inc. v M.A. Angeliades, Inc.**

2014 NY Slip Op 32352(U)

September 2, 2014

Supreme Court, New York County

Docket Number: 652590/12

Judge: Saliann Scarpulla

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 39**

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N.J.D. WIRING & ELECTRIC, INC.,

Plaintiff,

- against -

**DECISION AND ORDER**  
Index No. 652590/12  
Motion Seq. No. 001

M.A. ANGELIADES, INC. and FEDERAL  
INSURANCE COMPANY,

Defendants.

-----X  
**HON. SALIANN SCARPULLA, J.:**

Plaintiff N.J.D. Wiring & Electric, Inc. (“NJD”) asserts claims for breach of contract, unjust enrichment and breach of a bond/violation of New York State Finance Law § 137. Defendants M.A. Angeliades, Inc. (“MAA”) and Federal Insurance Company (“Federal”), MAA’s surety company, now move pursuant to CPLR 3211 to dismiss the complaint in its entirety.

**Background**

Sometime in or before January 2007, MAA entered into an agreement (the “Prime Contract”) with the New York School Construction Authority (“SCA”) to perform general construction work on a project known as PS/IS 366 Hebrew Academy in Brooklyn, New York (the “Project”).

Thereafter, on January 12, 2007, NJD and MAA entered into a subcontract to perform electrical work at the Project for the base price of \$3,380,000 (the “Subcontract”). Pursuant to the Subcontract, NJD was to commence work on or about January 2007 and finish within twenty-four months. The Subcontract expressly incorporates the Prime Contract and contains the following pertinent provisions:

## ARTICLE 5 PROGRESS SCHEDULE

The General Contractor has prepared and furnished a progress schedule to the Owner. The General Contractor at all times reserves the right to reasonably alter and modify such progress schedule in pursuance of its duties of determining and coordinating the progress of the Work. **Except as otherwise provided, the Subcontractor expressly acknowledges that the Owner and/or the General Contractor shall not be liable for damages of any kind to the Subcontractor resulting from any modification or change in the said progress schedule or modifications or changes in the sequence or quantity of the Work hereunder.** In the event the Work of the Subcontractor is delayed without its fault and for causes beyond its control, the Subcontractor agrees that it will, within seventy two (72) hours of the occurrence or discovery of the delay, notify the General Contractor in writing, transmitted via United States Mail, Certified, of the nature and cause of such delay. Should the Subcontractor experience a delay, for any reason, and thereafter fail to provide the notification as set forth above, the General Contractor may consider such failure to provide notice as above, a waiver. (emphasis added.)

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## ARTICLE 14 EXTRA WORK

[...] The Subcontractor shall not be entitled to receive any extra compensation for modifications or changes of any kind whatsoever, regardless of whether the same were ordered by the Owner or any of its representatives, unless said order is given IN WRITING and IS SIGNED BY AN OFFICER or Project Manager of the General Contractor, and the Subcontractor specifically agrees that it will make no claim that it was authorized to do any extra work or make any modification to the work by the General Contractor or any representative at the site or elsewhere and if such Work was so ordered and the Subcontractor has performed the same but has received no written order therefore as herein provided, the Subcontractor shall and hereby does waive any claim for extra compensation therefore regardless of any subsequent written or verbal protests or claims by the Subcontractor, except as provided under the Principal Contract or if the General Contractor receives payment for same from Owner.

Moreover, Exhibit A to the Subcontract provides as relevant in paragraph C, entitled Time of Performance, that

[t]he Subcontractor understands that work of this trade will not be continuous and that he may be required to work out of sequence and/or leave a portion of work out due to coordination, at the direction of the General Contractor. There shall be no charges for “comeback” time/work or out-of-sequence work. Multiple shift and/or weekend work will be required in order to execute the work in a timely fashion.

Finally, the Prime Contract provides in Section 8.02, entitled Claims for Delay, that

**[t]he Contractor agrees to make no claim for increased costs, charges, expenses or damages for delay in the performance of this Contract, or for any delays or hindrances from any cause whatsoever, and agrees that any such claims shall be fully compensated for by an extension in the time for Substantial and/or Final Completion of Work. (emphasis added.)**

Ex. 6, Aff. in Support of Ramdeo Arjune.

As alleged in the complaint, NJD was prevented by no fault of its own from starting its work on the Project until August 2008, eleven months after the expected start date. The Project delays resulted from “piles being driven deeper in order to meet the resistance levels indicated in the Project’s design, inefficiencies due to acceleration of the Project, and steel revisions which occurred after MAA submitted a recovery schedule to SCA.” Ex. C, Karageorgiou Aff.

NJD alleges that pursuant to the Subcontract, it was entitled to receive an extension in its completion time following delays in the Project. However, despite NJD’s numerous requests for an extension, MAA required it to complete the Project within thirteen months. NJD alleges that the additional work, labor, services and materials that it furnished necessitated by its expedited completion of the Project resulted in additional costs for labor wages, overtime and site supervision, extended general conditions and additional overhead. NJD alleges that the foregoing additional expenses totaled \$1,984,039.75, for which MAA has not been compensated.

NJD further alleges that Federal, as surety, and MAA, as principal, executed and delivered a payment bond in connection with the Project, guaranteeing prompt payment of all monies due to all persons supplying MAA with labor and materials used in the Project (the “Bond”). On or about January 15, 2010, NJD notified Federal of its claim under the Bond. NJD alleges that MAA’s failure to compensate it for its acceleration costs constitutes a breach of the Bond.

Moreover, plaintiff alleges that in about April, 2008, MAA submitted a change order to the SCA for its own acceleration costs incurred as a result of the Project delays, for which MAA was compensated.<sup>1</sup> Karageorgiou Aff., ¶ 10, Ex. C. Then in about December, 2009, in an effort to recover its acceleration costs, NJD submitted a Request for Equitable Adjustment (“REA”) to MAA seeking payment in the sum of \$1,984,039.75. Karageorgiou Aff., ¶ 17, Ex. E. By letter dated February 6, 2012, the SCA rejected NJD’s REA, stating that all costs associated with the acceleration of the Project were already included in change order 00258 (“CO-258”) in the amount of \$48,553.80, executed on June 16, 2011. Karageorgiou Aff., Ex. F. However, NJD contends that CO-258 did not relate to the acceleration costs that NJD identified in the REA. Karageorgiou Aff., ¶ 18.

In its complaint, NJD asserts causes of action for breach of the Subcontract, unjust enrichment, and a claim under the Bond/violation of New York State Finance Law § 137. MAA and Federal now move to dismiss the complaint.

### **Discussion**

In determining whether to grant a motion to dismiss pursuant to CPLR § 3211(a)(7), the court should accept as true the facts alleged in the pleading, accord the drafter the benefit of

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<sup>1</sup> MAA’s change order encompassed damages for delays that occurred on the Project prior to and including July 28, 2008, in the amount of \$900,000. Karageorgiou Aff., Ex. C.

every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dep't 2002).

MAA and Federal argue that NJD's claims are precluded by the language of the "no-damage-for-delay" clauses contained in Article 5 of the Subcontract and in Section 8.02 of the Prime Contract. It is well settled that no-damage-for-delay clauses are generally enforceable in New York. *See Premier-New York, Inc. v. Travelers Property Cas. Co.*, 20 Misc.3d 1115A, 867 N.Y.S.2d 20 (Supr. Ct., N.Y. Co. 2008); *see also Corinno Civetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297, 309 (1986). However, such a clause may be disregarded under certain recognized exceptions, including for delays that are "uncontemplated" by the parties at the time they enter into their agreement or which are "so unreasonable that they constitute an intentional abandonment of the contract by the contractee." *See id.* at 309-10. As such, exculpatory clauses generally only apply to "those delays which are reasonably foreseeable, arise from the contractor's work during performance, or which are mentioned in the contract." *Id.* at 310. Parties "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 Const. Management Corp.*, 91 A.D.3d 485 (1st Dep't 2012).

NJD argues that whether or not the parties actually contemplated the delay – it contends that they did not – is an issue of fact which cannot be determined on a pre-answer motion to dismiss. Moreover, NJD argues the fact that MAA sought and received compensation from SCA for unforeseen delays shows that a triable issue of fact exists as to whether the delay was so unreasonable as to be considered beyond the parties' contemplation. *See Bovis Lend Lease LMB Inc. v. GCT Venture, Inc.*, 6 A.D.3d 228, 229 (1st Dep't 2004) (affirming denial of summary

judgment where a two and a half year delay was so unreasonable as to present an issue of fact regarding whether the delay was contemplated by the parties).

MAA argues that the delays were a result of “poor planning” and were therefore foreseeable and within contemplation of the parties at the time they entered into the contract. *LoDuca*, 91 A.D.3d at 486 (finding that if, by reason of information it had prior to the contract, a defendant knew or should have known of alleged defects resulting in a delay in construction, such facts constitute merely “inept administration or poor planning” and do not negate the exculpatory clause); *Commercial Elec. Contr., Inc. v. Pavarini Constr. Co., Inc.*, 50 A.D.3d 316, 317-18 (1st Dep’t 2008).

I can not determine, at this pre-discovery stage, whether the delay in the Project was reasonable or contemplated, particularly given that MAA allegedly received compensation for its own delay costs but denies plaintiff damages for the same delay. I note that both parties are allegedly bound by the same no-damage-for-delay clause in the Prime Contract. Accordingly, I deny the defendants’ motion to dismiss the first cause of action for breach of contract.

Plaintiff seeks in its second cause of action for unjust enrichment or *quantum meruit*<sup>2</sup> the very same damages it seeks in its breach of contract cause of action. The “existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter.” *Curtis Properties Corp. v. Grelf Companies*, 236 A.D.2d 237, 239 (1st Dep’t 1997) (citing *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987)). Because there is no dispute over the validity or existence of the parties’ contract, plaintiff’s unjust enrichment claim is dismissed.

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<sup>2</sup> Plaintiff alleges in the complaint that “MAA has been unjustly enriched in the amount of \$1,984,039.75,” but explains in its memorandum of law that this cause of action is for quantum meruit.

The third cause of action is asserted against MAA and Federal for failing to promptly pay NJD pursuant to the payment Bond. In light of the issue of fact discussed above, and because the defendants did not specifically address this cause of action in their motion papers or at oral argument, I deny the defendants' motion to dismiss this cause of action.

In accordance with the foregoing, it is hereby

ORDERED that defendants M.A. Angeliades, Inc. and Federal Insurance Company's motion to dismiss is granted only with respect to the second cause of action for unjust enrichment/*quantum meruit*, and is otherwise denied as to the first and third causes of action which are severed and continued; and it is further

ORDERED that the defendants file and serve an answer within 30 days; and it is further

ORDERED that counsel for the parties appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on October 29, 2014 at 2:15 pm.

This constitutes the decision and order of the court.

Dated: New York, New York  
September 8, 2014

ENTER:

  
J.S.C  
**HON. SALIANN SCARPULLA**