Lakhi Gen. Contr., Inc. v New York City School Constr. Auth.
2014 NY Slip Op 32667(U)
September 8, 2014
Supreme Court, Queens County
Docket Number: 702735/2013
Judge: Marguerite A. Grays

Short Form Order

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED
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COUNTY CLERK
QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA PART 4

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LAKHI GENERAL CONTRACTOR, INC.,

Index No: 702735 2013

Plaintiff,

-against-

Motion Date: March 19, 2014

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY.

Motion Cal. No. 82

Defendants.

Mot. Seq. No. 1

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The following papers numbered 1 to 7 read on this motion by defendant New York City School Construction Authority (SCA) dismissing the complaint on the grounds of documentary evidence and failure to state a cause of action, pursuant to CPLR 3211(a)(1) and (7).

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-3
Opposing Affidavits-Affirmation-Exhibits	4-7
Memorandum of Law	
Memorandum of Law	
Reply Memorandum of Law	

Upon the foregoing papers the motion is determined as follows:

Background

On June 16, 2011, plaintiff Lakhi General Contractor Inc. (Lakhi) submitted a bid in the sum of $2,149,000.00 to furnish all work, labor and services for the exterior masonry replacement at PS 127, located at 7805 7th Avenue, Brooklyn, New York. On August 12, 2011, the SCA awarded the bid to Lakhi, and plaintiff thereafter commenced work on the project as directed by the SCA.

The notice to bid strongly urged all prospective bidders to attend a pre-bid meeting on June 9, 2011. Lakhi does not allege that it attended the pre-bid meeting or otherwise inspected the site prior to submitting its bid. Lakhi also does not allege that it submitted a

written request to the SCA for a clarification of any ambiguity or correction of any inconsistency or error in the contract documents prior to submitting its bid. After it was awarded the contract, Lakhi made several written requests for information regarding the replacement of decorative terra cotta panels, and the replacement of a pre-cast stone band. The SCA in response to these requests stated, in essence, that pursuant to the contract documents Lakhi was required to replace all of the inside decorative terra cotta panels as well as the four outer panels, and to replace the stone band with a terra cotta band.

Lakhi claimed that the replacement of the stone band and the replacement of the 24 terra cotta decorative inlay panels constituted extra work not contemplated by the contract and sent the SCA a written change order request, dated April 3, 2012, in which it sought to be paid $314,435.51 for replacing the existing pre-cast stone band located above the subject building's third floor windows, and $306,133.59 for the replacement of 24 additional decorative terra cotta inlay panels beyond the four panels included in the base contract. Lakhi asserted that said stone band was not shown on the drawings, and that the existing stone band was pre-cast and not terra cotta. It was asserted that the replacement of the subject stone band thus could not have been anticipated as being included in the contract. With respect to the decorative terra cotta inlay panels, it was asserted that the drawings indicated that only 4 out of 28 panels were to be replaced.

The SCA issued a notice of direction dated April 9, 2012, directing Lakhi to provide all equipment, labor and materials to perform "1. replacement of the existing Pre-Cast Stone Band located above the 3rd floor windows" and "2. replacement of 24 additional decorative Terra Cotta Inlay Panels beyond the 4 included in the base contract".

The SCA, in a letter dated August 22, 2012, notified Lakhi's that its request for a change order had been denied. The SCA's Change Order Unit in a memo dated August 17, 2012 determined that the claims for a change order were not valid, based upon a review of the contract documents, and set forth its reasons for denying Lakhi's request for a change order. The SCA stated that note #1 on A001.00 provided that "[o]nly terra cotta to be replaced or repaired are marked (by hatching) in the contract drawings", but the individual Legends for A201.00 and A202.00 "abandon hatching and use shading to represent replacement of lime stone/terra cotta"; that the shading for Key Note 04250-01, which covers the disputed area and calls for the removal of terra cotta does not include a quantity for the work indicated; and that the "KEY NOTE USE GUIDE" states that "if no quantity is indicated, 100% of the area is to be included".

Lakhi complied with the SCA's directive and removed the pre-cast stone band and replaced it with a terra cotta band, and removed and replaced the 24 decorative terra cotta inlay panels.

Lakhi filed a notice of claim dated November 27, 2012, pursuant to Public Authorities Law §1744, and sought estimated payments totaling $804,737.84 for the replacement of the stone band and the 24 decorative terra cotta inlay panels. In a supplemental notice of claim dated February 20, 2013, Lakhi revised the amount it sought for the replacement of the stone band, and set forth its actual damages as $824,699.11.

On May 31, 2013 Lakhi filed a notice of claim seeking $323,323.00 in delay damages caused by the SCA.

Lakhi commenced the within action on July 13, 2013. In its first cause of action for breach of contract, Lakhi asserts that the SCA has failed to compensate it for the extra work it performed, consisting of the removal of the pre-cast stone band and installation of the terra cotta band, and the removal of 24 decorative terra cotta inlay panels and the replacement of said panels. Lakhi alleges that it incurred the sum of $375,954.08 for the removal and replacement of the stone band and the sum of $448,737.84 for the 24 decorative terra cotta inlay panels. In the second cause of action for breach of contract, Lakhi seeks to recover damages of $323,323.00, and alleges that it failed to achieve substantial completion by November 2, 2012 and that substantial completion was delayed by 94 days, due to SCA directives to replace the existing precast stone band with a terra cotta band and to remove and install the 24 decorative terra cotta inlay panels, as well as weather delays. It is alleged that the SCA's directives constituted changes in the scope of work.

The SCA, in its pre-answer motion to dismiss, asserts that Lahki waived its claim for damages for the disputed masonry work because it failed to seek pre-bid clarification of ambiguities in the contract documents, as required by Section 1 of the Information for Bidders. It is therefore asserted that Lakhi is bound by the SCA's interpretation of the contract documents. The SCA further asserts that plaintiff is improperly attempting to modify its bid quote after the fact and in violation of the competitive bidding process; that pursuant to the contract terms, plaintiff was required to employ the more expensive way of completing the work; and that the complaint fails to state claim for delay damages.

Plaintiff, in opposition, asserts the complaint properly alleges valid causes of action for breach of contract, including delay damages. It is asserted that the documentary evidence submitted by the SCA does not conclusively establish a defense as a matter of law. Lakhi asserts that it relied upon the accuracy of the SCA's contract documents, and that as the contract was not ambagious it was not required to seek clarification prior to submitting its bid. Rather, it is asserted that the SCA required it to replace a previously undisclosed pre-cast band above the third floor windows of the subject building and that the SCA also directed it to replace 24 "additional" terra cotta decorative inlay panels beyond the 4 panels designated in the base contract. It is asserted that this constituted extra work and that the

SCA in its notice of direction acknowledged that this was extra work. Lakhi asserts that its bid only included the cost to replace the 4 decorative inlay panels that were shown in the SCA's design drawings, and did not include the cost of the replacement of the 24 additional panels that were not shown in the drawings or bid documents; that the pre-cast stone band was an undisclosed condition and was not included in the bid; and the SCA's notice of direction was the first SCA document to make any reference to the existence of said pre-cast stone band. Lakhi asserts that whether the subject work performed was outside of the scope of the contract is a vigorously disputed issue of fact that cannot be resolved on a CPLR 3211 motion to dismiss.

Lakhi further asserts that its post-bid request for payment for extra work does not violate the competitive bidding laws, and that the SCA's refusal to issue a change order constituted a violation of the duty of good faith and fair dealing; and that the more expensive way of doing the work is not at issue here.

A motion to dismiss a complaint based on documentary evidence pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Harris v Barbera*, 96 AD3d 904, 905 [2d Dept 2012]).

On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer,* 72 AD3d 803 [2d Dept 2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2nd Dept 2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2nd Dept 2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept 1985], *affirmed* 66 NY2d 946 [1985]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims,

of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]; *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 588-589 [2d Dept 2014]).

"When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see, id.*; *accord*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2nd Dept 2006], *quoting Doria v Masucci*, 230 AD2d 764,765 [2d Dept 2006]; *lv. to appeal denied* 89 NY2d 811 [1997]).

The documentary evidence submitted herein establishes that after the subject contract was awarded to Lakhi, plaintiff sent the SCA requests for information with respect to the decorative panels, entitled "extent of work in terra cotta unit" dated December 28, 2011, and February 21, 2012. In each instance Lakhi, sought clarification of the scope of work. The SCA, in its answer dated January 3, 2012, referred Lakhi to the "contract documents and key note 04250-1,remove terra cotta units including flat, bull nose band, decorative and flat panels, flat band below bull nose etc. (for more details refer to contract drwings[sic] for work". The SCA's answer dated February 28, 2012 referred Lahki to defendants prior answer.

Lakhi also sent the SCA a request for information dated January 3, 2012 in which it stated the details in the drawings did not match the field conditions; that "one course of brick has to be replaced in order to install the flashing on top of window terra Cotta band, but in the field there is a small stone/terra cotta band falls in between the window terra Cotta band and the Brick masonry.. It is clearly shown in the drawing that the detail does not call for the replacement of this stone". Lakhi inquired as to whether the flashing should be installed under the brick or stone band. The SCA, in its answer dated January 5, 2012 stated that "Refer to Elevation 1 on Drawing A201 and Image. Both clearly shows the band, window head, band and one brick course of face bricks replacement. It is also label as terra cotta for new work. This elevation is a part of the contract, therefore, all units including one brick course of face bricks should be removed and replaced with new material listed, which is terra cotta and face bricks".

These requests for information make it clear that Lakhi sought clarification of the contract drawings and documents with respect to the stone band and the 24 decorative terra cotta panels after it was awarded the contract. Lakhi's present claim that the contract was not ambiguous in any respect, therefore, is rejected.

The contract documents and drawings submitted herein establish that some ambiguity existed, as the "Terra Cotta Notes" provide that the only terra cotta required to be replaced or repaired are marked by hatching in the contract drawings; that the drawings abandoned the use of hatch marks, and utilized shaded areas for the replacement of "lime stone/terra cotta" and the "key work notes" for "spec 04250" stated "REMOVE TERRA COTTA UNITS INCLUDING FLAT AND BULL NOSE BAND, DECORATIVE AND FLAT PANELS, FLAT BAND BELOW BULL NOSE BAND ETC (AS SHOWN AS IMAGE #1 ON DRAWING A201, IMAGE #1 AND 2 ON DRAWING A202) INCLUDING ANCHORS AND TIES. REMOVE LOOSE AND DETERIORATED MORTAR FROM BACK-UP MASONRY AND COLLAR JOINTS AND FILL TIGHT WITH MORTAR. REMOVE LOOSE BACK-UP MASONRY AND REPLACE WITH NEW BRICK MASONRY. QUANTITY OF BRICK MASONRY SHALL BE USED FROM PROVISION AFTER APPROVAL OF EOR IN WRITING. PROVIDE NEW TERRA COTTA UNITS TO MATCH EXISTING UNITS IN PROFILE, COLOR, TEXTURE, ETC."

The Information for Bidders, made part of the contract documents, provides in pertinent part:

" I. Examination of the Contract Documents and Site:

A. Prospective Bidders shall examine the Contract documents carefully and, before bidding, shall make a written request to the SCA for clarification of any ambiguity, or correction of any inconsistency or error in the documents....

C. At the time of the opening of the bids, each Bidder shall be presumed to have inspected the Site and to be thoroughly familiar with all the Contract Documents. The failure of any Bidder to obtain or to examine all Contract Documents or to request a clarification or correction, shall in no way relieve any Bidder from any obligation in respect to the bid of such Bidder."

Lakhi does not allege that it attended the pre-bid meeting at the site, or otherwise conducted an inspection of the site prior to submitting its bid. Moreover, Lakhi failed to obtain clarification from the SCA about the alleged ambiguity with respect to the 24 terra cotta decorative inlay panels and the installation of the flashing which required the replacement of the stone band with the terra cotta band, prior to submitting its bid. Any ambiguity regarding the number of decorative terra panels and the replacement of the stone band with a terra cotta band in the subject contract must be construed against Lakhi, since Section I of the Information for Bidders required the contractor to discover and to inquire about a claimed ambiguity or error, including any omission from the contract drawings, prior to the submission of a bid (*see L & L Painting Co., Inc. v Contract Dispute Resolution Bd.,*

14 NY3d 827,828 [2010]; *Acme Bldrs. v Facilities Dev. Corp.*, 51 NY2d 833[1980]). *Delidakis Constr. Co., Inc. v City of New York*, 29 AD3d 403, 404 [1st Dept 2006]; *Cipico Constr. Inc. v City of New York,* 279 AD2d 416 [1st Dept 2001]; *Thalle Constr. Co. Inc. v City of New York*, 256 AD2d 157, 158 [1st Dept 1998]; *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514,515 [1st Dept 1995]; *Arnell Constr. Corp. v Bd of Educ.*, 193 AD2d 640, 641 [2d Dept 1993]). Therefore, as plaintiff Lakhi failed to obtain a clarification regarding the replacement of the stone band with a terra cotta band, and the replacement of the 24 terra cotta decorative inlay panels from the SCA prior to submitting its bid, that branch of the SCA's motion which seeks to dismiss the first cause of action for breach of contract, is granted.

Section 8.02 of the General Conditions of the contract provides that: "The Contractor agrees to make no claim for increased costs, charges, expenses or damages for delays in the performance of this Contract, or for 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 the Work. Should the Contractor be or anticipate being delayed or disrupted in performing the Work hereunder for any reason, it shall promptly, and in no event more than two (2) business days after the commencement of any condition which is causing or threatening to cause such delay or disruption, notify the SCA in writing of the effect of such condition, stating why and in what respects the condition is causing or threatening to cause such delay or disruption. Failure strictly to comply with this notice requirement shall be sufficient cause to deny Contractor a change in Schedule and to require it to conform to the Schedule then in effect."

"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) un-contemplated 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 Assoc., 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]). A "no damages for delay" clause applies to delays which are "reasonably foreseeable, arise from the contractor's work itself during performance, or others specifically mentioned in the contract" (*Peckham Road Co. v State of New York*, 32 AD2d 139, 141, 300 NYS2d 174 [3d Dept 1969], *affd* 28 NY2d 734,[1971]; *Blue Water Envtl., Inc. v. Incorporated Vil. of Bayville, N. Y.*, 44 AD3d at 810).

Here, Lakhi alleges in paragraph 25 of the verified complaint that "[a]mong other delays and impacts Lakhi encountered throughout the Project, Lakhi was prevented from achieving substantial completion by November 2, 2012 because: SCA directed changes to the scope of work; SCA's direction to replace the un-contemplated and unknown existing precast stone band with new terra cotta band at the third floor; SCA's direction to remove and install new, additional decorative panels; and weather delays". 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 SCA, and do not negate the application of the "no damages for delay" provisions.

Nor are there any facts in the verified complaint, as supplemented by the affidavit of Lakhi's president Gurcharan Singh, submitted in opposition to the instant motion, which, if credited, demonstrate that the delays were un-contemplated, so unreasonable that they constitute an intentional abandonment of the contract by the SCA', or resulted from the SCA's breach of a fundamental obligation of the contract. Rather, at the most they show "inept administration or poor planning," which does not negate application of the "no damages for delay provisions" (*LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d at 486; *J. Petrocelli Contr., Inc. v The Morganti Group, Inc.*, 2014 NY Slip Op 31024(U), 2014 N.Y. Misc. LEXIS 1850 [Sup. Ct., Suffolk County 2014]; *Omni Contr. Co., Inc. v City of New York*, 35 Misc3d 1243[A], 953 NYS2d 551, 2012 NY Slip Op 51128[U] [Sup Ct NY County 2012]).

Weather delays are foreseeable and thus fall within the "no damages for delay" clause. Mr. Singh asserts in conclusory terms that "from October 2011 to September 2012 there were 63 work days lost due to inclement weather" and that "severe weather conditions of this type are highly unusual and so unforeseeable" without specifying what weather conditions existed over a period of 11 months. In addition, the "no damages for delay" clause indicates that delays were contemplated, and that compensation for delays in achieving substantial completion would be in the form of an extension of the substantial completion date. Contrary to Mr. Singh's assertions, Section 7.01B(3) (f) does not constitute an exemption from the contract's "no damages for delay clause". Rather, said section sets forth the

payment method the SCA may select for approved change orders, and as the SCA denied Lahki's change order request, it may not seek delay damages under the contract for any of the identified "extended general conditions" listed in said section. As Lakhi'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 second cause of action for breach of contract is dismissed pursuant to CPLR 3211(a)(7).

In view of the foregoing, defendant SCA's motion to dismiss the complaint is granted in its entirety.

Dated:

SEP 08 2014

J.S.C.