

**Advanced Automatic Sprinkler Co., Inc. v Seaboard
Surety Co.**

2014 NY Slip Op 33130(U)

December 3, 2014

Sup Ct, New York County

Docket Number: 650321/2011

Judge: Marcy S. Friedman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

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ADVANCED AUTOMATIC SPRINKLER CO., INC.

Plaintiff,

Index No. 650321/2011

- against-

Motion Seq. No. 002

SEABOARD SURETY COMPANY,

DECISION AND ORDER

Defendant.

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MARCY S. FRIEDMAN, J.S.C.:

This action is brought by plaintiff Advanced Automatic Sprinkler Co., Inc. (Advanced), a subcontractor of non-party prime contractor, Dart Mechanical Corporation (Dart), against defendant Seaboard Surety Company (Seaboard), for delay damages of \$642,636, pursuant to a payment bond issued by Seaboard to Dart on June 20, 2001 (Payment Bond). Seaboard moves for partial summary judgment, pursuant to CPLR 3212, dismissing the third cause of action of the amended complaint for recovery of delay damages under the Payment Bond. Plaintiff settled its other claims in this action by stipulation dated December 4, 2013.

Seaboard issued the Payment Bond to secure payment obligations to suppliers of labor and material related to a \$11.644 million contract between Dart and the Department of Sanitation of the City of New York (DSNY), by which Dart agreed to serve as the prime HVAC contractor for the refurbishing of two separate garage buildings at 161 Varick Street in Brooklyn (the Project). Advanced entered a June 13, 2002 subcontract with Dart (the Subcontract [Ganz Aff., Ex. C]) for \$1.225 million to install automatic sprinklers and related fire safety infrastructure in the two

buildings.

In moving for summary judgment, Seaboard contends that its liability under the Payment Bond is co-extensive with that of its principal, prime contractor Dart, and that Dart is not liable for delay damages because it was not the cause of delays at the Project. Seaboard also contends that Advanced failed to comply with notice requirements under the Subcontract, that delay damages are barred by a no-damages-for-delay clause in the Subcontract, and that Advanced's claim is untimely under the Subcontract and Payment Bond.

Article 15 of the Subcontract contains an Exculpatory Clause which bars delay damages claims and imposes a notice requirement. This Article provides in pertinent part:

“15.1 DART shall not be liable to SUBCONTRACTOR for and SUBCONTRACTOR waives any damages or reimbursement of expenses resulting from delays, accelerations, inefficiencies, variations in the scope, schedule or the sequence of WORK and acts, omissions or interferences to the WORK caused by DART, other contractors, OWNER and/or the OWNER'S REPRESENTATIVE, even if the same shall constitute gross negligence, it being understood that SUBCONTRACTOR assumes the risk of such events, whether contemplated or un contemplated.

* * *

15.4 Nevertheless, if SUBCONTRACTOR contends that it has been damage[d] because of any default, breach, interference, act or omission, SUBCONTRACTOR shall make such claim, in writing, to DART within five (5) days after the occurrence of such act or omission to enable DART to adequately evaluate SUBCONTRACTOR'S possible entitlement to an extension of time. If the SUBCONTRACTOR fails to make written notice of claim within the time specified, stating the nature of the claim, the WORK delayed or interfered with and its effect on the WORK to be subsequently performed, together with an itemized breakdown of the alleged damages sustained, such failure shall constitute a waiver of the claim and preclude any right to an extension of time.”

This section does not by its terms apply to delay damages claims. Moreover, there is authority that where a construction contract contains a notice provision similar to that at issue here, but also contains a no-damages-for-delay clause, a request by the contractor for delay damages “seeks

relief wholly outside the scope of the contract[]” and is not governed by the notice provision.

(Huen New York, Inc. v Board of Educ. Clinton Cent. Sch. Dist., 67 AD3d 1337, 1339 [4th Dept 2009], rearg denied, lv denied 70 AD3d 1519 [2010].) Seaboard cites no authority to the contrary. On this record, the court accordingly declines to dismiss the delay damages cause of action based on non-compliance with a contractual notice provision.

The court further holds that Seaboard fails to demonstrate that the cause of action is barred by the statute of limitations. Section 37.1 of the Subcontract provides that any action by the Subcontractor for payment on Dart’s performance bond “shall be commenced within one year after the WORK of the SUBCONTRACTOR has been substantially completed (or if not substantially completed, within one year after the SUBCONTRACTOR last performed WORK at the PROJECT) or within the period of time prescribed by law if such period is shorter.” Section (e) of the Payment Bond provides that Seaboard shall not be “subject to any suit . . . that is instituted . . . later than two years after the complete performance of said Contract and final settlement thereof.”

Advanced argues that this motion cannot be granted on timeliness grounds because of the effect of State Finance Law § 137 (4) (b), which provides, in pertinent part: “[N]o action on a payment bond furnished pursuant to this section shall be commenced after the expiration of one year from the date on which the public improvement has been completed and accepted by the public owner.”

It is undisputed that Seaboard’s Payment Bond was issued for a public improvement project. It is immaterial whether the limitations period contained in the Subcontract, which is measured differently from that in the Payment Bond, has lapsed, because “unless the particular

bond provides a longer Statute of Limitations, the period prescribed in the State Finance Law governs.” (A.C. Legnetto Constr., Inc. v Hartford Fire Ins. Co., 92 NY2d 275, 277 [1998].)

Here, Seaboard fails to present evidence to demonstrate as a matter of law that “the public improvement has been completed and accepted by the public owner.”

The court accordingly turns to Seaboard’s claim that Advanced cannot prevail on the merits as a matter of law. Seaboard argues that its liability is co-extensive with that of the prime contractor, Dart, and that because Dart did not cause the complained-of delays, it is not liable for them. Seaboard also argues that Advanced’s delay damages claim is barred as a matter of law by the no-damages-for-delay clause. Advanced counters that there is a triable issue of fact as to whether Dart caused the delays, and that damages for Dart’s delay may be recovered under exceptions to the no-damages-for-delay clause.

According to the amended complaint, Dart and DSNY, and other contractors, caused substantial delays in the project by (1) denying Advanced access to the Project site; (2) failing to correct a flawed design; (3) failing to adhere to the Project schedule; 4) failing to perform their work in a timely manner; (5) failing to properly coordinate and supervise the work at the Project; and (6) failing to timely replace a prime electrical contractor on the Project, knowing that the Project schedule would be affected. (See Amended Complaint, ¶ 19).

Seaboard does not dispute that the entire Project was repeatedly delayed. Rather, it contends that the Project was delayed by DSNY because (1) the original property owner did not vacate the site in a timely fashion; (2) contaminated soil was encountered at the Project; (3) the prime electrical contractor failed to perform its work; and (4) DSNY’s engineers made design errors, including the design of the sprinkler system that Advanced was to install. (Aff. of

Douglas Karol [Dart's Vice President], ¶ 6.)

The parties agree that the liability of a surety is “measured by the liability” of its principal. (See e.g. American Bldg. Supply Corp. v Avalon Props., Inc., 8 AD3d 515, 516 [2d Dept 2004].) Moreover, “absent a contractual requirement to the contrary, a prime contractor is not responsible for delays that its subcontractor may incur unless those delays are caused by some agency or circumstance under the prime contractor’s direction or control.” (Triangle Sheet Metal Works, Inc. v James H. Merritt & Co., 79 NY2d 801, 802 [1991].)

It is further settled that a no-damages-for-delay clause which exculpates a contractor from liability for damages resulting from delays in the performance of the contractor’s work is generally valid and enforceable. (Corinno Civetta Constr. Corp. v City of New York, 67 NY2d 297, 309 [1986], rearg denied 68 NY2d 753, citing Kalisch-Jarcho, Inc. v City of New York, 58 NY2d 377, 384 [1983].) Such exemption from liability is not absolute. The Court of Appeals has identified four categories under which damages may be allowed despite the existence of a no-damages-for-delay clause: “(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., 67 NY2d at 309.) A party seeking to recover under any of these four exceptions bears a “heavy burden” of proof. (LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp., 91 AD3d 485, 485 [1st Dept 2012]; Dart Mech. Corp. v City of New York, 68 AD3d 664, 664 [1st Dept 2009].)

“On a motion for summary judgment, a defendant seeking to dismiss a cause of action to

recover damages arising from a delay bears the initial burden of demonstrating prima facie that none of the exceptions to the ‘damages for delay’ clause are present.” (Blue Water Envtl., Inc. v Incorporated Vil. of Bayville, N.Y., 44 AD3d 807, 810 [2d Dept 2007], lv denied 10 NY3d 713 [2008].)

Seaboard demonstrates its prima facie entitlement to judgment as a matter of law. More particularly, Seaboard makes a prima facie showing that the delays at issue were contemplated by the Subcontract. A no-damages-for-delay clause encompasses “those delays which are reasonably foreseeable, arise from the contractor’s work during performance, or which are mentioned in the contract.” (Corinno Civetta Constr. Corp., 67 NY2d at 310; LoDuca Assoc., 91 AD3d at 485 [“Possible causes for delay specifically mentioned in the contract are, by definition, contemplated”].) The Subcontract here expressly provides that Dart shall not be liable to Advanced for any damages “resulting from delays, accelerations, inefficiencies, variations in the scope, schedule or the sequence of WORK” caused by Dart, other contractors, or Owner. (Subcontract, § 15.1.) The Subcontract also provides that “DART shall have the right, at any time, . . . to modify progress schedules to accelerate, delay or vary any sequence of the WORK, in whole or in part.” (Id., § 13.1.) The categories of delay alleged in the complaint – denial of access to the Project site, flawed design, failure to adhere to or properly coordinate the progress schedule, delays due to the work of another (the electrical) prime contractor – are all delays within the scope of the contractual provisions.¹

¹ While Seaboard does not cite any provision of the Subcontract that mentions delays due to subsoil contamination or similar conditions, Advanced does not claim that these particular delays were caused by plaintiff and does not make any showing that such delays were so extensive as to have a material impact on Advanced’s completion of its work on the Project.

It is undisputed that Advanced's work was scheduled to be performed from April 21, 2003 to May 28, 2004, but was not completed until at least March 2006.² (May 18, 2009 letter from Advanced to Dart [Ganz Aff., Ex. E].) Although the length of delay is relevant, the length "does not transform a delay caused by an event specifically contemplated by the 'no damages for delay' clause into something unanticipated." (LoDuca Assoc., 91 AD3d at 486; Dart Mech. Corp., 68 AD3d at 664 [enforcing exculpatory clause as to 32 month delay due to design defects]; Blau Mech. Corp. v City of New York, 158 AD2d 373, 374 [1st Dept 1990] [same as to 709 day delay due to subsurface conditions].) Although plaintiff cites cases which have found triable issues of fact as to whether lengthy delays were unanticipated, these cases do not indicate that the contracts at issue, like that here, specifically contemplated the delays. (See Bovis Lend Lease LMB v GCT Venture, 6 AD3d 228, 229 [1st Dept 2004] [finding triable issue as to enforceability of no-damages-for-delay clause, where there were 2 ½ year delays and "dramatic" changes in the scope of work]; J.J. Flannery, Inc. v Kerby Saunders, Inc., 173 AD2d 415 [1st Dept 1991].)

In any event, Advanced fails to submit evidence in opposition to Seaboard's motion which is sufficient to raise a triable issue of fact as to whether the delays were caused, as Advanced claims (see P.'s Memo. In Opp. at 14), by Dart's willful misconduct, bad faith, or gross negligence, or conduct so unreasonable as to amount to an abandonment of the contract. In support of this claim, Advanced relies on a January 23, 2007 letter to Dart from the construction manager, noting delays in Dart's work since December 2006. (Jacobs Letter [Gentino Aff., Ex. B].) This letter on its face refers to events post-dating Advanced's March 2006 completion of


² Seaboard represented at the oral argument of the motion that the work was completed by June 30, 2006. (Oral Argument Transcript at 5.)

work. Advanced also relies on Project Meeting Minutes which refer to various delays by largely unidentified parties, occurring at a time when Advanced was not performing or scheduled to perform work on the Project. (See Nov. 2001, Sept. 2002, Sept. 2006, June 2006 Minutes [Gentino Aff., Exs. C, D, G, H].) The Project Meeting Minutes that do discuss Dart's work fall far short of alleging willful or bad faith delays or gross negligence on Dart's part. (See June 1, 2005, Aug. 2005 Minutes [Gentino Aff., Ex. E, F].)³ The court has considered the deposition testimony of Advanced's principal, and the other evidence cited by Advanced, and finds that it fails to raise a triable issue of fact on its delay damage claim. At most, the evidence of delays by Dart is consistent with "inept administration" or "poor planning and administration," which does not render the no-damages-for-delay clause unenforceable. (See S.N. Tannor, Inc. v A.F.C. Enters., 276 AD2d 363, 364 [1st Dept 2000]; Plato Gen. Constr. Corp./EMCO Tech Constr. Corp., JV, LLC, v Dormitory Auth. of State of New York, 89 AD3d 819, 824 [2d Dept 2011], lv denied 19 NY3d 803 [2012].)

It is hereby ORDERED that the motion of defendant Seaboard Surety Company for summary judgment is granted to the extent of dismissing the third cause of action of the amended complaint with prejudice; and the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
December 3, 2014



J. S. C.

MARCY S. FRIEDMAN, J.S.C.

³ The court notes that these documents are unsworn. But, for the reasons stated above, even if considered they do not raise a triable issue of fact as to whether Advanced's claim for delay damages is enforceable notwithstanding the no-damages-for-delay clause.