E.E. Cruz/Nicholson Joint Venture, LLC v Lend Lease (US) Constr. LMB, Inc.
2016 NY Slip Op 30207(U)
February 4, 2016
Supreme Court, New York County
Docket Number: 650716/2014
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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E.E. CRUZ/NICHOLSON JOINT VENTURE, LLC,

Index No.: 650716/2014

Plaintiff,

DECISION & ORDER

-against-

LEND LEASE (US) CONSTRUCTION LMB, INC., formerly known as BOVIS LEND LEASE LMB, INC., TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, FACILITIES DEVELOPMENT CORPORATION, BANK OF NEWYORK MELLON, as Collateral Agent and Custodian, NEW YORK CITY FIRE DEPARTMENT, NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK CITY PARKING VIOLATIONS BUREAU, and NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Lend Lease (US) Construction LMB, Inc. (Bovis) moves, pursuant to CPLR 3211(a)(1), to dismiss the fourth through seventh causes of action in the amended complaint (the AC). Defendant Trustees of Columbia University in the City of New York (Columbia) cross-moves to dismiss the ninth cause of action. Plaintiff E.E. Cruz/Nicholson Joint Venture, LLC (ECN) opposes both motions.[1] For the reasons set forth below, Bovis' motion is granted in part and denied in part, and, as a result, Columbia's cross-motion is granted in part and denied in part.

I. Factual Background

As this is a motion to dismiss, the facts recited are based upon the complaint and the

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[1] ECN submitted an over-long, 40-page brief opposing both Bovis' and Columbia's motions without leave of the court. However, the court, nunc pro tunc, has permitted the filing. In addition, Bovis failed to include a table of contents or table of authorities in any of its motion papers, in violation of this court's rules.

documentary evidence.

This case involves a dispute between Bovis, the general contractor for the Columbia-Manhattanville Development Project (the Project), and ECN, a subcontractor for phase one of the Project. The Project involves the construction of multiple buildings covering a five-block radius in upper Manhattan, to provide Columbia with academic and research facilities, graduate student housing, and retail stores.

Bovis executed an October 2010 construction manager agreement (the Contract) with Columbia, the owner of the development. On September 13, 2010, Bovis issued an invitation to multiple subcontractors, including ECN, to bid on the construction of slurry walls and building foundations for the Project. *See* Dkt. 54 (Invitation to Bid). Bovis included construction plans and specifications in the bidding materials. AC ¶ 13. The specifications prescribed the scope of work to be performed, the work schedule, and the basic means and methods by which the subcontractor was required to perform the work. *Id.* The plans also described field and subsurface conditions at the Project site, including subsurface soil quantities and groundwater elevation levels. ¶¶ 13, 51-58. The prospective subcontractors had 11 days to review the bid materials, investigate the Project site, and submit final bids for the work. *See* Dkt. 54.

In December 2010, Bovis accepted ECN's bid. ¶ 12; Dkt. 55 (ECN's Bid). Bovis and ECN then executed a formal subcontract agreement (the Subcontract).[2] The Subcontract, *inter alia*, required ECN to excavate petroleum contaminated soil from the worksite, construct drill shafts and load bearing elements, set forth as follows:

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[2] Both ECN and Bovis fail to submit complete copies of the subcontract documents, which the court understands are quite extensive. However, the parties have submitted hundreds of pages of documents, including project specifications and memoranda, without identifying which of these documents is part of the subcontract or, if incorporated by reference, where the parties (expressly) incorporate the documents by reference.

> furnish and install slurry walls, load bearing elements, site utilities, work platforms, guide walls, temporary steel bracing, concrete substructures foundation work and perform site work, demolition, pre-trenching, mass excavation, dewatering, site restoration and other work.

Dkt. 24 (the Subcontract), Ex. B, Scope of Work.

The complaint alleges that after ECN commenced work, it discovered that the field and subsurface conditions at the Project site significantly differed from those described in the Subcontract documents and pre-bid materials that Bovis had provided. ¶ 20. It contends: (1) ECN encountered substantially more petroleum-contaminated soil to be excavated than Bovis identified in the Subcontract (¶¶ 51-53); (2) Bovis' groundwater measurements, stability analyses, and other measurements for ECN's slurry wall installation were inaccurate, causing the wall to collapse (¶¶ 56-58); and (3) Columbia's geotechnical engineer provided inaccurate design parameters for constructing drill shafts and load bearing elements, forcing ECN to drill much deeper than expected (¶¶ 61-67). As a result of these discrepancies, ECN alleges that Bovis breached the Subcontract (*see* Dkt. 92, 9/11/15 Tr. at 4:15-26) and caused ECN to incur additional construction costs. ¶ 21.

ECN further alleges that Bovis breached the Subcontract by not adhering to the construction schedule and causing other delays. In particular, ECN asserts that Bovis failed to timely erect the steel and pour the concrete for the first floor of two buildings, blocking access to the worksite for two months and causing additional construction costs. ¶¶ 44, 46. Moreover, ECN contends that Bovis engendered other delays by failing to timely issue change orders, failing to supervise the work, and failing to administer the Subcontract. ¶ 22. ECN asserts that the parties did not contemplate the aforementioned delays, that Bovis acted in bad faith, and that the delays were so unreasonable that they constituted an intentional abandonment of the

Subcontract. ¶ 47. Alternatively, it alleges Bovis breached its fundamental obligations under the Subcontract. *Id.*

The AC seeks the following, numbered here as in the AC: 1) $7,088,574.40 allegedly owed for agreed-to additional work for which change orders (COs) were issued; 2) $4,445,527.58 in extra work, labor and materials for which no COs were issued; 3) $1,196,069.03 in extra work, outside of the contract, ordered or required to be performed, under protest; 4) $1,522,814.00 in damages caused by construction interference, delays, out-of-sequence work, changes in scope of work, lost labor productivity, denial of access to the site, unanticipated site conditions, and misrepresentations, errors and omissions in the subcontract documents; 5) $2,561,380.00 in excess costs for removal of contaminated soil since Bovis' bid package understated the number of underground storage tanks and the quantity of petroleum contaminated soil; 6) $2,166,604.00 in damages caused by the failure of the subcontract documents to provide accurate groundwater levels, adequate stability analysis and other accurate information, which resulted in slurry wall excavation failures; 7) $4,022,667.00 in costs above the subcontract price to drill and install caissons due to misinformation provided by Columbia's geotechnical engineer used as a basis for the planned design and made part of the pre-bid information and also due to Bovis "unreasonable interpretation of the Building Code"; 8) $1,129,128.48 in interest on late payments; and 9) enforcement of a mechanic's lien against the Project in the amount of $14,195,129.77.

Bovis now moves to dismiss the fourth through seventh causes of action, and Columbia seeks dismissal of the ninth cause of action. They argue that several Subcontract provisions, including a no-damage-for-delay clause and a "concealed conditions" clause preclude these claims as a matter of law. Dkt. 24.

A. Subcontract

The Subcontract, dated October 27, 2010, provides that ECN will be paid $121,900,000 for "Slurry Walls and Foundations." *Id.*, Ex. B, p. 1. The monthly billing date is the 20th of each month, and 10% of every application for payment would be kept as retainage until 50% is paid. *Id.* at 1-2. When the work is substantially complete, all but 1% would be released, and the 1% could be retained for up to one year. *Id.* Overhead and profit on COs were 15% on self-performed work and 5% on subcontracted work. *Id.*

Under the definition of "Work", the contract provides that the Subcontractor is obligated to:

> *familiarize itself* with the site, surrounding and *subsurface conditions* and the character of the operation to be carried on at the site, *and make such investigations as Subcontractor may deem fit or as may be prudent for Subcontractor to fully understand the facilities, physical conditions* and restrictions attending the Work. All Work shall be completed strictly in accordance with the requirements of this Subcontract and the Contract Documents.

See Dkt. 24 at 5 (emphasis added). "Substantial Completion" is defined, in part, as requiring the Slurry Walls and base slab to "provide a watertight structure." *Id.*

Article 2 of the Subcontract states that: the Subcontractor "represents and agrees that it has carefully examined and understands the Contract Documents relevant to the Work; *has adequately investigated the nature and conditions of the Project site* and locality; *has familiarized itself with conditions affecting the difficulty of the Work*; and *has entered into this Subcontract based on its own examination, investigation and evaluation and not in reliance upon any opinion or representations of Contractor or others*." *Id.* (emphasis added). Article 2 further states that the Contract Documents are to be treated as scope documents, but "do not necessarily indicate or describe all items required for the full performance and proper completion of the Work." *Id.*

Article 3 of the Subcontract speaks to ambiguities and provides that the Subcontractor is to examine the Subcontract for ambiguities, inconsistencies and errors and, in writing, request interpretation and correction. *Id.* at 5-6. Nonetheless, interpretation "shall not vary the Drawings and Specifications and/or the Subcontract." *Id.* The onus is placed on the Subcontractor to notify the Contractor of discrepancies and conflicts before performing the Work, and the Subcontractor is responsible for extra costs for failure to so notify. *Id.* Specifically, it provides:

> Subcontractor shall promptly and carefully check all Contract Documents and notify Contractor of any discrepancies or conflicts *before* performing any Work, *and Subcontractor shall be responsible for any extra costs resulting from its failure to do so. Subcontractor shall take field measurements and verify field conditions and compare such field measurements and field conditions with the Contract Documents before activities are commenced.* Errors, inconsistences or omissions discovered are to be reported to Contractor at once. *Any work done by Subcontractor with respect to any portion of the Work affected by such error, discrepancy, conflict, misunderstanding or variance will be at Subcontractor's own risk* and Subcontractor shall cooperate with Contractor and other subcontractors in the preparation of coordination drawings where required by Contractor.

See id. at 6.

Article 11 states that time is of the essence in the performance of Subcontractor's work. *See id.* at 8. On the other hand, Article 12 provides that a written CO may revise and extend the work and if the Subcontractor's work is obstructed or delayed through no fault of the Subcontractor, it will be granted an extension of time. *See id.* at 9. In such event, the Subcontractor must give written notice within 72 hours and set forth, in detail, the nature of the delay. *Id.*

Article 12 then provides:

> Except only in the case of Owner and Contractor's failure to provide access to the site of the Work, such that Subcontractor is wholly unable to perform the Work, all

> as set forth in the next succeeding paragraph of this Article 12, *which shall be the sole and exclusive exception to the no-damage for delay provision contained herein*, all extensions of time shall be in lieu of and in liquidation of any claims for compensation of damages against the Contractor or Owner....no claim for damages shall be made by the Subcontractor for any hindrances, obstructions or delays from any cause whatsoever, *including, without limitation, ordering changes, corrections, suspension, or rescheduling of the Work, whether or not the delays or their causes or their length were foreseeable or contemplated by the parties when they entered into this Subcontract, and whether the delays are the fault of the Contractor, Owner, Architects, or otherwise.* The parties agree that an extension of time to the extent justified pursuant to this Article, *shall be the sole remedy* of the Subcontractor for any (i) delay in the commencement, prosecution or completion of the Work, (ii) hindrance or obstruction in the performance of the Work, (iii) loss of productivity, or (iv) other similar claims....
>
> Notwithstanding...should the Subcontractor be wholly prevented from performing the Work, without fault on its part, as a result of Owner and/or Contractor's failure to provide it with access to the site, and as a result Subcontractor is actually and necessarily delayed in the performance of the Work, then Subcontractor shall be entitled, upon completion with the notice periods required hereunder, to payment of its actual, reasonable and verifiable equipment rental costs only, up to a maximum amount of One Million Five Hundred Thousand Dollars ($1,500,000) (the "Cap"), from and after the 30th calendar day of the commencement of the delay, ...(the "Grace Period"). The thirty day Grace Period shall apply on an occurrence basis... failure to provide access shall not be deemed to have occurred until the elapse of the Grace period in each instance. The Cap, on the other hand, shall be an aggregate cap representing Owner and Contractor's maximum liability for the costs of all delays arising out of or attributable to failure to provide access to the site as referenced herein....

See id. (emphasis added).

Article 13 addresses COs and specifically states that Subcontractor shall not proceed with changed work without a CO. *See id.* at 10. It provides that the Contractor will not be liable for costs or delays incurred in the performance of such changed work without a written CO. *Id.*

Article 13 continues:

> ...The agreed compensation specified in a Change Order for changed Work includes full payment for the extra Work covered by the Change Order as well as for any impact to other Work covered by the Change Order as well as for any impact to other Work caused by, arising from, or in any way related to the Change Order, and Subcontractor waives all rights to claim further compensation for such impacts, cumulative or otherwise.

See id.

Article 27 obligates the Subcontractor to submit, *inter alia*, shop and erection drawings, laboratory and inspection reports and engineering calculations. *See id.* at 15. By doing so, "Subcontractor represents and warrants that it has determined and verified all materials, field measurements, and field construction criteria pertaining thereto, [and] has checked and coordinated this information with the Work and Contract Documents." *Id.*

Article 41(a) provides that the Subcontract is to be governed by New York law. *See id.* at 19. Article 41(b) states that the Subcontract, Contract and the documents incorporated therein are the "the entire agreement of the parties and supersedes all prior negotiations, agreements and understandings...[,] and any claims against Contractor, irrespective of an alleged breach by Contractor of the Contract Documents, shall be based, nonetheless, upon this Subcontract and the Price, and shall in no event be based upon an asserted fair and reasonable value of the Work performed." *See id.* Article 41(c) is a no-waiver clause requiring a writing signed by the Contractor to amend the agreement. *See id.*

Finally, Article 45 provides that Subcontractor "expressly" agrees that it "has assumed full responsibility for all naturally occurring existing conditions at the Project site (including specifically regulated soil), whether subsurface or otherwise concealed conditions (and whether or not they differ in any way from those indicate in the Contract Documents), or unknown physical conditions which differ in any way from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents." *See id.* at 21. However, it excepts manmade obstructions. *See id.* Further, it states that Subcontractor has included these considerations in its price and will not be entitled to adjustments in price if these conditions are encountered. *See id.*

II. Discussion

In determining a CPLR 3211 motion to dismiss, the court's task is to determine whether, within the four corners of the pleading, the plaintiff alleges facts that manifest a legally cognizable claim. *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 (2002). The court must accept the facts in the complaint as true, as well as all reasonable inferences that the court may glean from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to favorable consideration." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Where, as here, the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. ECN's Delay Claim (Count 4)

Clauses in construction contracts barring damages for delay "will prevent recovery of damages resulting from a broad range of reasonable and unreasonable conduct by the contractee if the conduct was contemplated by the parties when they entered into the agreement." *Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 305 (1986). "But an exculpatory agreement, no matter how flat and unqualified its terms, will not exonerate a party from liability under all circumstances[,]" since "it will not apply to exemption of [the contractee's] willful or

grossly negligent acts." *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384-85 (1983); *see id.* Nor will delay damages be excused by an exculpatory clause where delay is not contemplated by the parties, is so unreasonable as to constitute an intentional abandonment of the contract by the contractee, or results from the contractee's breach of a fundamental obligation of the contract. *Corinno Civetta*, 67 NY2d at 309. "Thus, even broadly worded exculpatory clauses...are generally held to encompass only those delays which are reasonably foreseeable, arise from the contractors work during performance, or which are mentioned in the contract." *Id.* at 310.

Exceptions to no-delay clauses are strictly construed. *Bovis Lend Lease, Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 147 (1st Dept 2013) ("A party seeking to invoke any of the exceptions to the general rule that no damages for delay clauses are enforceable bears a heavy burden"); *LoDuca Assoc., Inc. v PMS Const. Mgmt. Corp.*, 91 AD3d 485 (1st Dept 2012). Consequently, abandonment of a contract by a contractee will only be found where the contractor demonstrates delays for which the contractee is responsible "which are so unreasonable that they connote a relinquishment of the contract by the contractee with the intention of never resuming it." *Corinno Civetta*, 67 NY2d at 312-13. And, a contractee's breach of contract claim will result in delay damages only in very narrow circumstances where a fundamental, express, affirmative obligation of the contractee under the agreement is breached. *Id.* at 313.

Hence, allegations that amount to nothing more than inept contract administration fall squarely within a broad no-damage-for-delay clause. *See, e.g., LoDuca*, 91 AD3d at 486 (delays caused by design defects based on faulty architectural drawings within contemplation of contract and contractee's knowledge of this merely inept administration or poor planning); *Comm. Elect.*

Contractors, Inc. v Pavarini Constr. Co., 50 AD3d 316, 318 (1st Dept 2008) (no-damage-for-delay provision barred subcontractor's claims against general contractor for inordinate delays allegedly caused by general contractor's improper scheduling and organization of subcontractors, changes to work, and failure to provide temporary heating). Similarly, although the length of delay is relevant to whether an exception applies, delays are not uncontemplated "simply because they substantially increase the time required for completion of the contract." *Dart Mech. Corp. v City of New York*, 2008 WL 4685294, at *13 (Sup Ct, NY County 2008), *aff'd* 68 AD3d 664 (1st Dept 2009) (36 month delay on construction project not uncontemplated); *see also Corinno Civetta*, 67 NY2d at 307 (2 year delay in completion of 3.5 year contract was not uncontemplated); *Buckley & Co. v New York*, 121 AD2d 933 (1st Dept 1986) (8 year delay in 2 year contract was not uncontemplated); *see Bovis Lend Lease LMB, Inc. v GCT Venture, Inc.*, 6 AD3d 228-29 (1st Dept 2004) (unreasonable delay of 2.5 years *and* dramatic changes in work raised issue as to whether delay contemplated).

Here, Article 12 of the Subcontract contains a no-damage-for-delay clause. *See* Dkt. 24 at 9. It explicitly bars ECN from bringing a claim for damages against Bovis for "any hindrances, obstructions or delays from any cause whatsoever, including without limitation, ordering changes, corrections, suspensions, or rescheduling of the [w]ork, whether or not the delays or their causes or their length were foreseeable or contemplated by the parties when they entered into this Subcontract, and whether the delays are the fault of [Bovis], [Columbia], [the architects], or otherwise." *Id.* ECN's only remedy under the Subcontract for most delays is to request an extension of time to perform. *See id.*

The sole exception to the no-damages-for delay clause is Bovis' or Columbia's "failure to provide access to the [worksite] such that [ECN] is wholly unable to perform the Work..." *Id.* In

such cases, the Subcontract states that ECN may collect "actual, reasonable and verifiable equipment rental costs" up to $1.5 million, excluding costs incurred during the first 30 days of the delays, the Grace Periods. *Id.*

ECN seeks delay damages for: "construction interference"; out of sequence work; changes in the scope of work; unanticipated site conditions; and misrepresentations, errors and omissions in the subcontract documents. Bovis argues that the Subcontract's no-damage-for-delay clause precludes ECN's claims for delay damages as a matter of law. ECN counters that the delays that it encountered were unreasonable and beyond the parties' contemplation in entering into the Subcontract.

"The best evidence of what parties to a written agreement intend is what they say in their writing. Therefore, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002) (citations omitted). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Id.*, *quoting Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 (1978). Additionally, it is well settled that "a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties." *Cole v Macklowe*, 99 AD3d 595, 596 (1st Dept 2012), *citing In re Lipper Holdings, LLC*, 1 AD3d 170, 171 (1st Dept 2003) (citations omitted); *see generally Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 54 (1st Dept 2015).

Here, in addition to including a no-damage-for-delay clause, the Subcontract repeatedly places responsibility on ECN to inspect the site and to take full responsibility for all site

conditions, including concealed conditions, as long as they were not manmade. ECN, in fact, agreed to ascertain the site conditions, make sure they conformed to the Subcontract documents, and notify Bovis of discrepancies between site conditions and Subcontract documents before doing the work.

ECN has not alleged any conduct on Bovis' part that would demonstrate that Bovis acted in bad faith or was willfully, maliciously or grossly negligent in causing any of the delays at issue. Further, ECN has not demonstrated that the delays were so unreasonable that they constituted an intentional abandonment of the contract – that the delays allegedly caused by Bovis connoted "a relinquishment of the contract by [Bovis] with the intention of never resuming it." *See Corinno Civetta*, 67 NY2d at 313. Nor has ECN alleged facts showing that Bovis breached a fundamental, affirmative obligation of the contract expressly placed upon it. *Id.*

That Bovis allegedly ordered out-of-sequence work, failed to pour the first floor concrete in two buildings within the Subcontract's 75-day window, and/or provided faulty construction drawings or plans amount to inept contract administration and falls squarely into the Subcontract's no-damage-for-delay clause. *See LoDuca,* 91 AD3d at 486; *Comm. Elect. Contractors,* 50 AD3d at 318. Moreover, "while the conditions [complained of] may not have been anticipated, the possibility, however unlikely, of their arising was contemplated and addressed by the parties in their agreement." *Blau Mech. Corp. v City of New York.* 158 AD2d 373, 375 (1st Dept 1990). ECN's conclusory allegations that Bovis' delays were "uncontemplated" or the result of "bad faith" cannot overcome the broad language of the Subcontract. AC ¶ 47; *see Skillgames*, 1 AD3d at 250 (on a motion to dismiss courts will not

assume that factual allegations that consist of bare legal conclusions are true). Accordingly, to the extent ECN seeks general delay damages against Bovis, ECN's delay claims are dismissed.[3]

ECN has, however, stated a claim for delay damages arising from Bovis' denial of access to the Project worksite. As set forth above, the Subcontract specifically carves out an exception to the no-damage-for-delay provision where ECN is "wholly prevented" from performing work as a result of being denied access to the worksite. *See* Dkt. 24 at 9. Count 4 of the AC alleges that Bovis delayed for two months in pouring the concrete and erecting the steel in two buildings, which resulted in ECN being denied access to the Project worksite and suffering damages. *See* AC ¶ 45. These allegations state a claim under the Subcontract's exception to no-damage-for-delay provision for any equipment costs up to the $1.5 million cap, after the Grace Period. ECN's claim for damages above the cap is dismissed.

B. ECN's Petroleum-Contaminated Soil Claim (Count 5)

The crux of the AC is that Bovis provided inaccurate information about existing physical conditions at the Project site that caused ECN to incur additional construction costs.
With respect to ECN's soil claim, ECN alleges that Bovis represented in its pre-bid materials that there were about 15,000 cubic yards of petroleum-contaminated soil at the worksite. *See* Dkt. 46 at 24-25. However, ECN claims that it encountered roughly 75,000 cubic yards of petroleum-contaminated soil, in addition to underground storage tanks and benzene-contaminated soil, which Bovis also failed to disclose. *Id.* The AC alleges that the discrepancy between the

[3] Although ECN asserts separate claims for "extra work" and "protest work," these claims, at least in part, stem from Bovis' alleged delays in performing under the Subcontract; i.e., that Bovis' failure to adhere to the construction schedule forced ECN to perform extra or protest work. To the extent that ECN's "extra work" and "protest work" claims arise from work caused by Bovis' alleged delays and not memorialized in change orders, those claims also may be subject to dismissal.

amount of soil at the worksite and the amount that Bovis estimated in its pre-bid documents purportedly caused ECN to incur an additional $2.5 million in construction costs. Further, ECN asserts that Bovis knowingly, and in bad faith, withheld documents during the pre-bid process that would have disclosed the correct amount of petroleum-contaminated soil. *Id.* at 26; *see* AC ¶ 52. ECN maintains that it could not have discovered (and did not discover) the actual amount of petroleum-contaminated soil through its own reasonable investigation, given the limited amount of time (11 days) it had to conduct subsurface investigations at the Project site before submitting its bid. *See* Dkt. 46 at 27-28.

The Subcontract, however, forecloses these claims.

Where a party agrees to perform construction work for a fixed sum, that party ordinarily "will not be excused or become entitled to additional compensation, because he encounters unforeseen difficulties." *United States v Spearin*, 248 US 132, 136 (1918). In other words, "[o]ne who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil." *Id.* Here, the contract specifically places the onus upon ECN to inspect. ECN relies upon pre-contract representations. Moreover, here, there is a merger clause which would foreclose this argument.

Specifically, Bovis disclaimed liability for any representations related to the amount of petroleum contaminated at the worksite. ECN expressly agreed to perform the Subcontract work for a lump sum payment without additional payments for changed site conditions. In the provision setting forth ECN's warranties, ECN represented and warranted that it "adequately investigated the nature and conditions of the Project Site ... familiarized itself with conditions affecting the difficulty of the Work [,] and ... entered into [the] Subcontract **based on its own examination, investigation and evaluation and not in reliance [on] any opinions or**

representations of [Bovis]...". *See* Dkt. 24 at 5 (emphasis added). Similarly, the Subcontract's definition of "Work" specifically includes "ECN's obligation to visit the Project site, and to fully acquaint and familiarize itself with the site, surrounding and subsurface conditions ... and make such investigations as [ECN] may deem fit or as may be prudent for [ECN] to fully understand the facilities, physical conditions and restrictions attending the Work." *See id.* (requiring ECN to verify and compare field conditions); *see also Bovis Lend Lease (LMB) Inc. v Lower Manhattan Dev. Corp.*, 2011 WL 10842023, at *6 (Sup Ct, NY County 2011) (enforcing similar clause on motion to dismiss that assumed risk of differing site conditions at construction site), *mod. on other grounds*, 108 AD3d 135 (1st Dept 2013).

In addition, the Subcontract contains multiple clauses assigning the risk of differing site conditions to ECN. Article 45 states that ECN assumed responsibility for all "naturally occurring existing conditions at the Project site (including specifically regulated soil), whether subsurface or otherwise concealed physical conditions (and whether they differ in any way from those indicated in the Contract Documents), or unknown physical conditions which differ in any way from those ordinarily found to exist [in similar construction projects]." *See* Dkt. 24 at 21. Article 45 goes on to state that ECN included in its Subcontract price all risk of subsurface, concealed, or unknown natural conditions (*excluding only manmade obstructions*), and agreed that it would not be entitled to a price adjustment for such conditions. *Id.*

At least six other Subcontract provisions reference ECN's assumption of risk of differing site conditions. These include several items that expressly address petroleum-contaminated soil quantities at the Project site. For instance, the Subcontract's Scope of Work addendum states that ECN included *all* petroleum-contaminated soil removal in its Subcontract price; that Columbia intended ECN to assume the risk for differing quantities of petroleum-contaminated

soil; and that ECN would not use any pre-bid estimate of petroleum-contaminated soil quantities as the basis of any claim against Bovis. *See* Dkt. 24 at 34, 39 (Ex. B, Scope of Work ¶¶ 4, 50) (requiring ECN to visit the jobsite and familiarize itself with field conditions); *see id.* at 52 (Ex. B. Scope of Work, Specific Work Items, Work Item XI, §§ 11.09 & 11.10) (ECN assumes risk of differing soil quantities in performing Slurry Wall construction; requiring ECN to verify any quantity estimates of subsurface materials that Bovis provided); *see id.* at 55 (Ex. B. Scope of Work, Specific Work Items, Work Item XIII, § 13.15) (Mass Excavation provision containing language identical to Slurry Wall provision).

Finally, at least two project specifications[4] required ECN to accept the excavation site "as-is", and to accept all risks associated with subsurface conditions without relying on any pre-Subcontract documents. *See* Dkt. 38 at 16-19. These specifications stated that Bovis provided the soil quantity estimates for ECN's reference only, and that those estimates might not be completely accurate. *Id.* Taken together, these provisions bar ECN from seeking additional compensation in the form of damages for changed Project conditions.

By its plain terms, the Subcontract states that it "embodies the entire agreement of the parties and supersedes all prior negotiations, agreements and understandings relating to the subject matter [of the Subcontract]."[5] *See* Dkt. 24 at 19. This merger clause precludes ECN's breach of warranty claims based on representations that pre-date the Subcontract. *See Torres v*

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[4] Bovis does not state whether the project specifications it cites in its moving papers constitute part of the Subcontract, or produce a complete copy of the Subcontract that includes all Subcontract Documents.

[5] ECN stated during oral argument that its sole claim against Bovis is for breach of contract, and not for fraudulent inducement. *See* Dkt. 92 (9/11/15 Tr. at 4). Thus, any pre-contract representations are precluded by the merger clause. Moreover, there can be no fraud claim here where there is no justifiable reliance. Again, ECN, contractually, undertook to investigate the construction conditions and represented that it actually did.

D'Alesso, 80 AD3d 46, 53 (1st Dept 2010) (holding that merger clause was enforceable, precluded consideration of pre-contract representations, and provided "further protection for the interests of certainty and finality."); *see also Foundation Co. v State*, 233 NY 177, 186 (1922) (holding that data in a pre-bid boring sheet did not amount to an affirmative representation that constituted a warranty) ("[The boring sheet] formed no part of the plans upon which the contract was based. It was not prepared or used for that purpose. It was an independent bit of information or supposed information in the possession of the [owner], to which the bidder resorted in making the investigations which it was required to make. If it relied upon this paper, it did so at its own risk."); *see also All Cty. Paving Corp. v Suffolk Cty. Water Auth.*, 20 AD3d 438, 438 (2nd Dept 2005) (the results of test borings previously performed for the defendant more than one mile from the construction site, furnished by the defendant as part of the contract specifications, did not constitute a representation as to the condition of the soil at the construction site).

In light of the foregoing, Bovis' motion to dismiss the fifth cause of action in the AC is granted.

C. ECN's Slurry Wall & Value Engineering Claims (Counts 6 & 7)

ECN further alleges that Bovis breached the Subcontract by impliedly warranting that the construction methods in the Subcontract documents were adequate for their intended purpose, when in fact they were not. Bovis argues the construction methods in the Subcontract documents only prescribe minimum construction requirements and that ECN had sole responsibility for the specific means and methods of construction.

1. ECN's Slurry Wall Claim (Count 6)

ECN's sixth cause of action is dismissed without prejudice and with leave to replead.

Unlike ECN's soil claim, ECN's slurry wall claim is based on alleged warranties in the Subcontract. These warranties (allegedly) set forth the means and methods by which ECN was to install a slurry wall at the Project worksite. ECN argues that Bovis' Scope of Work addendum and slurry wall specifications impliedly warranted that if ECN complied with Bovis' specifications, the slurry wall would function properly. However, ECN alleges the Scope of Work Addendum (Dkt. 24, Ex. B) and Slurry Wall specifications (Dkt. 58) that Bovis provided "failed to accurately indicate groundwater levels, failed to provide an adequate stability analysis, and contained other deficiencies, error and omissions that resulted in a series of slurry wall excavation failures." AC ¶ 58. ECN seeks damages for breach of warranty associated with the slurry wall collapse. AC ¶¶ 57-59.

Bovis argues that the Subcontract shifts responsibility for the slurry wall installation to ECN, and that ECN could not reasonably rely only on the construction plans that Bovis provided.[6]

The court finds that Subcontract does not unambiguously shift responsibility for the slurry wall construction to ECN. On one hand, Article 28 of Subcontract purports to disclaim Bovis' responsibility for ECN's construction means and methods. It states, in relevant part:

> Neither Architect nor [Bovis] nor [Columbia] shall be responsible to [ECN] or third parties for: construction means, methods, techniques, sequences or procedures of Subcontractor; ... the acts of omissions of [ECN]; or the failure of [ECN] ...to carry out the Work in accordance with the Contract Documents.

See Dkt. 24 at 16. Also, the slurry wall specifications (Dkt. 58) give ECN open-ended discretion in how to facilitate specific aspects of the slurry wall installation, including "maintain[ing] the

[6] The parties dispute whether ECN actually complied with Bovis' plans.

level of the bentonite slurry in the trench ... at a level not less than five feet above the level of the groundwater level...[and] [a]djust[ing] [the] slurry level as required to maintain panel stability at all times." *See* Dkt. 58 (Slurry Wall Specifications §3.3(k)).

Notwithstanding these provisions, the Subcontract and the slurry wall specifications indicate that Bovis retained some responsibility for the construction means and methods. Article 28 itself states that ECN was obligated to perform the work "under [Bovis'] direction and satisfaction...as provided herein." *See* Dkt. 24 at 16. Likewise, Article 27 refers to ECN's obligation to "perform the [w]ork in strict accordance with the Contract Documents," which Bovis provided. *See id.* at 15. Bovis admits that the slurry wall specifications that it provided contained "minimum" construction requirements from which ECN was unable to deviate. *See* Dkt. 92 (9/11/15 Tr. at 23). Indeed, the Subcontract's Scope of Work and slurry wall specifications prescribe *extensive* requirements for the slurry wall installation.

It appears, therefore, that Bovis' disclaimer of any responsibility for ECN's construction means and methods may be in conflict with the Subcontract's requirement that ECN not deviate from Bovis' prescribed construction means and methods. This tension between the provisions governing the party responsible for construction means and methods precludes the court from ruling on this issue on a motion to dismiss. While Bovis' position – that it only prescribed general construction requirements, while leaving the precise means and methods to ECN – is not "commercially unreasonable", it is not unambiguously clear from the Subcontract itself. *See Greenfield*, 98 NY2d at 569.

Nevertheless, to the extent that ECN's sixth cause of action is based on its differing site conditions claim, the sixth cause of action is dismissed. ECN alleges in the AC that Bovis' slurry wall specifications were defective because unexpected groundwater levels rendered them

so. AC ¶ 58; *see also* Dkt. 28 (12/5/13 Letter from ECN to Bovis, arguing that faulty groundwater elevations in the contract specifications caused the slurry wall to collapse). This allegation has less to do with the slurry wall specifications that Bovis provided, and more to do with whether those specifications were appropriate given then-existing site conditions. It is simply a reformulation of ECN's site conditions claim.

Although the complaint alleges that the construction plans contained other, unspecified "errors and inaccuracies" that caused the slurry wall to collapse, ECN does not state what those errors and inaccuracies were. Moreover, ECN's December 5, 2013 letter makes it clear that the presence of unexpected groundwater levels at the worksite rendered other aspects of Bovis' construction plans, such as Bovis' stability analyses, inaccurate. *See* Dkt. 28 at 2 ("Inadequate head differential between the groundwater elevation and the top of the slurry resulted in collapse…").

Ultimately, ECN fails to allege how Bovis' slurry wall plans were defective in any respect other than by failing to accurately reflect existing groundwater levels. As set forth above, however, ECN expressly assumed the risk of differing site conditions at the worksite, including the risk of unexpected groundwater levels. Accordingly, ECN's sixth cause of action is dismissed. Nonetheless, in the event that ECN can identify any other defects in Bovis' construction plans and requirements with which it had to comply, ECN may move to replead.

2. ECN's Value Engineering Claim (Count 7)

Finally, ECN alleges that before entering into the Subcontract, Bovis and Columbia provided ECN with design parameters for constructing drill shafts and load-bearing elements. ECN used the design parameters that Bovis provided as a basis for two value engineering proposals, which ECN expected would govern the drill shaft construction. ECN alleges that the

design parameters failed to take existing subsurface conditions into account, requiring ECN to drill thousands of feet deeper than planned. As a result, ECN contends that it incurred approximately $2.2 million in additional construction costs. AC ¶¶ 60-67.

Once again, ECN relies on allegedly "inaccurate pre-bid information" as a basis for a breach of warranty claim against Bovis. As set forth above, however, representations or data in pre-bid documents that are not part of a Subcontract do not create enforceable warranties in the Subcontract. This principal applies as much to pre-bid design parameters as it does to pre-bid representations about existing site conditions. ECN fails to allege that the parties incorporated the pre-bid design parameters that form the basis of count seven into the Subcontract, which had a merger clause and repeatedly required ECN to inspect the subsurface conditions, or the Project Specifications.[7] Bovis' motion to dismiss the seventh count of the AC is granted.

D. ECN's Mechanic's Lien (Count 9)

Columbia's motion to dismiss count 9 of the AC essentially argues that if counts 4-7 of the AC are dismissed, ECN should be precluded from enforcing its $14.2 million mechanic's lien against the Project (count 9), to the extent that the lien includes damages alleged in counts 4-7 (approximately $10.27 million in damages). *See* Dkt. 92 (9/11/15 Tr. at 17). The court agrees. *See MCC Dev. Corp. v Perla*, 81 AD3d 474, 474 (1st Dept 2011) (dismissing mechanic's lien arising out of contract where plaintiff failed to satisfy contract's conditions precedent to commencing litigation).

The lien will be reduced by $6,606,861, the amount of ECN's alleged damages surviving this motion to dismiss. This includes the total damages sought in the fifth and seventh causes of

[7] ECN also does not explain why Bovis should be held responsible for design parameters that Columbia's geotechnical engineer provided. AC ¶ 63.

action, plus the $22,814 in damages for the fourth cause of action that exceed the Subcontract's $1.5 million cap. Additionally, unless ECN timely repleads, the portion of the lien owing to the sixth cause of action ($2,166,604) and the remaining damages for the fourth cause of action ($1.5 million), will also be extinguished.

To amend the AC, ECN must include, at a minimum, allegations that show how it incurred reasonable equipment rental costs of $1.5 million, after the contractual grace period, as a result of Bovis' alleged delays. Should ECN timely amend the first and sixth causes of action and preserve those claims, the portion of the lien attributable to those counts will remain in place pending a final judgment on the merits. *See* Lien Law § 17 (filing of action to foreclose lien with notice of pendency preserves mechanic's lien beyond one-year statutory period). Accordingly, it is

ORDERED that the motions to dismiss by defendant Lend Lease (US) Construction LMB, Inc. and Trustees of Columbia University in the City of New York are granted in part as follows: (1) the fourth cause of action (delay damages claim) is dismissed except as to reasonable equipment rental costs and limited to $1.5 million in damages; (2) the fifth (petroleum contaminated soil claim), sixth (slurry wall claim) and seventh (value engineering claim) causes of action are dismissed; and (3) the ninth cause of action (mechanic's lien claim) is dismissed without prejudice and with leave to replead in accordance with the decision within 30 days of the entry of this order on the NYSCEF system.

Dated: February 4, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.