T. Moriarty & Son, Inc. v New York City Dept. of Envtl. Protection
2016 NY Slip Op 31540(U)
August 11, 2016
Supreme Court, New York County
Docket Number: 654488/2012
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
----------X
T. MORIARTY & SON, INC.,

Plaintiff,

- against -

THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE CITY OF NEW YORK,

Defendants.
----------X
O. PETER SHERWOOD, J.:

DECISION AND ORDER

Index No.: 654488/2012
Motion Sequence No.: 001

Defendant, the City of New York (City) moves, pursuant to CPLR 3212, for partial summary judgment dismissing the second and third causes of action of the complaint against the City.

Background

The facts on this motion are taken from plaintiff's Rule 19-a Statement except as otherwise noted.[1] On November 30, 2007, co-defendant, the New York City Department of Environmental Protection (DEP), awarded plaintiff a contract known as "Installation of SCADA System of 38 Regulators CCFISS, Reg-26,Various NYC DEP Locations, Registration Number: 20080019042," for the price of $15,721,000 (the Contract, SMF, ¶ 1) to install a "Supervisory Control and Data Acquisition System" (SCADA) to monitor and control the various pumping stations and regulators throughout the City's sewage collection system (Project) (*id.*, ¶ 2). Plaintiff was required to complete the Project by the substantial completion date of April 13, 2009, or within 500 calendar days (*id.*, ¶ 3).

Under the terms of a "Consent Order Decree," entered into between the DEP and the New York State Department of Environmental Conservation (DEC), the DEP was required to have the SCADA system fully operational no later than June 30, 2010, or face a penalty of $25,000 per day until its completion (*id.*, ¶ 4). On June 1, 2009, plaintiff and the DEP agreed upon an acceleration

[1]Despite the requirement that the moving party annex a Commercial Division Rule 19-a Statement to the notice of motion, only non-movant plaintiff, T. Moriarty & Son, Inc., submitted a Statement of Material Facts (SMF).

change order (Change Order 9) in the amount of $1,762,310.07. Plaintiff agreed to commence the acceleration work immediately as directed by the DEP (*id.*, ¶ 8). On August 24, 2009, plaintiff executed a "Time Extension Request," containing a standard form waiver and release of claims language derived from Article 13.8 of the Contract (*id.*, ¶ 13 and Peabody Aff., Ex C-1). The DEP issued "Time Extension No. 2" on September 11, 2009, which extended the substantial completion date to June 30, 2010, and covered the same work included in Change Order 9 (*id.*, ¶ 14).

On December 10, 2009, the DEP notified plaintiff that its "Audit-ACCO Office" (Audit Office) was making reductions to the agreed upon price, thereby revising Change Order 9 to a total of $1,027,565.00 (*id.*, ¶ 15). The reduction was achieved by reducing (1) the approved "acceleration costs" (consisting of additional supervision and safety work, and additional weekend and double shift work) by $174,268.81 and (2) the approved "time extension costs" by $555,116.25 (*id.*, ¶ 16). Plaintiff signed the revised change order under protest and reserved its rights to seek recovery of the costs eliminated by the Audit Office (*id.*, ¶ 17).

On January 7, 2010, plaintiff submitted a notice of dispute to the Office of the DEP Commissioner concerning the Audit Office's reduction of Change Order 9 from $1,762,310.07 to $1,027,565.00 (*id.*, ¶ 18). The Commissioner's Office denied the claim on July 30, 2010, reasoning that "additional costs incurred due to an extended contract time period are not appropriate for a Change Order" (*id.*, ¶ 19). The Audit Office approved the amount of $235,608.75 in "extended contract time" costs pursuant to the reduced change order that was eventually registered by the Comptroller's Office on February 29, 2010 (*id.*, ¶ 20).

Plaintiff also reserved its right to seek delay damages in connection with Time Extensions Number 3 and 4 (*id.*, ¶ 22). As to these Time Extensions, the parties agreed that, in consideration of the DEP granting these time extensions, plaintiff would waive all claims except damages for delay arising from issues such as design changes and change orders (*id.*, ¶¶ 24 and 25).

Plaintiff commenced this action stating that, on August 25, 2010, and November 19, 2012, it filed and served two notices of claim with the City Comptroller's Office and that the City refused to make an adjustment in the amount set forth in the notices of claim (Complaint, ¶ 5). The first three causes of action in the complaint are for breach of contract. The fourth seeks liquidated damages. This motion pertains to the second and third only.

The second cause of action is based on Change Order 9 (*id.*, ¶ 13). It alleges that plaintiff and the DEP agreed upon an acceleration Change Order in the amount of $1,762,310.07 on June 1, 2009; that plaintiff agreed to commence the acceleration work immediately as directed by the DEP (*id.*, ¶ 14); that while awaiting final processing of this Change Order, plaintiff continued to accelerate the project as directed by the DEP (*id.*, ¶ 16); that in reliance on assurances from the DEP that processing the agreed-upon Change Order was a mere formality, plaintiff continued to perform the work on an accelerated basis (*id.*, ¶ 18); and that when the DEP presented plaintiff with the reduced change Order 9 in December 2009, plaintiff signed the Change Order under protest and reserved its rights to seek recovery of the costs which the Audit Office had eliminated. Plaintiff seeks to recover these costs in an amount not less than $734,745.07 (*id.*, ¶ 21).

The third cause of action, also for breach of contract, alleges that, as a direct result of delays beyond its control, plaintiff was unable to achieve substantial completion of the Contract until December 28, 2010, or final completion until February 28, 2011 (a total of 1,125 calendar days for substantial completion and 1,187 calendar days for final completion) (*id.*, ¶ 25). These delays caused the Project work to be unreasonably extended and disrupted and prevented performance of the work which plaintiff reasonably anticipated could and would be performed (*id.*, ¶ 26). Plaintiff claims that neither DEP's acts nor its omissions which caused the delays were reasonably foreseeable by plaintiff at the time that it entered into the Contract, and these actions breached the DEP's fundamental obligations (*id.*, ¶ 27). Thus, the DEP breached the Contract and caused damages to plaintiff in an amount of at least $642,810.02 (*id.*, ¶ 28).

The City's answer contains one counterclaim based on the fact that the City, acting through the DEP, entered into the Contract and that Article 15 of the Contract and Schedule "A" of the General Conditions of the Contract provide for the assessment of $3,000 in liquidated damages for each consecutive calendar day beyond the time scheduled for completion of the work. The City claims plaintiff failed to complete the Contract within the agreed-upon period and is liable to the City for liquidated damages in an amount to be determined at trial.

On this motion to dismiss the second and third causes of action, the City argues that plaintiff's claims for delays, inefficiencies, and impact costs are barred by the "no-damage-for-delay" clause in Article 13 of the Contract. The City also argues that plaintiff submitted a time extension

request on August 24, 2009, agreeing to waive all claims it may have against the City for damages for delay and for any cause whatsoever and that plaintiff failed to reserve any claims from this waiver pursuant to Article 13 of the Contract. Therefore, to the extent that any of plaintiff's claims for delay damages arose out of events that preceded the August 24, 2009 extension request, or to the extent that it incurred any damages due to delays at that point, those claims are waived.

In opposition, plaintiff argues that: (1) the City's contention that the no-damage-for-delay clause bars its claims is belied by the terms of the Contract; (2) an issue of fact exists as to whether the City waived that clause; (3) the City cannot avail itself of the clause because of its bad faith conduct; (4) an issue of fact exists as to whether the delays caused by the DEP were contemplated at the time of contract; and (5) the City's contention that plaintiff waived its delay damages in connection with its August 24, 2009, time extension request is evidence of its bad faith dealing.

Plaintiff also argues that Article 11 of the Contract contains a provision outlining the proper procedure for plaintiff to follow to preserve its claim for damages from delay, indicating that the parties contemplated plaintiff seeking such damages despite the no-damage-for-delay clause in Article 13 of the Contract. Plaintiff contends the conflict between the two sections creates an ambiguity in the Contract and permits the court to consider extrinsic evidence.

For the reasons discussed below, the City's motion for summary judgment is granted to the extent of dismissing the third cause of action only.

Discussion

A. Second cause of action

The second cause of action alleges that, in June 2009, plaintiff and the DEP agreed upon an acceleration Change Order 9 in the amount of $1,762,310.07 and plaintiff agreed to commence acceleration work immediately, as directed by the DEP (Complaint, ¶ 14). In December 2009, the DEP reduced the payment amount due to $1,027,565. These facts are undisputed. Plaintiff claims entitlement to the difference of $734,745.07 plus interest (*id.*, ¶ 21).

The City argues that the second cause of action is barred by Article 13 of the Contract. Article 13.10 of the Contract, entitled "No Damage for Delay," states in pertinent part:

> "The Contractor agrees to make no claim for damages for delay in the performance of this Contract occasioned by any act or omission to act of the City or any of its representatives, and agrees that all it may be entitled to on account of any such delay is an extension of time to complete performance of the Work as provided herein"

(affirmation of Barbara Peabody, Esq., exhibit J at 16). The City claims that, based on this provision, plaintiff agreed it would not seek damages for delays for any act or omission of the City.

> "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]). The object of the clause is, in part, the "avoidance of vexatious litigation as to whether delays are reasonable or unreasonable or, for that matter, real or fancied" (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384 [1983]). There are exceptions. Even with the presence a no-damage-for-delay clause,

> "damages may be recovered for: (1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated 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*, 67 NY2d at 309). Plaintiff has a "heavy burden," however, of establishing an exception to the enforceability of the clause (*LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91AD3d 485, 485 [1st Dept 2012]; *Dart Mech. Corp. v City of New York*, 68 AD3d 664, 664 [1st Dept 2009]).

The City argues at great length that the no-damage-for-delay clause applies to plaintiff's claim, and that the four exceptions do not. Specifically, the City maintains the delays were not "uncontemplated" because they were due to circumstances mentioned in the Contract and arise from plaintiff's work during performance (citing *Corinno Civetta*, 61 NY2d at 310). The City also states that the allegations of delay by DEP amount to nothing more than a claim of "inept administration" which is insufficient to overcome the no-damage-for-delay clause (*see S.N. Tannor, Inc. v A.F.C. Enters.*, 276 AD2d 363, 364 [1st Dept 2000]).

The City contends there is no evidence the DEP acted with indifference to the need for the work to progress or otherwise acted intentionally to prevent plaintiff from progressing. It avers that the parties contemplated delays resulting from changes, including delays in responding to changed conditions and issuing change orders, because they are endemic to construction and are foreseeable, even when they appear to be unreasonable. Further, it contends there is no evidence to suggest DEP had any intention of ever abandoning the Project.

The City also argues that plaintiff does not allege the DEP acted in bad faith in managing the Project. Therefore, there is no credible evidence of willful conduct or conduct so grossly negligent as to constitute a predicate for a delay damage claim in the face of the broad exculpatory clause in the Contract.

Additionally, the City points to the terms of the August 24, 2009 "Extension of Contract Time" request, claiming that plaintiff waived any damages it may have incurred when it signed that request. The request provides, in relevant part:

> "In consideration of the granting, for the purpose of expediting payment by the Board of Extension of Contract Time, of an extension of contract time fixed in Contract Registration No. CTC82620080019042 for completion of work therein specified, we agree to and hereby waive and release any and all claims including, but not limited to, damages for delay or any other cause whatsoever which we may have against the City of New York in connection with the aforesaid contract"

(Peabody affirmation, exhibit C-1).

The City's reliance on the no-damage-for-delay clause is unavailing. The argument fails to address the essence of the claim in the second cause of action, namely that the parties agreed that plaintiff would receive extra compensation pursuant to Change Order 9, the remaining issue being the amount, if any, due plaintiff based on the parties' agreement. The no-damage-for-delay clause is a contractual term. Plaintiff's claim is also based on an agreement, the alleged terms of which it supports with evidence sufficient to create an issue of fact, as discussed below. As for the waiver dated August 24, 2009, plaintiff is not alleging it is owed any amount which accrued prior to that date.

The second cause of action challenges the November 2009 reduction that the DEP imposed on the previously agreed-upon amount of $1,762,310.07. The City concedes that the Consent Order was not contemplated by the Contract. DEP accelerated the work in its efforts to complete the Project by the Consent Order deadline. Although the Consent Order did not cause the delays, it supports plaintiff's contention of the uncontemplated urgency of the deadline and the need for accelerated work discussed in Change Order 9. Further, because the claim is based on the acceleration agreement underlying Change Order 9, the no-damage-for-delay clause is not dispositive. DEP's issuance of Change Order 9 demonstrates the parties' intent that plaintiff be paid delay damages. There are material issues as to the amount, if any, of the City's liability (*see Bovis*

Lend Lease LMB v GCT Venture, 6 AD3d 228, 229 [1st Dept 2004] ["triable issues of fact were raised as to whether the delays went beyond the contemplation of the contracting parties"]).

According to Anthony Abbene, the senior project manager for plaintiff, plaintiff learned in discovery that the DEP had misled it into believing that registration of the agreed-upon Change Order 9 was a mere formality, when the DEP already knew that it was not. Although this assertion is controverted, it is supported with specific details and raises a material factual issue. As "is true of contracts generally, implicit in the [no-damage-for-delay] provision is 'the obligation of fair dealing'" (*Plato Gen. Constr. Corp./EMCO Tech Constr. Corp., JV, LLC v Dormitory Auth. of State of N.Y.*, 89 AD3d 819, 823 [2d Dept 2011], *lv denied* 19 NY3d 803 [2012]; *see also Kalisch-Jarcho*, 58 NY2d at 385).

Abbene states that, at a project meeting held on October 16, 2008, the DEP advised plaintiff that it typically took the City's Comptroller's Office six months to register a negotiated change order (Abbene aff, ¶ 13). The DEP standard change order form provided that "[a]ll work begun before Contract Change is registered by the Comptroller's Office is done at the Contractor's own risk" (*id.*, ¶ 14; Abbene aff, exhibit 3). Waiting for registration would cause the City to miss the Consent Order deadline, but requiring plaintiff to proceed immediately put it at risk in the absence of a registered change order (*id.*).

In 2008, plaintiff had refused to proceed with any change order work issued by the DEP prior to issuance of a registered change order from the Comptroller's Office (*id.*, ¶ 15). As a result, the Project schedule began to incur substantial delays (*id.*). Plaintiff's construction manager, Arcadis, attributed the slippage of 311 calendar days to the DEP's issuance of Change Order 1, and to plaintiff's election not to perform the change-related work until registration of the change order (*id.*, ¶ 18).

Mr. Abbene states further that, realizing the standard six month wait to obtain a registered change order from the Comptroller's Office would ultimately render it impossible for the DEP to meet the Consent Order deadline, the DEP implored plaintiff to proceed with all change order work prior to registration and agreed that, once a change order was negotiated and a price agreed to with the DEP, it would constitute a valid and binding agreement between the parties (*id.*, ¶ 19).

Mr. Abbene avers that, in a good faith effort to assist the DEP in avoiding severe penalties

for failing to complete the Project by the Consent Order deadline, plaintiff agreed to proceed with change order work pursuant to the parties' understanding, (*id.*, ¶ 20). Plaintiff implemented Change Order 1 prior to registration and had recovered 100 calendar days by February 2009 (*id.*, ¶ 20; Abbene aff, exhibit 4, Update # 7 at 11). At a Project meeting held on April 2, 2009, the parties' understanding as to the performance of change order work prior to registration was confirmed (*id.*, ¶ 22; Abbene aff, exhibit 5 at 2). Allegedly, delays continued to plague the Project, forcing the DEP to take further drastic measures, including compensating plaintiff to accelerate the work with additional crews, supervision, and extended operations. By April 2009, plaintiff's Project schedule showed a revised completion date of September 2010 – well beyond the Consent Order deadline, creating an emergency situation for DEP (*id.*, ¶¶ 23-24).

According to Mr. Abbene, at a May 11, 2009 meeting, the DEP directed plaintiff to submit a change order proposal to accelerate the project schedule in order to meet the Consent Order deadline, and to cover the cost of adding the needed additional shifts, labor, and supervision to achieve a revised substantial completion date of April 30, 2010 (*id.*, ¶ 28). The parties agreed on an acceleration change order in the amount of $1,762,310.07, and plaintiff agreed to commence the work immediately, as directed by the DEP (*id.*, ¶ 31; Abbene aff, exhibit 10). On July 31, 2009, the DEP forwarded Change Order 9 to plaintiff for acceleration, and between June and October 2009 plaintiff accelerated the Project accordingly and with the DEP's continued assurances that it had been approved (*id.*, ¶ 34; Abbene aff, exhibit 12).

Allegedly, at no time in response to plaintiff's inquiries did the DEP advise that registration of the negotiated change order would not be forthcoming (*id.*, ¶ 38). Only after plaintiff had accelerated the work for five months did the DEP notify plaintiff of the price reduction (*id.*, ¶ 40). Plaintiff signed the reduced change order under protest and reserved its rights to seek recovery of the costs which had now been eliminated by the Audit Office (*id.*, ¶ 43; Abbene aff, exhibit 16).

Plaintiff contends that the items the Audit Office eliminated – additional project management and supervisory costs – were critical to plaintiff's ability to accelerate the Project in a prompt, efficient, and safe manner. But for the DEP's acceleration directive, plaintiff would not have been forced to incur significant extra costs to properly manage and supervise the work (*id.*, ¶ 75). As an incentive to convince plaintiff to perform change order work, it was understood that once the parties agreed upon a price for a change order, it was binding, and registration would be a mere formality

(*id.*, ¶ 77). Moreover, the Audit Office had approved some "time extension costs" in the amount of $235,608.75 (*id.*, ¶ 80). According to Abbene, plaintiff agreed to the release language in Time Extension No. 2 because it believed that an agreement as to Change Order 9 had been reached on June 1, 2009, and there were no claims it wanted to reserve (*id.*, ¶ 90).

Although the City did not file a Rule 19-A Statement, Frank Kulcsar, "Section Chief" in DEP's Bureau of Waste Water Treatment, Division of Facilities Analysis and Planning, submitted an affidavit in support of the City's motion for partial summary judgment presenting its version of the facts. As the DEP's Project Manager, Mr. Kulcsar oversaw the DEP's independent Project consultants, MWH, Inc. (design engineer) and Arcadis (construction manager). Plaintiff was the general contractor.

Mr. Kulcsar explains the Project was designed to increase wet-weather flow to water pollution control plants. Some components were required under the Consent Order to allow for real-time monitoring and remote control of sewer gates for more effective early warnings of regulator malfunction or capacity reduction; others were required to optimize the collections system and to focus staffing resources. The work included fabrication, installation, and testing of all programmable logic controller hardware and programmable software in accordance with the Contract documents (Kulcsar aff, ¶ 3).

Mr. Kulcsar states that plaintiff commenced work on November 30, 2007, and achieved substantial completion on December 28, 2010. Plaintiff applied for and received three extensions of time from the City, which extended the Contract's completion date from the original date of April 13, 2009 to December 28, 2010 (*id.*, ¶ 4; Peabody affirmation, exhibit C, C-1). Mr. Kulcsar does not dispute that DEP agreed to the terms of Change Order 9, including its $1,762,310.07 price tag, and directed plaintiff to proceed with the work prior to registration by the Comptroller. He merely asserts that the no-damage-for-delay clause bars the current claim (*id.*, ¶6).

At the completion of the Project, DEP's consultants MWH and Arcadis were required to prepare a delay analysis in connection with plaintiff's request for a final time extension. The delay analysis was based on the "Critical Path Method" schedule provided by plaintiff. It identified 14 separate delays on the Project totaling 686 days and it assigned responsibility for 119 of those days to plaintiff (*id.*, ¶ 5).

On September 28, 2012, plaintiff transmitted its "Final Extension of Time with Bill of Particulars," three claims, and a "Final Delay Analysis," taking issue with the DEP's determination that plaintiff was responsible for 119 days of delay and its assessment of liquidated damages for these days. In contrast to the DEP's delay analysis, plaintiff's analysis identifies six items that "significantly impacted and delayed the project," consisting of five changes to the work and the need for additional supervision. Mr. Kulcsar avers that plaintiff's primary grievance is the delay between identification of a change and the issuance of a change order. Mr. Kulcsar contends that, even if plaintiff's version of the events is accepted as true, claims for damages for delays are barred by the Contract's no-damage-for-delay clause and plaintiff's description of the delays does not present any reason why that provision should not be enforced according to its terms (*id.*, ¶ 6).

The City challenges plaintiff's assertion of delay. Plaintiff is claiming a delay of 238 days between April 12, 2008, and December 8, 2009. However, as asserted by the City (and discussed above), plaintiff waived its claims for damages for delay occurring on or before August 24, 2009, the date of plaintiff's "Request for Partial Extension of Time No. 2." Therefore, no more than 106 days of delay from August 24, 2009 until December 8, 2009, can be considered in plaintiff's delay analysis from Change Order 4 (*id.*, ¶ 8). Also, the City contends, no more than 74 days of delay, from August 24, 2009 through November 8, 2009 can be considered in plaintiff's delay analysis resulting from Change Order 7 (*id.*, ¶ 9). The delay from Change Order 15 amounts to no more than 120 days of delay, and Change Order 14 amounts to no more than 70 days. Therefore, the total delay associated with Change Orders 14 and 15 is 190 days, at most (*id.*, ¶ 12).

The City also disputes plaintiff's claim for additional staffing costs from December 28, 2010, the date of substantial completion, until July 26, 2011. Plaintiff claims that, due to delays in closing out the Project, plaintiff was required to provide staff to attend DEP meetings, conference calls and correspondence. The City argues that claims for delays in the performance of the work after substantial completion cannot be maintained.

The City's factual assertions in support of its motion, largely based on Mr. Kulcsar's affidavit, demonstrate the existence of factual issues. Moreover, as discussed above, they do not support the City's essential argument that the no-damage-for-delay clause is dispositive of the second cause of action.

In its reply memorandum, the City opposes the claim "for additional supervision costs on the grounds that plaintiff failed to prove that it incurred such costs" (Reply at 5). It contends that the DEP disallowed plaintiff's costs of $734,645 for additional superintendence because the overhead allowance provided by Article 26.2.9 of the Contract includes costs for management superintendence, which encompasses the additional superintendence costs that plaintiff sought. The City argues plaintiff failed to demonstrate it actually incurred any supervision costs not reimbursed through Article 26's overhead allowance. It argues plaintiff also failed to adduce any proof of increased home office overhead or of additional supervision related to the acceleration. It asserts plaintiff has failed to raise a triable issue of fact with respect to DEP's denial of plaintiff's alleged additional supervision costs or that the percentage markup provided by Article 26.2.9 of the Contract was inadequate to cover such costs.

The argument challenging entitlement to compensation for supervisory work (encompassed in Change Order 9) is raised for the first time in reply, and will not be considered. In its original moving papers, the City relied solely on the no-damage-for-delay clause. The City also argues it would have been unreasonable for plaintiff to rely on an assurance that the Change Order 9 was a certainty and registration a mere formality. Allegedly, plaintiff is an experienced contractor and was aware it was not obligated to proceed without a registered change order. As discussed above, plaintiff has submitted sufficient evidence to support its assertion that the DEP encouraged it to accelerate its work prior to registration of the change orders. The conflicting assertions raise issues of credibility not appropriate for resolution on a summary judgment motion (*see Rosenthal v Quadriga Art, Inc.*, 105 AD3d 507, 508 [1st Dept 2013]).

B. Third cause of action

Plaintiff alleges that because of delays beyond its control, including the DEP's: (1) issuance of excessive change orders, (2) errors or omissions in the original plans and specifications, (3) differing site conditions that were not known or reasonably ascertainable, (4) failure to provide timely access to the work site, (5) failure to properly supervise and administer the Contract, (6) failure to take reasonable measures to coordinate and progress the work, (7) failure to review or issue change orders in a timely manner, and (8) failure to timely review or approve shop drawings, plaintiff was unable to achieve substantial completion of the Contract until December 28, 2010, and

final completion until February 28, 2011 (*id.*, ¶ 25).

Allegedly, these delays caused the Contract work to be unreasonably extended and disrupted, and prevented completion of the work during the period in which plaintiff reasonably anticipated the work could and would be performed (*id.*, ¶ 26). Plaintiff argues that neither the acts nor omissions of the DEP were reasonably foreseeable to plaintiff at the time it entered into the Contract, and that they constituted a breach of the DEP's fundamental obligations (*id.*, ¶ 27). Thus, the DEP breached the Contract and caused damages to plaintiff in an amount not less than $642,810.02 (*id.*, ¶ 28).

The City seeks summary judgment on this claim based, again, upon the no-damage-for-delay clause in the Contract, asserting that the delays were contemplated by the Contract. Plaintiff responds that the City waived the clause by issuing and approving Time Extensions No 3 and 4 (*see* exhibits 29 and 31).

Plaintiff's opposition to the motion as to the third cause of action is unsupported. Plaintiff provides no authority for the premise that allowing a party to include language reserving rights to a claim constitutes an acknowledgment of the validity of the claim, or a waiver to defenses against it. Plaintiff appears to rely on the argument that these delays "were so unreasonable as to constitute an abandonment of the Project."

The term of the Project, originally 500 days, was extended by 730 calendar days. Plaintiff claims this creates an issue of fact as to whether the delay was reasonable or constituted an abandonment. Plaintiff does not make any assertions about what happened during that period, or why there were delays, but relies only on the number of days involved. To be sure, the "length of the delay is relevant to the issue of whether an exception to the general rule enforcing 'no damages for delay' clauses applies" (*LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d at 486). The length of the delay, however, "does not transform a delay caused by an event specifically contemplated by the 'no damages for delay' clause into something uncontemplated" (*id.*). Extended delay, alone, is insufficient (*Blau Mech. Corp. v City of New York,* 158 AD2d 373, 374 [1st Dept 1990] [709-day delay on a 730-day project did not avoid the no-damage-for-delay clause]; *Buckley & Co. v City of New York*, 121 AD2d 933, 934 [1st Dept 1986] [two-year project took 10 years, but did not avoid the no-damage-for-delay clause because the parties were aware that subsurface conditions might delay the project's completion]).

Abax Inc. v New York City Hous. Auth. (282 AD2d 372, 373 [1st Dept 2001]), cited by plaintiff, is distinguishable because the extended time there included "a substantial period during which [the Contract Manager] suspended work." There is no indication here that work was suspended on the Project, or that there was any abandonment, as demonstrated by Change Order 9, in which the City sought to accelerate the delayed work schedule, and for which plaintiff's compensation thereunder remains a viable issue in this action. The Contract contemplated setbacks and changes in the Project.

Accordingly, it is

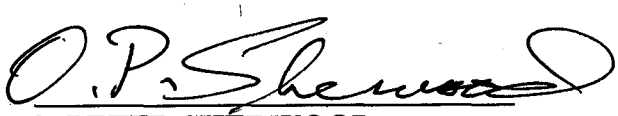
ORDERED that the motion is granted to the extent of dismissing the third cause of action and is otherwise denied; and it is further

ORDERED that the status conference scheduled for August 16, 2016 is hereby converted to a pre-trial conference.

This constitutes the decision and order of the court.

DATED: August 11, 2016

E N T E R,



O. PETER SHERWOOD
J.S.C.