

**WDF Inc. v Trustees of Columbia Univ. in the City of
N.Y.**

2016 NY Slip Op 33062(U)

November 10, 2016

Supreme Court, New York County

Docket Number: 651250/16

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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WDF INC.,

Plaintiff,

Index No. 651250/16

-against-

THE TRUSTEES OF COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK, and LEND LEASE (US)
CONSTRUCTION LMB, INC., formerly known as
BOVIS LEND LEASE LMB, INC.,

Mot. Seq. Nos. 001
and 002

Defendants.
-----X

OSTRAGER, J.:

Before the Court are pre-answer motions to dismiss this action in whole or in part by defendants The Trustees of Columbia University in the City of New York ("Columbia") and Lend Lease (US) Construction LMB, Inc., formerly known as Bovis Lend Lease LMB, Inc. ("Lend Lease"). The action relates to a major construction project known as the Manhattanville Development Project ("the Project") located on Columbia's property in West Harlem for which Lend Lease was the construction manager and plaintiff WDF Inc. ("WDF") was one of the subcontractors. The Project is the subject of a lengthy opinion by Justice Shirley Kornreich in a case commenced by a different subcontractor entitled "*E.E. Cruz/Nicholson Joint Venture, LLC v Lend Lease (US) Construction LMB, Inc., et al.*," 2016 WL 427619 (Sup. Ct., NY Co., February 4, 2016). For the reasons stated below, the motions are granted in part and denied in part.

The underlying facts are distilled from the voluminous documentary evidence adduced by the parties and affidavits from individuals with personal knowledge submitted on behalf of each party: Michael Wolfe, the Senior Project Manager for WDF; Michael Fletcher, Assistant Vice President – Business and Financial Services for the Manhattanville Development for Columbia; and Steven Sommer, the Senior Vice President and a Principal-in-Charge of Lend Lease.

On or about October 15, 2010, Lend Lease entered into a lengthy contract with Columbia pursuant to which Lend Lease agreed to provide certain construction management services to Columbia in connection with the Project ("the Construction Manager Agreement," Sommer Aff, Exh A). In connection with the Project's Mind Brain Building, Lend Lease engaged WDF pursuant to a written subcontract dated February 25, 2013 for the completion of work relating to the heating, ventilation and air conditioning ("HVAC") systems for the Project ("the Subcontract," Exh B). In addition to the 37-page agreement, the Subcontract included various riders and exhibits totaling hundreds of pages, as well as a detailed Scope of Work of nearly 40 pages (Exh C).

Article 18 of the Subcontract, entitled "Assignment and Subcontracting," provides that: "Contractor ... may assign this Subcontract at any time without the consent of Subcontractor, or Subcontractor's payment and performance sureties or guarantors, if any." Pursuant to that provision, on or about August 27, 2015, Lend Lease and Columbia entered into an Assignment and Assumption Agreement, whereby Lend Lease assigned the WDF Subcontract to Columbia, and Columbia accepted the assignment (Exh E). The Assignment/Assumption Agreement, which related to WDF and various other subcontractors, provides in relevant part (with emphasis added) that:

By executing this Agreement, and as of the Effective Date, Assignee [Columbia] agrees to assume all of the obligations of the Assignor [Lend Lease] to the Subcontractors under the respective Subcontracts as if it was originally a party thereto and Assignor shall have no obligations whatsoever to the Subcontractors under the Subcontracts, provided, however, that Assignor will hold and administer the Subcontracts solely as agent for Assignee as further provided in the Construction Manager Agreement between Assignee and Assignor dated July 1, 2013. Notwithstanding that Assignor will hold and administer the Subcontracts as agent for Assignee, the privity of contract shall exist solely between Assignee and Subcontractors.

With respect to the Lend Lease motion, the "Effective Date" of the Assignment, as expressly indicated at the top of the Agreement, is July 1, 2013, about two years **before** the Assignment was made but five months **after** the Subcontract was signed. However, despite its reliance on the Assignment as a basis for its dismissal request, the movant Lend Lease has not supplied an executed copy of the Assignment Agreement. Nor has Lend Lease provided a copy of the referenced Construction Manager Agreement dated July 1, 2013; as indicated earlier, the Construction Manager Agreement attached to the moving papers is dated October 15, 2010. Perhaps the discrepancy can be explained as a typographical error. In any event, WDF in its opposition acknowledges receipt of notice of the Assignment via a letter dated August 27, 2015 from Mr. Sommer on behalf of Lend Lease (Exh 3 to Sommer Aff).

About six months later, on March 10, 2016, WDF commenced this action against Columbia and Lend Lease asserting five causes of action all directed at "Defendants." In the First Cause of Action, WDF seeks to recover \$1,686,521.80, consisting of \$1,436,248.84 WDF claims was wrongfully withheld for retainage plus \$250,272.96 for the Subcontract balance. In the Second Cause of Action, WDF seeks \$600,750.00 for extra work defendants directed them to complete but for which no Change Order was issued (the "Extra Work"). In the Third Cause of Action, WDF seeks to recover at least \$7,255,919.00 for damages incurred due to delays and other alleged breaches of contract by defendants. In the Fourth Cause of Action, WDF seeks an unspecified amount due to defendants' failure to issue a base line critical path method ("CPM") schedule and updates and/or properly manage and coordinate the work. In the Fifth Cause of Action, WDF seeks interest in an unspecified amount based on defendants' failure to timely pay the subcontractor's bills.

The Lend Lease Motion

Lend Lease has moved pursuant to CPLR §3211(a)(7) to dismiss all the claims against it based on lack of privity. In the alternative, Lend Lease seeks to dismiss the Second, Third and Fourth Causes of Action pursuant to CPLR §3211(a)(1) based on certain provisions in the Subcontract and for a declaration that any remaining claims are barred by the terms of the Subcontract. On the privity issue, both sides devoted substantial sections of their briefs to the issue whether the Assignment/Assumption Agreement quoted above constituted a novation. However, at the oral argument on September 19, 2016, counsel for WDF stipulated that "Lend Lease has no obligations post July 1, 2013, and the only issue for [the Court] to decide is what obligations if any Lend Lease has from February 25, 2013 to July 1, 2013" when the Assignment became effective (NYSCEF Doc. No. 51, p 4, l 20-24).

But for the addition of the words "as of the Effective Date," the Court would likely find that the Assignment/Assumption Agreement releases Lend Lease from any and all liability for the period from February 25, 2013, when its Subcontract with WDF took effect, through July 1, 2013, defined as the Effective Date of the Assignment. But as indicated above, the Assignment directly references and relies on certain provisions in a Construction Manager Agreement dated July 1, 2013 to define the continued obligations of Lend Lease, but no such document has been submitted to the Court. Further, and significantly, by making the Assignment effective five months after the commencement date of the Subcontract, the parties to the Assignment could have intended to carve out a period of time when Lend Lease would retain liability, but any such intent cannot be determined one way or the other based on the record presently before the Court.

In addition, the sentence in the Assignment that “privity of contract shall exist solely between Assignee [Columbia] and Subcontractors” can be read to be prospective from the Effective Date of the Assignment, and not retroactive to the effective date of the Subcontract. Such a reading is consistent with the notice of the Assignment sent by Lend Lease to WDF. That notice, included in the August 27, 2015 letter to Sommer, reiterates the July 1, 2013 Effective Date of the Assignment (Exh 3, Sommer Aff).

For these reasons, the Court grants the motion by Lend Lease to dismiss claims against it effective July 1, 2013 based on a lack of privity, but otherwise denies dismissal on that ground for the period from February 1, 2013 through July 1, 2013. As to the period prior to July 1, 2013, Lend Lease has additional arguments that overlap in substantial part with those made by Columbia. Therefore, the remaining grounds for dismissal will be evaluated in that context.

The Columbia Motion

Like Lend Lease, Columbia has moved to dismiss the Second, Third and Fourth Causes of Action pursuant to CPLR §3211(a), subd. (1) and (7), based on documentary evidence and failure to state a cause of action, and for a declaration barring any remaining claims by WDF as precluded by the Subcontract. Specifically, defendants assert that the claims by WDF are barred by the express terms of various provisions in the Subcontract between WDF and Lend Lease.¹

¹ Defendants also seek dismissal of the Second Cause of Action on the ground that it sounds in *quantum meruit* and cannot lie because the Subcontract addresses the same subject matter as the *quantum meruit* claim. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382,387 (1987). WDF argues that the claim is, in fact, a breach of contract claim governed by Article 39 of the Subcontract, which expressly recognizes the concept of “Extra Work” and provides a procedure to resolve “any dispute as to whether any work item ... constitutes Extra Work ...” Although WDF has not cited Article 39 in its pleadings, as set forth below, the Court is treating the Extra Work claim as governed by Article 39 of the Subcontract.

As previously indicated, the dispute in this case arises from the same Project that was the subject of an opinion by Justice Shirley Kornreich entitled "*E.E. Cruz/Nicholson Joint Venture, LLC v Lend Lease (US) Construction LMB, Inc., et al.*" Although the plaintiff there was a different subcontractor, the causes of action asserted and the relevant provisions of the subcontract analyzed by Justice Kornreich are similar to some of the claims and provisions in the Lend Lease/WDF Subcontract at issue in this case. And the controlling case both here and in the *E.E. Cruz* case is *Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297 (1986).

The Court of Appeals in *Corinno* analyzed the validity of contract clauses barring a contractor from recovering damages for delay in the performance of a contract. The Court of Appeals discussed at length the exceptions to the strict application of "no damages for delay" clauses in construction contracts, concluding that such clauses prevent recovery of damages resulting from a broad range of reasonable and unreasonable conduct by the contractee if the conduct was or could have been contemplated by the parties when the parties entered into the contract.

The Court in *Corinno* reaffirmed its prior decision in *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 (1983), relating to damages reasonably foreseeable by the parties but held that such clauses are not enforceable to excuse or prevent the recovery of damages resulting from the contractee's grossly negligent or willful conduct. 67 NY2d at 305. The *Corinno* Court also reaffirmed the rule regarding delays **uncontemplated** by the parties; namely, that "damages resulting from uncontemplated delays caused by the contractee may be recovered despite the existence of a broad exculpatory clause relieving the contractee from liability." 67 NY2d at 306.

In *Corinno*, the Court of Appeals articulated the various exceptions to the general rule that 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 ...” *Id.* at 309. Those exceptions permit the recovery of damages, even in the face of a “no damages for delay” clause, for: (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.” *Id.* As noted by Justice Kornreich in *E.E. Cruz*, these exceptions are “strictly construed.” See also, *Bovis Lend Lease, Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 147 (1st Dep’t 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”).

The primary clause cited by Columbia and Lend Lease here, Article 12 of the Subcontract, contains a broad waiver of damages claims relating to delays and expressly limits the remedies of WDF to extensions of time as follows (with emphasis added):

All extensions of time shall be in lieu of and in liquidation of any claims for compensation of damages against the Contractor or Owner. The granting of an extension of time shall be without prejudice to any other rights of the Contractor [Lend Lease] under this [Contract]. Notwithstanding anything to the contrary in the Contract Documents, [WDF] expressly agrees not to make, and hereby waives any claim for damages, including without limitation those resulting from increased labor

or material costs, on account of any hindrances, obstruction or delays from any cause whatsoever, including without limitation, ordering changes, correction, 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 [Contract] and whether the delays are the fault of the Contractor, Owner, Architect, separate subcontractors or otherwise. ***The parties agree that an extension of time, to the extent justified pursuant to this Article, shall be the sole remedy of [WDF] for, and [WDF] waives its right to any claim for damages*** to the extent arising from, any (i) delay in the commencement, prosecution or completion of the Work, (ii) interferences caused by delay, (iii) cumulative impact, (iv) hindrance or obstruction in the performance of the Work, (v) loss of productivity, or (vi) other similar claims.

Columbia argues that this language in Article 12 bars the Second Cause of Action pursuant to which WDF seeks monetary damages primarily for increased labor and material costs incurred for Extra Work performed at defendants' direction for which no Change Order was issued ("Extra Work"). The claim is further barred, Columbia asserts, by Article 39, which specifically contemplates Extra Work and sets forth a procedure to be followed:

In the event of any dispute as to whether any work item is within the scope of Work to be performed by [WDF] or as to whether any such work constitutes Extra Work ... [WDF] shall submit such claims ... in writing to Contractor ... within **five (5) days** of the occurrence of the event which led to the claim or protest ... Unless such a written claim is submitted to Contractor in accordance with this Article, [WDF] will have waived its rights to any and all claims for Extra Work, damages and/or extensions of time. ... ***Failure to comply strictly with these requirements shall constitute waiver of any claim for extra compensation or damages on account of the performance of such work***

(words in bold only are emphasized in the original, but those in bold and italics are with emphasis added).

But for WDF's claim in the Second Cause of Action (§ 39) for damages based on "lost time for the November 19, 2014 stop work order issued by the New York City

Department of Buildings due to no fault of plaintiff,” the Extra Work claims is not tied to delays and therefore is not barred absolutely by the Article 12 waiver. However, regardless of whether the increased costs for Extra Work were caused by delays, defendants properly assert that plaintiff must still comply with the notice provisions in Article 39 of the Subcontract for Extra Work, which are strictly enforceable and treated as a condition precedent to recovery. See *F. Garofalo Electric Co., Inc. v New York University*, 270 AD2d 76 (1st Dep’t 2000). Columbia asserts that WDF has failed to plead compliance with the notice provisions and that documentation proves the required notice was not given, resulting in a waiver under Article 39. The documentation relied upon consists of the “first” notice of claim by WDF, dated October 10, 2014, and a more extensive one dated January 12, 2015 (Fletcher Aff, ¶¶15-16, Exhs D and E).

Referring to the notice provision as a condition precedent to a suit for Extra Work, WDF cites CPLR § 3015(a) for the principle that the “performance or occurrence of a condition precedent in a contract need not be pleaded” with particularity and argues that compliance with the notice provisions has been sufficiently alleged in the Complaint at ¶¶13 and 14. This Court agrees. However, more questionable is WDF’s position that the letters proffered by Columbia do not constitute “documentary evidence” which the Court may consider on a pre-answer motion to dismiss. (Wolfe Aff at ¶16, Memorandum of Law at p 20).

This Court finds that the letters do qualify as documentary evidence within the meaning of CPLR §3211(a)(1). However, standing alone, the letters neither “utterly refute” the plaintiff’s allegations of notice nor establish a defense as a matter of law. *Goshen v Mut. Life. Ins. Co.*, 98 NY2d 314 (2002). The letters do not contain sufficient

specifics, for example as to when the work was completed, to enable the Court to determine defendants' waiver defense as a matter of law. Therefore, passing over the "stop work" claim, the Court declines to dismiss the Second Cause of Action for Extra Work as barred by Article 12, and further declines to dismiss any of the causes of action based on improper notice, without prejudice to renewal of the motion as a motion for summary judgment either before or after testimonial discovery. In the latter connection, discovery should be phased, and there may be no need for testimonial discovery.

Turning to the "stop work" claim in the Second Cause of Action and all claims in the Third and Fourth Causes of Action, Columbia asserts that those claims are barred by Article 12, as they seek damages arising from various delays, inefficiencies, disruptions and interferences caused by the defendants. In an obvious attempt to fit the claims within one or more of the *Corinno* exceptions, WDF asserts that the delays were "not contemplated by the parties and/or were caused by Defendants' bad faith, willful, malicious, recklessly indifferent or grossly negligent conduct and/or were so unreasonable that they constituted an intentional abandonment of the Subcontract and/or resulted from Defendants' breach of its fundamental obligations under the Subcontract and of good faith and fair dealing..." (Complaint, ¶¶39, 48).

The conclusory claim by WDF is insufficient to avoid the broad reach of the no-damages-for-delay clause in Article 12 and satisfy plaintiff's heavy burden to show an exception to *Corinno*. The Third Cause of Action is premised on specific allegations regarding delays encountered by WDF due to issues such as defendants' failure to supervise and coordinate work, extensive construction changes and interferences, out-

of-sequence work, and excessive redesign of building systems. These are precisely the type of contemplated damages barred by *Corinno*, *supra*; see also *LoDuca Assoc., Inc. v PMS Const. Mgmt. Corp.*, 91 AD3d 485 (1st Dep't 2012) (delays cause by faulty architectural drawings were precisely within the contemplation of the exculpatory clause, regardless of the length of the delay). Notwithstanding the conclusory allegations in ¶ 38, WDF has failed to include even a single allegation in the Third Cause of Action to create an issue relating to a potential *Corinno* exception based on defendants' bad faith, unanticipated delays, delays so unreasonable as to constitute an abandonment of the contract, or delays tantamount to a breach of a fundamental contractual obligation.

A similar analysis applies to the claim in the Second Cause of Action for damages for delay caused by the stop work order. First, in contrast to *E.E. Cruz*, Article 12 here contains no exception to the broad waiver clause based on a denial of access to the site. On the contrary, the waiver expressly includes damages for delays caused by "suspension" of work. Further, the fact that a stop work order "may not have been anticipated, the possibility, however unlikely, of [such a suspension of work] arising was contemplated and addressed by the parties in their agreement." *Blau Mech. Corp. v City of New York*, 158 AD2d 373, 375 (1st Dep't 1990), quoting *Buckley & Co. v City of New York*, 121 AD2d 933, 934 (1st Dep't 1986), *lv dismissed* 69 NY2d 742 (1987) (damages due to delays caused when local community groups entered the job site and threatened the workers, forcing them to leave, were not "uncontemplated" and thus were not barred by the no damages for delay clause).

Similarly, the heart of the Fourth Cause of Action relates to delays related to poor contract administration and scheduling issues, which fall squarely within Article 12, as was found by the Court in *E.E. Cruz, supra*; see also, *Commercial Elec. Constrs., Inc. v Pavarini Constr. Co., Inc.*, 50 AD3d 316, 318 (1st Dep't 2008), citing *S.N. Tannor, Inc. v A.F.C. Enters.*, 276 AD2d 363 (1st Dep't 2000) (delays caused by contractor's improper scheduling and organization of subcontractors were barred, "as the conduct amounted to nothing more than inept administration or poor planning, which falls within the contract's exculpatory clause). Accordingly, both the Third and Fourth Causes of Action, as well as the claim in the Second Cause of Action relating to delays caused by a stop work order, are dismissed as barred by Article 12.

To the extent the moving papers seek a declaration pursuant to CPLR § 3001 barring any remaining claims by WDF, no arguments have been put forth justifying dismissal of the First Cause of Action, which is based directly on nonpayment of sums due under the Subcontract and is wholly unrelated to the issue of delays. Similarly, the Fifth Cause of Action for interest due on late payments is wholly unrelated to the issue of delays. Therefore, those claims withstand dismissal.

Accordingly, it is hereby

ORDERED that the motion by defendant Lend Lease (US) and Construction LMB, Inc., formerly known as Bovis Lend Lease LMB, Inc., to dismiss the Second Cause of Action is granted to the extent of directing the Clerk to sever and dismiss all claims relating to the period on and subsequent to July 1, 2013, as well as all claims for costs incurred due to delays caused by a stop work order, and is otherwise denied; and it is further

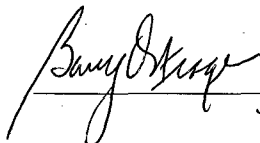
ORDERED that by defendant The Trustees of Columbia University in the City of New York, to dismiss the Second Cause of Action is granted as to all claims for costs incurred due to delays caused by a stop work order, and is otherwise denied; and it is further

ORDERED that the motions to dismiss by defendants the Trustees of Columbia University in the City of New York, and Lend Lease (US) and Construction LMB, Inc., formerly known as Bovis Lend Lease LMB, Inc., are granted to the extent of directing the Clerk to sever and dismiss the Third and Fourth Causes of Action as barred by the Subcontract; and it is further

ORDERED that the motions by both defendants are denied insofar as they relate to the First and Fifth Causes of Action; and it is further

ORDERED that both defendants shall serve Answers to the Complaint by December 7, 2016 and appear for a preliminary conference in Room 341 on December 20, 2016 at 9:30 a.m.

Dated: November 10, 2016



J.S.C.
BARRY R. OSTRAGER
JSC