

Pabco Constr. Corp. v Liberty Mut. Ins. Co.
2017 NY Slip Op 32045(U)
September 28, 2017
Supreme Court, Kings County
Docket Number: 500838/12
Judge: Lawrence S. Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of September, 2017.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.
-----X

PABCO CONSTRUCTION CORP.,

Plaintiff,

- against -

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant.
-----X

DECISION AND ORDER

Index No. 500838/12

Mot. Seq. No. 1

The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion, Supporting Affirmations (Affidavits), Memorandum of Law, and Exhibits _____	<u>8, 9, 10-20</u>
Affidavits (Affirmations) in Opposition, Memorandum of Law, and Exhibits _____	<u>24-39, 40</u>
Reply Affirmation, Memorandum of Law, and Exhibits Annexed _____	<u>41, 49-51</u>
Plaintiff's Letter Submission to the Court with Exhibits _____	<u>52-54</u>
Defendant's Letter Submission to the Court _____	<u>55</u>
Surreply Affidavit and Exhibits Annexed _____	<u>56-60</u>
Surreply Memorandum of Law in Opposition _____	<u>61</u>
Surreply Memorandum of Law in Support _____	<u>64</u>

In this action to recover on a payment bond, the defendant Liberty Mutual Insurance Company (hereafter, the surety) moves preanswer to dismiss the complaint, dated Nov. 8, 2016 (hereafter, the complaint), of the plaintiff Pabco Construction Corp. (hereafter, the plaintiff) pursuant to, inter alia, CPLR 3211 (a) (1) as barred by documentary evidence.

Facts and Allegations

The plaintiff was a subcontractor on a public improvement project at PS 237 located at 36 Avenue P in Brooklyn, New York (hereafter, the project), owned by nonparty New York City School Construction Authority (hereafter, the owner). The general contractor for the project was nonparty AMCC Corp. (hereafter, the GC). The surety posted a Labor and Material Payment Bond for the project (hereafter, the payment bond) as security for the subcontractors' claims, including those of the plaintiff, against the GC.

According to the plaintiff, "by reason of the acts and/or omissions of the [owner] and [the GC], the progress of [the plaintiff's] work [at the project] was negatively impacted" (Complaint, ¶ 8). By the terms of its subcontract with the GC, the plaintiff was precluded "from directly communicating or making claims to the [owner] concerning the delays, interferences, inefficiencies, impact to productivity, impediments, and other events that impeded [the plaintiff's] . . . work" (Complaint, ¶ 9). The plaintiff allegedly could not assert delay-related claims against the owner directly, but had to go through the GC (Complaint, ¶¶ 10-16). The plaintiff submitted its claims to the GC, which, in turn, submitted them to the owner, which, in turn, denied them, causing the GC to commence an action against the owner in Supreme Court, Queens County (hereafter, the GC Action) (Complaint, ¶¶ 17-20). The plaintiff alleges in this action that "[the GC] failed to properly present, prosecute and preserve [the plaintiff's] claims in the [GC] Action" (Complaint, ¶ 22). According to the plaintiff's complaint herein, "the [GC] Action was unsuccessful and [the GC] did not and

will not recover any monies from the [owner] in connection with the [p]roject” (Complaint, ¶ 23).¹

Discussion

The validity of the plaintiff’s claim, as pleaded against the surety in this action, is determined by the validity of its claim against the GC under the subcontract agreement, dated Oct. 20, 2008 (hereafter, the subcontract). The subcontract includes the “no damages for delay” clause which is a type of an exculpatory clause. The “no damages for delay” clause provides, in relevant part, that:

“Should [the plaintiff’s] performance, in whole or part, be interfered with or delayed, or be suspended in the commencement, prosecution or completion, for reasons beyond [the plaintiff’s] control and without its fault or negligence, [the plaintiff] shall be entitled to an extension of time in which to complete its Contract, but only if it shall have notified, in writing, [the GC] of the cause of delay within two (2) days of the occurrence of the event, and provided a similar extension of time, if needed, is allotted to [the GC] by [the owner]. *[The GC] owes no damage, duty, obligation, or liability to [the plaintiff] as a result of any delay, interference, suspension, or other event, except for seeking an extension of time from [the owner]. [The plaintiff] expressly agrees not to make, and hereby waives, any claim for damages, including without limit those resulting from increased labor or material costs, on account of any delay, obstruction or hindrance for any cause whatsoever, and that its sole right and remedy therefor[] shall be an extension of time*” (Subcontract, article XIII [emphasis added]).

¹ The May 22, 2017 affidavit of Phil Bonadonna, the plaintiff’s president and sole shareholder, in opposition to the instant motion (hereafter, the plaintiff’s affidavit) elaborates on the allegations in the complaint. According to the plaintiff’s affidavit, the GC action has not been unsuccessful as the complaint alleges; rather, the GC has placed the GC Action on hold while it is appealing to the Appellate Division, Second Department, an adverse outcome in several other actions involving its other projects with the owner. To date, the Second Department has not rendered a decision in the GC’s appeals of the adverse decisions in the other actions.

Clauses in construction contracts which preclude contractors from recovering damages for delay in the performance of the contract are generally valid and enforceable (*see Corinno Civetta Const. Corp. v City of New York*, 67 NY2d 297, 309 [1986]; *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384 [1983], *motion to amend remittitur denied* 60 NY2d 645 [1983]). “There are exceptions to this general rule, and a clause which purports to preclude damages for all delays resulting from any cause whatsoever will not be read literally” (*New York Trenchless, Inc. v Hallen Const. Co., Inc.*, 82 AD3d 850, 852 [2d Dept 2011]). Thus, despite a clause barring damages for delay, “damages may be recovered 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” (*Corinno Civetta Const. Corp.*, 67 NY2d at 309). “However, the clause exonerates the defendant for delays caused by inept administration or poor planning, a failure of performance by the defendant in ordinary, garden variety ways, or a failure of performance resulting from ordinary negligence, as distinguished from gross negligence” (*Plato Gen. Const. Corp./EMCO Tech Const. Corp. v Dormitory Auth. of State of New York*, 89 AD3d 819, 823 [2d Dept 2011] [internal citations and quotation marks omitted], *lv denied* 19 NY3d 803 [2012]).

The plaintiff’s claim, as pleaded in this action, alleges none of the enumerated exceptions to the enforceability of the “no damages for delay” clause (*see Polo Elec. Corp. v New York Law School*, 114 AD3d 419 [1st Dept 2014]; *International Installations, Inc. v Panther Assoc.*, 191 AD2d 253 [1st Dept 1993]; *cf. Tougher Indus, Inc. v Northern*

Westchester Joint Water Works, 304 AD2d 822, 823 [2d Dept 2003] [“the complaint adequately state(d) a cause of action to recover damages, inter alia, for unanticipated delays in the performance of the contract”]). Accordingly, the plaintiff’s complaint is dismissed with leave to amend (*accord Trataros Const., Inc. v New York City Hous. Auth.*, 34 AD3d 451, 453 [2d Dept 2006]; *Abax Inc. v New York City Hous. Auth.*, 282 AD2d 372, 373 [1st Dept 2001]).

The parties have called the Court’s attention to the fact that the plaintiff subsequently commenced a separate action against, among others, the surety and the GC in this County under index No. 518020/16 (hereafter, the subsequent action). The complaint in the subsequent action, unlike the complaint in the instant action, alleges one or more of the foregoing exceptions to the enforceability of the “no damages for delay” clause. By decision and order, dated June 5, 2017 and entered in the subsequent action, the Court (King, J.) denied the GC and the surety’s preanswer motion to dismiss the complaint in the subsequent action. Because the expanded allegations in the subsequent action are materially different from the bare-bones allegations of the complaint in the instant action, Judge King’s decision and order in the subsequent action are not binding on this Court under the principles of res judicata or collateral estoppel.

Conclusion

Based on the foregoing and after oral argument, it is

ORDERED that the surety’s motion to dismiss is granted to the extent that the plaintiff’s complaint is dismissed without costs and disbursements under CPLR 3211 (a) (1)

as barred by documentary evidence, and the remainder of its motion is denied as academic;
and it is further

ORDERED that the plaintiff may, if so advised, file and serve an amended complaint within 30 days from the date of service of this decision and order with notice of entry on the plaintiff's counsel; and it is further

ORDERED that the surety's counsel shall serve a copy of this decision and order with notice of entry on the plaintiff's counsel and shall file an affidavit of said service with the County Clerk.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,



J.S.C.

HON. LAWRENCE KNIPEL