Trocom Constr. Corp. v NYC
2017 NY Slip Op 32106(U)
October 6, 2017
Supreme Court, New York County
Docket Number: 650148/2012
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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TROCOM CONSTRUCTION CORP.,

Plaintiff,

-against-

NYC and CONSOLIDATED EDISON CO. OF NY

Defendant.

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DECISION AND ORDER
Index No. 650148/2012
Mot. Seq. No.: 002

O. PETER SHERWOOD, J.:

I. BACKGROUND

Trocom Construction Corp ("Trocom") contracted with the City of New York ("NYC") for reconstruction of Liberty Street, including utility, traffic, and streetlighting. Trocom claims that it subsequently agreed with NYC to provide additional labor, material, and equipment for other work. In Claim 1, Trocom seeks to recover from NYC for the value of that labor, material, and equipment. Consolidated Edison Co. of NY ("Con Ed") had an agreement with NYC that Con Ed's work would not interfere with Trocom's work. Trocom alleges that Con Ed and NYC interfered by providing defective plans for the work, failing to properly plan the work, and failing to obtain required permits, among other things. These errors and failures caused Trocom to perform additional work, or extended the work schedule, resulting in extra costs incurred for labor, supervision, and overhead totaling $1,073,982.90. In Claim 2, Trocom alleges it could not complete its work until Con Ed performed certain tasks to move or protect its underground facilities. In Claim 3, Trocom refers to extra work required for changes to the milling and paving order, additional work, fees, and additional costs for storage for certain sculptures, as re-installation was delayed. For these expenses, Trocom seeks $1,305,185.67 from either NYC or Con Ed, pursuant to the Joint Bid Agreement and the NYC/Con Ed agreement. Trocom also states 3 more claims against NYC that are not relevant here.

On this motion sequence number 003, Con Ed moves for partial summary judgment on the second and third claims, except for claims for incremental costs for excavating near transit facilities.

II. FACTS[1]

The NYC Department of Design and Construction (DDC) awarded a project for the reconstruction of Liberty Street in Lower Manhattan, with the designation HWMTCA6C (the Project) to plaintiff Trocom (¶1). The Project was to include "Public Work"[2] and "Utility Work"[3] (¶2). Con Ed provided a scope of work and unit prices for the Project, which were accepted (¶3). Trocom submitted a bid for the Project which, according to the contract, was to include incremental costs and additional compensation for performing Public Work required "because of direct or indirect obstructions due to the presence of Utility Facilities"[4] (¶4). It is disputed whether Con Ed's prices included overhead and profit (¶5). It is undisputed that Trocom's bid included a 5-day, 40-hour workweek. However, Trocom claims its people worked late and on weekends. It is also undisputed that the contract specifies that some activities are to be performed only by the utility or its specialty contractors (Specialty Utility Work is to be performed by Specialty Contractors) (¶8). The parties dispute whether the contract (citing Contract Addendum, attached as Exhibit E to Barsalona Aff, § 5.8) only allows Trocom to sue in court if delays were caused by

[1] As this is a motion for summary judgment, the facts are taken from the parties' 19-a statements (Con-Ed SMF, NYSCEF Doc. No. 93; Trocom Response to SMF, NYSCEF Doc. No. 124; Con-Ed Reply SMF, NYSCEF Doc. No.142).

[2] Section 1.2 of the Contract Addendum provides: "Public Work" shall mean the following: (a) construction, reconstruction, installation, alternation, maintenance, repair, grading, re-grading, regulating and improvement of roadways, highways, streets, parkways and other thoroughfares, and bridges located within Lower Manhattan and (b) similarly for sewers, culverts, catch basins, chutes and water mains. This also includes all City Accommodations.

[3] Section 1.34 of the Contract Addendum provides: "Utility Work" shall mean all Interference Work and Utility Capital Work.
Section 1.2 states: "Interference Work" shall mean such work as is required to be performed by Contractor during the performance of Public Work, as defined herein, in order to maintain, protect, support, shift, alter, relocate, remove, and/or replace Utility Facilities at the Utilities' expense.
Section 1.3 states: "Utility Capital Work" shall mean construction of new, relocation or replacement utility Facilities, the cost of which is not normally expensed by the utility in accordance with the New York Public Service Commission's Uniform System of Accounts or generally accepted accounting principles, and which is not Interference Work, as defined herein.

[4] Section 1.32 of the Contract Addendum provides: "Utility Facility(ies)" shall mean the property owned by the Utilities, including, but not limited to, pipes, poles, conduits, wires, lines and other facilities, structures or property of the Utilities that may be below ground, at ground-level or above ground, that could disturb or interfere with the Public Work.

Con Ed's failure to timely provide Specialty Contractors (¶9). Trocom contends any delay-based claim against a utility (such as this one) may be brought in a court of law.

Trocom alleges the delays caused it to incur increased home office overhead and supervision costs from October 22, 2009, to December 31, 2010. Of the 48 delay claims, the City approved 8, which covered 435 of the 440 total days' worth of time extensions Trocom sought (SMF ¶11). On or about November 3, 2014, Trocom accepted the "final quantities" under the Contract, except that it objected to two items: 6.02XHEC and 6.02XSCW. Trocom denies, however, that this acceptance covered all payments to which it was entitled (¶15). Trocom claims it is due additional payments for milling and paving work re-done because of damage done by Con Ed and storage fees for sculptures which could not be re-installed due to delays caused by Con Ed completing its work.[5] Trocom claims it filed a Notice of Claim related to the storage fees in December 2011.

III. ARGUMENTS

A. Con Ed's Partial Motion for Summary Judgment

Con Ed seeks dismissal of Trocom's second and third causes of action, except for claims to recover incremental costs for excavating near transit facilities. Con Ed argues that (1) there is no evidence Trocom had increased home office overhead; (2) Trocom cannot assert delay-related claims for work not involving Specialty Contractors; (3) Trocom waived its claims for delay and impacts by accepting payment from Con Ed for work under jobs JB 450 or JB 900, which included overhead, profit, and delay related costs; and (4) Trocom waived claims for milling and paving and for storage fees (Memo at 3-4).

To bring a claim for home office overhead (overhead costs not associated with a particular project, but needed to support a contractor's operations as a whole), a plaintiff must show an actual increase of home office overhead (*id.* at 6, *citing Manshul Const. Corp. v Dormitory Auth. of New York*, 79 AD2d 383, 389 [1st Dept 1981]). Con Ed argues that Trocom's claim is merely based on application of the "Eichleay formula," which calculates the percentage of the construction company's income from the project at issue, and then attributes that percentage of the home office overhead expenses to the project (*see Berley Indus., Inc. v City of New York*, 45 NY2d 683, 686

[5] For this reason the court will re-classify the sculpture storage fees as an element of the delay damages claim.

[1978]). The Court of Appeals has rejected this approach as inappropriately speculative (*id.*). Con Ed claims that the Trocom calculations are improper because the calculations are flawed and unreliable, and fail to deduct amounts allocated for overhead and profit (Memo at 7).

Con Ed also argues that the claims should be brought in an arbitration and are prohibited here by the terms of the parties' agreement (specifically Article 5.8 of Addendum 6 of the Contract), which only allow a delay claim against Con Ed for its failure to timely provide Specialty Contractors (Memo at 7-8). No Specialty Contractors were involved in connection with the work at issue here (*id. at 8*). Therefore, the Contract bars Trocom from bringing a delay claim against Con Ed (*id.*).

Finally, Con Ed claims that Trocom waived any delay related damages by accepting payment for jobs JB 450 and JB 900. In the Contract Addendum, Trocom agreed that its bid and prices included compensation for any delay due to the presence of Utility Facilities (Addendum, §3.4)[6]. Additionally, JB 450 and JB 900 specify that delay related claims are waived as the price for JB 450 includes overhead, profit, and costs related to any delays, and the price for JB 900 includes extra home office costs and a waiver of any impact of extra utility work (Memo at 9-10, see Joint-Bidding Specifications and Sketches for Lower Manhattan, attached as Exhibit F to Barsalona Aff).

B. Trocom's Opposition

Trocom argues that Con Ed has waived any right to insist that Trocom arbitrate because Con Ed did not assert it as an affirmative defense, and raises the issue now for the first time (Opp at 4, *citing Ryan v Kellogg Partners Institutional Services*, 58 AD3d 481 [1st Dept 2009] ["Defendant waived any right to arbitration by failing to raise it as a defense in its answer, asserting counterclaims, making a dispositive motion, and otherwise actively participating in this litigation for almost three years through the completion of extensive disclosure proceedings and the filing of a note of issue, all to the prejudice of plaintiff"]). The case has been pending since 2012 without

[6] Section 3.4 of the Contract Addendum provides: "the contractor agrees that its bid items and prices for Interference Work and Utility Work shall include all incremental costs and/or additional compensation for performing Public Work including: coordination of its work with the Utilities, loss of productivity and efficiency, idle time, delays . . . change in operations, mobilization, remobilization, demobilization, added cost or expense, loss of profit, other damages or impact costs that may be suffered by the contractor because of direct or indirect obstructions due to the presence of Utility Facilities, such as conduits, ducts or [other things]"

Con Ed's mentioning arbitration as it actively participated in extensive discovery (Opp at 5). In any event, arbitration is not required by the Contract (*id.* at 6). Contrary to Con Ed's position, the plain meaning of the Contract allows Trocom to pursue delay claims against Con Ed which do not involve Specialty Contractors (id. at 10-11). Further, if the court finds the Contract's terms to be ambiguous on this issue, it should be construed against defendants, as the language was required by the NYC/Con Ed agreement, making Con Ed the drafter, and a contractual ambiguity should be construed against the drafter (*id.* at 12).

Section 5.8 of the Contract Addendum[7] has two clauses. One refers to claims against a utility for failure to timely provide a Specialty Contractor. The other contemplates a claim against a utility for a delay that does not involve a Specialty Contractor (*id.* at 6-7). Accordingly, a suit is permitted for any claim against a utility for delay (*id.* at 7). Additionally, section 5.4 of the Contract Addendum discusses the circumstances which could give rise to an arbitration, which would include disputes over the quantities of Utility Work or which prices are applicable to that work (*id.* at 8-9). Further, the milling and paving work was not done pursuant to the Contract, and was billed separately, so the arbitration clause does not apply (*id.* at 9-10). Nor was the sculpture storage "extra Utility Work" (*id.* at 10). The storage fees were incurred because Trocom was prevented from reinstalling the sculpture for an extended period (*id.*).

Trocom also asserts that the argument that Trocom waived its delay claims must fail. First, Con Ed failed to raise waiver as an affirmative defense, which failure is fatal (*id.* at 13, *citing McIntosh v Niederhoffer, Cross & Zeckhauser,* 106 AD2d 774, 775 [3d Dept 1984]["waiver is an affirmative defense and, since defendant did not plead it as an affirmative defense, it was waived"] [internal citations omitted]). Substantively, Trocom did not waive its delay claims (Opp at 14-15). Trocom's Final Time Extension Request included delay claims against Con Ed, some of which were approved by NYC and resulted in Trocom getting a time extension of 435 days (*id.* at 15). Further, the work at issue here is not related to either JB 450 or JB 900 (*id.*). "Trocom did not get paid under any Utility pay item" during the delays, because Trocom could not do any work (*id.*).

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[7] Section 5.8 of the Contract Addendum states: Claims of Delay. If Contractor claims or alleges that delays were caused by a Utility for failure to supply and/or provide Specialty Contractors in a timely manner, then the Contractor may bring a claim against the Utility. Neither the Contractor nor the Utility shall bring a delay claim against the City . . . and to the extent the Contractor alleges a delay was caused by a Utility, the Contractor will be limited to bringing such legal action in a Court of law and shall not be able to seek arbitration over any delay claims or dela-related claims."

Then, there were additional costs to performing certain work, because it had to be done out of order, or inefficiently (*id.* at 15-16).

Insofar as Con Ed cites the standard for overcoming a "no damages for delay" clause, such standard is irrelevant as there is no such clause in the contract between Trocom and Con Ed (*id.* at 17). Even if Con Ed were to identify such a clause, summary judgment should still be denied because there are issues of fact as to whether an exception applies (*id.* at 17-18). Con Ed has the burden of proof to show that none of the exceptions to a "no damage for delay" clause applies, and Con Ed has failed to meet it (*id.* at 18).

As to evidence of actual home office overhead expenses due to the delays, Trocom points to the affidavit of Anthony Santoro (¶¶ 14-17), which explains that the delays required Trocom to devote home office resources to the Project for longer than anticipated, created additional "project schedules, extending permits, providing weekly utility markouts, identifying utility lines, producing payroll and extending liability insurance for an additional 14 months" (*id.* at ¶ 16). There were also additional costs for the project superintendent and project manager, and their unavailability to work on other projects (Opp at 24).

Trocom also contends it properly calculated its additional home office overhead using the process approved of in *Manshul Const. Corp.* (79 AD2d at 392), in that one should:

> "(i) Estimate the actual cost of the work done after the scheduled completion date by deducting from the contract price the portion allocable to overhead and profit.
>
> ii) Allocate a percentage of this cost for overhead, and allow this as excess overhead due to delay.
>
> (iii) Add to this a profit percentage based on this excess overhead.
>
> (iv) Award 95% of the figure thus arrived at (the sum of [ii] and [iii]) to plaintiff as delay damages.

The calculations were performed by Santoro (*see Santoro* Aff at ¶ 60, Opp at 21-22). Trocom points out that Con Ed does not contest these calculations, but only contends there is double counting of overhead and profit (Opp at 20-21). As Trocom has complied with the calculation requirements in *Manshul,* any further disputes raised by Con Ed present issues of fact (*id.* at 23).

C. Con Ed Reply

In reply, Con Ed contends, first, that summary judgment is appropriate because Trocom has failed to offer admissible proof that Con Ed was solely responsible for the delays at issue, "independent of concurrent delays caused by the City or Trocom" (Reply at 2). The contract which is clear and unambiguous, requires sections 3.4 and 5.8 to be read together (*id.* at 3). According to section 3.4, Trocom's bid price for "Interference Work" and "Utility Work" included "all incremental costs and /or additional compensation for . . . loss of productivity and efficiency, idle time, delays . . . added cost or expense, loss of profit, [and] other damages or impact costs that may be suffered by the Contractor because of direct or indirect obstructions due to the presence of Utility Facilities." Delays due to the presence of Con Ed facilities were anticipated and provided for in the Contract (Reply at 3). These included delays are the same kinds of delays for which Trocom is seeking compensation in this action (*id.*). Section 5.8 of Addendum 6 limits Trocom's recourse for delay-related claims, allowing Trocom to sue in court only for delays related to Specialty Contractors. The second clause prohibits bringing a delay claim against NYC, and provides additional information about bringing a claim against the utility of the type specified in the first clause (*id.* at 4). Trocom is an experienced contractor and has performed many such contracts. Section 3.4 provides that the bid price includes compensation associated with delays. Section 5.8 is an exception to that clause. It only applies to a failure to timely provide Specialty Contractors, and does not apply to Trocom's claims here as there is no evidence of Specialty Contractor involvement.

Con Ed also argues that it pled a relevant affirmative defense, specifically that it had fully compensated Trocom for its work (*id.* at 6, citing fourth affirmative defense). For job JB 450, there is an explicit statement that payment is based on the actual number of crew hours, and the price includes potential delays and method changes and operation modifications[8] (*id.* at 6). The price for job JB 900 also includes idle time, extended performance, and extended home office

[8] The Price to Cover Clause of JB 450 states in relevant part: "E . . . The unit price shall also include excavating by hand to expose existing structures. Any required removing, trucking, storing and disposing of material shall be deemed included in the unit price bid. Any and all Contractor method changes and operation modifications employed for construction field support are deemed to be included in the price bid for this item. Work under this item may be paid in combination with other City, utility or facility accommodations items bid under other contract items."

costs, and the specifications state that Trocom's acceptance of payment waives these claims[9] (*id.* at 7). By accepting payment for those items, Trocom waived any claims for delay, and so Con Ed has, indeed, paid the contractor in full (*id.*). As far as Trocom argues that jobs JB 450 and JB 900 were not relevant to the delays, and that Trocom wasn't paid for the delay pursuant to any items, Con Ed contends that Trocom did some work during that period, was paid for that work and what it received included profit and overhead (*id.* at 7-8). There is also a dispute about Trocom working weekends, and whether weekend days should be counted (*id.* at 8). Con Ed contends that weekends should be deducted from the delay, as Santoro testified at his deposition that they would work a five day, 40-hour week. While Santoro stated in his affidavit on this motion that Trocom worked many weekends and evenings, the representation is incorrect and is unsupported (*id.* at 8). Con Ed admits it did not specify the affirmative defense of waiver. However, it pled that it paid for all of the relevant utility work, and "Trocom knew or should have known from reading the Contract what JB 450 and JB 900 prices covered" (*id.*). Trocom clearly manifested an intent to waive its rights by accepting payment for those two items, which specified that they included delays, extended overhead, and so forth (*id.* at 9). When it accepted the final payment, it "only objected to the final quantities for 6.02 items," making its acceptance of the funds a waiver of its other claims (*id.* at 9).

While Con Edison did not specify a "no damages for delay" clause in its original motion papers, it did point to section 5.8, which limited the context under which Trocom could sue for delays (*id.* at 10). Con Ed also points to Article 13 of NYC's Standard Construction Contract, in which the contractor agreed not to make any claim for delay damages, but that it may be entitled to time extensions to complete the work (id.). Con Ed also argues that this situation is distinguishable from the facts in the cases cited by Trocom where "no damages for delay" clauses were found inapplicable, as Trocom has not raised an issue of fact supporting its position that the clause should not apply. There is no evidence that Con Ed "acted in bad faith, or engaged in willful, malicious or grossly negligent conduct," and the delays here were contemplated, typical

[9] The Price to Cover Claus of JB 900 provides in relevant part: E . . .Payment made under each lump sum (LS) amount, shall cover the cost of all labor, materials, equipment, supervision, insurance and incidentals necessary to complete the extra utility work. Each lump sum (LS) amount includes all special considerations due to all site conditions, loss of productivity and efficiency, idle time, extended performance, extended overhead costs, extended engineering and extended home office costs in connection with the extra utility work. In consideration of each lump sum (LS) amount, the contractor waives all claims for impacts arising from the extra utility work, which shall be deemed included in each lump sum amount paid.

of this kind of project, and not unreasonable (*id.* at 11). Even if the "no damages for delay" provisions for jobs JB 450 and JB 900 are not enforceable, section 5.8 limits delay claims (*id.* at 12).

Delay damages are precluded here, because Trocom has not established that Con Ed was responsible for the delay, that it suffered losses, and provided a rational basis for estimating damages (*id., citing Manshul Contr. Corp.*, 79 AD2d at 387 ["When claims are made for damages for delay, plaintiff must show that defendant was responsible for the delay; that these delays caused delay in completion of the contract (eliminating overlapping or duplication of delays); that the plaintiff suffered damages as a result of these delays; and plaintiff must furnish some rational basis for the court to estimate those damages, although obviously a precise measure is neither possible nor required"]). The delay claimed must cause delay in completion of the project, so there cannot be compensation for overlapping or duplicative delays (*id.* at 12-13). While Trocom alleges NYC approved six delay claims attributable to Con Ed, some of those claims occurred concurrently with delays attributable to other entities, including NYC (*id.* at 13). Other delay claims were rejected by NYC. Con Ed should only be held liable for delays attributable to it (*id.* at 14). As to Trocom's calculations of its claimed extra home office overhead, Trocom has the burden of showing an increase in such overhead (*id.* at 14, *citing Manshul Contr. Corp.*, 79 AD2d at 389, 391). Using the proportion of total billing over a period to the billing on this particular job is not a proper method (*id.* at 14, *citing Novak & Co., Inc. v Facilities Dev. Corp.*, 116 AD2d 891, 892 [3d Dept 1986]["Such a formulation in the instant case amounts to an unreliable approximation and must be rejected"]). Any recovery should be more closely connected to the actual cost (Reply at 15, *citing Manshul Contr. Corp.*,79 AD 2d at 391).

IV. DISCUSSION

A. Standard for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition

transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra; Olan v Farrell Lines, Inc.*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion, give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]), and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; see Zuckerman v City of New York, supra; *Ehrlich v Am. Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], *quoting Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

B. Breach of Contract

Trocom asserts a claim for breach of contract. It seeks additional payments due to delays in completing its work pursuant to the contract between the parties. To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], affd 13 NY3d 398

[2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

Here, the existence of a contract and Trocom's performance are undisputed. Con Ed claims it is undisputed that it has not breached the contract, because it paid Trocom in full. Trocom is not entitled to additional compensation for the delays, and, at any rate, Trocom suffered no damages, since its overhead and costs are covered by the contract.

C. Delay-Related Claims

In Claim 2, Trocom claims Con Ed and NYC failed to act in good faith, prevented, hindered, and delayed Trocom's performance. As a result of the delays, Trocom was required to do extra work and incur additional costs (Amended Complaint at 5-6). In Claim 3, Trocom claims Con Ed was responsible for some, or all, of the extra work required of it related to milling and paving. Trocom maintains that Con Ed breached the Contract or the NYC/Con Ed Agreement, to which Trocom was an intended third party beneficiary (*id.* at 7-8). Trocom argues that Con Ed is liable because Con Ed damaged the milling and paving work Trocom had already done (*id.* at 8). Alternatively, Trocom claims Con Ed breached the Contract or the NYC/Con Ed Agreement by failing to pay its portion of the fee associated with the re-milling and re-paving work (*id.* at 9). Con Ed's failures also caused additional delays, which required Trocom to incur costs for extended storage of sculptures (id.).

The threshold issue is whether the Contract permits delay-related claims. This court must first consider the Contract. A court should interpret a contract "so as to give full meaning and effect to the material provisions" (*Beal Savings Bank v Sommer*, 8 NY 3d 318, 324 [2007], *quoting Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]). "A reading of a contract should not render any portion meaningless . . . . Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (id. at 324-325, *quoting Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]).

The Contract clauses at issue are sections 3.4 and 5.8 of Addendum 6 (attached as Exhibit E to *Barsalona* Aff). Section 3.4 provides:

> "The contractor agrees that its bid items and prices for Interference Work and Utility Work include all incremental costs and /or additional compensation for performing Public Work including: coordination of its work with the Utilities, loss of productivity and efficiency, idle time, delays . . . change in operations, mobilization, remobilization, demobilization, added cost or expense, loss of profit, other damages or impact costs that may be suffered by the contractor because of direct or indirect obstructions due to the presence of Utility Facilities, such as conduits, ducts or [other things]"

Section 5.8 states:

> Claims of Delay. If Contractor claims or alleges that delays were caused by a Utility for failure to supply and/or provide Specialty Contractors in a timely manner, then the Contractor may bring a claim against the Utility. Neither the Contractor nor the Utility shall bring a delay claim against the Cit[illegible] . . . and to the extent the Contractor alleges a delay was caused by a Utility, the Contractor will be limited to bringing such legal action in a Court of law and shall not be able to seek arbitration over any delay claims or delay-related claims."

Reading these two clauses together, it is clear that Trocom's bid price includes incremental costs and profits to cover the delays and idle time of which it complains here. Accordingly, and even assuming Con Ed actually breached a contract, Trocom would have no additional damages because the incremental costs are already included in the price. While section 5.8 contemplates a delay-related suit against a Utility, such a suit lies only if the Utility fails to timely provide required Specialty Contractors, which is reasonable, since it is separate from a delay caused by the presence of the Utility Facilities and the performance of the actual work by the Utility.

Trocom concedes that the first sentence of section 5.8 is limited. It relies on the second sentence which states after the semi-colon that " . . . ; to the extent the Contractor alleges a delay was caused by a Utility, the Contractor will be limited to bringing a legal action in a Court of law and shall not be able to seek arbitration over any delay claims or delay-related claims". A plain reading of the section reveals that the first sentence concerns delay claims that may be brought against the utility. The second, more generally worded, sentence bars delay claims against NYC. As to permitted claims against the utility, the clause that appears after the semi-colon mandates that such claims be brought "in a Court of law". Any reading of this clause to allow claims not

permitted in the first sentence would cause the exception to swallow the rule. It would also allow any suit for a delay-related claim against the Utility, despite the lack of damages for delays created by section 3.4. There was no Specialty Contractor involved here. Accordingly, section 5.8 does not apply, and section 3.4 is the only applicable section. Pursuant to the Contract, Trocom has already been compensated by its bid amount for the costs of the delay. Therefore, Trocom cannot show damages for any delay-related breach by Con Ed, including extra sculpture storage fees. Summary judgment is appropriate on delay-related claims.

Additionally, assuming, as Trocom suggests, that section 3.4 should be treated as a "no damages for delay" clause as to which cases concerning such clauses might apply, there are exceptions. Under such a 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 Const. Corp. v City of New York*, 67 NY2d 297, 309 [1986]). While Trocom provides some evidence supporting the existence of costs caused by delay, there is no admissible evidence cited to support an argument that the delay at issue here was caused by bad faith, was unreasonable or uncontemplated, or resulted from breach of a fundamental obligation of the contract. Accordingly, the portion of the motion related to delay claims must be granted, and those claims shall be dismissed as to Con Ed.

D. Non-Delay Claims

Trocom has also asserted claims for milling and paving work, which are not not related to delays. Instead it claims (a) that Con Ed's actions caused Trocom to incur the costs of re-doing that work, or (b) that Con Ed breached some unspecified contractual obligation to pay Trocom some portion of the expenses for milling and paving. Con Ed claims that Trocom waived these claims, but does not discuss how. Trocom states, in its opposition papers, that these costs were invoiced to Con Ed separately and not through the contract (and therefore the arbitration clause does not apply).

As to these claims, Con Ed has failed to make a prima facie showing of entitlement to judgment as a matter of law. Accordingly, that portion of the motion for partial summary judgment for re-milling and re-paving costs is DENIED.

It is hereby

ORDERED that the motion for partial summary judgment of defendant, Con Edison to dismiss the Second Cause of Action (for delay damages) and the Third Cause of Action (for extra work and expenses) is GRANTED to the extent that the Second Cause of Action is DISMISSED as to defendant Con Edison and is otherwise DENIED.

This constitutes the decision and order of the court.

DATED: October 6, 2017

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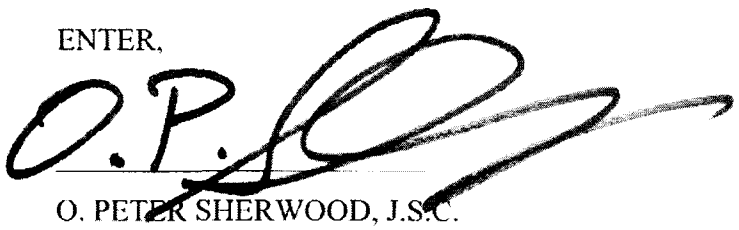

O. PETER SHERWOOD, J.S.C.