Sciame Constr., LLC v Trustees of Columbia Univ. in the City of N.Y.
2018 NY Slip Op 31167(U)
June 5, 2018
Supreme Court, New York County
Docket Number: 655114/2017
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SCIAME CONSTRUCTION, LLC.,

Plaintiff

-against-

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and GROUP PMX LLC,

Defendants.

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DECISION AND ORDER
Index No.: 655114/2017

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

Defendant The Trustees of Columbia University in the City of New York (Columbia) moves for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the second and part of the third cause of action for alleged "extra work."

In this action, Sciame Construction, LLC (Sciame) seeks to recover damages for work it performed as the construction manager in connection with the construction project for a new building for Columbia. Columbia contends Sciame seeks damages for additional general conditions costs, which are barred and waived by Sciame's failure to obtain a contract time extension or submit the required documents. It also asserts Sciame seeks recovery of damages for extra work by subcontractors, which are based on claims arising out of delay, hindrance, obstruction or loss of productivity, and which are unrecoverable under the parties' agreement. Columbia's motion is granted to the extent that part of the third cause of action is dismissed, and is otherwise denied.

BACKGROUND

By agreement dated October 31, 2013, Sciame, as construction manager, entered into a Construction Management Agreement (CMA) with Columbia to build a new building to be known as the New Medical & Graduate Education Building, located at 104 Haven Street, New York, New York (the Project) (exhibit A to affidavit of Steven Colletta, dated Nov. 9, 2017 [Colletta aff], complaint, ¶ 5). Defendant Group PMX was engaged by Columbia to act as its representative on the Project (*id.*, ¶ 6).

The CMA provides for the payment of $94.572 million for the construction of this medical school building, which includes: (1) approximately $77.4 million for the bricks and mortar costs incurred by Sciame for trade subcontractors; and (2) approximately $7.56 million to reimburse Sciame for construction phase reimbursable expenses, that is, general conditions costs for project supervision, administration, field office maintenance, general clean-up, labor, vendors, etc. (Colletta aff, ¶ 24). Pursuant to the terms of the CMA, Sciame prepared and delivered to Columbia its proposal for a Guaranteed Maximum Price (GMP), in which Sciame guaranteed to Columbia that the costs for the bricks and mortar would not exceed the agreed upon amount (*id.*, ¶ 25). The GMP set forth, in Article 2.03, that Sciame would substantially complete the project and obtain the temporary certificate of occupancy by December 31, 2015 (exhibit B to affidavit of Patrick Burke [Burke aff], GMP Article 2.03 at 3). With regard to the general conditions costs, the parties agreed not to a straight lump sum price, but to carry the general conditions as an allowance (Colletta aff, ¶ 29; *see* exhibit C to Colletta aff). The CMA also provides that the GMP could not be increased due to additions or changes to the original plans unless a change order to that effect was approved and signed by Columbia (Colletta aff, ¶ 25). Over the course of the contract, over 1,100 change orders were approved by Columbia with an increase of $21,812,496 to the GMP (*id.*, ¶ 26). Sciame asserts that when new work was added by these change orders, Sciame incurred general conditions expenses in connection with the execution of that new work (*id.*, ¶ 28).

During the course of the contract, each month, as part of the requisition process, Sciame submitted a requisition detailing its general conditions costs incurred in executing the brick and mortar work, and then Columbia would increase the allowance for general conditions costs (*id.*, ¶¶ 28, 33; *see* exhibit D to Colletta aff at 18-19 [itemizing general conditions costs]). As part of these monthly requests to replenish the general conditions allowance, Sciame furnished Columbia with detailed backup for such costs (Colletta aff, ¶ 35 & n7). This continued for five years while the construction was ongoing, until the parties began negotiating Change Order CA-510 in the spring of 2015. At that time, it became apparent that the general conditions allowance would be depleted before completion of the Project, and eventually the parties agreed that the projected general conditions account would be replenished by $1,595,743 (exhibit F to Colletta aff, CA-510). CA-510 indicates that the description of the change was "Additional General Conditions," and the "Reason"

for the change was "Added Scope & Contract Allowances depletion" (*id.*). It further indicates that the "Schedule Impact" was "N/A," and it makes no mention of the project completion date. In the notes at the end, note 4 states that "[a]ssumes General conditions runs out thru April 2016" (*id.*). This change order was approved and signed by Columbia on September 30, 2015 (*id.*).

Originally, the initial project schedule called for completion of the Project by March 7, 2016 (exhibit E to Colletta aff). Shortly before CA-510 was signed by Columbia, Sciame submitted the approved Project schedule to Columbia which showed a new Project completion date of June 1, 2016 (Colletta aff, ¶ 41 [d] and exhibit G annexed thereto). Over 208 change orders were signed off on by Columbia after CA-510 for additional work that arose through the summer of 2016, much of which was for additional scope of work requested by Columbia, and many indicated "TBD," for "to be determined" under "Schedule Impact" (*see* exhibit H to Colletta aff). Sciame asserts that when Columbia signed off on tickets for extra work, Sciame would submit to Columbia daily tickets from the contractors doing the work indicating what they did, and the hours worked (*see* exhibit J, a sampling of such daily tickets for extra work), and each of which was signed by Columbia (Colletta aff, ¶ 53).

On July 20, 2016, the New York City Department of Buildings issued a final inspection approval for the Project (exhibit O to Colletta aff). Columbia has had use of the building since then.

On July 31, 2017, Sciame commenced this action for breach of contract. It seeks damages for the contract balance due and retainage (first cause of action), general conditions costs (second cause of action), and extra work (third cause of action) (exhibit A to Collettta aff).

Columbia moves to dismiss based on documentary evidence and for failure to state a claim. It argues that Sciame is not entitled to recover any additional general conditions reimbursable expenses beyond the Guaranteed Maximum Price set forth in the CMA, because the project completion deadline was April 30, 2016, and Sciame failed to seek an extension of that deadline in accordance with provisions of the General Conditions of the Contract agreement (General Conditions Contract) (exhibit C to Burke aff). Specifically, Columbia urges that pursuant to Article 10.2.3 of the General Conditions Contract, Sciame was required to apply for an extension of the deadline for delay beyond its control or for extra work ordered by Columbia within seven days or be deemed to have waived its right to such extension (*id.*). Columbia also argues that Article 17.2.4

of the General Conditions Contract provides that for any claimed change order work performed on a time and materials basis, Sciame and its subcontractors had to submit daily time sheets with the names of the contractors' and subcontractors' employees working on the extra work, as well as other information detailed in that provision. Moreover, Article 17.2.4 provides that the "[f]ailure to strictly comply with these requirements for the performance of work on a cost plus basis shall constitute a waiver of extra compensation on account of the performance of such work" (*id.*). Further, Article 19.1.1 requires that any claim arising out of alleged extra work must be submitted within fourteen (14) days of the event giving rise to the claim, and "shall state clearly and in detail the Contractor's objections and reasons therefor," and Article 19.1.3 provides that failing to submit a written claim or protest results in a waiver of any claim for extra work (*id.*). Columbia argues that Sciame failed to comply with any of these provisions, and, therefore, its claims for extended general conditions Reimbursable Expenses, in the second cause of action, and, by necessity, an extension of time to support such claim, have been waived. Columbia further urges that the third cause of action should be dismissed to the extent that it seeks damages for delay, hindrance, obstruction, and loss of productivity for Sciame's subcontractors including Di Fama Concrete (Di Fama) and Permasteelisa NA (Permasteelisa).

DISCUSSION

On a motion to dismiss based on documentary evidence (CPLR 3211 [a] [1]), the documentary evidence submitted must resolve all factual issues, definitively disposing of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]). It is "granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009]). The facts as alleged in the complaint are accepted as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Bare legal conclusions and factual claims flatly contradicted by the documentary evidence are not entitled to such considerations (*see Nisari v Ramjohn*, 85 AD3d 987, 989 [2d Dept 2011]). Defendant's factual affidavits do not constitute documentary evidence within the meaning of CPLR 3211 (a) (1) (*see Calpo-Rivera v*

Siroka, 144 AD3d 568, 568 [1st Dept 2016]; *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d at 438).

On a motion to dismiss for failure to state a claim (CPLR 3211[a] [7]), again, the complaint allegations, and any submissions in opposition to the dismissal motion, are accepted as true, the plaintiff is afforded the benefit of favorable inferences, and the court need only determine whether the facts fit within a cognizable legal theory (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Guggenheimer v Ginzberg*, 43 NY2d 268, 275 [1977]).

With respect to the second cause of action, Columbia's argument that Sciame was not entitled to any additional general conditions costs because the contract expired, is not supported by the documents submitted. While section 2.03 of the GMP indicates that the project would be complete and the temporary certificate of occupancy (TCO) would be obtained by December 31, 2015, the initial Project schedule, signed off on by Columbia and annexed to the CMA, stated that the Project completion date was March 7, 2016 (*see* exhibit E to Colletta aff). Then, shortly before CA-510 was signed, Sciame submitted the approved Project schedule to Columbia which showed a new Project completion date of June 1, 2016 (Colletta aff, ¶ 41 [d] and exhibit G annexed thereto). While the TCO was not obtained until July 20, 2016, Sciame has submitted numerous change orders dating from the spring and summer of 2016, approved by Columbia for extra work requested by Columbia, many of which indicated schedule impact "TBD" (*see* exhibit H to Colletta aff). Therefore, the documentary evidence does not conclusively support Columbia's claim that Sciame failed to meet the Project deadline.

In addition, Sciame asserts, in the complaint and in its supporting affidavit, that with regard to the general conditions costs, the parties agreed to carry the general conditions as an allowance, and not as a lump sum amount (Colletta aff, ¶ 29; *see* exhibit C to Colletta aff). The Project involved hundreds of change orders, many of which involved extra work, and Sciame would submit monthly requisitions detailing its general conditions costs (with detailed backup for such costs [Colletta aff, ¶ 35 n7]), and then Columbia would increase the allowance for general conditions costs (Colletta aff, ¶¶ 28, 33; *see* exhibit D to Colletta aff at 18-19 [itemizing general conditions costs]). In fact, the explicit purpose of CA-510 was to address additional general conditions costs required by "Added Scope & Contract Allowances depletion" (exhibit F to Colletta aff at 1). It would be

inconsistent, if the general conditions costs were to be only on a lump sum basis, for the parties to refer to them as "Contract Allowances depletion." Columbia's contention that note 4 of CA-510, which states that it "[a]ssumes General conditions runs out thru April 2016" (*id.* at 2), means that the Project completion date was April 30, 2016, is unpersuasive. CA-510 makes absolutely no mention of the Project completion date, and that note simply supports Sciame's assertion that the general conditions costs were an allowance, and recognizes that the allowance was projected to run out sometime that month.

Since Columbia fails to demonstrate that April 30, 2016, was the new Project completion date, its argument that Sciame failed to seek, and thereby waived its right to, an extension under the various contract provisions, fails to provide a basis to dismiss the second cause of action.

Columbia's additional argument that it does not owe money for any extra work Sciame performed at Columbia's request because Sciame failed to submit daily time sheets for such work, waiving the right to payment, also is insufficient at this stage of the action. Scaime has submitted a sampling of the daily time sheets of subcontractors regarding such extra work, which were signed by Columbia, warranting denial of the motion to dismiss (exhibit J to Coilletta aff). Whether there were sufficient time sheets submitted for each change order for work performed on a time and materials basis (*see* exhibit B to Burke aff, Article 17.2.4 of the General Conditions to the GMP at 52), and whether Sciame's general conditions work also required such daily time sheets, cannot be determined on this pre-answer dismissal motion.

With respect to the third cause of action, entitled "Extra Work," that claim is barred only to the extent that it seeks delay damages on behalf of Sciame's subcontractors Di Fama and Permasteelisa. Columbia contends that the claims of Di Fama and Permasteelisa are delay claims, barred by the agreement's "no damages for delay" clause (exhibit B to Burke aff, Article 10.2.4 of the General Conditions at 26), and that Sciame fails to allege any basis for an exception to enforcing such a clause. Sciame asserts that these claims were submitted to Columbia, which discussed and negotiated the claims with Sciame, and the claims were carried on Sciame's cost reports that were reviewed by Columbia (Colletta aff, ¶¶ 98-99).

In Article 10.2.4 of the General Conditions, the parties clearly agreed that all extensions of time granted by Columbia "shall be in lieu of and in liquidation of any claims for compensation of

delay damages against [Columbia], except for recovery of the Contractor's Reimbursable Expenses, . . . resulting from the extension of time" (exhibit B to Burke aff, Article 10.2.4 of the General Conditions at 26). That clause provided that the time extension and Reimbursable Expenses "shall be the sole remedy" for any delay, hindrance or obstruction in the performance of the work, or loss of productivity, or other similar claims (*id.*). Such "no damage for delay" clauses are routinely upheld (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]; *LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d 485, 486 [1st Dept 2012]). There are four recognized exceptions to the enforcement of such clauses where: (i) delays are caused by the contracting party's willful or bad faith, malicious or grossly negligent conduct; (ii) uncontemplated delays; (iii) delays so unreasonable that they constitute intentional abandonment of the contract; and (iv) delays caused by a fundamental breach of a contractual obligation (*Corinno Civetta Constr. Corp.*, 67 NY2d at 309). Delays are not considered uncontemplated if they were reasonably foreseeable, are mentioned in the contract, or arise from the contractor's work during its performance (*see Bovis Lend Lease [LMB], Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 147 [1st Dept 2013]). The party seeking to enforce these exceptions "bears a heavy burden" of proof (*id.*).

Columbia has submitted a letter dated April 25, 2014, from Di Fama to Sciame referring to its claims for delay, inefficiencies, and nonproductive work in the amount of $344,872.00 (exhibit D to Burke aff). Columbia also submitted a claim by Permasteelisa to Sciame from August 2, 2013, seeking an extension of time, and money compensation for delays and loss of productivity, totaling $597,067.00 (exhibit E to Burke aff). Even Sciame's September 28, 2015, change order log, showing change order amounts, contracts, and contractors (exhibit CC to Colletta aff), indicates that Di Fama and Permasteelisa were making claims for delays. This is sufficient to demonstrate that these claims from these two subcontractors are delay damages, which are barred under Article 10.2.4. Sciame fails to carry its heavy burden. It fails to show any basis for the application of an exception to the "no damage for delay" clause. Therefore, to the extent that the third cause of action is seeking such delay damages regarding amounts sought by Di Fama and Permasteelisa, such claims are dismissed. The remainder of the third cause of action, which seeks payment for extra work approved by change orders for other subcontractors, however, shall continue.

Accordingly, it is

ORDERED that the motion to dismiss by defendant The Trustees of Columbia University in the City of New York is granted only to the extent that the portion of the third cause of action seeking delay damages related to subcontractors Di Fama Concrete and Permasteelisa is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the remaining claims are severed, and defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 252, 60 Centre Street, on July 24, 2018, at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: June 5, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.