

Welsbach Elec. Corp. v Judlau Contr., Inc.
2018 NY Slip Op 31416(U)
June 28, 2018
Supreme Court, New York County
Docket Number: 652595/2017
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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WELSBACH ELECTRIC CORP.,

Plaintiff,

-against-

**JUDLAU CONTRACTING, INC., TRAVELERS
CASUALTY AND SURETY COMPANY OF
AMERICA, ZURICH AMERICAN INSURANCE
COMPANY, AND LIBERTY MUTUAL
INSURANCE COMPANY,**

Defendants.

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O. PETER SHERWOOD, J.:

As this is a motion to dismiss, the facts are taken from the amended complaint and are assumed true (*see Whitebox Concentrated Convertible Arbitrage Ptnrs L.P. v Superior Well Servs., Inc.*, 20 NY 3d 59, 63 [2012]).

Plaintiff Welsbach Electric Corp. (Welsbach) and defendant, Judlau Contracting, Inc. (“JCI”) entered into a subcontract for electrical work (“Subcontract”) relating to construction of the 72nd Street station of the Second Avenue Subway, (“Project”). Plaintiff seeks compensation for the cost of delays not caused by Welsbach. In this motion defendant JCI seeks dismissal of the Third (acceleration work), Fourth (breach of contract), Fifth (delay damages), and Seventh (payment bond) causes of action on the ground that the subcontract is dispositive of these claims.

In early 2013, JCI entered into a contract (the “General Contract”), with the Metropolitan Transportation Authority (“MTA”) and the New York City Transit Authority (“TA”) and with MTA “Owner” pursuant to which JCI agreed to act as general contractor in connection with a project known as “Construction of Part of Second Avenue Subway Route 132A 72nd St. Station” (the “Project”) (1st Amend. Compl. ¶ 8; NYSCEF Doc. No. 8). On or about April 3, 2013, Welsbach and JCI entered into the Subcontract whereby Welsbach agreed to perform certain work and furnish materials and equipment as part of the Project (*id.* ¶ 10).

Welsbach’s planned field construction work that would span 593 calendar days, from January 30, 2014 through September 2, 2015, with Project substantial completion occurring on November 13, 2015 (*id.* ¶ 12). Following this milestone, the MTA would have 10 calendar days

to provide JCI with its Remaining Work List. JCI, inclusive of Welsbach, would then have 90 calendar days to complete this work finishing on February 20, 2016. The Project schedule was to conclude with a period for MTA work leading to a final date to open the Project for Revenue Service on December 31, 2016 (*id.* ¶ 12).

JCI repeatedly revised the approved baseline schedule which changes re-prioritized Welsbach's work and limited Welsbach's access to its worksite (*id.* ¶ 16). JCI also failed to provide Welsbach with available work, and delayed, accelerated and compressed Welsbach's work schedule (*id.* ¶ 17). Welsbach's work activities were delayed by JCI, other trades and/or changes over which Welsbach's had no control or responsibility (*id.* ¶ 22). JCI also made changes to the schedule and critical path which incrementally reduced the critical path by a total of 216 calendar days (*id.* ¶ 24). These reductions in the remaining duration of the Project had the effect of accelerating and compressing Welsbach's activities throughout the various areas of the Project site (*id.* ¶ 26).

On February 1, 2016, JCI issued Subcontract Change Order # 31 to Welsbach, which compensated Welsbach for acceleration of specific milestone work for the base Subcontract (*id.* ¶ 28). Change Order # 31 also required JCI to provide Welsbach with access to its work and to ensure completion of precedent trades (*id.* ¶ 30). As of February 1, 2016, JCI directed Welsbach to accelerate its work. Welsbach complied with this directive.

After issuance of Change Order # 31, JCI changed the accelerated schedule, reprioritized Welsbach's work, limited Welsbach's access to its work, failed to provide Welsbach with available work, and/or accelerated other aspects of Welsbach's work (*id.* ¶ 32). JCI failed to resolve multiple design issues, which had the effect of preventing Welsbach's access to its base contract work. The design issues and their associated change orders added to Welsbach's scope of performance, extended Welsbach's time of performance, effectively delayed access to base contract and other follow-up work and disrupted ongoing work (*id.* ¶ 35).

JCI issued change directives to Welsbach that failed to follow contract procedures and demonstrated that the original design was not complete. These change directives added to Welsbach's acceleration (*id.* ¶ 36).

Submittals, evaluations, and approvals took an excessive amount of time, impacted Welsbach's procurement process, delayed delivery of materials and equipment and delayed Welsbach's installation activities (*id.* ¶ 37). JCI's late and incomplete responses to Welsbach's

RFIs delayed Welsbach's access to its work by not providing timely and clear direction for necessary clarifications and resolution of design and other document conflicts (*id.* ¶ 38). Welsbach was denied access to many areas of the Project due to incomplete and delayed precedent trade work (*id.* ¶ 39).

Throughout the Project, Welsbach notified JCI and the MTA of delays it experienced as the result of improper designs, additional work orders, access issues and environmental issues (*id.* ¶ 43). Despite Welsbach's diligent efforts to notify MTA and JCI of Project delays, design flaws, additional work orders, site access issues and poor environmental conditions, JCI refused to provide Welsbach with additional time and compensation (*id.* ¶ 44). JCI instead threatened Welsbach with liquidated damages, specific acceleration directives, and/or accusations of default in an effort to force Welsbach to adhere to an unreasonable project schedule (*id.* ¶ 45).

Despite JCI and MTA's improper conduct, Welsbach overcame delays and completed the electrical work to meet the Owner's January 1, 2017 Revenue Service Date (*id.* ¶ 47). As a result of unanticipated delays, Welsbach was delayed, disrupted and accelerated in the performance of its work (*id.* ¶ 48), was required to hire additional manpower and supervisors in order to staff the Project (*id.* ¶ 50), and was required to perform extra and additional work for which it was entitled to additional compensation (*id.*, ¶ 51). JCI failed and refused to issue change orders or issued unilateral change orders in an amount less than the fair and reasonable value of the extra and additional work (*id.* ¶ 53). As a result of unforeseen Project delays, accelerations and compressions, Welsbach incurred significant costs to complete its work by January 1, 2017 (*id.* ¶ 58).

The Third Cause of Action for Breach of Contract seeks damages due to acceleration, schedule changes and site access issues. The Fourth Cause of Action alleges several breaches of contract, including failures to provide access, issue change orders, coordinate the work of subcontractors, pay for materials, adhere to the project schedule and deal with plaintiff in a fair and equitable manner. The Fifth Cause of Action alleges "breach of fundamental condition, including failure to provide timely and proper access and failure to provide precedent work that conformed to the contract documents. The Seventh Cause of Action seeks payment for the same damages under the surety bond on the Project.

PARTIES' ARGUMENTS

Defendants' Arguments

Defendants argue that the Third, Fourth and Fifth Causes of Action should be dismissed as the documentary evidence upon which the motion is based, the Subcontract, bars damages for delay claims. Specifically, section 8 of the Subcontract provides in part:

The Contractor shall not be liable, and the Subcontractor shall make no claim against the Contractor for damages for any delay, suspension or interruption of the work, whether caused by the Contractor, any of the Contractor's other subcontractors, any other contractor working on the site or the Owner or the Owners representatives or the A/E.

NYSCEF Doc. No. 12.

Plaintiff's claims all refer to prohibited delay related damages under section 8 and are not compensable (*see Nova Casualty Co. v Liberty Mut. Ins. Co.*, 540 F Supp 2d 352, 353 [SDNY 2008]; *Universal/MMEC, Ltd v Dormitory Auth. The State of New York*, 50 AD 3d 352, 353 [1st Dept 2008]). Defendants also assert that although the Court of Appeals has recognized four exceptions to "no-damage-for-delay" clauses, specifically (i) delays caused by the contracting party's bad faith or willful malicious or grossly negligent conduct; (ii) unanticipated delays; (iii) delays so unreasonable as to constitute intentional abandonment of the contract; and (iv) delays resulting from breach of a fundamental obligation of the contract (*see Corinno Cavitta Constr. Corp. v City of New York*, 67 NY 2d 297, 309 [1986]), plaintiff has not alleged facts that fit into any of them (*see Defendant Br.*, p. 11, NYSCEF Doc. No. 14). As to the Seventh Cause of Action, defendants assert that because damages are barred under the Subcontract, Welsbach cannot recover delay damages in an action against the surety on the bond (*see Universal/MMEC, Ltd. v Dormitory Auth. of the State of New York*, 50 AD3d 352 [1st Dept 2008]).

Plaintiff's Arguments

Plaintiff responds that defendants ignore section 11 of the Subcontract, which plaintiff maintains carves out exceptions to the "no-damage-for-delay" clause. Section 11 provides in relevant part:

Notwithstanding anything to the contrary in this article or the Agreement, Subcontractor shall be entitled to additional compensation (as well as an extension of time for delay), to the

extent Contractor obtains same from the Owner, if the Owner or Contractor changes any schedule for the work, or prioritizes certain work or otherwise limits Subcontractor's access or ability to provide work, and such decision results either in an acceleration or compression, for Subcontractor to maintain the schedule or in a delay.

id. Welsbach argues that having agreed in section 11 that the normal “no-damage-for-delay” clause would not apply to the Subcontract, plaintiff's claims survive. Moreover, the Court of Appeals in *Corino Covitta Constr. Corp.* held that delay claims include claims for additional costs “expended in an effort to complete the work on time” (67 NY 2d at 313-14) and some of plaintiff's work fall into this category.

By including section 11, the parties intended to limit the reach of the “no-damage-for-delay” clause to permit recovery for delay related additional costs resulting from certain actions of JCI and the Owner as described in section 11. Under this section, Welsbach is entitled to recover additional compensation if

- JCI obtains the same from the Owner
- The Owner or JCI change any schedule for the work
- The Owner or JCI prioritizes the work or otherwise limits Welsbach's access or ability to provide work

“and such decision results in either an acceleration, compression, for [Welsbach] to maintain the schedule or in a delay” (§ 11). Welsbach asserts that the additional costs incurred are not due to the “garden variety type delays” referenced in the cases cited by JCI. Rather, they are additional costs incurred under circumstances described in section 11 (*see* Welsbach Br., p. 9).

Because section 11 limits the reach of the “no-damage-for-delay” clause contained in section 8 and provides Welsbach with the right to assert claims for damages arising out of changes to the Project Schedule, the motion to dismiss must be denied as defendants have failed to demonstrate that the documentary evidence submitted conclusively establishes a defense (*see* *Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005]). Welsbach also asserts that even if section 8 is applicable, it is vitiated because the damages at issue were caused by JCI's bad faith and breaches of its fundamental obligations. (*see* Plaintiff Br., p. 11). Regarding the Seventh Cause of Action against the payment bond, Welsbach tacitly concedes that the claim is

dependent on its success on one or more of the other six causes of action (*see* Plaintiff Br., p. 18). As discussed above, Welsbach maintains that Third, Fourth, and Fifth causes of action are viable.

DISCUSSION

Having examined the Subcontract, the court finds that section 11 does not except the damages claimed in this case from the limitations of section 8. The section provides repeatedly that the Subcontractor is not entitled to additional compensation for garden variety delay or acceleration such as those alleged in the complaint (*see* Subcontract § 11). Nor is the Subcontractor entitled to extensions of time except to the extent the contractor obtains like extensions from the Owner (*id.*). Recovery of damages under section 11 as additional compensation is recoverable only “to the extent Contractor obtains same from the Owner” (*id.*). Welsbach does not claim that JCI obtained additional compensation from either the MTA or the CTA for changes in the schedule, prioritization of work or limitation of Welsbach’s access. Accordingly, plaintiff cannot recover damages for delay or failure of JCI to obtain extensions based on section 11 of the Subcontract.

The amended complaint alleges facts that amount to a failure to provide timely and proper access to work areas on multiple occasions, failure to perform trade work in conformance with the contract documents and causing delays affecting plaintiff’s timely and efficient performance of work. Plaintiff also asserts that JCI failed to adhere to the project schedule, failed to make timely decisions and failed to issue change orders for additional work, among other things (1st Amend. Compl. ¶¶ 35-39, 42; NYSCEF Doc. No. 8). All of the complained of delays are the typical types of impacts encountered on large complex projects (*see e.g., Commercial Elec. Contractors, Inc. v Pavarini Constr. Co.* 50 AD3d 316 [1st Dept 2008] [“[T]he conduct [complained of] amounted to nothing more than inept administration or poor planning, which falls within the contract’s exculpatory clause.”]; *T.J.D. Construction Co., Inc. v City of New York*, 295 AD2d 180, [1st Dept 2002] [same]; *S.N. Tannor, Inc v A.F.C. Enterprises, Inc.*, 276 AD2d 363 [1st Dept 2000] [same]; *see also, Sarah B. Biser et al.*, 33 NY Prac, New York Construction Law Manual section 7.1 [2d ed 2016] [“[d]elays are common in construction, as common as extras and change orders. Rare is the construction project that is complete by the date specified in the contract”]; *Dart Mechanical Corp. v City of New York*, 2008 NY Misc LEXIS 10429 [Sup Ct NY Cty, Oct. 10, 2008] [granting summary judgment and dismissing delay claims due to poor contract administration on the basis of the contract’s no-damage-for-delay clause]; *Long Island Mechanical of New York. Inc. v*

Connetquot Central School District, 2008 NY Slip Op 31126[U], *2 [Sup Ct Suffolk Cty, April 1, 2008] [the actions alleged by the defendant to “have caused the delays amount to no more than poor planning and scheduling and inept administration which are within the scope of the no-damages-for-delay clause”]; and *Weydmar Electric, Inc. v Joint Schools Construction Board*, 140 AD3d 1605 [4th Dept 2016] [ruling that even if the project was dysfunctional and poorly managed, exclusionary provisions bar plaintiff’s claims]).

Even if the law were not as described, the parties’ contract at the very section relied on by plaintiff would bar recovery. Section 11, captioned “Progress and Performance”, provide that “Subcontractor *without additional compensation*, shall perform its work at such time, in such order, and in such manner as the Contractor may direct” (Subcontract § 11) (*emphasis added*). It directs that the “Subcontractor shall promptly increase its forces, accelerate its performance, work overtime and weekends, *without additional compensation*, if, in the opinion of the Contractor, such work is necessary to maintain proper progress so long as not delayed by the contractor or other subcontractors” (*id.*) (*emphasis added*). It also recites that the “subcontractor acknowledges that the Subcontractor price is based on the fact that the Contractor is not liable to the Subcontractor, absent any actual fraud, for damages . . . due to delays, accelerations, interferences, suspensions, or changes in the performance or sequence of the Subcontractor’s works” (*id.*). Should the Subcontractor’s performance be delayed for reasons beyond the Subcontractor’s control, “the Subcontractor shall be entitled to an extension of time in which to complete the work . . . provided a similar extension of time . . . is given to the Contractor by the Owner . . .” (*id.*).

Regarding the claim of breach of a fundamental obligation under *Corinno Cavitta Constr. Corp.*, 67 NY2D at 309, Welsbach states that “[w]hether the root causes of the project interruptions, acceleration, and compression were actual bad faith or mere ineptitude, the damage to Welsbach did not derive from the delays themselves but from JCI’s failure either to grant time extensions and/or to provide compensation for the acceleration and compression of Welsbach’s Work” (Opp. Br., p. 14). The concession is unsurprising because the Subcontract anticipated changes and established a procedure to address potential delays (*see* § 8). Similarly, section 7, entitled “Changes” shows that the parties anticipated changes to the Subcontract and to the scope of Welsbach’s work. And assuming that Welsbach was damaged from JCI’s failure to grant time extensions or compensation for acceleration or compression, nowhere in the Subcontract does it

appear that JCI was mandated to grant such extensions or compensation. These were discretionary acts.

The Amended Complaint does not allege the elements of breach of JCI's fundamental obligations to Welsbach. Rather, it alleges only that JCI failed to obtain either time extensions or compensation from the Owner. These allegations amount to nothing more than a claim of breach of JCI's promise to take commercially reasonable steps to seek payment from the Owner for damages properly presented to JCI by Welsbach (*see* Subcontract § 8). The Subcontract does not mandate granting either payment or additional time by JCI but instead provides for payment or extensions of time only to the extent JCI actually obtains same from the Owner (*see id.*, §§ 8 and 11; *Polo Electric Corp. v New York Law School*, 2012 NY Misc LEXIS 6540 [Sup Ct, NY Cty, October 23, 2012] [where the court dismissed a contractor's causes of action for delay finding that delays caused by inept administration and improper scheduling are barred by the no-damage-for-delay- clause]).

Having failed to allege specific facts that, accepted as true, would fit its claim within any of the judicially established exemptions to a "no-damages-for-delay" clause, the amended complaint fails. Here, the Amended Complaint recites the exception for breach of a fundamental obligation without alleging facts to establish its applicability. Merely reciting a legal standard without any factual support does not state valid claim. Welsbach has failed to satisfy its "heavy burden" of providing that one of the noted exceptions of *Corino Covitta Constr. Corp.* applies (*see Matter of Manshul Construction Corp. v The Board of Education of the City of New York*, 160 AD2d 643, 644 [1st Dept 1990]; and *LoDuca Associates, Inc. v PMS Construction Management Corp.*, 91 AD3d at 485 [1st Dept 2012]).

As to the claim against the bond, the surety's obligation is limited to those undertaken in the bond (*see Varlotta Construction Corp. v Sette-Gulino Construction Corp.*, 234 AD2d 183 [1st Dept 1996]). Because plaintiff cannot recover under the Subcontract, it is barred from recovery against the payment bond and the Seventh Cause of Action must be dismissed.

Accordingly, it is hereby

ORDERED that the motion of defendants to dismiss the Third, Fourth, Fifth and Seventh Causes of Action is GRANTED and said causes of action are DISMISSED; and it is further

ORDERED that counsel for the parties are directed to appear for a status conference on Tuesday, July 31, 2018 at 9:30 AM at Part 49, Courtroom 252, 60 Centre Street, New York, New York 10007.

This constitutes the decision and order of the court.

DATED: June 28, 2018

ENTER,



O. PETER SHERWOOD J.S.C.