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

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MULTI-PHASE ELECTRICAL SERVICES INC.,

Plaintiff,

-against-

BARR & BARR INC., *et al.*,

Defendants,

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DECISION AND ORDER
Index No.: 652879/2018

Mot. Seq. No.: 001

O. PETER SHERWOOD, J.:

In motion sequence 001, defendant Barr & Barr, Inc. ("Barr") moves for partial summary judgment dismissing the portions of plaintiff Multi-Phase Electrical Services, Inc. (MPES)'s complaint seeking "delay damages", particularly count 2 for unjust enrichment, count 4 for loss of productivity, count 5 for acceleration/constructive acceleration and count 6 for delay. Defendant Barr also seeks dismissal of certain change order requests seeking payment for delay damages in the form of wage rate increases. For the following reasons, the motion shall be granted.

I. BACKGROUND

This action arises out of the construction of a building at the Cornell Tech Campus on Roosevelt Island in New York City (the "Project") (Barr's statement of material facts ¶ 5). Barr was the Construction Manager on the Project, and plaintiff MPES was a subcontractor for certain electrical work (*id.* ¶¶ 5, 6). The parties entered into the subcontract on May 1, 2015 (the "Subcontract) (*see* Cardillo aff, Ex. D [NYSCEF Doc No 10]). Plaintiff was to receive a "lump sum" of $13,710,000 for its work (parties' statements of material facts ¶ 7). The Subcontract contains a notice provision providing:

> "As a condition precedent to Subcontractor's right to assert or pursue a claim of any nature whatsoever against the Construction Manager… Subcontractor shall give the Construction Manager, Owner and Architect written notice of the nature and amount of such claim within (15) days… of the occurrence of the event or document upon which such claim is based. In default of such written notice the claim is waived"

(Cardillo, Ex. D at Article 23[a]). The Subcontract also contains a "no damages for delay" clause that provides:

> "In the event that Subcontractor is obstructed, re-sequenced or delayed in its performance of its Work by reason of the fault of the Construction Manager or Owner or Architect, Subcontractor will be entitled to a reasonable extension of time. It is agreed that the extension of time will be Subcontractor's sole and exclusive remedy for any obstruction or delay. In no event shall Subcontractor be entitled to any monetary damages on account of any obstruction or delay"

(*id.* at Article 23[c]).

The work began in 2015. On March 1, 2017, plaintiff emailed to Barr a document dated February 27, 2017, entitled "Compression Costs for TCO [Temporary Certificate of Occupancy] Change in Date". This document claimed $911,856.31 in extra costs due to the "impact of sporadic overtime on labor productivity" resulting from an alleged "7-week delay in the project" (Cardillo, Ex. E). On the same day, Barr rejected the claim based on Articles 23(a) and (c) of the Subcontract (Cardillo, Ex. G). On March 20, 2017, plaintiff emailed to Barr a claim for $4,543,590 in costs for the life of the Project due to alleged inefficiencies caused by Barr, including "Design changes/Redos; Working Multiple Floors; Compressed Schedule; Working 6 days/wk" (Cardillo, Ex. H). The parties dispute this fact, but defendant Barr states that it advised plaintiff that it had rejected this claim at a meeting held on April 4, 2017 (Barr's statement of material facts ¶ 14). On July 21, 2017, plaintiff submitted a subsequent letter to Barr claiming a total of $7,056,652 for alleged inefficiencies for the life of the Project, including "Design Changes/Redos; Working Multiple Floors; Compressed Schedule; Working 6-7 days/wk; Improper sequencing/scheduling; Constant redirection; RFIs/Change Orders; No schedule updates; Lack of Coordination of trades" (Cardillo, Ex. I). On July 21, 2017, Barr rejected the claim based on Articles 23(a) and (c) of the Subcontract (Cardillo, Ex. J). On December 29, 2017, plaintiff sent another letter to Barr indicating that it had increased its total claim for delay damages to $7,625,704 (Cardillo, Ex. K). Barr admits that it directed plaintiff to perform certain overtime work beginning in June 2015 (Barr's statement of material facts ¶¶ 19, 20).

In addition to the claims for delay damages, plaintiff submitted five change order requests to defendant Barr over the course of the Project (Cardillo, Ex. L).

II. LEGAL STANDARD

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]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 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,* 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 and must give that party the benefit of every favorable inference (*see William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizleh,* 22 NY 3d 470, 475 [2013]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, 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. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American 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]).

III. Discussion

A. Claims for delay damages – counts 4, 5, 6

Plaintiff seeks delay damages based on three separate theories – delay, loss of productivity, and acceleration/constructive acceleration. Defendant treats them all as delay damages claims, and plaintiff does not make a distinction. To the extent that plaintiff has attempted to separate its delay

damages from productivity damages (*see* Kelly affirmation [NYSCEF Doc No. 30] ¶ 8), the distinction is of no consequence (*see Corinno Civetta Const. Corp. v. City of New York*, 67 NY2d 297, 313–14 [1986] ["All delay damage claims seek compensation for increased costs, however, whether the costs result because it takes longer to complete the project or because overtime or additional costs are expended in an effort to complete the work on time. It is of no consequence that the obstruction, whatever its cause, occurs during the term of the contract or afterwards or whether it disrupts the contractor's anticipated manner of performance or extends his time for completion."]).

Plaintiff cites defendant Barr's mismanagement, failure to coordinate and hold foreman meetings, failure to timely answer RFIs, direction to perform overtime and work out of sequence, design changes, misrepresentations, and compression/acceleration of the Project schedule as the causes of its damages. "As in all contract actions, the burden of proving the damages is on plaintiff. 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" (*Manshul Const. Corp. v. Dormitory Auth. of New York*, 79 AD2d 383, 387 [1st Dept 1981] [collecting cases] [internal citations omitted]).

The threshold issue raised by defendant on this motion is whether the claims for delay damages are precluded by the "no damages for delay" clause of the Subcontract, which also contains certain requirements with respect to notice of claims. "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, even with 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, 67 NY2d at 309).

Barr has met its prima facie burden of establishing that damages sought by plaintiff for delays are barred by the "no damages for delay provision of the Subcontract, which provides that:

> "In the event that Subcontractor is obstructed, re-sequenced or delayed in its performance of its Work by reason of the fault of the Construction Manager or Owner or Architect, Subcontractor will be entitled to a reasonable extension of time. It is agreed that the extension of time will be Subcontractor's sole and exclusive remedy for any obstruction or delay. In no event shall Subcontractor be entitled to any monetary damages on account of any obstruction or delay"

(Subcontract, Article 23[c]). Defendant also makes an affirmative showing that all of the delays at issue in this case were contemplated by the Subcontract. To the extent plaintiff complains of damages caused by defendant's direction to plaintiff to work overtime, Article 19 of the Subcontract specifically contemplates the possibility of overtime. As to plaintiff's complaint for damages caused by defendant's direction to perform work "out of sequence", such work is contemplated by Article 18(c) and Schedule C to the Subcontract. Regarding plaintiff's complaint of delays caused by design changes and the issuance of change orders, such work is also contemplated by Article 18. In the case of delays allegedly caused by defendant's mismanagement of the Project, including failure to hold foreman meetings to coordinate the subcontractors' work and to timely answer RFIs, this conduct does not rise to the level of gross negligence as a matter of law (*see Martin Mechanical Corporation v P.J. Carlin Construction Company*, 132 AD2d 688 [2d Dept 1987] [mismanagement]; *Travelers Casualty and Surety Company v Dormitory Authority – State of New York*, 735 FSupp2d 42 [SD NY 2010] [RFIs]). Finally, as discussed above, to the extent plaintiff complains of damages stemming independently from acceleration of the Project, this is just another form of delay damages grounded in the cost of overtime paid to union workers, that are barred by the Subcontract.

After the movant has "met their prima facie burden on their motion of establishing that damages sought by plaintiff for delays in the performance of its work are barred by the no-damages-for-delay exculpatory clause of the parties' contract…[i]t then became incumbent upon plaintiff in opposition to 'meet the heavy burden' of establishing the applicability of one of the exceptions to the general rule that no-damages-for-delay clauses are enforceable" (*Weydman Electric Inc. v Joint Schoals Constrn Bd.*, 140 AD3d 1605, 1606-1607 [4th Dept 2016]). On

rebuttal, plaintiff successfully raises an issue of material fact as to whether the breach of a fundamental obligation exception applies. To show that defendant breached their fundamental obligation to provide three days to cure following a notice of default caused damages (*see* Subcontract, Article 8[a]), plaintiff proffers the June 20, 2017 notice to cure from Barr to MPES (Kelly, Ex. B [NYSCEF Doc No. 32]) and subsequent work ticket for another subcontractor dated two days later (Kelly, Ex. C [NYSCEF Doc No. 33]). Defendant fail to address the issue on reply. With respect to the purported breach of the Subcontract Articles 9.1 and 9.3, plaintiff submits the affidavit of Daniel Kelly containing statements supporting its position that defendant failed to "maintain the Master Construction Schedule" and "coordinate their schedules with the schedules of other Subcontractors" as required, thereby causing delays (*see* Kelly ¶¶ 11, 22-68). Viewed in the light most favorable to the opposing party (*see William J. Jenack Estate Appraisers & Auctioneers, Inc.*, 22 NY 3d at 475), these facts may raise another triable issue of fact.

The other purported breaches raised by plaintiff do not raise issues of material fact. With respect to defendant's alleged breach in failing to provide plaintiff with an extension of time pursuant to Article 23(c) of the Subcontract, plaintiff does not show how such a breach caused its damages. Plaintiff's arguments that defendant's conduct amounts to gross negligence are unavailing as it cites no authority supporting the proposition that mismanagement may rise to the level of gross negligence. Plaintiff has also failed to show that defendant's course of conduct modified the contract as the conduct at issue was contemplated by the contract, as discussed above.

There is no dispute that the Subcontract contains a notice provision that would have required plaintiff to notify the Construction Manager (Barr), Architect (Morphosis) and Owner (Cornell University) of its claims within 15 days of the occurrence and document the underlying claim. Defendant proffers plaintiff's various notices, the earliest dated February 27, 2017 and received March 1, 2017, to show that the notices were not timely as per Article 23(a) of the Subcontract (Cardillo aff, exhibits E, H, I and K, NYSCEF Docs. No. 11, 14, 15, 17). While there is no dispute among the parties as to when the notices were sent to Barr, there does exist a dispute as to when the claim would have accrued, and by when, exactly, notice would need to have been given in order to be timely. To that end, the above-referenced communications offer only limited assistance. The earliest notice seeks compensation for work performed over at least a seven week

period (NYSCEF Doc. No. 11). Thus, most of the extra work for which reimbursement was claimed as of January 27, 2017 must have been performed more than 15 days earlier. As to the subsequently filed claims, the services to which they relate extend back more than 15 days from the dates of the notices (*see* NYSCEF Docs. No. 14, 15, 17). Nevertheless, partial summary judgment based on untimely notice must be denied because of Barr has failed to show that all of plaintiff's claims for delay damages are barred under Article 23(a) the Subcontract.

There is no dispute that under the same provision, plaintiff was required, as a condition precedent to its right to assert claims arising out of the Subcontract, to serve the Owner and Architect with notice (Subcontract, Article 23[a]). Plaintiff has not presented any evidence of notice given to Barr, Morphasis and Cornell University. The notices that defendant Barr attaches to the motion do not indicate that any of these except Barr was provided notice (*see* Cardillo, Ex. E, H, I , K [NYSCEF Docs. No. 11, 14, 15, 17]). Plaintiff does not offer any argument or evidence on rebuttal, and effectively concedes the point. The proof of notice before the court reveals notices sent to Barr by MPES on four occasions but none sent to either the Owner or Architect. The motion for partial summary judgment shall be granted based on failure of timely notice to the Owner and Architect.

B. Claims for "Wage Rate Increase"

Although defendant Barr raises the issue separately from the delay claim, the parties do not appear to dispute that these claims fall within the category of "delay damages"; nor do they make any argument that any other analysis should apply. Plaintiff has therefore failed to make a prima facie case for entitlement to summary judgment on the claims for wage rate increase, to the extent they qualify as claims for delay damages, or otherwise.

C. Quantum Meruit – Count 2

Despite the detailed written contract of the parties, plaintiff seeks to recover under the theory of quantum meruit (described in the complaint as "unjust enrichment/quasi contract", NYSCEF Doc. No. 1, p.5). It asserts that the claim is appropriate as it is to recover money for unapproved change order work which may fall outside the ambit of the Subcontract (Opp at 25). The claim must be dismissed as it is well settled that "[r]ecovery under the theory of quantum meruit is not appropriate where . . . an express contract governed the subject matter involved,"

Parker Realty Group, Inc. v Petigny, 14 NY 3d 864, 866 (2010).

D. Cross-Motion to Amend

Leave to amend a pleading pursuant to CPLR § 3025 "shall be freely given," in the absence of prejudice or surprise (*see e.g. Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). Mere lateness in seeking such relief is not in itself a barrier to obtaining judicial leave to amend (*see Ciarelli v Lynch*, 46 AD3d 1039 [3d Dept 2007]). Rather, when unexcused lateness is coupled with significant prejudice to the other side, denial of the motion for leave to amend is justified (*see Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]). Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Const. Co.*, 54 NY2d 18, 23 [1981]).

In order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*Thompson* 24 AD3d at 205; *Zaid* 18 AD3d at 355). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*see Aerolineas Galapagos, S.A. v Sundowner Alexandria*, 74 AD3d 652 [1st Dept 2010]; *Thompson* 24 AD3d at 205). Thus, a motion for leave to amend a pleading must be supported by an affidavit of merit or other evidentiary proof (*Delta Dallas Alpha Corp. v S. St. Seaport Ltd. Partnership*, 127 AD3d 419, 420 [1st Dept 2015]).

As the party seeking the amendment, plaintiff has the burden in the first instance to demonstrate their proposed claims' merits, but defendants, as the parties opposing the motion, "must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 W. 40th St. LLC*, 42 AD3d 82, 86 [1st Dept 2007]). Where there has been extended delay in seeking leave to amend, the party seeking to amend a pleading must establish a reasonable excuse for the delay (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003]).

As plaintiff points out, there can be no prejudice or surprise, as plaintiff only seeks to add certain facts to the complaint supporting its position with respect to the unenforceability of the "no

damages for delay" clause due to the factual circumstances falling into an exception. There is no issue of lateness here as the parties not yet begun discovery. However, plaintiff has failed to provide the requisite affidavit of merit or evidentiary proof and, as discussed above, plaintiff has failed to show compliance with Section 23(a) of the Subcontract. Although plaintiff has provided a copy of the proposed complaint, it has not provided a blackline per CPLR 3025 (b). The motion to amend shall be denied with leave to renew upon proper papers within 10 days of service of this Decision and Order with notice of entry.

It is hereby,

ORDERED that the motion for partial summary judgment of defendant Barr & Barr, Inc. is hereby GRANTED and the Second (Unjust Enrichment/Quantum Meruit), Fourth (Loss of Productivity), Fifth (Acceleration/Constructive Acceleration) and Sixth (Delay) causes of action are hereby DISMISSED.

This constitutes the decision and order of the court.

DATED: **May 6, 2019**

E N T E R,

O. P. Sherwood

O. PETER SHERWOOD J.S.C.