SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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LAKHI GENERAL CONTRACTOR, INC.

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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INDEX NO. 651957/2017

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for DISMISS.

In this action stemming from a public housing improvement project contract, plaintiff Lakhi General Contractor, Inc. seeks to recover damages for defendant New York City Housing Authority's alleged breach of contract; failure to pay delay damages; unjust enrichment; *quantum meruit*; and breach of implied duty of good faith and fair dealing. Defendant moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint. Plaintiff opposes defendant's motion; and defendant replies.

Factual Background

On July 31, 2014, defendant awarded plaintiff, a general contractor, the contract numbered BW1310355 (the Contract) to perform building exterior restoration and roof replacement at the West Brighton Plaza and Richmond Terrace, two of defendant's public housing developments located in Staten Island, New York. The total winning bid amount was $10,427,253.56. The Notice to Proceed dated August 1, 2014, required plaintiff to commence work on August 4, 2014, and to complete it within 540 calendar days or by January 26, 2016 (NYSCEF # 22 at 2).

On October 27, 2015, defendant's project manager granted plaintiff's request for a 180-day extension of the completion date to July 24, 2016 (NYSCEF # 23). Defendant's construction manager, as agent, issued a certificate of substantial completion to the project manager on April 22, 2016 (NYSCEF # 24). Gucharan Singh, plaintiff's president, testified that the project was finished on July 22, 2016 (NYSCEF # 15 at 106:15).

On June 27, 2016, plaintiff submitted its Notice of Claim to defendant, for, among other things, unpaid change orders, extended general conditions/general

requirements costs, and labor and materials escalation costs (NYSCEF # 20). On July 18, 2016, plaintiff submitted a Supplemental Verified Notice of Claim in the total amount of $5,684,093.00 (NYSCEF # 16).

The complaint alleges that defendant failed to pay any of its claims. Plaintiff claims a number of delays occurred and incurred costs to them in the amount of $5,684,093,00; defendant failed to compensate plaintiff (NYSCEF # 1, ¶¶ 17-22). Plaintiff also disputes a sidewalk credit that it provided to defendant; the amount defendant paid on over-run quantities; and the unit prices for change orders. The details of the alleged unpaid claims are below[1].

Discussion

Where a motion to dismiss is based on documentary evidence pursuant to CPLR 3211(a)(1), the claim will be dismissed "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]).

Breach of Contract

In support of its motion to dismiss, defendant argues that plaintiff's breach of contract claims, including its delay claims, sidewalk credit claim, change order claims, and panel adjustment claims, are prohibited by Section 23 of the Contract's General Conditions, since plaintiff failed to timely serve a written Notice of Claim on defendant. In opposition, plaintiff argues that under Section 23, the date of when a claim arises is ambiguous, and thus the claims are not barred. Plaintiff further contends that it could not have ascertained its damages until its work on the project was complete.

Section 23 of the Contract states in pertinent part:

> "(a) If the Contractor claims that any instructions of the Authority, by drawings or otherwise, involve Extra Work entailing extra cost, or [damages], the Contractor shall, within twenty (20) days after such

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[1] Plaintiff's breach of contract claims include: (1) $381,124 in damages for "Change In Unit Price On Under Run Quantities"; (2) $223,307 for "NYCHA Took 20% Credit On Sidewalk Shed Bridge Instead of 2%"; (3) $1,526,291 for "NYCHA Paid Bid Price On Over Run Quantity Instead of New Unit Price; (4) $85,976 for "Bulk head door threshold and step modification"; (5) $280,083 for "Roof Railing Panel Height Adjustment"; (6) $55,997 for "Underpaid Roofing Quantities"; and (7) $261,203 for "Roof Edge Additional Height of Gravel Stop Fascia."

Plaintiff's delay claims are: (1) $459,224 in damages for "Sidewalk Shed Rental"; (2) $193,768 for "Work Disruption Due to Multiple Inspections"; (3) $791,567 for "Cost related to Acceleration /Recovery Schedule"; and (4) $1,425,553 for "Cost related to Time extension" (*see* NYSCEF # 16).

> claim shall have arisen, file with the Authority written notice of intention to make a claim for such extra cost or damages. . . .
>
> (b) The filing by the Contractor of a notice of claim . . . within the time limited herein, shall be a condition precedent to the settlement of any claim or to the Contractor's right to resort to any proceeding or action to recover thereon, and failure to do so shall be deemed to be a conclusive and binding determination on the Contractor's part that he/she has no claim against the Authority for compensation for Extra Work or for compensation for damages, as the cause may be, and shall be deemed a waiver by the Contractor of all claims for additional compensation or for damages."

(NYSCEF # 22, General Conditions at 20).

It is well established that contractual notice provisions like Section 23 are conditions precedent to suit or recovery, and failure to comply with the notice provisions warrants dismissal of the action (*see A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 30-31 [1998]). Contracts containing identical contractual provisions to Section 23 have been strictly enforced by the courts (*see, e.g., S.J. Fuel Co., Inc. v New York City Hous. Auth.*, 73 AD3d 413, 413-414, [1st Dept 2010]) [finding that neither "prior dealings among the parties nor actual knowledge of plaintiffs' claims . . . relieved plaintiff of the obligation to serve a timely and sufficiently detailed notice of claim" under section 23]; *Promo-Pro Ltd. v Lehrer McGovern Bovis. Inc.*, 306 AD2d 221, 222 [1st Dept 2003]), *lv denied* 100 NY2d 628, 801 [2003]) [finding that "compliance with the notice of claim provision was an express condition precedent to the contractor's right to bring an action for recovery of change order payments"]; *Master Painting & Roofing Corp. v New York City Hous. Auth.*, 258 AD2d 275, 275 [1st Dept 1999]).

As a timely Notice of Claim is a condition precedent to maintaining an action against defendant, plaintiff has the burden to prove that its Notice of Claim was served within 20 days after accrual of its claim or that an exception to the 20-day requirement applies. As the Court of Appeals has explained:

> "It is well settled that a contractor's claim accrues when its damages are ascertainable. Although the determination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, it has generally been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted."

(*C.S.A. Contr. Corp. v New York City Sch. Constr. Auth.*, 5 NY3d 189, 192 [2005]).

Here, a certificate substantial completion was issued on April 22, 2016, and thus, plaintiff's claims asserted in its Notice of Claim and Supplemental Notice of Claim were ascertainable on that date. Accordingly, plaintiff was required to submit its Notice of Claim by May 12, 2016, which it did not. Plaintiff's argument that its damages were not ascertainable until the work was complete is of no moment since it is the date of the substantial completion of the work that starts the clock, and not the completion of the project.

Plaintiff argues that the certificate of substantial completion was unsigned, so there is no way to determine whether April 22, 2016, was the actual date of substantial completion (NYSCEF # 41 at 8). Plaintiff supplies no legal authority to make the argument that a missing signature voids a certificate of substantial completion. Furthermore, the certificate itself had no line designated for a signature so there is no reason to believe that it had to be signed in the first place (NYSEF # 24). Accordingly, the court finds plaintiff's Notice of Claim and Supplemental Notice of Claim untimely and barred by Section 23 of the Contract's General Conditions.

It is also evident that the time plaintiff was required to submit a notice of claim for its sidewalk bridge credit, change-orders, and panel adjustments before April 22, 2016, as those claims arose as early as September 2014 (NYSCEF ## 17, 20). Plaintiff's sidewalk credit claim alleges that defendant improperly took a twenty percent credit instead of two percent on a sidewalk bridge. This claim was ascertainable on September 10, 2014, when plaintiff agreed to provide a twenty percent credit to defendant (NYSCEF # 17 at 1). Thus, the last date for plaintiff to file a sidewalk credit claim was September 30, 2014.

Next, plaintiff's change-orders claim alleges that the change-orders entered into between the parties resulted in the increase of work and materials required for the project. Plaintiff's change-order nos. 1, 2, and 3 to perform extra work were signed and accepted by Singh on plaintiff's behalf on May 28, 2015, June 22, 2015, and October 19, 2015, respectively. Thus, plaintiff's change-orders claim arose on the date in which Singh agreed to the change orders, which it did not.

As for plaintiff's panel adjustments claim, the agreement between the parties on April 12, 2016 indicates that plaintiff accepted $65,000 for roof railing panel adjustment work and work performed including labor and materials for other projects (NYSCEF # 19). Accordingly, the damages were ascertainable on April 12, 2016, when the invoice of the work performed was submitted (*see C.S.A. Contr. Corp.*, 5 NY3d 833). Plaintiff's argument that its damages were not ascertainable until after project completion is without merit. Plaintiff had no later than May 2, 2016 to file its Notice of Claim pursuant to Section 23, which it failed to do.

Plaintiff also alleges that defendant failed to pay $592,963.73 due under the contract. However, as plaintiff also indicates that defendant has paid the amount due under its retainage claim, the first cause of action for breach of contract is dismissed to the extent that it alleges that defendant failed to pay the retainage amount (NYSCEF # 41 at 13).

Accordingly, plaintiff's breach of contract claims in the first and second causes of action are dismissed. In any event, as discussed below, there is additional basis to dismiss plaintiff's delay, underrun quantities, and change-orders claims.

Delay Claim

Defendant argues that plaintiff's breach of contract claim for delay is also precluded under Section 14 of the Contract's General Conditions, the no-damages-for-delay-clause. Section 14 of the contract provides in pertinent part:

> "In the event completion of the work is necessarily delayed beyond the time for completion of the Work . . . on account of unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to acts or omissions of the Authority, its officers, agents, or employees, . . . the time for completion shall be extended by a period of time corresponding to the delay, provided that within twenty (20) days from the beginning of such delay the Contractor notifies the Authority of the causes of the delay
> . . . .
> Except as otherwise provided in this Contract, the Contractor expressly agrees to make no claim or maintain any action against the Authority for damages for suspension of or delay in the performance of this Contract occasioned by delays to or interruptions of the work, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance."

(NYSCEF # 22, Contract's General Conditions at 16).

As held by the Court of Appeals, a clause which exculpates a contractee from liability is generally valid and enforceable (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986], citing *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384 [1983]). Here, defendant demonstrates that Section 14 of the Contract's General Conditions prohibits plaintiff's claim for damages due to delay. In opposition, plaintiff's argument that it's claim is not barred because the delays were not contemplated by the parties at the time the parties entered into the contract is without merit.

It is well settled that "exculpatory clauses will not bar claims resulting from delays caused by the contractee if the delays or their causes were not within the contemplation of the parties at the time they entered into the contract" (*see Corinno Civetta Constr. Corp.,* 67 NY2d at 309-310 [1986]). However, the uncontemplated delays exception only applies if the claimant can demonstrate that the delays were wholly unanticipated (*see North Star Contracting Corp. v City of New York,* 203 AD2d 214, 215 [1st Dept 1994]).

Plaintiff claims eleven delays related to the sidewalk shed credit: defendant's delay in supplying information related to the existing slab thickness; defendant's delay in approving submittals; delays related to the bulging bricks, delays related to the window caulking asbestos abatement; delays related to the removal of NYPD equipment on the roof of Buildings 4 and 6; delays related to the roof railing height adjustment; door threshold and gravel stop fascia; delays related to the removal of the sidewalk shed; delays related to additional asbestos abatement; delays related to inclement weather; and delays related to work interruptions were never contemplated by the parties when the Contract was executed (NYSCEF # 32, ¶¶6-7). Plaintiff has neither provided legal authority nor factual basis to determine that the delays were "wholly" unanticipated. Moreover, defendant granted plaintiff's request for an additional 180 days to complete the project (NYSCEF # 23).

Underrun Quantities Claim

Defendant also argues that plaintiff's breach of contract claim for underrun quantities is precluded by the Omission Clauses in Section III(E)(8) of the Form of Bid and section 8(a) of the Contract's General Conditions. Omission Clauses have been construed to permit deletions in contracts so long as they do "not alter the essential identity of the main purpose of the contract" (*see Camarco Contrs. v State of New York,* 33 AD2d 717, 719 [3d Dept 1969], quoting *Del Balso Constr. Corp. v City of New York,* 278 NY 154, 160 [1938]).

Section III(E)(8) of the form bid states that defendant:

> "[m]ay at any time order an increase or decrease in the quantities of an Item of Work. Increases and/or decreases in quantities of an Item of Work will result in a corresponding change in Contract value on a per unit basis at the Unit Price(s) for such Item(s) . . . ."

(NYSCEF # 22, Form of Bid at 9).

Section 8(a) of Contract's General Conditions states in relevant part that defendant "[m]ay at any time . . . make changes by altering or changing the work or by ordering extra work, or by omitting or reducing the work in part" (NYSCEF # 22 at 15). Section 8(a) further states that when work is omitted or reduced plaintiff

shall not have a right to compensation or damages for any loss or cost, except that defendant will pay for work performed.

Here, the Omissions Clauses bar plaintiff's underrun quantities claim since they provide that defendant may at any time order an increase or decrease in work under the Contract. Plaintiff argues that defendant's deletions were random and caused plaintiff to sustain substantial damages (NYSCEF # 41 at 16). However, plaintiff fails to explain how defendant's decision to delete certain work was arbitrary or capricious. Plaintiff's additional argument that the omissions altered the essential identity of the main purpose of the contracts is also without merit absent any explanation on how the main purpose of the contract was altered by the subject deletion (*see De Foe Corp. v City of New York*, 95 AD2d 793, 794 [2d Dept 1983]).

Change-Orders Claim

Defendant argues that plaintiff's change-orders claim is barred by Section III(E)(8) of the Form of Bid, and Section 8(b) of the Contract's General Conditions. Section 8(b)(1)-(2) states that:

> "[f]or changes [in the Contract] resulting in Extra Work, the contract price shall be adjusted by such of the . . . following methods as the Authority selects: 1. Where unit prices have been established in the Contract, such unit prices may be used as a basis for computing the additions to be made; or 2. The Authority and the Contractor may agree upon unit prices or a lump sum therefor. . . ."

(NYSCEF # 22 at 15).

Plaintiff's change-orders claim seeks damages based on the increased amount of materials and labor required for work on the project (NYSCEF # 32, ¶¶15-16). Since sections III(E)(8) and 8(b) explicitly permit defendant to modify the quantities of an item of work and a method to adjust the contract price, plaintiff's change-orders claim must be dismissed.

Quantum Meruit, Unjust Enrichment, and Implied Duty of Good Faith and Fair Dealing

Defendant contends that plaintiff's claims for unjust enrichment and *quantum meruit* must be dismissed since a contract exists (NYSCEF # 27 at 19). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]).

Here, specific provisions in the Contract governs plaintiff's breach of contract and delay claims. Section 14 of the Contract's General Conditions addresses the delay damages (NYSCEF # 22, General Conditions at 16). Section 8 of the Contract's General Conditions addresses the additional work (*id.* at 14). For these reasons, plaintiff's *quantum meruit* and unjust enrichment claims are dismissed.

Finally, plaintiff's claim for breach of the implied duty of good faith and fair dealing is duplicative of it breach of contract claim, since it alleges identical factual basis and damages, and is thus dismissed as duplicative (*see Empire State Bldg. Assocs. v Trump*, 247 AD2d 214 [1998]).

Attorneys' Fees

As addressed in the foregoing sections, plaintiff's claims are dismissed. Accordingly, as plaintiff is not the prevailing party in this matter, its claim for attorneys' fees is dismissed (*see* CPLR 8601). In any event, CPLR 8601 does not provide for attorneys' fees against a city agency such as defendant (*see Hernandez v Hammons*, 98 NY2d 735, 736 [2002]).

Conclusion

Accordingly, it is hereby

ORDERED that the branch of defendant, New York City Housing Authority's motion pursuant to CPLR 3211(a)(1) to dismiss the complaint of plaintiff, Lakhi General Contractor, Inc., is granted and the complaint is dismissed; it is further,

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the Decision and Order of the court.

5/8/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE