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

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THE HANOVER INSUARNCE COMPANY,

Plaintiff,

-against-

E.E. CRUZ & TULLY CONSTRUCTION CO., A JOINT VENTURE, LLC,

Defendant.

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DECISION AND ORDER
Index No.: 651815/2017

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

Under motion sequence 001, defendant moves to dismiss pursuant to CPLR 3211(a) but fails to state which, if any, of the eleven subdivisions thereof it seeks to invoke. The court assumes plaintiff is relying on CPLR 3211(a)(1) as it relies on documentary evidence to advance the motion. For the following reasons, the motion to dismiss the complaint shall be denied.

I. FACTS

As this is a motion to dismiss, the facts are drawn from the complaint except as noted and are accepted as true.

Defendant E.E. Cruz & Tully Construction Co., A Joint Venture, LLC (CTJV) is a general contractor for certain work on a portion of the Second Avenue Subway. Plaintiff Hanover Insurance Co. (Hanover) is a surety for the nonparty subcontractor, 4J's Plumbing LP (4J's). On June 22, 2012, through the New York City Transit Authority (NYCTA), the Metropolitan Transportation Authority (MTA) as owner entered into the general contract with CTJV for a price of $324,600,000 (complaint ¶ 5). On June 11, 2012, CTJV and 4J's entered into the subcontract (Subcontract) for plumbing, fire standpipe and temporary fire standpipe work for a price of $9,075,000 (complaint ¶ 6, NYSCEF Doc. No. 11). On September 19, 2012, plaintiff Hanover as surety issued a Subcontract Performance Bond and Subcontract Labor and Material Payment Bond (Performance Bond) on behalf of 4J's, as principal, in favor of CTJV, as obligee in the sum of $9,075,000 (complaint ¶ 7). On March 30, 2015, CTJV terminated the 4J's Subcontract for default (complaint ¶ 8).

Per the terms of the Performance Bond, CTJV demanded that Hanover complete the Subcontract, and on November 11, 2015 Hanover and CTJV entered into an agreement (Letter Agreement) to that effect. The Letter Agreement provides that Hanover would arrange completion of the remaining work under the 4J's Subcontract and that Hanover had retained nonparty Metro City Group, Inc. (Metro) to perform the work. CTJV acknowledged that it was satisfied with Metro's work progress since it terminated the 4J's Subcontract and promised to pay Hanover the remaining balance on the subcontract in a timely manner (complaint ¶ 12). Hanover has paid Metro at least $11 million so far, yet CTJV repeatedly failed to timely pay Hanover. Hanover has repeatedly notified CTJV of its failures to make payments due, as well as payments for extra work pursuant to change orders for which Hanover submitted payment requests totaling $1,350,199 (complaint ¶¶ 16-18).

Part of the completion work included work on seismic restraints in the North Tunnel (Seismic Work). Due to CTJV's failure to properly coordinate and supervise this work, Hanover's costs increased (complaint ¶ 20). On July 7, 2016, Hanover submitted a proposal to CTJV to complete the work for $154,452, plus 21% markup for overhead and profit (complaint ¶ 21). CTJV failed to timely submit the proposal to the NYCTA and did not respond until after February 2017. Hanover submitted a revised proposal in March 2017 but CTJV refused to issue a change order. Hanover believes that CTJV completed this work with another contractor (complaint ¶ 25). Hanover declared CTJV in default and sent a Termination Letter effective March 28, 2017, listing each of CTJV's alleged breaches and excusing Hanover from further performance (complaint ¶ 27). Another letter dated April 28, 217 reaffirmed the same.

The Termination Letter also referenced Hanover's impact claims based on extension of the original substantial completion date, December 21, 2015. The substantial completion date was first extended to October 5, 2016, and again to June 1, 2017 (complaint ¶¶ 30, 31). Hanover incurred impact costs for extended general conditions, labor escalation, material escalation, additional small tool costs, additional overtime costs, impact costs including design error and seismic restraints delay costs, lost profits on original contract value, and unpaid work authorizations (complaint ¶ 32). Hanover has submitted to CTJV a series of Requests for Equitable Adjustments (REA). To date, CTJV has not made any payment on the original or updated REA. In addition, CTJV

prematurely paid or overpaid 4J's $500,000 and CTJV should be required to return this money to Hanover (complaint ¶¶ 13, 38).

Plaintiff brings causes of action for (i) breach of contract, and (ii) quantum meruit.

II. LEGAL STANDARD

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85).

III. CONTRACT INTERPRETATION

A. Arguments

Defendant argues that the Performance Bond between defendant and plaintiff surety "incorporates the terms of the Subcontract between 4J's and defendant and binds plaintiff to the

same terms and conditions" (mem at 1). Hanover reaffirmed its obligation to perform pursuant to the terms of the Subcontract when it stated in the Letter Agreement that "Hanover will be submitting additional applications for payment on a go forward basis and CTJV agrees to process them and pay Hanover in accordance with the terms of the Subcontract" (Malandro aff, exhibit 1 NYSCEF Doc. No. 18; *Chiacchia v Nat'l Westminster Bank USA*, 124 AD2d 626 [2d Dept 1986] [finding that when an agreement refers to and describes a referenced paper such that it is identified beyond all reasonable doubt, it is incorporated]).

In opposition, plaintiff argues primarily that defendant CTJV failed to establish that plaintiff Hanover incorporated or is bound by the terms of the Subcontract between CTJV and 4J's. Hanover was not an assignee of that agreement, but a surety completing certain work under a performance bond following a termination. The surety is only bound to provisions of the Subcontract to the extent they are incorporated into the parties' agreements. Neither the Letter Agreement, nor the Performance Bond establish that Hanover incorporated all the terms of the 4J's Subcontract (opp at 7-8). While CTJV claims that the allegations in paragraphs 43 and 44 of the complaint acknowledge that the Subcontract was incorporated by reference into the Letter Agreement, those paragraphs only indicate that CTJV was required to process Hanover's payment application in accordance with the Subcontract (opp at 8; complaint ¶¶43, 44). One specific reference does not incorporate the entire Subcontract (*Auburn Custom Millwork, Inc. v Schmidt & Schmidt, Inc.*, 148 AD3d 1527, 1530 [4th Dept 2017] [holding that "reference by the contracting parties to an extraneous writing for a particular purpose makes it part of their agreement only for the purpose specified"]). It is evident that the parties chose to incorporate specific provisions of the Subcontract, so a general incorporation clause should not be read into the Letter Agreement (*22 CPS Owners, LLC v Carter*, 2009 NY Slip Op 32637[U], at *6-7 [Sup Ct NY County 2009] [holding that a "court should not, under the guise of contract interpretation imply a term which the parties themselves failed to insert or otherwise rewrite the contract"]). Nor does the Performance Bond bind Hanover to the Subcontract. The Letter Agreement provides that Hanover "commenced performance of its obligations under the Performance Bond" (Malandro aff, exhibit 1 at 1).

In reply, defendant reiterates its position that "Plaintiff guaranteed that it would fulfill the obligations of the subcontract, which was made part of the bond itself" (reply at 2). All of the terms of the Subcontract are incorporated into the Performance Bond. "The contract of a surety on a

building or contruction [sic] contract is to be construed together with other instruments to which it refers (*id.*, *Madawick Contr. Co. v Travelers Ins. Co.*, 307 NY 111, 118 [1954]).

B. Discussion

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]).

Without articulating as much, it appears that defendant moves pursuant to CPLR 3211(a)(1) on the basis of documentary evidence, as it submits the Performance Bond, Letter Agreement and Subcontract in support of the motion (*see* Monte affirmation, exhibit 2 [NYSCEF Doc No. 16]; Malandro affidavit, exhibits 1, 2 [NYSCEF Doc Nos. 18, 19]). CTJV does not cite any specific clause in the Performance Bond that could be interpreted to incorporate the terms of the Subcontract between 4J's and CTJV and bind Hanover and upon its review, the court has found none. Instead, CTJV argues that the Letter Agreement dated November 11, 2015 does so (opp mem at 1). The court is not persuaded. The relevant portion of the Letter Agreement states:

> "Hanover will be submitting additional applications for payment on a go forward basis and CTJV agrees to process them and pay Hanover in accordance with the terms of the Subcontract, so long as Hanover continues to perform under the Performance Bond in a timely manner and to submit similar documents to those submitted for payment of pay apps Nos. 32 and 33"

(NYSCEF Doc. No. 18). Thus, Hanover did not agree to be bound by the Subcontract. It agreed to submit future applications for payment to CTJV and CTJV agreed "to process them and pay Hanover in accordance with the terms of the Subcontract ..." (*id.*) (emphasis

added). Such language does not bespeak an intention to incorporate and be bound by all of the terms of another's contract. However, it does reflect an acknowledgement of the payment application procedures and an agreement to submit its applications for payment to CTJV to be forwarded by CTJV for processing.

CTVJ relies on paragraphs 43 and 44 of the complaint as an acknowledgment by Hanover that it is "bound by the terms of 4J's subcontract." The court has found no such acknowledgment in the complaint. Rather, paragraph 43 alleges that the Performance Bond commits Hanover to accept payment on "that portion of the balance of the subcontract price as may be required to complete the subcontract [and to be] ... paid ... at such times and in the manner as said sums would have been payable to [4J's]" (complaint ¶ 43). Paragraph 44 references the Letter Agreement provision which the court has already discussed.

IV. CONDITION PRECEDENT – MEDIATION

A. Arguments

Defendant argues that the complaint should be dismissed because plaintiff failed to fulfill the contract's express condition precedent that the parties mediate prior to arbitration or litigation. Section 18.2 of the 4J's Subcontract states that "[a]ny other dispute between the Contractor or Subcontractor arising out of this Subcontract or the Work shall be submitted to mediation conducted by a mediator, selected by the parties".

Plaintiff argues that general incorporation provisions in performance bonds do not extend to ADR provisions – they must be specifically incorporated (*Fid. & Deposit Co. v Parsons & Whittemore Contractors Corp.*, 48 NY2d 127 [1979]; *Navillus Tile, Inc. v Bovis Lend Lease LMB. Inc.*, 74 AD3d 1299, 1301-1302 [2d Dept 2010] [holding that an "alternate dispute resolution agreement, like an arbitration agreement, must be clear, explicit and unequivocal... and must not depend upon implication or subtlety"]). The Performance Bond here specifically contemplates disputes being resolved through litigation (affirmation of Paul Monte, exhibit 2 ["[a]ny suit under this bond must be instituted before the expiration of one year from [the] date on which final payment under the subcontract falls due"]).

B. Discussion

The court has already found that the Subcontract was not incorporated into the Performance Bond. Even if the court had not so held, plaintiff has demonstrated that it is well-established that arbitration clauses must be specifically incorporated into the Performance Bond, even if one exists between the original parties to the subcontract (*Fid. & Deposit Co. v Parsons & Whittemore Contractors Corp.*, 48 NY2d 127 [1979] [Despite there being an arbitration clause in the underlying subcontract, the parties to the Performance Bond "did not agree, however, that separate and distinct controversies, if any, which might arise under the terms of the performance bond between the general contractor as obligee thereunder and the surety company would be submitted to arbitration."]; *Navillus Tile, Inc. v. Bovis Lend Lease LMB, Inc.*, 74 AD3d 1299, 1302 [2d Dept 2010] ["Here, the general incorporation of the Prime Contract...into the Subcontract, without any explicit reference to their respective ADR provisions, was insufficient to incorporate those ADR provisions into the Subcontract."]). Neither the Performance Bond nor the Letter Agreement specifically incorporate the ADR provision of the Subcontract. Accordingly, failure to comply with this condition precedent to claims under the Subcontract does not defeat Hanover's right to assert claims here under the Performance Bond.

V. COMPLIANCE WITH NOTICE PROVISIONS

A. Arguments

Defendant argues that the complaint should be dismissed because plaintiff failed to provide notice of its delay impact claims pursuant to the terms of the Subcontract. Section 5.5 of the Subcontract provides that "Subcontractor shall not be entitled to any such extension of time unless Subcontractor (a) notifies Contractor in writing within forty-eight hours of the causes of such delay, (b) gives written notice of its claim for a time extension as provided herein and (c) demonstrates that it could not have anticipated or avoided such delay and has used all available means to minimize the consequences thereof". Section 9.1 of the Subcontract provides that "Subcontractor must give written notice to Contractor of any claim by Subcontractor for Increase to the Subcontract Price, extra compensation or damages of any kind, or extension of time as soon as possible and in no event later than forty-eight (48) hours after Subcontractor learns of the act, omission, occurrence or circumstance on which the claim is based". Failure to strictly comply with

these conditions precedent to recovery is deemed a waiver of such claims (mem at 10-11, collecting cases, *e.g. F. Garofalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80 [1st Dept 2000]).

Plaintiff Hanover argues that it is not subject to the notice and delay provisions because the general incorporation of a subcontract is limited to "the scope, quality, character and manner of the work" (opp at 10). When prime contract clauses are incorporated by reference into a subcontract, the provisions incorporated are limited as such (*Navillus Tile*, 74 AD3d at 1302). Courts have "persuasively analog[ized]" this scenario to incorporation by reference of a subcontract into a performance bond (*Caravousanos v Kings Cty. Hosp.*, Misc. 3d 1117[A], 2009 NY Slip Op 50156[U], *7 [2009], aff'd 74 AD3d 716 [2d Dept 2010]). But even if the provisions were applicable to Hanover, they do not defeat the breach of contract claim. Defendant's assertion that "Hanover has not fulfilled [the notice] requirement" is blatantly false, because allegations in the complaint plainly state that it has "repeatedly notified" CTJV of the issues giving rise to this litigation (complaint ¶¶ 16, 17). While the allegations in the complaint must be accepted as true for the purposes of this motion, defendant's assertions are not supported by any evidence (opp at 12). The Malandro affidavit submitted by CTJV does not even attempt to support the assertions that Hanover failed to comply with the provisions at issue. In response, Hanover submits the affidavit of Arthur J. Werth, who was the consultant for Hanover on the project. The Werth affidavit attaches documentary evidence confirming that Hanover gave CTJV notice, or that it was actually CTJV who directed the change order work at issue (Werth affidavit ¶¶ 17-24, exhibit 5-12).

Plaintiff also argues that in any event, there can be no noncompliance with the notice provisions on Hanover's part because CTJV gave the directives to perform the work in question, not Hanover (opp at 13). Even if defendant contends that strict compliance is required, "[u]nder New York law, oral directions to perform extra work, or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorization or notice of claims" (*Peter Scalamandre & Sons, Inc. v FC 80 DeKalb Assocs, LLC*, 129 AD3d 807, 809 [2d Dept 2015]). The complaint alleges that CTJV directed Hanover to do the extra work (complaint ¶ 14-15, 17-18). While defendant does not address these allegations, plaintiff submits evidence supporting its contentions (Werth affidavit ¶¶ 17-20, exhibits 6-8).

Plaintiff also argues that the notice of claim provisions do not apply to claims for the contract balance or overpayment. In the Letter Agreement, Hanover specifically reserved its rights against CTJV for the premature payment, and agreed that CTJV would process Hanover's payment applications and pay Hanover. Neither of these claims would be subject to the notice of claim provision (opp at 15, Malandro aff at 2-3). Nor do the notice of claim provisions apply to claims for delay damages. "[W]here a construction contract contains a notice provision... but also contains a no-damages-for-delay clause, a request by the contractor for delay damages seeks relief wholly outside the scope of the contract and is not governed by the notice provision" (*Advanced Automatic Sprinkler Co., Inc. v Seaboard Sur. Co.*, 2014 NY Slip Op 33130[U], at *3 [Sup Ct NY County 2014]). Therefore, CTJV's characterization of Hanover's damages as delay damages effectively moots their notice arguments (opp at 16).

In reply, defendant argues that Hanover cannot argue that the payment provisions were incorporated into the Performance Bond without the notice provisions, because in the Subcontract, notice is a prerequisite to payment (reply at 2). Hanover cannot argue that the notice provisions only apply to extra work because the plain language of the Subcontract states that notice must given "of any claim... for Increase to the Subcontract Price, extra compensation or *damages of any kind*" (reply at 3, Subcontract § 9.1 [emphasis added]). Although Hanover purports to provide evidence showing that it complied with the notice provisions, it does not plead or provide support showing that it complied with the required timeframe (reply at 3-4; complaint ¶¶ 16-17).

B. Discussion

"Under New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Navillus Tile, Inc. v. Bovis Lend Lease LMB, Inc.*, 74 AD3d 1299, 1302 [2010], citing *Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [2d Dept 2001]). It is not as clear to whether the same holds true for subcontracts incorporated into performance bonds, although as plaintiff points out, courts have extended the principle (*Caravousanos v. Kings Cty. Hosp.*, 22 Misc. 3d 1117(A), 880 N.Y.S.2d 222 (Sup Ct Kings County 2009), *aff'd*, 74 AD3d 716 [2d Dept 2010] ["Neither party has identified authority definitively establishing that the incorporation by reference of a subcontract into a performance bond is either automatically limited

to performance-of-work clauses contained in the subcontract or also encompasses indemnification and insurance clauses found therein. Indeed, the court notes that, in a persuasively analogous context, an incorporation clause contained in a construction subcontract which incorporates prime contract clauses by reference is generally construed to bind the subcontractor only to those clauses related to the scope, quality, character and manner of the work to be performed by the subcontractor, absent additional language explicitly expanding the subcontractor's obligations."]).

As discussed above, in the Letter Agreement, Hanover agreed to abide by the payment procedures in the Subcontract. Arguably, the notice provisions are an integral part of the payment procedure but CTJV has not establish that fact to the level of certainly necessary for the grant of a motion to dismiss under CPLR 3211 (a) (1) (*see, e.g. Blonder & Co. v Citibank, N.A.*, 28 AD 3d 180, 182 [1st Dept 2008] ["In order to prevail on a CPLR 3211 [a] [1] motion, the documents relied on must definitely dispose of plaintiff's claim"]).

Even assuming the notice provisions were found to be incorporated into the Letter Agreement, Hanover's claim may not be dismissed for failure to provide notice. Although it does not indicate the time frame of the notices, Hanover alleges that it repeatedly provided notice of its claims, and provides documentary evidence to support the claim. The breach of contract claim will not be dismissed for failure to allege that Hanover gave timely notice in accordance with the Subcontract.

VI. PROXIMATE CAUSE

A. Arguments

Defendant argues that the complaint should be dismissed because plaintiff fails to allege that defendant was the proximate cause of the alleged damages. The issue is governed by *Triangle Sheet Metal Works, Inc. v James H Merritt & Co.*, which held that absent a contractual commitment to the contrary, a prime contractor is not responsible for delays incurred by the subcontractor unless those delays are caused by some agency or circumstance under the contractor's direction or control (79 NY2d 801 [1991]). Hanover complains of coordination failures, design errors, late submittal responses, lack of direction, failure to issue change orders, and lack of timely payment, but, according to CTJV, all of these issues were either caused by the owner (MTA) or other subcontractors. The MTA's designers prepared the plans and specifications, and the MTA issued the directives, change orders and AWOs at issue (mem at 13-14). Defendant CTJV did "not agree

to be a guarantor of job performance", but rather plaintiff Hanover "expressly agreed that CTJV would not be liable for delays pursuant to Sections 5.2, 9.4, and 9.5 of the Subcontract (mem at 14). The delay claims at issue were submitted by CTJV to the MTA on behalf of Hanover – therefore Hanover's recovery is limited to whatever the MTA pays CTJV on behalf of Hanover (mem at 15).

Plaintiff contends defendant's argument that all of the damages were caused by NYCTA is "both factually and legally erroneous" (opp at 19). The complaint describes different categories of damages, each supported by allegations of wrongful conduct by CTJV. For example, plaintiff alleges that CTJV specifically approved and directed the base contract work and extra work at issue (complaint ¶¶ 14-15, 18-19). The complaint also alleges that extended job site costs and impact costs were CTJV's responsibility (complaint ¶¶ 20, 29). The complaint also alleges that the overpayment damages were due to CTJV's premature payment of 4J's (complaint ¶ 13). Hanover only submitted a portion of its damages to CTJV, on its direction, and reserved the right to recoup those funds in the event that CTJV was not successful in recovering them from NYCTA (opp at 20-21). The only claims that went through the NYCTA were for delay damages or impact costs. The rest were owed by CTJV under the Letter Agreement (opp at 21). Finally, the case that defendant cites, *Triangle Sheet Metal*, actually supports plaintiff's position (*see Glob. Precast, Inc. v Stonewall Contracting Corp.*, 78 AD3d 432, 432-33 [1st Dept 2010]; *Sea Crest Constr. Corp. v City of NY*, 286 AD2d 652, 653 [1st Dept 2011]; *Schiavone Constr. Co. v Triborough Bridge & Tunnel Auth.*, 209 Ad2d 598, 599-600 [2d Dept 1994]). These subsequent cases have rejected a general contractor's use of *Triangle Sheet Metal* to defeat a subcontractor's claim that is passed through to an owner (opp at 21).

B. Discussion

As plaintiff points out, cases subsequent to *Triangle Sheet Metal* clarify its application. For example, in *Schiavone*, the Appellate Division found that the trial court improperly dismissed the plaintiff contractor's cause of action asserting "pass through" claims on behalf of its subcontractors. "The subcontract agreement was sufficient to establish a 'pass through' claim because it provided that the plaintiff liquidate its liability to the subcontractors in such amounts as may be recovered against the defendants" (*Schiavone*, 209 AD2d at 600). Courts in the other cases cited by plaintiff, *Glob. Precast* and *Sea Crest*, dealt with motions for summary judgment.

Here, like in *Schiavone*, to the extent that portion of the Subcontract is incorporated into the parties' agreement, the agreement provides for certain damages to be recovered from the owner. Plaintiff also alleges as much in the complaint. Therefore, *Triangle Sheet Metal* does not bar claims for "pass through" damages and the complaint may not be dismissed on these grounds.

VII. NO DAMAGES FOR DELAY CLAUSE

A. Arguments

Defendant argues that Hanover's claims are barred by no damages for delay clauses in Sections 5.2, 5.4, and 5.5 of the Subcontract. For example, Section 5.2 provides that "[Hanover] shall not be entitled to additional compensation for any such decisions [regarding suspension, delay, or acceleration] made by [CTJV]". Although plaintiff characterizes its first claim as one for breach of contract based on acceleration, issuance of change orders, AWOs, and other impact damages, these are all delay damages (*see* complaint ¶¶ 32, 45, 47; *Nova Casualty Co. v Liberty Mut. Ins. Co.*, 540 FSupp2d 476, 483 [SD NY 2008] ["equitable adjustment" claim barred by "no damage for delay" clause]; *Universal/MMEC, Ltd. v Dormitory Auth. of the State of New York*, 50 AD3d 352, 353 [1st Dept 2008] [loss of productivity claim barred by "no damage for delay" clause]; *Commercial Elec. Contractors, Inc. v Pavarini Constr. Co.*, 50 AD3d 316, 318 [1st Dept 2008] [improper scheduling of subcontractors claim barred by "no damage for delay" clause]). Plaintiff fails to allege that its claims fall into any of the exceptions to enforcement of the "no damages for delay" clause as provided in *Corinno Civetta Constr. Corp. v City of New York* (67 NY2d 297 [1986]). Plaintiff could only argue that there were uncontemplated delays, but the "garden variety" impact allegations of poor administration made by plaintiff do not constitute an "uncontemplated delay" under *Corinno Civetta* (mem at 19, collecting cases).

In opposition, plaintiff points out that the Malandro affidavit submitted by defendant concedes that plaintiff's claims were also the result of "additional work" and defendant cannot therefore argue that all of plaintiff's damages are attributed to delay (Malandro aff at 2). In fact, the only portion of plaintiff's damages that can be categorized as for delays are the $3,327,387 in extended jobsite costs and $315,094 in impact costs. In any event, CTJV "specifically directed Hanover to submit its impact claims for the [initial] 289 day delay in the substantial completion date", then CTJV submitted these claims, along with its own delay claims, to the NYCTA for compensation (opp at 17-18; Werth aff ¶ 14; Malandro aff ¶ 5). CTJV's actions establish that the

delays at issue were not contemplated by the Subcontract, and thus, a motion to dismiss based on a no-damage-for-delay clause must fail (*N.J.D. Wiring & El., Inc. v M.A. Angeliades, Inc.*, 2014 NY Slip Op 32352[U], at *5-6 [Sup Ct NY County 2014] [finding that the court could not "determine, at this pre-discovery stage, whether the delay in the Project was reasonable or contemplated, particularly given that [the general contractor] allegedly received compensation for its own delay costs but denies plaintiff damages for the same delay"). Moreover, "CTJV cannot seriously argue that the alleged delay claims are barred by the no damage for delay clause when CTJV has sought compensation for those exact same claims from the NYCTA" (opp at 18-19). At the very least, defendant's motion is premature per *NJD*.

B. Discussion

Hanover characterizes its damages as follows: (i) $1,805,502 for contract balance; (ii) $2,243,243 for lost profits on the contract, markup and interest on amounts owed; (iii) $500,000 in premature payments to 4J's; (iv) $3,327,387 in extended jobsite costs; and (v) $315,094 for impact costs (opp, citing updated REA [NYSCEF Doc No. 29], complaint 36, 48,). While the first three items do not appear to be for delay damages, it may be that the last two items are attributable to delay damages (*Corrino Civetta*, 67 NY2d at 313-14 ["All delay damage claims seek compensation for increased costs... whether the costs result because it takes longer to complete the project or because overtime and additional costs are expended in an effort to complete the work on time."]). To the extent the no-damages-for-delay clause is incorporated into the Subcontract, it does not bar plaintiff's claim for breach of contract as plaintiff has alleged other damages that would not be covered by the provision.

VIII. QUANTUM MERUIT

A. Arguments

With regard to the claim for quantum meruit, defendant argues that the claim should be dismissed because there is a valid contract governing the subject matter of the dispute (mem at 20-21). In opposition, plaintiff asserts it may maintain the cause of action for quantum meruit because defendant failed to pay according to the terms of the contract. Thus, plaintiff may choose to pursue a breach of contract claim or deem the contract terminated and sue in quantum meruit for work, labor, and materials furnished (opp at 22, citing *A-1 General Contracting, Inc. v River Market Commodities Inc.*, 212 AD2d 897 [3d Dept 1995]; *Meyers v Town of Coxsackie*, 139 AD2d 855

[3d Dept 1988]; *United States ex rel. Maris Equip. Co. v Morganti, Inc.*, 163 FSupp2d 174, 186 [ED NY 2001]).

B. Discussion

To make out a prima facie case for quantum meruit, a plaintiff must establish (1) the performance of services in good faith, (2) acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*Freedman v Pearlman*, 271 AD2d 301, 304 [1st Dept 2000]). Here, the services at issue were performed pursuant to the agreement between the parties. Plaintiff has not elected to abandon its breach of contract claim in favor of a claim for damages in quantum meruit. This cause of action in quasi contract is duplicative of the breach of contract claim and must be dismissed.

IX. CONCLUSIONS

The motion shall be denied as to the first cause of action as defendant has failed to satisfy the standards applicable to motions to dismiss based on documentary evidence (*see* CPLR 3211 [a][1]) and because the Performance Bond does not incorporate all of the terms of the 4J's Subcontract. Hanover is not subject to the ADR provision of the Subcontract. Regarding the alleged failure to give notice, the documentary evidence presented by CTJV does not "utterly refute" Hanover's allegations that it gave proper notice and that the notice provisions do not apply. Similarly, Hanover's various claims for damages cannot be dismissed at this, the pleading stage, based on *Traingle Sheet Metal Works, Inc.*, 79 NY2d 801 where that case was dismissed at the close of the trial of plaintiff's case for failure to make out prima facie case.

As provided in the Letter Agreement, Hanover is bound by the payment procedures of the Subcontract.

The second cause of action based on quantum meruit shall be dismissed as it is duplicative of the breach of contract claim.

Accordingly, it is hereby

ORDERED that the motion to dismiss is GRANTED to the extent that the second cause of action (quantum meruit) is hereby DISMISSED and is otherwise DENIED.

This constitutes the decision and order of the court.

DATED: August 9, 2019

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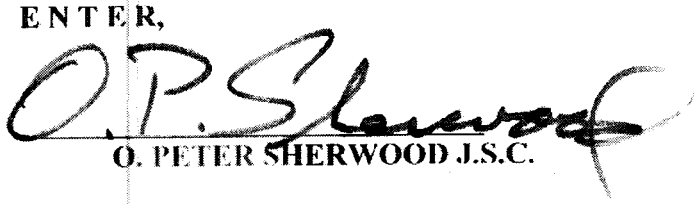

O. PETER SHERWOOD J.S.C.