

<b>Dinallo Constr. Corp. v Phoenix RMA Constr. Servs. LLC</b>
2020 NY Slip Op 30695(U)
March 3, 2020
Supreme Court, New York County
Docket Number: 652491/2017
Judge: Robert R. Reed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ROBERT R. REED PART 43**

*Justice*

-----X  
DINALLO CONSTRUCTION CORPORATION,  
  
Plaintiff,

INDEX NO. 652491/2017  
MOTION DATE 06/06/2019  
MOTION SEQ. NO. 002

- v -

PHOENIX RMA CONSTRUCTION SERVICES LLC,  
MICHAEL LEINEEK, LIBERTY MUTUAL INSURANCE  
COMPANY

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for DISMISS.

In motion sequence 002, plaintiff Dinallo Construction Corporation (Dinallo) and counterclaim defendant Liberty Mutual Trust Company (Liberty) move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the second, third, and fourth counterclaims asserted by defendant Phoenix Construction Services LLC (Phoenix) and, pursuant to Lien Law § 19(6), to discharge Phoenix’s mechanic’s lien, filed on April 10, 2017 (the Lien).

Furthermore, Phoenix cross-moves pursuant to Lien Law § 12-a to amend the Lien to eliminate and exclude certain block and lot numbers.

**BACKGROUND**

This action arises out of the renovation of the building located at 212 Fifth Avenue, New York, New York (the Building). The Building was being converted into a luxury condominium with apartment units, common spaces, and retail spaces on the

ground floor (the Project). Dinallo was the construction manager for the Project and retained subcontractor Phoenix pursuant to an interior and finishes contract (the Agreement) (Winkler affirmation, exhibit G).

On May 8, 2017, Dinallo commenced this action alleging that Phoenix breached the Agreement (NYSCEF Doc. No. 1). Phoenix subsequently answered and asserted counterclaims for breach of contract, delay damages, unjust enrichment, and foreclosure of the Lien (NYSCEF Doc. No. 5).

As alleged in the pleadings, on November 9, 2015, Dinallo and Phoenix entered into the Agreement, whereby Phoenix agreed to perform certain interior and finishing work related to the Project (Answer ¶ 43). Phoenix alleges that its scope of work was intended to be performed after the mechanical tradesmen completed their work behind the walls (Answer ¶ 44). Phoenix also allegedly performed work that was outside of the scope of the Agreement at Dinallo's request (Answer ¶ 45).

During the Project, delays in progress and scheduling caused Phoenix to incur additional costs and perform its work in an inefficient and unproductive manner (Answer ¶¶ 47, 48).

Phoenix alleges the unforeseen and unanticipated delays and disruptions were a result of Dinallo's failure to properly and timely: (1) issue change orders, (2) review and approve shop drawings and other submissions, (3) review and respond to requests for information, and (4) anticipate changes in design and sequencing (Answer ¶ 49).

As an example, Phoenix alleges that it was directed by Dinallo to close up certain walls with sheetrock, despite Phoenix's protests that the work to be performed by other

tradesmen behind the walls was incomplete (Answer ¶¶ 53-54). Phoenix eventually complied, only to have Dinallo thereafter direct Phoenix to remove the walls to allow other tradesmen to complete their work, requiring Phoenix to close up the walls with sheetrock a second time (Answer ¶ 55-57).

As a result, Phoenix alleges that it incurred damages of no less than \$2,473,755.78.

## DISCUSSION

When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff “the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*id.*). The motion must be denied if from the pleadings’ four corners “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

“[D]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively established a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88 [internal quotation marks omitted]).

Phoenix alleges in its second counterclaim for delay damages that it was damaged as a result of Dinallo’s malicious and/or bad faith actions which caused unanticipated delays that were unforeseeable at the time the Agreement was executed. Phoenix alleges delays in detail stemming from preventable duplicative work,

the failure to maintain a constant temperature in the work site, and the provision of incorrect measurements to tradesmen (§§ 50-61).

Dinallo argues that a claim for delay damages is barred by express provisions of the Agreement (Winkler affirmation, exhibit G).

The parties do not dispute that the Agreement contains a provision barring recovery of damages for delays. Pursuant to Article 6 of the Agreement, Phoenix agreed that:

“[Dinallo] is not liable, absent actual fraud, for any damages or costs due to delays, accelerations, impact, non-performance, interferences with performance, suspension or changes in the performance or sequence of [Phoenix’s] work.... Thus, in no event, absent actual fraud, shall [Dinallo] be liable to [Phoenix] for any damages caused by delay, acceleration, interferences, suspension, non-performance, or changes in the sequence of performance or impact upon, the Work of [Phoenix]”

(*id.* at pp 16-17).

Furthermore, Article 20, of the Agreement states that:

“[Phoenix] shall perform its work solely in accordance with the construction and progress schedules furnished to him by [Dinallo], which may be modified, corrected, changed, altered, or amended by [Dinallo] from time to time and by no schedule whatsoever. It is distinctly understood that there shall be no right of recovery on the part of [Phoenix] against [Dinallo] for any damages caused by the delays in the construction of the projects, irrespective of the fact that [Dinallo] may have changed, modified, corrected, altered or amended the construction or progress schedule from time to time”

(*id.* at pp 21-22).

In addition, it is well established that a no damages for delay clause that bars a contractor from recovering from damages for delays in performance is generally valid

and enforceable (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]). However, despite the language of the Agreement, Phoenix would still be able to recover for delay damages if it establishes that the delays: (1) were caused by [Dinallo's] bad faith or its willful, malicious, or grossly negligent conduct, (2) unanticipated by the parties, (3) were so unreasonable that they constitute an intentional abandonment of the Agreement, and (4) arose from Dinallo's breach of a fundamental obligation of the Agreement (*id.*).

Phoenix's counterclaim merely alleges in conclusory fashion that Dinallo acted in bad faith and does not otherwise support those allegations with any facts that would allow this court to sustain the counterclaim (Answer ¶¶ 79-80).

Furthermore, the Agreement contemplates the types of the delays that Phoenix is now seeking damages for. Pursuant to the Agreement, damages arising "due to delays, accelerations, impact, non-performance, interferences with performance, suspension or changes in the performance or sequence of [Phoenix's] work" are not recoverable.

Phoenix's delays were allegedly the result of Dinallo's: (1) failure to respond to or approve Project documents in a timely manner (Answer ¶ 49), (2) provision of improper measurements to the tradesmen (Answer ¶¶ 51-52), (3) improper sequencing of the work resulting in duplicative work (Answer ¶¶ 53-57), and (4) failure to maintain proper temperature control over the work site (Answer ¶¶ 58).

Each of the alleged delays are sufficiently encompassed in the broad categories of delay damages set forth in the Agreement. The broad exculpatory clause of the Agreement clearly encompasses each of Phoenix's alleged delays. Even accepting Phoenix's allegations as true, the delays amount only to inept administration and poor

planning, neither of which serves as an exception to the no damages for delay clause in the Agreement (*LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d 485, 486 [1st Dept 2012]). “Delays are not considered unanticipated when they are reasonably foreseeable, arise from the contractor’s work during performance, or...are mentioned in the contract” (*Bovis Lend Lease (LMB), Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 147 [1st Dept 2013] [internal quotation marks omitted]). Under the circumstances presented in this case, as in other similar cases before it, “[w]hile the conditions themselves may not have been anticipated, the possibility, however unlikely, of their arising was contemplated and addressed by the parties in their agreement” (*id.* [internal citation omitted]).

The inclusion of a no damages for delay clause in the Agreement establishes that the parties intended for Phoenix, rather than Dinallo, to absorb any damages arising from a delay (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384 [1983]).

Consequently, Phoenix’s second counterclaim for breach of contract is dismissed.

Phoenix alleges in its third counterclaim for unjust enrichment that Dinallo was unjustly enriched by an amount no less than \$3,811,075.61 for the labor, equipment, and materials furnished by Phoenix in connection with the Project, which Dinallo has failed to pay.

“The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in equity and good conscience should be paid to the plaintiff” (*Corsello v Verizon N. Y., Inc.*, 18 NY3d 777, 790 [2012] [internal quotation marks omitted]). However, “unjust enrichment is not a catchall cause of action to be used when others

fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff” (*id.*). “Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled” (*id.*).

In light of the dismissal of Phoenix’s second counterclaim for breach of contract, Phoenix’s third counterclaim for unjust enrichment must also be dismissed. Phoenix’s counterclaim for unjust enrichment is based on the same facts as its breach of contract counterclaim and seeks the same damages. To the extent those delay damages are not recoverable as matter of law, there is no basis to sustain an unjust enrichment counterclaim seeking the same relief. “An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*id.*).

Phoenix’s fourth counterclaim seeks to foreclose against the Lien. In addition, Phoenix cross-moves to amend the Lien pursuant to Lien Law 12-a to remove the superseded single lot number.

The Lien clearly provides that:

“[t]he property subject to the lien is known and described as:  
212 Fifth Avenue, New York, New York, and situated in  
**Block 827 Lot 44**, as shown on the Land and Tax Map of  
the City of New York, County of New York. 212 Fifth Avenue,  
New York, New York also encompasses **Block 827 Lots  
1001 through 1048, inclusive**”

(Winkler affirmation, exhibit H ¶ 10, [**emphasis in original**]).

Dinallo argues that the Lien is an invalid blanket lien because it references the single superseded lot number of the Building and includes all lot numbers of the condominium including units that were sold by the developer prior to the filing of the

Lien. Furthermore, Dinallo argues, Phoenix's cross-motion should be dismissed because an invalid lien cannot be amended pursuant to Lien Law 12-a.

The court finds that the Lien sufficiently describes the property that Phoenix is seeking to encumber, and is valid despite referencing the single superseded lot number and all of the specific lot numbers assigned to the individual condominium units (*East Coast Mines & Materials Corp. v Golf Course Properties Co.*, 228 AD2d 545, 546 [2d Dept 1996] ["As the description included too much property, but nevertheless included and identified all the property on which the lien could properly be claimed, the defect was not fatal, as the lien would be limited and restricted only to that part against which it could properly be enforced"]).

Furthermore, Lien Law § 23 disfavors the invalidating of a lien based on technical defects and provides that liens are "to be construed liberally to secure the beneficial interests and purposes thereof and that substantial compliance with its several provisions shall be sufficient for the validity of a lien" (*id.* [internal quotation marks and citations omitted]). Moreover, no prejudice resulting from the amendment of the Lien has been demonstrated.

As a result, Dinallo's motion to dismiss is denied with respect to Phoenix's fourth counterclaim to foreclose the Lien and Phoenix's cross-motion to amend the Lien is granted.

Accordingly, it is

ORDERED that the motion to dismiss Phoenix's second, third, and fourth counterclaims is granted in part to the extent that the second and third counterclaims are dismissed, and the motion is otherwise denied; and it is further

ORDERED that Phoenix's cross-motion for leave to amend the mechanic's lien is granted upon the condition that Phoenix serve a proposed amended mechanic's lien in conformity with this decision within thirty (30) days of this decision; and it is further

ORDERED that the parties are directed to appear for a status conference in Part 43, at 60 Centre Street, Room 412, on April 16, 2020 at 2:30 PM.

3/3/2020

DATE



ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: