SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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FIVE STAR ELECTRIC CORP.,

Plaintiff,

- v -

A.J. PEGNO CONSTRUCTION CO., INC./ TULLY CONSTRUCTION CO., INC.,A JOINT VENTURE, TULLY CONSTRUCTION CO, INC.,A.J. PEGNO CONSTRUCTION CO., INC.,

Defendant.

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INDEX NO.	400897/2011
MOTION DATE	04/17/2020
MOTION SEQ. NO.	006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 221, 222, 223, 224

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents and for the reasons set forth below, A.J. Pegno Construction Co., Inc./Tully Construction Co., Inc., a joint venture of Tully Construction Co., Inc. (the **Joint Venture**), and A.J. Pegno Construction Co., Inc.'s (**A.J. Pegno**, and together with the Joint Venture, collectively, **Pegno Tully**) motion for summary judgment dismissing Five Star Electric Corp.'s (**Five Star**) complaint pursuant to CPLR § 3212 is denied.

I. The Relevant Facts and Circumstances

This action arises out of a project of the City of New York, Department of Environmental Protection (the **DEP**) to expand and upgrade the Newtown Creek Water Pollution Control Plant in Greenpoint, Brooklyn (the **Project**). The general construction portion of the work was awarded by the DEP in accordance with Contract No. NC-31G, dated July 10, 2000, by and between the DEP and Pegno Tully (the **Pegno Tully Contract**), pursuant to which Pegno Tully

agreed to provide structures and equipment at the Project site, including construction of the centrifuge thickening, digestion, service, and grit handling buildings, and the DEP agreed to pay Pegno Tully $304,490,749 for its services (NYSCEF 201, 202). The electrical work was awarded by the DEP in accordance with Contract No. NC-31E, dated August 17, 2000, by and between the DEP and Five Star (the **Five Star Contract**), pursuant to which Five Star agreed to perform all electric work on the Project and the DEP agreed to pay Five Star $44,444,444 for its services, with additional incentive compensation upon completion of work on or before certain milestone dates (NYSCEF 201, 203; Compl., ¶ 11).

The terms and conditions of the contracts were substantially similar except for the sections setting forth the services to be performed by each contractor. Pursuant to Article 12 of the Pegno Tully Contract and the Five Star Contract:

> ***Should the Contractor sustain any damage through any act or omission of any other Contractor having a Contract with the City for the performance of work upon the site or of work which may be necessary to be performed for the proper execution of the work to be performed hereunder, or through any act or omission of a subcontractor of such Contract, the Contractor shall have no claim against the City for such damage, but shall have a right to recover such damage from the other Contractor*** under the provision similar to the following provisions which have been or will be inserted into the Contracts with such other Contractors.
>
> Should any other Contractor having or who shall hereafter have a Contract with the City for the performance of work upon the site sustain any damage through any act or omission of the Contractor hereunder or through any act or omission of any subcontractor of the Contractor, ***the Contractor agrees to reimburse such other Contractor for all such damages and to defend at [his or her] own expense any suit based upon such claim and if any judgment or claims against the City shall be allowed***, the Contractor shall pay or satisfy such judgment or claim and pay all costs and expenses in connection therewith and shall indemnify and hold the City harmless from all such claims (NYSCEF 201, Art. 12 [emphasis added]).

In other words, pursuant to Article 12 of the Pegno Tully Contract and Five Star Contract, the contractors agreed to the hold the City harmless, and each contractor was authorized to recover directly from the other for damages incurred by the other's deficient performance.

Article 8 of the Pegno Contract and the Five Star Contract provides: "[t]ime being of the essence of this Contract, the Contractor shall [hereafter] prosecute the work diligently, using such means and methods of construction as will assure its completion not later than the date specified therefor, or on the date to which the time for completion may be extended" (*id.*, Art. 8).

The scheduled completion date for the Project was December 12, 2004 (NYSCEF 213; Compl., ¶ 9). But the Project was plagued by persistent and lengthy delays from the start. Pursuant to a Memorandum, dated September 5, 2001, from Hazen & Sawyer, P.C. and Malcom Pirnie, Inc. (the **Construction Managers**) to Pegno Tully, the Construction Managers stated:

> Based on the delinquent status of the contract being approximately 5-7 months behind schedule on all contract milestones, you are required to submit a recovery plan outlining the corrective measures that will be taken to recover the delays incurred to date. Please make this plan available immediately for review prior to submission in the next update.
>
> * * *
>
> A review of the schedule has revealed that many activities are being performed out-of-sequence. This needs to be corrected immediately [to] prevent reporting inaccurate information. In the future, out of sequence progress should be discussed and agreed upon at the update meeting prior to submission of the monthly report (NYSCEF 207, at 1, 2).

Subsequently, by Letter 31G-0903, dated December 16, 2003, from David B. Tweedy, First Deputy Commissioner of the DEP, to Pegno Tully, Mr. Tweedy wrote:

> It appears that your management is not, as presently organized, capable of carrying out the requirements of this contract. Your Project Manager reinforces this premise when he states in his September 24, 2003 letter, "Our inexperience in dealing with other prime contractors since this is our first DEP job . . . has significantly delayed the work of Contract 31G." His statement in the same letter "that the proposed schedule was extremely optimistic . . . " reiterates that this project may not be within Pegno/Tully's capability or experience. The Department advertised this project with the intention of having it completed on time. I am not sure that you fully recognized this fact at bid time.
> From the Department's perspective, the problem is Pegno/Tully's inability to preplan its work, to have the materials available and to execute its plan. It's our observation that you have been unable to commence follow up operations and execute a consistent plan (NYSCEF 208).

Ultimately, the Project was not substantially completed until June 2009 (Znascko Aff., ¶ 7).

Five Star commenced this action against Pegno Tully for breach of contract and breach of the implied covenant of good faith and fair dealing alleging that Pegno Tully failed to perform its work in a timely manner and failed to properly coordinate its work with other contractors, including Five Star. Specifically, Five Star alleges that Pegno Tully (i) caused delays in the commencement, progress, and completion of work, (ii) failed to adequately coordinate or supervise work, (iii) lacked sufficient manpower, (iv) failed to engage in proper project planning, (v) permitted work to be performed out of sequence, (vi) oversaw a slow pace of critical work, (vii) failed to mitigate delays, and (viii) failed to clean up debris (Compl., ¶¶ 24). Pegno Tully filed an answer and asserted counterclaims for breach of contract, alleging that Five Star failed to properly coordinate its work or perform its work in a timely manner, resulting in monetary damages.

II. Discussion

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a prima facie showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such showing requires denial of the motion (*id.*, citing W*inegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

i. Five Star's Rights as a Third Party Beneficiary under the Pegno Tully Contract

To invoke the rights of a third-party beneficiary in a cause of action for breach of contract, a plaintiff must establish: (i) a valid and binding contract between other parties that was (ii) intended for the benefit of the third party, and (iii) the intended benefit to the third party is sufficiently immediate to indicate that the contracting parties assumed a duty to compensate the third party should the benefit be lost (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 286 [2006]). In addition, contractual indemnification clauses are to be strictly construed and a duty to indemnify will not be found unless the contract clearly and unequivocally manifests such an intention (*Millennium Holdings LLC v Glidden Co.*, 146 AD3d 539, 545 [1st Dept 2017]). But where an intention to allow a third party to recover pursuant to an indemnification provision is clear from the language of the agreement, the purpose of the agreement, and the relevant facts and circumstances, the third party is entitled to full contractual indemnification (*Blank Rome, LLP v Parrish*, 92 AD3d 444, 445 [1st Dept 2012]). And, as the Court of Appeals has explained,

"[i]t is not necessary that third-party beneficiaries be identified or identifiable at the time of the making of a contract" (*Matter of Associated Teachers of Huntington v Board of Educ., Union Free School Dist. No. 3, Town of Huntington*, 33 NY2d 229, 234 [1973]).

Pegno Tully argues that summary judgment dismissal of the complaint is warranted because (i) Five Star is not an intended third-party beneficiary of the Pegno Tully Contract, (ii) Five Star failed to provide proper notice prior to commencing this action, (iii) the Pegno Tully Contract's "no-damage-for-delay provision" bars recovery in this action, and (iv) by Five Star's own admissions, the delays were caused by the acts and omissions of the City, not of Pegno Tully. In its opposition papers, Five Star argues that (a) under the express language of the Pegno Tully Contract it is an intended third party beneficiary, (b) the notice provision does not apply and, in any event, is not a condition precedent to commencing litigation, (c) the no-damage-for-delay provision is not available as a defense to Pegno Tully, and (d) the documents relied on by Pegno Tully do not constitute admissions that the delays were caused by the City.

First, under the plain language of the Pegno Tully Contract, Five Star is an intended third-party beneficiary of the contract. Article 12 expressly provides that any contractor that incurs damages as a result of any other contractor's acts or omissions "shall have a right to recover such damage from the other Contractor under the provision similar to the following provisions which have been or will be inserted into the Contracts with such other Contractors" (NYSCEF 201, Art. 12). Pegno Tully's interpretation of Article 12 as merely providing for indemnification against claims brought against the City would deprive this language of any meaning. Accordingly, such a reading would run afoul of well-established cannons of construction (*Georgia Malone & Co.,*

Inc. v E & M Assocs., 163 A.D.3d 176, 186 [1st Dep't 2018]). Therefore, Five Star has a viable breach of contract claim against Pegno Tully. And, similarly, Five Star may also maintain its cause of action for breach of the implied covenant of good faith and fair dealing as a third party beneficiary (*Williams v Sidley Austin Brown & Wood, L.L.P.*, 38 AD3d 219, 220-221 [1st Dept 2007] [holding that plaintiff had viable breach of implied covenant of good faith and fair dealing claim as a third party beneficiary]).

To the extent that Pegno Tully relies on *Snyder Plumbing & Heating Corp., v Purcell*, (9 AD2d 505 [1st Dept 1960]) in support of its argument that Five Star is not an intended third-party beneficiary of the Pegno Tully Contract, its reliance is misplaced. In *Snyder*, the parties each entered into separate contracts with the County of Rockland (**the County**) in connection with a project for the construction of a home and an infirmary (*id.* at 506). Pursuant to their respective contracts, Purcell agreed to be the general contractor and Snyder Plumbing & Heating Corp. (**Snyder**) agreed to perform plumbing and drainage work (*id.*). The contracts were substantially similar except for those provisions relating to the specific work to be performed by each party (*id.*). Snyder sued Purcell to recover damages that it allegedly sustained as a result of Purcell's procrastination and delays in completing its work as general contractor (*id.*). Article 34 of the parties' respective contracts provided:

> Mutual Responsibility of Contractors.--If, through acts of neglect on the part of the Contractor, any other Contractor or any sub-contractor shall suffer loss or damages on the work, the Contractor agrees to settle with such other Contractor or sub-contractor by agreement or arbitration, if such other Contractor or Sub-contractor will so settle. If such other Contractor or Sub-Contractor shall assert any claim against the Owner on account of any damage alleged to have been so sustained, the Owner shall notify the Contractor who shall defend at his own expense any suit based upon such claim and, if any judgment or claims against the

> Owner shall be allowed, the Contractor shall pay or satisfy such judgment or claim and pay all costs and expenses in connection therewith (*id.* at 507 n 1).

The First Department determined that "Article 34 is essentially an indemnity provision solely for the benefit of Rockland County and does not create an obligation to any other contractors performing work on the project that Article 34," and found that was there was no clear intention in the parties' contracts to confer a direct benefit on a third party (*id.* at 507-508). In other words, the contract at issue in *Snyder* provided protection for Rockland County either by providing that the contractors would work it out amongst themselves by settlement or by indemnifying Rockland in the event settlement did not occur. Significantly, however, the contract contained no obligation of one contractor to protect the other contractor from incurring damages as a result of its conduct.

This is wholly different than the contract at issue in this case. Here, the contract provides that the contractor holds the City harmless from damages caused by its conduct and also expressly provides that each contractor may seek reimbursement from another contractor that causes damages arising from such other contractor's acts or omissions. Put another way, this contract says exactly what the contract in *Snyder* did not – *i.e.*, that contractors can seek reimbursement for damages caused by other contractors (*i.e.*, third parties) and such other contractors, including Pegno Tully, agreed to reimburse such other contractors from damages caused by its acts or omissions (*See*, NYSCEF 201, Art. 12).

ii. The Article 12 Notice Requirements

Second, Pegno Tully argues that Five Star cannot recover because it failed to follow the notice procedures set forth under Article 12, which it argues is a condition precedent to recovery. Specifically, Pegno Tully argues that Five Star was required to notify the City's Engineer of any alleged coordination errors on the part of Pegno Tully so that the Engineer could conduct an investigation and issue directives with respect to purported delays, which it argues Five Star did not do. In support of its motion, Pegno Tully submits the testimony of the City's Engineer, Paul Romano (NYSCEF 187). Mr. Romano states that the contractors "coordinated very well" and he never investigated any coordination disputes for the Project (*id.* at 289:16, 290:5-18). Pegno Tully also submits the deposition testimony of Five Star's Project Manager, Dennis Falk, who testified that he did not recall the City's Engineer arranging any meetings with the contractors regarding coordination disputes (NYSCEF 188 at 57:7-12). The argument fails.

Article 12 provides, in relevant part:

> ***If the Contractor notifies the Engineer*** in writing that another Contractor on this Project is failing to coordinate [his or her] work with the work of this Contract as directed, ***the Engineer must promptly investigate the charge.*** If the Engineer finds it to be true, he must promptly issue such directions to the other Contractor with respect thereto as the situation may require (NYSCEF 201, Art. 12 [emphasis added]).

The purpose of this provision is undeniably to provide a mechanism for the resolution of bottlenecks caused by coordination issues by placing an obligation on the Engineer to intervene. As Mr. Znascko, who has served as Five Star's Project Engineer for the last 20 years explained, the term "coordination" as used in Article 12 refers to disputes concerning the sequencing of work or allocation of space (Znascko Aff., ¶ 10). In other words, this is a provision for the benefit of the contractor to give them comfort that if there is a problem with a coordination that

they will not be required to go to another contractor and work it out, but instead, can look to the Engineer to resolve coordination issues. And, there is no clear, express, and unequivocal language mandating notice to the Engineer prior to the commencement of litigation. Put another way, this provision imposes no obligation on the contractor at all. And, there simply is no contractual basis for Pegno Tully's argument that Five Star is precluded from recovery because it did not provide any notice of its coordination issues as there is no obligation to do so pursuant to this provision. Accordingly, Five Star has not waived its claims by failing to provide notice to the City's Engineer (*Mario & Di Bono Plastering Co., Inc. v Rivergate Corp.*, 140 AD2d 164, 165 [1st Dept 1988] ["A careful reading of the applicable sections of the agreement establishes that although its terms require submission of a claim to the architect, there is no clear indication that this is a necessary prerequisite to the commencement of litigation."]).

iii. The "No-Damage-for-Delay" Clause

Third, Pegno Tully argues that Five Star's claims are barred by the "no-damage-for-delay" clause set forth in Article 13. Five Star argues that by its express terms, Article 13 can only be invoked by the City. The court agrees.

Article 13 provides:

> The Contractor agrees to make no claim for damages for delay in the performance of this Contract ***occasioned by any act or omission to act of the City or any of its representatives***, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work as Provided herein (NYSCEF 201, Art. 13 [emphasis added]).

In other words, the express language of Article 13 bars claims for damages for delays ***caused by the City or its representatives***, not for delays caused by other contractors. There is nothing in the Pegno Tully Contract or the Five Star Contract that would support the interpretation that Pegno

Tully is a representative of the City for the purposes of this Article. And, indeed, Article 12, as discussed above, expressly provides an affirmative obligation for one contractor to reimburse another for damages caused by its acts or omissions. Therefore, Five Star's claims are not barred by the no-damage-for-delay clause.

iv. Collateral Estoppel

The doctrine of equitable estoppel provides that a party may not deny his or her own express or implied admission which another party has accepted and acted on in good faith (*Sardanis v Sumitomo Corp.*, 282 AD2d 322, 324 [1st Dept 2001]). "The purpose of invoking the doctrine is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another" (*American Bartenders School v 105 Madison Co.*, 59 NY2d 716, 718 [1983]). A party asserting equitable estoppel must establish detrimental reliance on the other party's admission (*Fisk Bldg. Assoc. v Shimazaki II, Inc.*, 76 AD3d 468, 469 [1st Dept 2010]).

FPegno Tully argues that the court should issue an order precluding Five Star from recovering damages for more than 262 calendar days under the doctrine of collateral estoppel based on certain Five Star requests for partial extensions to the DEP (NYSCEF 189-193) and a verified statement of claim in which Five Star sought additional compensation from the City based on "City-caused delays and interferences with the City" (NYSCEF 195).

In their opposition papers, however, Five Star argues that the timely requests for partial extensions upon which Pegno Tully relies are not evaluations as to the responsibilities for the

delays but are merely timely requests for extensions and payments. In support of their position, Five Star offers the deposition testimony of Mr. Romano who explained that on projects such as this one, once the original contract completion date is passed, partial extensions are needed in order for the Engineer to process monthly progress payments (NYSCEF 215, Tr at 285:20-286:21) and that partial time extension requests are mere formalities and evaluations of responsibility for delays are not done until the end of the project (*id.* at 412:14-25, 413:2-17). And, as Mr. Znascko testified, contractors will often employ a "kitchen sink" approach to time extension requests by including a long list of events that might justify an extension to increase their chances that they will continue getting paid (Znascko Aff., ¶ 31). Equally significantly, Five Star also proffers a third partial time extension request (NYSCEF 191), which attributes 1,340 days of delay to Pegno Tully, a fourth partial time extension request (NYSCEF 192), which attributes 1,520 days of delay to Pegno Tully, a fifth partial extension request (NYSCEF 193), which attributes 1,745 days of delay to Pegno Tully. In other words, the very time extension requests that Pegno Tully relies on in support of its argument that it is entitled to summary judgment based on Five Star's own admissions actually attribute significant delays directly to Pegno Tully, not just to the City.

Based on the conflicting evidence submitted by the parties, there are material issues of fact regarding the issue of the percentage of the delays, if any, that can be attributed to Pegno Tully. Pegno Tully fails to meet its burden in establishing that the partial time extension requests and verified statement of claim constitute admissions that preclude a finding of liability on the part of Pegno Tully in excess of 262 calendar days. And, significantly, Pegno Tully offers no evidence

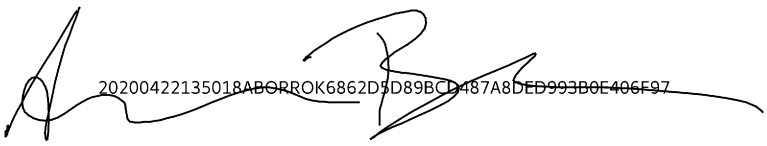
that it ever accepted and relied on Five Star's alleged admissions to its detriment – *i.e.*, a necessary element of an equitable estoppel defense (*Fisk*, 76 AD3d at 469).

Therefore, the motion for summary judgment is denied in its entirety.

Accordingly, it is

ORDERED that A.J. Pegno Construction Co., Inc./Tully Construction Co., Inc., a joint venture of Tully Construction Co., Inc. and A.J. Pegno Construction Co., Inc.'s motion for summary judgment pursuant to CPLR § 3212 is denied; and it is further

ORDERED that the parties are to contact to Part 53 to arrange a status conference for next week to discuss the previously scheduled trial.



4/22/2020
DATE

ANDREW BORROK, J.S.C.

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