Eurotech Constr. Corp v Skanska USA Bldg. Inc.
2020 NY Slip Op 31433(U)
April 21, 2020
Supreme Court, New York County
Docket Number: 654155/2019
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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EUROTECH CONSTRUCTION CORP,

Plaintiff,

- v -

SKANSKA USA BUILDING INC.,

Defendant.

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INDEX NO.	654155/2019
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DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Before the Court is a pre-Answer motion by defendant Skanska USA Building Inc. ("Skanska") for an Order, pursuant to CPLR § 3211(a) (5), (1) and (7), dismissing the Complaint filed by plaintiff Eurotech Construction Corp. ("Eurotech") on the grounds that the claims are barred by the Statute of Limitations, there is a complete defense founded upon documentary evidence, and the complaint fails to state a cause of action. Skanska also seeks dismissal pursuant to CPLR § 3014 on the ground that the Complaint fails to meet the pleading requirements. For the reasons stated below, the motion is granted in part and denied in part.

Background Facts

According to the 80-page Complaint verified by Thomas P. Devlin as CEO of Eurotech (NYSCEF Doc. No. 1), defendant Skanska was the general contractor retained by the New York City School Construction Authority to construct a school known as IS/HS 404 - Hunters Point South New Intermediate School & High School ("the Project"). On March 25, 2011, Eurotech signed a detailed subcontract with Skanska dated October 18, 2010, wherein Eurotech, as the Subcontractor, agreed to perform certain masonry, rough carpentry, gypsum wall board, and ceiling work for the Project as spelled out in Exhibits A-Y of the subcontract ("the Subcontract")

(NYSCEF Doc. Nos. 9 and 10). Skanska counter-signed the Subcontract as the Contractor on April 5, 2011.

Eurotech commenced this action on July 21, 2019, seeking declaratory relief, compensatory damages in the amount of $5,967,126.17, plus punitive damages and attorney's fees. The essence of the Complaint appears to be that Eurotech agreed to a specific price and a set schedule for the Subcontract work based on bid drawings and specifications provided by Skanska and based on representations by Skanska regarding important matters relating, for example, to the planned building demolition and the condition of the soil. However, as the Project progressed, Eurotech learned of material misrepresentations and omissions by Skanska that prevented Eurotech from completing the work on schedule and without exorbitant cost overruns. Eurotech seeks to have Skanksa compensate it fully for all labor and materials used in relation to the Project, including those attributable to delays caused by Skanska.

In the Complaint Eurotech asserts six causes of action: (1) for a declaration that Skanska's "act of fraud and fraudulent inducement makes the subcontracting agreement void and … that the subcontract pursuant to which labor and services were provided by the plaintiff be treated as a time and material contract"; (2) for a declaration that "the no damages for delay clause (Exculpatory Clause) is obviated by common law exceptions to the Exculpatory Clause and is therefore void"; (3) unjust enrichment; (4) negligent misrepresentation; (5) breach of contract and breach of the implied covenant of good faith and fair dealing; and (6) *quantum meruit*, as an alternative to breach of contract. Skanska seeks to dismiss the Complaint in its entirety, asserting first that, because the work was "substantially complete" more than six years before this action was commenced, the action is time-barred. Next, Skanska claims the action is barred by the "no damages for delay" clause in the Subcontract. Additionally, Skanska argues

that the quasi-contract claims for unjust enrichment and *quantum meruit* (the third and sixth causes of action, respectively) should be dismissed as barred by the existence of a written contract between the parties. Eurotech opposes each and every aspect of the motion.

Discussion

Addressing first the request for dismissal under CPLR § 3211(a)(5) based on the Statute of Limitations, Skanska correctly notes the breach of contract claim is governed by the six-year Statute of Limitations in CPLR § 213(2), which also applies to the contract-related request for declaratory relief and the quasi-contract claims (counts 2, 3, 5 and 6). Citing *Phillips Constr. Co. v City of New York*, 61 NY2d 949, 951 (1984), Skanska argues that the claims accrued upon the "substantial completion" of the work, which occurred by June 20, 2013 when Eurotech sent an invoice indicating that 98% of the work had been completed. As this action was commenced on July 21, 2019, and all the claims accrued before the six-year limitations period commenced on July 21, 2013, the claims must be dismissed as time-barred, Skanska contends.

Another set of claims, including the first count requesting declaratory relief, is based on alleged fraud. CPLR § 213(8) provides that a cause of action for fraud must be commenced within six years from the time the misrepresentation occurred, or two years from the time the plaintiff discovered the fraud or could have done so with reasonable diligence, whichever period is longer. The negligent misrepresentation claim (count 4) is governed by the same Statute of Limitations applicable to fraud. Any fraud or misrepresentation necessarily occurred before June 20, 2013 when Eurotech substantially completed its work, Skanska contends. Therefore, Skanska urges the Court to dismiss the fraud-related claims as time-barred, along with the contract-related claims, pursuant to CPLR § 3211(a)(5).

In opposition, Eurotech agrees that the six-year Statute of Limitations applies to the contract claims and that *Phillips* articulates the controlling test for the accrual of the cause of action. However, Eurotech disagrees that the test is "substantial completion" as reflected by a percentage point, and it relies instead on the following language in *Phillips*, 61 NY2d at 951*:*

> The Statute of Limitations prescribed in CPLR 213 (subd 2) began to run on completion of the actual physical work even though incidental matters related to the project remained open …

The "incidental matters" in *Phillips* consisted of a minor punch list with items such as work on a single door frame. Eurotech asserts that, in contrast to the contractor in *Phillips*, Eurotech performed substantial "actual physical work" and supplied extensive materials until at least January 1, 2014, including 1,039 hours after the June 20, 2013 date Skanska defines as the "substantial completion" date. To support its assertion, Eurotech provides an affidavit on personal knowledge from Thomas Mullahy, the Project Manager, and some documentation (NYSCEF Doc. No. 22). Mullahy attests that Eurotech performed the following significant work after June 20, 2013: repairs to auditorium ceilings; changing and raising soffits; changing and raising framing; changing metal panels and waterproofing; changing and fixing hundreds of doors; installing louvers and door stops; installing aluminum sills; removing ceilings to permit cable installation; and patching sheetrock ceilings. Skanska replies, in part criticizing the documents as not dispositive.

As to the fraud claims, Eurotech alleges in the Mullahy affidavit and elsewhere continuing misrepresentations by Skanska as late as January 2014 when the parties were discussing the extent of work yet to be completed and appropriate compensation in connection with change orders. By applying the six-year limitations period from the occurrence of the continuing fraud through January 2014, the claim asserted in 2019 is timely, Eurotech asserts.

Without directly addressing Eurotech's continuing wrong analysis, Skanska in reply contends that the alleged misrepresentation occurred in 2011 when the subcontract was signed, but certainly before the work was substantially completed in June of 2013. Applying the alternative two-year discovery prong of CPLR § 213(8), Skanska relies on a February 12, 2015 letter from Eurotech's counsel alleging fraud to argue that the Statute of Limitations barred the fraud-related claims as of February 12, 2017.

The Court declines to dismiss the Complaint as time-barred. "A defendant who moves to dismiss a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired …. The burden then shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period …." *Plaza Invs. v Capital One Fin. Corp.*, 165 AD3d 853, 854 (2nd Dep't 2018) (citations omitted).

Skanska here met its initial burden on the contract claim by arguing that the cause of action accrued on June 20, 2013 when the work was allegedly "substantially complete", but Eurotech succeeded in opposition in raising a question of fact as to whether substantial physical work continued such that the cause of action did not accrue until January 2014. The Mullahy affidavit was extremely detailed, as was the Verified Complaint, and the Court may consider the affidavit along with the pleadings when considering the motion to dismiss. *See Mulder v Donaldson, Lufkin & Jenrette*, 208 AD2d 301, 303 (1st Dep't 1995). Similarly, Skanska met its burden on the fraud claim by arguing that any fraud necessarily occurred before June 20, 2013

and was discovered by 2015, but Eurotech created an issue in opposition by offering evidence of a continuing fraud within the applicable limitations period, which trumps the discovery rule.

The next issue is whether Eurotech has stated a claim for delay damages, despite the existence of exculpatory language in the Subcontract. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction … We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine [under CPLR 3211(a)(7)] only whether the facts as alleged fit within any cognizable legal theory ….Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law …. In assessing a motion under CPLR 3211 (a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint … and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' …". *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (citations omitted).

Skanska relies on Article 11.3 of Exhibit E to the Subcontract, commonly known as a "no damages for delay" clause, which allegedly limits Eurotech's delay damages to an extension of time and bars any claim for additional costs incurred as a result of delays, providing in relevant part as follows:

> Except as provided under Article 10.5 the full and complete compensation to, and sole and exclusive remedy of Subcontractor in the event of any delay, interference or other adverse impact to the Work shall be an extension of time for performance of the Work. Subcontractor acknowledges that in agreeing to the Subcontract Amount it has assessed the potential impact of the limitations in this Section 11.3 on its ability to recover additional compensation in connection with a Work delay or interference and agrees that these limitations will apply regardless of the accuracy of Subcontractor's assessment or actual costs incurred by Subcontractor.

The cited Article 10.5 of Exhibit E, in turn, provides that Eurotech's recovery for delays and interferences caused by the New York City School Construction Authority is limited to the amount received by Skanska from the New York City School Construction Authority.

The landmark case upholding the enforceability of a "no damages for delay" clause in a construction contract is *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384-85 (1983). The Court of Appeals reaffirmed the *Kalisch-Jarcho* holding three years later in *Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 305 (1986), reiterating that "contract clauses barring a contractor from recovering damages for delay in the performance of a contract are valid, that they will prevent recovery of damages resulting from a broad range of reasonable and unreasonable conduct by the contractee if the conduct was contemplated by the parties when they entered into the agreement, but that they will not excuse or prevent the recovery of damages resulting from the contractee's grossly negligent or willful conduct, i.e., conduct which "smacks of intentional wrongdoing" (*quoting Kalisch-Jarcho* at 385). Subsequent First Department cases have applied the rule to bar damages claims for costs incurred, for example, due to the loss of labor productivity caused by inadequate hoists, excessive overtime work, and working in an occupied building [*Universal/MMEC, Ltd. v Dormitory Auth. of the State of N.Y.*, 50 AD3d 352, 353 (1st Dep't 2008)], and the failure to provide heat during winter months and improper scheduling caused by the general contractor's mismanagement of the project [*Commercial Elec. Contrs, Inc. v Pavarini Constr. Co.*, Inc., 50 AD3d 316, 318 (1st Dep't 2008)].

Skanska argues that all of Eurotech's claims are barred by cases such as these upholding "no damages for delay" clauses as all the claims relate to potential delays that Eurotech could have reasonably contemplated involving matters such as issuing and approving change orders, reviewing and approving shop drawings and submittals, changes in design, reviewing and

responding to requests for information, resequencing work, and other aspects of contract administration. What is more, Skanksa argues, several items were directly addressed by the parties in writing. For example, as to the resequencing of the work, Articles 3.2 and 9.2 of Exhibit E to the Subcontract provided Skanska with the right to revise and amend the schedule (Article 3.2) and to decide the time, order and priority for performance of the various portions of the Subcontractor's work (Article 9.2).

Eurotech is well aware of the rule, but argues that plaintiff's claims are not barred because they fall within the exceptions articulated by the Court of Appeals in *Corinno, supra.* The four exceptions explicitly stated in *Corinno* were described as follows*:* "Generally, even with such a clause [barring damages for delays], ***damages may be recovered*** for: (1) delays caused by the contractee's [Skanska's] bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract." 67 NY2d at 309 (emphasis added).

Eurotech relies on all four exceptions but primarily the first, arguing that the "Verified Complaint is crystal clear in attributing the delays and the damages the Plaintiff sustained from those delays which were the direct result of bad faith or the willful, malicious fraud on the part of Skanska" (Memo in Opposition, NYSCEF Doc. No. 23, at p 20). To support the claim, the Affidavit of the Project Manager Thomas Mullahy provides generous details (NYSCEF Doc. No. 22). The details include specific examples of unforeseeable conditions known to Skanska but not revealed to Eurotech until ***after*** Eurotech had executed the Subcontract and which allegedly were not ascertainable by Eurotech through the restricted site inspection and limited document review available in advance and which caused uncontemplated and unreasonable delays and expenses.

One example is the alleged concealment related to the soil remediation work which the contract schedule dictated be completed, including days for foreseeable and contemplated delays, by September 28, 2010. Eurotech claims Skanska knew by December 6, 2010 that the presence of contaminated soils would prevent Eurotech from completing its work on schedule because excavation could not even begin until the remediation had been completed, but Skanska allegedly chose to conceal that information until ***after*** Eurotech executed their contract several months later in March 2011. Another condition that Skanska allegedly did not disclose, despite its knowledge, was the presence of subsurface obstructions such as buried masses of concrete, timber, steel debris, and other material that had to be removed before excavation operations could begin. Yet another condition related to water sampling by the New York State Department of Environmental Conservation. Eurotech describes all these conditions as "unforeseeable" problems that Skanska should have disclosed based on its specialized knowledge of facts that Eurotech could not have discovered through the exercise of ordinary due diligence. Mullahy claims the unforeseen conditions caused such unreasonable delays and cost overruns that Skanska suggested a 30% markup on the Subcontract price as compensation for delays (Aff. ¶12). Eurotech also asserts that scheduling to coordinate work among the various trades is a key aspect of Skanska's role under the Subcontract which Skanska failed to competently perform.

Eurotech thus argues for delay damages based on the four *Corinno* exceptions: (1) delays caused by Skanska's bad faith or grossly negligent conduct; (2) uncontemplated delays; (3) delays so unreasonable they constitute an abandonment of the contract by Skanska; and (4) delays resulting from Skanska's breach of a fundamental obligation of the contract. Citing the First Department's affirmance of this Court's decision dismissing certain damages claims based on a "no damages for delay" clause, Skanska argues that Eurotech has failed to allege sufficient

details to satisfy any of the *Corinno* exceptions. *WDF Inc. v Trustees of Columbia Univ. in the City of N.Y.*, 156 AD3d 530 (2017). In some instances, such as Skanska's alleged offer of a 30% cost adjustment over the contract price, Skanska disagrees on both the alleged facts and Eurotech's interpretation of the law as to what constitutes an "intentional abandonment" of the contract. Skanska further notes that in Section 2.2 of Exhibit E to the Subcontract Eurotech acknowledged its completion of a site inspection and document review, and section 19.12 is a merger clause that bars parol evidence.

Although the question is a somewhat close one, the Court finds that the voluminous Complaint verified on personal knowledge, coupled with the extensive affidavit from the Project Manager Thomas Mullahy, distinguishes this case from *WDF*. Pursuant to *Leon v Martinez,* discussed above, the Court must "accept the facts as alleged in the complaint as true [and] accord plaintiffs the benefit of every possible favorable inference." By so doing, the Court finds that Eurotech's delay damages claims survive dismissal at the pleading stage, without prejudice to a summary judgment motion by Skanska after discovery has been completed.

However, Skanska is correct that the quasi-contract claims for unjust enrichment and *quantum meruit* (the third and sixth causes of action, respectively) should be dismissed as barred by the existence of a written contract between the parties. *Clark-Fitzpatrick Inc. v Long Island Rail Road Co.*, 70 NY2d 382, 388 (1987). Unlike the cases cited by Eurotech, it is undisputed that the parties entered into a valid written contract, and the question is simply whether the claimed contract damages are permitted or barred by the terms of the contract under the particular circumstances of this case.

Accordingly, it is hereby

ORDERED that the motion by defendant Skanska USA Building Inc. to dismiss the Complaint filed by plaintiff Eurotech Construction Corp. is granted to the extent of dismissing the third and sixth causes of action for unjust enrichment and *quantum meruit* and is otherwise denied without prejudice to renewal on summary judgment; and it is further

ORDERED that Skanska shall serve an Answer by May 26, 2020, and e-file the Answer when circumstances permit. Following service of the Answer, counsel shall confer and prepare a preliminary conference order pursuant to the Temporary Part 61 Rules available on the Commercial Division website, http://ww2.nycourts.gov/courts/comdiv/ny/newyork.shtml, using the form and following the instructions available there. A compliance conference is scheduled for September 22, 2020, at 9:30 a.m.

Counsel are urged to discuss a consensual resolution of the case, and the Court is available to assist. Any request for assistance should be sent to the Court via email to SFC-PART61@nycourts.gov.

Dated: April 21, 2020

BARRY R. OSTRAGER, J.S.C.

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