Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE IA Part 33
Justice

x

WDF INC., individually and on behalf of the persons entitled to share in the funds received by ANDRON CONSTRUCTION CORP. from the New York City School Construction Authority in connection with the public improvement known as "P.S. 290" in Queens, New York under Article 3-A of the New York State Lien Law,

Plaintiff(s),

-against-

ANDRON CONSTRUCTION CORP., LIBERTY MUTUAL INSURANCE COMPANY, CHARLES F. WINTER, DONALD L. BENSON and JOHN DOE "1" through JOHN DOE "5"

Defendants

Index Number 707414 2015

Motion Date January 21, 2020

Motion Seq. No. 2

ANDRON CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against

THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORTITY,

Third-Party Defendant.

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The following numbered papers numbered EF45-107 read on this motion by plaintiff pursuant to CPLR 3212(e) for partial summary judgment in favor of plaintiff WDF, Inc. and against defendants Andron Construction Corp. ("Andron") and Liberty Mutual Insurance Company ("Liberty Mutual"), granting WDF's first or second, third or

fourth, fifth and sixth causes of action for breach of contract, quantum meruit, and Payment Bond Claims, respectively, as set forth in the verified amended complaint, and pursuant to CPLR 3212 directing the entry of summary judgment in favor of plaintiff and against defendant Andron dismissing Andron's counterclaim; and on the cross motion by the defendants Andron, Charles F. Winter and Donald L. Benson pursuant to CPLR 3212 for partial summary judgment dismissing WDF's claims for damages related to delays and dismissing the seventh cause of action.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF 45-73
Notice of Cross Motion - Affidavits - Exhibits...	EF 75-96
Answering Affidavits - Exhibits.....	EF 97-98
	EF 104-106
Reply Affidavits.....	EF 101-103
	EF 107

Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows:

This case arises out of a construction project. On or about December 12, 2011, defendant Andron, as general contractor entered into a prime contract with the New York School Construction Authority ("SCA"), whereby for specified sums, Andron agreed to perform certain work, labor and services at a public improvement project known and described as P.S. 290Q, located at 55-20 Metropolitan Avenue Queens New York (the Project). As a condition of Andron being awarded the prime contract, Liberty Mutual issued a payment bond to SCA, as obligee pursuant to section 137 of the State Finance Law ("Payment Bond"). Under the Payment Bond the sureties agreed to pay certain claims by the subcontractors who performed work on behalf of Andron at the Project.

On September 26, 2012, Andron entered into two subcontracts with plaintiff WDF. Under one contract WDF agreed to perform certain plumbing work, labor and services for the sum of $2,198,000. Under the second contract WDF agreed to perform certain HVAC work, labor and services for the sum of $6,450,000. Both subcontracts contain a no-damage for delay clause under which the prime contractor shall not be held liable by reason of delay whether due to the fault of the contractor or otherwise and that the subcontractor's sole remedy is an extension. Between

January 2013 and November 2014, WDF performed its work under both subcontracts at the project.

Subsequent to the commencement of its work, WDF at the direction of Andron performed additional and extra work and incurred costs outside the scope of the plumbing subcontract. Andron and WDF executed change orders for additional plumbing work amounting to $58,251, increasing the plumbing subcontract to $2,256,251. Andron made payments to WDF under the plumbing subcontract totaling $1,921.883.550. WDF argues that there is a balance of $334,367.50 under the contract and agreed-to change orders. Andron disputes that there are any amounts due and owing to WDF. Andron believes that the amount owed to WDF was setoff by back charges for work not performed, costs of emergency contractor work and costs incurred from WDF's delays. Andron argues that it, therefore, does not owe any further amount to WDF and, in fact, it is owed money from WDF.

WDF alleges that in addition to the work it did under the plumbing subcontract and the work done under the change orders executed by Andron and WDF, it incurred additional costs and markups in the amount of $35,730.41. WDF alleges these costs are reflected in certain Change Estimates for work that it did at the direction of Andron and for which Andron was responsible. Andron disputes some of these charges arguing both that some of this work was unnecessary and disagrees with the charges for the work done. WDF alleges that it did further work and incurred further charges of $225,796.49, which includes a delay charge of $42,699.88. WDF alleges that these costs are reflected in certain proposed change orders for work that it did at the direction of SCA. Andron disputes some of these charges arguing both that some of this work was unnecessary and disagrees with the charges for the work done.

Subsequent to the commencement of its work, WDF at the direction of Andron performed additional and extra work and incurred costs outside the scope of the HVAC subcontract. Andron and WDF executed change orders for additional HVAC work amounting to $56,027.53, increasing the plumbing subcontract to $6,506,027.53. Andron made payments to WDF under the HVAC subcontract totaling $5,625,116.56, leaving a balance of $1,240,910.97. Andron disputes that there are any amounts due and owing to WDF. Andron believes that the amount owed to WDF was setoff by back charges for work not performed, costs of emergency contractor work and costs incurred from WDF's delays. Andron argues that it, therefore, does not owe any further amount to WDF and, in fact, it is owed money from WDF.

WDF alleges that in addition under the HVAC subcontract, and the work done under the change orders executed by Andron and WDF, it incurred additional costs and markups in the amount of $80,122.13. WDF alleges these costs are reflected in certain Change Estimates for work that it did at the direction of Andron and for which Andron was responsible. Andron disputes some of these charges arguing both that some of this work was necessary and disagrees with the charges for the work done. WDF alleges that it did further work and incurred further charges of $796,804.14 and also is entitled to acceleration delay costs of $164,001.39. WDF alleges that these costs are reflected in certain proposed change orders for work that it did at the direction of SCA. Andron disputes some of these charges arguing both that some of this work was necessary and disagrees with the charges for the work done.

Andron commenced an action against the SCA. Pursuant to its notice of claim Andron submitted claims to the SCA for, among others, a contract balance of $7,838,651, submitted but unapproved change order requests in the amount of $8,535,684 and subcontractor's claims for additional extra work and delay/acceleration costs in the amount of $885,999. Andron's claims also disputed the validity and fair market value of a unilateral back charge imposed by the SCA. This back charge was attributable to the SCA's costs associated with work performed by an emergency contractor hired by the SCA to supplement Andron's forces which were thereafter charged to Andron. Andron settled the action against the SCA and received project trust funds in the amount of $8,750,000.

On or about December 1, 2014, WDF duly served upon Liberty Mutual notice and proof of HVAC and plumbing claims asserted under the payment bond. WDF then commenced this action on July 15, 2015. WDF filed an amended complaint on June 14, 2017. Under the amended complaint in the first, second, third, fourth and fifth causes of action WDF seeks payment for work done under the subcontracts and additional work performed.

On a motion for summary judgment, the party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The elements for a cause of action for breach of contract are (1) the existence of a contract, (2) the performance by plaintiff, (3) the defendants' breach of their contractual obligations and (4) damages resulting from the breach (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83

AD3d 804 [2d Dept 2011]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802 [2d Dept 2010]). Here, WDF alleges that Andron breached the two subcontracts.

In support of its motion WDF submitted the affidavit of Liam McLaughlin who oversaw the HVAC operations and oversaw the HVAC work performed by WDF at the construction project. Mr. McLaughlin in his affidavit outlined the HVAC work done by WDF under the contract. He further outlined additional work done in accordance with change orders that were executed by Andron and WDF. He further detailed other work that was done at the direction of Andron for which Andron did not issue change orders. He also detailed work that was done due to directives by the SCA. He stated that WDF substantially performed all the labor and provided all of the materials under the HVAC subcontract, including the work that was done outside the scope of the subcontract and that Andron has refused to pay WDF in full for the subcontract work and the additional work done under the change estimates and proposed change orders. Additionally, Mr. McLaughlin attached to his affidavit an HVAC subcontract accounting and also attached the change estimates and proposed change orders for the additional work that was done either at the behest of Andron or the SCA. Included with other bills were bills for delay/acceleration damages which WDF alleges are attributable to Andron.

WDF also submitted the affidavit of Michael Tumminello, who was in charge of WDF's plumbing operations and oversaw the plumbing work performed by WDF at the subject construction project. Mr. Tumminello in his affidavit outlined the plumbing work done by WDF under the contract. He further outlined additional work done in accordance with change orders that were executed by Andron and WDF. He further detailed other work that was done at the direction of Andron for which Andron did not issue change orders. He also detailed work that was done due to directives by the SCA. He stated that WDF substantially performed all the labor and provided all of the materials under the plumbing subcontract, including the work that was done outside the scope of the subcontract and that Andron has refused to pay WDF in full for the subcontract work and the additional work done under the change estimates and proposed change orders. Additionally, Mr. Tumminello attached to his affidavit a plumbing subcontract accounting and also attached the change estimates and proposed change orders for the additional work that was done either at the behest of Andron or the SCA. Included with other bills were bills for delay/acceleration damages which WDF alleges are attributable to Andron.

The evidence submitted by WDF established its prima facie entitlement to summary judgment on its causes of action for breach of contract. The evidence by WDF established that it performed under the contracts and it has not received payment for the work it performed. Under both contracts payment became due and owing form Andron to WDF within 30 days after completion and acceptance of the work. Here, more than 30 days have elapsed since the completion and acceptance of the work and WDF has established that it has not received payment from Andron. WDF further argues that Andron failed to engage in good faith negotiations for the extra work that it was required to do and therefore, it is entitled to recover for the amount it claims is due.

The opponent of a summary judgment motion must present admissible evidence that is sufficient to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In opposition, the defendant submitted the affidavit of affidavit of Sinclair Fianko-Ayeh. The affidavit of Mr. Fianko-Ayeh went through the subcontracting accounting submitted by WDF for both the plumbing and HVAC subcontracts. He outlined all the extra work that WDF did, disputing much of the work and charges in the accounting in the affidavits submitted by the plaintiff. He further detailed instances were WDF was notified of the negotiation meetings with SCA and the fair and reasonable estimate issued by the SCA for the work done. He detailed instances that WDF attended negotiations with SCA. He detailed other instances where WDF did not submit its claims until the project was complete and WDF had already commenced this action.

Additionally, while, Andron admits that it did not pay WDF fully for the work under the subcontract and extra work that it did under the executed change orders, Andron alleges that it does not in fact owe any additional money to WDF. In support of this argument, Andron again relies on the affidavit of Mr. Fianko-Ayeh. In his affidavit Mr. Fianko-Ayeh detailed delays and damages that were allegedly incurred by Andron that were due to WDF. In its opposition papers, Andron alleges that is owed money due to back charges for work not performed, costs incurred for work that SCA submitted to an emergency contractor because WDF failed to finish its work in a timely manner and costs incurred from WDF's delays. Andron argues that no further payments are due under either the plumbing or HVAC subcontracts and, in fact, that WDF owes money to Andron under both subcontracts when the offsets and back charges are taken into consideration.

WDF, on the other hand, alleges that Andron did not provide the requisite contractual notice of its intention to perform or complete any of WDF's work, and thus Andron is not entitled to the back charges and offsets due to the emergency contractor, work allegedly not performed or the charges for the delays. WDF argues that under Section 7 of the subcontracts, Andron is required to provide WDF with 24 hour written notice before remedying any defective work. WDF argues that under Section 21 of the subcontracts Andron was required to provide WDF with written notice no less than five business days before performing any of WDF's scope of work. Finally, WDF argues that pursuant to Section 23 of the subcontracts Andron was required to provide WDF with written notice no less than three business days before prosecuting WDF's Work and deducting costs from amounts owed. WDF argues because Andron did not comply with these notice provisions it is not entitled to the charges it seeks against WDF.

In response to this argument Andron argues that it did in fact comply with the notice requirements. In the affidavit of Mr. Fianko-Ayeh states that Andron did in fact give the required notices to WDF. He detailed the alleged instances where WDF failed to perform and outlined lists the instances where WDF was allegedly given prior written notice.

Here, Andron has raised multiple issues of fact that warrant denial of the summary judgment motion. Andron has raised issues of fact as to whether the extra work done by WDF was necessary and as to the amounts claimed due by WDF for the work that was done outside the scope of the contract. Additionally there are issues of fact as to whether Andron did in fact negotiate in good faith over the extra work that was done by WDF and, thus, WDF is not entitled as a matter of law to the amounts it seeks for the extra work done. Finally, there are issues of fact as to whether Andron is entitled to any back charges, delay cost or other offsets from WDF. These issues of fact include as to whether Andron provided necessary notice to WDF before remedying any allegedly defective work, performing any work that WDF allegedly did improperly or taking action for work allegedly done improperly. There are also issue of fact as to whether WDF caused delays that caused Andron to incur additional costs. Due to the conflicting evidence put forth in the affidavits of each party, summary judgment is not warranted.

Liberty Mutual's liability as a payment bond surety is measured by the liability of its principal, Andron (*see American Bldg. Supply Corp. v Avalon Props., Inc.*, 8 AD3d 515 [2d Dept 2004]). The amount due a claimant as provided in the bond is

determined by the amount owed by Andron. In light of the above finding that issues of fact exist as to the liability of Andron, summary judgment is not warranted against Liberty Mutual. Therefore, the branches of the motion for summary judgment by plaintiff for summary judgment on its fifth and sixth causes of action are denied.

Turning to the branch of the summary judgment motion to dismiss Andron's counter claims it must also be denied. As discussed above with regard to the question of whether Andron is entitled to any back charges or set offs there are multiple issues of fact on these issues and thus WDF is not entitled to summary judgment dismissing the counterclaims.

The court next turns to the cross motion by the defendant Andron. First though the branch of the cross motion by the defendant for partial summary judgment prohibiting WDF from seeking delay costs is untimely, it is made on nearly identical grounds as the timely motion by the plaintiff and will therefore be considered *(see Ellman v Village of Rhinebeck*, 41 AD3d 635 [2d Dept 2007]; *Grande v Peteroy*, 39 AD3d 590 [2d Dept 2007]). Here, both subcontracts contained a clause barring the subcontractor from seeking damages for delays. A no damage for delay clause will generally be enforceable (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]). Here, the defendant Andron established its prima facie entitlement to summary judgment barring WDF from collecting damages resulting from delays.

In opposition, the plaintiff failed to raise an issue of fact. Despite a no damages for delay clause a contractor may still recover damages for "(1) delays caused by the contractee'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" (*Id.* at 309). The plaintiff, however, failed to raise any issue of fact as to any of these grounds (*Ecoline, Inc. v Heritage Air Systems*, 161 AD3d 1045 [2d Dept 2018]; *New York Trenchless v Hallen Const. Co.*, 82 AD2d 850 [2d Dept 2011]).

On the other hand, the branch of the cross motion for summary judgment dismissing the seventh cause of action is time barred (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). The plaintiff argues that it should be considered on the ground that the parties stipulated to an extension of time. This argument is

without merit. First, the stipulation only extended the time for Andron to respond to the motion made by the plaintiff it did not extend the time to make a cross motion. Furthermore, even if the stipulation could be read as an attempt by the parties to extend the time to make a cross motion this stipulation was not so-ordered. The parties cannot on their own extend a statutory deadline to make a summary judgment motion. Additionally, the stipulation was not entered into until after the deadline to make a summary judgment motion had expired.

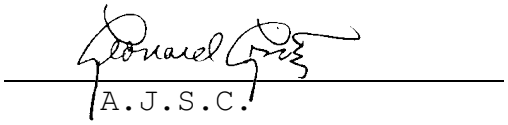
Finally, even if the court accepts the defendant's reliance on the stipulation as the reason it did not seek leave court to make a late summary judgment motion, the defendant has failed to show good cause for making a late summary judgment motion (*see Rivera v Toruno*, 19 AD3d 473 [2d Dept 2005]; *Thompson v Leben Home for Adults*, 17 AD3d 347 [2d Dept 2005]; *Gonzalez v Zam Apartment Corp.*, 11 AD3d 657 [2d Dept 2004]; *Thompson v New York City Bd. of Educ.*, 10 AD3d 650 [2d Dept 2004]). The argument that because the plaintiff made its summary judgment motion on the day the deadline to make summary judgment motion deprives it of an opportunity to seek summary judgment in a cross motion is devoid of merit. Nothing precluded the defendant from moving for summary judgment on its own rather than waiting to file a cross motion in response to the plaintiff's motion. The fact that the defendant chose not to make a motion on its own, but instead to make a cross motion is not good cause for the lateness of seeking summary judgment.

Accordingly, the motion by plaintiff pursuant to CPLR 3212(e) for partial summary judgment in favor of plaintiff and against defendant granting WDF's first or second, third or fourth, fifth and sixth causes of action for breach of contract, quantum meruit, and Payment Bond Claims, respectively, as set forth in the verified amended complaint, and pursuant to CPLR 3212 directing the entry of summary judgment in favor of plaintiff and against defendant Andron dismissing Andron's counterclaim for summary judgment is denied.

The branch of the cross motion by the defendant Andron pursuant to CPLR 3212 for partial summary judgment dismissing WDF's claims for damages related to delays is granted, The branch of the cross motion for summary judgment dismissing the seventh cause of action is denied.

Accordingly, the motion and cross-motion are denied.

Dated: May 11, 2020



A.J.S.C.