SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

----------X

FIVE STAR ELECTRIC CORP,

Plaintiff,

-against-

PLAZA CONSTRUCTION LLC, AMERICAN HOME ASSURANCE COMPANY,

Defendants.

----------X

Index No. 656786/2017

DECISION & ORDER
Mot. Seq. No. 001

O. PETER SHERWOOD, J.S.C.:

I. FACTS

As this is a motion to dismiss, these are the facts as stated in the Complaint (NYSCEF Doc. No. 001) and they are assumed to be true.

Plaintiff Five Star Electric Corp. (Five Star) and defendant Plaza Construction, LLC (Plaza) entered into a subcontract for a construction project located at 45 East 22nd Street in New York (the Subcontract and the Project). Five Star was to perform electrical work and furnish and install a fire alarm system, security system, wiring, and perform other work (together, the Work). Plaintiff has performed its obligations to the extent plaintiff's performance has not been prevented by the defendants and plaintiff is not in default.

In the original complaint, Five Star asserts claims for:

1) Breach of Contract against Plaza, for failure to pay for work performed pursuant to the Subcontract and for additional work as requested by Plaza.

2) Account Stated against Plaza, as Five Star periodically provided statements of account to Plaza and Plaza accepted those statements without objection.

3) For the full amount owed from the undertaking, against Plaza and defendant American Home Assurance Company (American Home). American Home is made a party because plaintiff filed a mechanic's lien (the Lien) on certain real property, which was entered and filed with the County Clerk of New York County and served upon the owner of the Premises and Plaza. Plaza, as principal, and American Home, as surety, delivered an Undertaking in an amount greater than the amount of the Lien, resulting in the Lien being discharged. However, plaintiff has still not been paid.

The Proposed First Amended Complaint adds a claim between the second and third claims alleging changes to the Project were so dramatic and required such different additional work, that the changes constituted a new project, entitling plaintiff to additional compensation (Proposed First Amended Complaint, NYSCEF Doc. No. 40, ¶ 173-77).

II. MOTION TO DISMISS

Defendants move to dismiss the claims only to the extent they are based on allegations of delay (Memo, NYSCEF Doc. No. 24, at 1).

A. Premature

As far as plaintiff argues the motion to dismiss is premature, as no discovery has taken place to date and that discovery is needed to explore the parties' intentions, their duties under the Subcontract and the prime contract, who was responsible for the various delays, and whether plaintiff received all of the relevant information about the Subcontract and Project known by defendants before signing the Subcontract (Opp, NYSCEF Doc. No. 56, at 5-7), plaintiff is incorrect and the cases cited by plaintiff are distinguishable and inapplicable (see e.g. *Venables v Sagona*, 46 AD3d 672, 673 [2d Dept 2007] [considering a motion for summary judgment]; *Telerep, LLC v U.S. Intern. Media, LLC*, 74 AD3d 401, 403 [1st Dept 2010] [denying a motion to dismiss on the merits, as the agreement at issue was ambiguous]. This motion is not premature and will be considered on its merits.

B. Cross-Motion to Amend

Plaintiff also cross-moves to amend the complaint, claiming it can do so as of right, since no discovery has been conducted and it is being sought in opposition to a motion to dismiss (Opp, at 3-4, citing *Avigdor v Rosenstock*, 47 Misc 3d 1220(A) [NY Sup 2015]). In *Avigdor*, no answer had been served. CPLR 3025 provides "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Here, the defendants filed answers in December 2017. Accordingly, plaintiff may no longer amend as of right.

Leave to amend a pleading pursuant to CPLR § 3025 "shall be freely given," in the absence of prejudice or surprise (*see e.g. Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). Mere lateness in seeking such relief is not in itself a barrier to obtaining judicial leave to amend (*see Ciarelli v Lynch*, 46 AD3d 1039 [3d Dept 2007]). Rather, when unexcused lateness is coupled with significant prejudice to the other side, denial of the motion for leave to amend is justified (*see Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]). Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Const. Co.*, 54 NY2d 18, 23 [1981]). Defendants only oppose the motion to amend on the ground that the amendment would be futile (Reply, NYSCEF Doc. No. 59, note 2). Accordingly, in the interest of efficiency, the cross-motion to amend will be granted, and the motion to dismiss applied to the First Amended Complaint (FAC). The FAC adds a plethora of allegations regarding various changes to the Project and delays to plaintiff's work and adds a cause of action alleging the changes to the contract constituted a cardinal change.

C. 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). Here, the documentary evidence is the Subcontract, with all its attachments.

D. Claim 1- Breach of Contract

a. No Damages for Delay Clause

Defendants Plaza Construction LLC (Plaza) and American Home Assurance Company (AHAC) move to dismiss the complaint to the extent it is based on delay claims, since the Subcontract had a "no damages for delay" clause (NDFD Clause) and New York enforces such clauses, except under particular circumstances which do not exist here. Defendants also argue plaintiff failed to fulfil the notice conditions precedent in the Subcontract (see Subcontract, attached as Exhibit A to DiGiorgi Aff., NYSCEF Doc. No. 15, section 5.7). In the Subcontract, plaintiff agreed

> "to make no claim on account of, and contractually assume[] the risk of, any and all loss and expense for delay in the performance of the Work (or any other obligation of Subcontractor under this Subcontract), including any delay occasioned by or resulting from any act or omission to act of Owner, Construction Manager, Architect or their consultants or other contractors or subcontractors employed at the Project site"

(Subcontract, §5.7). Defendants argue that whether the plaintiff colors the claims as being for "acceleration" or "delay" or based on "timing, sequencing, [or] coordination" (Memo at 6), the claims are barred by the NDFD Clause (*id.* at 7, citing *Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 313-14 [1986]). According to defendants, many of the issues of which plaintiff now complains were contemplated by the parties and waived by the NDFD Clause (Memo at 11). Defendants argue plaintiff's first two claims assert damages for delay and should be dismissed (*id.* at 8-9, citing "excessive" design changes, slow turn-around of information, lack of coordination, inefficiencies, and work having to be done because of damage by other workers, and time spent waiting).

Plaintiff does not dispute the existence of a NDFD Clause in the parties' agreement, but contends the facts at issue fall within an exception to the clause.

b. Exceptions

Plaintiff contends there are well-established exceptions to an NDFD Clause, allowing damages to be recovered 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"

(*Corinno*, 67 NY2d at 309). Defendants argue that none of the delays here fall into a *Corinno* exception (Reply at 5).

1. Bad Faith or Willful, Malicious, or Grossly Negligent Conduct

Plaintiff claims these delays were caused by bad faith or grossly negligent conduct, specifically, that defendants misrepresented field conditions, misrepresented that the work could be done in accordance with the Subcontract when Plaza knew it to be impossible, restricted access to places plaintiff needed to work, failed to coordinate other workers, delaying plaintiff's work, directed plaintiff to do work outside the scope of the Subcontract, and other failures (*id.* at 10-13). All of these actions illustrate bad faith and show willful, malicious, and grossly negligent conduct, putting this dispute in the exception, preventing enforcement of the NDFD Clause.

Defendants argue that all of the delays were contemplated, and none of the conduct alleged is alleged to be "in contravention of acceptable notions of morality" (Reply at 6, quoting *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]). According to the Court of Appeals of New York, an exculpatory clause is enforceable unless "the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit" (*Kalisch-Jarcho,* 58 NY2d at 385). As far as plaintiff complains about the designs, or design changes, the designers were employed by the owner, not Plaza, and that information was disclosed in the prime contract between Plaza and the owner, which was attached to the parties' subcontract (Reply at 6). Plaintiff relies on cases where the owner was responsible for problems

with the plans. Plaza was not the owner and had no control over the plans. Plaintiff alleges bad faith and negligence in conclusory fashion but does not allege how Plaza acted badly (*id.* at 7-8).

Plaintiff cites several cases in support of its argument. In *S. Erectors, Inc. v City of New York,* there were issues of fact as to whether the City of New York had misled plaintiff Southern Erectors with promises that Southern Erectors would be reimbursed for the expense of maintaining its materials onsite for a project, and whether the City's interest in protecting those materials was greater than Southern's, indicating bad faith (90-CIV-5651 [LJF], 1992 WL 162743, at *4 [SDNY June 19, 1992]). However, that case is distinguishable. Here, plaintiff merely alleges defendants "misrepresented, concealed, or failed to disclose material facts and wrongfully, deliberately, maliciously and/or with gross negligence delayed and prevented Plaintiff from performing the Subcontract within the period of time fixed by the Subcontract and/or the manner in which Plaintiff reasonably anticipated the Work could and would be performed" (FAC,¶ 32). Plaintiff has not alleged facts to support this conclusion. Merely restating the rule is not enough. Plaintiff does allege facts showing various changes and delays in the Project (*see* Opp at 12). However, plaintiff does not allege facts showing recklessness, misrepresentations, malice, negligence, or bad faith. At most, plaintiff has alleged "inept administration or poor planning, which falls within the contract's exculpatory clause" (*Commercial Elec. Contractors, Inc. v Pavarini Const. Co., Inc.*, 50 AD3d 316, 318 [1st Dept 2008]). This argument does not provide an exclusion to the NDFD Clause.

2. Uncontemplated Delays

Plaintiff also contends the NDFD Clause is unenforceable because these delays were uncontemplated (*id.* at 13-14). In fact, "[p]laintiff was invited by Defendants to plan its Work under the exact opposite conditions as those that existed at the Project, namely that critical precedent work would be timely completed to allow Plaintiff to perform its Work and permit Five Star to utilize its manpower as planned to avoid inefficiency" (*id.* at 15). Defendants' changes, re-designs, and failure to complete "critical precedent work" created delays plaintiff could not have anticipated when it submitted its bid (*id.* at 15-17).

Defendants argue that each cause of delay alleged in the FAC is contemplated in the Subcontract and by law, and so the claims are barred by the NDFD Clause (Reply, NYSCEF Doc. No. 59, at 1-2, 5). Further, as far as the claims are based on scheduling issues and general

mismanagement, such claims are generally barred (*id.* at 2, citing *Welsbach Elec. Corp. v Judlau Contr., Inc.*, 2018 N.Y. Slip Op. 31416[U], 6 [NY Sup Ct, New York County 2018], *affd as mod,* 2019 N.Y. Slip Op. 04037 [1st Dept 2019] ["The amended complaint alleges facts that amount to a failure to provide timely and proper access to work areas on multiple occasions, failure to perform trade work in conformance with the contract documents and causing delays affecting plaintiffs timely and efficient performance of work. Plaintiff also asserts that JCI failed to adhere to the project schedule, failed to make timely decisions and failed to issue change orders for additional work, among other things . . . . All of the complained of delays are the typical types of impacts encountered on large complex projects"]), where the types of claims asserted by plaintiff are not specifically barred by the NDFD Clause or the Subcontract, generally (*id.* at 3-4). These delays are also all contemplated (*id.* at 5).

The Scope of Work notes plaintiff "will include all costs for project phasing and out of sequence work" in its price and "may be required to leave out portions of its work for temporary services, and return at a later date to complete the work. Comeback time will be at no additional cost to the Construction Manager" (Scope of Work, ¶ 43). The plaintiff also "acknowledges that intermittent loss of vertical transportation may occur due to forces beyond the control of the Construction Manager. [Plaintiff] waives its right to claim for additional money and/or time resulting from such intermittent loss of transportation" (*id.* at ¶58). As discussed above, these are the typical types of impacts encountered on large complex projects. Further, delays, working out of order, and the challenges of providing vertical transportation, among others, were contemplated by the parties and do not make the NDFD Clause unenforceable here.

3. Breach of a Fundamental Obligation

Plaintiff contends defendants have breached specific, fundamental obligations in the Subcontract by failing to "provide vertical transportation to the work site [,] required waterproofing [, and] access to critical work areas" which "caused Plaintiff to incur significant losses of time, money and labor productivity", creating an exception to the NDFD Clause (Opp at 17-20).

Defendants argue plaintiff has failed to plead breach of a fundamental obligation of the agreement, pointing out plaintiff waived claims related to vertical transportation delays in the Subcontract (Reply at 9, citing Scope of Work, NYSCEF Doc. No. 43, Exhibit A at ¶ 58 on page

36). As far as plaintiff alleges a lack of access, the cases cited by plaintiff were against owners, not prime contractors (Reply at 10). Further, the Scope of Work to the Subcontract states that "access to the site will require close coordination with the Construction Manager who will have final say as to the use of the site and the adjourning areas" (*id.* at 10, quoting Scope of Work, NYSCEF Doc. No. 43, Exhibit A at ¶ 27). Finally, as far as plaintiff asserts claims based on a failure of waterproofing, while the Subcontract does require Plaza to waterproof the worksite, the NDFD Clause disclaims claims for delay because of weather and the Scope of Work states plaintiff "will include all costs for . . . out of sequence work. . . . [Plaintiff] may be required to leave out portions of its work for temporary services, and return at a later date to complete the work. Comeback time will be at no additional costs to [Plaza]" (Reply at 10, quoting Scope of Work at ¶ 43).

E. Claim 3- Cardinal Change

Plaintiff also argues there is an issue of fact stated in the First Amended Complaint (*see* FAC, NYSCEF Doc. No. 40) as to whether the changes to the scope of work of the Subcontract constitutes a "cardinal change" such that the essential purpose of the Subcontract was altered, breaching that contract (*id.* at 20). Plaintiff alleges "the resequencing of the Project events . . . , together with the thousands of additional contract drawings issued after the Project started, and which resulted in substantial additional costs and inefficiencies" (*id.* at 21). According to plaintiff, these changes both increased the scope of work and impacted plaintiff's productivity (*id.*).

"Cardinal change" is "[t]he principle that if the government makes a fundamental, unilateral change to a contract beyond the scope of what was originally contemplated, the other party (usu. a contractor) will be released from the obligation to continue work under the contract. • A contractor's allegation of *cardinal change* is essentially an assertion that the government has breached the contract" (CARDINAL-CHANGE DOCTRINE, Black's Law Dictionary [11th ed. 2019]). In one case cited by plaintiff, the Fourth Department noted "[c]hange orders may be issued without competitive bidding as to details and minor particulars. However, no important general change may be made which so varies from the original plan or is of such importance as to constitute a new undertaking. Thus, [defendant] could modify or change the work required under the general construction contract so long as such modification did not 'alter the essential

identity or the main purpose of the contract'" (*Albert Elia Bldg. Co., Inc. v New York State Urban Dev. Corp.*, 54 AD2d 337, 342-43 [4th Dept 1976][citations omitted]). A cardinal change "change[s] the nature of the work to be performed by the contractor so dramatically that the changes cannot be said to have been within the reasonable contemplation of the contractor at the time the contract was executed" (Construction Briefings No. 2005-9). Here, none of the change was "cardinal." Plaintiff was still required to perform the same kind of work. While there were delays alleged, they were of the type of delay contemplated by the Subcontract and do not constitute a change in the character of the contract.

As far as plaintiff relies on the Subcontract as giving defendants the obligation to manage the project competently, defendants point out the language is not in the Subcontract, but in the prime contract between Plaza and the owner (NYSCEF Doc. No. 43, Exhibit D, Article 1.2.1 at p 144). Plaza does not owe these obligations to plaintiff, and there was no breach of a fundamental obligation, nor was there a cardinal change to the Subcontract. This claim is barred by the NDFD Clause.

F. Claim 2- Account Stated

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [3d Dept 1993]). The agreement can be express (*Ross v Sherman*, 57 AD3d 758, 759 [2d Dept 2008]), or "may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account" (*Am. Express Centurion Bank v Cutler*, 81 AD3d 761, 762 [2d Dept 2011]). "[R]eceipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor" (*Shea & Gould v Burr*, 194 AD2d 369, 370-71 [1st Dept 1993] [citation and internal quotation marks omitted]).

While defendants claim plaintiff is not entitled to the money sought under this claim, defendants do not argue plaintiff failed to allege the elements of this claim. Accordingly, this claim survives.

identity or the main purpose of the contract'" (*Albert Elia Bldg. Co., Inc. v New York State Urban Dev. Corp.*, 54 AD2d 337, 342-43 [4th Dept 1976][citations omitted]). A cardinal change "change[s] the nature of the work to be performed by the contractor so dramatically that the changes cannot be said to have been within the reasonable contemplation of the contractor at the time the contract was executed" (Construction Briefings No. 2005-9). Here, none of the changes was "cardinal." Plaintiff was still required to perform the same kind of work. While there were delays alleged, they were of the type of delay contemplated by the Subcontract and do not constitute a change in the character of the contract.

As far as plaintiff relies on the Subcontract as giving defendants the obligation to manage the project competently, defendants point out the language is not in the Subcontract, but in the prime contract between Plaza and the owner (NYSCEF Doc. No. 43, Exhibit D, Article 1.2.1 at p 144). Plaza does not owe these obligations to plaintiff, and there was no breach of a fundamental obligation, nor was there a cardinal change to the Subcontract. This claim is barred by the NDFD Clause.

F. Claim 2- Account Stated

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [3d Dept 1993]). The agreement can be express (*Ross v Sherman*, 57 AD3d 758, 759 [2d Dept 2008]), or "may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account" (*Am. Express Centurion Bank v Cutler*, 81 AD3d 761, 762 [2d Dept 2011]). "[R]eceipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor" (*Shea & Gould v Burr*, 194 AD2d 369, 370-71 [1st Dept 1993] [citation and internal quotation marks omitted]).

While defendants claim plaintiff is not entitled to the money sought under this claim, defendants do not argue plaintiff failed to allege the elements of this claim. Accordingly, this claim survives.

Accordingly, for the reasons discussed above, both the cross-motion to amend is hereby GRANTED and the motion to dismiss is GRANTED IN PART; and it is further

ORDERED that the First Amended Complaint shall be considered the operative complaint in this action; and it is further

ORDERED that the first claim, for breach of contract, is hereby dismissed as far as the claims are based on allegations of delay; and it is further

ORDERED that the second claim, for an account stated, shall survive; and it is

ORDERED that the third claim, alleging a cardinal change in the contract, is dismissed; and it is further

ORDERED that the fourth claim, regarding the undertaking, also survives. Counsel shall appear for a video conference with the court on August 25, 2020, at 9:30am. Counsel should contact the court the week before the conference regarding setting up the video conference.

Dated: July 30, 2020

ENTER:

O. P. Sherwood

O. PETER SHERWOOD, J.S.C.