

**Tyrek Hgts. Erectors, Inc. v WDF, Inc.**

2021 NY Slip Op 31891(U)

June 2, 2021

Supreme Court, New York County

Docket Number: 650690/2012

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

TYREK HEIGHTS ERECTORS, INC.,

INDEX NO. 650690/2012

Plaintiff,

- v -

POST TRIAL DECISION and ORDER

WDF, INC., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ZURICH AMERICAN INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, THE NEW YORK CITY TRANSIT AUTHORITY

Defendant.

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This case was tried without a jury over the course of 21 days, beginning January 21, 2021 and ending February 23, 2021. Thereafter, the parties were given the opportunity to submit post trial memoranda. The action stems from a dispute between WDF, Inc. (WDF), a prime contractor, and Tyrek Heights Erectors, Inc. (Tyrek), a subcontractor, with respect to certain work to be performed on two public improvement projects known as the Five Stations Project (Contract # A-36018/19/20/21/22) and the Three Stations Project (Contract # A-36068/69/70; the Five Stations Project and the Three Stations Project, together, the Projects).

I. Relevant Factual Background

Reference is made to five separate subcontracts dated August 12, 2009 between WDF and Tyrek related to these two Projects:

- (i) subcontract to perform certain stair work at the Three Stations Project (the Three Stations Stair Subcontract) for the sum of \$2,096,424 (NYSCEF Doc. No. 320);

OTHER ORDER – NON-MOTION

- (ii) subcontract to perform certain windscreen support, structural steel and double angle reinforcement work at the Three Station Project (the **Three Stations Windscreen Subcontract**) for the sum of \$1,525,000 (NYSCEF Doc. No. 313);
- (iii) subcontract to perform certain stair work at the Five Stations Project (the **Five Stations Stair Subcontract**) for the sum of \$4,608,450 (NYSCEF Doc. No. 323);
- (iv) subcontract to perform certain windscreen support and structural steel work at the Five Station Project (the **Five Stations Windscreen Subcontract**) for the sum of \$1,760,000 (NYSCEF Doc. No. 316); and
- (v) a subcontract to perform certain structural steel rehabilitation work on a time and material basis, as needed, at the Three Stations Project for the sum of \$1,000,000 (the **Three Stations T&M Subcontract**; NYSCEF Doc. No.325 ).<sup>1</sup>

During both Projects, WDF and Tyrek ran into a number of extensive delays, the most significant of which was caused by a high-powered wire cable controlled by the Long Island Power Authority (**LIPA**). Once this wire cable (the **LIPA Cable**) was discovered, the Metropolitan Transit Authority (the **MTA**) issued a Stop Work Order and WDF was informed

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<sup>1</sup> WDF and Tyrek also entered into a sixth subcontract for time and materials with respect to the Five Station Project, but this subcontract is not at issue in this litigation.

that because of the LIPA Cable, it could not work within ten feet of the LIPA Cable when it was energized and could not work within five feet of the LIPA Cable when it was de-energized. This necessarily prevented both WDF and Tyrek from working on the Projects at times and caused additional costs and delays. The LIPA Cable was not the only latent condition not properly identified by the MTA on its contract drawings. Additionally, a fiber optic cable (the **Fiberoptic Cable**) that ran alongside a concrete platform was also not properly identified by the MTA on its plans. This, too, caused unanticipated additional costs and delays.

Tyrek submitted a delay claim to WDF in connection with the Three Stations Project (NYSCEF Doc. No. 485) but not in connection with the Five Stations Project. Tyrek claims that it never submitted a delay claim in connection with the latter only because WDF told it to wait to do so that the parties could coordinate their claims to the MTA. WDF contends that the failure to submit any delay claim with respect to the Five Stations Project constitutes a waiver.

A number of disputes occurred between the parties during Tyrek's time on the Projects, as further detailed below. Finally, in the Summer of 2011, WDF terminated Tyrek's subcontracts "for cause" as follows: (i) the Five Stations Stair Subcontract pursuant to a termination letter dated June 2, 2011 (NYSCEF 483), (ii) the Five Stations Windscreen Subcontract pursuant to a termination letter dated August 16, 2011 (NYSCEF Doc. No. 482), (iii) the Three Stations Stair Subcontract pursuant to a termination letter dated August 11, 2011 (NYSCEF Doc. No. 480), and (iv) the Three Stations Windscreen Subcontract (NYSCEF Doc. No. 481) pursuant to a termination letter of even date. WDF had previously terminated the Three Stations T&M Subcontract for convenience.

Tyrek asserts claims for breach of the respective Subcontracts, mechanic's lien foreclosure, payment bond claims, and delay claims against WDF for WDF's alleged failure to pay Tyrek for work it performed. Tyrek also alleges that its termination was in bad faith and motivated at least in part by former WDF Project Manager Ed Seaman's animus toward its principal, Michael Aponte. Tyrek seeks damages for unpaid work totaling \$259,501.59 for the Three Stations Project and \$433,824.28 on the Five Stations Project. Tyrek also seeks delay damages of \$1,019,248.49 and \$1,010,392.64, plus interest, on the Three Stations Project and the Five Stations Project, respectively, based on WDF's purported bad faith.

WDF, in turn, asserts counterclaims for breach of contract, and seeks damages in an amount in excess of \$499,226.11 resulting from Tyrek's purported breach of the construction subcontracts for the Three Stations Project, and in excess of \$1,897,126.55 resulting from Tyrek's purported breach of the construction subcontracts for the Five Stations Project.

The following witnesses testified on behalf of Tyrek at trial:

- Mike Aponte
- Richard Miceli
- Steve Gallagher

The following witnesses testified on behalf of WDF:

- Dennis Occhino
- Ed Seaman
- Jeff Bradley
- Karen Carbonell
- Nick Ciarcia
- Joseph Krajczewski

## II. Findings of Fact and Conclusions of Law

The testimony and evidence adduced at trial demonstrates the following:

1. On a construction job, it is not atypical for there to be disagreement as to whether the site is ready for a subcontractor to perform work, and for a subcontractor to have to explain why the site is not ready for the performance of work. The Three Stations and Five Stations Project was no different in this regard.
2. The e-mail correspondence, photographic evidence and testimony that was adduced at trial demonstrates that Tyrek was at times directed to perform work when, in fact, the prerequisite work, which was necessary to enable Tyrek to do so, had not yet been formed or that Tyrek had not been given a change order to perform certain work so that it would have to perform any such requested work at its own risk of not being properly paid. WDFs' termination of the Subcontracts under the circumstances were wrongful and caused Tyrek damages.
3. With respect to the Five Stations Stair Subcontract, Tyrek established damages in the amount of \$322,094.46, together with interest from May 31, 2011 based on WDF's breach.
4. The requisitions and payments relating to the Five Stations Stair Subcontract show that Tyrek performed work totaling \$2,414,167.98, of which WDF paid only \$2,092,073.52, leaving a balance due and owing of \$322,094.46 (*see* NYSCEF Doc. Nos. 543, 581, 582, 652).

5. With respect to the Five Stations Windscreen Subcontract, Tyrek has also established its damages in the amount of \$111,729.82, together with interest from April 21, 2011 based on WDF's breach.
6. The requisitions and payments relating to the Five Stations Windscreen Subcontract show that Tyrek performed work totaling \$1,170,596.45, of which WDF paid only \$1,058,866.63, leaving a balance due and owing of \$111,729.82 (*see* NYSCEF Doc. Nos. 545, 585, 586, 652).
7. WDF has failed to establish that Tyrek waived any additional amounts due on the Five Stations Subcontracts. The credible evidence demonstrates that Tyrek was waiting to coordinate its additional claims on the Five Stations Subcontracts with WDF in order to submit both together to the MTA.
8. With respect to the Three Stations Stair Subcontract, Tyrek has established its damages in the amount of \$152,767.45, plus interest from June 15, 2011 based on WDF's breach.
9. The requisitions and payments relating to the Three Stations Stair Subcontract show that Tyrek performed work totaling \$1,601,646.51, of which WDF paid only \$1,448,879.06, leaving a balance due and owing of \$152,767.45 (*see* NYSCEF Doc. Nos. 544, 583, 584, 652).

10. With respect to the Three Stations Windscreen Subcontract, Tyrek has established its damages in the amount of \$106,734.14, plus interest from May 16, 2011 based on WDF's breach.
11. The requisitions and payments relating to the Three Stations Windscreen Subcontract show that Tyrek performed work totaling \$1,226,465.38, of which WDF paid only \$1,119,731.24, leaving a balance due and owing of \$106,734.14 (NYSCEF Doc. No. 546, 587, 588, 562).
12. Tyrek has not established its entitlement to any additional delay damages (19<sup>th</sup> cause of action).
13. Article 8 of all the Subcontracts addresses delay damages:

***The Subcontractor acknowledges that the Subcontract Price is based on the fact that the Contractor is not liable, absent actual fraud or intentional misconduct, for any damages or costs due to delays,*** accelerations, impact, non-performance, interferences with performance, suspension or changes in the performance or the sequence of the Contractor's Work, whether or not caused by the Contractor and even if the Contractor wrongfully denies the Subcontractor's request for an extension of time. The Contractor shall have the right at any time to delay, accelerate or suspend the execution of the whole or any part of the Subcontract Work or vary the sequence of performance without compensation to the Subcontractor other than extending the time for completing the Work for a period equal to such delay or suspension

(NYSCEF Doc. Nos. 480-483, Art. 8 [emphasis added]).

14. Based on the foregoing, Tyrek may only collect delay damages if there was "actual fraud or intentional misconduct" on the part of WDF.

15. Tyrek does not dispute the validity of the foregoing provision or allege fraud. Stated differently, Tyrek does not claim that it would be entitled to delay damages in the absence of intentional misconduct.
16. Although a closer call, the testimony and evidence adduced at trial does not demonstrate that Tyrek has met its burden of demonstrating intentional misconduct on the part of WDF, or by otherwise showing by a preponderance of the evidence that WDF acted in bad faith.
17. Although Tyrek is correct that some of the items listed in the notices of termination could not be performed, Tyrek failed to demonstrate that *all* of the items listed, which WDF claimed Tyrek did not do, including properly manning the project, were not performed adequately. Therefore, it cannot be said that the notices of termination were pretextual or otherwise manufactured to hurt Tyrek.
18. For example, Tyrek's own witness, Richard Micelli, wrote in an email dated August 10, 2011 to Jay Dier (copying Mr. Bradley, Sean Hickey and Ms. Carbonell):

We have to be prepared to find Aponti [sic] in default of his contract tomorrow if he does not properly man the project. We have bent over backwards in cooperating with him so he can complete his contract. Tomorrow is the day.....

(NYSCEF Doc. No. 615).

At trial, Mr. Micelli confirmed that he was not forced by anyone at WDF to write this email and that this assessment was "accurate when I wrote it" (01/27/2021 *Tr.* at 757:20-24). The terminations for the Three Stations Stair and Windscreen Subcontracts were

issued the next day on August 11, 2011 (*id.* at 757:25-758:3; NYSCEF Doc. Nos. 480-81).

19. Mr. Bradley also credibly testified that at the time that the 48 Hour Notice (NYSCEF Doc. No. 480) was sent out for the Three Stations Stair Subcontract, there was no prerequisite work that prevented Tyrek from completing most of the items listed on that Notice (02/05/2021 *Tr.* at 265:4 – 271:7; 272:7-23; 02/08/2021 *Tr.* 287:6-11, 287:20-24; 289:4-7), and that the “level of manpower” with which Tyrek responded to cure the noticed issues (*i.e.*, two men) “wouldn’t be even close enough” to what was necessary (*id.* at 293:7-25). This was not controverted.
20. Mr. Bradley also explained that with respect to the Three Stations Windscreen Subcontract, that contract was terminated due to a lack of manpower because no one showed up to complete the work (*id.* at 298:21-299:11), and that the Three Stations T&M Subcontract was terminated for convenience (*id.* at 298:14-300:23). To the extent that earlier WDF had directed Tyrek to perform certain work that was not available due to LIPA Cable issues, Mr. Bradley explained that WDF “didn’t know that to be true at the time” (*i.e.*, that the work would not be able to be performed), and that WDF was “just trying to plan and push the job forward. You have to be prepared in order to do this work” (*e.g.*, *id.* at 319:11-20).
21. Nor does the testimony and evidence adduced at trial establish by a preponderance of the evidence WDF’s supervisor Ed Seaman’s animus towards Mr. Aponte was either exclusive

to Mr. Aponte or motivated by racial prejudice. Indeed, the record reflects that Mr. Seaman did not get along with many people including the MTA's inspector, Gholam Farjam, which led to the removal of Mr. Seaman as Project Manager on the Five Stations Project (*e.g.*, 02/22/2021 *Tr.* at 970:2-971:5). No one credibly testified that they heard Mr. Seaman use any slurs towards or about Mr. Aponte. To wit, neither of Mr. Aponte's witnesses (Mr. Gallagher nor Mr. Miceli) corroborated Mr. Aponte's claim about Mr. Seaman. Mr. Bradley also credibly testified that he had never heard any racial slurs from Mr. Seaman (or otherwise) while working on the Projects. Ms. Carbonell testified that although Mr. Seaman would often yell and use colorful language, a fact with which she was familiar because their offices were next to each other, she could not recall that he ever used any racially biased language towards Mr. Aponte (02/19/2021 *Tr.* at 889:5-20, 890:10-16). In fact, the only credible testimony involving profanity or slurs amounted to overhearing one side of a telephone conversation. However, without knowing what such comments were, the context in which any such comments were made, it is impossible for the court to conclude that the conversation had anything to do with Mr. Aponte or that Mr. Seaman must have had improper motive towards Mr. Aponte (*i.e.*, if the conversation was about Mr. Aponte at all, the conversation may have been no more than that a denial from Mr. Seaman, *e.g.*, "he said I called him a ?"). Stated differently, Tyrek has failed to establish more than just the fact that there was no love lost between Mr. Aponte and Mr. Seaman and that Mr. Seaman was angry at Mr. Aponte for sending emails which Mr. Aponte testified demonstrate that Mr. Seaman's analysis of the jobsite and whether it was ready for Tyrek was simply not correct.

22. For the avoidance of doubt, nor does WDF's exclusion of Tyrek's trailer from the worksite demonstrate intentional interference or delay under the circumstances. Nick Ciarcia, WDF's Civil Division COO, indicated that WDF, in managing the site, needed the additional space where Tyrek had its trailer for materials and mobilization (02/22/2021Tr. at 973:21-974:3). Another contractor ("the painters") was also removed from the worksite for some period of time (*id.* at 974:17-975:9), *i.e.*, it was not just Tyrek that was excluded. When asked if Mr. Seaman took any actions to purposefully impede Tyrek's work, Mr. Ciarcia was unequivocal that Mr. Seaman did not do so (*id.* at 966:2-4). Although Mr. Seaman signed the 48 Hour Notices and Terminations for Tyrek, notwithstanding his removal from the Five Stations Project, Mr. Ciarcia credibly testified that Mr. Seaman signed the terminations in his capacity as Senior Vice President of WDF, and not because he was continuing to work on the Projects or because he was being vindictive or that he otherwise interfered with or delayed Tyrek.

23. Tyrek is also not entitled to lost profits.

24. As provided in Article 26 of all the Subcontracts, "[s]hould any termination for default under this Article 26 be determined to be invalid, improper or wrongful, such termination shall be deemed to have been a termination as provided in Article 28" (NYSCEF Doc. Nos. 480-483, Art. 26[f][iv]).

25. Pursuant to Article 28, in case of such termination, a "[s]ubcontractor's rights and remedies, including the basis for payment of any unpaid portion of the Subcontract Price, shall be limited to the corresponding rights and remedies available to Contractor under the

Contract Documents, and controlled by Article 26 hereof” (*id.*, Art. 28). Neither Article 26 nor 28 provide for lost overhead or profit.

26. Tyrek provided no expert testimony with respect to its lost profit calculations.
27. Only Mr. Aponte testified as to what he calculated his profits would be, without any underlying support for his calculations. Indeed, he relies on only his pre-bid estimates, which included certain percentage mark-ups.
28. As discussed at length on the record at trial, Tyrek’s internal speculations as to what profits it may have earned is not supported by any expert testimony as to the different percentages of profit that Tyrek now claims. It is of no moment that WDF submitted certain of Tyrek’s proposals for AWOs, which included such profit to the MTA. Had the MTA accepted those proposals, WDF was agnostic. If the MTA did not, WDF would have gone back to Tyrek and required Tyrek to justify their proposal or to adjust their proposal accordingly. This is not proof entitling Tyrek to lost profits.
29. In fact, Tyrek conceded that as it related to certain remobilization aspects of their damages, they were, in fact, double counting because their profit estimation was included in both the original work and also the substitute work and as such charging profit on the remobilization itself was inappropriate double counting.
30. Inasmuch as Mr. Aponte testified that he relied on a promise by WDF to provide manlifts and elevated platform shields and was damaged by WDF’s failure to consistently provide such items, nothing in the Subcontracts required WDF to do so.

31. Nor can reliance on any oral promise to do so made prior to the execution of the Subcontracts be reasonable where the Subcontracts all contain the same merger clause in Article 30(b) (NYSCEF Doc. No. 480-83, Art. 30[b]). The audio recordings as to post-contract conversations between WDF employees and Mr. Aponte also did not establish that WDF had previously promised to provide manlifts to Tyrek, that Tyrek entered into the Subcontracts based on the assumption that the manlifts would be provided, or anything more than the fact that WDF may have at some point offered to allow Tyrek to use its manlifts when they were otherwise not in use in order to move the job forward.
32. Because WDF breached the Subcontracts, it is not entitled to its cover damages for work performed after Tyrek's termination.
33. As the prevailing party, Tyrek is also entitled to recover its attorneys' fees, costs and expenses pursuant to Article 30(j) of the Subcontracts (*id.*, Art. 30[j]).

Accordingly, based on the foregoing, the Clerk is directed to enter judgment for the plaintiff Tyrek Heights Erectors, Inc., as follows:

1. in the amount of \$322,094.46, plus interest from May 31, 2011 to the date of entry of judgment, for a total of \_\_\_\_\_ on its (a) First Cause of Action against WDF, Inc. for breach of the Five Stations Stair Contract, (b) its Eleventh Cause of Action for Foreclosure on the Lien

Discharged by Bond as against WDF and Travelers Casualty and Surety Company of America, and (c) its Fifteenth Cause of Action against Defendants WDF, Zurich American Insurance Company, Fidelity and Deposit Company of Maryland and National Union Fire Insurance Company of America;

2. in the amount of \$152,767.45, plus interest from June 15, 2011 to the date of entry of judgment, for a total of \_\_\_\_\_ on (a) its Second Cause of Action against WDF, Inc. for breach of the Three Station Stair Contract, (b) on its Twelfth Cause of Action for Foreclosure on the Lien Discharged by Bond as against WDF and Travelers Casualty and Surety Company of America, and (c) on its Sixteenth Cause of Action against Defendants WDF, American Insurance Company, Fidelity and Deposit Company of Maryland and National Union Fire Insurance Company of America;

3. in the amount of \$111,729.82, plus interest from April 21, 2011, to the date of entry of judgment, for a total of \_\_\_\_\_ on (a) its Third Cause of Action against WDF for breach of the Five Station Windscreen Contract, (b) on its Thirteenth Cause of Action for Foreclosure on the Lien Discharged by Bond as against WDF and Travelers Casualty and Surety Company of America, and (c) on its Seventeenth Cause of Action against Defendants WDF, Zurich American Insurance Company, Fidelity and Deposit Company of Maryland and National Union Fire Insurance Company of America;

4. in the amount of \$106,734.14, plus interest from May 16, 2011 to the date of entry of judgment, for a total of \_\_\_\_\_ on (a) its Fourth Cause of Action against WDF for breach of the Three Station Windscreen

Contract, (b) on its Fourteenth Cause of Action for Foreclosure on the Lien Discharged by Bond as against WDF and Travelers Casualty and Surety Company of America, and (c) on its Eighteenth Cause of Action against Defendants WDF, Zurich American Insurance Company, Fidelity and Deposit Company of Maryland and National Union Fire Insurance Company of America;

and it is further,

ORDERED that the Tyrek's 19<sup>th</sup> cause of action is dismissed; and it is further

ORDERED that WDF's counterclaims for breach of contract are all dismissed; and it is further

ORDERED that the issue of reasonable attorneys' fees and costs incurred in this action is referred to a Special Referee or Judicial Hearing Officer ("JHO") to hear and determine; and it is further

ORDERED that a JHO or Special Referee shall be designated to determine the issue of reasonable attorneys' fees and costs, which are hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

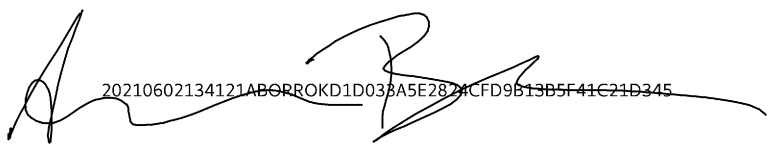
ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the “References” link ), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).



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**ANDREW BORROK, JSC**

**DATE: 6/02/2021**

**Check One:**       **Case Disposed**                       **Non-Final Disposition**

**Check if Appropriate:**     **Other (Specify \_\_\_\_\_ Special Ref Reference \_\_\_\_\_ )**