Tutor Perini Corp. v City of New York
2022 NY Slip Op 32277(U)
July 11, 2022
Supreme Court, New York County
Docket Number: Index No. 651039/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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TUTOR PERINI CORPORATION,

Plaintiff,

- v -

CITY OF NEW YORK ACTING BY AND THROUGH THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY, AND NEW YORK CITY COMPTROLLER'S OFFICE,

Defendants.

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INDEX NO. 651039/2021

MOTION DATE 03/31/2022

MOTION SEQ. NO. 001

DECISION, ORDER AND JUDGMENT ON MOTION

HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

In this action seeking, *inter alia*, a judgment declaring that the defendant New York City Department of Transportation (NYCDOT) is contractually obligated to timely and reasonably address claims for additional compensation and schedule extensions made by the plaintiff contractor, Tutor Perini Corporation (Tutor Perini), Tutor Perini moves pursuant to CPLR 3212 for summary judgment on the complaint. The defendants oppose the motion. The motion is denied.

II. BACKGROUND

In 2018, NYCDOT entered into a contract (the contract) with Tutor Perini for the structural, mechanical, and architectural rehabilitation of Broadway Bridge over the Harlem

River (the project). Pursuant to Part H of the contract, the parties agreed to certain "General Conditions." The General Conditions include a set of provisions entitled "Article 11. Notice of Conditions Causing Delay and Documentation of Damages Caused by Delay." As its title suggests, Article 11 provides detailed notice and submission requirements that the "Contractor," Tutor Perini, must strictly adhere to in order to receive any extensions of time for the completion of its work under the contract and to claim any damages for compensable delays, as defined therein.

Article 11.1 states,

> 11.1. After the commencement of any condition which is causing or may cause a delay in completion of the Work, including conditions for which the Contractor may be entitled to an extension of time, the following notifications and submittals are required:
>
> > 11.1.1. Within fifteen (15) Days after the Contractor become aware or reasonably should be aware of each such condition, the Contractor must notify the Resident Engineer or Engineer, as directed by the Commissioner, in writing of the existence, nature and effect of such condition upon the approved progress schedule and the Work, and must state why and in what respects, if any, the condition is causing or may cause a delay. Such notice shall include a description of the construction activities that are or could be affected by the condition and may include any recommendations the Contractor may have to address the delay conditions and any activities the Contractor may take to avoid or minimize the delay.
> >
> > 11.1.2. If the Contractor shall claim to be sustaining damages for delay as provided for in this Article 11, within forty-five (45) Days from the time such damages are first incurred for each such condition, the Contractor shall submit to the Commissioner a verified written statement of the details and estimates of the amounts of such damages, including categories of expected damages and projected monthly costs, together with documentary evidence of such damages as the Contractor may have at the time of submission ("statement of delay damages"), as further detailed in Article 11.6. The Contractor may submit the above statement within such additional time as may be granted by the Commissioner in writing upon written request therefor.

Pursuant to Article 11.2, the contractor's failure "to strictly comply with the requirements of Article 11.1.1 may, in the discretion of the Commissioner, be deemed sufficient cause to deny any extension of time on account of delay arising out of such condition" and the contract's failure "to strictly comply with the requirements of both Articles 11.1.1 and 11.1.2 shall be deemed a conclusive waiver by the Contractor of any and all claims for damages for delay arising from such condition…" Article 11.9 provides, in pertinent part, that "[a]ny compensation provided to the Contractor in accordance with this Article 11 will be made pursuant to a claim filed with the [New York City] Comptroller."

Tutor Perini claims that almost immediately after it started its work under the contract, the project began experiencing delays caused by NYCDOT's acts and omissions. Beginning in July 2019, Tutor Perini began submitting requests for schedule extensions and monthly notices of delay damage claims pursuant to Article 11.1.2. On August 23, 2021, after the commencement of this action, NYCDOT notified Tutor Perini that it was extending the project's substantial completion date to August 24, 2023, which Tutor Perini avers is still insufficient. NYCDOT has not responded to Tutor Perini's delay damage claims and has directed Tutor Perini to proceed with its work "as is." NYCDOT has further represented to Tutor Perini that Article 11 claims will not be administered by the New York City Comptroller until after substantial completion. Tutor Perini now seeks declarations from this court that (1) Article 11 of the contract's General Conditions does not mandate that properly submitted claims for additional compensation and schedule extensions must await substantial completion before they are heard and considered and (2) the City of New York, acting through NYCDOT and the Comptroller's Office, must consider and respond to properly submitted claims made by Tutor Perini for

additional compensation and schedule extensions within a "reasonable time" after they are submitted.

III. DISCUSSION

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010).

The sole issue in this action is one of contract interpretation. "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Greenfield v Philles Records, 98 NY2d 562, 569 (2002) (citations and internal quotation marks omitted). Importantly, "a contract is not rendered ambiguous just because one of the parties attaches a different, subjective meaning to one of its terms." Bank of N.Y. Mellon v. WMC Mortgage, LLC, 136 AD3d 1, 9 (1st Dept. 2015) (quoting Bajraktari Mgmt. Corp. v Am. Int'l Grp., Inc., 81 AD3d 432, 432 [1st Dept.

2011]) (internal quotation marks omitted). Nor, where an agreement is reasonably susceptible of only one meaning, is a court "free to alter the contract to reflect its personal notions of fairness and equity." Greenfield v Philles Records, supra at 570; see Reiss v Financial Performance Corp., 97 NY2d 195, 199 (2001) (court may not, under guise of interpretation, add or excise terms or otherwise distort meaning of those used).

Tutor Perini contends that the language of Article 11 compels judgment in its favor because it "expressly and unambiguously sets forth" NYCDOT's "obligations to review and respond" to Tutor Perini's claims and requests. However, this argument is wholly unsupported by the text. A plain reading of Article 11 reveals that while it contains numerous requirements that Tutor Perini must adhere to in order to preserve its delay-related claims, not a single provision requires NYCDOT, the Comptroller, or the City of New York to respond to or otherwise process such claims. Tutor Perini's numerous summary declarations to the contrary does not alter this simple fact.

Tutor Perini asks, in effect, for this court to read implied obligations into the parties' contract corresponding to its own notice obligations. But "[a]n omission or mistake in a contract does not constitute an ambiguity." Reiss v Financial Performance Corp., supra at 199 (internal quotation marks and citations omitted). Moreover, the parties' contract was negotiated by sophisticated parties at arms' length, spans hundreds of pages, and contains detailed procedures and obligations applicable the NYCDOT in the event of other types of contractual disputes. These are all compelling indicators that the parties considered the sort of provisions Tutor Perini proposes and chose not to include them. Since Article 11 is clear and unambiguous on its face, there is no basis for the relief Tutor Perini seeks.

The court further rejects Tutor Perini's suggestion that the absence of an affirmative requirement for the City of New York to respond to its Article 11 claims on a rolling basis is somehow contrary to public policy. Notice requirements of the type specified in Article 11 are commonplace in public works contracts as they "provide public agencies with timely notice of deviations from budgeted expenditures or of any supposed malfeasance, allow them to take early steps to avoid extra or unnecessary expense, make necessary adjustments, mitigate damages and avoid the waste of public funds." A.H.A. General Const., Inc. v New York City Housing Authority, 92 NY2d 20, 34 (1998); see APS Contractors, Inc. v New York City Housing Authority, 193 AD3d 628, 628 (1st Dept. 2021). The built-in flexibility offered by such requirements, which do not typically mandate any particular response from the public agency, is part of its utility. As the defendants observe, the inclusion in public works contracts of an affirmative requirement that City agencies analyze delay claims at the time each claim is asserted would substantially increase the City's administrative burden. Moreover, Tutor Perini is not without remedy for its alleged injuries. Assuming, without deciding, that Tutor Perini has properly noticed all of its delay claims in accordance with the contract, Tutor Perini is free to bring timely claims against the City for damages should it wish to do so.

The court concludes that Tutor Perini fails to make out a *prima facie* case for declaratory judgment. Its motion for summary judgment is therefore denied. The defendants' request for a contrary declaration stating that the contract does not require them to issue a determination, settlement offer, or other response to Tutor Perini's delay notices, delay damages notices, or delay claims is granted. Cf. 200 Genesee St. Corp. v City of Utica, 6 NY3d 761 (2006); 644 BRDY Realty Inc. v Bleecker Tower Tenants Corp., 149 AD3d 538 (1st Dept. 2017).

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3212 is denied in its entirety; and it is further

ADJUDGED and DECLARED that Contract No. HBM1147 between the plaintiff and the defendant New York City Department of Transportation for the rehabilitation of Broadway Bridge over the Harlem River does not require any of the defendants to issue a determination, settlement offer, or other response to the plaintiff's delay notices, delay damages notices, or delay claims submitted pursuant to the contract.

This constitutes the Decision, Order and Judgment of the court.

DATED: July 11, 2022

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON