

WDF, Inc. v Dormitory Auth. of the State of N.Y.

2023 NY Slip Op 31870(U)

May 31, 2023

Supreme Court, New York County

Docket Number: Index No. 653079/2019

Judge: Melissa A. Crane

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

-----X

WDF, INC.,

Plaintiff,

- v -

DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Defendant.

-----X

INDEX NO. 653079/2019

MOTION DATE 02/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for

JUDGMENT - SUMMARY

The project underlying this dispute was to build a Court Officers Training Academy in Brooklyn. Defendant Dormitory Authority of the State of New York (“DASNY” or “Defendant”) moves for summary judgment dismissing Plaintiff WDF, Inc.’s (“WDF” or “Plaintiff”) second cause of action for extra work and Plaintiff’s third cause of action for delay damages.¹

There is no question that this building project encountered every problem imaginable. There were problems with the slab foundation in building 2. There were asbestos, mold and roofing issues. There were delays in obtaining permits. Extensive redesign was required. The questions are whether WDF can obtain compensation for the extra work it performed and whether it can recover damages for the delays it experienced.

The contract between the parties governs both issues.

1. Damages for Delay:

¹ Defendant has not moved for summary judgment dismissing the first cause of action seeking the unpaid balance of the contract.

In Section 4.10.F. of the General Conditions, WDF agreed that DASNY could not guarantee the “responsibility, efficiency, unimpeded operations or performance of any contractor” (General Conditions, NYSCEF Doc. No. 20, § 4.10.F.). WDF also agreed that it “shall bear the risk of all delays [in the Project] including, but not limited to, delays caused by the presence or operations of other contractors and delays attendant upon any CPM [Critical Path Method] schedule approved by [DASNY]” (*id.*). WDF further acknowledged and agreed that DASNY “shall not incur any liability by reason of any delay” (*id.*; *see also*, Section 10.03 of the General Conditions, in which WDF explicitly agreed not to seek damages for any species of delay). Plaintiff contends, despite the plain language, that this is not a “no damages for delay” clause.

Plaintiff is incorrect. Absent anything out of the ordinary, this exact language bars damages for delay (*see MLB Construction Services LLC v DASNY*, 194 AD3d 1140, 1143 [3d Dep’t 2021] interpreting exact same contract language to mean “plaintiff bears the risk of all delays”). In the absence of Appellate Division, First Department authority to the contrary, this court must follow precedent from a New York appellate court involving the exact same issue and the exact same contract language (*see, e.g., State v Gary K*, 179 AD3d 623, 623 [1st Dep’t 2020]; *D’Alessandro v Carro*, 123 AD3d 1, 6 [1st Dep’t 2014]).

In an attempt to contrive Appellate Division, First Department precedent to the contrary, Plaintiff cites the recent case of *Henick-Lane, Inc. v 616 First Ave. LLC*, 214 AD3d 435 (1st Dep’t 2023). That case is totally different. There is no indication it involved the same contract language. What it **did** involve was a handwritten amendment to the no-damages-for-delay clause that rendered the clause ambiguous: if plaintiff’s work was “delayed or disrupted by fault of [JDS], Architect, or any other contractor, or by abnormal weather conditions, then the time fixed for the completion of the Work shall be extended for a period equivalent to the time actually lost, in the discretion of [JDS] *and compensated for additional, mutually agreed to costs*” (*id.* at 435). The italicized portion was handwritten and falls at the end of the sentence. This could mean that the parties changed their bargain to mean if there was additional time to complete, JDS would have to pay. This language is not involved here.

This leaves plaintiff only with the legal exceptions to no damages for delay clauses. These would be: (1) DASNY’s bad faith, willful, malicious or grossly negligent conduct; (2)

uncontemplated delays; (3) delays so unreasonable they amount to abandonment of the contract or (4) DASNY's breach of a fundamental obligation (*see Corinno Civetta Construction Corp. v City of New York*, 67 NY2d 297, 309 [1986]).

WDF argues that DASNY, the entity with access to the site, did such a bad job investigating the property that, when it sent the contracts out for bid, the site conditions the architectural documents depicted were tantamount to fraud. However, nothing in the record points to anything more than the usual problems that occur during the course of a construction project. (*See Dinallo Constr. Corp. v Phoenix RMA Constr. Servs., LLC*, 193 AD3d 407, 407 [1st Dep't 2021] ["Phoenix's claims of bad faith and gross negligence amount to nothing more than 'inept administration or poor planning'"]; *WDF, Inc. v Trustees of Columbia University*, 170 AD3d 518, 519 [same]).

More important, multiple sections of the contract put the onus on WDF to inspect the premises and satisfy itself that the work was possible to perform. Most of the significant problems WDF encountered occurred in building 2, a 100-year-old former stable. Even if the age of the building alone were not enough to put WDF on notice that it might encounter problems, section 2.0 of the "Information For Bidders" specifically warns "[a]t the time of the opening of bids, each bidder shall be presumed to have inspected the Site and to have read and to be familiar with the Contract Documents" (Ex. B to Bartlett Reply Aff., NYSCEF Doc. No. 98). Moreover, Section 3.02 of the General Conditions - Verifying Dimensions and Conditions - puts *inter alia*, the following responsibilities on WDF:

- A. The Contractor shall take all measurements at the Site and shall verify all dimensions and conditions at the Site before proceeding with the Work. . .
- B. During the performance of the Work, the Contractor shall verify all field measurements prior to fabrication of building components or equipment, and proceed with the fabrication to meet field conditions.
- C. The Contractor shall review all Contract Documents to determine exact location of all Work and verify spatial relationships of all the Work. Any question concerning said location or spatial relationships shall be submitted in a manner approved by the Owner.
- D. Special locations for equipment, pipelines, ductwork and other such items of the Work, where not dimensioned on plans, shall be coordinated with other affected Contractors.

Further, pursuant to the General Conditions, Section 4.01 - Representations of Contractor, WDF "represent[ed] and warrant[ed]":

- D. That it has carefully examined the Contract Documents and the Site, and from the Contractor's own investigations is satisfied as to the nature and materials likely to be

encountered . . . the general and local conditions, and all other materials or items which may affect the work.”

E. That it is satisfied that the Work can be performed and completed as required in the Contract Documents . . . ”

Thus, WDF represented and warranted that it not only reviewed all the Contract documents and the Site, but from its own investigations was satisfied with what it would encounter on this job. WDF fully accepted the drawings and measurements and then took on the responsibility to verify those dimensions prior to working on the site.

Despite this language, WDF in particular singles out the foundation slab in building 2 as having been insufficiently investigated by DASNY. However, in Section 3.01 of the General Conditions, WDF acknowledged that DASNY “assumes no responsibility for the correctness of any boring or other subsurface information and makes no representation whatsoever regarding subsurface conditions and test borings, reports, rock cores, foundation investigation and topographical maps which may be made available to the Contractor” (General Conditions, § 3.01 [emphasis added]). The section continues:

D. Subsurface or site conditions found materially differing from these that could have been reasonably anticipated may be cause for change to the Contract amount and time of completion. This determination will be made at the sole discretion of the Owner.

Thus, the parties did anticipate finding material differences under the surface and provided that “at the sole discretion of the Owner” WDF might be paid more. This provision does not override the “no damages for delay” clause (*see MLB Construction Services LLC v DASNY*, 194 AD3d 1140, 1143-44 [3d Dep’t 2021]).

WDF complains that it relied on incorrect dimensions and measurements for steel in the bid plans. But, Contract Specification Section 013300, Part 2.1.C entitled “Submittal Procedure” states that WDF “shall verify all field measurements” prior to submitting its structural steel shop drawings (Bartlett Reply Aff., NYSCEF Doc. No. 96, ¶ 21).² In addition, Contract Specification 051200 entitled “Structural Steel” states in Section 3.1 that WDF must:

² The court notes that while the table of contents of Exhibit D to the Bartlett Reply Affidavit does refer to Section 013300, the actual text of the section does not appear within the document. Similarly, the actual text of the portions of Section 024119 that the court cites below does not appear within the document. As such, the court relies on the Bartlett Reply Affidavit’s undisputed recitation of the text.

A. Before erection proceeds, and with the steel erector present, verify elevations of concrete and masonry bearing surfaces and locations of anchorages for compliance with requirements.

B. Do not proceed with erection until unsatisfactory conditions have been corrected. (Ex. D to Bartlett Reply Aff., NYSCEF Doc. No. 100).

Thus, not only was it WDF's responsibility to verify measurements and dimensions, but the Contract Specification document clearly demonstrates that the parties contemplated the discrepancies WDF claims concerning steel measurements.

WDF claims to have been surprised to find asbestos. However, again the contract and bid documents contradict WDF. Specification 024119 states:

a. 1.5 (C) – “Notice of differing conditions: submit a written notification if, during the work of demolition and cutting, conditions are discovered which significantly vary from those shown on the drawings. . . .”

b. 1.6 (A) – “Special Precaution: **Hazardous materials may be encountered during demolition operations including asbestos . . .**” (emphasis added)

c. 1.7 (A) (1) – “Condition of Structure: The Contractor for the work of this Section shall be held to have visited the site, examined the premises, determined for himself the existing conditions, character of equipment and facilities needed for the performance of the work, and all matters which may in any way affect the work before submitting a bid.”

d. 1.7 (A) (1) (a) – “Information regarding existing construction or conditions is based on available record drawings which may or may not truly reflect existing conditions. Such information is included on the assumption that it may be of interest to the Contractor, but the Architect, Owner and their consultants do not assume responsibility for its accuracy or completeness.”

e. 3.4 (B) (4) – “Be ready at any time to promptly provide, add to, or strengthen temporary shoring, bracing, or support for existing work, in case existing construction begins to show signs of structural stress.” (Bartlett Reply Aff., ¶ 37).

Thus, the parties specifically contemplated the possibility of potential asbestos issues, and WDF took on that risk.

WDF also complains that terracotta blocks had unexpectedly deteriorated, and that Plaintiff had to replace them before it could install structural steel. Again, it was WDF's responsibility to inspect the site. Had it done so, it would have found the deteriorating blocks. Moreover, Section 1.2 of 017329 of the General Requirements entitled “Cutting and Patching” states that “[e]ach Contractor is responsible for the cutting and patching to permit installation.” (See also Section 3.3 of 017329, Ex. C to Bartlett Reply Aff., NYSCEF Doc. No. 99). The Cutting and Patching

specification even contemplates deterioration of structural elements (*see* Ex. C, Section 1.5(A), Floor and Walls (3.3[C][3]), and Exterior Building Enclosure (3.3[C][5])). Thus, the contract documents contemplate exactly what WDF claims was unexpected, i.e., deteriorated conditions that it would need to replace before it could install steel beams.

Finally, WDF claims DASNY unreasonably caused delay because it never filed the necessary paperwork with the Department of Buildings for a sprinkler system. However, per Section 1.8(F) of Section 014000 of the General Requirements of the contract, it was WDF's responsibility to secure these permits:

The Contractor shall secure and pay for all work permits, applications, filings, and approvals that are associated with the Work of the Contract and pay all other permits, fees, licenses and inspections necessary for the proper execution and completion of the Contract as required by applicable New York City agencies and departments (i.e. Department of Buildings, Bureau of Electrical Control, Fire Department, Department of Environmental Protection, etc.).

1. The Contractor shall secure required work permits and approvals prior to commencement of the Work, provide a copy to the Owner and post a copy of the permit at the Project site.
2. The Contractor shall be responsible to maintain updated work permits and approvals.

(Ex. C to Bartlett Reply Aff.).

Thus, these delays are not only of the type that one would encounter on any construction project, but also the contract specifically placed the risk for them squarely on WDF (*see Bovis Lend Lease (LMB), Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 147 [1st Dept 2013] [finding that no exception to enforceability of no-damage-for-delay clause applied where the contract "specifically anticipated the possibility that the involvement of regulators would delay the process"]; *North Star Contracting Corp. v City of New York*, 203 AD2d 214, 214-215 [1st Dept 1994] [stating that no-damage-for-delay clauses "have been found valid, and preclude recovery of damages resulting from a broad range of reasonable and unreasonable conduct, where, as here, the conduct was specifically contemplated by the parties when they entered into the agreement"]). Accordingly, the court dismisses plaintiff's third cause of action seeking damages for delay.

The remainder of Plaintiff's contentions concerning damages for delay are unavailing.

2. Extra work:

Defendant DASNY also seeks summary judgment dismissing the second cause of action seeking payment for extra work because WDF failed to comply with the notice of claim procedure within the General Conditions. Section 10.01(A) of the General Conditions requires notice within a specific deadline and supporting documentation:

A. A written notice of Claim shall be delivered concurrently to the Owner's Project Manager and Cost Control Unit by the Contractor within fifteen (15) working days after occurrence of the event giving rise to such Claim or within fifteen (15) working days after the Contractor first recognizes the condition giving rise to the Claim, whichever is earlier. Burden of proving the Owner's receipt of Claim shall be the Contractor's responsibility.

B. Within ninety (90) working days of the initial notice of Claim, the Contractor shall substantiate the Claim and document the nature of the Claim and provide supporting cost data, Contractor's original cost estimate, P6 Project Management schedule demonstrating alleged impact and correlation to the Claim and a Contractor affidavit stating the following:

"I hereby certify that the value assigned the work, material and equipment that comprise the Claim, represents the actual value of said work, material and equipment pursuant to the Contract between the undersigned and the Dormitory Authority."

1. The Contractor shall provide, every thirty (30) days thereafter for as long as such damages are incurred, verified statements of the details and the amounts of such damages, together with documentary evidence of such damages.

2. Failure of the Contractor to comply and submit the requirements stated in Section 10.01 may result in rejection of Claim.

Additionally, Section 10.02 of the General Conditions regarding "Claim for Extra Work" states the following:

A. If the contractor wishes to make Claim for an increase in the Work of the Contract, or that any action or omission of the Owner is contrary to the terms and provisions of the Contract, a Claim shall be filed in accordance with the procedure herein.

B. No payment for Extra Work shall be allowed unless directed by a Notice to Proceed executed by the Owner.

C. The Contractor's failure to comply with **any or all parts** of this Article 10 shall be deemed to be:

1. A conclusive and binding determination on the part of the Contractor that a Notice to Proceed, Work, action or omission does not involve Extra Work.

2. A waiver by the Contractor of all claims for additional compensation or damages as a result of a Notice to Proceed, Work, action or omission.

(Emphasis added).

DASNY argues that WDF waived any right to its claims for extra work by failing to adhere to the notice of claim procedures in the General Conditions. In particular, DASNY argues that

Plaintiff: (1) failed to serve notices of claim until after the 15-work-day deadline, (2) failed to provide a written substantiation of the claims with cost data within 90 working days, (3) failed to provide written certifications that Plaintiff actually incurred the value of work that it was seeking, and (4) failed to provide verified statements of claim every 30 days thereafter.

WDF argues in response that the notice of claim procedures did not even apply because there was no actual dispute for which WDF would have needed to give DASNY notice. Rather, WDF points to notices to proceed that DASNY issued, arguing that these show DASNY agreed to pay for the purported extra work. Even if the notice of claim procedures did apply, WDF argues that it did “substantially comply” with the notice requirements. Finally, WDF argues DASNY suffered no prejudice and WDF should be excused from any “de minimis failure” to comply with the notice provisions (Memorandum of Law in Opposition [“Opposition”], pp. 6-7).

As an initial matter, the court rejects WDF’s argument that the notice of claim procedures did not apply. Section 10.01(A) of the General Conditions requires WDF to provide DASNY with a “written notice of Claim” within a certain period of time. WDF argues that because DASNY directed WDF to do the additional work through notices to proceed, there was no dispute as to whether the work was extra or not and therefore there was no “claim” of which to provide notice (*see* Opposition, p. 6; Oral Argument Transcript, pp. 23-24).

However, this interpretation does not comport with the definition of “Claim” set forth in the General Conditions. The General Conditions define “Claim” as:

A demand by the Contractor seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, an extension of time or other relief with respect to the terms of the Contract. The term Claim also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.
(General Conditions, § 1.01).

Therefore, while WDF is correct that a notice of claim is required for “disputes” arising out of the contract, the notice of claim requirement is not limited to disputes. Rather, under the General Conditions, a “notice of Claim” is required any time the contractor seeks “payment of money.” “Extra Work” clearly falls within this definition of “Claim” as “Extra Work” is defined as “[a]ny work in addition to the Work initially required to be performed by the Contractor pursuant to the Contract Documents” (General Conditions, § 1.01). Because requests for money for “Extra Work”

constitute “Claims” under the definitions in the General Conditions, WDF was required to adhere to the notice of claim procedures.

Because the notice of claim procedures applied, the core question that the court must evaluate is whether evidence of actual notice of extra work is sufficient to defeat summary judgment, even if Defendant establishes that Plaintiff did not strictly and literally comply with its notice of claim obligations. In general, a contractual notice provision, such as the ones here, constitutes a condition precedent (*see A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 30-31 [1998]; *Fahs Rolston Paving Corp. v County of Chemung*, 43 AD3d 1192, 1194 [3d Dept 2007]; *TADCO Constr. Corp. v Dormitory Auth. of the State of NY*, 139 AD3d 471, 472 [1st Dept 2016] [affirming summary judgment dismissal where motion court “correctly determined that plaintiff failed to comply with any of the conditions precedent to recovering its claims for additional compensation for change orders and extra work”]). Failure to “strictly comply” with these provisions “generally constitutes waiver of a claim for additional compensation” (*Fahs Rolston*, 43 AD3d at 1194; *F. Garofalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80 [1st Dept 2000] [“The contract’s notice and documentation requirements for extra work and delay damages are conditions precedent to plaintiff’s recovery and the failure to strictly comply is deemed a waiver of such claims.”]; *see also Mezzacappa Bros., Inc. v City of New York*, 29 AD3d 494, 495 [1st Dept 2006] [“Where the parties to a contract have made an event a condition of their agreement, there must be strict compliance.”]). Generally, express conditions precedent must be “literally performed” and “substantial performance” is not sufficient to excuse a plaintiff’s failure to do so (*see NASDI LLC v Skanska Koch Inc. Kiewit Infrastructure Co. (JV)*, 2020 WL 5768319, **12-13 [SDNY Sept 28, 2020]; *Tak Chio Cheong v Jinghong Zhu*, 138 AD3d 433, 433 [1st Dept 2016]).

The court also notes that there are particularly strong public policy considerations against excusing noncompliance with notice requirements in public works contracts. The Court of Appeals explained the importance of such notice provisions in *AHA Gen Constr. v New York City Hous. Auth.*, 92 NY2d 20, 33-34 [1998]:

These provisions, common in public works projects, provide public agencies with timely notice of deviations from budgeted expenditures or of any supposed malfeasance, and allow them to take early steps to avoid extra or unnecessary expense, make any necessary adjustments, mitigate damages and avoid the waste of public funds. Such provisions are important both to the public fisc and to the integrity of the bidding process.

To put it plainly, when a contractor is working with taxpayer funds, the courts should strictly enforce contractual provisions to protect those funds (*see id.*; *see also Bat-Jac Contracting, Inc. v New York City Housing Authority*, 1 AD3d 128, 129 [1st Dept 2003] [granting defendant's motion for summary judgment, finding that "[p]laintiff failed to file a timely notice of claim, which is expressly made a prerequisite to recovery under the parties' contract and which is subject to strict construction as a matter of public policy"]).

Here, the court grants summary judgment dismissing the cause of action for recovery of the value of extra work because DASNY presented undisputed evidence showing that WDF did not comply with conditions precedent within the notice of claim procedures. Most notably, DASNY argues that it is entitled to summary judgment because none of WDF's extra work claims complied with the General Conditions' requirements of notice of claim within 15 working days, substantiation of claim within 90 working days, or both (Memorandum of Law in Support of Motion for Partial Summary Judgment, NYSCEF Doc. No. 56, p. 9). The Bartlett Affidavit that DASNY filed with its opening papers provides exhaustive detail of WDF's failure to issue timely notices of claim. For example, the Bartlett Affidavit references the following:

- DASNY notified WDF of the need for additional work related to oversized footing in conflict with an elevator pit on 04/30/2015, but WDF did not issue its notice of claim letter until 03/07/2016, nearly a year later (Bartlett Aff., NYSCEF Doc. No. 17, ¶¶ 59-61; Ex. C to Bartlett Aff., WDF Request for Time Extension, p. 76, NYSCEF Doc. No. 21; Ex. F to Bartlett Aff., NYSCEF Doc. No. 24).
- DASNY notified WDF of the need for extra work related to revising structural steel erection drawings at the latest in 04/2015, but WDF did not issue its notice of claim letter until 03/16/2018, almost three years later (Bartlett Aff., ¶¶ 63-66; Ex. C to Bartlett Aff., p. 77; Ex. D to Bartlett Aff., NYSCEF Doc. No. 22).
- DASNY issued notice to proceed # 264 to WDF requesting WDF do extra work extending electrical service 23 feet in 08/2017 (Bartlett Aff., ¶ 136; Ex. C to Bartlett Aff., p. 83). While the Bartlett Affidavit acknowledges that it "appears that WDF may have filed a timely alleged 15-day notice" on this claim, the Bartlett Affidavit states that WDF did not comply with its 90-day certification requirement (Bartlett Aff., ¶ 138).

In response, WDF offers a list of purportedly unresolved proposed change orders that WDF allegedly issued in response to DASNY's notices to proceed (Ex. 3 to Krajczewski Aff., NYSCEF Doc. No. 64), but WDF makes no attempt to argue that its purported notices were timely under

the General Conditions.³ On the contrary, the Krajczewski Affidavit attaches examples of proposal letters that WDF clearly issued **after** the 15-work-day deadline to respond to their respective notices to proceed:

- DASNY's Notice to Proceed CM # 317 instructing WDF to repair a crack in the cellar foundation was dated **07/31/2018** (Ex. 4 to Krajczewski Aff., NYSCEF Doc. No. 65). WDF wrote a letter to DASNY with a proposal for the work under CM # 317 on **08/27/2018** (Ex. 5 to Krajczewski Aff., NYSCEF Doc. No. 66). WDF then wrote another letter with a revised cost proposal on **05/13/2019** (Ex. 6 to Krajczewski Aff., NYSCEF Doc. No. 67).
- DASNY's Notice to Proceed CM # 245 instructing WDF to provide labor and material for grate installation was dated **05/24/2017** (Ex. 7 to Krajczewski Aff., NYSCEF Doc. No. 68). WDF wrote a letter to DASNY with a proposal for the work under CM # 245 on **07/21/2017** (Ex. 8 to Krajczewski Aff., NYSCEF Doc. No. 69). WDF then wrote another letter with a revised cost proposal on **02/01/2019** (Ex. 9 to Krajczewski Aff., NYSCEF Doc. No. 70).
- DASNY's Notice to Proceed CM # 209 instructing WDF to provide labor, material and equipment to use epoxy anchors in plumbing pipe and duct installation was dated **01/05/2017** (Ex. 10 to Krajczewski Aff., NYSCEF Doc. No. 71). WDF wrote a letter to DASNY with a proposal for the work under CM # 209 on **07/19/2017** (Ex. 11 to Krajczewski Aff., NYSCEF Doc. No. 72). WDF then wrote another letter with a revised cost proposal on **11/07/2017** (Ex. 12 to Krajczewski Aff., NYSCEF Doc. No. 73).

Thus, each and every purported notice of claim that WDF references in support of the extra work was late under the notice of claim provisions. Regardless of whether the purported notices of claim satisfied any other of the requirements under the General Conditions, WDF failed to satisfy express conditions precedent for recovery of the value of extra work because it did not comply with the timing requirements. Because Plaintiff failed to satisfy the conditions, Section 10.02 of the General Conditions applies. Under Section 10.02, the "failure to comply" with a condition under Article 10 shall be deemed a "conclusive and binding determination" that the work was not "Extra Work" and a "waiver . . . of all claims for additional compensation or damages" (General Conditions, § 10.02).

³ The court also notes that while WDF submitted proposals in support of its argument, WDF has not provided the court with documents actually "designated as a notice of claim" (*see Start Elevator, Inc. v New York City Housing Authority*, 106 AD3d 450, 450-451 [1st Dept 2013]). The First Department in *Start Elevator* found that a letter proposal stating the amount of an extra cost did not satisfy a notice of claim provision in the parties' contract, but nevertheless granted a motion to dismiss "assuming that plaintiff's letters constitute a notice of claim" (*id.*). The court similarly assumes, without deciding, that WDF's proposals constituted notices of claim, but nevertheless finds them untimely as set forth below.

The case law that Plaintiff cites in support of its argument that the court should excuse its noncompliance with conditions precedent is distinguishable. Plaintiff is correct that under the First Department's decision in *Danco Elec. Contractors, Inc. v Dormitory Auth. of the State of NY*, the court may excuse noncompliance with such conditions to "avoid a disproportionate forfeiture . . . where the noncompliance is de minimis and defendant has shown no prejudice whatsoever" (162 AD3d 412, 413 [1st Dept. 2018]). However, the condition that the court in *Danco* excused as de minimis was service of verified statements (*id.*). In finding this condition was "de minimis," the court suggested that the failure to provide timely notice would not be de minimis (*id.* ["Defendant does not argue that plaintiff failed to document the costs of the claimed extra work, to provide timely notice of its claims for extra work, or to provide timely notice of its objections to defendant's rejections of and price reductions on the claimed extra work."]). This interpretation of the holding in *Danco* is bolstered by the Third Department's holding in *MLB Constr. Servs., LLC v Dormitory Auth. of the State of NY*, 194 AD3d 1140 [3d Dept 2021]. There, the court distinguished *Danco*, finding that unlike in *Danco*, where the lack of verifications was not a "material part of the agreed exchange," the plaintiff in *MLB* had "assumed the risk of its failure to comply with the conditions precedent" (*id.* at 1142-43). Additionally, like here, *MLB* involved a plaintiff's failure to provide "timely" notice of claim and documentation (*see id.* at 1143; *see also Bat-Jac Contracting, Inc. v New York City Housing Authority*, 1 AD3d 128, 129 [1st Dept 2003] [affirming summary judgment dismissing delay damages claim where plaintiff failed to file timely notice of claim, a prerequisite to recovery "which is subject to strict construction as a matter of public policy"]; *Hi-Tech Constr. & Mgt. Servs. Inc. v Housing Auth. of the City of NY*, 125 AD3d 542, 542 [1st Dept 2015] [same]). Therefore, while noncompliance with some conditions may be excused as de minimis, timeliness of notice of claim is not one of those conditions, and the court will not excuse Plaintiff's undisputed failure to comply.

Additionally, Plaintiff's citation to *Koren-DiResta Constr. Co. v New York City School Constr. Auth.* is inapposite. There, the court found that plaintiff's notice of claim was timely pursuant to Public Authorities Law § 1744[2] because the time to give notice never began to run as the project was not "substantially completed" (293 AD2d 189, 195-196 [1st Dept 2002]). Not only does *Koren-DiResta* involve a statutory notice of claim provision that does not apply here, but just like in *Danco*, the court ultimately found that the notice of claim was timely. Not so here.

The court has considered Plaintiff's remaining contentions as to extra work and finds them unavailing.

Accordingly, it is

ORDERED that Defendant's motion for summary judgment dismissing the second and third claims for breach of contract based on delay damages and extra work is granted in its entirety.

05/31/2023
DATE


MELISSA CRANE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE