

**Oldcastle Infrastructure, Inc. v
Bronx Commons Bldrs., LLC**

2023 NY Slip Op 32540(U)

July 24, 2023

Supreme Court, New York County

Docket Number: Index No. 655931/2020

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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OLDCASTLE INFRASTRUCTURE, INC., Plaintiff, - v - BRONX COMMONS BUILDERS, LLC, Defendant.	<table border="0"> <tr> <td style="width: 150px;">INDEX NO.</td> <td><u>655931/2020</u></td> </tr> <tr> <td>MOTION DATE</td> <td><u>03/08/2022, 04/14/2022, 07/19/2022</u></td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td><u>001 002 003</u></td> </tr> </table>	INDEX NO.	<u>655931/2020</u>	MOTION DATE	<u>03/08/2022, 04/14/2022, 07/19/2022</u>	MOTION SEQ. NO.	<u>001 002 003</u>
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**DECISION + ORDER ON
 MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 93, 154, 155

were read on this motion to AMEND, SUMMARY JUDGMENT and DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 90, 91, 92, 94, 95, 96, 155

were read on this motion to REMOVE CONFIDENTIALITY DESIGNATIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 155

were read on this motion to COMPEL DISCOVERY.

This is a construction contract dispute. A threshold issue before the Court is whether Plaintiff Oldcastle Infrastructure, Inc. (“Oldcastle”) complied with a contractual condition precedent requiring that its claims against Defendant Bronx Commons Builders, LLC’s (“BCB”) be submitted to the project architect before litigation. The Court holds that Oldcastle has sufficiently demonstrated compliance with the condition precedent to survive dismissal of its claims on that ground.

Following BCB's receipt of Oldcastle's Final Requisition, BCB submitted a claim against Oldcastle (as well as claims against other relevant subcontractors) to the project architect. Oldcastle responded by arguing that, because final payment was due, the requirement to bring the matter to the project architect did not apply. Oldcastle also objected to the architect's authority to render a decision. Instead, Oldcastle commenced arbitration against Oldcastle.

The architect made an initial determination in favor of BCB that credited Oldcastle for the entire amount of its Final Requisition and applied it as a setoff against the architect's proposed award to BCB. Oldcastle subsequently commenced this action.

BCB argues that Oldcastle failed to comply with the contractual condition precedent because Oldcastle did not submit its own claim to the project architect. BCB moves to amend to clarify its condition precedent defense and for summary judgment determining that any claim made by Oldcastle was required to be submitted to the architect as a condition precedent to litigation. BCB also seeks dismissal of Oldcastle's claim for failure to comply with the condition precedent.

BCB's motion to amend to clarify its condition precedent defense is **granted** as is its motion for summary judgment determining that Oldcastle's claim accrued before final payment was due, thus requiring submission to the architect. However, on the unique facts presented, the Court determines that Oldcastle has adequately demonstrated compliance with the condition precedent and BCB's motion to dismiss is **denied**.

Separately, Oldcastle's motion to compel BCB to remove its "confidential" designations is **denied** without prejudice. Further, Oldcastle's motion to compel BCB to produce discovery and to enforce non-party subpoenas to Kaufman Dolowich & Voluck, LLP ("KDV") and The Law Firm of Elias C. Shwartz PLLC ("Shwartz") is **granted in part**. Any agreement obtained

by Oldcastle from its subcontractors to testify against Oldcastle and related documents must be produced. Finally, BCB's cross-motion to enforce a "Clawback" agreement is **granted**.

BACKGROUND

This case concerns a construction project at 443 East 162nd Street, Bronx, NY ("Project"). Oldcastle provided engineering and precast concrete products to BCB pursuant to a subcontract valued at \$7,989,276.00 ("Contract" [NYSCEF 59]). Non-parties J&R Slaw Inc. ("J&R Slaw") and JC Steel Erectors Corp. ("JC Steel") provided related fabrication and installation services.

Oldcastle and BCB each allege that the other breached the Contract. Oldcastle claims that it is owed \$1,072,513.77 as set forth in its Final Requisition and asserts claims for breach of contract, account stated, and goods sold and delivered (Complaint [NYSCEF 6]). BCB counterclaims it is owed \$2,352,000 for Oldcastle's breach of contract and fraud (NYSCEF 9 [Answer with Counterclaims]).

Claims also arose between BCB and J&R Slaw as well as between BCB and JC Steel. Discovery has revealed that BCB entered settlement agreements with J&R Slaw and JC Steel (the "Settlements") pursuant to which they have agreed to cooperate in litigation against Oldcastle. BCB, J&R Slaw and JC Steel oppose production of the Settlements and related information.

A. The Relevant Contract Provisions

Section 24.1.a of the contract defines a "Claim" as including "a demand or assertion by a party hereto seeking. . . payment of money. . .with respect to the Subcontract." Section 24.1.c of the contract requires that all Claims "shall be referred to an Initial Decision Maker for initial decision," appoints the Architect (Danois Architects, P.C.), as the "Initial Decision Maker" and provides that "[a]n initial decision shall be required as a condition precedent to litigation of all

Claims arising prior to the date final payment is due, unless 30 days have passed after the Claim has been submitted to the Initial Decision Maker with no decision having been rendered.”

Section 5.5 of the Contract governs final payment. That section provides that final payment is to be made forty days after Oldcastle submits (i) “evidence satisfactory to Contractor that there are no claims, obligations or liens outstanding or unsatisfied for labor, services, materials, equipment, taxes or other items performed, furnished or incurred for or in connection with Work,” and (ii) “an Affidavit and Final Release, in form and substance satisfactory to Contractor, in favor of Contractor and Owner.”

Section 24.1.e of the Contract provides that, upon submission of a Claim, the Initial Decision Maker shall take one or more actions, including requesting additional information from the claimant or a response from the respondent, deciding the Claim, suggesting a resolution or advising that the Initial Decision Maker “concludes that, in the Initial Decision Maker’s sole discretion, it would be inappropriate for the Initial Decision Maker to determine the Claim.”

Section 24.1.f of the Contract provides that the “the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party. . .in rendering a decision.” Section 24.1.g of the Contract provides that, upon a request by the Initial Decision Maker for a response, the respondent may “advise the Initial Decision Maker that no response and/or supporting data will be furnished.” Section 24.1.i of the Contract provides that, if a lawsuit is timely filed within thirty days of the Initial Decision, that “the Initial Decision shall be admissible as evidence in such action.” Section 27 of the Oldcastle addendum to the Contract includes a standard arbitration clause.

B. BCB Submits Claims to the Architect and Oldcastle Timely Objects

On June 2, 2020, BCB submitted a Notice of Claim with exhibits (NYSCEF 41 [“Claim”]) against Oldcastle to the Initial Decision Maker. Notably, the Claim acknowledges “Oldcastle’s unpaid approved requisitions: \$1,072,513.77” (Claim at 10).

Also on June 2, 2020, BCB submitted a Notice of Claim against J&R Slaw (NYSCEF 101). The claim against J&R Slaw provides that J&R Slaw was to coordinate with Oldcastle concerning the pre-cast façade wall panels at issue.

On June 9, 2020, the Initial Decision Maker requested that Oldcastle provide its position within ten business days (NYSCEF 42). Oldcastle timely responded and, among other things, objected based on a perceived conflict of interest resulting from BCB’s status as a client of Danois, the Initial Decision Maker (NYSCEF 85). Oldcastle wrote that it “objects to any attempt by Danois to issue a decision with regards to BCB’s claim. . .” Later on June 19, 2020, Oldcastle commenced an arbitration (AAA Case No. 012000072674) against BCB (NYSCEF 44 [the “Arbitration”]).

On October 5, 2020, the Initial Decision Maker determined that “Oldcastle owes to the sum of \$1,279,579.36 (\$2,352,093.13 less \$1,072,513.77). . .” which are the same amounts sought by the parties in this case (NYSCEF 48). On October 20, 2020 the Bronx County Supreme Court (Hon. Julia I. Rodriguez) permanently stayed the arbitration (*Bronx Common Builders, LLC v. Oldcastle Infrastructure, Inc.* 27121/2020E [NYSCEF 47]). Justice Rodriguez determined that the specific dispute resolution procedure set forth in the Contract, including submission of claims to the architect, controlled.

C. J&R Slaw and JC Steel Settle with BCB and Agree to Cooperate Against Oldcastle

During the course of discovery, Oldcastle learned that BCB obtained, in connection with the Settlements, J&R Slaw and JC Steel's agreements to cooperate in litigation against Oldcastle (NYSCEF 100 [Affidavit of David Toolan with Exhibits]). Oldcastle has submitted evidence which it claims shows that BCB paid settlements to J&R Slaw and JC Steel to induce them to submit testimony against Oldcastle (Toolan Aff. Exs. 9-10). Oldcastle subsequently issued subpoenas ("Subpoenas") to KDV, counsel to JC Steel, and Shwartz, counsel to J&R Slaw (NYSCEF 105-106).

D. Procedural History

Oldcastle commenced this case on November 3, 2020 – within 30 days of the Initial Decision Maker's determination. Discovery commenced and, on December 21, 2021 the Court entered a stipulated confidentiality order (NYSCEF 30). The parties subsequently submitted an amended stipulation and proposed order adding a "highly confidential" designation which was not entered as an order (NYSCEF 31).

Separately, the parties entered into a "Clawback Agreement" (NYSCEF 127) providing that upon an inadvertent production of privileged information that "[u]pon request by the producing Party for the return of the Protected Information inadvertently produced, the receiving party shall promptly return the Protected information and destroy all copies thereof." The Clawback Agreement waives any right to challenge the review procedures, timing of the request or to assert prejudice.

Following substantial discovery, BCB moves (1) to amend to clarify that its Twelfth Affirmative Defense is premised on Oldcastle's failure to comply with a condition precedent under Section 24 of the Contract; (2) for summary judgment declaring that Oldcastle's claims

arose before final payment was due under the Contract; and (3) for dismissal of Oldcastle's claim for failure to comply with the condition precedent. (Mot. Seq. No 1). Plaintiff Oldcastle moves to remove Defendant BCB's confidentiality designations (Mot. Seq. No. 2). Oldcastle also moves to compel discovery from BCB and to compel compliance with the Subpoenas (Mot. Seq. No. 3). BCB cross-moves to enforce the Clawback Agreement. The Court heard oral argument on the motions (NYSCEF 155 [Transcript]).

DISCUSSION

A. Motion Sequence No. 1 – BCB's Motion to Amend, For Partial Summary Judgment and Dismissal

BCB's motion is granted insofar as it seeks amendment and partial summary judgment and denied insofar as it seeks dismissal.

a. BCB's Motion to Amend its Twelfth Affirmative Defense is Granted

CPLR 3025(b) provides that “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court.” “Motions for leave to amend should be freely granted, absent prejudice or surprise . . . unless the proposed amendment is palpably insufficient or patently devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010] [citations omitted]). The movant “need not establish the merit of its proposed new allegations” (*Id. citing Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008]).

The Court concludes that BCB's proposed amendment (NYSCEF 53) clarifies an existing defense. Further, clarification of the Twelfth Affirmative Defense does not prejudice Plaintiff Oldcastle because Defendant's First Counterclaim specifically invokes Section 24.1. Accordingly, Defendant BCB's motion to amend its Twelfth Affirmative Defense to clarify that Section 24.1 of the parties' contract imposes a condition precedent is granted.

b. BCB's Motion for Partial Summary Judgment is Granted

Defendant BCB's motion for partial summary judgment determining that Plaintiff Oldcastle's claims arose prior to the date final payment became due under the Contract is granted. Summary judgment is appropriate pursuant to CPLR 3212(b) where the movant establishes an entitlement to relief as a matter of law and the opponent fails to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). The construction and interpretation of an unambiguous contract is an issue of law which the Court may resolve on summary judgment (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 163 [1990]).

Oldcastle does not dispute that it has not complied with Section 5.5 of the Contract. Instead, Oldcastle contends that Section 24.1 does not apply because it submitted its Final Requisition on May 31, 2019 that was approved by BCB. Therefore, Oldcastle claims that it need not submit its claim to the Initial Decision Makes as a condition precedent to litigation.

The Court finds that Section 5.5 of the Contract governs final payment, and that Oldcastle was not entitled to final payment under the Contract when its claims arose. Specifically, Oldcastle did not, and could not, provide a certification that no liens or claims against BCB existed or a final release in favor of BCB which are preconditions to final payment under Section 5.5. Thus, partial summary judgment is granted, and it is determined that Plaintiff Oldcastle's claims arose prior to the date final payment became due under the Contract.

c. BCB's Motion to Dismiss is Denied Because the Condition Precedent Has Been Satisfied

On a motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7), the Court must assume the truth of the facts alleged by Plaintiff and afford Plaintiff "the benefit of every possible

inference”(*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Dismissal is warranted under CPLR 3211(a)(1) and (a)(7) where the complaining party has failed to comply with a contractual condition precedent (*Archstone Dev. LLC v Renval Constr. LLC*, 156 AD3d 432, 433 [1st Dept 2017] [citations omitted]). “The question of whether a condition precedent has been complied with is generally an issue for the courts, particularly where the question of whether the condition precedent has been satisfied can be determined prior to resolution of the substantive claims” (*Ambassador Const. Co., Inc. v 40 Wall St. Dev. Assoc., LLC*, 264 AD2d 317, 318 [1st Dept 1999] [collecting cases]).

Conditions precedent requiring claims to be submitted for informal resolution, typically to the project architect, prior to commencing litigation are common in construction contracts and enforced by New York courts (*Matter of Asphalt Green, Inc. (Herbert Const. Co., Inc.)*, 210 AD2d 21 [1st Dept 1994]). Failure to comply with a condition precedent requiring submission of a claim to a project architect is sufficient grounds for dismissal (*Archstone, supra, citing MCC Dev. Corp. v Perla*, 81 AD3d 474 [1st Dept 2011], *lv. den.*, 17 N.Y. 3d 715 (2011)).

During oral argument, counsel for Plaintiff argued that the parties’ respective claims were submitted to the Initial Decision Maker by BCB and “I don’t think there was a separate requirement that plaintiff resubmit the claim” (NYSCEF 155 [Tr. at 32]). As stated above, BCB’s Claim does not dispute the amount sought in Oldcastle’s Final Requisition which the Initial Decision Maker applied as a setoff. Further, Plaintiff argued that the Initial Decision Maker’s decision is not akin to an arbitration award that must be formally vacated but that it is instead evidence to be considered in connection with a timely-filed lawsuit (Tr. at 33).

BCB’s motion to dismiss Oldcastle’s claim based on the condition precedent elevates form over substance. The record conclusively demonstrates that the Initial Decision Maker *did*

decide the competing claims of Oldcastle and BCB despite Oldcastle's objection to the process, and that Oldcastle thereafter followed the Contract by filing this action within thirty days of the Architect's decision. Because Plaintiff Oldcastle adequately demonstrates compliance with the condition precedent, dismissal is denied (*HRH Const., LLC v Elite Const. of N.Y., Inc.*, 36 AD3d 560 [1st Dept 2007]).

B. Motion Sequence No. 2 - Plaintiff's Motion to Remove Confidentiality Designations is Denied Without Prejudice

Plaintiff's motion to compel BCB to remove its "Confidential" designation from all documents produced in discovery pursuant to the January 22, 2022 stipulation (NYSCEF 31) is denied without prejudice to renewal as to specific documents and, if necessary, submission of an amended confidentiality order highlighting any proposed changes to be "so ordered" (Tr. 54-56). Relevant here, there is a distinction between confidential documents exchanged in discovery and those filed in Court for which a sealing order is sought (*Norddeutsche Landesbank Girozentrale v Tilton*, 165 AD3d 447, 449 [1st Dept 2018] [collecting cases]). Section 4 of both the confidentiality order and proposed amended confidentiality order permit challenges to confidentiality designations "at any time. . ." Should the parties elect to file a confidential document, the Court retains the authority to determine whether a document – in whole or in part – may be sealed (*Brummer v Wey*, 66 Misc 3d 1205(A) [Sup Ct New York Co. 2019] [collecting cases]). As Oldcastle may make "immediate use" of the documents, the Court sees no reason to interfere with Defendants' confidentiality designations at this time (*Mann v Cooper Tire Co.*, 56 AD3d 363, 365 [1st Dept 2008]).

C. Motion Sequence No. 3 - Plaintiff's Motion to Compel is Granted in Part and Defendant's Cross-Motion to Enforce the Clawback is Granted

Oldcastle moves to compel documents from BCB as well as to enforce the Subpoenas served on Shwartz, counsel to J&R Slaw, and KDV, counsel to JC Steel. BCB cross-moves for the return or destruction of twenty-one (21) inadvertently produced documents pursuant to the parties Clawback Agreement.

Oldcastle's motion is granted in part. BCB's cross-motion to enforce the Clawback Agreement is granted. All requests for costs, fees, attorney's fees and sanctions are denied.

a. Oldcastle's Motion Against BCB is Granted in Part

Oldcastle seeks to compel responses to its Documents Requests 4, 5 and 9 which seek "all" contracts and related documents concerning the Project. Additionally, Oldcastle seeks to compel response to its Document Request 11 which seeks all communications on the Project and Documents Request 36 which seeks all lien waivers and releases from the Project. Finally, Oldcastle seeks a privilege log.

The Settlements are potentially relevant to Oldcastle's claims and defenses (and possibly for impeachment of witnesses at trial). J&R Slaw and JC Steel worked with Oldcastle on the relevant portions of the Project and thereafter purportedly entered the Settlements on the condition that they cooperate with BCB in litigation against Oldcastle. Thus, notwithstanding Oldcastle's failure to abide by Rule 14, the Court will direct that some discovery with respect to the Settlements may proceed.

Specifically, the Settlements and related documents responsive to the foregoing requests shall be produced to the extent they relate to or concern any claim by or against Oldcastle arising out of the Project. Similarly, any other agreement between BCB and J&R Slaw or JC Steel

concerning assistance to be provided in prosecuting or defending any claim against Oldcastle shall be produced. Further, BCB shall produce a privilege log if one has not already been provided (*see* Rule 11-b of the Rules of the Commercial Division). Portions of the documents that do not relate to those issues may be redacted. Counsel for the parties and non-parties are strongly encouraged to agree to a stipulation to be “so ordered” concerning the terms of the production.

b. Oldcastle’s Motion to Compel Compliance with the Subpoenas is Granted in Part

The Subpoenas issued to the two non-party law firms, Shwartz and KDV, primarily concern the Settlements. Shwartz and KDV have responded to the Subpoenas, generally stating that the Settlements are confidential and that they are not the custodians of their respective client’s business records. As set forth above, the Settlements are – at least in part – potentially relevant and therefore discoverable. Thus, Shwartz and KDV shall produce responsive documents limited to the issue of any agreement by their respective clients, J&R Slaw and JC Steel, to assist BCB. The Court again suggests that the parties and non-parties agree to a protocol for the production of documents that minimizes costs and burdens.

c. BCB’s Cross-Motion to Enforce the Clawback Agreement is Granted

BCB’s cross-motion to enforce the Clawback Agreement is granted. Clawback agreements are enforceable and, generally, privileged and confidential documents should be returned when they are disclosed inadvertently and prompt action is taken to secure their return (*Oakwood Realty Corp. v HRH Const. Corp.*, 51 AD3d 747, 749 [2d Dept 2008] [citations omitted]). The twenty-one documents in question shall be promptly returned by Oldcastle to

BCB. BCB shall re-produce said documents with redactions to the extent any of the subject documents contain discoverable information (Tr. at 93).

* * * *

Accordingly, it is

ORDERED that Defendant BCB's motion to amend, for partial summary judgment and dismissal (Mot. Seq. No. 1) is **GRANTED IN PART**. Leave to amend to clarify the Twelfth Affirmative Defense is **GRANTED**; summary judgment on the issue of whether Oldcastle's claim accrued prior to the date final payment was due under the Contract is **GRANTED**, and dismissal for failure to comply with the condition precedent is **DENIED**; it is further

ORDERED that the Amended Answer be filed within seven (7) days; it is further

ORDERED that Plaintiff Oldcastle's motion to remove confidentiality designations (Mot. Seq. No. 2) is **DENIED WITHOUT PREJUDICE**; it is further

ORDERED that Oldcastle's motion to compel (Mot. Seq. No. 3) is **GRANTED IN PART** and BCB, Shwartz and KDV shall respond to requests for the Settlements and related documents as set forth above (the parties and non-parties may submit a stipulation governing the production to be "so ordered"); it is further

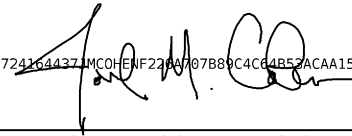
ORDERED that BCB's cross-motion to enforce the Clawback Agreement is **GRANTED**; it is further

ORDERED that all requests for sanctions, costs, fees and other relief are **DENIED** without prejudice to Shwartz and KDV seeking, if appropriate, reasonable production expenses; it is further

ORDERED that the parties submit a status letter by August 4, 2023, concerning any remaining discovery and submit a proposed schedule for the completion of discovery, the filing of the note of issue, and any further summary judgment motion practice.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

7/24/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: