

**Trocom Constr. Corp. v City of New York**

2023 NY Slip Op 33499(U)

September 28, 2023

Supreme Court, New York County

Docket Number: Index No. 650262/2015

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

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TROCOM CONSTRUCTION CORP.,

Plaintiff

Index No. 650262/2015

-against-

DECISION AND ORDER

CITY OF NEW YORK, CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC., and EMPIRE  
CITY SUBWAY,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

The parties' dispute relates to a project reconstructing portions of Fulton Street from Church Street to South Street and Nassau Street from Fulton Street to Spruce Street in lower Manhattan. Pursuant to a contract between plaintiff and defendant City of New York, this construction project included roadway reconstruction, pavement marking, sewer manhole reconstruction, installation of sewers, a new water main, catch basins, sidewalk replacement, traffic signals, street lighting, and private utilities work. Plaintiff sues defendants City of New York, Consolidated Edison Company of New York, Inc., and Empire City Subway. Plaintiff claims the City breached the parties' contract by (1) failing to pay plaintiff for additional work plaintiff agreed to perform, (2) forcing plaintiff to

perform additional work worth almost \$1.3 million, and (3) failing to reimburse plaintiff for the prevailing wages that the United States Department of Labor determined to be owed to pedestrian flaggers on the job. Plaintiff also claims the parties' mutual mistake regarding the pay due to the flaggers and the City's obligation to reimburse plaintiff and seeks a declaratory judgment regarding the rate of pay for a flagger and the reimbursement for the additional wages paid. Plaintiff claims all three defendants breached the contract by causing delays in the performance of the contract, requiring plaintiff to perform extra work and incur additional costs. Finally, plaintiff claims breaches of the contract by the City and Consolidated Edison in failing to pay plaintiff \$16,000 to cover increased costs for specific items of utility work in plaintiff's contract bid that required special equipment, methods, or care. Each defendant now moves for summary judgment dismissing all claims against that defendant. C.P.L.R. § 3212(b).

## II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, defendants must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence eliminating all material factual issues. C.P.L.R. § 3212(b); Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d 173, 179 (2020); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v.

Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014). If defendants fail to make this evidentiary showing, the court must deny their motions. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Dorador v. Trump Palace Condo., 190 A.D.3d 479, 481 (1st Dep't 2021). Only if defendants meet this initial burden, does the burden shift to plaintiff to rebut that prima facie showing by producing admissible evidence sufficient to require a trial of material factual issues. Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d at 179; De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008). In evaluating the evidence for purposes of the summary judgment motions, the court construes the evidence in the light most favorable to plaintiff. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d at 475; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503.

### III. DEFENDANT CITY'S MOTION FOR SUMMARY JUDGMENT

The contract between plaintiff and the City, which the parties agree is authenticated and admissible, required plaintiff to provide to the City's engineer a notice of claim for any claimed damages from project delays caused by the City within 45 days after plaintiff incurred the damages and to provide additional notice every 30 days afterward. Aff. of Hesham Kotby Ex. 1, NYSCEF Doc. No. 144 (Standard Construction Contract) art. 11.1.2. The contract allowed plaintiff to seek more time to provide the notice, but warned that: "On failure of the Contractor to fully comply with the foregoing provisions, such claims shall be deemed waived and no right to recover on such claims shall exist." Id. Although plaintiff repeatedly emphasizes that the bulk of plaintiff's claims are for delays caused by defendants that extended plaintiff's performance of the contract, the Standard Construction Contract also included a similar provisions regarding plaintiff's claims for other damages caused by the City. Id. arts. 30, 56. Finally, the contract also required plaintiff to cooperate with the head of the contracting agency or the City Comptroller in investigating claims or disputes. Id. art. 30.

The City contends that plaintiff failed to provide timely notices of claim and that any notice plaintiff did provide claiming damages failed to specify the nature and amount of

damages attributable to specific delays or other causes or to specify the nature of the delays or other causes. Plaintiff also failed to provide the details of its claims for delay damages either in response to the Comptroller's inquiry or in disclosure in this action. Aff. of Lewis R. Lear, NYSCEF Doc. No. 164, ¶¶ 2-3, 21, 23, 25, 33, 36. Plaintiff does not deny failing to comply with the contractual notice requirements, but contends that informal, actual, notice through meetings and correspondence was sufficient and that plaintiff provided thousands of pages of documents to the Comptroller.

At best, the evidence in the record demonstrates that plaintiff simply complained of general delay, without specifying the dates and specific causes of each delay, attributing it to particular defendants, apportioning their percentages of fault, other than 50-50% or 33-33-33%, or providing documentary support. Frequently plaintiff faulted defendants for delays caused by weather conditions or nonparties such as the New York City Transit Authority, private building owners, or archeologists, without explanation of why defendants were responsible. Whenever plaintiff complained of delay, it was incumbent on plaintiff to show that a particular delay actually delayed completion of the project and did not run concurrently with independently caused delays, but plaintiff made no such showing. The evidence in the record, presented by the City, also demonstrates that plaintiff

did not produce responsive documents and data required by the Comptroller to specify and clarify plaintiff's damages. Id. ¶¶ 21, 33, 35-36.

Even if substantial compliance with the notice requirements was sufficient, plaintiff's noncompliance was not just to omit a few required details, but was to forego any notice whatsoever resembling the contract requirements. Plaintiff's current admitted inability to specify the dates plaintiff incurred delays or other damages or to apportion the cause of the delays or other damages among defendants with any precision points up the importance of providing the detailed notice called for within a short period after the damages were incurred. The City thus establishes a prima facie defense that plaintiff failed to comply with the Standard Construction Contract requirements regarding notice to the City's engineer and compliance with the Comptroller's investigations into any claim.

Despite plaintiff's insistence that the contractual notice was unnecessary when the City received actual notice, Article 11.2 of the Standard Construction Contract specifies that: "Failure of the Contractor to strictly comply with the requirements of 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 and no right to recover on such claims shall exist." Kotby Aff. Ex. 1. Article

30 of the contract also provides that plaintiff's failure to cooperate with the Comptroller's investigation constitutes a waiver of plaintiff's claims against the City. See Dart Mech. Corp. v. City of New York, 68 A.D.3d 664, 664-65 (1st Dep't 2009). These terms do not comprise a broad exculpatory provision subject to exceptions. See Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y.2d 297, 309 (1986). Instead, these terms impose conditions precedent to this action. A.H.A. Gen. Constr., Inc. v. New York City Hous. Auth., 92 N.Y.2d 20, 30 (1998); Tyrek Hgts. Erectors, Inc. v. WDF, Inc., 178 A.D.3d 631, 633 (1st Dep't 2019). As plaintiff fails to raise a material factual issue that plaintiff complied with the contractual prerequisites to maintain this action, the court considers plaintiff's claims against defendant City waived and grants the City's motion for summary judgment dismissing plaintiff's claims against the City.

C.P.L.R. § 3212(b).

IV. THE MOTIONS FOR SUMMARY JUDGMENT BY CONSOLIDATED EDISON AND EMPIRE CITY SUBWAY

Consolidated Edison and Empire City Subway also maintain that plaintiff waived all claims for damages against these defendants by failing to comply with the notice of claim provisions in plaintiff's contract with the City. In addition to insisting that strict compliance with the notice of claim provisions was not required and that Consolidated Edison and Empire City Subway received adequate actual notice, plaintiff

suggests that the notices of claim that plaintiff contractually was required to provide to the City's engineer were for only the City's benefit. While plaintiff admits that Consolidated Edison and Empire City Subway were third party beneficiaries of that contract, plaintiff contends that that specific requirement was not for their benefit, so plaintiff's failure to provide the required notice to the City did not waive plaintiff's claims against Consolidated Edison and Empire City Subway. These defendants, however, point out that they would have benefitted from the required notice, especially since many of plaintiff's claims implicated these defendants as well as the City. Had plaintiff provided the required notice of plaintiff's claimed damages, these defendants would have received detailed information from the City about the claims, giving these defendants the opportunity to engage in the contractual arbitration or other dispute resolution process without resort to litigation.

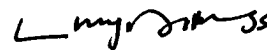
Moreover, in Addendum No. 6 to the contract, plaintiff specifically agreed that: "Utilities are third party beneficiaries of the contract" and are "entitled to rely on and enforce any and all terms and conditions." Kotby Aff. Ex. 2, NYSCEF Doc. No. 145 (Addendum No. 6), art. 3.6. Consolidated Edison and Empire City Subway are defined as "Utilities" in this agreement. Id. art. 1.33.

Consequently, plaintiff also fails to raise a material factual issue that plaintiff complied with the contractual prerequisites to maintain this action against any of defendants. The court considers plaintiff's claims against Consolidated Edison and Empire City Subway waived and grants each of their motions for summary judgment dismissing the claims against these defendants. C.P.L.R. § 3212(b).

V. CONCLUSION

For the reasons explained above, the court grants the motions by the City of New York, Consolidated Edison Company of New York, Inc., and Empire City Subway for summary judgment dismissing plaintiff's claims against each defendant. Id.

DATED: September 28, 2023



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**

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