

**C.D.E. A.C. Co., Inc. v New York City  
Dept. of Env'tl. Protection**

2023 NY Slip Op 34251(U)

December 5, 2023

Supreme Court, New York County

Docket Number: Index No. 652485/2020

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X

C.D.E. AIR CONDITIONING CO., INC.,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION, THE CITY OF NEW YORK

Defendant.

INDEX NO. 652485/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
 MOTION**

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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 were read on this motion to/for PRECLUDE.

The Defendants’ motion to preclude Joseph Wallwork’s expert testimony and report is denied.

The Plaintiff was awarded a contract on July 12, 2005 (the **Contract**) to furnish labor and material necessary to provide all heating, ventilation, and air condition systems (**HVAC**) for the Paerdegat Basin Combined Sewage Overflow Facility (the **Project**). The Plaintiff was one of four prime contractors. Each of the prime contractors was independently responsible for their own work, but each of their contracts contemplated that all of their work on the Project would be started and completed on the same dates. The Contract set forth a period of performance of 1,461 consecutive calendar days, which indisputably was not met. The Plaintiff alleges that the Defendants (i) delayed the substantial completion of the Project by 679 days and (ii) delayed the Plaintiff’s demobilization from the site by 727 days, causing a total delay of 1,406 days. The Plaintiff retained Nautilus Consulting, LLC (**Nautilus**), to determine what damages, if any, the Plaintiff sustained as a result of delays caused by the Defendants. Mr. Wallwork, a professional

engineer and the managing director of Nautilus, determined in his report that the Plaintiff suffered \$4,841,521 in damages caused by the Defendants' delays.

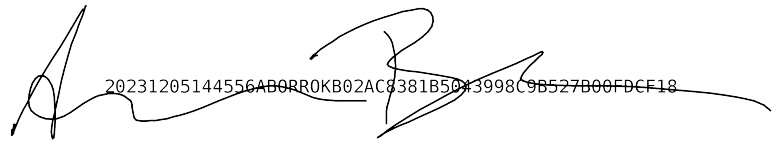
The Defendants now move to preclude Mr. Wallwork's from testifying at trial, arguing that (i) testimony about his report is inadmissible because his report fails to conform to an industry standard because (x) his report only analyzed how certain delays impacted the path to substantial completion of the entire Project, not specifically the path to substantial completion of the Plaintiff's work, (y) the "but-for" analysis in his report does not properly identify how any delays impacted the critical path to substantial completion of the Plaintiff's work or the Project as a whole, and (z) his report and testimony fail to incorporate contractual limitations and requirements in assessing the scope of the Plaintiff's alleged damages and (ii) his testimony improperly offers opinions as to legal standards and the ultimate issues in the case.

In their opposition papers, the Plaintiff argues that (i) Mr. Wallwork's proposed testimony is admissible because his report does conform to industry standards because he properly considered delays to the Project as a whole where the contractual construction schedule contemplated that all the prime contractors, of which the Plaintiff is one, would commence and complete work on the same dates and (ii) the Defendants should be judicially estopped from seeking to preclude Mr. Wallwork's report and testimony because they have identified and submitted a copy of the report and Mr. Wallwork's deposition transcript with accompanying exhibits to be admitted as evidence at trial.

The testimony of an expert is admissible where (i) the expert is qualified by special experience or special knowledge in the field and (ii) the expert's methodology is sufficiently established to have gained general acceptance in the particular field in which it belongs (*Frye v US*, 293 F 1013, 1014 [DC App 1923]; *People v Williams*, 35 NY3d 24, 37 [2020]).

Mr. Wallwork's report complies with the AACE International Recommended Practice guidelines (the **AACE Guidelines**; NYSCEF Doc. No. 86). Pursuant to AACE Guideline 1.5(B)(6), (i) a delay event is compensable where it affects the critical path and (ii) a delay event must cause an increase in the duration of the project because a contractor's delay damages are a function of the overall duration of the project. The Defendants' reliance on AACE Guideline 1.5(B)(5), which stands for the proposition that a sub-contractor's delay must be considered on its own because what is critical to a sub-contractor may not be considered critical to a general contractor, is inapposite. The Plaintiff and other prime contractors were not sub-contractors. They were each prime contractors and the critical path of the Project was tied to each of the prime contractors jointly, such that a delay to one prime contractor caused a delay to the entire Project. Mr. Wallwork therefore could look to the critical path of the Project as a whole in analyzing the Plaintiff's delays and damages. The defendants concerns amount to nothing more than proper cross-examination. For the avoidance of doubt, Mr. Wallwork will not however be permitted to testify as to the legal standard or the ultimate issues in this case.

It is hereby ORDERED that the motion to preclude Mr. Wallwork's proposed trial testimony is denied.



20231205144556ABORROKB02AC8381B5043998C98527B00FDCF18

12/5/2023

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE