SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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SKYLAND DEVELOPMENT CORP.

Plaintiff,

- v -

ELMWOOD VENTURES, LLC,

Defendant.

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INDEX NO. 656645/2019

MOTION DATE 11/17/2023

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 128, 129, 130, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 165, 166, 167, 168, 170, 171

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 94, 95, 96, 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, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 164, 169, 172, 173, 174, 175, 176, 177

were read on this motion to/for SUMMARY JUDGMENT.

Motion Sequence Numbers 003 and 004 are consolidated for disposition. Defendant's motion (003) for summary judgment is denied and plaintiff's motion (004) for summary judgment is denied.

Background

This action concerns a construction contract entered into between plaintiff and defendant. In the contract, plaintiff agreed to perform construction services at a restaurant owned and operated by defendant. The contract provided that defendant was to be paid $1.25 million and that the work was to be completed within 140 days. This work is denoted as Phase 1 (Vanilla Box) in the contract—plaintiff insists that this meant that it was hired to construct, essentially, a

blank canvas and Phase 2 would include the unique designs of the restaurant. Plaintiff brought this case to recover for work for which it claims it was not paid.

Defendant contends that plaintiff failed to complete the work, performed substandard work, and did not meet the deadline under the contract. It argues that on December 10, 2018, it declared plaintiff in default under the terms of the contract and formally terminated the contract on January 14, 2019. Defendant asserts that it hired other contractors to complete the work in February 2019. Defendant also directs the Court to a lien release, which states that the amount left on the contract was $239,035.10 (NYSCEF Doc. No. 89).

In its motion, defendant seeks summary judgment on its counterclaims and to dismiss the complaint. It contends that plaintiff's failure to complete the job caused it significant damages. It argues that the project's delays and the fact that it had to find new contractors resulted in nearly a $1 million in damages.

Defendant emphasizes that it never agreed to any change orders concerning this project and that it never signed any such change orders as required under the terms of the parties' contract. It points to a deposition from its representative who testified that there was only one change order submitted by plaintiff but that defendant never accepted it in writing (NYSCEF Doc. No. 86 at 72). Defendant argues that the lien release shows that plaintiff was paid nearly 80% of the contract price despite the fact that the work was substandard and incomplete.

Plaintiff argues in support of its motion (and in opposition to defendant's motion) that it was wrongfully terminated from the subject project. It argues that when it bid for the project, defendant only provided minimal information about the scope of the work. Plaintiff insists that about a month after the bidding process, defendant provided revised interior design drawings with some more details but plaintiff claims it asked for additional information.

According to plaintiff, the contract that the parties eventually entered into was for the construction of a vanilla box (which plaintiff characterizes as Phase 1) and that the second phase would include a further buildout of the restaurant. It claims that the contract did not specifically bar change orders nor would it have ever entered into a contract that prohibited change orders, particularly given the unfinished drawings it initially received from defendant.

Plaintiff details that during the project it encountered design deviations and other conditions that changed the proposed scope of work. It claims that it submitted change orders to account for these items (such as the relocation of the sprinkler system, additional AC units) but that defendant refused to accept these change orders. Plaintiff insists that defendant accepted the work but refused to pay for the work. Plaintiff observes that in order to complete these tasks (and to keep good relationships with its subcontractors), it had to self-fund many of the payments to its subcontractors.

Plaintiff observes that in November 2018, defendant hired Nucatola Development LLC ("Nucatola") to act as defendant's representative. It alleges that in December 2018, it met with Nucatola to go over various "punch list" items cited by Nucatola and that plaintiff was told to accelerate its work timeline. Plaintiff observes that it was told by Nucatola that it would be paid for the open change orders as part of Phase 2.

Plaintiff claims it was shocked by the seven day termination letter dated December 10, 2018. It argues that the work was about 95% completed and that the termination notice was not accompanied by an architect's certification as required by the contract. Plaintiff insists that it was subsequently terminated from the project because defendant did not want to pay the full amount due under the contract or for the extra work it did.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (id.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], affd 99 NY2d 647, 760 NYS2d 96 [2003]).

Defendant's Motion

The Court denies defendant's motion as there are numerous issues of fact. There are plainly issues of fact relating to whether plaintiff actually breached the contract. According to plaintiff's witness, the initial drawings did not have much detail (NYSCEF Doc. No. 87 at 23).

Plaintiff insists that this led to many problems with the construction and led to additional costs. The Court observes that the proposal containing the $1.25 million fee cited numerous construction assumptions (NYSCEF Doc. No. 156 at 14 of 14) that turned out to require more expenses. In other words, plaintiff raised an issue of fact by noting that the contract was based, in part, on assumptions that entailed revising the work to be performed.

As plaintiff points out, the contract contained clauses specifying that:

> "By appropriate Modification, changes in the Work may be accomplished after execution of the Contract. The Owner, without invalidating the Contract, may order changes in the Work within the general scope of the Contract consisting of additions, deletions, or other revisions, with the Contract Sum and Contract Time being adjusted accordingly. Such changes in the Work shall be authorized by written Change Order signed by the Owner, Contractor, and Architect, or by written Construction Change Directive signed by the Owner and Architect. Upon issuance of the Change Order or Construction Change Directive, the Contractor shall proceed promptly with such changes in the Work, unless otherwise provided in the Change Order or Construction Change Directive" (NYSCEF Doc. No. 81, § 13.1).

The contract also provided that:

> "If concealed or unknown physical conditions are encountered at the site that differ materially from those indicated in the Contract Documents or from those conditions ordinarily found to exist, the Contract Sum and Contract Time shall be equitably adjusted as mutually agreed between the Owner and Contractor; provided that the Contractor provides notice to the Owner and Architect promptly and before conditions are disturbed" (*id*. § 13.4).

Defendant's assertion that it had a no change order policy is belied by the above paragraphs which contemplate a process for change orders. And the testimony from defendant's witness that plaintiff agreed (while the parties were in negotiations) not to submit any change orders (NYSCEF Doc. No. 84 at 21) is not a basis upon which this Court could grant summary judgment. The contract contains a clause stating that "The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral" (NYSCEF Doc. No. 81, § 7.2). Therefore,

references to prior oral agreements have no effect on the final contract which, as noted above, contains a process for change orders.

But, more importantly, the communications between plaintiff and Nucatola, defendant's representative, expressly references change orders to permit plaintiff to finish the items on the punch list (NYSCEF Doc. No. 161). The Court makes no finding that this entitles plaintiff to recover on a change order; the Court merely finds that these emails raise questions about defendant's assertion that there was some agreement that there would be no change orders. Defendant's representative cannot mention change orders and allegedly direct plaintiff to do additional work only for defendant to then insist it need not pay for that extra work.

And the record contains allegations that the construction job was far from detailed and so, according to plaintiff, its work would necessarily involve change orders to accommodate the specifics that defendant wanted. Plaintiff's version of events is that the project contained only a barebones description and as the project developed, plaintiff was compelled to do extra work as the initial proposal was only an estimate. The Court cannot find as a matter of law that plaintiff was barred from seeking payments based on its change orders.

And, of course, this Court cannot conclude as a matter of law that plaintiff's work was shoddy or substandard. That must be determined by a fact finder.

Moreover, even if the Court could conclude that plaintiff failed to complete the work, there are issues of fact about damages. Defendant claims that plaintiff's failures led to over $965,000 in damages and lists various expenses it insists it should recover, including costs associated with hiring other contractors and delay costs (including rent) (*see* NYSCEF Doc. No. 79, ¶ 73). However, the contract between the parties contains a provision entitled "Waiver of

Claims for Consequential Damages" (NYSCEF Doc. No. 81, § 21.11). This included a waiver of:

> "1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
>
> 2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work" (*id*.).

A fact finder must assess what amount of those damages are actually permissible under the contract and which are barred by the terms of the contract.

Plaintiff's Motion

The Court denies this motion as it was not made within 120 days after the filing of the note of issue. "As the Court of Appeals has repeatedly reiterated, court-ordered time frames are requirements to be taken seriously by the parties . . . Whatever the source of the deadline with which a party fails to comply, the lateness may not be excused without a showing of good cause within the meaning of CPLR 3212(a)-a showing of something more than mere law office failure" (*Quinones v Joan and Sanford I. Weill Med. Coll. and Graduate School of Med. Scis. of Cornell Univ.*, 114 AD3d 472, 473, 980 NYS2d 88 [1st Dept 2014] [denying a summary judgment motion as untimely]).

Plaintiff acknowledges that its motion was not timely filed and claims it waited until the late evening of July 10, 2023 (deadline day) to start uploading documents. It complains that because it had so many documents to file, it took until seven minutes after the deadline had passed in order to file the motion. The metadata for this motion sequence on NYSCEF indicates that all documents were received by NYSCEF at 12:07 a.m., *after the deadline*.

Unfortunately, plaintiff did not cite good cause for this late filing. In fact, no explanation was offered until after defendant pointed out the untimely filing in opposition and plaintiff addressed it in reply (*see Miral, Inc. v Kovac Media Group, Inc.*, 212 AD3d 479, 479, 179 NYS3d 899 (Mem) [1st Dept 2023] [affirming the denial of untimely summary judgment motions]). Waiting until the very last moment of a 120-day deadline to file a motion and then missing the deadline is certainly not good cause. Poor planning and execution do not compel the Court to overlook a clear deadline. Plaintiff's argument that the 120-day deadline imposed by the CPLR and this part's rules should be viewed as a guideline is without merit. The fact is that this deadline is a bright line rule (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 83, 978 NYS2d 13 [1st Dept 2013]).

"Law office failure is insufficient to demonstrate the good cause necessary to permit an untimely summary judgment motion" (*Hennessey-Diaz v City of New York*, 146 AD3d 419, 420, 44 NYS3d 404 [1st Dept 2017]). The Court views the untimely filing to constitute mere law office failure. And plaintiff did not cite a single case for the proposition that filing a summary judgment motion seven minutes after the deadline is *de minimis* and therefore must be overlooked by the Court. The Court declines to open the gates to that slippery slope—what constitutes a *de minimis* missed deadline for a summary judgment motion where no good cause is cited.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment (MS003) is denied; and it is further

ORDERED that plaintiff's motion for summary judgment (MS004) is denied.

11/30/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE