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| <b>Resetarits Constr. Corp. v Norfolk S. Ry. Co.</b>                                                                                                                                                                           |
| 2024 NY Slip Op 35569(U)                                                                                                                                                                                                       |
| September 5, 2024                                                                                                                                                                                                              |
| Supreme Court, Erie County                                                                                                                                                                                                     |
| Docket Number: Index No. 808585/2022                                                                                                                                                                                           |
| Judge: Deborah A. Chimes                                                                                                                                                                                                       |
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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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RESETARITS CONSTRUCTION CORPORATION,  
PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Plaintiffs,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,  
WNY GALBO, INC.,

Defendants.

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DECISION

Index No. 808585/2022

Plaintiff, Resetarits Construction Corporation, moved for an Order of partial summary judgement pursuant to CPLR 3212; for a determination that the contract between plaintiff and Norfolk Southern Railway Company, (hereafter, NSRC) was terminated "for convenience" under Section 3.7 of the contract; and to dismiss the counterclaim of NSRC, (NYSCEF motion 7). NSRC opposed the motion.

This matter revolves around claimed breaches of a construction contract between plaintiff and NSRC. Norfolk Southern is an interstate rail carrier. Plaintiff was hired by NSRC to perform construction at the Bison Yard Car Shop in Cheektowaga, New York. Norfolk Southern and Plaintiff entered into a contract on April 6, 2021.

At issue are two clauses in the contract and a termination letter dated October 21, 2022. The two contract clauses are as follows:

**3.7. Termination.** Railway shall have the right at any time and for any reason to cancel this Contract upon giving written notice to Contractor. Upon such termination, Railway shall pay to Contractor any amounts accrued and outstanding under this Contract, provided that Railway shall be entitled to withhold payment of any such amounts to the extent provided in Section 4.5 and/or Section 4.6 hereof.

**3.8. Failure of Performance by Contractor.** If Contractor, in the opinion of the Engineer, shall at any time fail to comply with any provision of this Contract, Railway may provide Contractor with ten (10) days' written notice requiring Contractor to remedy such failure. If Contractor has failed to remedy such failure at the end of such ten-day period, Railway may, at its option, terminate this Contract and relet the whole or any part of the unfinished Work without further notice to Contractor, or may take possession of Contractor's equipment, materials, tools, and supplies located on the premises and employ such forces as may be necessary to finish all or any part of the Work. To the extent that all or any part of the Work is relet or undertaken by Railway as provided herein ("Relet Work"), Contractor shall, notwithstanding the termination of this Contract, reimburse Railway for the full cost to Railway of having Relet Work performed. The cost of Relet Work undertaken by Railway shall be deemed to equal the direct cost thereof to Railway plus 10 percent for overhead expense. The foregoing remedy shall not be exclusive of, but in addition to, any other remedies available at law or in equity.

Termination under section 3.7 of the contract is known as a termination "for convenience" and termination under section 3.8 a termination "for cause". The manner in which the contract was terminated carries consequences regarding damages.

This action was initially commenced on July 26, 2022. On October 21, 2022, counsel for NSRC sent correspondence to counsel for plaintiff terminating the contract. The correspondence lists what NSRC claims are material breaches of the contract on the part of plaintiff and declares, relying on the listed breaches, plaintiff, "to have defaulted on the Project Contract and the Project Contract is hereby terminated." The correspondence also states: "Pursuant to Section 3.7 of the Project Contract, Norfolk Southern hereby terminates the Project Contract."

In support of the motion for partial summary judgment, plaintiff argues that there is no question of fact because NSRC terminated the contract for convenience. In opposition, NSRC argues that the contract was terminated for cause.

A party moving for summary judgment "must make 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposition papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] citations omitted).

Though the October 21, 2022, correspondence, written by counsel for NSRC, lists reasons for the termination, it concludes by clearly invoking the termination clause of section 3.7. That clause, which is referred to as the termination for convenience clause allows defendant to terminate the contract "for any reason" and limits payment to any amounts accrued and outstanding under the contract. Where defendant elected to terminate for convenience, "whether with or without cause," defendant cannot counterclaim for the cost of curing any alleged default (*See Tishman Const Corp, Inc. v City of New York*, 228 A.D. 2d 292, 293 [1st Dept. 1996]).

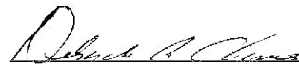
Regarding defendant's argument that it may change the basis for its termination, the Court finds this argument unpersuasive. No such right was reserved in the contract and to invoke such a right after the fact would prove the contract termination clauses meaningless.

Regarding defendant's argument that plaintiff took a contrary position in another judicial proceeding and is therefore estopped, the Court rejects the argument on the basis that the prior document was not verified and even if it was, it does not contradict the position taken by plaintiff in this litigation.

Plaintiff's motion for a determination that the contract was terminated for convenience under 3.7 of the Contract is granted and defendant's counterclaim for costs to cure any defects dismissed.

Counsel for plaintiff is to prepare and e-file an Order on approval of counsel for defendant. The Order shall refer to and attach the Court's Decision and be submitted in 30 days.

DATED: September 5, 2024  
Buffalo, New York

  
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Hon. Deborah A. Chimes, J.S.C.