SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 11

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STONEWALL CONTRACTING CORP.,

Plaintiff, Decision and order

- against - Index No. 503994/12

THE LONG ISLAND RAILROAD COMPANY, May 4, 2017

Defendants

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking summary judgement to dismiss various affirmative defenses and counterclaims. The defendant has cross moved seeking summary judgement on the same claims. The motions have been opposed respectively. Papers have been submitted and arguments held and after reviewing all the arguments this court now makes the following determination.

In December 2005 the plaintiff Long Island Rail Road [hereinafter 'LIRR'] entered into a construction contract with plaintiff Stonewall Contracting Corp. [hereinafter 'Stonewall']. The contract involved extensive renovations to the entry pavilion and ticket office of the LIRR Atlantic Terminal in Kings County. The contract was scheduled to commence January 2006 and to be completed August 2008. An adjacent retail complex operated by F.C. Hanson was developed at the same time, while the construction was ongoing. Stonewall experienced delays and

submitted monthly reports detailing the work performed, the delays encountered and the impact those delays would have on the ultimate completion of the project. Indeed, on March 11, 2009 Stonewall submitted a request for equitable adjustment to the contract and such requested was granted by LIRR. Furthermore, on May 31, 2011 LIRR issued Modification #26 which extended the completion date of the contract to May 31, 2011. However, additional delays ensued and on May 25, 2012 Stonewall submitted an additional request for equitable adjustment in the amount of $4,329,619.36. LIRR rejected the request on the grounds it was untimely and that in any event Stonewall waived its rights in this regard and that it had already been settled. This lawsuit followed wherein Stonewall seeks to recover those costs.

Stonewall has now moved seeking summary judgement dismissing various affirmative defenses and counterclaims. Specifically, Stonewall seeks to dismiss the first and second affirmative defenses which claim Stonewall has already settled any claims against the LIRR based on a settlement with FC Hanson. The fourth affirmative defense concerns the defense the matter is time barred and hence Stonewall's claims must be dismissed. In addition, Stonewall seeks to dismiss three counterclaims. The third counterclaim concerns liquidated damages. The fourth counterclaim concerns quasi-contractual claims and the fifth counterclaim relates to costs and fees related to the settlement

with FC Hanson. LIRR seeks summary judgement on those very same defenses and counterclaims.

Stonewall's request seeking summary judgement is essentially premised upon two factors, namely that the claims are timely since the ninety day time limit never even began and that there was never a waiver of any claims for damage delays.

Concerning the first assertion regarding timeliness, the contract required Stonewall to commence any legal action against LIRR, such as the present action, "within 90 days following Construction Completion or termination for any reason" (see, Contract, Section X-3.1, submitted within the Notice of Cross-Motion, Exhibit 13). Construction completion is defined in the contract following a paragraph heading entitled 'substantial completion' (see, Contract, Section V-3.2, submitted within the Notice of Cross-Motion, Exhibit 13) . According to that provision "substantial completion occurs when the Work, or any milestone of the Work, has been completed to the point that only punch list items remain and the Work or that portion thereof is substantially fit for the purpose intended. The contractor shall request the Railroad, in writing, for an initial inspection which, upon satisfactorily completion [sic] will result in a Railroad issued Certificate of Substantial Completion" (supra). The following section of the contract, Section V-3.3 entitled 'construction completion' describes what happens next. Thus,

when the contractor believes "it has completed all the Work, including, but not limited to, the previous punch list items, the Contractor shall notify the Railroad in writing, that Contractor considers the Work to have achieved the status of construction completion" (id). That notice then requires the LIRR to conduct an inspection within 15 days of receipt of the notice and notify the contractor, in writing, of the results of that inspection. The contract is ambiguous regarding the procedures where the LIRR, upon its initial inspection, concludes that construction completion has occurred. Rather, the contact describes the scenario where "if the Work is evaluated as unsatisfactory due to non-conformances, defects, omission, or failure to complete, the Railroad will notify the Contractor, in writing, which requirements have still not been met" (id). The contract then states that "upon completion of the punch list items, the Contractor shall notify the Railroad, in writing, and the Railroad will, within fifteen (15) days, arrange for a final inspection of the Work. The Railroad will then inspect the punch list items to determine if the Contractor has achieved Construction Completion. Should the final inspection result in the resolution of all such items, the Railroad will issue the Contractor, within fifteen (15) working days of the final inspection, a Certificate of Construction Completion" (see, Contract, Section V-3.3, submitted within the Notice of Cross-

Motion, Exhibit 13).

Thus, the contract is quite clear that the Contractor must submit to the LIRR at least two, and possibly three, notices that it has reached substantial and then complete construction. The contract is equally clear that the LIRR must submit at least one, and possibly two, notices of inspection. There is no dispute in this case that neither the requests by Stonewall or the notices by LIRR were ever properly served. The defendant's statement of material facts, which the plaintiff did not dispute, states that "on December 17, 2009, Stonewall asked LIRR to deem the work to be "substantially complete" in accordance with the terms of the contract" (see, Defendant's Statement of Material Facts, ¶ 14). The source for this assertion is contained in Exhibit 16 of the Defendant's Opposition, in the form of an e-mail from Ed Krause an engineer employed by Stonewall, dated December 29, 2009, to the president of Stonewall Danny Sawh asking to send an email to the LIRR informing them that "we were substantially complete on 12/17/09" (id). Indeed, the e-mail contained the text of a further e-mail that Mr. Krause intended to send to the LIRR stating that "all systems...were tested and fully operational for the 12/17/09 opening of the new facility to the public" (id). A few hours later, Mr. Sawh responded to Krause "Good idea Ed. Do it" (id). There is no evidence presented if in fact that e-mail or one of similar content was ever forwarded to the LIRR. Even

if it was forwarded, that surely did not comply with the provisions of the contract. First, the "writing" was forwarded at least ten days after the alleged completion date. More significantly the notice, if one was sent, did not mention an inspection and no inspection was ever conducted by the LIRR. Thus, it is clear that both parties failed to fulfill the provisions of the contract in this regard.

LIRR argues that since the construction project was completed by May 31, 2011, the date the final contract modification was issued, the lawsuit filed 547 days after that date is woefully late. However, as noted, each party had obligations that remained unfulfilled. Thus, the reality that the project was, of course, completed by that date does not undermine the claims of Stonewall or render them late but rather reflects the mutual waiver of the notice and inspection provisions of the contract. Both Stonewall and LIRR failed to perform the above enumerated provisions of the contract and failed to insist the other party also so perform. This conduct can only be considered a mutual waiver of these provisions. Thus, Stonewall is not relying on a "technicality to infinitely extend its time to bring suit" (see, LIRR's Memorandum of Law in Opposition to the Plaintiff's Motion, page 5) but is rather relying upon a mutual waiver of these strict contractual limitations. Moreover, since both parties mutually waived the

notice and inspection requirements there is no "absurdity" (id. at page 6) allowing Stonewall's claims.

Consequently, Stonewall's commencement of the lawsuit was timely and Stonewall's motion seeking summary judgement dismissing LIRR's fourth affirmative defense is granted and LIRR's motion in this regard is denied.

Turning to the issue whether Stonewall waived its claims, LIRR argues that Stonewall failed to notify LIRR of any delays within 5 days as required by the contract and that in any event Stonewall waived any claims for delay damages by agreeing to the contract modifications which precipitated the delays without any further changes. Specifically, LIRR asserts that three of the delay damage claims for which Stonewall now seeks compensation, namely the reduction of the Hanson Place staging area, the redesign of the smoke purge and fire alarm system and additional grouting and dip pans were all approved pursuant to various contract modifications (Modifications, 16, 19, 24 and 22 respectively) and that such modifications represented the maximum obligation. Thus, by agreeing to the modifications, Stonewall cannot at this juncture seek additional delay damage claims. The fourth delay damage claim concerns the fabrication of canopy glass which the LIRR argues was caused by the LIRR's architect and consequently cannot form the basis of a claim.

Concerning the first three claims, it is true that "each of the Contract modifications that Stonewall signed was itself a contract" (id. at page 15). However, the modifications still had to comport with the entire contract as a whole. Thus, the modifications could not abrogate or render null any other substantive provision of the contract, especially the provisions that extensions of time, preceded by a five day notice, and the provision detailing contractor damages for delays, are proper. The contract itself acknowledges this reality. In Section VII § 1.4.6 entitled Contract Modifications the contract states that "when mutual agreement as to scope, price and schedule impact have been achieved on a change, the change will be incorporated into the Contract via a Modification issued to the Contractor by the Railroad" (id). The very next section entitled Cost Determination states that "cost determination for claimed costs associated with delay shall be in accordance with the Article titled 'Contractor Damages for Delay' in the Section titled Provisions Relating to Time, and this 'Changes' Article" (id). Thus, there are three provisions of the contract that must be examined to determine the scope of delay damages, changes and extensions of time which will demonstrate that any Modifications could not abrogate further requests in these matters.

The provision entitled 'Contractor Damages for Delay' (section V-6) provides that the Railroad is responsible for

damages for delay provided Stonewall proves the following four items, namely that it did not cause the delay, the delay lengthened the path to completion, the delay did not include any concurrent delays by Stonewall and the delay was "clearly beyond what the Contractor and the Railroad should have contemplated with proper investigation for the type of Work being performed" (supra at V-6.1). Section 6.3 states that "other than in the circumstances set forth above, the Railroad shall not be liable for any claims for damages for delay associated with a delay in the performance of this Contract occasioned by any cause whatsoever. Any such claim shall be fully compensated for by an extension of time to complete performance of the Work as provided herein" (id). Thus, these provisions only contemplate delay damages when the four enumerated criteria above have been satisfied. There is no five day notice requirement, indeed, there does not seem to be any notice requirement at all provided "the Contractor submits with any such claim, evidence, satisfactory to the Railroad" (supra at 6.1). Any other claim for delay damages must be brought pursuant to a different provision of the contract. The next contract provision is contained in Section V-4.0 entitled "Extension of Time" (see, Contract, Section V-4.0, submitted within the Notice of Cross-Motion, Exhibit 13). Section 4.1 states that "revised completion dates for the Work will be authorized in writing by the Railroad

Procurement Officer only if the Contractor has been necessarily delayed in meeting the completion dates set forth in these Contract Documents by a cause which" was not the fault of the contractor, the cause was not anticipated, the cause necessarily resulted in a delay and the delay could not be avoided or mitigated (id). Section 4.4 states that "the Contractor shall give written notice including an explanation and anticipated schedule impact to the Railroad within five (5) days after the time the Contractor knows or should have known of any cause which might under reasonably foreseeable circumstances result in delay for which it may claim an extension of time...failure of the Contractor to give written notice shall be a waiver of an extension of time for the cause of delay in question" (id). In these provisions, the five day notice is critical and the basis for the delays are impacted by differing circumstances than those of the other section.

The third set of provisions are contained in Section VII entitled 'Changes to the Contract' (supra). Section VII-1.1 states that these changes may include "revisions to the drawings, specifications, method and manner of performance of the Work, including additions, deletions in whole or in part, and acceleration of the work" (id). Further, as noted ¶ 1.4.7 states that any costs associated with delay shall be governed pursuant to Section VI and the 'Changes' article (Section VII). As noted,

Section VI does not have a five day notice requirement. Thus, any modifications made pursuant to the 'Changes' provisions of the contract may expressly permit delay damage claims provided they satisfy the criteria of Section V-6.

Thus, regardless of any language contained in any modification prohibiting further delay damage claims, the contract expressly permits such claims provided they meet the contractual criteria enumerated. Therefore, Stonewall did not categorically waive any delay damage claims.

The question that now must be addressed is whether Stonewall's claim in this action is one based upon Section V-6, in which no five day notice is required, or Section V-4, in which the five day notice is required and even if required whether there was compliance with that notice provision.

It is well settled that in the State of New York a no-damages delay clause is generally enforceable (Corinno Civetta Construction Corp., v. City of New York, 67 NY2d 297, 502 NYS2d 681 [1986]). There are, though, situations where a no-damages delay clause will be held unenforceable and one of those situations concerns claims for uncontemplated damages (Buckley & Co. Inc., v. City of New York, 121 AD2d 933, 505 NYS2d 140 [1st Dept., 1986]). Of course, the contract in this case does not contain a no-damage delay clause, however, the clause does prohibit delay damage claims for "contemplated" delays. LIRR

argues that the same standard should apply and presents cases such as Blau Mech. Corp. v. City of New York, 158 AD2d 373, 551 NYS2d 228 [1st Dept., 1990] and Buckley, (supra) for the proposition that since there were modifications agreed upon by the parties any delays which flowed therefrom were necessarily contemplated. However, the judicial imposition of an exception for uncontemplated delays which is based upon a concept of "mutual assent" (see, Corinno Civetta, supra) cannot have the selfsame standard as a clause actually contained within the contract since that would render the actual clause in the contract entirely superfluous. There would be no need to include language which subsequent cases have already deemed included. Thus, the actual language of the contract provides greater protections that the exception created for no-damage clause cases.

Consequently, it cannot be said as a matter of law that the four enumerated items were all contemplated and hence no recovery is possible. Likewise, there are factual questions concerning the nature of the four claims that prevent a conslusory determination they were uncontemplated. Rather, the factual issues related to each of the four claims must be presented before a trier of fact to determine whether they were contemplated. Therefore, the motions seeking summary judgement in this regard are all denied and the matters must be presented

to a jury. Should a jury determine that any of the matters were contemplated, the parties may then file further motions to ascertain whether the claims now derive from Section V-4.0 of the contract, which will necessarily require an examination of the five day notice provision.

The court has already determined that the modifications are valid despite the fact Stonewall can maintain actions for damage delay. Therefore, the motion seeking to dismiss the fourth counterclaim based upon quasi-contractual claims is granted and the cross-motion in this regard is denied.

Concerning the third counterclaim for liquidated damages, it is clear that Section V of the contract concerns "Liquidated Damages for Contractor Delay" clearly authorizing liquidated damages only where there is contractor delay. Thus, delay caused by LIRR or concurrently by LIRR and Stonewall does not entitle LIRR to liquidated damages. Further, there is no merit to the argument presented by LIRR that Modification 26 was never agreed upon by the parties since a handwritten notation by Stonewall was deemed a "counteroffer" which was never accepted and that consequently LIRR is entitled to liquidated damages. First, that argument which appears on page 24 of LIRR's opposition contradicts arguments presented on page 13 of the same opposition papers. On page 13 LIRR argued that "Mr. Sawh's handwritten note

on Modification 26 is completely ineffectual" and on page 14 asserted that "with regard to Stonewall's hand-written reservation of rights on Modification 26, even assuming that such a reservation was effective, it could not revive all of the other delay claims...." clearly arguing the notation was a nullity. More significantly, LIRR repeatedly accepted Modification 26 and thus as a matter of law Modification 26 has been contractually agreed to by the parties. Therefore, the motion seeking to dismiss the third counterclaim is granted and the cross-motion in this regard is denied.

Lastly, without opposition, Stonewall's motion seeking to dismiss the fifth counterclaim and the first and second affirmative defenses are granted.

So ordered.

ENTER:

DATED: May 4, 2017
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC