

<b>Hailey Insulation Corp. v WDF, Inc.</b>
2018 NY Slip Op 32717(U)
October 22, 2018
Supreme Court, New York County
Docket Number: 652470/2018
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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HAILEY INSULATION CORPORATION

Plaintiff,

- v -

WDF, INC.,

Defendant.

INDEX NO. 652470/2018

MOTION DATE 10/19/18

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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HON. BARRY R. OSTRAGER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33

were read on this motion to/for DISMISSAL

HON. BARRY R. OSTRAGER:

Plaintiff Hailey Insulation Corporation (“Hailey”) is a subcontractor hired by WDF, Inc. (“WDF”), as contractor, to install insulation and fireproofing on plumbing and HVAC systems for a building being developed by Columbia University. Plaintiff alleges that it completed all work under the subcontract despite extensive delays caused by Defendant’s mismanagement. Plaintiff alleges that there is \$1,341,480 due and owing under the subcontract with Defendant and that Plaintiff is entitled to delay damages. Defendant moves to dismiss the complaint pursuant to CPLR § 3211 because, *inter alia*, the causes of action are barred by a contractual one-year statute of limitations. For the reasons stated herein, the motion to dismiss is granted in part.

In 2013, non-party Lend Lease, a construction management firm, was hired by Columbia University to construct the Columbia Mind and Brain Building (the “Project”). In 2014, Lend Lease entered into a contract with WDF to provide plumbing and HVAC construction on the Project.

On July 7, 2014, WDF entered into a subcontract with Hailey to install insulation and fireproofing on the plumbing and HVAC systems at the Project. From early in the subcontract work, Hailey alleges it became aware that the Project plans did not reflect a realistic schedule. Mismanagement purportedly resulted in constant delays, as a result of which Hailey incurred substantial and unanticipated costs for labor and material.

On November 18, 2014, Hailey notified WDF of the site conditions affecting its work on the Project. (*See* Tung Aff. Ex. 3 [NYSCEF Doc. 13]). In February and March of 2015, Hailey and WDF were apparently in contact with their respective attorneys regarding problems with the Project. (*See* Buckman Aff. Ex. C [NYSCEF Doc. 23]). On March 5, 2015, WDF told Hailey that it was “handling the case at this time” and that Hailey should “forward [its] claim and all supporting documentation to [WDF].” *Id.* Donald Donnelly, the Project Executive at Hailey, states in his affidavit that WDF’s representatives repeatedly told him and his wife not to sue WDF “but instead to wait for WDF to file its own claim against Lend Lease.” (Donnelly Affidavit [NYSCEF Doc. 26]). Thus, Hailey alleges that WDF made at least oral representations to Hailey that WDF would include Hailey’s claims for damages in an action brought by WDF against Lend Lease.<sup>1</sup> WDF now seeks to dismiss the contract and quasi-contract causes of action asserted by Hailey.

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<sup>1</sup> WDF did, ultimately, file an action against Lend Lease and other defendants (the “WDF Action”). It is not entirely clear whether the WDF Action includes Hailey’s claims for damages, but counsel for Hailey represented at oral argument that the WDF Action does not include Hailey’s claims. In any event, that action is scheduled for a bench trial on 10/23/2018. **HAILEY INSULATION CORPORATION vs. WDF, INC.** Page 2 of 7  
Motion No. 001

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction .... Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Further, “[i]t is well-settled that [] an agreement, which modifies the statute of limitations by specifying a shorter, but reasonable period within which to commence an action, is enforceable provided it is in writing.” *Brintec Corp. v. Akzo N.V.*, 171 A.D.2d 440, 440-41 (1st Dep’t 1991).

WDF argues that the subcontract contains a one-year statute of limitations on all causes of action arising out of the agreement, thus barring Hailey’s complaint in its entirety because it was commenced well beyond a year after Hailey had knowledge of WDF’s purported breaches. WDF also argues that Hailey failed to provide the contractually necessary pre-litigation notice of its claims before commencing the action.

The subcontract states:

No action or proceeding shall be maintained by Subcontractor ... against Contractor ... unless the following occur: (a) Such action or proceeding is commenced within one (1) year after Subcontractor or its representatives knew or should have known of the facts constituting the basis of its claim, or within the otherwise applicable statute of limitations, whichever is shorter; and (b) Two (2) months prior to commencing said action or proceeding ... Contractor receives written notice of each claim.... (Buckman Aff. Ex. B [NYSCEF Doc. 22]).

Hailey argues in opposition that WDF should be equitably estopped from asserting the one-year contractual statute of limitations as a defense because WDF told Hailey not to commence an action and that WDF would instead commence an action, covering Hailey’s claims, against Lend Lease. Hailey thus justifiably relied on WDF’s repeated representations that

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trial before Justice Ostrager on February 13, 2019. *See WDF, Inc. v. Trustees of Columbia, et al.*, Index No. 651250/2016.

WDF would pursue Hailey's claims in a separate action. These communications likewise satisfy the pre-litigation notice requirement in the subcontract.

Equitable estoppel acts to "bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing ... which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding." *Zumpano v. Quinn*, 6 N.Y.3d 666, 673 (2006). Thus, "equitable estoppel will apply where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action," so long as the "plaintiff ... demonstrate[s] reasonable reliance on the defendant's misrepresentations." *Id.*

Here, as is generally the case, equitable estoppel presents several issues of fact warranting at least further discovery and precluding dismissal of the complaint on a pre-answer motion. *See Jobim v. Songs of Universal, Inc.*, 732 F. Supp. 2d 407, 422 (S.D.N.Y. 2010) (equitable estoppel is "generally a question of fact for the jury"). Plaintiff has submitted email correspondence and an affidavit from a Hailey principal sufficient to raise factual issues as to whether WDF made oral representations to Hailey that it would pursue Hailey's damages in an action against Lend Lease, as well as whether Hailey justifiably relied on such representations in failing to commence this action within the one-year statute of limitations.

As for the subcontract's pre-litigation notice requirement, Hailey's correspondence with WDF in late 2014 and early 2015 seemingly provided sufficient notice to WDF of Hailey's potential claims. For those reasons, WDF's motion to dismiss the breach of contract claim is denied without prejudice to raising the statute of limitations defense following discovery.

Plaintiff's quasi-contract claims sounding in quantum meruit and restitution must be dismissed because the subcontract is valid and governs the subject matter of Plaintiff's claims. It

is well settled under New York law that “the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987). Here, the subcontract covers the subject matter at issue and thus the quasi-contract claims are duplicative of the breach of contract claim and must be dismissed as such.

To the extent Hailey alleges that it expended additional time and labor to complete work on the Project, Article 9 of the subcontract explicitly states that “if work is added, the subcontractor shall be fairly compensated.” (Buckman Aff. Ex. B [NYSCEF Doc. 22]). Article 9 of the subcontract thus governs because it “specifically provid[es] for project design changes with adjustments in compensation contemplated in light of those changes.” *Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 389. The existence of a valid subcontract governing change orders, additional time expended, and extra compensation precludes claims sounding in quasi-contract.

Finally, WDF moves to dismiss Hailey’s fourth cause of action seeking delay damages. The subcontract states: “The Subcontractor acknowledges that the Subcontract Price is based on the fact that the Contractor is not liable, absent actual fraud or intentional misconduct, for any damages or costs due to delays, accelerations, impact, non-performance, interferences with performance, suspension or change in the performance or the sequence of the Contractor’s Work.” (Buckman Aff. Ex. B [NYSCEF Doc. 22]). The Court of Appeals has held that a “clause which exculpates a contractee from liability to a contractor for damages resulting from delays in the performance of the latter’s work is valid and enforceable and is not contrary to public policy if the clause and the contract of which it is a part satisfy the requirements for the validity of contracts generally.” *Corinno Civetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297, 309

(1986). The exception to the rule stated by the Court of Appeals allows for damages to be recovered for: “(1) delays caused by the contractee’s bad faith or its willful, malicious, or grossly negligent conduct, (2) unanticipated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee’s breach of a fundamental obligation of the contract.” *Id.*

Here, the allegations that the delays were caused by WDF’s bad faith or grossly negligent conduct are entirely conclusory and are clearly intended to fit within the exceptions stated in *Corinno*. See *WDF Inc. v. Trustees of Columbia University in City of New York*, 156 A.D.3d 530, 530 (1st Dep’t 2017) (“While the complaint here recites a list of purported causes for delays ... it makes no factual allegations supporting the conclusory claim that such alleged delays fell within the exceptions to the no-damages-for-delay rule.”). The delays are not so unreasonable as to constitute an intentional abandonment of the contract, nor do they result from a breach of the fundamental obligations of the contract. Further, the delays of a subcontractor on this type of construction project are reasonably foreseeable and thus cannot be said to be “unanticipated” within the meaning of the *Corinno* exception. Therefore, Defendant’s motion to dismiss Plaintiff’s fourth cause of action for delay damages is granted.

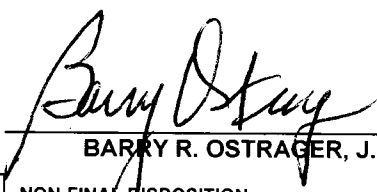
Accordingly, it is hereby

ORDERED that Defendant’s motion to dismiss is granted as to the first, second, and fourth causes of action. The Clerk is directed to dismiss and sever those causes of action; it is further

ORDERED that Defendant’s motion to dismiss is denied as to the third cause of action alleging breach of contract; it is further

ORDERED that Defendant shall file an answer within twenty days of this decision; and it is further

ORDERED that the parties appear for a preliminary conference on November 20, 2018 at 9:30 a.m.

<u>10/22/2018</u> DATE		 BARRY R. OSTRAGER, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE