

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

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GOTHAM CONSTRUCTION COMPANY, LLC, :
 :
Plaintiff, : Index No. 116256/10
 :
-against- : DECISION AND ORDER
 :
SENTRALE CONSTRUCTION CORPORATION, : Sequence No. 001
 :
Defendant. :
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MELVIN L. SCHWEITZER, J.:

This matter arises out of the construction of residence halls at Fordham University in the Bronx. It involves the timeliness of claims by a subcontractor for payment for work performed for the general contractor.

Background

On April 24, 2008, plaintiff Gotham Construction Company, LLC (“Gotham”) was retained as the general contractor for the construction of two new residence halls at the Fordham University Rose Hill campus in the Bronx. Defendant Sentrale Construction Corporation (“Sentrale”) submitted a proposal to perform the initial substructure work at the Fordham job site including, among other things, site clearing and excavation, pile driving, and concrete retaining wall and foundation work. On August 20, 2008, Sentrale and Gotham entered into a formal subcontract (“Subcontract”). The Subcontract details Sentrale’s job specifications, and provides that Sentrale will complete the work in a set period of time, in exchange for the payment of twelve million dollars. Specifically, the Subcontract payment covers:

- (a) all Work provided for in the drawings and specifications, together with all work reasonably inferable therefrom, and

(b) all increases in costs for work based on the mutually agreed schedule, including, without limiting the generality of the foregoing, labor and materials, the cost of all of which is to be borne solely by [Sentrale] except for unavoidable delays as that term is defined in the general conditions. [Art. 3.4].

Article 17 of the General Conditions of the Subcontract expressly defines what delays could be deemed “unavoidable,” and therefore outside the scope of Sentrale’s responsibility (i.e., Acts of God (tornado, flood, fire, hurricane, etc.); unusually adverse weather; industry-wide labor strikes; delays or failures to obtain building permits, etc). (Section 1 of Insert to Trade Subcontract and General Conditions).

Sentrale agreed to perform its work in exchange for a lump sum payment, pursuant to the terms of the Subcontract. If any agreed-upon “unavoidable delays” occurred, resulting in additional expense to Sentrale, there were clear instructions in the Subcontract providing Sentrale a method for requesting an adjustment to the Subcontract price. Article 16(E) of the General Conditions of the Subcontract provides:

If [Sentrale] desires to make a claim for an increase in the Subcontract Price or any extension in the time for completion, he shall give Gotham written notice thereof within ten (10) days after [Sentrale’s] knowledge of the occurrence of the event giving rise to such claim. This notice shall be given by [Sentrale] before proceeding to execute the work . . . **No such claim shall be valid unless so made.** Sentrale shall proceed to execute the work even though the adjustment has not been agreed upon. [emphasis added]

Article 17 of the General Conditions of the Subcontract then set out a provision under which Sentrale had ten days to provide notice of any “unavoidable delay” to Gotham and gain entitlement to a time extension:

Any claim relating to an Unavoidable Delay shall be made by [Sentrale] to Gotham in writing within ten (10) days of the commencement of the Unavoidable Delay or the time when [Sentrale] knew or should have known of the Unavoidable Delay (whichever is later) . . . **If the written notice set forth in this Section is not given as required herein, [Sentrale] shall be deemed to**

have waived entitlement to any remedies, including time extension. [emphasis added].

These claim procedures were designed to explicitly ensure that, in the event Sentrale believed it was entitled to an increase in the amount to be paid by Gotham on the Subcontract (or an extension of its time to complete its work), Sentrale would be required to provide Gotham with advance notice. This notice would ensure that Gotham could, in turn, change *its* general contract with Fordham, in regards to expense or time. The claim provision clearly indicates that timely notice-of-claim is a condition precedent to recovery, and non-compliance would act as waiver of the claim.

In addition to costs relating to “unavoidable delay”, there was another relevant Subcontract provision addressing any other documented increase in the Subcontractor’s obligations. Section 30 to Scope of Work (Exhibit A to the Subcontract). This Section also provides that Sentrale must follow strict notice procedures in order to obtain a corresponding increase in Subcontract price:

In the event Subcontract Documents are revised, [Sentrale] must advise Gotham of any proposed change to the Subcontract Price within twenty (20) calendar days from receipt of said Documents. If said request is not made within this time period, then said revised Documents shall become part of [Sentrale’s] contractual obligations **with no change in Subcontract Price.** (emphasis added).

The Subcontract also provided that notices of claim, both under Article 16(E) and Section 30, must be

“in writing and . . . personally delivered or forwarded by overnight express mail or registered or certified mail, return receipt requested, and shall be addressed to the party hereto to whom directed, at its address, as herein stated.” [Art. 18].

Further, the Subcontract explicitly precluded any oral modifications of the Subcontract, and provided it could only be changed upon written agreement of both sides. Specifically, Article 16

of the Subcontract states, “[N]o amendments to this Subcontract shall change or modify this Subcontract unless in writing and signed by both Gotham and [Sentrale].”

On November 12, 2010, one and a half years after its work on the project was completed, Sentrale served Gotham with a purported “Request for Equitable Adjustment on the Fordham University Residence Hall Project” (“REA”). In the REA, Sentrale alleged it had been required to perform work outside the scope of the original Subcontract due to unforeseen site conditions, redesign/retesting of pile design, excessive design changes, and weather conditions. To date, Sentrale has been paid twelve million dollars for its work on the Project plus an additional \$619,520.00 in change orders. However, as a result of alleged additional work outside the scope of the Subcontract, Sentrale demanded (in the REA) further payment from Gotham of approximately \$3.7 million dollars.

Subsequently, Gotham brought this action seeking, as its First Cause of Action, a declaratory judgment that Sentrale’s claims for additional payments in the REA are barred because of its failure to adhere to the contractual requirement of timely notice of claims. Gotham further seeks recovery for damages sustained as a result of Sentrale’s alleged violation of its contractual and professional duties in its performance under the Subcontract.

Sentrale, in turn, filed an answer, twelve affirmative defenses, and six counterclaims against Gotham. Every cause of action brought by Sentrale arises out of the claims made in its REA.

The first cause of action alleges that Gotham breached its agreement with Sentrale by failing to pay Sentrale the additional amount of \$3,711,203.00, and by wrongfully declaring Sentrale in default for violation of its contractual duties under the Subcontract.

The second cause of action alleges that Gotham has been unjustly enriched, in that it benefitted from Sentrale's work, labor, services, equipment and supplies, without payment therefore. For this reason, Sentrale alleges, even if the Subcontract terms do not provide for this payment, Sentrale would be entitled to the same value under the doctrine of unjust enrichment.

The third cause of action relates to Sentrale's filing of a mechanic's lien on the job site, on December 10, 2010, for \$2,001,369.00. On December 21, 2010, Gotham executed a bond to discharge the lien, in the original principal amount of \$2,261,506.00. Sentrale alleges this discharge is conditioned on the payment of any judgment that might be recovered by Sentrale under this cause of action.

Sentrale's fourth cause of action raises issue with Travelers Casualty and Surety Company of America. Surety (and Gotham as principal) issued a Labor and Material Payment Bond to Gotham, ensuring prompt payment of monies due to all persons furnishing labor, materials, supplies or equipment for use in the performance of the project. Sentrale alleges it is owed a sum of \$3,711,203.00 under the Surety bond that neither Gotham nor Surety has paid.

The fifth Sentrale cause of action alleges that Gotham and Sentrale entered into an oral agreement that varied the terms of their Subcontract, and provided that Sentrale would perform disputed work and/or accelerate its performance under protest, and with full reservation of its rights, including its right to assert claims against Gotham. Further, Sentrale alleges that the parties had a mutual understanding that it would submit its additional claims for consideration as soon as the damages became fully ascertainable, and the REA was submitted in accordance with such oral agreement. Therefore, Sentrale alleges, Gotham breached the oral agreement by failing to make payment of the \$3,711,203.00.

Sentrale's sixth and final cause of action alleges that Gotham is unfairly withholding retainage, the portion of a contract's final payment that may be withheld by a principal until a project is complete. Sentrale alleges that the amount of retainage Gotham may withhold from Sentrale (currently 5%) may not exceed the actual percentage retained by the owner, Fordham, against Gotham (allegedly reduced to 2.5%). Therefore, Sentrale is demanding judgment in the amount of \$315,488, for the retainage thus far allegedly withheld by Gotham, plus interest.

Gotham promptly filed a motion for partial summary judgment on its First Cause of Action for declaratory judgment, and also moved for dismissal of the First through Fifth counterclaims asserted against it by defendant Sentrale. Gotham's position on the motion dismissing Sentrale's counterclaims is that Sentrale is seeking to recover additional monies for work, labor and services under the Subcontract, without having followed the strict notice-of-claim provisions set out in the Subcontract.

Discussion

On a motion for summary judgment pursuant to CPLR 3212, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, proffering evidence to eliminate any material issue of fact. *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD2d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Notice provisions in contracts are read literally and are strongly favored under New York law. New York courts have repeatedly held that the failure to strictly comply with a construction

contract's notice-of-claim requirements for extra work, disputed work, or delay damages may be deemed a waiver of such claims. See *Promo-Pro Ltd. v Lehrer McGovern Bovis, Inc.*, 306 AD2d 221, 222 (1st Dept 2003) (holding that because "[c]ompliance with the notice of claim provision was an express condition precedent to the contractor's right to bring an action for recovery of change order payments . . . noncompliance clearly constituted a waiver of its claim"); *F. Garofalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80 (1st Dept 2000) (holding that plaintiff waived its claim for extra work and delay damages by failing to strictly comply with the contractually required notice provisions; *Huff Enters., Inc. v Triborough Bridge and Tunnel Auth.*, 191 AD2d 314 (1st Dept 1993) (granting summary judgment on the grounds that plaintiff's failure to comply with notice-of-claim provisions precludes recovery for extra work damages).

In construing similar contractual terms to the ones here, New York courts have noted that the purpose of requiring a subcontractor to furnish written notice in accordance with the subcontract, and to prevent oral modifications of the contract, "is to obviate any issue as to the credibility of either the contractor or the [agent] as to what was or what was not said by either of them." *Huff Enters.*, 191 AD2d at 316 (citing *Albert Saggese, Inc. v Town of Hempstead*, 100 AD2d 885, 886 (2d Dept 1984), mod on other grounds 64 NY2d 908 (1985)). Moreover, such rigid compliance with a notice-of-claim provision may be strictly required regardless of whether the contract is one for a private or public construction project. See *Northgate Elec. Corp. v Barr & Barr, Inc.*, 61 AD3d 467, 468-69 (1st Dept. 2009).

Here, it is undisputed that the Subcontract contains explicit provisions requiring Sentrale to provide Gotham with timely notice of any conditions encountered at the Project site which it believed may give rise either to an entitlement to time extension or an increase in Subcontract

price. These notice-of-claim provisions make certain that Gotham would be timely notified of any conditions giving rise to claims for an increase in the cost or time needed to complete the Project, as such circumstances were occurring.

There is a narrow exception to the general rule favoring enforcement of strict notice-of-claims provisions in subcontracts in private works contracts that modifies and supersedes a notice-of-claim provision. This exception is demonstrated through the proffering of evidence of a differing course of conduct on the part of the general contractor, or the substantial compliance of the subcontractor with oral directions to continue work before filing claims. *Barsotti v Consolid. Edison Co.*, 680 NYS2d 88, 89, (1st Dept. 1998). Here, the necessary evidence to prove this exception would be found in communications between Gotham and Sentrale, all of which would be in Sentrale's possession. Therefore, the question presented regarding the validity of Sentrale's REA and its subsequent counterclaims is whether Sentrale strictly complied with the notice-of-claim provisions expressed in the contract, or supplied sufficient evidence to invoke the narrow exception.

It is undisputed that Sentrale, as the first subcontractor on the Fordham project, conducted its substructure work between May 2008 and June 2009, and therefore had knowledge of any claims for increase in Subcontract price and delay damages long before it submitted the REA on November 12, 2010. Yet Sentrale waited over a year and a half to request any monetary adjustments in the REA. Faced with Gotham's position that, due to its failure to follow the strict notice-of-claim procedures, Sentrale waived all its claims in the REA, Sentrale fails to come forward with any evidence that notices-of-claim were provided to Gotham along the way. Instead, Sentrale offers the conclusory allegation that "Gotham was notified of all these conditions as they arose." (*Shepard Aff., Ex. B at ¶107*). Furthermore, Sentrale offers no proof

that its alleged discussion of work conditions with Gotham also put Gotham on notice of Sentrale's intent to file a claim in the future.

In *F. Garofalo, supra*, the plaintiff similarly failed to provide the contractually required contemporaneous written notice and documentation of his claims, and therefore his untimely claims were barred. There, the Appellate Division, First Department determined that "the contract's notice and documentation requirements for extra work and delay damages are condition precedents to plaintiff's recovery and [his] failure to strictly comply is deemed a waiver of such claims." 270 AD2d at 80. Further, the court said that "when a written contract . . . provides that it can be modified only by a signed writing, an oral modification of that agreement is not enforceable unless the oral modification is fully executed or there has been a partial performance 'unequivocally referable' to the oral modification." *Id.*

Here, there is no issue of fact that the notice provisions of the Subcontract were never complied with. The only written notice Gotham ever received of Sentrale's claims for additional payment came a year and a half after its work had been completed. There is no evidence of any written notice of claims made during the course of the project, much less within the requisite ten day period following Sentrale's "knowledge of the occurrence of the event giving rise to such claim." Article 16(E). The REA was submitted long after the contractually-provided period of time to submit claims had expired. Accordingly, Gotham contends, and the Court agrees, that the REA does not meet the written notice requirement of the Subcontract. Similar to *F. Garofalo*, no conduct on the part of Gotham can be viewed as "unequivocally referable" to an intent to orally modify the notice-of-claim provisions.

In an effort to circumvent this clear contractual requirement, Sentrale supplements its Answer and counterclaims with evidence detailing communications between Sentrale and

Gotham in which they discuss various issues that gave rise to additional work on Sentrale's part. This evidence indeed illustrates Gotham's acknowledgment of change orders, and various scheduling delays. (Defense Opp. Brief, 12). However, Sentrale provides neither contemporaneous requests for additional payment, nor evidence of any intent to later request additional payment.

Under New York law, a waiver is a voluntary and intentional abandonment of a contract right. Waiver may be inferred by words, course of conduct, or a failure to act that clearly manifests intent not to claim the purported advantage of the contractual provision. *Hadden v Consolidated Edison Co. of New York, Inc.*, 45 N.Y.2d 466, 469, (1978). The intention to waive must be unmistakable. *Echo Star Satellite, LLC v ESPN, Inc.*, 79 AD3d 614, 617 (1st Dept 2010). Sentrale argues that Gotham purportedly waived the contractual notice requirements by engaging in a course of conduct that departed from the notice-of-claim provisions in the Subcontract. The course of conduct argument, however, is flawed because, despite submitting hundreds of pages of exhibits and affidavits, there is no evidence that supports Sentrale's contentions that the parties in any way intended to depart from the contractual provisions. None of the documents submitted by Sentrale for the alleged "unexpected conditions" for which it now (a year and a half after completing its work) seeks recovery establish a course of conduct or a manifest intent on the part of Gotham to waive the notice-of-claim provisions in the Subcontract.

In *Penava Mechanical Corp. v Afgo Mechanical Services, Inc.*, the Appellate Division, First Department, denied summary judgment to the general contractor, while interpreting the exception Sentrale raises here. 71 AD3d 493, 495-96 (1st Dept. 2010). There, the general contractor testified that he had directed the subcontractor to work overtime during the last three

weeks of the project and had agreed to pay for this time over and above the contract price, consistent with prior overtime payments throughout the project. The general contractor also testified that his team had instructed the subcontractor not to bother with the “tickets” that were usually prepared for such extra work. Further, the general contractor agreed that it was the typical course of conduct on that job site for the subcontractor to sign receipts for work to be later filed as claims. Given this testimony, the Appellate Division, First Department determined that the general course of conduct and oral directions by the general contractors could be viewed as an unmistakable intent to modify or waive the notice-of-claim provisions in question, and summary judgment was denied. *Id. at 494.*

Penava is clearly distinguishable from the present case. Here, Gotham insists it had no intention to stray from the strict contract provisions. There is no evidence of Gotham instructing Sentrale to continue working without filing notice-of-claim. There is no evidence of a course of conduct that differed from the contractual requirements. Rather, if anything, Sentrale proffers evidence indicating Gotham’s intent to *comply* with the contractual notice-of-claim requirements. For example, Sentrale submitted a chain of e-mails between Sentrale, Gotham and a third party, in which Sentrale requested that official change orders be completed and forwarded to Gotham. This exchange actually supports *Gotham’s* position that change orders detailing requests for additional payment in a timely fashion were expected as such circumstances arose. See Affidavit in Opposition to Motion for Summary Judgment, Ex. 42. Any reliance by Sentrale on a purported waiver and/or modification of the contract on the part of Gotham, which would result in nearly four million dollars in extra work and delay damages was, as the First Department has held, simply unreasonable. *F. Garofalo*, 270 AD2d at 81.

In citing the exception to the strict adherence to timely notice that may apply here, Sentrale contends it needs more discovery to prove its position. Despite Sentrale's contentions, the court finds that the contract is unambiguous and clear in its use of industry terminology and notice-of-claim requirements. In *Kingsley Arms, Inc., v Sano Rubin Const. Co., Inc.*, the Appellate Division, Third Department was confronted with similar provisions of a construction contract and granted summary judgment in favor of the general contractors who received an untimely claim from its subcontractor. 16 AD3d 813, 814-15 (3rd Dept 2005). Since compliance with notice provisions was a condition precedent to the subcontractor's claim, that court determined the failure to strictly comply was a waiver of claims. *Id.* at 814. And while the court recognized that on a motion of this gravity, the subcontractor could be granted some leniency in its attempt to raise a triable issue of fact, there, its proffer was simply insufficient. *Id.*

Here, Sentrale was similarly required, as a condition precedent to recovery, to provide timely notice of any claims for an increase in the Subcontract price, an extension in time to complete the Project, and/or "Unavoidable Delay" damages. Since Sentrale has access to all of its communications with Gotham, and all of its evidence has been submitted, the present issues can be decided at this point. The court finds the Sentrale's assertions to be insufficient to defeat the defendant's motion. Therefore, its effort to obtain more discovery to avoid summary judgment is to no avail.

As for Sentrale's claim of unjust enrichment, New York law establishes that a plaintiff may not recover under this theory where there is an existing contract between the parties covering the dispute in issue. *See Clark-Fitzpatrick, Inc., v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987) (dismissing unjust enrichment claim on the basis that a valid contract governed the subject matter of the claim); *see also Centro Empresarial Cempresa S.A. v America Movil*,

S.A.B. de C.V., 76 AD3d 310 (1st Dept 2010) (same). Sentrale's Second Counterclaim seeks recovery for work performed outside the Scope of Work under an unjust enrichment theory. However, the Subcontract governs the subject matter of this claim (the Scope of Work for the Project, and all work performed outside the Scope of Work). Therefore, the Second Counterclaim for unjust enrichment is duplicative of its First Counterclaim and is dismissed.

Further, the express terms of the Subcontract and the New York Statute of Frauds, as codified in N.Y. General Obligations Law § 15-301, bars an oral modification of the Subcontract here. Sentrale contends that the parties' conduct demonstrated an "indisputable mutual departure" from the notice-of-claim requirements in the Subcontract. However, as previously mentioned, New York case law supports that "[w]hen a written contract, as here, provides that it can be modified only by a signed writing [by both parties], an oral modification of that agreement is not enforceable unless the oral modification is fully executed or there has been a partial performance 'unequivocally referable' to the oral modification." *F. Garofalo*, 270 AD2d at 80-81. Here, the documentary evidence submitted by Sentrale establishes that Gotham's conduct was in accordance with the Subcontract. Further, since Sentrale has already been paid over \$600,000.00 in change order fees, Sentrale, too, had at least "partially performed" in accordance with the notice-of-claim provisions, and was well aware of the accepted course of conduct between the parties. Therefore, the Statute of Frauds bars Sentrale's Fifth Counterclaim, alleging an oral modification of the Subcontract.

Sentrale's First, Third and Fourth counterclaims are predicated on the theory that it is entitled to damages claimed in the REA. However, Sentrale is not entitled to the damages arising out of the REA, because it failed to satisfy the notice-of-claim provisions set forth in the

Subcontract. Therefore, Sentrale's First, Third and Fourth counterclaims are dismissed, since they request relief that would entitle it to receive payment for claims arising out of the REA.

In a 3212(c) motion the moving party must make a prima facie entitlement to summary judgment. Here, Gotham provided a prima facie entitlement to summary judgment by proffering the text of the Subcontract. Once this prima facie entitlement was made, the burden shifted to Sentrale to oppose the summary judgment, with admissible evidence and not speculation. Here, Sentrale seeks to defeat summary judgment with mere speculation that access to communications between Gotham and the owner of the job site, Fordham University, would reveal evidence that establishes the exception to the notice-of-claim requirement. This argument is clearly unpersuasive in light of the fact that highly relevant communications between Sentrale and Gotham fail to establish the exception and, in fact, illustrate Gotham's intent to comply with the express terms of the Subcontract.

Therefore, based upon well-established New York law requiring strict compliance with notice-of-claim provisions and no-oral-modification provisions, Sentrale's failure to comply with the notice-of-claim provisions constitutes a waiver of its claims asserted a year and a half later in its REA. The court grants summary judgment in favor of Gotham on its motion for declaratory judgment, and also dismisses Sentrale's First, Second, Third, Fourth and Fifth counterclaims.

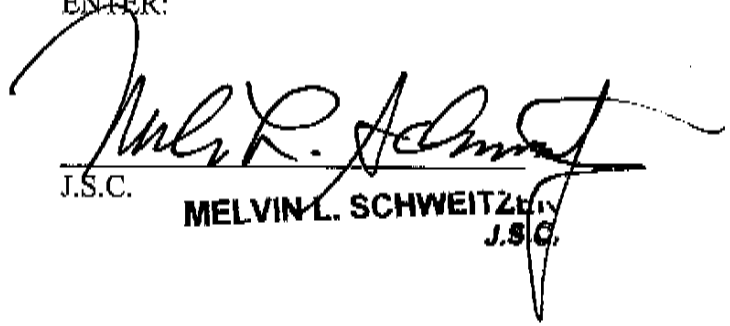
Consequently, it is

ORDERED that plaintiff's motion for partial summary judgment with respect to its First Cause of Action is granted; and it is further

ORDERED that plaintiff's motion to dismiss defendant's First, Second, Third, Fourth and Fifth counterclaims is granted.

Dated: August 23, 2011

ENTER:



J.S.C. MELVIN L. SCHWEITZER
J.S.C.