

# Contractor's Delay Claim Can Proceed Notwithstanding a No-Damage-For-Delay Clause in Contract

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Delays -- all owners, contractors and subcontractors are all too familiar with delays during construction. Delays can occur due to any number of causes, but the results are nearly always the same, increased time and costs of construction. On the contractor/subcontractor end, those increased costs include, but are not limited to, escalated labor and materials, extended general conditions, as well as extended insurance and home office overhead. For the owner, those costs can be inability to sell or lease finished spaces and carrying costs on mortgages/loans.

Often times, to limit the potential exposure to delay claims of contractors and subcontractors, owners will insert a no-damage-for-delay clause in the construction contract. Generally, contract clauses barring a contractor from recovering damages for delay in the performance of a contract are valid, and they will prevent recovery of damages resulting from a broad range of reasonable and unreasonable conduct, if the conduct was contemplated by the parties when they entered into the agreement. These clauses are often referred to as exculpatory clauses.

Exculpatory clauses, however, will not bar claims resulting from delays caused by the owner, if the causes and resulting delays were not within the contemplation of the parties at the time they entered into the contract. Therefore, even broadly worded exculpatory clauses are generally held to encompass only those delays which are reasonably foreseeable, arise from the contractor's work during performance, or which are mentioned in the contract.

Courts have carved out four exceptions to no-damage-for-delay clauses and damages may be recovered for delays which: (1) were unanticipated at the time of contract formation; (2) were caused by the owner's bad faith or willful, malicious, or grossly negligent conduct; (3) were so unreasonable that they constitute an intentional abandonment of the contract by the owner; or (4) resulted from the owner's breach of a fundamental obligation of the contract.

In a recent case, a contractor's construction efforts were delayed by the public owner and the contractor sought to recover delay damages, notwithstanding a no-damage-for-delay clause in the contract.

The contractor commenced an action to recover damages for delays, alleging that the public owner created unanticipated and unforeseen disruptions to the contractor's work, causing the contractor to incur substantial additional costs. The public owner made a pre-answer motion to dismiss the complaint on the grounds that the parties' contract contained a no-damages-for-delay provision which prevented recovery of damages

arising from an alleged delay, and that the contractor failed to give timely notice of the condition causing the delay as required by the parties' contract. The trial court granted the public owner's motion and dismissed the contractor's complaint. The contractor then appealed.

The motion to dismiss was based upon two legal theories, (1) the contractor's complaint failed to state a cause of action because the no-damage-for-delay clause in the contract barred the delay claim and (2) documentary evidence, namely, the no-damage-for-delay clause in the contract barred the claim. On appeal, the court addressed each theory of the motion separately.

First, the court held that the allegations in the complaint sufficiently stated a cause of action to recover damages for breach of contract by reason of the public owner's alleged delays and obstruction of the contractor's performance of the contract. Moreover, the court held that the contractor was not required to anticipate the defense that its claims were barred by the no-damage-for-delay clause of the contract and plead the exceptions thereto.

Second, the court found that the public owner's documentary evidence failed to conclusively establish the defense that the contractor's cause of action was barred by the no-damage-for-delay clause of the parties' contract. In support of its motion, the public owner merely relied upon the existence of the exculpatory clause of the contract, without attempting to establish that the delays alleged in the complaint were contemplated by the parties at the time that they entered into the contract. The court held that the existence of the exculpatory clause, standing alone, was insufficient to establish the defense as a matter of law.

Moreover, the court held that, contrary to the public owner's contention, the contractor's failure to provide written notice of the alleged delay or disruption would not bar the contractor from seeking damages for the alleged delay. The parties' contract provided that the consequence of such a failure constitutes a denial of a request for a schedule change. Furthermore, the documentary evidence submitted by the public owner in support of its motion did not conclusively establish that the contractor failed to comply with the subject provision of the parties' agreement.

### Commentary

While this recent case is a good win for contractors, it is an outlier based on other, multiple recent no-damage-for-delay cases. Other courts have dismissed cases where there were undisputed significant delays due to extensive owner-directed design changes because design changes were contemplated by the parties through the existence of a change order clause in the contract.

Delays are inevitable on projects. The key is to plan, prepare and know your contract. To the extent possible, contractors and subcontractors should comply with all written notice and claim provisions under the contract. This means that at the beginning of a project a

contractor or subcontractor should create a “cheat sheet” for the project staff that succinctly breaks down the various notice and claims provisions. The owner’s actions are not in a contractor’s control, but providing timely notice can be controlled.

Feel free to call me to discuss contract notice and claim provisions.