

Exceptions To No-Damage-For-Delay Clause Further Limited

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All too familiar to contractors and subcontractors is the “no-damage-for-delay” clause contained in contracts. The “no-damage-for-day” clause is often nonnegotiable and the only limited recourse available to contractors and subcontractors is an extension of time to complete the project. Unfortunately, delays during the construction of a project are all too commonplace (and pervasive) and extensions of time do not adequately compensate a contractor or subcontractor for the extended duration costs and/or any other delay related costs and damages encountered.

As many contractors and subcontractors are aware, the New York Courts adopted four exceptions to the general rule enforcing no-damage-for-delay clauses, which allow for a contractor and/or subcontractor to obtain damages for delays in limited situations: delays that were unanticipated at the time the parties entered into the contract; willful, malicious, grossly negligent conduct or bad faith; unreasonable delays that constitute an intentional abandonment of the contract; or breach of a fundamental obligation of the contract.

Since courts carved out the four exceptions to the general rule, courts have severely limited the application of these exceptions and have made it nearly impossible to overcome an extremely high burden to prove that an exception to the no-damage-for-delay clause in the contract applies to the specific facts of the particular case. In a recent court decision, a trial court reiterated how difficult it is to overcome the burden of a no-damage-for-delay clause in holding that only one of a subcontractor’s delay claims could proceed.

In the recent case, the subcontractor commenced an action against a contractor seeking damages for, among other causes, delays encountered during the construction project. The subcontractor claimed that the contractor delayed the project by not adhering to the construction schedule, failed to timely erect steel, pour concrete, blocked access to the site, failed to issue change orders, failed to supervise the work and failed to administer the subcontract. The subcontractor also claimed that the delays were unanticipated, that the contractor’s actions were in bad faith, the delays constituted an intentional abandonment of the subcontract and that the contractor breached its fundamental obligations under the subcontract.

The contractor moved to dismiss the delay claim causes of action in the subcontractor’s complaint based upon the no-damage-for-delay clause in the parties’ subcontract.

In analyzing the specific facts of the case, the court reiterated that exceptions to no-delay clauses are strictly construed and that the party seeking to invoke any of the exceptions to the general rule that no damages for delay clauses are enforceable bears a heavy

burden. The court proceeded to address each of the exceptions. The court held that abandonment of a contract will only be found when a subcontractor demonstrates that the delays for which the contractor is responsible are so unreasonable that they connote a relinquishment of the contract with the intention of never resuming it. A breach of contract claim will result in delay damages only in very narrow circumstances where a fundamental, express, affirmative obligation of the contractor under the contract is breached. The court held that inept contract administration, design defects, poor planning, improper scheduling and organization of subcontractors all fall squarely within a broad no-damage-for-delay clause and are generally contemplated at the time contracts are executed. Moreover, the court held that although the length of delay is relevant to whether an exception applies, delays are not unanticipated simply because they substantially increase the time required for completion of the contract.

Ultimately, the court held that the sole valid exception to the no-damage-for-delay clause the subcontractor was entitled to pursue in the litigation was the claim that the contractor failed to provide access to the project such that the subcontractor was wholly unable to perform the work.

Commentary

While this is yet another decision that further limits the enforceability of the exceptions to the general rule that no-damage-for-delay clauses are enforceable, there is a ray of hope that the exceptions are not completely rendered meaningless. Here, the subcontractor is permitted to seek damages for the delays associated with the denial of site access.

Moreover, the court provided a road map to overcome motions to dismiss. The court stated that conclusory allegations that delays were unanticipated or the result of bad faith cannot overcome the broad language of the no-damage-for-delay clause. This means that contractors and subcontractors, in order to defeat motions to dismiss, need to artfully craft pleadings with specific factual allegations, so a court cannot deem the allegations as “bare legal conclusions.”

The take-away from this case is that subcontractors and contractors need to be diligent during the construction project to document the delays encountered, provide the requisite contractual notice, and to work with skilled consultants and attorneys that can properly draft delay claims and artfully craft litigation papers that can survive judicial scrutiny. It is still a steep climb to overcome a no-damage-for-delay clause, however, it is not insurmountable.

Feel free to contact me to discuss delay claims and the steps required to successfully recuperate damages.