No damage for delay clauses as interpreted by The Appellate Division, First Department - by Andrew Richards

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Delay damages have been a hot topic in construction in New York State for over three decades. These damages could be for extended supervision costs, increased labor wages and additional labor costs caused by inefficient work experienced by contractors caused by owner delays. Up until the seminal case of Corinno Civetta, decided by the New York State Court of Appeals, delay damages were available to contractors who incurred additional costs for labor due to delays caused by the owner. However, in the 1980s, owners began inserting clauses in contracts which are known as “no damage for delay” clauses. Simply put, these exculpatory clauses state that the owner is not liable for additional costs incurred by the contractor in the event that the owner caused delays to the contractor’s work.

However, the decision in Corinno Civetta, while upholding a no damage for delay clause, the Court dictated that the exculpatory clause was not all encompassing. The Court held that there are four exceptions to a no damage for delay clause. They are:

1. Delays resulting from the contractee’s [i.e., owner] breach of a fundamental obligation of the contract;

2. Uncontemplated delays;

3. Delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee; and

4. Delays caused by the contractee’s bad faith or its willful, malicious, or grossly negligent conduct.

Since the Corinno Civetta, courts have held that to get past the no damage for delay clause poses a “heavy burden” of proof on contractors. This heavy burden has evolved into a rash of decisions coming from the First Department, which holds jurisdiction over cases brought in New York and Bronx counties, whereby the First Department has routinely dismissed delay claims at the pleading stage (i.e., after the complaint is filed).

This has become particularly concerning as the First Department hears cases where the construction project is built in Manhattan, where large development projects are common. Over the last several years contractors who have suffered significant delay damages caused by owners have essentially not received their day in court. By dismissing the delay claims at the pleading stage, the contractor does not get the opportunity to gather all evidence which would show that one of the exceptions should apply. This has happened despite the fact that many complaints filed with the lower courts have alleged numerous particularized facts in the complaint as opposed to conclusory allegations. Despite the fact that New York is a notice pleading state (i.e., a complaint must state sufficient facts that shows the defendant the nature of the claim), the lower courts in New York County have dismissed delay claims routinely even though the complaint alleges more than enough facts which would satisfy the notice pleading requirements.

The two exceptions that are most litigated are those for uncontemplated delays and those regarding an alleged breach of a fundamental obligation of the contract. There is very little case law that states what constitutes an uncontemplated delay and a fundamental obligation of the contract. It has become common for courts in the First Department and the First Department itself to dismiss uncontemplated delay claims by virtue of generalized clauses in a contract that list what are contemplated delays. These clauses set forth broad based contemplated delays such as issuance of change orders, out of sequence work, and acts and omissions of the owner. In addition, the courts have held that certain obligations of the owner of the project are not fundamental obligations of contract, but merely obligations under the contract.

Instead of looking at the facts of each case, the courts have been simply reciting the boilerplate decision reasoning set forth in prior cases. For example, even though each construction project is different and the causes for delays are different on each project, the courts in the First Department have been dismissing the complaints stating that the delays set forth in the complaint show, e.g., only inept administration or poor planning, delays resulting from failure of performance in ordinary, garden variety ways, reasonably foreseeable delays and those specifically mentioned in the contract. The courts have used the foregoing language to dismiss delay claims on a motion to dismiss the complaint even though prior case law does not state what constitutes inept administration, garden variety failures of performance, etc.

Motions to dismiss a complaint in New York must show that the complaint does not state a cause of action. All of the complaints dismissed over the last several years have stated a cognizable cause of action. Yet, the courts in the First Department have essentially dismissed the complaints without the benefit of discovery and expert witness reports/testimony.

Not all may be lost. I argued an appeal before the First Department recently on behalf of a client

which had its complaint for delay claims dismissed at the pleading stage. At oral argument the bench was engaging and understood the magnitude of the prior decisions. I argued that if the particular complaint in question does not fit an exception to the no damage for delay clause at the pleading stage, then no complaint ever will. Stay tuned.

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