Owners win and contractors lose: Delay claims in the First Department - by Andrew Richards

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One of the most hotly litigated construction issues for the last few years concerns delay and labor inefficiency claims. When the time to substantially complete a project is delayed due to tardy

performance by the general contractor or subcontractors; design changes by the owner or delays in material deliveries, the general contractor or subcontractors may incur labor inefficiency costs and extended general conditions. Most construction contracts contain a “no damage for delay” clause which is an exculpatory clause precluding a contractor or subcontractor for making claims for these damages even though that contractor or subcontractor did not cause a delay to the project.

The New York State Court of Appeals (this state’s highest court) issued decisions in 1983 and 1986 in the cases Kalisch-Jarcho and Corinno Civetta which declared that a “no damage for delay” exculpatory clause is valid and enforceable. However, those decisions provided exceptions to such an exculpatory clause permitting the contractor to maintain a delay claim past the pleading stage and recover damages due to the contractee’s bad faith or its willful, malicious, or grossly negligent conduct; uncontemplated delays; delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and delays resulting from the contractee’s breach of a fundamental obligation of the contract. Since those decisions were issued, attorneys were able to plead certain basic allegations in a complaint that would allow the contractor to maintain a lawsuit against the contractee and engage in discovery to prove the claims.

However, the playing field has been dramatically changed by the Appellate Division of the Supreme Court of the State of New York, First Department. The Appellate Division of the Supreme Court of the State of New York, First Department, holds jurisdiction over appeals from orders issued by judges in New York County and Bronx County. In the last few years, complaints filed in lower court New York County cases alleging delays were dismissed by the lower court at the pleading stage without any discovery. That is, the courts have been dismissing the complaints despite the fact that complaints in New York State do not have to allege specific facts. In turn, the First Department affirmed those decisions even though the allegations set forth therein mimicked the same allegations that had been used by attorneys for decades in complaints for delay damages. As a result, attorneys began to file particularized complaints alleging specific facts supporting the four exceptions to a “no damage for delay” clause which are generally needed to oppose a motion for summary judgment.

However, despite these specified and lengthy allegations which support one or more of the four exceptions, and which are uncommon and unnecessary for complaints in the State of New York based on longstanding case law, the First Department has affirmed lower court decisions in the last year which dismissed these complaints without allowing the contractor to engage in any discovery. By dismissing complaints alleging specific factual allegations of delay, the First Department has essentially reversed the law created by the Court of Appeals which is backwards. The Appellate Divisions of the Supreme Court must follow the case law issued by the Court of Appeals. The First Department has basically determined that there are no exceptions to a “no damage for delay” clause.

By dismissing complaints at the pleading stage, there is no chance a contractor or subcontractor will ever be able to maintain a delay claim based on the exceptions permitted by the Court of Appeals. Making matters worse, the First Department has not given any guidance in its decisions over the last year as to what it takes to maintain a delay claim. The First Department simply states that the

allegations set forth in the complaint do not support any of the four exceptions. As a result, it will be very difficult if not impossible for a contractor or subcontractor to maintain a delay claim in a case filed in New York or Bronx County.

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