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CONSTRUCTION LAW

Limiting a Contractor's Right To Delay Damages

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Shortly after the downturn of the financial markets in 2008, the value of construction starts in New York City tumbled, jobs in the construction industry fell, and contractors competed heavily for new projects. But in the last few years, a dramatic upswing has changed the landscape. In 2014, construction starts in New York City increased by over 30 percent from the previous year, fueled mostly by the boom in high-end residential construction, and the New York Building Congress now forecasts increased spending on construction in 2015 and 2016. With the demand for reputable construction firms high, contractors are faced with an increase in opportunities and, as a result, construction firms are less tolerant of developer-caused delays that keep them from starting on the next lucrative project. These recent changes in the market increase the risk to developers that contractors will assert claims for compensation due to such delays.

Compensation For Delay

There are an infinite number of factors that can cause delay on a construction project for which a contractor may seek compensation. If a developer fails to make the work site available on the anticipated commencement date, embarks on a redesign of the project, engages a separate contractor that interferes with the contractor's work, fails to properly coordinate contractors, or issues extensive change orders, the associated delays in the construction project schedule result in lost profit for the contractor. If the offending delay is deemed "excusable" (i.e., not caused by the contractor), it will entitle the contractor to extra time for completion. If the delay is deemed both excusable and compensable (i.e., the owner is responsible), the contractor will be entitled to extra time and an increase in the contract price.

Only excusable and compensable delays will entitle the contractor to additional compensation. The damages for delay consist not only of lost opportunity associated with the next project, but also a potential for an increase in labor costs, increased cost of materials, loss of productivity, increase in tool and rental costs, increased costs of field and office overhead, and higher financing costs.

The general rule is that a delay caused by developer interference is both excusable and compensable and therefore entitles the contractor to extra time and additional compensation. In order to prevail on such a claim, the contractor must show that the developer was responsible for the delay, the developer's interference caused delay in completion of the project, the contractor suffered damages as a result of the delay, and the damages can be quantified. *Manshul Constr. v. Dormitory Auth. of N.Y.*, 79 A.D.2d 383, 387 (1st Dept. 1981). The relatively low bar of this four-part test provides the contractor with a viable mechanism for obtaining damages from the developer in cases of delay.

No-Damages-For-Delay Clause

Of course, the developer is not without a mechanism for some protection. It is common in contracts for construction to relieve the developer of such exposure with a provision often referred to as the no-damages-for-delay clause. This exculpatory clause can be written narrowly to address specific instances in which the developer will escape liability for compensable delays, or broadly to exculpate the developer, its agents and contractors for any delay. An example of a broad no-damages-for-delay provision is one that provides as follows:

> Should the work be obstructed or delayed by any act, neglect, delay or default of owner, or by changes to the work or the work of others, or any other causes beyond the reasonable control of contractor (all of which shall be deemed "contemplated delays"), then the time herein fixed for the completion of the work shall be extended and no claim shall be made by contractor for damages for any such delay or cessation of work.

A different approach is one in which the contractor is compensated for the actual costs incurred as a result of the delay. A no-damages-for-delay clause consistent with this principle could provide that "…contractor may be entitled to an extension of time and reimbursement of all direct on-site costs, if any, incurred to

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perform the work which shall be equal to the impact upon the substantial completion date by reason of any or all of the causes aforesaid." Nonetheless, it is recommended that the developer require the contractor to provide prompt notice of any such claim with a provision similar to the following:

> Contractor shall promptly advise owner in writing within seven (7) calendar days of contractor's discovery or knowledge of an unavoidable delay (or the reasonable likelihood of an unavoidable delay) and shall suggest strategies to owner to mitigate the effect of any delay including overtime, resequencing and other remedial methods, failing which contractor shall be deemed to waive any claims for time or money.

A no-damages-for-delay clause is enforceable if it satisfies the requirements for the validity of contracts generally. *McNamee Constr. Corp. v. City of New Rochelle*, 60 A.D.3d 918, 919 (2d Dept. 2009). Although courts will uphold the validity of a no-damages-for-delay clause, the New York Court of Appeals identified four exceptions to the rule that such clauses are enforceable: (1) delays caused by bad faith or willful, malicious or grossly negligent conduct, (2) uncontemplated delays, (3) unreasonable delays that constitute an intentional abandonment of the contract, and (4) delays resulting from the breach of a fundamental obligation of the contract. *Corinno Civetta Constr. Corp. v. City of N.Y.*, 67 N.Y.2d 297, 299 (1986).

Determining whether any of the four exceptions applies is a question of both fact and law and the exceptions are to be narrowly construed. In an action to recover for delay damages, the developer bears the burden to establish that the damages sought by the contractor are banned by the no-damages-for-delay clause, including evidence that none of the exceptions to the clause are present. *Blue Water v. Inc. Vill. of Bayville*, 44 A.D.3d 807, 810 (2d Dept. 2007).

The first Corinno exception concerns those instances in which the developer has acted in bad faith or with willful, malicious or grossly negligent conduct. There are no known cases in which a court granted a contractor relief from the no-damages-for-delay provision by invoking this exception, supporting the premise that the exceptions are to be narrowly applied. It is universally accepted, however, that delays that arise out of "ordinary negligence" are barred by a no-damages-for-delay clause. *Travelers Cas. and Sur. v. Dormitory Auth.*, 735 F.Supp.2d 42, 65 (S.D.N.Y. 2010) (quoting *Obremski v. Image Bank,* 30 A.D.3d 1141 (1st Dept. 2006)). There must be a "reckless indifference to the rights of others" in order to trigger this exception. *Kalisch-Jarcho v. City of N.Y.*, 58 N.Y.2d 377, 385 (1983).

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With regard to the second Corinno exception, New York courts will consider four points in determining whether delays that led to the contractor's damages were "uncontemplated." First, if the factor that caused delay is anticipated in the contract, it will be considered contemplated; however, it is not necessary for the contract to explicitly anticipate the actual delay caused by the developer—the "class" of the occurrence is all that is required.

Second, if it is found that a class of the occurrence has been contemplated, any subsequent delays arising from that class are also considered to be contemplated. Third, "ordinary, garden variety" poor performance such as inept administration is typically considered "contemplated." Fourth, poor coordination in complex, multi-contractor projects is also considered "contemplated." *Travelers*, 735 F.Supp.2d at 60.

With regard to the third exception, the courts have concluded that the no-damages-for-delay clause can be overcome by a showing that the developer-caused delays were so unreasonable that they should be "deemed equivalent to [its] abandonment of the contract." *People ex rel. Wells & Newton v. Craig*, 232 N.Y. 125, 144 (1921). In other words, the contractor must show that the developer "is responsible for delays which are so unreasonable that they connote a relinquishment of the contract by the [developer] with the intention of never resuming it." *Corinno*, 67 N.Y.2d at 313 (referencing *Kalisch*, 58 N.Y.2d at 386 & n 8). The amount of the delay necessary to satisfy this exception varies on a case-by-case basis.

Finally, although breach of contract can be a reason for defeating the no-damages-for-delay clause, there must be a "breach of a fundamental, affirmative obligation" that the contract expressly imposes on the developer. *Corinno*, 67 N.Y.2d at 313. The Corinno court notes that such a breach can be found, for instance, where a developer fails to obtain title to the property or fails to make the property available for the contractor. *Corinno*, 67 N.Y.2d at 313. Other potential breaches that would invoke this exception are the developer's failure to obtain a required permit or failure to obtain required financing for the project. Under New York law, such fundamental and substantial breaches would also entitle the contractor to terminate the contract.

Conclusion

Since the exceptions to the no-damages-for-delay clause expose the developer to liability for a broad array of contractor-incurred damages, a properly crafted exculpatory clause and attention to the project-specific factors that could lead to delay are critical parts of any construction contract. The recent demand for contractors makes attention to this issue all the more important, and developers should take the time at the early stages of project planning to identify the factors to reduce the risk of such delays.