

SHORT FORM ORDER
To commence the statutory
time period for appeals as
of right (CPLR 5513 (a)),
you are advised to serve a
copy of this order, with
notice of entry upon all parties.

FILED
AND
ENTERED
ON March 3, 2011
WESTCHESTER
COUNTY CLERK

SUPREME COURT : STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. NICHOLAS COLABELLA
J.S.C.

-----X
DGI-MENARD, INC.,

Plaintiff,

- against -

YONKERS CONTRACTING COMPANY, INC.,

Defendant.
-----X

DECISION/ORDER

INDEX NO.

27435/08

MOTION DATE

10/8/10

The following papers numbered 1-36 were read on this motion by defendant for partial summary judgment.

Papers Numbered

Notice of Motion, Affidavits, Exhibits, Memorandum	<u>1-18</u>
Answering Affidavits, Exhibits, Memorandum	<u>19-28</u>
Reply Affidavits, Exhibits, Memorandum	<u>29-36</u>

Plaintiff is a subcontractor and defendant is one of the prime contractors on a failed construction project known as the Meadowlands Remediation and Redevelopment Project located in Bergen County and Hudson County, New Jersey. After numerous delays, the owner, EnCap Golf Holdings LLC, constructively suspended the project and filed for bankruptcy. Plaintiff now seeks to recover sums allegedly owed it under the subcontract with defendant.

The first cause of action seeks amounts invoiced by plaintiff to defendant, which plaintiff claims defendant was paid by the owner, as well as retainage that defendant allegedly withheld during the project. The second cause of action seeks to recover for extra work allegedly performed by plaintiff in connection with the project for which plaintiff did not receive payment. The third cause of action seeks to recover for alleged delay costs incurred by plaintiff.

Defendant does not dispute that certain money are owed plaintiff, but contends that it is only obligated to pay plaintiff under the terms of the subcontract if it is paid by the owner and that it was never paid by the owner for the retainage sought in the first cause of action, the extra work sought in the second cause of action, or the delay costs alleged in the third cause of action. Accordingly, it moves for summary judgment dismissing so much of the complaint as seeks to recover for the foregoing.¹

Motion is granted. Defendant is awarded partial summary judgment dismissing that part of the first cause of action seeking retainage and the second and third causes of action.

Defendant agreed to compensate plaintiff for owner caused delays that the owner recognized and paid to defendant on behalf of plaintiff. As the project was never completed, section 4.2 of the contract is applicable and states that "payment by the Owner shall be a condition precedent to Contractor's obligation to make payment to Subcontractor."

The foregoing constitutes what has been called a "pay-if-paid" clause whereby the risk of nonpayment is transferred to the subcontractor. Such "pay-if-paid" clauses have been held to be void as a matter of public policy, pursuant to Lien Law section 34, where it results in a waiver of the right to file or enforce a lien created under Article two of the Lien Law (Welsbach Elect. Corp. v. Mas Tec North America, Inc., 7 NY3d 624; West-Fair Elect. Contractors v. Aetna Casualty & Surety Co., 87 NY2d 148). The New York Lien Law, however, only applies to improvements to real property within New York. It has no extraterritorial force outside the state (Allied Thermal Corp. v. James Talcott, Inc., 3 NY2d 302; see also, Carrier Corp. v. J. E. Schechter Corp., 347 F2d 153; Zysk v. Smith, 2010 WL 5027493 [E.D.N.Y. 2010]). The New York Lien Law is inapplicable in the case at bar as the construction project involved was in New Jersey. Accordingly, the "pay-if-paid" clause does not violate Lien Law section 34 and is not void for public policy thereunder.

Plaintiff maintains that such clauses are void regardless of the applicability of the Lien Law. This argument, however, ignores the fact that the holdings in Welsbach and West-Fair, *supra*, were specifically predicated on the violation of Lien Law section 34. It is the violation of Lien Law section

¹The claim in the first cause of action for payment of monies due for the base contract is not the subject of the motion.

34 that implicates public policy (Hugh O'Kane Elec. Co. LLC v. Mas Tec North America, Inc., 19 AD3d 126). Absent a prohibited waiver of lien rights, "pay-if-paid" clauses are not fundamentally against public policy in New York and have been upheld where permitted in other jurisdictions (Hylan Elec. Contracting Inc. v. Mastec North America, Inc., 28 Misc3d 1225(A)).

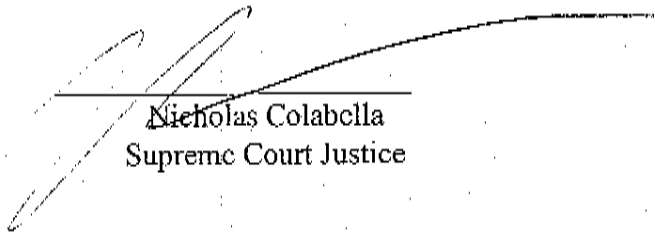
Such clauses are also apparently not violative of public policy in New Jersey. While New Jersey has an anti waiver statute, it has been construed as not invalidating such clauses on public policy grounds because, under New Jersey law, the subcontractor retains it's right to obtain a lien against the owner (Fixture Specialists, Inc. v. Global Construction, LLC, (District Court, New Jersey 2009), 2009 WL 904031; Thomas Group v. Wharton Senior Citizen Housing, 163 N.J. 507, 750 A2d 743 (2000)).

Accordingly, plaintiff is only entitled to recover it's claims here for retainage, extra work and delays costs if defendant is paid by the owner. Although plaintiff questions defendant's assertion that it has not been paid for these items, the affidavit of plaintiff's President, Seth Pearlman, does not specifically address these items and actually admits that plaintiff does not know the status of payments to defendant.² The foregoing is insufficient to raise an issue of fact as to payment.

Plaintiff has also failed to demonstrate that it's claims for delay costs are attributable to defendant. To the contrary, the Pearlman affidavit, pars. 15-17, and the answers provided by plaintiff in response to defendant's interrogatories indicate that the delays were caused by the owner in failing to provide access to the work areas and material, and appropriate engineering studies. Defendant was obligated to submit such claims to the owner under section 6.3 of the subcontract, which it did, but was not responsible for the payment of such claims if the owner did not.

Dated: White Plains, New York

3-3-11


Nicholas Colabella
Supreme Court Justice

²See, Pearlman Affidavit, par. 33 which states: "The nature of the payments from Yonkers has been the source of ongoing uncertainty for DGI because it was consistently slow-paid, underpaid or partially paid for items, and has difficulty matching payments to the corresponding items of base contract work, retainage and extra work."

PECKAR & ABRAMSON, P.C.

By: Peter E. Moran, Esq.

Attorneys for Defendant Yonkers Contracting

41 Madison Avenue, 20th Floor

New York, NY 10010

ECKERT, SEAMANS, CHERIN & MELLOTT, LLC

By: Geraldine A. Cheverko, Esq.

Attorneys for Plaintiff

Ten Bank Street, Suite 1061

White Plains, NY 10606