SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
--X

DGI-MENARD, INC.,

Index No. 27435/08

Plaintiff,

-against-

YONKERS CONTRACTING COMPANY, INC.,

Defendant.
--X

**MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT YONKERS CONTRACTING COMPANY,
INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

PECKAR & ABRAMSON, P.C.
Attorneys for Defendant
Yonkers Contracting Company, Inc.
41 Madison Avenue, 20th Floor
New York, New York 10010
(212) 382-0909

Of Counsel:

Roger S. Markowitz, Esq.

On the Brief:

Michael S. Zicherman, Esq.
Peter E. Moran, Esq.

RECEIVED
JUL 14 2010
CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

I. DGI'S COMPLAINT SHOULD BE DISMISSED PURSUANT TO THE "PAY-IF-PAID" CLAUSE IN THE SUBCONTRACT 7

A. The "Pay-if-Paid" Clause In The Subcontract is Enforceable 8

B. The Subcontract Contains A Valid "Pay-if-Paid" Clause And Since Yonkers Never Received Payment From EnCap, No Payment Is Due To DGI 11

II. DGI'S CLAIMS FOR EXTRA WORK AND DELAYS ARE BARRED BY THE TERMS OF THE SUBCONTRACT. 14

A. DGI Admits That EnCap Caused And Was Responsible For Its Unpaid Extra Work Claims. 17

B. DGI'S Delay Claims Were The Result Of EnCap's Actions Or Inactions, And, As Such, Yonkers Has No Contractual Liability To Pay Those Claims. 18

CONCLUSION 23

PRELIMINARY STATEMENT

The within action arises out of the failed Meadowlands Remediation and Redevelopment Project ("Project"), a several Hundred Million Dollar landfill closure and grounds remediation project undertaken by EnCap Golf Holdings LLC ("EnCap"), as Owner. The Project is located in Bergen County and Hudson County, New Jersey. The Project was supposed to be a public/private partnership for the clean up and redevelopment of a series of garbage dumps that were to be converted into golf courses and luxury residences, among other things. Defendant, Yonkers Contracting Company ("Yonkers"), one of the prime contractors for the first phase of the Project, sought to insulate and protect itself against the risk of delays caused by EnCap and of nonpayment by EnCap by incorporating various contractual safeguards into its subcontract with Plaintiff, DGI-Menard, Inc. ("DGI"). These safeguards specifically provide that Yonkers is not obligated to pay DGI for claims or contract work unless Yonkers receives payment from EnCap; and that said payment by EnCap is an express "condition precedent" to any obligation on Yonkers' part to make payment to DGI.

After years of mismanagement by EnCap and state regulators, and the expenditure of more than $300 million in state and local funds, an insolvent EnCap constructively suspended the Project and filed for bankruptcy, leaving Yonkers and numerous other creditors with no available recourse to recover the hundreds of millions of dollars they were owed.

Yonkers has already lost millions of dollars on this highly publicized failed Project, and, in accordance with the specific terms and conditions of the Subcontract, it cannot be held liable to pay DGI the $1.6 million that it claims to have lost on the job due to owner-caused delays and other actions and inactions of EnCap, since Yonkers has never received payment of this money from EnCap. Yonkers never agreed to be a guarantor of payment to DGI, and it cannot be

required to indemnify DGI against alleged losses occasioned by the Owner's non-payment, which were indisputably beyond Yonkers' control. Accordingly, Yonkers' Motion for Partial Summary Judgment should be granted in all respects.

STATEMENT OF FACTS

On or about April 16, 2004, Yonkers entered into a prime contract with EnCap to perform certain work in connection with the Phase 1 Ground Improvements Program for the Project, specifically the Dynamic Compaction Program and the Installation of Wick Drains, for the base contract amount of $12,756,965.05 ("Prime Contract" and "Contract Work" respectively) (Kolaya Aff. at Ex. "A"). EnCap was the actual owner of the Project, having purchased the subject property from the New Jersey Meadowlands Commission. (OIG Report, "Ex. "C" to Zicherman Affirm. at p. 12). In furtherance of the Contract Work, Yonkers entered into a subcontract with Plaintiff, DGI-Menard, Inc. ("DGI") to perform a portion of that work for the total sum of $9,184,319 ("Subcontract"). (Kolaya Aff. at Ex. "B")

Yonkers incorporated several safeguards into its Subcontract with DGI to protect it in the event of nonpayment by EnCap and to insulate it from liability for any actions or inactions by EnCap that resulted in alleged damages to DGI. First, DGI agreed in the Subcontract that Yonkers' receipt of payment from EnCap on behalf of DGI "shall be a condition precedent to [Yonkers'] obligation to make payment to [DGI]" on any amounts invoiced by DGI. (Kolaya Aff. at Ex. "B" at ¶ 4.2). Similarly, with respect to claims for changed work, extra work performed, or for delay or other claims that were the responsibility of EnCap, DGI "reliev[ed Yonkers] of all liability in connection with any such claims". Yonkers' only obligation to DGI with respect to such claims was that Yonkers agreed to submit or "pass-through" any such claims to EnCap on behalf of DGI; DGI, in turn, agreeing to be bound by any decision of EnCap. (Id. at

¶ 6.3). This latter provision is consistent with other provisions of the Subcontract with respect to delays due to the unavailability of the work. For example, in the event that EnCap suspends the Project (an allegation specifically asserted by DGI in its Complaint [Zicherman Affirm., Ex. "A" at ¶ 26]), DGI agreed that it "shall be entitled to no compensation or damages on account of such suspension from [Yonkers], unless, and only to the extent that, [EnCap] compensates [Yonkers] for additional costs incurred by [DGI] on account of such suspension." (Id. at Art. 12). Thus, the only costs and delays for which Yonkers agreed it would be liable to DGI were those that were due to Yonkers' actions and inactions, or for which Yonkers had actually received compensation from EnCap on behalf of DGI.

The Contract Work commenced in or about May or June 2004, and it was supposed to be completed within 750 calendar days (on or about August 5, 2006). (Prime Contract and Subcontract, Kolaya Aff. at Exs. "A" and "B"). The Work contemplated under the Subcontract was divided into eight (8) work areas, referred to as the North Node, Rutherford West, Buckley, FOTC, Ballfields, AFH, Accessible, and Stockpile areas. (Complaint, Zicherman Affirm., Ex. "A" at ¶ 12). However, throughout the Project, EnCap continually denied Yonkers access to most of these Contract Work areas. In addition, progress was further impeded by EnCap's changes to the Project design and specifications. (Kolaya Aff. ¶¶ 8, 9, 11). This resulted in delays to the Project, and by August 5, 2006 (the date that the entire Contract Work was to be completed), approximately 75% of the work areas were still on hold by EnCap. (Kolaya Aff. at ¶¶ 8, 9; 8/10/06 letter at Kolaya Aff., Ex. "C"). These unanticipated owner-caused changes and delays resulted in additional costs to Yonkers, and DGI, as well, alleged that these owner-caused delays increased its costs. (Kolaya Aff, at ¶¶ 11, 13). As of August 2006, Yonkers had completed the Contract Work in the only two areas that EnCap had made available to it (the

North Node and Rutherford West), and it was never given access to the other six Contract Work areas. (Kolaya Aff., ¶ 15).

On August 10, 2006, pursuant to Paragraph 6.3 of the Subcontract, Yonkers submitted to EnCap a comprehensive Request for Equitable Adjustment of the Contract ("REA"), which likewise included DGI's request for an equitable adjustment ("DGI REA"). (Kolaya Aff. at ¶ 12; Ex. "C" to Kolaya Aff.). The total amount sought by way of the REA was $2,835,069, which included unrealized field office overhead and unabsorbed home office overhead costs claimed by Yonkers and DGI due to delays by EnCap, as well as DGI's alleged unpaid extra work claim (inclusive of Yonkers' 5% contractual markup). (Kolaya Aff. at ¶ 13; Ex. "C" to Kolaya Aff.). The Project delays experienced by Yonkers and DGI were solely due to the actions and inactions of EnCap. (See 8/10/06 letter at Kolaya Aff., Ex. "C"; and DGI REA at Ex. "D" to Kolaya Aff.). To date, discovery has not revealed any unpaid extra work claims or delays to the Contract Work claimed by DGI that were caused by Yonkers. All work areas to which Yonkers had been given access by EnCap, Yonkers immediately made available to DGI. (Kolaya Aff. at ¶ 10). DGI even admitted that the delays (and alleged delay costs) it experienced, as well as the extra work it allegedly performed, were attributable to EnCap. In particular, DGI admitted in the DGI REA that only 12% of the subcontract work was completed by the original contract completion date "due to owner-caused delays to the scheduled progression of the work." (See Ex. "D" to Kolaya Aff.) According to DGI's REA, these "owner-caused delays" resulted in its claim for unabsorbed home office overhead costs in the amount of $707,116.60 and unrealized field overhead costs of $546,350 ($1,253,466 in total). (See id.).

Because EnCap never formally terminated the Prime Contract, Yonkers had to continue maintaining a presence on site and was on standby in the event that EnCap made other areas

available to Yonkers to complete its Contract Work. (See extra work claims in Proof of Claim, Ex. "E" to Kolaya Aff.). However, no further work areas were ever made available by EnCap, thereby constructively suspending the Prime Contract, the Contract Work and the Project. (Kolaya Aff., ¶ 15). The situation with EnCap and its constructive suspension of this public/private partnership project became the focus of an investigation by the New Jersey Office of Inspector General ("OIG").

On February 28, 2008, the OIG issued a 257 page report, documenting the findings from its investigation of EnCap's failed performance and the overall failure of the Project. These failures are best summarized by the following finding in the report:

> What began as a landfill closure project with limited development evolved into the largest remediation/development project ever undertaken in the State. However, control of the project was in the hands of a small company with only approximately $18.9 million in capital run by money managers and a geologist inexperienced in landfill closure. EnCap's inexperience and lack of financial wherewithal have permeated the Project from the beginning through to the present. Neither EnCap nor the Project ever overcame the deficiencies. (Report at page 12, Ex. "C" to Zicherman Affirm.)[1]

In addition, the OIG referred its investigative findings to the Division of Criminal Justice at the New Jersey Attorney General's Office to determine whether any action based on the OIG's findings was warranted by that Office. (Id. at p. 30).

On or about May 8, 2008, EnCap filed a voluntary petition for bankruptcy, pursuant to Chapter 11 of the U.S. Bankruptcy Code, in the United States Bankruptcy Court for the District of New Jersey. (See Petition, Ex. "D" to Zicherman Affirm.). At the time the petition was filed,

---

[1] The entire Report can be found at http://www.state.nj.us/oig/pdf/Meadowlands%20Remediation%20and%20Redevelopment%20Project.pdf and the press release for the Report can be found at http://www.state.nj.us/oig/pdf/Report%20on%20Meadowlands.pdf. Because this a public document derived from a public website, this Court can take judicial notice of the OIG's findings.

EnCap had between 100-200 creditors and an estimated $100-$500 million in liabilities. (See id..) On September 4, 2008, Yonkers, again pursuant to its obligations under Paragraph 6.3 of the Subcontract, filed a proof of claim on behalf of itself and DGI, which incorporated both Yonkers' and DGI's original requests for equitable adjustment and updated the total amount of the claimed additional costs incurred due to EnCap's delays and other work performed by Yonkers and DGI for which they had not received payment ("Proof of Claim"). (See Proof of Claim confirmation, Ex. "E" to Zicherman Affirm.) In total, the Proof of Claim sought $4,423,864, broken down as follows:

1. Yonkers' unrealized field office overhead and unabsorbed home office overhead costs:	$1,778,533
2. DGI's alleged unrealized field office overhead and unabsorbed home office overhead costs:	$1,253,466
3. DGI's alleged unpaid extra work (including Yonkers' 5% contractual markup):	$318,484
4. Yonkers' unsigned change orders for standby field office overhead from 8/06-8/07:	$670,900
5. Extra work change orders signed by EnCap and performed by Yonkers and/or DGI:	$247,246
6. Release of retainage request for Yonkers and DGI:	$155,235
TOTAL	**$4,423,864.00**

(See Proof of Claim, Ex. "E" to Kolaya Aff.). On February 3, 2009, the Bankruptcy Court dismissed EnCap's bankruptcy for cause based on its failure to develop a confirmable plan of reorganization. (See Bankruptcy dismissal order, Ex. "F" to Zicherman Affirm.). To date, Yonkers has not received any payment from EnCap, through the bankruptcy or otherwise, for any of the amounts sought in the Proof of Claim that it submitted in the Bankruptcy.

On or about December 22, 2008 (approximately 7 months after EnCap filed for bankruptcy), DGI filed the within Complaint against Yonkers, seeking more than $1.6 million which it disingenuously claimed was due it from Yonkers in connection with the Project.

(Zicherman Affirm., Ex. "A".) The First Cause of Action seeks $35,792[2] invoiced by DGI to Yonkers and for which DGI claimed that Yonkers had been paid by EnCap, as well as $72,175 in retainage that allegedly had been withheld during the Project. (Id.) The Second Cause of Action seeks $294,861 for extra work performed by DGI in connection with the Project for which DGI had not received payment. (Id.) This amount is less than the amount set forth in the REA and the Proof of Claim, exclusive of Yonkers' markup. (Compare Complaint and REA; Ex. "A" to Zicherman Affirm. with Ex. "C" to Kolaya Aff.). The Third Cause of Action seeks from Yonkers $1,253,466 for alleged delay/disruption costs that DGI purportedly incurred. (Zicherman Affirm., Ex. "A".). Tellingly, this is precisely the same amount that DGI sought from EnCap in its request for equitable adjustment and proof of claim in bankruptcy for "owner-caused delays", but which it now inconsistently alleges to have been caused by Yonkers. (Compare Complaint and DGI REA/proof of claim; Ex. "A" to Zicherman Affirm. with Exs. "C" and "E" to Kolaya Aff.) It is undisputed that EnCap did not pay Yonkers the $72,175 claimed by DGI for retainage, the $294,861 claimed by DGI for extra work performed, or the $1,253,466 for alleged delay/disruption costs. (Kolaya Aff. at ¶ 23) Discovery has not revealed any facts showing that EnCap ever made such payments to Yonkers, and DGI essentially concedes in its Complaint that no such payments were ever made.

I. DGI'S COMPLAINT SHOULD BE DISMISSED PURSUANT TO THE "PAY-IF-PAID" CLAUSE IN THE SUBCONTRACT.

The Subcontract between Yonkers and DGI contains a valid, enforceable "pay-if-paid" clause which bars that portion of DGI's First Cause of Action for contractual retainage of

[2] Yonkers denies that it was paid $35,792 from EnCap which was not remitted to DGI. As a result of this disputed issue of fact, Yonkers is not moving for summary judgment with respect to the "base contract" portion of DGI's First Cause of Action.

approximately $72,175[3], as well as DGI's Second and Third Causes of Action for unpaid extra work and delay damages, respectively. In essence, the Subcontract provides that receipt of payment from the owner is a condition precedent to Yonkers' obligation to pay DGI under the Subcontract. It is undisputed that Yonkers has not paid the retainage to DGI. In addition, it is also undisputed that DGI has not alleged nor furnished any evidence that Yonkers ever received this sum from EnCap. In contrast, Yonkers has consistently maintained, in sworn statements and otherwise, that it has not received payment of this retainage from the owner, EnCap. Because Yonkers was never paid this retainage by EnCap, which constructively suspended the Project, the condition precedent was not met, and, pursuant to the terms of the "pay-if-paid" clause of the Subcontract ,Yonkers is not obligated to pay the retainage directly to DGI.

A. The "Pay-if-Paid" Clause in The Subcontract is Enforceable.

Prior to the New York Court of Appeals' decision in West-Fair Elect. Contractors v. Aetna Casualty & Surety Co., 87 N.Y.2D 148 (1995), pay-if-paid provisions were routinely enforced in this state for more than 100 years. See Welsbach Elect. Corp. v. MasTec North America, Inc., 7 N.Y.3d 624, 626, 631-32 (2006) (Discussing the history of pay-if-paid clauses in New York). However, even after West-Fair, pay-if-paid clauses still may be enforced, since they are not "truly obnoxious" to New York public policy. Id. at 632. Indeed, recently, the New York Court of Appeals, in Welsbach, overruled the Second Department's dismissal of affirmative defenses based on a pay-if-paid provision in a contract for a New York construction project, where the parties agreed to be bound by the law of Florida, which enforces pay-if-paid provisions. Id. at 626, 632.

---

[3] The First Cause of Action seeks $35,792 that DGI invoiced Yonkers and for which DGI claims that Yonkers has been paid by EnCap, as well as $72,175 in retainage that had been withheld during the Project. (Complaint, Ex. "A' to Zicherman Affirm.). Yonkers denies that EnCap ever paid it this $35,792. As a result of this disputed issue of fact, Yonkers is not moving for summary judgment with respect to the "base contract" portion of DGI's First Cause of Action, but solely as to the claimed retainage of $72,175, which DGI does not dispute has never been paid.

A reading of the Court of Appeals decisions in West-Fair and Welsbach, makes it clear that the only reason "pay-if-paid" clauses in construction contracts (i.e., provisions that condition payment to a subcontractor upon the general contractor's receipt of payment by the owner, such that the right to payment may never arise if the owner becomes insolvent and never tenders payments) are unenforceable is because they violate the New York Mechanic's Lien Law ("Lien Law"); and, specifically, the anti-lien waiver provisions of Lien Law § 34. West-Fair, 87 N.Y.2d at 158-159; Welsbach, 7 N.Y.3d at 626, 628-29, 631-32. But the proscriptive rationale underlying West-Fair is inapposite to the facts of this case, since unlike West-Fair, which involved a dispute on a New York construction project, the case at bar involves a New Jersey construction project. This fundamental distinction is dispositive of the issue of the enforceability of the "pay-if-paid" clause because New York's Lien Law only applies to construction projects performed in this state.[4]

In West-Fair, the New York Court of Appeals answered the certified question of whether a "pay when paid" provision in a subcontract that transferred the risk of the owner's default from the general contractor to the subcontractor violated New York's public policy as set forth in the Lien Law. 87 N.Y.2d at 153. The Court of Appeals held that such clauses violate the anti-lien waiver provisions of Lien Law § 34, which forbid the enforcement of contracts that contain clauses waiving a subcontractor's right to file or enforce a mechanic's lien, in that it could postpone indefinitely the subcontractor's right to payment if the owner becomes insolvent or never tenders payment to the general contractor. Id. at 158. Thus, the Court of Appeals' holding that "pay-if-paid" clauses are against New York's public policy was predicated on New York's Lien Law. Id. at 159 (distinguishing prior New York cases which upheld such clauses

[4] However, even when the construction project is located in New York, the Court of Appeals in Welsbach held that New York's Lien Law will not prohibit enforcement of a pay-if-paid clause where the parties agreed to apply the law of another state that allows pay-if-paid provisions. (Welsbach, 7 N.Y.3d at 632).

because those courts did not consider whether the clauses operated as a waiver of lien rights under Lien Law § 34).

The policy rationale underlying the decision in West-Fair has no application to the instant case, since New York's Lien Law clearly is inapplicable to New Jersey construction projects. It is the long-standing law of New York that the Lien Law does not extend beyond the territorial boundaries of New York and it, thus, cannot affect or be applied to construction projects located in other states. See Allied Thermal Cop. v. James Talcott, Inc., 3 N.Y.2d 302, 303-04 (1957) (Holding that the Article 3-A trust fund provisions of the New York Lien Law do not apply to construction projects in Pennsylvania); Birmingham Iron Foundry v. The Glen Cove Starch Manuf. Co., 78 N.Y. 30, 32 (1879) (The Lien Law "has no extraterritorial force. It was intended for the protection of those who performed labor or furnished materials within this State"); see also, Carrier Corp. v. J.E. Schecter Corp., 347 F.2d 153,154 (2d Cir.1965) (Holding that New York's Lien Law did not apply to a construction project in New Jersey, even though the contract stated that New York law applied). Hence, the pay-if-paid clause in the Yonkers/DGI Subcontract cannot be invalidated under the New York Lien Law because the extant Project was located in New Jersey and only New Jersey's Construction Lien Law would be applicable to the Project.[5] Hence, this case presents a clear exception to the general rule announced in West-Fair.

West-Fair's general prohibition against the enforceability of pay-if-paid clauses is not absolute, as demonstrated by the Court of Appeals' 2006 decision in Welsbach v. MasTec, supra, which revisited the Court's jurisprudence concerning "pay-if-paid" clauses. In Welsbach, the

[5] Pay-if-paid provisions are enforceable in New Jersey and do not violate New Jersey's Construction Lien Law. See Fixture Specialists, Inc. v. Global Construction, LLC et al., 2009 U.S. Dist. LEXIS 27015, *18-22 (D.N.J. Mar. 30, 2009) (Upholding a "pay-if-paid" clause as compatible with New Jersey's lien law and rejecting the anti-lien waiver rationale of West-Fair under the New Jersey Supreme Court's decision in Thomas Group v. Wharton Senior Citizen Housing, 163 N.J. 507 [2000]). Unpublished decision attached to Zicherman Affirmation at Ex. "H".

parties were engaged in the performance of a construction project in New York, but the subcontract between them provided that it was governed by Florida law, which does not prohibit "pay-if-paid" clauses. 7 N.Y.3d at 626. The trial court and the Appellate Division held the clause to be enforceable under Florida law, but went on to conclude that it nonetheless, violated New York's Lien Law. Accordingly, they dismissed the general contractor's affirmative defenses based on this clause. The Court of Appeals disagreed and held that "given the checkered history of pay-if-paid clauses in the construction industry [and in New York], we cannot say they are 'truly obnoxious' so as to void the parties' choice of law." Id. at 632. The Court then allowed the payment dispute to be decided under Florida law with the "pay-if-paid" clause in place.

Since West-Fair and Welsbach clearly held that the only reason a pay-if-paid provision would be unenforceable in New York was because it violated the anti-lien waiver provisions of New York Lien Law § 34, by parity of reasoning, Lien Law § 34 cannot be applied to this New Jersey construction project. Therefore, it will not render the pay-if-paid provisions of the Subcontract unenforceable. Accordingly, the Subcontract contains a valid pay-if-paid clause which must be enforced.

B. The Subcontract Contains A Valid "Pay-if-Paid" Clause And Since Yonkers Never Received Payment From EnCap, No Payment Is Due to DGI.

When analyzing "pay-if-paid" clauses, New York courts look to the language of the agreement to determine whether the clause merely fixes a time for payment to the subcontractor, or whether the clause creates a condition precedent on the general contractor's legal responsibility to pay the subcontractor ("pay-if-paid"). See West-Fair, 87 N.Y.2d at 154-156. In this regard, a provision that merely states that a payment will occur upon the happening of a stipulated event is interpreted as a "time-for-payment" clause; whereas, by contrast, a provision

that "explicitly makes payment from the owner to the general contractor a 'condition precedent' to any payment to [the subcontractor]" will be construed as a true "pay-if-paid" clause. Id. at 155 (discussing Schuler-Haas Elect. Co. v. Aetna Cas. & Sur. Co., 40 N.Y.2d 883, 885 (1976)).

Given the long history of the enforceability of "pay-if-paid" provisions in New York, there is ample case law establishing that a contractor need only express that payment from the owner is a condition precedent to unambiguously transfer the risk of an owner's nonpayment to a subcontractor. For example, in a decision prior to West-Fair, the First Department in David Fanarof, Inc. v. Dember Constr. Corp., 195 A.D.2d 346, 347 (1st Dept. 1993), held that the contractual clause, "Payment of purchaser [defendant] by Owner shall be a condition precedent to Vendor's [plaintiff's] right to receive payment hereunder," "could hardly express more clearly that payment by the owner to defendant *was* a condition precedent to plaintiff's right to receive payment under the subcontracts," and it entered summary judgment in favor of the general contractor. Id. at 347-48 (emphasis in original). Moreover, even in West-Fair, the Court of Appeals found that the following contractual language unambiguously placed the risk of the owner's inability or failure to pay the general contractor upon the subcontractor, and that it was not merely a time for payment clause:

> IT IS SPECIFICALLY UNDERSTOOD AND AGREED THAT THE PAYMENT TO THE TRADE CONTRACTOR [PLAINTIFF] IS DEPENDENT, AS A CONDITION PRECEDENT, UPON THE CONSTRUCTION MANAGER [THE GENERAL CONTRACTOR] RECEIVING CONTRACT PAYMENTS, INCLUDING RETAINER FROM THE OWNER. (emphasis added)

West-Fair, 87 N.Y.2d at 154-55; see also, Minelli Constr. Co., Inc. v. Arben Corp., 1 A.D.3d 580, 581 (2d Dept. 2003) (holding that express language which imposes a condition on the legal responsibility of a general contractor to pay a subcontractor is a "pay-when-paid" provision, not

a time for payment clause)[6]. Similarly, in Welsbach, the parties admitted, and the Court of Appeals agreed, that the language "Contractor will pay Subcontractor for the Work at the prices and schedule and in the manner described in Schedule 1; provided that, *all payments to Subcontractor by Contractor are expressly contingent upon and subject to receipt of payment for the Work by Contractor from Owner* ..." clearly transferred the risk of the owner's nonpayment to the subcontractor. Welsbach, 7 N.Y.3d at 627-28 (emphasis in original).

Like these cases, the "pay-if-paid" clause contained in the Yonkers-DGI Subcontract also unambiguously transfers the risk of EnCap's nonpayment to DGI. Specifically, Paragraph 4.2 of the Yonkers-DGI Subcontract states:

> Contractor will pay Subcontractor within ten (10) days after Contractor receives payment from the Owner for Subcontractor's items of work based on the quantities approved and paid for by the Owner, and on the basis and in the manner stipulated in the General Contract (which Subcontractor shall accept as agreed). Such payment by the Owner shall be a condition precedent to Contractor's obligation to make payment to Subcontractor. (Ex. "B" to Kolaya Aff.) (emphasis added).

While the first sentence of Paragraph 4.2 merely establishes a time for payment to DGI, the second sentence, which is virtually identical to the language at issue in West-Fair and David Fanarof, unambiguously "conditions" Yonkers' "obligation" to make payment upon Yonkers' receipt of payment from EnCap. Thus, under New York law, Paragraph 4.2 of the Subcontract is undeniably a "pay-if-paid" clause, as defined by West-Fair.

Accordingly, "when commercial parties expressly agree that a specified occurrence shall be a condition precedent to the creation or enforceability of a right or obligation," such as with a pay-if-paid clause, the only question left for the court is to determine whether the condition precedent has been complied with. David Fanarof, Inc. v. Dember Constr. Corp., 195 A.D.2d

---

[6] While the Court used the terminology "pay-when-paid", the context of its use of this term indicates that it actually was referring to what more accurately is now referred to as a "pay-if-paid" clause, since the clause at issue transferred the risk of nonpayment to the subcontractor.

346, 348 (1st Dept. 1993) (citing Niagara Frontier Transp. Auth. v. Computer Sciences Corp.., 179 A.D.2d 1037 (4th Dept. 1992)). Here, it is undisputed that Yonkers has not received payment from EnCap for either the retention sought in DGI's First Cause of Action, the alleged unpaid extra work sought in the Second Cause of Action, or the alleged extended home and field office overhead claim in the Third Cause of Action. (See Kolaya Affidavit at ¶¶ 19, 21, 23). Moreover, DGI does not even allege in the Complaint that EnCap ever paid those moneys to Yonkers. Thus, there being no disputed issue of fact about whether EnCap ever paid these moneys to Yonkers, and because the Subcontract requires the payment of these moneys to Yonkers as a condition precedent to its obligation to make payment to DGI, DGI's claims for retainage, unpaid extra work, and extended home and field office overhead must be dismissed with prejudice, as a matter of law.

II. DGI'S CLAIMS FOR EXTRA WORK AND DELAYS ARE BARRED BY THE TERMS OF THE SUBCONTRACT.

DGI's Subcontract with Yonkers creates a straightforward procedure for the disposition and payment of claims for any additional costs that DGI allegedly incurred in connection with the Project, regardless of whether they were attributable to extra work, delays, or other circumstances. Simply, Yonkers agreed to compensate DGI for any legitimate claim for which Yonkers was solely responsible, and, with respect to any and all claims caused by other entities such as the owner, Yonkers' sole obligation to DGI was to submit DGI's claim to the owner, and to remit to DGI any payment received by Yonkers from the owner in connection with DGI's claim. Yonkers never agreed to guaranty, insure or indemnify DGI against losses it might incur due to the actions or inactions of entities such as EnCap.

While there are several sections of the Subcontract that relate to the various circumstances under which DGI may have the right to claim additional compensation, Yonkers' obligations with respect to such claims is largely controlled by Article 6 – "Claims and Notices." Pursuant to Article 6, if DGI has a claim for "any condition claimed to be grounds for any increase in the Subcontract Price" or "for an extension of time within which to complete the Work", DGI is required to provide Yonkers with written notice of the claim. (Subcontract, Ex. "B" to Kolaya Aff. at ¶¶ 6.1, 6.2, respectively). Once DGI furnishes Yonkers with notice of a claim, Paragraph 6.3 instructs that Yonkers' only obligation to DGI is to submit DGI's claim to the owner. Specifically, Paragraph 6.3 expressly states:

> Any claims for extra or additional costs attributable to, or arising from unforeseen site conditions or orders, acts or omissions of the Owner or others, <u>shall be presented by Contractor to Owner</u> … and Subcontractor shall accept and be conclusively bound by the determination of the Owner with respect thereto, relieving Contractor of all liability in connection with any such claims. <u>Nothing in this Article is intended, nor shall be construed to impose on Contractor any obligation or responsibility to take any further action whatsoever with respect to such claims of Subcontractor or otherwise be answerable or liable in anyway for any acts or omissions of the Owner or others which cause damage to Subcontractor</u>.

(emphasis added). Further, as previously discussed, pursuant to Paragraph 4.2, Yonkers only agreed to pay DGI those moneys that EnCap remitted to Yonkers on account of DGI.

The dual concepts that Yonkers would only be responsible to DGI for its own actions, and that, with respect to any acts or omissions of EnCap or others which caused damage to DGI, it would only be obligated to submit DGI's claim and remit compensation, if any, it received from the owner on DGI's behalf, are fundamental aspects of the parties' contractual arrangement and are carried throughout the Subcontract. For example, Paragraph 5.3 of the Subcontract, explicitly provides that Yonkers did "not assure [DGI] that [DGI] shall be able to commence,

prosecute or complete the work at the time stated, or in the sequence, manner or duration provided for in any progress schedule … or that the entire Work shall be completed at the time fixed in any progress schedule", but that "[c]hanges in the schedule that result in delays or shut downs directly attributed to delays solely caused by [Yonkers], or compensable by owner, shall be grounds for additional compensation for justifiable standby costs." (Id. at ¶¶ 5.3, 5.3(b), respectively). Thus, if Yonkers is solely responsible for shut downs or delays, it potentially would be responsible to DGI on account thereof, and where the delays were caused by the owner, relief, if any, would be controlled by, and revert back, to Paragraph 6.3, pertaining to claims for owner-caused delays, for which Yonkers' only responsibility would be to submit the claim and to remit to DGI, payment, if any, Yonkers received from EnCap.

Likewise, if the owner suspends "the whole or any part of the work", pursuant to Article 12 of the Subcontract, "[DGI] understands and agrees" that its rights are limited to such extension of time to complete the work "as may be allowed to [Yonkers] by the Owner", and that "[DGI] shall be entitled to no compensation or damages on account of such suspension from [Yonkers], unless, and only to the extent that, the Owner compensates [Yonkers] for additional costs incurred by [DGI] on account of such suspension." (Id. at ¶ 12) (emphasis added). Thus, for any such claim, Yonkers would submit it to EnCap, as required by Paragraph 6.3 of the Subcontract, and, pursuant to Paragraph 4.2 of the Subcontract, Yonkers would remit to DGI any amount paid to it by EnCap on behalf of DGI.

DGI's claims in the Second and Third Causes of Action of the Complaint fall squarely within these agreed upon contractual procedures, conditions and parameters for payment. Obviously, where, as is the case here, Yonkers received no payment or compensation from

EnCap in respect to DGI's claims, it had no contractual obligation whatsoever to make payment to DGI for such claims.

A. DGI Admits That EnCap Caused And Was Responsible For Its Unpaid Extra Work Claims.

DGI's Second Cause of Action seeks $294,861 for alleged extra work performed in connection with the Project. (Complaint, Ex. "A" to Zicherman Affirm.). According to DGI's answers to interrogatories, the specific extra work and standby claims that comprise this claim are set forth in DGI's November 28, 2006 letter to Yonkers, which identifies eight (8) separate "Unpaid Extra Work Items"; North Node Standby, Rutherford West Standby, DGI Monitoring during NN Standby, Damaged Weight, DC Standby, Radio Wave Interference, Stitcher Standby, and Locating FOTC Test Pad. (See Interrogatory Response #27 and 11/28/06 letter, Exs. "G" and "I" to Zicherman Affirm.). These are the very same eight extra work claims that Yonkers submitted to EnCap on behalf of DGI in connection with the request for equitable adjustment and the Proof of Claim in EnCap's bankruptcy, as Yonkers was required to do for owner-caused claims. (Compare 11/28/06 letter, DGI REA, and Proof of Claim; Ex. "I" to Zicherman Affirm. with Exs. "D" and "E" to Kolaya Aff.).

As is evident from the November 28, 2006 letter from DGI, DGI admitted that these owner-initiated extra work claims were the responsibility of EnCap, and the letter even reflects that EnCap acknowledged its responsibility for many of these costs and intended to recommend that AIG (EnCap's insurer on the Project) pay many of DGI's claims. Specifically, DGI wrote that "if AIG does not accept EnCap's recommendation, EnCap will be financially responsible to make good on [DGI's counter]offers." (11/28/06 letter, Ex. "I" to Zicherman Affirm.) (emphasis added). Nowhere is there any suggestion that Yonkers is responsible for these costs, and any

such related contention now is belied by DGI's contemporaneous memorialization of its true position during the course of the Project. It is clear from the REA, the Proof of Claim, and DGI's November 28, 2006 letter that Yonkers complied with its contractual obligations, pursuant to Paragraph 6.3, by submitting DGI's owner-caused extra work claims to EnCap. Since Yonkers has never received payment from EnCap or AIG on these claims (See Kolaya Aff., ¶¶ 17, 19, 21, 23), Yonkers is not "answerable or liable in anyway (sic) for ... [those] damage[s] to [DGI]." (Subcontract, Ex. "B" to Kolaya Aff. at ¶ 6.3). Thus, DGI's Second Cause of Action must be dismissed with prejudice as a matter of law.

B. DGI'S Delay Claims Were The Result Of EnCap's Actions Or Inactions, And, As Such, Yonkers Has No Contractual Liability To Pay Those Claims.

DGI's Third Cause of Action seeks from Yonkers $1,253,466 for alleged delay/disruption costs that DGI purportedly incurred for "extended home and field office overhead" due to EnCap's actions and inactions. (Complaint, Ex. "A" to Zicherman Affirm). It is a well-settled precept of New York law that "absent a contractual commitment to the contrary, a prime contractor is not responsible for delays that its subcontractor may incur unless those delays are caused by some agency or circumstance under the prime contractor's direction or control." Triangle Sheet Metal Works, Inc., v. James H. Merritt and Co., 79 N.Y.2d 801, 802 (1991) (citations omitted) (Dismissing subcontractor's delay claim against general contractor for owner-caused delays); see also Schiavone Const. Co., Inc. v. Triborough Br. & Tunnel Auth., 209 A.D.2d 598, 599 (2d Dept. 1994) (Discussing the need for specific contractual obligation for prime contractor to be responsible for owner-caused delays); Sea Crest Const. Corp. v. City of New York, 286 A.D.2d 652 (1st Dept. 2001). As the Court of Appeals explained, "[i]f a

subcontractor wants a prime contractor to be a guarantor of job performance, it should bargain for the inclusion in its subcontract of a provision to that effect". Triangle Sheet Metal, 79 N.Y.2d at 803. Neither situation exists here; DGI already has admitted, both within and without this action, that said damages are due to owner-caused delays and the parties' Subcontract expressly provides that Yonkers is not liable to DGI for any delay or other additional costs that were caused by EnCap.

To date, discovery has not revealed any delays to the Contract Work that were caused by Yonkers. In fact, the discovery in this action has negated that contention and, instead, confirmed that EnCap caused the delays. Thus, DGI cannot meet its burden of proof under Triangle Sheet Metal.

DGI has admitted that the delays (and alleged delay costs) it experienced were solely attributable to EnCap. In particular, DGI admitted in the Request for Equitable Adjustment of the Contract ("the DGI REA") submitted to the owner that only 12% of the subcontract work was completed by the time of the original date for contract completion "due to **owner-caused delays** to the scheduled progression of the work." (See DGI REA at Ex. "D" to Kolaya Aff.) (emphasis added). According to DGI's REA, these "owner-caused delays" resulted in its claim for unabsorbed home office overhead costs in the amount of $707,116.60 and unrealized field overhead costs of $546,350 ($1,253,466 in total). (See id.). Tellingly, this is the precise amount of DGI's delay claim advanced in the Third Cause of Action, and the precise amount claimed by DGI in its Proof of Claim submitted in EnCap's bankruptcy for "owner-caused delays". Kolaya Aff. at ¶ 17. It is incongruous and disingenuous for DGI to now belatedly attempt to blame Yonkers for these delays, when it has consistently identified the owner as the responsible party.

The reason for this inconsistency is obvious – DGI knows that EnCap is insolvent and that it will never be compensated for its claims unless it now falsely blames Yonkers.

DGI's admissions have also carried forward into its recent Answers to Interrogatories. In its response to Interrogatory Number 13, DGI essentially admits that it was delayed in the North Node area of work by EnCap's failure to provide enough fill material. In relevant part, its sworn interrogatory response states:

> **Q:** Set forth in detail each and every fact (not legal conclusion) supporting your contention, in paragraph 14 of the Complaint, that "DGI's performance of its Work at the North Node area was delayed, interrupted and severely impacted … by other causes for which Yonkers is responsible." Identify all persons that have knowledge of the facts set forth in response to this interrogatory, and further, identify, and annex hereto, copies of all documents that relate to your answer.
>
> **A:** "The necessary fill to place the platform for the North Node was not ready for Plaintiff to proceed with its work in accordance with the Schedule on which the Subcontract was based. Defendant's failure to timely place the fill and provide the platform in the North Node area was purportedly caused by EnCap's failure to provide enough fill to prepare the necessary platform. Defendant was in contractual privity with EnCap, while Plaintiff had no contractual relationship with EnCap. Therefore, Defendant was in a position to enforce the terms of the Contract with EnCap, but did not meet its obligations to Plaintiff, as Plaintiff was denied continuous access to the site and the work."

(See Ex. "G" to Zicherman Affirm.) (Emphasis added). This same essential response was repeated throughout DGI's answers to interrogatories in response to questions seeking the factual basis of Yonkers' alleged responsibility for the delay claims in the other work areas (see, e.g. Interrogatory Answers 12, 15, 18, 19 at Ex. "G" to Zicherman Affirm.). While these interrogatory responses indicate that the delays experienced by DGI were attributable to the fill material, there were no proofs provided that Yonkers was responsible for furnishing the fill or that Yonkers otherwise delayed the performance of the work once the fill was provided. Moreover, as reflected in DGI's November 28, 2006 letter to Yonkers, DGI admitted that

delivery of fill material was the responsibility of EnCap, and that EnCap's failure to deliver the fill material to the Project had caused delays. In this regard, DGI stated that "The fill for each lift was to be delivered at a conservative rate of 1000 cubic yards per day (roughly 25% of the rate that EnCap claimed the[y] would achieve)". (See 11/28/06 letter, Ex. "I" to Zicherman Affirm.).

In addition, DGI noted that "engineering deficiencies" relating to the required spacing and depth of wick drains resulted in periods of standby time at the Rutherford West work areas. (See Interrogatory Answer 15, Ex. "G" to Zicherman Affirm.). Surely, since Yonkers was the general contractor, and not the engineer for the Project, it cannot be held accountable for engineering difficulties encountered during the work. Within the same response to Interrogatory Number 15, DGI further concedes that it was "forced to proceed with its work in an inefficient pattern due to EnCap's slow removal of the asphalt millings stockpile from the Rutherford West area…" Id. Again, this is an admission that delays were caused by EnCap, the owner, a party over which Yonkers had no direction or control. These are just a few examples from DGI's sworn discovery responses which further substantiate Mr. Kolaya's testimony that "[a]ll the delays experienced on the Project by Yonkers and DGI were due solely to the actions and inactions of EnCap". (Kolaya Aff. at ¶ 14.) As he stated, after 2 of the 8 areas of work were completed by Yonkers/DGI, none of the remaining areas were ever made available to the parties to work, and EnCap constructively suspended the Project. (Kolaya Aff., ¶¶ 9, 15). The suspension is further acknowledged by DGI in its Complaint. (Complaint, Ex. "A" to Zicherman Affirm. at ¶ 26). Mr. Kolaya's statements have not been rebutted or challenged by anything proffered by DGI in discovery, and there is no question of fact whatsoever is presented with regard to the issue of EnCap having caused DGI's alleged delays damages. In fact, Yonkers was

equally impacted by EnCap's actions, and consequently it claimed damages in excess of $2 million against EnCap.

For these reasons, since the delays were attributable to EnCap's failures to provide access to work areas, to provide materials to be furnished by owner; and to discharge its duty to provide proper engineering, Yonkers cannot be held liable for DGI's claims under Triangle Sheet Metal.

In addition, the exception to Triangle Sheet Metal does not exist here, since, as discussed above, the terms of the Subcontract do not make Yonkers liable for owner-caused delays. Delays attributable to the owner are "grounds for additional compensation" under Paragraph 5.3(b), as are additional costs for the owner's suspension of any part of the contract work pursuant to Article 12. However, as is clear from Paragraph 6.3 and Article 12, DGI agreed that for all such additional costs it incurred as a result of EnCap's actions or inactions, Yonkers' only obligation to DGI was to submit its claim to EnCap for consideration. It is undisputed that Yonkers discharged this duty, and given that it did so, Yonkers is not "answerable or liable in anyway for any acts or omissions of the Owner or others which cause damage to [DGI]" and it is "reliev[ed] ... of all liability in connection with any such claims." (Subcontract, Ex. "B" to Kolaya Aff. at ¶ 6.3). Yonkers' only obligation to pay DGI in connection with these claims was to remit payment, to the extent that EnCap, actually compensated Yonkers for the additional costs allegedly incurred by DGI. (See id. at ¶ 4.2; Article 12). Since the delays and the suspension of the work was indisputably due to the actions and inactions of EnCap, and since Yonkers submitted DGI's extended home and field office overhead claims to EnCap, and since these claims were never paid by EnCap, Yonkers has no further responsibility or liability to DGI under the terms of the Subcontract. Accordingly, DGI's Third Cause of Action must be dismissed as a matter of law.

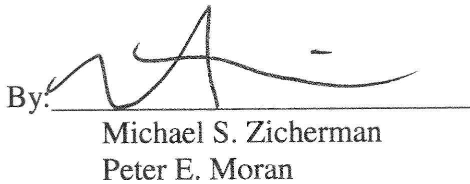
CONCLUSION

For the foregoing reasons, it is respectfully submitted that Yonkers is entitled to partial summary judgment against DGI, dismissing with prejudice a portion of its First Cause of Action seeking retainage, and its entire Second and Third Causes of Action, together with such other and further relief is deemed by the Court to be just and proper, and appropriate costs and disbursement.

Dated: New York, New York
July 13, 2010

Respectfully submitted,

PECKAR & ABRAMSON, P.C.



By: ______________________
Michael S. Zicherman
Peter E. Moran

Attorneys for Defendant
Yonkers Contracting Company, Inc.
41 Madison Avenue, 20th Floor
New York, New York 10010
Phone: (212) 382-0909
Fax: (212) 382-3456

322268.1/07/13/10