

## CONSTRUCTION

## ALERT

JANUARY  
2015**RECENT NEW YORK DECISION REAFFIRMS LIMITS TO SURETY'S LIABILITY ON A DELAY CLAIM MADE UNDER A PAYMENT BOND***By Cynthia A. Murray*

A recent decision by the Supreme Court, New York County, reaffirmed the law as it applies to important issues relating to a surety's defenses to a claim for delay damages made under a payment bond. In *Advanced Automatic Sprinkler Co., Inc. v. Seaboard Surety Co., Inc.*, No. 650321/2001, N.Y.L.J. 1202678994141, at \*1 (Sup. Ct. New York County Dec. 3, 2014), the Court (Hon. Marcy Friedman) granted the defendant surety's motion for summary judgment dismissing the subcontractor's claim for delay damages, holding, among other things, that the no-damages-for-delay clause in the subcontract precluded recovery of delay damages where the delays caused by the non-party prime contractor were foreseeable.

**Facts**

Dart Mechanical Corporation ("Dart") was hired by the Department of Sanitation of the City of New York ("DSNY") as the prime HVAC contractor for the refurbishing of two separate garage buildings located in Brooklyn for a contract price of \$11.644 million. Defendant Seaboard Surety Company ("Seaboard") issued a payment bond to Dart to secure payment obligations to Dart's subcontractors and suppliers. Shortly thereafter, Dart entered into a subcontract with plaintiff Advanced Automatic Sprinkler Co., Inc. ("Advanced") for \$1.23 million for Advanced to

install automatic sprinklers and other fire safety infrastructure in the two garages.

Advanced brought an action against Seaboard to recover \$642,636 for delay damages pursuant to the payment bond Seaboard issued to Dart. According to the complaint, Dart, DSNY, and others, caused substantial delays in the project by: (1) denying Advanced access to the project site; (2) failing to correct a flawed design; (3) failing to adhere to the established project schedule; (4) failing to perform their work in a timely manner; (5) failing to properly coordinate and supervise the work at the project; and (6) failing to replace a prime electrical contractor on the project in a timely manner, knowing the project would be affected.

**Seaboard's Motion for Summary Judgment**

Seaboard moved for partial summary judgment, pursuant to CPLR § 3212, to dismiss Advanced's claim for recovery of delay damages under the payment bond on the grounds that (1) Advanced failed to comply with notice requirements contained in the subcontract; (2) Advanced's claims were untimely under the subcontract and the payment bond; (3) delay damages were barred by a no-damages-for-delay clause in the subcontract and (4) as a surety, Seaboard's liability

under the payment bond was co-extensive with that of its principal, Dart, and Dart was not responsible for the delay damages because it was not the cause of the delays at the project.

In its analysis, the Court first noted that the liability of a surety is “measured by the liability” of its principal. *Id.* at \*5 (citing *American Bldg. Supply Corp. v. Avalon Props. Inc.*, 8 A.D.3d 515, 516 (2d Dep’t 2004)). The Court denied Seaboard’s summary judgment motion based on Advanced’s non-compliance with the notice provision in the subcontract because the notice provision did not, by its terms, apply to claims for delay damages. Furthermore, where a construction contract contains a notice provision similar to the provision in the subcontract but also contains a no-damages-for-delay clause, a claim for delay damages is outside the scope of the contract and is not governed by the notice provision.

The Court also found that the cause of action was not barred by the statute of limitations. Because the limitations period set forth in the subcontract was shorter than the limitations period provided in N.Y. State Finance Law § 137(4), it was immaterial whether the limitations period contained in the subcontract had lapsed. N.Y. State Finance Law § 137(4) provides that “no action on a payment bond furnished pursuant to this section shall be commenced after the expiration of one year from the date on which the public improvement has been completed and accepted by the public owner.” In this case, Seaboard did not establish as a matter of law that the project had been completed and accepted by the owner.

The Court, however, granted Seaboard’s motion for summary judgment dismissing Advanced’s claim for recovery for delay damages based on the no-damages-for-delay clause. As an initial matter, the Court noted that “[a]bsent a contractual requirement 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.” *Id.* at \*5 (citing

*Triangle Sheet Metal Works, Inc. v. James H. Merritt & Co.*, 79 N.Y.2d 801, 802 (1991)).

The Court went on to reaffirm the rule set forth by the Court of Appeals that a contract clause barring damages for delay in the performance of a contract is valid and enforceable and prevents a party from recovering damages for “those delays which are reasonably foreseeable, arise from the contractor’s work during performance, or which are mentioned in the contract.” *Id.* at \*6 (quoting *Corinno Civetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297, 310 (1986)). There are four exceptions under which a contractor may still recover delay damages despite the existence of a no-damages-for-delay clause: (1) delays that are unanticipated at the time of the contract; (2) delays due to bad faith or willful, malicious or grossly negligent conduct; (3) delays so unreasonable that they amount to an intentional abandonment of the contract; and (4) delays resulting from breach of a fundamental obligation of the contract. *Id.* at \*5 (citing *Corinno Civetta Constr. Corp.*, 67 N.Y.2d at 309).

The Court recognized that there was a two-year delay to the completion of the project and that other cases have found a triable issue of fact as to whether long delays were contemplated by the parties. In this case, however, Advanced’s subcontract specifically addressed delays to the project as a result of Dart’s actions. In addition, the Court held that that Advanced failed to submit evidence in opposition to Seaboard’s motion sufficient to raise a triable issue that the delays were caused by Dart’s bad faith, willful misconduct, gross negligence or unreasonable conduct amounting to abandonment of the contract. Rather, the delays by Dart were consistent with “inept administration” or “poor planning and administration” which does not render the no-damages-for-delay clause unenforceable. *Id.* at \*8.

### **Considerations**

The decision in *Advanced v. Dart* has reaffirmed important issues for sureties in defending a claim for delay damages brought under a payment bond.

Certain defenses will be derived directly from the principal's contract, including notice requirements and a no-damages-for-delay clause. Specifically, the notice provision must be directly applicable to a claim for delay and a no-damages-for-delay clause will preclude recovery of delay damages where the delays were foreseeable. Assertion of a statute of limitations defense will depend on the language of the contract, New York State Finance Law and issues of completion and acceptance by the owner. ♦

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