

## 'No damages for delay' clause doesn't bar recovery

### Subcontractor files suit over 'loss of productivity'

By: Eric T. Berkman January 9, 2014



A "no damages for delay" clause did not preclude a subcontractor from recovery after it incurred "loss of productivity" as a result of the general contractor's mismanagement of the project, a Superior Court judge has ruled.

According to the provision, the sole remedy for any delay caused by the contractor would be an extension of the time by which the subcontractor's work must be completed.

The plaintiff subcontractor argued that that should not be enforced because the defendant general contractor refused to grant extensions as it was contractually obligated to do. In addition, the plaintiff asserted that it was not actually seeking compensation for delay but rather for the additional resources it had to expend to address hindrances and interference caused by the defendant's mismanagement.

Judge S. Jane Haggerty agreed.

"[The defendant's] breaches of its obligations did not result in an 'idle workforce' on [the plaintiff's] part, but, to the contrary, in an increased workforce as [the plaintiff] had to comply with [the defendant's] compressed schedule," Haggerty wrote, ordering the defendant to pay damages plus interest.

The defendant's breaches did not affect the plaintiff's "ability to complete its work on time — and indeed, the project was substantially completed ... in compliance with the general contract — but, rather, with its ability to complete its work on budget," Haggerty continued.

The judge also found that the plaintiff's expert did not err by applying the "total cost" methodology, under which he compared the plaintiff's projected versus actual work on the project, to calculate damages, as opposed to the generally preferred "measured mile" approach, which compares the cost of completing work not subject to delay or acceleration with the cost of completing work during a period that was.

The defendant's misconduct throughout the project impacted all aspects of the plaintiff's performance, which precluded the expert from identifying a baseline with which to apply the measured mile method, Haggerty said.

The 28-page decision is *Central Ceilings, Inc. v. Suffolk Construction Company, Inc., et al.*, Lawyers Weekly No. 12-095-13. The full text of the ruling can be ordered by clicking [here](#).

#### 'Absolute bombshell'

Plaintiff's counsel Paul R. Mordarski of Morrissey, Hawkins & Lynch in Boston called the decision a "long-overdue reality check to temper the overly rigid application of ossified and hyper-technical defenses."

Construction projects are too often plagued by disruption, coordination failure, design changes and other impediments that make it difficult for subcontractors to complete their projects efficiently and in line with the assumptions underlying their initial bids, Mordarski said.

Regarding delay clauses in particular, Mordarski said that while they remain generally enforceable in Massachusetts, unlike in many other states where they are void on public policy grounds, the decision shows they will be narrowly construed against the party seeking to avoid liability.

"Where the clause speaks strictly to 'delay' only, it therefore should not operate to bar recovery of claims for loss of productivity attributable to other independent factors," he said.

East Walpole construction lawyer Jonathan P. Sauer, who was not involved in the case, called the ruling "an absolute bombshell of a decision" that could cause major problems for contractors.

Sauer was particularly critical of the judge's application of the "total cost" method for calculating loss-of-productivity damages, pointing out that under such a method there is no reduction to a subcontractor's damages due to its own participation in the delay, such as by failing to mitigate its own damages when possible.

"In handling construction cases for several decades, none come to mind where the subcontractor's actions and inactions didn't contribute in at least some measure to the delay, even where the vast majority of the delay is attributable to others," Sauer said. "Under this decision, it appears the subcontractor may get a free pass, ... which would not be fair to either general contractors or their sureties."

Sauer also found "startling" the fact that the judge listed both design problems and project mismanagement as grounds for loss-of-productivity damages, yet held the contractor accountable for all such damages. By failing to distinguish between the general contractor's responsibilities and those of the design professional on the project, the judge essentially made the general contractor a partial guarantor of the design professional's work, he said.

"This is a screwball thing that could cause [construction sureties] to back out of the Massachusetts market if this stands," Sauer said. "It would certainly increase the cost of public construction because sureties will increase their premiums and there will be fewer sureties you can get quotes from."

But as bad as the ruling may be, Sauer said, the defendant — a large company — should pay the damages and dispose of the case.

"[The defendant] might achieve some hits in the Appeals Court, but [it] won't get a homerun," he said. "Pains should be taken in appropriate cases — and this might be one of them — to not follow through with an appeal and potentially create bad law in the process."

Harvey B. Heafitz, a Boston construction lawyer who also was not involved in the litigation, said *Central Ceilings* reflects the inability of contractors on state projects to coordinate effectively or provide appropriate facilities so that subcontractors can finish their work on time and on budget.

But the case shows that if there is simple, straightforward contractual language and the subcontractor does its homework and asks for a time extension, it can bring a claim, Heafitz said.

"Not for the delay itself, but for the consequences of disruption on the project, which is sometimes delays and sometimes for acceleration costs trying to make up for delays," he said.

John P. Connelly of Hinckley, Allen & Snyder represented the defendant. The Boston lawyer could not be reached for comment prior to deadline.

### **Project mismanagement**

The state hired defendant Suffolk Construction Co. to serve as general contractor for a \$25 million project involving the construction of a new residence hall at Westfield State College, to be completed by July 1, 2005.

On Aug. 8, 2004, the defendant entered a \$3.5 million subcontract with plaintiff Central Ceilings, Inc., to supply labor and material for the drywall and ceiling portions of the work on the project.

The subcontract contained a provision under which the plaintiff could not make a claim for money damages as a result of any delays on the project. However, the no-damages-for-delay clause also stated that should there be delays not attributable to the plaintiff, it would be entitled to an extended deadline for its work as long as it notified the defendant in time.

The project ultimately was beset by a number of management and design issues, including the defendant's apparent failure to coordinate erection of the steel; failure to correctly establish the elevation, column and control lines of one of the buildings; failure to coordinate delivery of materials in a timely manner; failure to provide the necessary climate for interior work; and a number of other issues.

As a result, the plaintiff repeatedly had to demobilize and remobilize its manpower, materials and equipment and to perform "do-overs." It also had to increase its manpower and supervision to comply with the compressed schedule that resulted from both the delays and the defendant's unwillingness to grant extensions despite the plaintiff's timely notification.

Alleging that it suffered more than \$320,000 in loss of productivity as a result of the mismanagement, the plaintiff sued the defendant in Superior Court for breach of contract.

A bench trial took place in fall 2011 and spring 2012, and Haggerty issued her findings last month.

### **Loss of productivity**

Haggerty first found that the defendant did, in fact, breach the subcontract by failing to adequately supervise, direct, coordinate and sequence work on the project, causing the plaintiff a loss of productivity.

She also rejected the defendant's argument that the no-damages-for-delay clause in the subcontract precluded the plaintiff from recovering damages from the loss of productivity it suffered.

The defendant violated the plain language of the clause itself by failing to grant the plaintiff extensions, Haggerty said.

"By not granting Central its requested extensions, Suffolk deprived Central of its contractually-mandated remedy," the judge wrote. "The deprivation is, itself, a breach of the Subcontract, and Central's damages for loss of productivity are a direct result of this breach. The plain language of the no-damages-for-delay clause accordingly does not bar Central's recovery."

Haggerty also found that the plaintiff was not actually seeking damages based on delay but for "hindrances" and "interferences" with the orderly performance of its work, noting that the defendant's breaches did not prevent the plaintiff from completing its work on time. Rather, the judge said, the plaintiff did complete its work on time but was forced to expend significant resources in order to do so as a result of such hindrances.

Haggerty concluded that the no-damages-for-delay provision did not preclude the plaintiff from recovery "regardless of whether the court characterizes Central's damage as arising from Suffolk's failure to provide Central with the contractually-required extensions or as a result of Suffolk's hindrances and interferences with Central's work on the Project." **MLW**

**CASE:** *Central Ceilings, Inc. v. Suffolk Construction Company, Inc., et al.*, Lawyers Weekly No. 12-095-13

**COURT:** Suffolk Superior Court

**ISSUE:** Did a no-damages-for-delay clause in a construction subcontract preclude a subcontractor from obtaining damages for "loss of productivity" incurred as a result of the general contractor's mismanagement of the project?

**DECISION:** No

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