

General contractor liable for subcontractor's 'loss of productivity'

No-damages-for-delay clause doesn't bar contract claim

By: Pat Murphy April 6, 2017



A "no-damages-for-delay" clause in a construction contract did not bar claims for additional labor costs incurred by a subcontractor due to loss of productivity resulting from the general contractor's failure to manage the project efficiently, the Appeals Court has found.

The defendant general contractor, Suffolk Construction Co., argued that damages for lost productivity fell within the plain meaning of "damages for delay" barred by the exculpatory clause

in its subcontract with the plaintiff, Central Ceilings.

But the court disagreed, affirming a \$321,315 judgment handed down by Superior Court Judge S. Jane Haggerty following a bench trial on the plaintiff's breach-of-contract claim.

Judge Kenneth V. Desmond Jr., writing for the unanimous Appeals Court panel, concluded that Haggerty "was merely (and properly) interpreting the no-damages-for-delay clause at issue. Her ruling neither seeks to impose, nor results in, a new, universally applicable definition of 'delay.'"

The 20-page decision is *Central Ceilings, Inc. v. Suffolk Construction Company, Inc., et al.*, Lawyers Weekly No. 11-036-17. The full text of the ruling can be found [here](#).

Groundbreaking decision?

Plaintiff's attorney Paul R. Mordarski of Boston said Suffolk Construction breached the contract in so many ways that it disrupted his client's performance "throughout."

"It wasn't so much that Central was delayed and had to wait around to do work; we had to accelerate or compress work, or go back and do work," he said.

Boston attorney Joel Lewin represented the defendant. Lewin said courts in Massachusetts have historically construed the word "delay" very broadly.

"If you, as a contractor, are delayed at the start of the job, at the end of the job, or during the job by any combination of events, then that damage is covered by the no-damage-for-delay clause," he said.

But Boston construction attorney Andrew G. Wailgum said the Appeals Court decision is consistent with courts around the country carving out exceptions to no-damages-for-delay clauses, distinguishing delay from other circumstances.

"I'm not surprised by this [decision], and it makes sense based on what everybody else is doing," Wailgum said. "You're going to see general contractors and construction managers tweaking their no-damages-for-delay clauses to include damages resulting from hindrances, loss of productivity, and compression or acceleration [of work]."

The decision correctly applied a deprivation-of-remedy exception to the general enforceability of no-damages-for-delay clauses, according to Worcester's David L. Fine, who typically represents subcontractors in construction cases. Fine pointed out that the only remedy afforded the subcontractor under the clause at issue was an extension of time granted by the general contractor.

"This was an unambiguous term," Fine said. "[The clause] did afford the sub the right to request extra time, that request was rejected, so it put the sub between a rock and a hard place."



Fine said the decision arguably could be read to mean that so-called acceleration damages are no longer considered delayed damages in Massachusetts.

"The court said there was no delay here, that these were ramped up costs for finishing the work on schedule," Fine said, adding that the case also is significant because the court affirmed the use of the "total cost" method of calculating damages.

Time of the essence

The defendant was hired by the Massachusetts State College Building Authority as general contractor for the construction of three dormitories at Westfield State University.

The state expected the dormitories to be ready for occupancy by students arriving for the fall 2005 semester. Accordingly, the general contract called for substantial completion by July 1, 2005, providing a \$200,000 bonus for the defendant's completion of the project on time.

The defendant's contract with the state also provided for substantial liquidated damages for failure to complete the project on time.

The defendant accepted the plaintiff's \$3.6 million bid to become subcontractor for various jobs, including the installation of drywall, exterior metal framing and metal door frames. Critical to the plaintiff's cost estimates was its ability to complete the work in a timely fashion within the "flow" of the project.

In light of the bonus and liquidated damages provisions in its contract with the state, the defendant made clear to the plaintiff that no extensions of time would be granted.

However, Haggerty found that the defendant failed in many of its duties managing the project.

Those problems forced the plaintiff to repeatedly redeploy personnel, tools and materials to other tasks when scheduled jobs were not ready for the subcontractor's work.

In addition, the plaintiff found the efficiency of its operations further degraded because its workers often found themselves trying to perform tasks at the same time and in the same space as other subcontractors.

Haggerty found that start dates for the plaintiff's subcontract work were consistently pushed back due to problems related to the defendant's management of the project.

Because the defendant held firm to scheduled completion dates, however, the plaintiff frequently was forced to complete its work within compressed time frames. When the plaintiff complained, the defendant told the subcontractor to use additional manpower to meet its deadlines.

As a result, although the dormitory project was completed on time, the plaintiff incurred substantial additional costs it had not anticipated.

The plaintiff sued for breach of contract and quantum meruit, claiming the defendant had not adequately managed and coordinated the project. The plaintiff alleged that the defendant's mismanagement resulted in damages for loss of productivity in the amount of \$321,315, and \$82,538 in unpaid change order requests.

At the conclusion of trial, Haggerty determined that the defendant had breached the contract and awarded the plaintiff damages for loss of productivity.



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— Andrew G. Wailgum, Boston



Lost productivity recoverable



On appeal, the defendant contended that the award of damages for loss of productivity was barred by a no-damages-for-delay clause in the subcontract.

The clause stated that the subcontractor "agrees that it shall have no claim for money damages or additional compensation for delay no matter how caused, but for any delay or increase in the time required for performance of this Subcontract not due to the fault of the Subcontractor, the Subcontractor shall be entitled only to an extension of time for performance of its Work."

Haggerty found the no-damages-for-delay clause inapplicable because, even if the plaintiff's complaint could be construed as seeking damages "for delay," the defendant had deprived the plaintiff of its only remedy under that clause by refusing to grant extensions of time.

The defendant argued that the trial judge erred in her conclusion because there was no evidence that the plaintiff had actually requested any extensions.

But the Appeals Court found no error in light of evidence that the defendant had made it clear from the beginning no extensions would be granted, as well as evidence that the defendant was "financially incentivized to avoid extensions of time" by both the bonus for completing the project on time and liquidated damages for failing to do so.

"As such, we see no basis for disturbing the [trial] judge's resulting conclusion that Suffolk had committed a material breach by depriving Central of its sole contractual remedy, thereby precluding Suffolk from invoking the no-damages-for-delay clause as a bar to Central's claim for damages," Desmond wrote.

The panel further rejected the defendant's argument that the damages sought by the plaintiff were in essence damages "for delay" barred by contract.

Haggerty had reasoned that the no-damages-for-delay clause was inapplicable as the plaintiff was not seeking damages because it had been delayed. Instead, the trial judge saw the plaintiff as seeking to recover its higher labor costs as a result of having to increase its workforce to complete jobs within a compressed schedule.

In reaching her conclusion, Haggerty found persuasive a 1984 decision from the 6th U.S. Circuit Court of Appeals, *John E. Green Plumbing & Heating Co. v. Turner Construction Co.*

In that case, the 6th Circuit held that a contractor's claim for damages was not barred by a no-damages-for-delay clause, interpreting delay damages to mean damages for "the cost of an idle workforce."

The panel found Haggerty's consideration of *John E. Green Plumbing* "well-grounded," noting with approval the trial judge's finding that the defendant's breaches did not affect the plaintiff's ability to complete its work "on time" but, rather, with its ability to complete its work "on budget."

"In sum, we discern no basis for disturbing either her interpretation of the clause at issue or her related factual findings," Desmond wrote.

Significantly, the panel further approved of the use of the "total cost" method for calculating the plaintiff's damages. The total cost method examines the difference between the amount bid for the work and the actual cost of the work.

While some courts disfavor the use of the total cost method, and no Massachusetts appellate court has addressed the issue, the panel concluded it was appropriately applied to the plaintiff's claim.

In particular, the court pointed out that the plaintiff's construction expert testified that the total cost method was the only method by which the plaintiff's loss of labor productivity could be calculated.

Based on the expert's testimony, Desmond wrote, "the pervasive nature of Suffolk's breaches made it impossible to identify an adequate baseline for assessing damages on an event-by-event basis."

The panel further upheld the trial judge's award to the plaintiff of \$471,682 in attorneys' fees. On the other hand, the panel rejected the plaintiff's cross-appeal challenging Haggerty's ruling that a "pay-if-paid" clause in the subcontract barred the recovery of \$82,538 from the defendant for unpaid change order requests.



Central Ceilings, Inc. v. Suffolk Construction Company, Inc., et al.

THE ISSUE: Does a “no-damages-for-delay” clause in a construction contract bar a claim for added labor costs incurred by a subcontractor due to lost productivity resulting from the general contractor’s failure to efficiently manage the project?

DECISION: No (Appeals Court)

LAWYERS: Paul R. Mordarski and Thomas J. Fullam, of Morrissey, Hawkins & Lynch, Boston (plaintiff)

Joel Lewin and John P. Connelly, of Hinckley, Allen & Snyder, Boston (defense)

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