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DELAY, SUBCONTRACT

## New York Court Holds Contractor's Failure to Timely Pass Through Subcontractor Delay Claim to the Owner Constitutes Breach of the Covenant of Good Faith and Fair Dealing

*Rad and D'Aprile, Inc. v. Arnell Construction Corp*, No. 502464/14, 2019 BL 131606 (NY. Sup. Ct. April 3, 2019)



Kristopher Berr

In June of 2001, Arnell Construction Corp. ("Arnell") entered into a prime contract to build two sanitation garages in Brooklyn for the New York City Department of Sanitation (the "City"). Arnell subcontracted the project's masonry work to Rad and D'Aprile, Inc. ("Rad"). After execution of the subcontract, Rad was informed that the start of work would be delayed because the City had not yet obtained ownership or access to all portions of the site. When its work did commence, only limited portions of the site were available. This caused inefficiencies in Rad's work and caused it to incur increased costs.

During the Summer of 2002, Rad put Arnell on notice of its delay claim and requested additional compensation under the subcontract. In a liquidating agreement dated August 9, 2002, Arnell agreed to increase Rad's compensation by \$100,000 and further agreed to incorporate Rad's claim into Arnell's own claims to the City, which Arnell would submit at the completion of the project. Arnell agreed that "[a]ny money received in the settlement of the claim [for Rad] over the \$100,000 will be forwarded to [Rad]."

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Rad substantially completed its work in September of 2005 and, after working with Arnell to perfect its claim throughout 2005, ultimately submitted its claim to Arnell on October 31, 2005. In turn, in January of 2006, Arnell informed Rad that the claim had been submitted to the City, along with the claims of Arnell and other subcontractors. Thereafter, Rad periodically inquired about the status of the claim. From 2006 through 2010, Arnell provided assurances that the claim had been submitted and remained pending with the City. In reality, however, Arnell never submitted its claim to the City until August 11, 2010. When Arnell subsequently filed a breach of contract action against the City, the action was dismissed as time-barred. Eventually, in August of 2013, Arnell settled its claims with the City. Arnell agreed to release Rad’s claims, but Rad was never informed of the settlement.

On March 21, 2014, Rad sued Arnell for breach of contract in the Supreme Court, Kings County, asserting causes of action for breach of contract, quantum meruit and breach of the August 9, 2002 liquidating agreement. On the parties’ cross motions for summary judgment, all of Rad’s claims arising under the subcontract were dismissed as time-barred. The court reasoned that Rad’s causes of action under the subcontract accrued at substantial completion of its work, which had occurred in September of 2005.

With respect to Rad’s claim under the August 9, 2002 liquidating agreement, the Court denied Arnell’s motion for summary judgment and entered judgment in favor of Rad. First, Arnell argued that Rad was not entitled to recover delay damages under the liquidating agreement because the subcontract contained a no-damage-for-delay clause. The Court rejected this argument, reasoning that the liquidating agreement provides an independent basis for Rad’s recovery of delay damages. Whether or not such damages would have been recoverable under the subcontract, the Court determined that in entering into the liquidating agreement, “Arnell assumed liability for Rad’s damages occasioned by the City’s delays[.]”

Second, Arnell argued that no part of the 2013 settlement with the City constituted payment for Rad’s claim. Thus, it argued that Rad had no right to recover damages under the terms of the liquidating agreement. The Court rejected this argument, holding that Arnell breached the covenant of good faith and fair dealing and that Rad was therefore entitled to recover all damages caused by the breach. The Court reasoned that Arnell acted in bad faith by failing to timely present Rad’s claim to the City or take other steps necessary to protect Rad’s claim, such as responding to requests from the City for appropriate claim and close-out documentation. The Court reasoned that Arnell’s bad faith was further demonstrated by its failure to inform Rad of the 2013 settlement with the City. As a result of its breach of the covenant of good faith and fair dealing, Arnell would therefore be liable under New York law for Rad’s full damages and would not be limited to a pro rata portion under the liquidating agreement.

[To view the full text of the court’s decision, courtesy of Bloomberg Law, click here.](#)

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