"NO DAMAGES FOR DELAY" CLAUSES IN CALIFORNIA IN THE PUBLIC AND PRIVATE WORKS SETTINGS

A brief summary of "no damages for delay" provisions in the California public and private works settings.

Despite the California's legislature limiting "no damages for delay" provisions in public works contracts through Public Contracts Code section 7102, public works owners can still enforce such provisions in certain circumstances. Section 7102 provides that even if there is a "no damages for delay" clause in a contract between the public works owner and the general contractor or between a general contractor and subcontractor, the general contractor or subcontractor can still recover delay damages provided that (1) the other contracting party was responsible for the delay, (2) the delay was unreasonable under the circumstances, and (3) the delay was not within the parties' contemplation at the time of contracting. Thus, section 7102 does not always invalidate "no damages for delay" provisions in public works prime contracts or subcontracts. Since the California legislature adopted section 7102 in 1984, however, there have been no published decisions enforcing "no damages for delay" provisions in the public works context.

In the private works sector, although there is a shortage of case decisions, "no damages for delay" provisions appear to be alive and kicking with no similar limitations. Courts have pointed to the private sector parties freedom to contract in validating such provisions in their contracts.

A. Public Works Setting

The only published decision examining section 7102 is *Howard Contracting, Inc. v. G.A. MacDonald Construction Co.*, 71 Cal.App.4th 38 (1998). *Howard Contracting* involved claims for delay and disruption that MacDonald Construction, the general contractor, and Howard Contracting and Soil Retention Systems, subcontractors, had against the City of Los Angeles arising from the rehabilitation of the Venice canals. The project was delayed eight and a half months. The general contract contained a typical "no damages for delay" provision allowing the general contractor an extension of time for delay caused by unforeseen events but no damages. Another provision in the general contract did create an exception, allowing for delay damages due to unreasonable and unanticipated delays that the City caused.

The trial court confirmed the finding of a judicial referee awarding damages to MacDonald Construction and Howard Contracting against the City. The City appealed, arguing that section 7102's prohibition against enforcing "no damages for delay" clauses was inapplicable because the City was a "charter city." The City argued that charter city status rendered it immune from state statutes regulating contracts inasmuch as a public works contract is a municipal matter that falls under the "home rule" exception. The home rule doctrine grants precedence to a city charter or municipal enactment over a conflicting state statute purporting to regulate a municipal matter. In rejecting the City's argument, the court found no conflict between section 7102 and any charter provision or municipal enactment and, thus, found the home rule doctrine inapplicable. Accordingly, the "no damages for delay" provision in MacDonald Construction's contract with the City was unenforceable under section 7102.

Without explanation, the appellate court failed to address the other provision in the general contract allowing for delay damages due to unreasonable and unanticipated delays that the City caused notwithstanding that it would appear that the City included the exception for the very purpose of ensuring compliance with section 7102. Therefore and unfortunately, the decision does not provide any guidance in identifying situations where "no damages for delay" provisions might be enforceable when (1) the public agency caused the delays, (2) the delays were unreasonable, and (3) the delays were not the type that the parties originally contemplated.

There was a case where those issues were litigated, *L.S. Hawley v. Orange County Flood Control District*, 211 Cal.App.2d 708 (1963). *L.S. Hawley* involved a general contractor's action against a public entity arising from sewer line construction. Prior to the construction beginning, the public agency notified the general contractor that it had specified the wrong type of manhole cover and that the public agency would provide revised plans. The contractor completed its work except for the placement of the manhole covers. The public agency took several weeks more than the one week it should have needed to provide the revised plans. After the general contractor priced the extra work, it took the public agency several more weeks to authorize the work. Due to the delay in providing the revised design, the banks of the sewer trench caved in knocking the sewer line out of place and causing sewage flooding in the trench. It took weeks to repair the damage that the cave caused. The general contractor sued for damages for the extra work and for delays and cost overruns.

The trial court granted the public agency's motion for non-suit holding that although there was clear evidence that the public agency had caused the delays, there was a provision in the prime contract that allowed an extension of time for owner-caused delays but precluded damages for delay. The only issue on appeal was whether that section prevented the general contractor from recovering those damages. The appellate court reversed and held that the "no damages for delay" provision was an invalid forfeiture clause: "A clause which in ultimate result has the effect of imposing a forfeiture will be strictly construed, especially where the contract as here, was prepared by the one seeking to impose the forfeiture." (211 Cal.App.2d at 713.) The public agency insisted, however, that the provision was so unequivocal that the general contractor assumes the risk of any owner-caused delays. After distinguishing a few decisions that the public agency cited, the appellate court examined several California decisions and various non-California decisions, and held there was significant legal authority against enforcing a "no damage for delay" provisions when the facts reveal that the public agency caused an unreasonable delay to the contractor's work. Whether the delays were the type contemplated under the conditions imposed at the time of contracting was for the trier of fact to resolve: "The question of whether or not the delay damage clause was intended by the parties to prevent recovery under the peculiar circumstances here involved resolves itself into a factual question requiring the weighing of all the facts presented." (211 Cal.App.2d at 717.)

In *McGuire & Hester v. City of San Francisco*, 113 Cal.App.2d 186 (1952), a general contractor contracted with the city to build a water supply line. There was a "no damages for delay" clause for all delays. The city, although contractually obligated to obtain necessary rights of way or easements prior to commencement, failed to do so, which delayed the project into the winter months. The general contractor completed the project late and sued the city for delay damages.

The court rejected the city's argument that under the prime contract's express terms the general contractor's only remedy was an extension of time. The court found that the "no damages for delay" clause did not specifically exculpate the city from liability for damage arising from delays that the city's acts and omissions caused. The court stated that to adopt the city's interpretation "would be to give the clause and the contract as a whole a strained, unreasonable and unfair interpretation." (113 Cal.App.2d at 189.) (See also *Hensler v. City of Los Angeles*, 124 Cal.App.2d 71 (1954), *Milovich v. City of Los Angeles*, 42 Cal.App.2d 364 (1941) and *D.A. Parrish & Sons v. County Sanitation Dist.*, 174 Cal.App.2d 406 (1959), allowing damages for delay when the public agency breached the contract causing the delay.

B. Private Works Setting

There is a paucity of law in the private works setting. A few decisions, however, have enforced "no damages for delay" provisions in private party contracts. For example, in *Hansen v. Covell*, 218 Cal. 622 (1933), the owner's acts and omissions caused a hotel construction project to be delayed five months and the contractors sought and received an award of damages for delays. The contracts at issue provided that the contractors remedy for delay was a time extension. They did not expressly waive delay damages; however, the owner argued that it had the effect of waiving damages due to owner-caused delays. The California Supreme Court agreed: "the parties had a right to agree upon the exclusive remedy available to the contractors by reason of such delay." (218 Cal. at 628.) Focusing on freedom to contract and non-California decisions holding that a contractor accepting an extension of time as its sole contractual remedy for delay waives any other remedy, the Court reversed the award of damages.

In *Huber, Hunt & Nichols, Inc. v. Moore*, 67 Cal.App.3d 278, 302 (1977), a contractor action against an architect, one small issue among a multitude of issues, was the contractor's claim that the architect unreasonably delayed processing of change orders thereby damaging the contractor. Citing *Hansen*, and the rule that "the law is clear that Contractor could legally waive its claim for damage resulting from delay," the court held that signing the change orders acted as an accord and satisfaction whereby the contractor waived its right to obtain any damages associated with delay.

In *Michel & Pfeffer v. Oceanside Properties, Inc.*, 61 Cal.App.3d 433 (1976), a subcontractor alleged, among other causes of action, rescission against the general contractor based on the general contractor's work stoppage order. However, the subcontract contained a "no damages for delay" provision, which also expressly set forth that the exclusive remedy for contractor-caused delay was a time extension. Based on that provision, the trial court concluded, and the appellate court agreed, that the subcontractor had waived the right to rescind the subcontract based on delay. Gratuitously, the court did note that there was no need for it to determine whether the "no damages for delay" clause constituted a forfeiture because the subcontractor had not claimed delay damages—just rescission.

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