NORTON ROSE FULBRIGHT

Commercial division update: Enforceability of delay damage waivers

New York Law Journal

February 20, 2026 | By **Thomas Hall** and **Judith Archer**

Parties to construction contracts frequently include provisions that exculpate a party, such as a general contractor, from liability for damages resulting from delays caused due to the performance of another party, for example a subcontractor. New York law is clear that such clauses will be strictly enforced. As with most legal principles, however, exceptions exist.

Where the delay was caused by unusual events that the parties could not have contemplated at contract inception, or caused by the exculpated party's bad faith or willful misconduct, the waiver of delay damages may be found to be unenforceable. However, the party advancing the existence of such an exception to enforceability faces a "heavy burden" of proving such. This column addresses recent Commercial Division cases dealing with delay claims, the effectiveness of delay waiver clauses, and the high standard of proof required to establish the existence of an exception to enforceability.

Appellate division precedent

The foundational rule for the enforceability of delay damage waivers can be traced to the Court of Appeals' seminal decision in *Corinno Civetta Const. Corp. v. City of New York*, 67 N.Y.2d 297, 309-14 (1986), holding that a clause exculpating a party from liability for delay damages generally is valid and enforceable. Importantly, the court went on to articulate four narrow exceptions in which delay damages may be recovered notwithstanding a waiver clause:

(1) delays caused by the contractee's bad faith or willful, malicious, or grossly negligent conduct;

(2) uncontemplated delays;

(3) delays so unreasonable as to amount to an intentional abandonment of the contract; and

(4) delays arising from a breach of a fundamental, affirmative contractual obligation. The court also clarified that the term "delay" encompasses both schedule extensions and disruption/inefficiency costs; simply relabeling delay as "loss of productivity" will not avoid a delay exculpatory clause.

Appellate Division decisions have routinely applied *Corinno Civetta's* rule and exceptions, and stress a consistently high bar for pleading an exception to enforceability. In *Dinallo Constr. Corp. v. Phoenix RMA Constr. Servs. LLC*, 193 A.D.3d

Thomas J. Hall and **Judith A. Archer** are partners with Norton Rose Fulbright US. **Jenn Wais**, a law clerk with the firm, assisted in the preparation of this column.
More than 50 locations, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg.

Attorney advertising
Reprinted with permission from the February 20, 2026 edition of the *New York Law Journal* © 2026 ALM Media Properties, LLC. All rights reserved.
Further duplication without permission is prohibited. www.almreprints.com – 877-257-3382 – reprints@alm.com.

407, 407 (1st Dep't 2021), for example, the First Department affirmed dismissal of a subcontractor's delay claims holding they were barred by a broad no damages for delay clause. The court rejected allegations of bad faith and gross negligence as amounting to "nothing more than inept administration or poor planning," and held that an alleged failure to provide adequate heat did not breach a fundamental obligation of the contract.

Likewise, the First Department also affirmed the dismissal of claims for delay in *Gamma USA, Inc. v. Pavarini McGovern, LLC*, 239 A.D.3d 441, 441-42 (1st Dep't 2025). The court rejected allegations premised on a year-long start delay, late completion, two week look ahead scheduling in lieu of critical path method schedules, and the removal of a crane, holding these types of delays were not unusual and were of the type that would have been contemplated by the parties at contract inception. At most, the court found, they alleged "inept administration or poor planning," which has been repeatedly held to be insufficient to trigger an exception of enforceability.

In *Henick–Lane, LLC v. Stellar Mgmt. Grp, Inc.*, 241 A.D.3d 1201, 1202 (1st Dep't 2025), the court held that a subcontractor's "extra work" change-order claims were subject to, and barred by, a clause making an extension of time the "sole and exclusive remedy" for any obstructions, hindrances, or delays, including delays from owner/contractor conduct and changes in the work, because they were expressly contemplated by the no-damages-for-delay clause.

The court further found that no *Corinno Civetta* exception applied because plaintiff failed to raise an issue of fact as to whether defendants' delays were willful, malicious, or in bad faith, and the failure to provide a crane did not constitute a breach of a fundamental obligation. See *Maric Mech., Inc. v. Dormitory Auth. of New York*, 62 A.D.3d 965, 965 (2d Dep't 2009); *Tougher Indus., Inc. v. Dormitory Auth. of New York*, 130 A.D.3d 1393, 1393-96 (3d Dep't 2015); *Weydman Elec., Inc. v. Joint Schs. Const. Bd.*, 140 A.D.3d 1605, 1606-07 (4th Dep't 2016).

Commercial Division application

Commercial Division decisions reflect rigorous enforcement of delay waivers, while occasionally allowing well pleaded exception theories to proceed when supported by detailed, nonconclusory facts.

In the recent case of *Tutor Perini Corp. v. State Univ. Constr. Fund*, 2025 NY Slip Op 52062(U) (N.Y. Co. Dec. 1, 2025), the construction of a new academic building allegedly was delayed by more than 1,100 days, resulting in the general contractor's claims against the developer for $23.5 million in delay damages. The delays allegedly arose from defective designs in the plans provided, developer change orders, and the developer's maladministration of the project.

The developer responded that the delays at issue were not uncommon and were not the result of any willful misconduct. In granting summary judgment for defendant, Justice Richard Platkin of the Albany County Commercial Division held that plaintiff's bad faith allegations were nothing more than "boilerplate references to bad faith," which were insufficient to satisfy the heavy burden to prove an exception to enforceability of the delay waiver.

Specifically, the court held that the plethora of alleged maladministration lacked evidence of the level of intent required, improperly relied on expert opinions, and constituted garden variety delays which would have been within the contemplation of parties at the time of contracting. The court did find triable issues over whether the developer's request for bids for the project was based on an incomplete design—allowing only that delay claim to proceed. As to that claim, the court placed considerable weight on the fact that defendant's own documents provided some evidence to support it, rather than plaintiff simply relying on the expert's blanket opinion.

In *Five Star Elec. Corp. v. Silverite Constr. Co.*, 2022 NY Slip Op 50899(U) (N.Y. Co. Sept. 26, 2022), a subcontractor sought more than $6 million in delay damages for a school construction project. Justice Robert R. Reed of the New York County Commercial Division enforced the no-damages-for-delay clause which provided that an extension of time was the subcontractor's "sole and exclusive remedy," as well as provisions limiting any monetary recovery to sums actually recovered by the general contractor from the owner.

The court rejected the contractor's arguments that exceptions to enforceability existed, finding that its complaint included only "conclusory recitations" without "specific factual

allegations in support." The court noted that allegations of unreasonable delays, failures to coordinate work, or failures to promptly resolve requests for information did not amount to "bad faith or willful, malicious, or grossly negligent conduct" and did not "allege a breach of a fundamental, affirmative obligation expressly imposed on defendants by the agreement."

Similarly, in *Welsbach Elec. Corp. v. Judlau Contracting, Inc.*, 2018 NY Slip Op 31416(U) (N.Y. Co. June 28, 2018), Justice O. Peter Sherwood of the New York County Commercial Division enforced a no-damages-for-delay clause in a subcontract for electrical work on the Second Avenue Subway project. The subcontract provided that "[t]he contractor shall not be liable, and the Subcontractor shall make no claim against the contractor for damages for any delay, suspension or interruption of the work." The court dismissed the subcontractor's claims, finding that the delays – coordination, scheduling, and site logistics frictions—were of the type that would have been within the contemplation of the parties, and plaintiff failed to meet the "heavy burden" to satisfy an exception for gross negligence or willful misconduct.

As the above cases demonstrate, a frequent issue in these cases is whether the types of delays at issue were contemplated by the parties at the time of contracting. This issue was central to the court's denial of a motion to dismiss a subcontractor's delay claim in *Eurotech Constr. Corp. v. Skanska USA Bldg. Inc.*, 2020 N.Y. Slip. Op. 31433(U) (N.Y. Co. April 21, 2020). Relying on a detailed affidavit of its project manager, plaintiff argued that the delays encountered were not of the type contemplated by the parties at contract inception because their causes were the direct result of bad faith or the willful, malicious fraud by defendant in failing to disclose certain conditions relating to contaminated soil and subsurface obstructions, such as masses of concrete, that had to be removed before excavation could begin. While finding the question to be a "somewhat close one," the court denied the motion to dismiss at the pleading stage, without prejudice to a summary judgment motion after discovery.

In *WDF, Inc. v. Dormitory Auth. of New York*, 2023 NY Slip Op 31870(U) (N.Y. Co. May 31, 2023), Justice Melissa A. Crane of the New York County Commercial Division also dismissed claims for delay damages and extra work. The court enforced contractual language placing the risk of "all delays" on the contractor and barring monetary delay damages. While the contractor claimed the defendant did such a poor job investigating the property that the site conditions in the bid documents were tantamount to fraud, the record did not point to "anything more than the usual problems that occur during the course of a construction project." Moreover, the contract put the onus on the contractor to inspect the site.

Conclusion

Contract clauses barring recovery of damages for delay are generally enforceable in New York. However, a party suffering from delays may attempt to invoke one of the four *Corinno Civetta* exceptions—bad faith or grossly negligent conduct, uncontemplated delays, delays amounting to intentional abandonment, or breach of a fundamental obligation. Success on such exception claims remains difficult, as courts have emphasized that the party challenging enforcement "bears a heavy burden."

NORTON ROSE FULBRIGHT

Norton Rose Fulbright provides a full scope of legal services to the world's preeminent corporations and financial institutions. The global law firm has more than 3,000 lawyers advising clients across more than 50 locations worldwide, including Houston, New York, London, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg, covering the United States, Europe, Canada, Latin America, Asia, Australia, Africa and the Middle East.

nortonrosefulbright.com

The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.

Norton Rose Fulbright © 2026. All Rights Reserved
69830-US- 02/26