Building Concepts, Inc. v 225 E. 26th St., LLC
2025 NY Slip Op 34647(U)
December 2, 2025
Supreme Court, New York County
Docket Number: Index No. 653920/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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BUILDING CONCEPTS, INC.,

Plaintiff,

- v -

225 EAST 26TH STREET, LLC,

Defendant.

---X

INDEX NO. 653920/2021

MOTION DATE 03/20/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 140, 141, 142, 143, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 164, 165, 166

were read on this motion for PARTIAL SUMMARY JUDGMENT.

This case concerns the interpretation of a construction agreement between Building Concepts, Inc. ("BCI" or "Plaintiff") and 225 East 26th Street, LLC ("225 LLC" or "Defendant"). The agreement is essentially identical to an agreement between BCI and 220 East 26th Street, LLC ("220 LLC"), an affiliate of 225 LLC, that is the subject of a case currently pending before Justice Schecter of this Court (*Building Concepts, Inc v 220 East 26th Street, LLC*, Index No. 653919/2021 [Sup Ct, NY County] [Schecter, J] [the "220 LLC Action"]).

On September 3, 2025, Justice Schecter granted 220 LLC's motion for partial summary judgment, dismissing most of BCI's breach of contract claim and granting 220 LLC's First Counterclaim (*see* 220 LLC Action, NYSCEF 216 ["220 LLC SJ Decision"]). 225 LLC now moves for partial summary judgment seeking the same relief on the same grounds. Indeed, the parties' briefs in the two actions are essentially the same. For the reasons set forth below, 225 LLC's motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND

On February 20, 2020, 225 LLC, as owner, and BCI, as general contractor, entered into a written agreement (NYSCEF 6 [the "Contract"]), under which BCI agreed to perform labor and furnish materials in connection with a private improvement construction project located at 225 East 26th Street, New York, NY, 10010 (the "Project"), for an initial stipulated sum of $2,607,449.74 (the "Contract Sum") (NYSCEF 99 ["Material Undisputed Facts"] ¶ 1).

Consistent with industry practice, and in anticipation of BCI incurring additional costs once the Project got underway, the Contract contained a mechanism allowing the parties to agree upon changes to the scope of work and adjustments to the Contract Sum (*see* Contract, Art. 13). These changes were formalized by written Change Orders ("COs"), each of which required the signed authorization of BCI, 225 LLC, and the Project architect to take effect (*id.*). To streamline this process, the parties negotiated supplemental exhibits, including Exhibit B ("Unit Prices and Labor Rates") and Exhibit D ("Trade Summary"), setting predetermined rates for certain categories of additional work. Specifically, Tenant Protection Protocols (TPP) and Health and Safety Plans (HASP) were to be billed at $5,500 per unit (Contract, Exhibit B), and BCI's 'General Requirements' were to be billed at 14% (Contract, Exhibit D). In this way, when the Project's scope expanded or unforeseen costs arose, the parties could, at least in theory, execute COs without dispute (*id.* ¶ 2)

In addition, the Rider to the Contract (Contract, Exhibit K [the "Rider"]) contained several provisions governing, *inter alia*, the handling of claims and disputes. Specifically,Section 22 requires that:

> Any and all claims by Contractor shall be made in writing by Contractor within ten (10) days of the date of occurrence of the event giving rise to the claim. Service of such written notice of claim shall be a condition precedent to the commencement of any action by the Contractor and the failure to serve a written notice of claim within the time provided under this Paragraph shall constitute a waiver of any such claim.

Section 12 provides that:

> If there shall be a dispute as to whether any portion of the work is within the scope of the Work as shown by the Contract Documents, or any other dispute or controversy as to the interpretation of any of the Contract Documents, the performance of the work, the delivery of materials, *the payment of monies*, or otherwise, notwithstanding that any such dispute is not then resolved, Contractor shall continue to perform the work expeditiously and with due diligence as requested by Owner pending the resolution of such dispute or controversy.

Separately, Section 4 establishes that:

> This Agreement represents the entire and integrated agreement between Owner and Contractor and supersedes all prior negotiations, representations or agreements, either written or oral. No provisions of this Agreement shall be changed or modified, nor shall this Agreement be discharged in whole or in part, except by an agreement in writing signed by the party against whom the change, modification or discharge is claimed or sought to be enforced. No waiver of any of the conditions or provisions of this Agreement or of any of the rights of either party hereunder shall be effective or binding unless such waiver shall be in writing and signed by the party claimed to have given, consented to or suffered the waiver.

For approximately the first year of the Contract, the Project proceeded as planned. The parties executed various COs, and the Contract Sum increased to $5,236,169.04 (Material Undisputed Facts ¶¶ 4, 8-9).[1] However, by March 2021, the relationship was beginning to

[1] 225 LLC paid Payment Requisitions Nos. 1 through 13, encompassing 39 COs, in full.

deteriorate. BCI claimed it could no longer fund ongoing work and, despite efforts to resolve the impasse, the parties reached a stalemate concerning several pending COs, including CO 58. BCI abandoned the Project on May 3, 2021 (*id*. ¶ 10).

One month later, on June 3, 2021, BCI submitted Payment Requisition No. 14, comprising, among other terms, $655,558.00 for TPP/HASP work (CO 58) and $1,128,129.24 for General Requirements (CO 68). The requisition purported to increase the total Contract Sum to over $7.3 million. 225 LLC did not approve either CO 58 or CO 68 (*id*. ¶¶ 12-15).

On June 18, 2021, BCI commenced this action seeking to recover the amounts set forth in Payment Requisition No. 14, asserting causes of action for breach of contract, unjust enrichment, and quantum meruit (*see* NYSCEF 13 [Amend. Compl.]). The damages sought are no less than $2,472,492.85 (*id*. ¶ 16).

On July 19, 2021, 225 LLC moved to dismiss BCI's unjust enrichment and quantum meruit claims on the ground that they were preempted by the breach of contract claim. That motion was granted on September 9, 2022 (NYSCEF 29 [Decision and Order]); *see also* *Bldg. Concepts, Inc. v 220 E. 26th St., LLC*, 2021 WL 4164371 [Sup Ct, NY County] [dismissing the same claims in the 220 LLC Action]).

After completion of discovery, 225 LLC now moves for partial summary judgment dismissing those portions of BCI's breach of contract claim pertaining to COs 58 and 68, and on the issue of liability on 225 LLC's First Counterclaim which seeks no less than $250,000 based on BCI's alleged breach of contract in abandoning the Project (*see* NYSCEF 31 [Answer With Counterclaim] ¶¶ 18-26).

DISCUSSION

Under CPLR 3212(b), summary judgment is appropriate where the record demonstrates that "there is no material issue of fact to be tried, and that judgment may be directed as a matter of law" (*Brill v City of New York*, 2 NY3d 648, 651 [2004]). Once the moving party has made a *prima facie* showing of entitlement to judgment as a matter of law, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact," or to demonstrate an "acceptable excuse for [their] failure to meet the requirement of tender" (*Stonehill Cap. Mgmt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Glassman v Weinberg*, 154 AD3d 407, 408 [1st Dept 2017]).

I. Defendant's Motion for Partial Summary Judgment Reducing Plaintiff's Breach of Contract Claim

BCI contends that 225 LLC breached the Contract by refusing to pay $1,793,007.43 owing under COs 58 and 68.[2] However, BCI did not provide 225 LLC with timely written notice of either CO, a condition precedent to recovery under Section 22 of the Rider. Furthermore, BCI abandoned the Project before completing performance of its contractual obligations, an additional bar to recovery based on breach of contract. BCI has failed to adduce any evidence

[2] Plaintiff also asserts breach of contract claims for $403,220.98 under other COs, and $21,700.01 for base Contract work, neither of which are at issue in this motion (NYSCEF 54 [Miller Aff.] ¶ 15).

sufficient to raise a triable issue of fact as to either issue. Accordingly, partial summary judgment reducing Plaintiff's breach of contract claim is warranted (*see* 220 LLC SJ Decision at 28).

(a) Plaintiff's Failure to Provide Timely Notice

"[F]ailure to comply with a contractual notice of claim provision" constitutes a waiver of the related claim, even where the claim would otherwise be valid (*Promo-Pro Ltd. v Lehrer McGovern Bovis*, 306 AD2d 221, 222 [1st Dept 2003] [dismissing complaint for breach of contract and foreclosure of mechanic's lien on the basis that "[c]ompliance with the notice of claim provision was an express condition precedent to the contractor's right to bring an action for recovery of change order payments and, under such provision, noncompliance clearly constituted a waiver of its claim"]; *see also Metropolitan Bridge & Scaffolds Corp. v New York City Hous. Auth.*, 138 AD3d 423 [1st Dept 2016] [dismissing claims for failure to comply with contractual notice of claim provision]; *Jungmann & Co. v Atterbury Bros.*, 249 NY 119, 122 [dismissing plaintiff's claim for failure to give defendant advance notice of shipment as mandated by the contract; "The plaintiff may not recover upon its contract without proof that it has performed all conditions precedent required of it. The plaintiff is barred from recovery […] by failing to give notice according to the terms of the contract"]).

In this case, Section 22 of the Rider requires that any claim by BCI be submitted in writing within 10 days of the event giving rise to the claim, and states that such written notice is a condition precedent, with failure to comply constituting a waiver. As the summary judgment record makes clear, BCI did not propose either CO 58 or CO 68 until long after the occurrence of the respective events in question. BCI submitted CO 58, concerning TPP/HASP costs, in April 2021, more than one year after the COVID-19 mandates that allegedly triggered the increased costs went into effect (NYSCEF 99 [Statement of Material Facts] ¶ 18). Similarly, BCI submitted CO 68, concerning General Requirements, in June 2021, one month after BCI abandoned the Project and therefore necessarily more than 10 days after the event giving rise to the claim (*id.* ¶ 12). Notwithstanding BCI's assertion that its costs "exploded" due to, *inter alia*, compliance with the mandates and inadequate construction plans (NYSCEF 104 [Memo in Opp.] at 4), it has presented no evidence that 225 LLC was apprised of either CO within the requisite period, nor has it even sought to contend as much.

In a final attempt to excuse noncompliance, BCI argued, at oral argument, that the term "claim" in Section 22 refers only to disputing the non-payment of a CO, not to submitting a CO in the first instance (*see similarly* 220 LLC SJ Decision at 28). Under this interpretation, BCI was not required to provide advance notice of COs 58 and 68; its "claim" only arose when 225 LLC declined to pay, on or around April 1. But the phrase "the *event* giving rise to the claim" (*emphasis added*) clearly indicates that "claim" refers to a request for additional compensation resulting from a change in circumstances such as an unanticipated increase in costs (Rider § 22). The First Department has interpreted similar provisions consistently, emphasizing "the notice of claim's […] underlying purpose of avoiding the credibility contests that arise in cases of alleged oral modification" (*Promo-Pro* at 222). In other words, the notice requirement is intended to allow owners such as 225 LLC to verify, in real time, any amendments a contractor may seek to impose—such as the deployment of additional labor or equipment—and to prevent precisely the situation presented here, where the owner is confronted long after the fact with a large payment demand reflecting alleged costs it had no realistic opportunity to verify.

Because the Contract made timely written notice a condition precedent to any claim, and failure to give such notice a waiver, BCI cannot recover under either CO 58 or CO 68 (220 LLC SJ Decision at 4-5, 26).

BCI contends in opposition that, in spring 2021, 225 LLC instructed it, via email and in-person discussions, to withhold TPP/HASP and General Requirements billing until the end of the Project, thereby waiving the Section 22 notice requirement. The record belies that contention. The April 1, 2021, email cited by BCI contains no indication that 225 LLC consented to defer billing or to waive any contractual condition; instead, the communication reflects 225 LLC's skepticism regarding the basis for the claimed costs and expressly states that it was not waiving any rights or defenses under the Contract (*see* NYSCEF 122 [4.1.21 Email]; *see also* NYSCEF 105 [Louis Alba Aff.] ¶¶ 63-65; NYSCEF 106 [Paul Alba Aff.] ¶ 28).[3]

In any event, Section 4 of the Rider establishes that the Contact is the parties' entire agreement and may be modified or waived only through a written instrument signed by the party against whom such modification or waiver is asserted (*see* 220 LLC SJ Decision at 4). Accordingly, even assuming 225 LLC made oral or other non-written statements suggesting that billing could be delayed, any such statements are unenforceable (*see* NY Gen. Oblig. 15-301 ["A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought"]; *Rose v Spa Realty Associates*, 42 NY2d 338, 343 [1977] ["if the only proof of an

[3] The two affidavits submitted in support of BCI's proposition are self-serving and, absent corroborating documentary evidence, are insufficient to defeat a motion for summary judgment.

alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls"]; 220 LLC SJ Decision at 14-15).

To be sure, New York courts have occasionally enforced oral modifications notwithstanding the presence of a no-oral-modification clause, *e.g.*, where the parties clearly acted in conformity with the oral modification (*see Rose*, 42 NY2d at 343 ["[W]hen the oral agreement to modify has in fact been acted upon to completion, the same need to protect the integrity of the written agreement from false claims of modification does not arise. In such case, not only may past oral discussions be relied upon to test the alleged modification, but the actions taken may demonstrate, objectively, the nature and extent of the modification"]). Here, however, the parties did not act in accordance with any alleged agreement to withhold billing. Instead, BCI continued to bill 225 LLC for TPP/HASP work and General Requirements at the contractual rates of $5,500 per unit and 14%, respectively, in the months following 225 LLC's alleged promises. In these circumstances, there is no reason to depart from the terms of the no-oral-modification provision.

(b) Plaintiff's Abandonment of the Project

Generally, a party to a contract is in breach if it fails to perform its contractual obligations. That said, a party may, in certain circumstances, be entitled to cease performance and bring a claim under the contract in response to the other party's breach, such as when the other party disregards performance (*Stadtmauer v Brel Associates IV, L.P.*, 270 AD2d 59, 60 [1st Dept 2000] ["It is a rule of long standing that, as a matter of law, the declaration by one party that material obligations will not be performed relieves the other party of any duty to perform obligations similarly imposed by the contract"]). However, where the contract contains a specific provision mandating continuing performance notwithstanding a dispute, cessation of performance constitutes a breach (*see Iberdrola Energy Projects v Oaktree Capital Mgt. L.P.*, 231 AD3d 33, 43-44 [1st Dept 2024] [granting motion to dismiss breach of contract claim based on continuing performance provision; "[P]laintiff was required to continue to perform notwithstanding that [defendant] stopped paying plaintiff disputed amounts in 2018. The parties contemplated that they may have disagreements during the project, and the contract addressed that contingency"]). Concurrently, to plead a breach of contract, a plaintiff must allege not only the defendant's breach but also satisfaction of its own performance in accordance with the terms of the contract (*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-446 [1st Dept 2016]).

Here, BCI abandoned the Project by ceasing performance following a disagreement over the payment of certain proposed COs (*see Rosiny v Schmidt*, 185 AD2d 727 [1st Dept 1992] [defining abandonment as conduct that is "mutual, positive, unequivocal, and inconsistent with the intent to be bound"]). The Contract, however, contained a "Continuing Performance" obligation under Section 12 of the Rider, which provides that, notwithstanding any dispute, BCI must continue to perform its contractual obligations expeditiously and with due diligence pending resolution.

Accordingly, BCI breached the Contract by abandoning the Project in violation of Section 12. Because performance of contractual obligations is a prerequisite to maintaining a breach of contract claim, BCI cannot recover for the amounts contained in COs 58 and 68 (*see Savitsky v Sukenik*, 240 AD2d 557, 559 [2d Dept 1997] ["[B]ecause the plaintiff […] evinced an intent to abandon the contract, she may not otherwise pursue her claims for breach of the contract"]; 220 LLC SJ Decision at 16-18, 27-28).

II. Defendant's Motion for Summary Judgment on the Issue of Liability on its First Counterclaim

Because BCI breached the Contract by ceasing performance in circumstances where the Contract, by virtue of Section 12, required continuing performance, BCI is liable for breach of contract. Accordingly, 225 LLC's motion for summary judgment on its First Counterclaim—declaring BCI liable for breach of contract and setting the matter for an inquest to determine 225 LLC's damages—is granted (*see* 220 LLC SJ Decision at 28).

* * * *

Accordingly, it is

ORDERED that Defendant's motion for partial summary judgment dismissing those portions of BCI's First Cause of Action based on the alleged non-payment of proposed COs 58 and 68 and granting 225 LLCs First Counterclaim on the issue of liability, with the matter to be set down for an inquest to determine 225 LLC's damages, is **GRANTED**; it is further

ORDERED that the parties appear via Microsoft Teams for an initial pre-trial conference on January 9, 2026, at 10:00am to discuss trial scheduling and logistics; the parties are directed to meet and confer prior to the conference to discuss the proposed length of trial and any other logistical issues that they have identified and be prepared to discuss those at the conference; it is further

ORDERED that the parties participate in a mandatory settlement conference in accordance with Rule 30(b) of the Rules of the Commercial Division, and the parties are directed to submit a joint request or separate statements pursuant to Rule 30(b)(1) on NYSCEF within a week of this Order; and it is further

ORDERED that the parties upload the oral argument transcript to NYSCEF upon receipt.

This constitutes the Decision and Order of the Court.

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12/2/2025
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION	
	X	GRANTED	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE