STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

THE PIKE COMPANY, INC.,

Plaintiff, DECISION AND ORDER

v. INDEX No. 2006/05958

ONEIDA INDIAN NATION, a Sovereign Indian Nation, and BERTINO & ASSOCIATES, INC.,

Defendant.

The finding on the prior motion that the Nation failed to comply with the termination provisions of the contract was for a specific purpose, and that was to preclude the Nation's entitlement to the relief it sought on its action in Index #2006-05677, namely post-termination completion costs sought in that action. General Supply & Constr. Co. v. Goelet, 241 N.Y. 28 (1925); Fruin-Conon Corp. v. Niagra Frontier Transp. Authority, 180 A.D.2d 222, 233 (4th Dept. 1992); Greenspan v. Amsterdam, 145 A.D.2d 535, 536 (2d Dept. 1988); Felix Contracting Corp. v. Oakridge Land and Prop. Corp., 106 A.D.2d 488, 489 (2d Dept. 1984). Plaintiff cannot in its own action for breach, by virtue of that finding alone, obtain a liability judgment on its discrete claim for wrongful termination, the only claim that is now the subject of Pike's motion for summary judgment.

Although "where parties agree on a termination procedure, the clause must be enforced as written," A.S. Rampell, Inc. v. Hyster Co., 3 N.Y.2d 369, 382 (1957); see also, Blumberg v. Florence, 143 A.D.2d 380, 381 (2d Dept. 1988)); Postner & Rubin, New York Construction Law Manual § 4.06, § 4.18 (1992) ("[The terminating party] must follow contract procedures precisely. A failure to follow contractual termination procedures may turn a justified termination into a breach of contract.... Notice provisions are closely read and literally construed."), finding a breach thereof will not result in a liability judgment in favor of plaintiff where factual issues are presented on the question then facing the Nation, i.e., whether plaintiff "made clear" to it that plaintiff would not live up to its end of the bargain to the point of making the Nation's further performance futile. J. Petrocelli Constr., Inc. v. Realin Electrical Contractors, Inc., 15 A.D.3d 444, 446 (2d Dept. 2005)("whether the plaintiff is liable for its alleged failure to comply with the termination procedure . . . hinges on, inter alia, the resolution of factual issues centered around Realin's alleged prior repudiation"). Summary judgment would also be precluded unless Pike's moving papers also established as a matter of law that it did not abandon performance. General Supply, 241 N.Y. at 34; Wolff & Munier, Inc. v. Whiting-Turner Contracting Co., 946 F.2d 1003, 1009 (2d Cir. 1991).

The proof on this motion as on the prior one is that The Nation allowed Pike to continue performance of the contract, which it accepted, despite the many claimed breaches by Pike, until February 2004 when it sent a letter of Pike on its face purportedly complying with the 7 day notice requirement but which in reality was accompanied by a forcible removal of Pike's employees from the site on the same day as delivery of the letter, by simultaneously notifying Pike's subcontractors that the Nation accepted "assignments" of all subcontractors due to Pike's termination, and by simultaneously seizing Pike's equipment at the site and otherwise locking Pike out. On the prior motion, Pike argued that by failing timely to invoke the termination provisions in response to The Nation's many claims of breach by Pike, it either waived the right to terminate for those reasons or should be estopped from doing so. Albany Medical College v. Cobel, 296 A.D.2d 701 (3d Dept. 2002); R & A Food Services, Inc. v. Halmar Equities, Inc., 278 A.D.2d 398 (2d Dept. 2000). See generally, General Supply & Constr. Co. v. Goelet, 241 N.Y. 28, 33-34 (1925). Because the manner of physical termination on February 6th was not contested by The Nation, it was unnecessary to reach those issues. Indeed, as The Nation contends here, the issue of Pike's substantial performance of its end of the bargain was not addressed in the court's decision, nor need it have been given the fact that The Nation's affidavit in

opposition to Pike's motion to dismiss the suit for completion costs did not rely on any of the two exceptions to the strict compliance rule set forth above, but rather relied exclusively on the sufficiency of the February 16th termination letter to comply with ¶14.2 of the General Conditions, without regard to ¶14.2.2.1 of the General Conditions (permitting seizure of job site only after preconditions such as a seven day notice period are satisfied).

Although the Appellate Division will have some say in the matter when deciding the appeal of that order, the clear rule is that, when the owner fails to raise an issue of fact on the two exceptions permitting summary termination enumerated above, the question whether the owner indeed had cause to terminate "is irrelevant." Kalus v. Prime Care Physicians, P.C., 20 A.D.3d 452, 454 (2d Dept. 2005). See General Supply, 241 N.Y. at 33 ("We may assume that, at the time the owner put the contractor off the work, he had, with reason, ceased to hope or expect that the contractor would mend his ways; yet the owner had no right to terminate the contract in the manner he did."); Hanson v. Capital District Sports, Inc., 218 A.D.2d 909, 911 (3d Dept. 1995)("it is immaterial whether there was 'cause' for plaintiff's discharge"). But the failure of The Nation to raise an issue of fact on the two exceptions precluding summary judgment dismissing its action for completion costs does not relieve Pike from its initial

burden on this motion to establish as a matter of law that the two exceptions are not invoked here. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). See also, Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). Accordingly, Pike's collateral estoppel argument must be rejected.

Nevertheless, I find that Pike's showing on this motion satisfies its initial burden to show that neither of the recognized exceptions to the strict compliance requirement in regard to notice of termination clauses applies here. The repudiation issue is foreclosed by Pike's proof that it actively worked at the site until its abrupt and physical expulsion on February 6th. In addition, there is no factual or legal basis for concluding that Pike abandoned the contract. In Wolff & Munier, Inc. v. Whiting-Turner Contracting Co., supra, for example, the plaintiff subcontractor had reduced its manpower on the defendant's job site from sixty workers to, ultimately, four workers while also demanding that the defendant general contractor either pay additional charges or agree to expedited binding arbitration. Affirming a determination that strict adherence to the notice of termination provision would have been a "useless act," the court held that, by stifling performance and

refusing to resume until the defendant either increased the payments or submitted to arbitration, the plaintiff had abandoned the contract. Wolff & Munier, Inc. v. Whiting-Turner Contracting Co., 946 F.2d at 1007. Pike establishes sufficient undisputed facts showing that nothing of the kind occurred here. Instead, there are only issues whether The Nation waived the timely completion clauses by altering the specified completion date by setting a new one in November 2003, and even thereafter accepting performance from Pike. Accordingly, Pike meets its initial burden on summary judgment.

The Nation contends that the court must deny Pike's motion because Pike failed to establish or even to address as part of its initial showing on summary judgment that it substantially performed under the contract, a necessary finding to any liability judgment in a breach of contract claim. That is true with respect to a termination without cause claim, but Pike does not move for judgment on that claim and has limited itself to the wrongful termination claim. In that regard, Pike contends that it need not establish initially or otherwise that it substantially performed under the contract or indeed that The Nation waived the right to terminate by failing to take action at the time of the claimed breaches by Pike until the precipitous February 2004 removal of Pike and lockout. Instead, Pike insists that, by the very nature of notice of termination clauses like

this one, it need only establish as part of its original moving papers that none of the two exceptions to the rule of strict compliance is present, in particular that it did not repudiate or abandon the contract or otherwise make it so clear to The Nation that it would "'not live up to the contract, (that) the aggrieved party is relieved from performance of futile acts, such as conditions precedent'" to termination. J. Petrocelli Constr., 15 A.D.3d at 446 (quoting Allfrand Discount Logs. v. Times Sq. Stores Corp., 60 A.D.2d 568 (2d Dept. 1977)). Thus, to escape liability under a notice of termination clause on the ground of repudiation or abandonment on the part of Pike, The Nation would have to allege that "the repudiating party expressly disavowed any further duties under the contract at issue, in effect declaring the contract at an end." Bausch & Lomb Incorporated v. Bressler, 977 F.2d 720, 728 (2d Cir. 1992)(applying New York law). Pike succeeds in establishing as a matter of law on the facts construed in a light most beneficial to the Nation that such a repudiation or abandonment did not occur. Accordingly, "[t]he termination of the contract in this case without the required previous notice . . . in accordance with the terms of the contract was wrongful." General Supply & Constr. Co. v. Goelet, 241 N.Y. at 34. See, Allied-Lynn Associates, Inc. v. Alex Bro. LLC, 34 A.D.3d 1247 (4th Dept. 2006); MCK Building Assoc. Inc. v. St. Lawrence Univ., 301 A.D.2d 726, 728 (3d Dept.

2003); and esp. Paragon Restoration Group, Inc. v. Cambridge Square Condominiums, 14 Misc.3d 1236(A), 2006 WL 4094363, 2006 N.Y. Slip. Op. 52579(U) (Sup. Ct. Erie Co. 2006)(Fahey, J.). Pike thus satisfies its initial burden on summary judgment.

In response, the Nation only points to Pike's claimed failure to substantially perform under the contract by reason of the many breaches enumerated. In the absence of the kind of repudiation or abandonment described above, however, this is insufficient to raise a question of fact. Pike's motion is granted, and the matter must be scheduled for a damages hearing in accordance with the rules set forth in General Supply, supra.

The motion for a stay is denied for the reasons stated in Mr. Moretti's Reply Affirmation. The motion to amend is denied with respect to the proposed Twenty-Second Affirmative Defense (Nation's breach not material), and the Twenty-Fifth Affirmative Defense and Third Counterclaim (completion costs), and otherwise is granted.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: March 28, 2007
Rochester, New York