Kingdom Assoc. Inc. v JDS Constr. Group LLC
2026 NY Slip Op 30628(U)
January 13, 2026
Supreme Court, Kings County
Docket Number: Index No. 513652/2018
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of January 2026

HONORABLE FRANCOIS A. RIVERA

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KINGDOM ASSOCIATES INC. and
NEW YORK CONCRETE CORP.,

Plaintiff,

- against -

JDS CONSTRUCTION GROUP LLC,
9 DEKALB OWNER LLC, ATLANTIC
SPECIALTY INSURANCE COMPANY
and "JOHN DOE NO. 1"
hrough "JOHN DOE NO. 5"

Defendants.

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DECISION ORDER & JUDGMENT

Index No.: 513652/2018

Fully Submitted: 8/15/2025

The following is the decision, order, and judgment after a non-jury trial in the instant action commenced by plaintiffs Kingdom Associates, Inc. (hereinafter "Kingdom") and New York Concrete Corp. (hereinafter "NY Concrete") against JDS Construction Group LLC, 9 Dekalb Owner LLC, and Atlantic Specialty Insurance Company (hereinafter collectively "the defendants") and the counterclaim of JDS Construction Group LLC and 9 Dekalb Owner LLC asserted against the plaintiffs.

The plaintiffs' action alleges causes of action for breach of contract, contract balance, account stated, and foreclosure of mechanic's liens in connection with a construction project located at 340 Flatbush Avenue Extension, Brooklyn, New York and 9 Dekalb Avenue, Brooklyn, New York (hereinafter the "Project"). The counterclaim of JDS Construction Group LLC and 9 Dekalb Owner LLC as asserted against the plaintiffs is for willful exaggeration of a lien.

BACKGROUND

On July 3, 2018, plaintiffs Kingdom and NY Concrete commenced the instant action by filing a summons, verified complaint and notice of pendency with the Kings County Clerk's Office (hereinafter "KCCO"). The verified complaint included two annexed exhibits, namely, a mechanics lien filed by Kingdom and a mechanic's lien filed by NY Concrete.

On August 17, 2018, defendants JDS Construction Group LLC and 9 Dekalb Owner LLC (hereinafter "the Dekalb parties") interposed and filed a joint verified answer with KCCO.

On September 6, 2018, the plaintiffs filed a supplemental summons and amended verified complaint with the KCCO.

On September 26, 2018, JDS Construction Group LLC and 9 Dekalb Owner LLC interposed and filed a joint verified answer and counterclaim to the amended complaint with the KCCO. The sole counterclaim alleged that the plaintiffs' liens were willfully exaggerated warranting statutory damages pursuant to Lien Law § 39-a.

On October 15, 2018, the plaintiffs filed a reply to JDS Construction Group LLC and 9 Dekalb Owner LLC's counterclaim with the KCCO.

On October 22, 2018, defendant Atlantic Specialty Insurance Company interposed and filed a verified answer to the amended verified complaint with the KCCO.

On January 31, 2020, the plaintiffs filed a note of issue with the KCCO.

The amended complaint has alleged the following salient facts among others. The Dekalb parties entered into an agreement (hereinafter the "Prime Contract") with Kingdom whereby Kingdom agreed to furnish certain labor, materials, equipment, work and/or services for the Project and the Dekalb parties agreed to pay Kingdom (either directly and/or through payments the Dekalb parties agreed to make directly to NY Concrete) the lump sum and unit prices set forth therein.

Thereafter, Kingdom entered upon the performance of the Prime Contract and duly performed all the terms and conditions thereof on its part to be performed, except as prevented or otherwise waived by the Dekalb parties. During its performance of the Prime Contract, Kingdom performed additional and extra work at the special instance and direction of the Dekalb parties. There remains an agreed to sum of $6,654,237.87 due and owing to Kingdom from the Dekalb Parties for the labor, materials, equipment, work, and services furnished by Kingdom in connection with the Prime Contract, no part of which balance has been paid by the Dekalb Parties, although duly demanded.

Kingdom has furnished labor, materials, equipment, work, and services, as aforesaid, to the Dekalb Parties for incorporation into the Project, and the Dekalb Parties has accepted and received the benefit of same. Kingdom had an expectation of compensation from the Dekalb Parties for the labor, materials, equipment, work, and services it furnished in connection with the Project. The reasonable value of said labor, materials, equipment, work, and services for which payment has not been made (excluding

sums that were to be paid directly to NY Concrete) is $856,173.58, plus appropriate interest.

Kingdom has regularly billed the Dekalb parties for the services it furnished. The Dekalb parties have received, accepted, and retained the bills without objection and have failed and refused to pay same, despite demand therefor. By reason of the foregoing, Kingdom is entitled to recover from the Dekalb parties, based upon an account stated, the sum of $856,173.58.

NY Concrete has furnished labor, materials, equipment, work, and services, as stated above, to the Dekalb parties for incorporation into the Project, and the Dekalb parties has accepted and received the benefit of same. NY Concrete had an expectation of compensation from the Dekalb parties for the labor, materials, equipment, work and services it furnished in connection with the Project. The reasonable value of said labor, materials, equipment, work, and services for which payment has not been made (excluding any sums that were to be paid directly to Kingdom) is $4,536,555.29.

NY Concrete has regularly billed the Dekalb parties for the services it furnished. The Dekalb parties have received, accepted, and retained the bills without objection and have failed and refused to pay same, despite demand therefor. By reason of the foregoing, NY Concrete is entitled to recover from the Dekalb Parties, based upon an account stated, the sum of $4,536,555.29.

On July 26, 2024, after a pretrial conference, November 18, 2024, was set as the commencement date for a nonjury trial.

THE TRIAL

The trial commenced on November 18, 2024 and ended on November 20, 2024. On November 20, 2024, during the trial the parties entered into a stipulation, which the Court so-ordered, whereby NY Concrete was no longer seeking to recover from Skyline Steele: (1) $430,980.00 per 40' casing, (2) $661,341.00 for escalation and storage amounts and (3) $1,400,000.00 in additional insurance costs.

Plaintiffs' first witness was Eric Goldberg, their second was Cyril Kearney, their third was Eduard Chiarelli, and their fourth and final witness was Thomas Solimeo. By stipulation of the parties plaintiffs' exhibits 1-38, excluding 19A, were admitted into evidence and defendant's exhibits H-R, excluding Q, were also admitted into evidence. The defendants did not call any witnesses.

After all parties rested, the parties were ordered pursuant to CPLR 4213 to file with the KCCO written requests for findings of fact on or before January 6, 2025.

By so-ordered stipulation dated December 31, 2024, the date for submission of requests for findings of fact was extended to January 13, 2025.

On January 13, 2925, the partied filed their respective requests for finding of fact.

By so-ordered stipulation dated January 24, 2025, the parties agreed that they would not file motions for directed verdicts and would instead file post-trial brief on or before February 28, 2025.

The parties submitted post-trial briefs on February 28, 2025.

FINDINGS OF FACT

The request for findings of fact submitted by the plaintiff pursuant to CPLR 4213 were accepted and adopted by the Court. The Court found the testimony of each of the plaintiffs' witnesses to be credible and supported by the admitted documentary evidence. The Court has made the following findings of fact.

1. Plaintiff, Kingdom Associates Inc. (hereinafter "Kingdom"), is a foundation contractor located in Maspeth, New York has been in business for 22 years. Kingdom has performed foundation work for over 100 buildings, including some as tall as 60 stories.

2. Cyril Kearney (hereinafter "Kearney") is Kingdom's president and an owner of the company and has been in the construction industry for 35 years.

3. Eric Goldberg (hereinafter "Goldberg") is a project manager and estimator at Kingdom, has a degree in civil engineering from Hofstra University, and holds a professional engineering license. He has estimated approximately 1,000 projects for Kingdom and has been the project manager on approximately 80 projects.

4. Plaintiff, New York Concrete Corp. (hereinafter "NY Concrete"), is a certified Woman-Owned Business Enterprise and has performed numerous construction projects throughout the five boroughs of New York City.

5. DonnaMarie Russo (hereinafter "Russo") is NY Concrete's president.

6. Eduard Chiarelli (hereinafter "Chiarelli") is NY Concrete's vice-president. He has a bachelor's and a master's degree in civil engineering from New York University.

Chiarelli oversaw project management and engineering at the Project that is the subject of this action and has worked on more than 60 projects for NY Concrete.

7. Thomas Solimeo (hereinafter "Solimeo") has been a financial consultant for NY Concrete for 25 years, has a master's degree in accounting, is a certified public accountant, and is a battalion chief for the New York City Fire Department on Prospect Avenue in Brooklyn.

8. Defendant, 9 DeKalb Owner LLC (hereinafter "9 DeKalb"), was the owner of the real property and improvements thereon located at 340 Flatbush Avenue Extension, Brooklyn, New York, and 9 DeKalb Avenue, Brooklyn, New York (hereinafter the "Premises").

9. Defendant, JDS Construction Group LLC ("hereinafter JDS"), was the construction manager for 9 DeKalb in connection with a project for the construction of the Brooklyn Tower, a new, 1000-foot-tall mixed-use building at the Premises (hereinafter the "Project").

10. JDS is owned by Michael Stern (hereinafter "Stern").

11. Stern also is a principal of 9 DeKalb.

12. Based on his dealings with JDS and 9 DeKalb, Chiarelli viewed them as one and the same entity, consisting of the same people.

13. On or about January 13, 2017, Kingdom, as trade contractor, entered into a written agreement with JDS (hereinafter the "Kingdom Contract"), whereby Kingdom agreed to furnish certain labor, materials, equipment, work and/or services relating to foundation and support of excavation work at the Project in exchange for payments of the

lump sum and unit prices set forth therein, to be made directly to Kingdom and/or to Kingdom's subcontractor, plaintiff, NY Concrete.

14. Kingdom's scope of work at the Project consisted of drilling of piles, support of excavation, deep foundations (including drilling of caissons), and foundation concrete.

15. Kingdom's base contract price was $22,127,184.

16. Kingdom included in its base contract price a fifteen percent (15%) markup for its profit.

17. Pursuant to section 36 of the Kingdom Contract, 9 DeKalb was designated as JDS's payment agent.

18. On or about January 13, 2017, Kingdom and NY Concrete entered into a written subcontract agreement hereinafter (the "NY Concrete Subcontract"), whereby NY Concrete agreed to furnish certain labor, materials, equipment, work and/or services relating to foundation and support of excavation work at the Project in exchange for payments of the lump sum and unit prices set forth therein.

20. NY Concrete's scope of work at the Project included installing the drilled items for the supportive excavation and installing the large and small diameter, deep caissons, as well as installing soldier piles and a secant wall.

21. The drilling system used for the Project is atypical for the northeast area of the United States and is technically known as a "reverse circulation casing advancement system with internal flush."

22. The drilling system, which is mainly used in Europe, was repurposed by Chiarelli for use in downtown Brooklyn, and required NY Concrete to purchase and pay for specially manufactured equipment from companies including Robit and OCI.

23. NY Concrete's base subcontract price was $15,069,145.

24. The $15,069,145 price for NY Concrete's work was included in Kingdom's contract price of $22,127,184.00.

25. In or about March 2017, Kingdom, NY Concrete, and JDS entered into a written joint check agreement.

26. The joint check agreement provided, at section 1, that JDS was to make payments to NY Concrete by joint check made payable to Kingdom and NY Concrete, or directly to NY Concrete, for the work performed by NY Concrete at the project, and that invoices issued by NY Concrete shall be sent to both Kingdom and JDS simultaneously.

27. The joint check agreement further provided, at section 2, that any payments made to NY Concrete shall be credited as payment by JDS with respect to any obligations JDS may have to Kingdom under the Kingdom Contract.

28. All payments that were made to Kingdom in connection with the project were made by 9 DeKalb.

29. All payments that were made to NY Concrete in connection with the project were made by joint checks issued by 9 DeKalb.

30. Goldberg and Kearney testified at trial on behalf of Kingdom.

31. Solimeo and Chiarelli testified at trial on behalf of NY Concrete.

32. Defendants did not call any witnesses at trial.

33. The project was divided into two phases, one on the northern portion of the Premises and the other on the southern portion.

34. Phase one was to precede phase two.

35. The MTA was occupying a building on the project site that needed to be demolished before phase two could begin.

36. Phase one of the project consisted of a small number of caissons and soldier piles and began in or about January 2017.

37. NY Concrete's phase one work included installing secant piles for the secant pile wall (i.e., a wall constructed below the ground using low vibration methods), soldier piles, small diameter caissons and approximately 10 large caissons.

38. Phase two (A) of the project involved a slightly larger number of caissons to be drilled as tiebacks at the existing bank façade and, according to the project schedule, was supposed to begin shortly after Phase one, in late Winter or early Spring of 2017.

39. NY Concrete's phase two work consisted of completing a portion of a secant wall, installing power frame caissons, and the vast majority (i.e., approximately 50) of the large-diameter caissons.

40. Phase two (B) of the project consisted of the balance of the support of excavation and caisson work and was scheduled to begin after the MTA tenant left the last remaining, existing building that was to be demolished.

41. In phase one, Kingdom itself performed a very small amount of work, consisting of timber lagging.

42. In phase one, NY Concrete performed a small portion of the caisson and soldier pile work.

43. The portions of Kingdom's scope of work that were supposed to be performed in phase two included excavation, additional bracing, and concrete work.

44. The portions of NY Concrete's scope of work that was supposed to be performed in phase two included the second allotment of caissons and soldier piles.

45. NY Concrete's phase two work was to begin after the building that the MTA was occupying was demolished and cleared, to make way for NY Concrete's drills, excavators, and drilling equipment.

46. Kingdom's contract price contemplated mobilizing to the project site once at the beginning of the project and demobilizing from the project site once after the completion of all of Kingdom's work.

47. "Mobilizing" means all the logistics, time, and effort to load and off-load equipment, tools and manpower to a construction site to and set it up to be ready to perform work. It also includes preparing and maintaining the equipment to get it ready for delivery to the site, following manufacturers' standards and instructions with each piece.

48. "Demobilizing" means removing the equipment, tools, and manpower from the construction site, including decommissioning the equipment, taking it apart, putting it on trucks, delivering it the yard, taking it off the trucks, performing maintenance, winterizing and wrapping it, and placing it in boxes or cases.

49. NY Concrete's subcontract price includes the cost of one mobilization and one demobilization.

50. Kingdom and NY Concrete mobilized to the project site in or about the winter of 2017 to perform a small amount of work as part of phase one.

51. They were expecting to demobilize 12 months after mobilization.

52. After NY Concrete mobilized, it started its phase one work in the winter of 2017.

53. NY Concrete completed all its phase one work.

54. NY Concrete was never able to begin its phase two work because JDS and 9 DeKalb were unable to remove the MTA from an existing building it was occupying at the Project site that needed to be demolished before NY Concrete's work could begin.

55. Specifically, NY Concrete was to install many of the caissons and the secant wall in the location of the existing building that was occupied by the MTA, and that building had to be demolished before NY Concrete could approach the area and drill.

56. The delays at the Project caused by defendants' inability to remove the MTA from the building lasted for more than one (1) year, from approximately the spring of 2017 to the fall of 2018.

57. Kingdom notified JDS, both in writing and orally, about the delays Kingdom and NY Concrete were experiencing at the Project, the unavailability of the phase two site, and the costs they were incurring because of same.

58. JDS also was kept informed of the status of the Project at bi-weekly, and later, weekly, meetings with Kingdom.

59. Kingdom was unable to provide JDS with a critical path method analysis of the delays because it did not know when the Project work would eventually become available.

60. NY Concrete provided written notices to both JDS and Kingdom regarding the delays it was experiencing at the Project and the costs it was incurring due to the scheduling impact.

61. On April 11, 2017, Chiarelli sent an email to JDS's Tom Alaimo (hereinafter "Alaimo") and JDS's Senior Project Manager, James Corral (hereinafter "Corral"), advising them that NY Concrete's suppliers had been holding onto NY Concrete's drilling equipment and caisson material since early February and had been complaining about storage and requesting to bill for stored material and equipment. Those suppliers included Skyline Materials, Robit, OCI, and SAS.

62. Chiarelli sent that email because the suppliers had expedited the materials and equipment, including hundreds of feet of 40-inch diameter pipe, so that NY Concrete could start Phase two and meet all its milestones, but due to the delays at the Project, the materials and equipment were lying in the suppliers' yards. Skyline was threatening to charge storage fees to NY Concrete for the equipment and materials.

63. In his reply email, dated April 11, 2017, Corral stated, in part, "That seems reasonable. Just let us know what the rate to store the materials and include this in the next Req[uisition]."

64. Kingdom was unable to take any actions to try to mitigate the delays or their impact because Kingdom was not in control of when it could remobilize to the Project site. Kingdom required direction from JDS to remobilize.

65. Neither Kingdom nor NY Concrete was able to do any work at the Project while they were waiting for the phase two site to become available, as they had already completed all the work that was available to them.

66. Kingdom was unable to continue with its phase two work while the MTA building still stood on the Project site.

67. At the direction of Corral from JDS, NY Concrete demobilized from the site in or about the spring of 2017, before its phase two work could begin, because there was no work available for it to perform.

68. Corral had discussions with NY Concrete regarding whether JDS preferred for NY Concrete to leave its equipment on site while waiting for phase two to begin and for JDS to pay NY Concrete the rental costs for the equipment, or to pay NY Concrete to demobilize and then remobilize to the site when phase two became available.

69. Chiarelli of NY Concrete had a meeting with JDS, which was referenced in an email sent by Chiarelli on April 18, 2017, in which JDS requested an analysis of the cost to pay NY Concrete for downtime/standby time to keep its equipment and key labor on site compared to the cost for NY Concrete to fully demobilize and then remobilize. Chiarelli's April 18, 2017, email was meant to provide JDS with information to evaluate the costs of the downtime/standby time option.

70. In an email dated May 11, 2017, Corral confirmed that he also wanted pricing for the full demobilization and remobilization option.

71. On July 31, 2017, Chiarelli sent an email to Corral and Alaimo providing them with the approximate costs of $375,000 for demobilization and $479,000 for remobilization.

72. Corral and Alaimo advised Chiarelli that JDS had chosen the option of paying NY Concrete to demobilize and remobilize.

73. JDS explained that, since it did not have a specific date for the completion of the demolition of the MTA-occupied building, JDS elected to direct NY Concrete and Kingdom to demobilize instead of having them keep their equipment and manpower at the site and continue to incur downtime costs.

74. JDS and NY Concrete agreed on a dollar amount that JDS would pay NY Concrete to demobilize and remobilize, which NY Concrete would bill into the schedule of values.

75. By email dated October 23, 2017, Corral sent to Chiarelli a JDS Purchase Order addressed to NY Concrete for demobilization in the sum of $370,000 and remobilization in the sum of $475,000.

76. Chiarelli signed the purchase order and returned it to JDS.

77. After Chiarelli signed the purchase order, Corral confirmed to him and Solimeo that JDS was willing to pay NY Concrete $370,000 for demobilization costs, but advised that he did not want to issue a change order for it because JDS did not want its partners to see the charge, so Corral instructed them to bill for the demobilization charge through the caisson line item in NY Concrete's payment application.

78. NY Concrete complied with JDS's instruction by billing the $376,202.80 demobilization charge through the line item for caissons in Application for Payment No. 10.

79. NY Concrete only charged JDS for one demobilization.

80. Line items 1 through 5 in NY Concrete's applications for payment, all of which relate to mobilization, did not include demobilization costs.

81. There is no line item in NY Concrete's Schedule of Values that specifically refers to demobilization, because NY Concrete gradually demobilizes as each operation is completed

and the costs for demobilization are included within the other line items in the Schedule of Values.

82. At meetings and in phone calls, and via a change order, JDS provided direction to NY Concrete and Kingdom to demobilize prior to completing all their work at the Project, and they complied with such directions.

83. Prior to demobilizing, NY Concrete, at JDS's direction, backfilled the Project site to make it ready for the dormant, demobilized period.

84. At JDS's direction, NY Concrete cleared off the site and made it level, even though that was not in NY Concrete's scope of work.

85. After NY Concrete demobilized, Chiarelli called JDS's Corral and Alaimo on a regular basis, at least once a week, to ask when the site would become available for Phase two. The delay was greatly impacting NY Concrete's operations because it had equipment and materials for the Project filling up its yard.

86. Even though NY Concrete's written subcontract was with Kingdom, NY Concrete communicated directly with JDS regarding the above issues as well as day-to-day issues at the Project and was not required to communicate with JDS through Kingdom.

87. Between the spring of 2017 and the fall of 2018, Kingdom and NY Concrete had discussions, including in-person meetings, with JDS (primarily with Corral), as to when the phase two site would become available for the bulk of the work remaining to be done, but JDS could not provide a confirmed date.

88. Those discussions included the costs and damages being incurred by Kingdom and NY Concrete relating to insurance, lost profits, and equipment.

89. On April 11, 2018, Kingdom's President, Kearney, had a face-to-face meeting (the "April 11, 2018 meeting") with JDS's owner and 9 DeKalb's principal, Stern, in Stern's office in Manhattan, to discuss the delays to the work at the Project.

90. NY Concrete's Solimeo also attended the April 11, 2018 meeting.

91. On April 16, 2018, Kingdom's Goldberg sent an email to JDS and NY Concrete summarizing the discussion at the April 11, 2018 meeting.

92. At the April 11, 2018 meeting, the parties discussed a new start date of August 18, 2018, for phase two, as well as the other items described by Goldberg in his April 16, 2018 email.

93. At the April 11, 2018 meeting, Kearney expressed concerns about the additional costs associated with the delay to the start and completion of phase two of the Project and spoke with Stern about being compensated for those additional costs. They negotiated a sum to compensate Kingdom and NY Concrete for the costs associated with the delay, including material and labor escalation.

94. At the April 11, 2018 meeting, Stern agreed to pay $1,500,000 to NY Concrete and $800,000 to Kingdom.

95. Stern did not testify at trial to dispute this agreement.

96. When Kearney left the April 11, 2018 meeting, he believed he had an agreement with Stern about JDS paying Kingdom and NY Concrete additional monies to come back and finish the work.

97. Goldberg's April 16, 2018, email accurately sets forth the agreement made at the April 11, 2018 meeting.

98. After the MTA building was demolished, JDS never directed or demanded that Kingdom and NY Concrete return to the site to continue their work or told them that phase two was ready for them.

99. Kingdom and NY Concrete never returned to the Project site, because neither JDS nor 9 DeKalb ever called them back to the site to finish their work.

100. Neither JDS nor 9 DeKalb ever told Kingdom why they had not called Kingdom or NY Concrete back to the site.

101. Kingdom and NY Concrete were ready, willing, and able to return to the site to complete their work at that time.

102. The Kingdom Contract provides, in pertinent part, at section 26, entitled, "Termination for Contractor Default": "If [Kingdom] shall fail to comply with any of the provisions or obligations under this Agreement … [JDS] shall have the right after three (3) days' written notice to [Kingdom] … to terminate, in whole or part, [Kingdom's] employment under this Agreement…"

103. The Kingdom Contract further provides, in pertinent part, at section 27, entitled, "Termination for Convenience": "(a) [JDS] may terminate, in whole or part, this Agreement for convenience at any time without cause upon three (3) days prior written notice to [Kingdom]…".

104. Neither Kingdom nor NY Concrete ever received a notice of termination or a notice of default in connection with the Project.

105. JDS never notified Kingdom about any defects or problems with Kingdom's or NY Concrete's work.

106. NY Concrete never received notice from JDS or 9 DeKalb about any defects or problems with NY Concrete's work.

107. After Kingdom and NY Concrete demobilized from the Project site, they passed by the Project site and saw that Linde-Griffith Construction Company (hereinafter "Linde-Griffith") had been hired to complete their work.

108. Linde-Griffith submitted payment applications to JDS requesting payment for its work at the Project.

109. The work that is included in Linde-Griffith's applications for payment constitutes the work that was to be done by Kingdom and NY Concrete under the Kingdom Contract.

110. The total price of Linde-Griffith's contract to complete Kingdom's and NY Concrete's work was at least $21,948,079.70, including change orders.

111. 9 DeKalb issued payments to Linde-Griffith for its work at the Project. (Ex. 38).

112. Kingdom incurred losses and damages because of not being allowed to complete its work at the Project.

113. On the 15th day of each month, Kingdom sent a draft application for payment (i.e., pencil requisition) to JDS for its review.

114. If JDS disagreed with an application for payment, it would mark it; accordingly, otherwise, JDS would send the application back to Kingdom without markups, indicating its approval of the application.

115. When Kingdom received markups from JDS, Kingdom would either revise the application accordingly or, if it disagreed, it would provide a counterproposal to JDS.

116. By the end of the month, Kingdom and JDS would agree on the final version of the application for payment, including the percentages of completion for each line item.

117. Kingdom submitted fourteen (14) payment applications to JDS in connection with its work at the Project.

118. Kingdom and JDS followed the pencil requisition process described above for each of the fourteen (14) applications for payment.

119. As part of Kingdom's payment applications, Kingdom billed for both its own work and NY Concrete's work and broke out each according to the schedule of values in the payment applications. Schedule of values refers to the amount of money allocated to each item to be billed. Taken together, the lines items in the schedule of values add up to the total price for the job. The schedule of values for the Project was included as part of the Kingdom Contract.

120. In Kingdom's applications for payment, the percentages of completion for each line item were determined based upon the amount of work that was performed during the application period, and Kingdom discussed and agreed upon the percentages with JDS.

121. For example, Kingdom confirmed that 50% of the line item for tiebacks was completed, as stated in its application for payment no. 14 by counting the total number of tiebacks on the Project drawing and then counting the number of tiebacks that were installed.

122. Kingdom also confirmed that the percentages of work for NY Concrete's scope of work, as stated in the applications for payment, were performed by visiting the Project site to view the work that had been performed.

123. 9 DeKalb paid Kingdom's payment application nos. 1 through 8, less ten percent (10%) retainage. Retainage refers to a portion of the payment that is withheld from the contractor to ensure that it completes its work.

124. Kingdom did not receive any further payments from 9 DeKalb or JDS after payment application no. 8.

125. Kingdom did not receive any rejections or objections from JDS or 9 DeKalb in response to any of its applications for payment.

126. In an email dated March 16, 2018, JDS approved Kingdom's payment application nos. 11 and 12, but did not make any payments to Kingdom for same.

127. Kingdom's application for payment no. 14, set forth the total value of the work performed by Kingdom and NY Concrete at the Project at $4,496,220.48.

128. Of that figure, Kingdom earned a total base contract amount of $567,607.10.

129. As set forth in Kingdom's application for payment no. 14, Kingdom also earned $24,423.98 for change order work pursuant to change order nos. 1, 2 and 3.

130. Kingdom did not receive any rejections or objections from JDS or 9 DeKalb in response to its application for payment no. 14.

131. A change order is a change from the original contract value. Change order no. 1, which was signed by Stern, Alaimo, and Simon Koster of JDS, and by a representative of Kingdom, is in the amount of $7,500.

132. Kingdom performed the work referenced in change order no. 1.

133. Change order no. 2, which was signed by Stern and Alaimo of JDS, and by a representative of Kingdom, is in the amount of $8,700.

133. Kingdom performed the work referenced in change order no. 2.

134. Change order no. 3 relates to additional work at the bank bracing, which Corral of JDS directed Kingdom to perform.

135. Kingdom performed $8,223.98 of the work referenced in change order no. 3.

136. Thus, Kingdom earned the total sum of $592,031.08 (i.e., $567,607.10 base contract balance plus $24,423.98 in change order work).

137. Kingdom has received total payments in the sum of $213,007.50 in connection with its work at the Project.

138. Kingdom's unpaid contract balance is $379,023.58 (i.e., $592,031.08 earned, less $213,007.50 paid to Kingdom).

139. Kingdom's overall contract price of $22,127,184 included insurance at a price (i.e., scheduled value) of $636,200.00.

140. That insurance figure represents the General Liability and Workers' Compensation insurance that Kingdom was required by the Kingdom Contract to carry for its portion of the work.

141. Kingdom paid in full for its insurance coverage for the Project but billed JDS and 9 DeKalb, as part of its applications for payment for reimbursement, for only 25% of its insurance costs. Kingdom performed only approximately 25% of its work at the Project and was not permitted to complete its remaining work.

142. Specifically, as of the date of Kingdom's payment application no. 8, which is the last payment application that was paid, Kingdom billed out 25% of the scheduled value for insurance, and $477,150 was left to bill for insurance.

143. On March 28, 2018, Kingdom sought payment from JDS and 9 DeKalb for its paid but unreimbursed insurance costs in the amount of $477,150.00.

144. The reference to "Insurance Projection Not Met" in change order request no. 4R1 attached to the March 28, 2018, email means the balance of the insurance that Kingdom had not billed yet to JDS and 9 DeKalb through any of its applications for payment, even though Kingdom had paid the insurance premiums in full.

145. Kingdom has not received any portion of the foregoing unreimbursed insurance payments, in the sum of $477,150.

146. In addition, Kingdom suffered a loss of profit because it was not permitted to perform and bill for its phase two scope of work at the Project and was unable to obtain other work during that period, from approximately January to December of 2017.

147. In its March 28, 2018, email, Kingdom notified JDS that it had suffered a loss of profit in the amount of $1,013,733.65 and requested payment for same via change order request no. 4R1.

148. Kingdom's lost profit of $1,013,733.65 represents the profit that Kingdom would have earned under the Kingdom Contract but did not, since it was not permitted to complete its work.

149. As set forth in change order request no. 4R1, Kingdom's lost profit in the sum of $1,013,733.65 is calculated by subtracting the profit that Kingdom actually earned on the work performed as reflected in its paid requisitions (i.e., $44,972.20), from the profit that Kingdom would have earned if it had been permitted to perform all of its work at the Project (i.e., $1,058,705.85).

150. In change order request no. 4R1, the "Base Job Profit" in the amount of $1,058,705.85 is fifteen percent (15%) of the scheduled value of Kingdom's base contract scope of work in the amount of $7,058,039.00 The "Profit Earned to Date" in the sum of $44,972.20 is fifteen percent (15%) of the total payments that Kingdom received for the work it performed at the Project.

151. In addition, Section 39 (a) (iii) of the Kingdom Contract provides for a mark-up of fifteen percent (15%) for overhead and profit on Kingdom's labor and materials.

152. The total sum due and owing to Kingdom is $1,869,907.23, as follows:

$567,607.10 – Base Contract Balance

$24,423.98 – Change Orders 1, 2 and 3

$477,150.00 – Unreimbursed Insurance Costs

$1,013,733.65 – Lost Profit

$2,082,914.73 – Subtotal

($ 213,007.50) – Less Total Paid to Kingdom

$1,869,907.23 – Total Due and Owing to Kingdom

153. The sums owed to NY Concrete are in addition to, and not included within, the foregoing sum of $1,869,907.23 owed to Kingdom.

154. The labor, materials, equipment, work, and services furnished by Kingdom were furnished for and used for the improvement of the premises, with the knowledge and consent of JDS and 9 DeKalb.

155. The last date on which Kingdom performed work or furnished any material at the Project was February 25, 2018.

156. On June 29, 2018, Kingdom filed with the KCCO a Notice of Mechanic's Lien (hereinafter the "Kingdom Lien") in the amount of $856,173.58 against the Premises.

157. The Kingdom Lien states the agreed price and value of the labor performed and materials furnished at the Premises as $1,069,181.08.

158. The Kingdom Lien states that the total amount unpaid for the labor and materials furnished by Kingdom at the Premises is $856,173.58.

159. The Kingdom Lien states that the total amount of the lien claim by Kingdom is $856,173.58.

160. The amount of the Kingdom Lien is $856,173.58 consisting of the sums of $379,023.58 and $477,150.00. The $379,023.58 figure was arrived at by taking the unpaid contract balance of $592,031.08 and subtracting the amount of $213,007.50 paid to Kingdom. The $477,150.00 was the unreimbursed insurance costs.

161. On or about August 16, 2018, 9 DeKalb, as principal, and defendant, Atlantic Specialty Insurance Company (hereinafter "Atlantic"), as surety, in order to discharge the Kingdom Lien, executed and issued a bond (Bond No. 8000035535) in the sum of $941,790.94, conditioned for the payment of any judgment which might be rendered in an action to enforce the Kingdom Lien (hereinafter the "Kingdom Lien Discharge Bond").

162. On or about August 16, 2018, 9 DeKalb and Atlantic filed the Kingdom Lien Discharge Bond with the KCCO.

163. Kingdom has not received any payment in connection with the Kingdom Lien or the Kingdom Lien Discharge Bond.

164. NY Concrete's Application for Payment No. 10, NY Concrete claimed that it earned the total sum of $3,904,189.39 under the NY Concrete Subcontract.

165. NY Concrete received total payments of $2,437,955.10 from 9 DeKalb.

166. The unpaid subcontract balance owed to NY Concrete is $1,466,234.29 (i.e., $3,904,189.39 earned, less $2,437,955.10 paid to NY Concrete).

167. NY Concrete submitted twelve (12) payment applications to JDS and 9 DeKalb in connection with its work at the Project.

168. 9 DeKalb paid NY Concrete's payment application nos. 1 through 8, less ten percent (10%) retainage.

169. NY Concrete did not receive any payments from 9 DeKalb or JDS for payment application nos. 9 and 10.

170. The amount due for payment application no. 9 is $554,055.66.

171. The amount due for payment application no. 10 is $521,759 which includes the cost of demobilizing from the Project site.

172. By email dated March 28, 2018, Solimeo reminded JDS and 9 DeKalb that NY Concrete was still owed $1,075,815 for its application for payment nos. 9 and 10 and requested payment for same.

173. In addition, 9 DeKalb is withholding retainage from NY Concrete in the amount of $390,418.94, no part of which has been paid to NY Concrete.

174. The balance due and owing to NY Concrete is $1,466,234.29, as follows:

$ 554,055.66 – Payment Application No. 9

$ 521,759.69 – Payment Application No. 10

$ 390,418.94 – Retainage

$1,466,234.29 – Contract Balance Due and Owing to NY Concrete

175. In anticipation of performing its phase two work, NY Concrete ordered certain materials to be specially manufactured for the Project (the "Specially Manufactured Materials") (exhibits 19, 19-a).

176. The Specially Manufactured Materials consist of 5,224 40-inch casings, 38 40-inch casing ringbits, and 5 40-inch pilot bits for casing ring. (exhibit 19)

177. Regarding the 40-inch casings, although NY Concrete initially was invoiced by Skyline Steel, the supplier of the casings, in the amount of $430,980, NY Concrete ultimately was not required to pay for the 40-inch casings because Linde-Griffith purchased them directly when it replaced NY Concrete at the Project.

178. However, NY Concrete received invoices for, and actually paid, $228,000 for the 40-inch casing ringbits and $350,000 for the 40-inch Pilot Bits for casing ring (exhibits 19 and 19-a), for a total amount paid of $578,000 for the Specially Manufactured Materials.

179. NY Concrete was unable to use or bill for the Specially Manufactured Materials at the Project because it was not permitted to perform its phase two scope of work.

180. NY Concrete notified JDS in writing of the costs its was incurring with respect to the Specially Manufactured Materials and requested payment for same.

181. NY Concrete has not received payment for the Specially Manufactured Materials.

181. NY Concrete claimed a loss of profit in the amount of $1,801,493.00 calculated as fifteen percent (15%) of the work that NY Concrete was not permitted to perform because it was not permitted to perform its Phase two scope of work.

182. By email dated March 28, 2018, NY Concrete submitted to JDS a Change Order Request No. 2, seeking payment in the amount of $1,801,493 for NY Concrete's lost profit.

183. NY Concrete alleges a total sum due and owing in the amount of $3,845,727.29 calculated as follows:

$1,466,234.29 – Unpaid Contract Balance

$ 228,000.00 – Specially Manufactured Casing Ringbits

$ 350,000.00 – Specially Manufactured Pilot Bits

$1,801,493.00 – Lost Profit

$3,845,727.29 – Total Due and Owing to NY Concrete

184. The labor, materials, equipment, work, and services furnished by NY Concrete were furnished for and actually used for the improvement of the Premises, with the knowledge and consent of Kingdom, JDS and 9 DeKalb.

185. The last date on which NY Concrete performed work at the Project was November 7, 2017.

186. On June 29, 2018, NY Concrete filed with the Kings County Clerk a Notice of Mechanic's Lien (hereinafter the "NY Concrete Lien") in the amount of $4,536,555.29 against the Premises.

187. The amount of the NY Concrete Lien consists of the following sums:

$1,466,234.29 – Contract Balance Due

$1,008,980.00 – Cost of Specially Manufactured Materials

($228,000 for 40-inch casing ringbits

$350,000 for 40-inch Pilot Bit for casing ring

$430,980 for 40-inch casings)

$ 661,341.00 – Additional Escalation and Storage Amounts Charged to NY Concrete by Skyline Steel, LLC

$1,400,000.00 – Additional Insurance Costs

$4,536,555.29 – NY Concrete Lien Amount

187. NY Concrete did not include the lost profit component of its claim in the NY Concrete Lien.

188. At the time the NY Concrete Lien (exhibit 33) was filed, and the Itemized Statement of the lien was submitted to Defendants, Solimeo believed that NY Concrete was obligated to pay Skyline Steel for the 40-inch casings.

189. However, at some point thereafter, NY Concrete learned that it was not going to have to pay Skyline Steel for the 40-inch casings, because JDS's new contractor purchased them. Thus, the $430,980 charge for the 40-inch casings is no longer part of NY Concrete's claims by a stipulation dated November 20, 2024, filed under NYSCEF doc. no. 62.

190. Additionally, as set forth above, the NY Concrete Lien also includes $661,341 for "Additional Escalation and Storage Amounts Charged to NY Concrete by Skyline Steel, LLC." The escalation component of that item in the lien refers to the increase in the cost of certain materials that NY Concrete purchased from Skyline Steel. The storage component refers to the sum of money that Skyline Steel was charging NY Concrete to store certain materials—which NY Concrete had purchased from Skyline Steel—at Skyline Steel's facility because NY Concrete was unable to take delivery of them at the Project site, due to the delays at the Project.

191. NY Concrete included those escalation and storage charges in its lien because, at the time it filed the lien, NY Concrete was responsible for those charges and believed that it was going to have to pay them.

192. However, since NY Concrete ultimately was not required to pay the escalation and storage charges, they are no longer part of NY Concrete's claim pursuant to stipulation dated November 20, 2024 under NYSCEF doc. no. 62.

193. The additional insurance costs component of the NY Concrete lien refers to $1,400,000.00 in additional insurance premiums that NY Concrete paid, based on the value of work that NY Concrete was supposed to complete at the Project. However, after the NY Concrete Lien was filed, NY Concrete received a credit from its insurer for the $1,400,000 in additional premiums. Thus, the Additional Insurance Costs are no longer part of NY Concrete's claim, pursuant to stipulation dated November 20, 2024 under NYSCEF doc. no. 62.

194. The current amount of NY Concrete's lien claim is $2,044,234.29 (= $4,536,555.29 [original lien amount] less $430,980.00 [40-inch casings] less $661,341.00 [escalation and storage charges] less $1,400,000.00 [Additional Insurance Charge]).

195. On or about August 16, 2018, 9 DeKalb, as principal, and Atlantic, as surety, in order to discharge the NY Concrete Lien, executed and issued a bond (Bond No. 8000035536) in the sum of $4,990,210.82, conditioned for the payment of any judgment which might be rendered in an action to enforce the NY Concrete Lien (hereinafter the "NY Concrete Lien Discharge Bond").

196. On or about August 16, 2018, 9 DeKalb and Atlantic filed the NY Concrete Lien Discharge Bond with the KCCO.

197. After the NY Concrete Lien was filed, Stern told Solimeo that 9 DeKalb would pay NY Concrete's Application for Payment Nos. 9 and 10 (which Stern previously had agreed to pay) if NY Concrete would remove the lien. Solimeo explained to Stern that NY Concrete could not agree to release the lien because it included items in addition to the two applications for payment.

LAW AND APPLICATION

Plaintiffs commenced this action to recover the sums due in connection with a construction project at 340 Flatbush Avenue Extension and 9 Dekalb Avenue, Brooklyn, New York of which Defendant 9 DeKalb was the owner and JDS was denominated as the construction manager.

The first request made in the plaintiffs' post-trial brief was for a missing witness charge to be applied against the defendants based on their failure to call Michael Stern or any other witness to testify at trial. On November 20, 2024, both sides rested. The plaintiffs did not ask for a missing witness charge until long after the close of all the evidence. The request is therefore denied as untimely (*see Russo v Levat*, 143 AD3d 966 [2d Dept 2016]; *Mereau v. Prentice*, 139 A.D.3d 1209 [3d Dept 2016]).

Kingdom's Breach of Contract Claim

Kingdom and NY Concrete called Goldberg, Kearney, Chiarelli, and Solimeo as witnesses on their direct case. Their testimony was credible. Through their credible testimony and documentary submissions the following facts were established. Kingdom had a written contract with defendant 9 DeKalb as the owner and JDS as the construction manager for a construction project at 340 Flatbush Avenue Extension and 9 Dekalb Avenue, Brooklyn, New York. The construction contract contemplated separate phases of work.

Kingdom was able to perform and complete its work on phase one of the project but was not able to start phase two. The MTA was occupying a building on the project site that needed to be demolished before phase two could begin. Phase two work was to begin after the building that the MTA was occupying was demolished and cleared, to make way for NY Concrete's drills, excavators, and drilling equipment. The delays at the project caused by defendants' inability to remove the MTA from the building lasted for more than one year, from approximately the spring of 2017 to the fall of 2018.

Neither Kingdom nor NY Concrete was able to do any work at the project while they were waiting for the phase two site to become available, as they had already completed all the work that was available to them. After the MTA building was eventually demolished, JDS never directed or demanded that Kingdom and NY Concrete return to the site to continue their work or told them that phase two was ready for them. Kingdom and NY Concrete never returned to the project site, because neither JDS nor 9 DeKalb ever called them back to the

site to finish their work. Neither JDS nor 9 DeKalb ever told Kingdom why they had not called Kingdom or NY Concrete back to the site.

The Kingdom contract provided, in pertinent part, at section 26, entitled, "Termination for Contractor Default": "If [Kingdom] shall fail to comply with any of the provisions or obligations under this Agreement … [JDS] shall have the right after three (3) days' written notice to [Kingdom] … to terminate, in whole or part, [Kingdom's] employment under this Agreement…"

The Kingdom Contract further provides, in pertinent part, at section 27, entitled, "Termination for Convenience": "(a) [JDS] may terminate, in whole or part, this Agreement for convenience at any time without cause upon three (3) days prior written notice to [Kingdom]…".

JDS never notified Kingdom about any defects or problems with Kingdom's or NY Concrete's work. JDS also never notified NY Concrete about any defects or problems with NY Concrete's work. After Kingdom and NY Concrete demobilized from the project site, they passed by the project site and saw that Linde-Griffith Construction Company had been hired to complete their work. 9 Dekalb and JDS'S conduct in failing to notify Kingdom that it effectively, terminating the contract effectively, terminating the contract by going forward with Linde-Griffith Construction Company in its place was a breach of its contract with Kingdom. The breach caused Kingdom to sustain damages.

"The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that

contract, and resulting damages" (*South Shore Eye Care, LLP v Lane*, 242 AD3d 792,795 [2d Dept 2025]).

Kingdom's evidentiary submission established the existence of a contract, Kingdom's performance under the contract, 9 DeKalb's breach of the contract, and Kingdom's damage caused by the breach.

Kingdom established monetary damages in the amount of $1,869,907.23 computed as follows. The base contract balance in the amount of $567,607.10; plus, change orders 1, 2 and 3 totaling $24,423.98; plus, unreimbursed insurance costs totaling $477,150.00; plus, lost profits in the amount of $1,013,733.65 for a subtotal of $2,082,914.73 minus $213,007.50 already paid to Kingdom.

Defendants JDS Construction Group LLC, 9 Dekalb Owner LLC, and Atlantic Specialty Insurance Company have argued in their joint post-trial memorandum that to the extent plaintiffs seek recovery for damages arising out of delays experienced during the course of the project, such claims are barred by the contract between JDS and Kingdom and by the Subcontract between Kingdom and NY Concrete. They further contend that any such claim by NY Concrete for damages arising out of delays are properly asserted against Kingdom as a party in privity, and not against JDS.

The Court finds that the defendants are seeking damages due to the plaintiffs alleged breach of its agreements and not due to any delays on the project site.

NY Concrete's Breach of Contract Claim

In its post-trial brief plaintiffs made the following argument. NY Concrete's subcontract was with Kingdom and the first cause of action for breach of contract was asserted by Kingdom for both its own damages and those of NY Concrete. Plaintiff contends that the evidence supports NY Concrete's entitlement to recover for breach of contract directly against JDS for its own damages. Specifically, the parties executed a joint check agreement pursuant to which JDS, rather than Kingdom, would pay NY Concrete the sums owed under its subcontract and the payments to NY Concrete would be credited as payments made to Kingdom under its contract with JDS. Further, NY Concrete submitted its payment applications directly to JDS, and all payments to NY Concrete were made by 9 DeKalb, as JDS's payment agent, rather than by Kingdom. Additionally, NY Concrete communicated directly with JDS regarding day-to-day issues and was not required to communicate with JDS through Kingdom.

Based on the foregoing plaintiffs contends that under CPLR 3025 (c) the Court may deem the pleadings amended to conform to the evidence presented, even absent a motion, to allege in the first cause of action that Kingdom is owed $1,869,907.23 and NY Concrete is owed $3,845,727.29. Should the Court decline to deem the complaint amended, then Kingdom contends that it should be awarded judgment for the full $5,715,634.52, of which Kingdom would then have to turn over $3,845,727.29 to NY Concrete.

In or about March 2017, Kingdom, NY Concrete and JDS entered into a written joint check agreement. The joint check agreement provided, at section 1, that JDS was to make payments to NY Concrete by joint check made payable to Kingdom and NY Concrete, or

directly to NY Concrete, for the work performed by NY Concrete at the Project, and that invoices issued by NY Concrete should be sent to both Kingdom and JDS simultaneously. The joint check agreement further provided, at section 2, that any payments made to NY Concrete were to be credited as payment by JDS with respect to any obligations JDS may have to Kingdom under the Kingdom Contract. All payments that were made to Kingdom in connection with the project were made by 9 DeKalb. All payments that were made to NY Concrete in connection with the project were made by joint checks issued by 9 DeKalb.

The purpose of the joint checking agreement was to facilitate payments to NY Concrete on the project by allowing payment from JDS to NY Concrete without having to pass through Kingdom's accounting records. By doing so, Kingdom did not have to pay insurance on those payments. NY Concrete had a contract with Kingdom as the subcontractor to Kingdom, but NY Concrete did not have a contract with 9 Dekalb and JDS. Nor was 9 Dekalb and JDS a party to the contract between Kingdom and NY Concrete.

There is no dispute that the plaintiffs did not make a motion pursuant to CPLR 3025 (c) to amend the pleadings to the proofs. The plaintiffs argue that the Court may do so on its own in the absence of a motion. The Court does not find that amending the pleadings to the proofs as requested by the plaintiffs would occasion no prejudice to the defendants. Moreover, the Court declines to do so in the absence of a notice of motion for such relief. Under these circumstances, NY Concrete may not assert a claim against 9 DeKalb and JDS for breach of contract. Moreover, NY Concrete could not asset such a claim because it had no contract with the defendants.

NY Concrete's Claim for Unjust Enrichment

"Unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Bedford-Carp Constr., Inc. v Brooklyn Union Gas Co*., 219 AD3d 1293, 1295 [2d Dept 2023]; *see Canas v Oshiro*, 221 AD3d 650, 651 [2d Dept 2023]). "To recover under a theory of unjust enrichment, a litigant must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Bedford-Carp Constr., Inc. v Brooklyn Union Gas Co.*, 219 AD3d 1293, 1295 [2d Dept 2023]). "The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*id*.)

"A property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi-contract theory unless it expressly consents to pay for the subcontractor's performance" (*Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club*, 156 AD2d 550, 551 [2d Dept 2018]). The mere fact that the owner "consented to the improvements and received some benefit" from the subcontractor's activities "is insufficient to recover on such a theory;" the subcontractor must also show that it was working for the owners "when it performed its work resulting in unjust enrichment" (*Yellowstone Indus. v. Vinco Mar. Mgt*., 305 AD2d 587, 588 [2d Dept 2003]).

The Court made the following findings of fact. NY Concrete's phase one work included installing secant piles for the secant pile wall, soldier piles, small diameter caissons, and approximately 10 large caissons. NY Concrete's subcontract price includes the cost of

one mobilization and one demobilization. Kingdom and NY Concrete mobilized to the project site in or about the winter of 2017 to perform a small amount of work as part of phase one They were expecting to demobilize 12 months after mobilization. After NY Concrete mobilized, it started its phase one work in the winter of 2017. NY Concrete completed all its phase one work.

NY Concrete was never able to begin its phase two work because JDS and 9 DeKalb were unable to remove the MTA from an existing building it was occupying at the project site that needed to be demolished before NY Concrete's work could begin.

At the direction of Corral from JDS, NY Concrete demobilized from the site in or about the spring of 2017, before its phase two work could begin, because there was no work available for it to perform. JDS and NY Concrete agreed on a dollar amount that JDS would pay NY Concrete to demobilize and remobilize, which NY Concrete would bill into the schedule of values. By email dated October 23, 2017, Corral sent to Chiarelli a JDS Purchase Order addressed to NY Concrete for demobilization in the sum of $370,000 and remobilization in the sum of $475,000.

Chiarelli signed the Purchase Order and returned it to JDS.

After Chiarelli signed the Purchase Order, Corral confirmed to him and Solimeo that JDS was willing to pay NY Concrete $370,000 for demobilization costs but advised that he did not want to issue a change order for it because JDS did not want its partners to see the charge, so Corral instructed them to bill for the demobilization charge through the caisson line item in NY Concrete's payment application.

NY Concrete complied with JDS's instruction by billing the $376,202.80 demobilization charge through the line item for caissons in application for payment no. 10. NY Concrete only charged JDS for one demobilization. At meetings and in phone calls, and via a change order, JDS provided direction to NY Concrete and Kingdom to demobilize prior to completing all their work at the Project, and they complied with such directions. Prior to demobilizing, NY Concrete, at JDS's direction, backfilled the Project site to make it ready for the dormant, demobilized period.

At JDS's direction, NY Concrete cleared off the site and made it level, even though that was not in NY Concrete's scope of work. At meetings and in phone calls, and via a change order, JDS provided direction to NY Concrete and Kingdom to demobilize prior to completing all their work at the Project, and they complied with such directions.

On April 11, 2018, Kingdom's President, Kearney, had a face-to-face meeting, the April 11, 2018 meeting with JDS's owner and 9 DeKalb's principal, Stern, in Stern's office in Manhattan, to discuss the delays to the work at the Project. NY Concrete's Solimeo also attended the April 11, 2018 meeting. On April 16, 2018, Kingdom's Goldberg sent an email to JDS and NY Concrete summarizing the discussion at the April 11, 2018 meeting. At the April 11, 2018 meeting, the parties discussed a new start date of August 18, 2018, for Phase two, as well as the other items described by Goldberg in his April 16, 2018, email. At the April 11, 2018 meeting, Kearney expressed concerns about the additional costs associated with the delay to the start and completion of phase two of the Project and spoke with Stern about being compensated for those additional costs. They negotiated a sum to compensate Kingdom and NY Concrete for the costs associated with the delay, including material and

labor escalation. At the April 11, 2018, Meeting, Stern agreed to pay $1,500,000 to NY Concrete and $800,000 to Kingdom.

NY Concrete has alleged a total sum due and owing in the amount of $3,845,727.29 calculated as follows: $1,466,234.29 as the unpaid contract balance; $228,000.00 for specially manufactured casing ringbits; $350,000.00 for specially manufactured pilot bits; and $1,801,493.00 in lost profit.

The unpaid contract balance was computed as follows. As set forth in NY Concrete's Application for Payment No. 10, NY Concrete earned the total sum of $3,904,189.39 under the NY Concrete Subcontract and received $2,437,955.10 from 9 DeKalb. The unpaid subcontract balance owed to NY Concrete is $1,466,234.29 computed as $3,904,189.39 earned minus $2,437,955.10 paid to NY Concrete. NY Concrete submitted twelve (12) payment applications to JDS and 9 DeKalb in connection with its work at the Project. There was no evidence that JDS or 9 DeKalb objected to any of NY Concrete's payment applications.

The credible evidence establishes that although NY Concrete did not have a contract with the defendants, it was working for the owners when it performed its work under phase one of the project. The direct involvement and directions given to NY Concrete by Corral, as JDS's senior project manager, and NY Concrete's compliance with same establishes that NY Concrete was working directly for and at the direction of the owner, 9 Dekalb. NY Concrete may recover under a theory of unjust enrichment the costs of its materials and labor done at the owner's directions through its project manager.

The Court has determined that NY Concrete may not assert a claim against 9 DeKalb and JDS for breach of contract because NY Concrete did not have a contract with the defendants. Defendants JDS, 9 Dekalb, and Atlantic Specialty have argued in their joint post-trial memorandum that the lack of a contract between NY Concrete and the defendants and the existence of a contract between Kingdom and JDS also bars NY Concrete from pursuing damages under a theory of unjust enrichment. The court disagrees.

NY Concrete may not pursue a breach of contract claims against the defendants. Nor may it seek its lost profits from the defendants under an unjust enrichment theory as that item of damage is not available under a theory of unjust enrichment.

Consequently, the measure of NY Concrete's damages owed by the defendants under an unjust enrichment theory is $2,044,234.29 computed as follows: $1,466,234.29 as the unpaid contract balance; $228,000.00 for specially manufactured casing ringbits; and $350,000.00 for specially manufactured pilot bits.

Kingdom's Claim of an Account Stated

An account stated requires "an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*D & N Lending, LLC v Tachlis Corp.*, 221 AD3d 954, 955 [2d Dept 2023], quoting *Fleetwood Agency, Inc. v Verde Elec. Corp.*, 85 AD3d 850, 851 [2d Dept 2011]).

The evidentiary submissions by Kingdom did not make a prima facie showing of an agreement between Kingdom and the defendants to an account based upon prior transactions between them.

NY Concrete's Claim of an Account Stated

The evidentiary submissions by NY also failed to establish an agreement between NY Concrete and the defendants to an account based upon prior transactions between them. Although Kingdom and NY Concrete regularly submitted payment applications to JDS in connection with its work at the project, the application was scrutinized and negotiated following a pencil requisition process. While the pencil requisition process was agreed upon in practice, the amount due was not agreed upon by the submission of the application for payment.

Foreclosure of Kingdom's Mechanic's Lien

There is no dispute that on July 3, 2018, Kingdom filed with the Kings County Clerk a notice of mechanic's lien (the "Kingdom Lien") in the amount of $856,173.58 against the subject premises. There is also no dispute that on or about August 16, 2018, 9 DeKalb, as principal, and defendant, Atlantic Specialty, as surety, in order to discharge the Kingdom Lien, executed and issued a bond (Bond No. 8000035535) in the sum of $941,790.94, conditioned for the payment of any judgment which might be rendered in an action to enforce the Kingdom Lien.

Pursuant to Lien Law § 19 (4), a mechanic's lien is "discharged if the owner or contractor executes a bond or undertaking from a surety authorized to do business in New York in an amount equal to 110% of the lien amount" (*Sanco Mech., Inc. v DKS Gen. Contrs. & Constr. Mgrs., Inc.*, 34 AD3d 271, 273 [1st Dept.2006]). Here, the defendant has obtained a surety bond from Atlantic Specialty to discharge Kingdom's mechanic's

lien. The bond no. 8000035535 was in the sum of $941,790.94 and is conditioned for the payment of any judgment which might be rendered in an action to enforce the Kingdom lien. There is no dispute it was filed. It is therefore in compliance with the requirements of Lien Law 19 (4) and Kingdom's mechanic's lien is therefore discharged.

Foreclosure of NY Concrete's Mechanic's Lien

There is no dispute that on July 3, 2018, NY Concrete filed with the Kings County Clerk a notice of mechanic's lien (the "NY Concrete Lien") in the amount of $4,535,555.29 against the subject premises. There is also no dispute that on or about August 16, 2018, 9 DeKalb, as principal, and Atlantic, as surety, in order to discharge the NY Concrete Lien, executed and issued a bond (Bond No. 8000035536) in the sum of $4,990,210.82, conditioned for the payment of any judgment which might be rendered in an action to enforce the NY Concrete Lien (the "NY Concrete Lien Discharge Bond"). It is therefore in compliance with the requirements of Lien Law 19 (4) and NY Concrete's mechanic's lien is therefore discharged.

Defendants' Counterclaim for Willful Exaggeration of a Lien

Under Lien Law § 39, where a lienor has willfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. (*see Consumer Protection Restoration, LLC v Hickory House Tenants Corp.*, 236 AD3d 744, 746 [2d Dept 2025]; *see Guzman v Estate of Fluker*, 226 AD2d 676, 678 [2d Dept 1996]). Further, where a lien is determined to be willfully exaggerated, the person filing the exaggerated notice of lien shall be liable in

damages to the owner or contractor (Lien Law § 39-a). "[T]he remedy in Lien Law § 39-a requires a finding that the lienor deliberately and intentionally exaggerated the lien amount, and is available only where the lien is otherwise valid" (*Adria Infrastructure, LLC v Henick-Lane*, 207 AD3d 604, 606 [2d Dept 2022]).

"The fact that a lien may contain improper charges does not, in and of itself, establish that a plaintiff willfully exaggerated a lien" (*Minelli Const. Co. v Arben Corp*., 1 AD3d 580, 581 [2d Dept 2003], citing *Goodman v Del-Sa-Co Foods*, 15 NY2d 191, 193-194 [1965]). This is particularly true considering the requirement that Lien Law § 39 a must be "strictly construed" in favor of the party against whom the penalty is sought to be imposed (*Goodman v Del-Sa-Co Foods*, 15 NY2d 191, 195 [1965]*; Pyramid Champlain Co. v Brosseau & Co.*, 267 AD2d 539, 543 [3d Dept 1999]). In the case at bar, the defendants called no witnesses and produced no sworn testimony in support of its counterclaim.

The plaintiffs, on the other hand, provided reasonable explanations for the itemized figures in their respective mechanic's liens. They also provided reasonable explanations for some mistakes or errors pertaining to the inclusion of arguably non-lienable amounts therein. Consequently, the defendants failed to meet their prima facie burden demonstrating that the mechanic's liens filed by the plaintiffs were willfully exaggerated.

CONCLUSION

The claim of Kingdom Associates, Inc. for breach of contract asserted against 9 Dekalb and JDS Construction Group LLC is established, and it is awarded damages in the

amount of $1,869,907.23 with pre-judgment interest retroactive to July 13, 2018, the date the instant action was commenced, and the date the mechanic's lien was filed.

The claim of Kingdom Associates, Inc. to foreclose its mechanic's lien is rendered academic by the lien's replacement with a bond.

The claim of Kingdom Associates, Inc. for an account stated is dismissed.

The claim of New York Concrete Corp. for breach of contract asserted against 9 Dekalb and JDS Construction Group LLC is dismissed as it had no contract with against 9 Dekalb and JDS Construction Group LLC.

The claim by New York Concrete Corp. against 9 Dekalb and JDS Construction Group LLC is established, and it is awarded damages in the amount of $2,044,234.29 with pre-judgment interest retroactive to July 3, 2018, the date the instant action was commenced, and the date the mechanic's lien was filed.

The claim by New York Concrete Corp. to foreclose its mechanic's lien is rendered academic by the lien's replacement with a bond.

The claim by New York Concrete Corp. for an account stated is dismissed.

The claim by 9 Dekalb and JDS Construction Group LLC pursuant to Lien Law 39-a seeking statutory damages against Kingdom Associates, Inc. and New York Concrete Corp based on willful exaggeration of their respective mechanic's liens is dismissed.

The foregoing constitutes the decision, order and judgment of the Court.

ENTER:

Francois A. Rivera

J.S.C.