B.O.S.S. Assoc., Inc. v 427 E 90 Owner LLC

2026 NY Slip Op 30972(U)

March 10, 2026

Supreme Court, New York County

Docket Number: Index No. 655690/2020

Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** 54

Justice

----------X

B.O.S.S. ASSOCIATES, INC.,

Plaintiff,

- v -

427 E 90 OWNER LLC, LIBERTY MUTUAL INSURANCE COMPANY, RELIABLE ELECTRICAL CONTRACTORS CORP., YUKOS MECHANICAL, INC., CUETES CORP., STARLITE PLUMBING & HEATING CORP.,

Defendants.

----------X

INDEX NO. 655690/2020

DECISION AFTER TRIAL

Defendant 427 E 90 Owner LLC (Owner) hired plaintiff B.O.S.S. Associates, Inc. (BOSS) as its general contractor on a construction project (the Project) pursuant to an agreement dated February 7, 2018 (Dkt. 502 [the Agreement]). The primary issue in this case is whether Owner properly terminated BOSS for default under Article 9 of the Agreement (in which case Owner could be entitled to damages) or whether the termination was for convenience (in which case BOSS could be entitled to damages). A bench trial was held on July 14 and 15, 2025 (*see* Dkts. 647, 648), after which the parties filed post-trial briefs (*see* Dkts. 650, 651).

As discussed below, the credible evidence established that Owner did not terminate BOSS for default in accordance with the Agreement because it did not comply with its obligations to provide BOSS with proper written notice of a breach and the opportunity to cure, and that BOSS is entitled to $932,869.12 in damages, plus pre-judgment interest and contractual prevailing-party fees.

Termination of the Agreement

The following facts are either undisputed, clear from the evidence submitted at trial or drawn from the credible testimony of BOSS' Vice President, Michael Saratovsky (*see* Dkt. 634).

In July 2018, BOSS commenced work on the Project. On March 27, 2020, it stopped work in accordance with an Executive Order issued by the Governor due to the Covid-19 pandemic. At that time, there were conflicts between the parties (*see id.* at 3-4). BOSS claims that Owner used the pandemic as a pretext to try to effectuate a termination for default (*see id.* at 5-6).

DECISION AFTER TRIAL

Because of the Executive Order, BOSS "demobilized its workforce from the site but continued to work on and with respect to the Project, including working with the Owner on the building facades" (*id.* at 5). One month later, by letter dated April 24, 2020, Owner sought permission from the New York City Department of Buildings (DOB) to perform work at the Project on an emergency basis (Dkt. 505). Owner requested permission to "complete the four building facades that are currently unfinished," explaining that it would take 55 days to complete this work (*see id.*). DOB denied the application (*see* Dkt. 506 at 10-11). DOB also denied Owner's appeals, reasoning that its request did "not meet requirements under essential construction" (Dkt. 507). At the time, Owner did not notify BOSS of its application or DOB's denial (*see* Dkt. 634 at 7).

On May 13, 2020, Owner submitted another application to DOB (Dkt. 512 [the Application]). The work was described as necessary "to protect the interior of the building and the electrical wiring in the walls" (*id.*). The Application explained:

> We would like to formally request an emergency work permit to complete the necessary work at the 427 E 90th project location to protect the interior of the building and the electrical wires in the walls. Mold is present on floors 2,3 and 9-11, which also indicates potential for corrosion of the electrical wiring within the walls. Eighty percent of the electrical work is complete throughout the building, and its exposure to the elements results in a potential for an electrical shortage and thus a fire. The sprinkler system is not yet activated and if a fire were to occur it could endanger the two occupied neighboring buildings.
>
> An electrical shutoff was considered but deemed inadequate as the presence of corrosion on the installed electrical wiring could still result in an electrical shortage even if power was shutoff. The open facades are resulting in a great amount of water infiltration throughout the building. We request approval to complete the open facades, mitigate the water infiltration and thus prevent any additional damage (*id.* [emphasis added]).

As with the first application--despite the seemingly different scope--Owner explained to DOB that it should take 55 days to complete the operation and that personnel would be "kept at a minimum amount needed to complete the facade work and repair and replace electrical wiring as needed" (*see id.*).

DOB approved the Application on May 14, 2020 in a Certificate of Authorization that states: "The scope of work cited in the application is approved to proceed" (Dkt. 513). Despite Owner's 55-day-job estimate, however, DOB only allowed work through June 7, 2020 (*see id.*).

The following day, on May 15, 2020, Owner wrote BOSS:

> Here is a certificate from the NYS DOB allowing the re-opening of the Project site. The certificate is effective . . . only until June 7, 2020. Accordingly, [Owner] demands that [BOSS] reopen the project site on Monday, May 18th.
>
> Also, as demanded in the Owner's prior notices, including from May 11, 2020, BOSS is to immediately comply with the requirements of the mold report and perform all the remedial work and mold prevention work detailed in that report. This work must be done immediately upon re-opening the site to prevent further mold growth at the Project. BOSS' commencement of this work must begin no later than 48 hours from Monday, May 18, 2020 (Dkt. 515).

Significantly, Owner did not supply a copy of the Application containing the scope of work DOB approved or its contents. Without that documentation, BOSS had no way of directly verifying what DOB permitted and whether the mold prevention and remediation work described in Owner's May 11 letter (*see* Dkt. 514) was in fact authorized.

It was not reasonable for Owner to insist that BOSS commence work, potentially in violation of the Executive Order, without disclosing the scope of work DOB allowed. BOSS was justifiably concerned that the scope of work that the eager Owner demanded exceeded what DOB had permitted especially since it realistically could not be completed by the June 7 permit expiration (*see* Dkt. 634 at 10 ["To say that Boss was shocked by the Owner's May 15, 2020 letter would be an understatement. The COVID pandemic was raging. Thousands of people were dying every day. All non-essential businesses were closed. Construction in New York City was stopped. Boss simply could not accept the Owner's statement that the Certificate of Authorization permitted Boss to 'reopen' the Project and perform mold remediation work"], 12 ["Based on my reading of the Certificate of Authorization (including the statement by the DOB that 'exposure to the elements results in potential for an electrical fault'), and what I learned from Mr. Soskin, I was confident that Boss was not permitted to 'reopen' the Project and Boss was not permitted to perform mold remediation and mold prevention work"]; *see also* Dkt. 651 at 18 ["it is clear that no request was made by the Owner for permission to perform mold remediation work (i.e., to remove sheetrock and disinfect mold). Accordingly, the COA could not have authorized mold remediation work and the Owner's decision to terminate Boss for failing to perform mold remediation work was wrongful"]).

Indeed, Alexander Soskin--who signed the Application and was the Project's engineer of record--testified that the Application, and thus scope of work approved by DOB, "was limited to MEP work necessary to avoid an electrical circuit tripping hazard and did not include mold removal, sheetrock removal, or facade work" (Dkt. 651 at 18, citing Dkt. 647 at 27 ["Q: So, when you say that the mold wasn't part of the permit, it's not part of the permit because you only deal with M.E.P. issues; is that accurate? A: That's accurate"], 31 ["THE COURT: So, is it your belief when you signed that letter, that the only scope of

work that was being requested is that which fell under M.E.P? THE WITNESS: Correct"], 41 ["Q: When you signed the May 13th letter...was it your intention to ask the D.O.B. for permission for the owner to perform mold remediation work? A: No, we wanted only to protect the M.E.P. elements of the construction, nothing else. Q When you signed that letter, the May 13th, 2020 letter...was it your intention to ask the Department of Buildings for permission for B.O.S.S. to remove sheetrock from the interior of the building? A: No. Q: When you signed the letter...was it your intention to ask the D.O.B. for permission for B.O.S.S. to complete the facades of the building? A: No."]; *see also* Dkt. 634 at 14 ["If the Owner had asked Boss to mobilize workers to cover the open facades at the Project, Boss would have done so because that work appears to have been authorized by the Certificate of Authorization. But the Owner did not ask Boss to cover open facades. Rather, the Owner demanded that Boss reopen the Project and perform interior mold remediation work"]). Soskin had personal knowledge about the Application's purpose and scope (*see* Dkt. 633 at 2 ["The scope of work requested in the letter did not include installation of finished façades and it did not include any work in the interior of the Property. To be clear, the scope of work requested in the letter did not include removal or replacement of sheetrock located inside the Property and it did not include any mold remediation work inside the Property. The scope of work requested also did not include the 're-opening' of the construction site. The scope of work requested was limited to the installation of temporary means to prevent water from entering the building, such as tarps covering openings in the building envelope, in order to prevent corrosion of the electrical wiring previous installed in the Property"], 3 ["My reference in the email to a 'tripping hazard condition' refers to an electrical fault (a/k/a 'tripping') which could have resulted in harm"]).

The court credits the testimony of Saratovsky and Soskin on these issues.*

BOSS sought transparency. On May 20, it wrote Owner that it had "not seen any document which authorizes it to 're-open' the Project site" and requested that Owner "send a copy of the application which was filed so that BOSS can see the specific work which has been authorized by the DOB" and that it "provide specific instructions concerning the work the owner is asking BOSS to perform (which must be consistent with the application) so that BOSS will know what work to perform and how to perform it" (Dkt. 518).

Rather than simply sending BOSS the Application as requested (which should have been provided at the outset if Owner had really wanted BOSS on the job immediately), Owner raised further suspicion and cost itself more time. It responded that same day with a letter wrongly notifying BOSS that it was in default for failing to reopen the site based on the bald certificate of authorization (which was meaningless without its supporting paperwork) and that BOSS would be terminated unless it "timely and completely cured" by May 29,

* Yehuda Mor's contrary testimony was not credible. Owner's expert, John Nargi, had limited probative testimony on these topics since he was uninvolved before BOSS' termination and did not visit the Project until June 8, 2020 (*see* Dkt. 636 at 2). In any event, much of his testimony concerned the merits of Owner's counterclaim, and the substance of that testimony is, in the end, irrelevant.

2020 (Dkt. 519). Owner wrongfully insisted that BOSS begin working while purposely concealing from it the scope of work permitted by DOB. That alone rendered its Notice of Default ineffective.

Owner then waited another week, until May 27 (which was almost two weeks after the permit was issued), to send BOSS the Application for the very first time. This left less than two weeks until the June 7 permit expiration and only two days until Owner's (albeit ultimately ineffective) deadline for cure. BOSS could not possibly have completed the work in that time (*see Klein v Opert*, 218 AD2d 784, 785 [2d Dept 1995]). After all, Owner itself took the position that the work would take 55 days to complete.

Owner then purported to terminate BOSS for default by letter dated May 31, 2020 based on the improper May 20 Notice of Default (Dkt. 523). This was inconsistent with the Agreement's provisions for a termination for default as the May 20 notice was not predicated on a valid actionable breach that BOSS would have had any obligation to cure based on the notice provided (*see East Empire Constr. Inc. v Borough Constr. Group LLC*, 200 AD3d 1, 5 [1st Dept 2021] ["where contracting parties agree on a termination procedure, the procedure will be enforced as written"]).

Owner terminated BOSS less than five working days after it provided BOSS with a copy of the Application (May 27 was a Wednesday and May 31 was a Sunday) and it based BOSS' defaults on failing to perform work that exceeded the scope of what was legally allowed. Section 9.1 provides that "if the Contractor does not proceed with the Work in accordance with the Contract Documents within five (5) working days of receipt of the written termination notice, including the prompt performance of all punchlist items, the Owner may terminate the Contract for default" (Dkt. 502 at 14). Section 9.2 alternatively provides that "The Owner may immediately terminate the Contract, in whole or in part, for default, by written notice, if (a) the Contractor commits a material breach of the Contract which is not cured following written notice and opportunity to cure" (*id.*). Claiming that BOSS was in default before providing it with a copy of the Application and insisting on performance without providing proof of the permitted scope of work was unreasonable, and by terminating BOSS fewer than five working days after finally sending it the Application, Owner did not provide BOSS with a reasonable opportunity to "timely and completely" cure even to the extent that BOSS may have been required to perform limited work consistent with the approved Application had it truly been given notice and the opportunity to do so (though, to be sure, Owner's demands exceeded the scope of the Certificate of Authorization) (*see id.*; *see also* Dkt. 519 at 1 ["The work was to include addressing … the result of BOSS' prior failures (removal treatment and replacement work for all mold)" and "BOSS was to follow all guidelines of the mold expert report"]; Dkt. 523 at 3 ["no mold remedial work occurred"]).

Credible evidence demonstrated, moreover, that Owner lacked a genuine desire to have BOSS continue working on the Project and that it was merely looking for a pretext to terminate BOSS for default. After all, an owner that was worried about the possibility of a fire that wanted emergency work done promptly would have made sure its general

contractor was immediately informed of the scope of work permitted by DOB so it could begin to perform (*see* Dkt. 651 at 20 ["The Owner could have told Boss that all the Owner wanted was for Boss to install temporary protections and that if Boss would do just that termination could be avoided"]). While BOSS perhaps could have tried to further ascertain what subset of the work was legally permissible and partially performed, under the governing Agreement, Owner had no right to terminate BOSS for default under these circumstances and its default notices were improper (*see id.* at 19 ["Boss has a perfectly reasonable and rational explanation for why" it did "not do so – the Owner had made it clear that even a partial cure would not have avoided termination"]). BOSS understandably and justifiably objected that this was unreasonable (Dkt. 522 ["The fact that the Owner won't ask the architect and/or engineer to email the 'application' to me with a statement that the attached document is the application referred to in the work authorization continues to raise red flags. Can you please explain why the Owner won't take what would be a simple and easy step to provide BOSS with assurance about what is contained in the 'application?' The Owner also has not responded to BOSS's request for an explanation as to how, even assuming that the work letter is the 'application' (which has not been demonstrated), the Owner expects Boss to 'complete the open facades' since the work letter says that it will take 55 days to do the work and the Owner has not approved a final facade, has not approved a facade plan, and has not released the facade for fabrication"]; *see also* Dkt. 634 at 14 ["If the Owner had asked Boss to mobilize workers to cover the open facades at the Project, Boss would have done so because that work appears to have been authorized by the Certificate of Authorization. But the Owner did not ask Boss to cover open facades. Rather, the Owner demanded that Boss reopen the Project and perform interior mold remediation work"]). This, to be sure, is not the only credible evidence that Owner was acting in bad faith based on a pretextual desire to terminate BOSS formed prior to even submitting the first DOB application (*see, e.g.*, Dkt. 528 [April 9, 2020 email stating: "Waiting to get on a call with Steve Gillepsie today to formulate a tactical response which we can use to remove them from the project"]; *see also* Dkts. 527, 529). In fact, Owner already had "a replacement ready to go" weeks before submitting the Application (Dkt. 530).

This evidence explains why Owner was not transparent; it was trying to put BOSS in an untenable position so it could be terminated for default. This course of conduct appears to have been planned before Owner even knew if DOB would approve any work or what the permitted scope of the work would be. Owner was always committed to termination (*see* Dkt. 531). While this evidence further demonstrates that Owner's conduct was unreasonable, the timing of when Owner sent BOSS a copy of the Application relative to its termination is itself a sufficient basis to conclude that BOSS was not properly terminated for default.

Damages

Section 9.7 provides that "in the event the Owner terminates the Contract for default and such termination is later held to have been improper and/or without lawful cause, that improper termination shall without further notice or action be converted to a termination

for convenience under Section 9.6" (Dkt. 502 at 15; *see Minelli Constr. Co. v WDF Inc.*, 134 AD3d 508 [1st Dept 2015] ["The 'automatic conversion' language...providing for conversion of otherwise invalid default terminations into terminations for convenience, is clear on its face and also enforceable"]). Section 9.6 sets forth the amount that would be owed to BOSS in the event of a termination for convenience (Dkt. 502 at 15; *see* Dkt. 651 at 26 n 8 ["Upon termination for convenience, BOSS is entitled to be paid for 'the Work performed under the Contract prior to termination, plus 10% of the unearned 'Overhead and Fee' portion of the Contract Amount (based upon the line item set forth in the Schedule of Values) and for materials paid for by the Contractor)"]). Section 27.5 further provides that "in the event of any litigation between the Owner and Contractor involving any disputes under this Contract, the prevailing party in the litigation shall be entitled to reimbursement of its reasonable counsel fees and disbursements" (Dkt. 502 at 26).

BOSS seeks damages totaling $1,003,066.12. Saratovsky's testimony about the components of this total are mostly uncontested (*see* Dkt. 634 at 15-19). He testified that "each of these items is for work actually performed by Boss and/or materials actually supplied in connection with the Project and to improve the real property which was the subject of the Mechanic's Lien up to and including March 27, 2020" (*id.* at 16). The court credits the unrebutted portions of his testimony—all but the $197,327 addressed in Owner's brief (*see* Dkt. 650 at 23)—and his testimony regarding the $10,000 of demobilization costs incurred between June 12-19, 2020 (*see* Dkt. 651 at 35), as well as the $117,130 for unpaid safety manager expenses (*see* Dkt. 647 at 142). However, the court agrees with Owner that there is insufficient support for BOSS' claims for $28,500 for fences, noise barriers and traffic control expenses and $41,697 for additional site safety manager expenses (Dkt. 650 at 24; *see* Dkt. 647 at 121-22, 126). Thus, BOSS is entitled to damages totaling $932,869.12 ($1,003,066.12 - $28,500 - $41,697), plus pre-judgment interest and prevailing-party fees.

The termination for convenience precludes Owner's counterclaims, including its claim for an offset of $731,810 to remediate BOSS' allegedly defective work, as Owner did not submit credible proof that it made overpayments based on fraud or mistake (*see Tishman Constr. Corp. v City of New York*, 228 AD2d 292, 293 [1st Dept 1996], *accord Paragon Restoration Group, Inc. v Cambridge Sq. Condominiums,* 42 AD3d 905, 906 [4th Dept 2007]; *see also Misty Cleaning Servs., Inc. v Independent Group Home Living Program, Inc.*, 223 AD3d 897, 899 [2d Dept 2024]). Owner acknowledges that the specifications of such work are set forth in the Agreement (*see* Dkt. 650 at 25) and its argument--that there is a "mistake and/or fraud" because BOSS certified that it completed work in accordance with the Agreement but did not do so--is insufficient as a matter of law. Thus, *Tishman* bars defendant's counterclaim (*see also Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.*, 180 AD2d 222, 233 [4th Dept 1992]).

Owner's other arguments are unavailing. The court will direct the entry of judgment after addressing BOSS' forthcoming fee application.

Accordingly, it is ORDERED that, unless the parties reach an agreement on fees (in which case the parties shall e-file and email the court a joint letter to that effect along with a proposed judgment), BOSS shall e-file a fee application (including billing records) and e-file and email the court a Word version of a proposed judgment by March 30, 2026, and Owner may e-file any objections to the fee application and proposed judgment by April 20, 2026.

DATE: 3/10/2026 **JENNIFER G. SCHECTER, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**