

At an IAS Term, Part Comm-1 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 10th day of September, 2010.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

-----X

400 15TH STREET, LLC,

Plaintiff,

- against -

Index No. 20651/06

PROMO-PRO, LTD., ET AL.,

Defendants.

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The following papers numbered 1 to 12 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-4</u>
Opposing Affidavits (Affirmations) _____	<u>5-7</u>
Reply Affidavits (Affirmations) _____	<u>8-9</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Memoranda of Law</u> _____	<u>10-12</u>

In this action by plaintiff 400 15th Street, LLC (plaintiff) against defendants Promo-Pro, Ltd. (Promo-Pro) and Colonial Surety Company (Colonial) alleging a breach of contract by Promo-Pro and seeking to recover on a performance bond issued by Colonial, defendant Colonial moves for summary judgment dismissing plaintiff's complaint as against it.

BACKGROUND

On April 13, 2005, Promo-Pro, a contractor, entered into a contract (the Contract) with plaintiff, as the owner, to perform certain construction work involving the building of an 18 unit condominium at 400 15th Street, in Brooklyn, New York. The Contract was in the form of American Institute of Architects (AIA) Document A101-1997, and incorporated the terms of AIA Document A201-1997, General Conditions of the Contract for Construction (the General Conditions), by reference. The Contract provided for a contract sum of \$3,865,000,¹ with plaintiff required to make progress payments to Promo-Pro based upon applications for payment submitted to the architect by Promo-Pro and certificates for payment issued by the architect. In addition to the progress payments, plaintiff was to make two advance payments to Promo-Pro of \$50,000 when Promo-Pro obtained the building permit, and \$50,000 at such time as 198 piles were in place and passed all controlled inspections.

The General Conditions set forth in section 14.1.1, entitled “Termination By The Contractor,” provided that Promo-Pro could terminate the Contract if, among other reasons, plaintiff had not made payment on a certificate for payment within the time stated in the contract documents. Section 14.2.1 of the General Conditions, entitled “Termination By The Owner For Cause,” permitted plaintiff to terminate the Contract for cause if, among other reasons, Promo-Pro failed to prosecute the work promptly and diligently, failed to make prompt payment to subcontractors or pay for materials or labor in accordance with the applicable subcontract, or violated any material provision

¹A change order issued by plaintiff on October 3, 2005 states that the contract sum was increased to \$3,895,000. However, plaintiff disputes that this change order actually increased the contract sum since it was actually an agreement to repair the wall at 404 15th Street, which had become damaged during Promo-Pro’s performance of excavation and underpinning operations.

of the contract documents. In the event of termination for cause under section 14.2.1 of the General Conditions by plaintiff, plaintiff was required to give Promo-Pro and its surety seven days' written notice, and, if no cure was effected, it could then terminate Promo-Pro's employment.

Pursuant to section 14.2.3 of the General Conditions, if plaintiff terminated the Contract for one of the reasons stated in section 14.2.1, Promo-Pro was not entitled to receive further payment until the work was finished. Section 14.2.4 provided that if the costs of finishing the work and other damages incurred by plaintiff, not expressly waived, exceeded the unpaid balance of the contract sum, Promo-Pro was required to pay the difference to plaintiff. Section 14.3.1 of the General Conditions allowed plaintiff to suspend the work under the Contract for convenience for such period of time as it determined to be necessary.

Section 14.4 of the General Conditions, entitled "Termination By The Owner For Convenience," provided, in section 14.4.1, that plaintiff was permitted to terminate the Contract for convenience and without cause. Section 14.4.2 of the General Conditions provided that upon receipt of written notice from plaintiff of such termination for plaintiff's convenience, Promo-Pro was to cease operations as directed by plaintiff in the notice; take actions necessary, or that plaintiff may direct, for the protection and preservation of the work; terminate existing subcontracts and purchase orders; and execute such confirmatory assignments as plaintiff might request, and simultaneous with plaintiff's payment of all agreed amounts, assign to plaintiff all of Promo-Pro's rights and obligations under covered subcontracts and purchase orders. Section 14.4.2 of the General Conditions further provided that, in case of such termination for plaintiff's convenience, Promo-Pro was entitled to receive payment for work executed, and costs incurred by reason of such termination, along with Promo-Pro's fee on the work not executed.

Section 4.3.10 of the General Conditions, entitled “Claims for Consequential Damages,” expressly provided that plaintiff and Promo-Pro “waive [c]laims against each other for consequential damages arising out of or relating to this [c]ontract.” Such provision stated that this mutual waiver included “damages incurred by [plaintiff] for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons.” Section 4.3.10 of the General Conditions further stated that this mutual waiver was also applicable, without limitation, to all consequential damages due to either party’s termination in accordance with article 14 of the General Conditions.

On May 5, 2005, Colonial, as surety, issued a performance bond on behalf of Promo-Pro, as principal, and in favor of plaintiff, in connection with the Contract. The performance bond, which provided that the Contract between Promo-Pro and plaintiff was made a part thereof, had a penal sum in the amount of \$1,000,000. Colonial’s obligations under the performance bond were to be triggered in the event that Promo-Pro was “declared by [plaintiff] to be in default under the contract,” with plaintiff having performed all of its obligations thereunder. The performance bond provided that in the event of such a default by Promo-Pro, Colonial could promptly remedy the default, or complete the Contract, or arrange for a Contract between a bidder and plaintiff, making available, as work progressed, sufficient funds to pay the cost of completion less the balance of the contract price.

On May 16, 2005, Promo-Pro began to perform work under the Contract. However, almost immediately after Promo-Pro began its performance, differing site conditions were discovered at the project. Specifically, Promo-Pro and Leonid Krupnik, plaintiff’s engineer, discovered weak soils which required an alteration of the construction plans. Despite Leonid Krupnik’s issuance of certain

directives which sought to resolve the issues associated with the differing site conditions, damage was caused to structures situated on adjoining properties.

According to plaintiff, Promo-Pro failed to perform the excavation and underpinning operations at 400 15th Street in accordance with the contract specifications. Plaintiff claims that due to Promo-Pro's negligence in the performance in the excavation and underpinning operations, the brick wall directly adjacent to the project site and located at 396 15th Street cracked, became unstable, and required complete replacement. On August 4, 2005, due to the collapse of the adjoining property at 396 15th Street, Scott Jensen (Jensen), the owner of that adjoining property, brought an action against plaintiff, Promo-Pro, and others (*Jensen v 400 14th Street, LLC*, Sup Ct, Kings County, index No. 23960/05) (the *Jensen* action). Although the *Jensen* action was ultimately settled, during the *Jensen* action, Jensen obtained injunctive relief which prevented ongoing work on plaintiff's construction project for over a month, delaying the progress of the project. Additionally, plaintiff paid substantial costs for repairs to Jensen's property. Promo-Pro's work also caused damage to the adjoining property located at 404 15th Street, and Promo-Pro was required to repair a supporting wall at that property which was in danger of collapsing.

According to Gennady Borokhovich, a co-owner and the general managing partner of plaintiff, in addition to the problem with the damage to the adjoining properties, there were chronic delays by Promo-Pro with respect to its performance of work at the project. Borokhovich asserts that while excavation was supposed to take 15 days and be finished by the end of May 2005, it took Promo-Pro over seven months, and was never completed by Promo-Pro.

Promo-Pro did not complete the foundation by July 22, 2005, in accordance with the project schedule. On November 16, 2005, the project site was re-zoned from an R6 zoning district to an

R6B zoning district. In order for the project to have been exempt from the new Zoning Resolution Amendments, the entire foundation needed to have been completed on the date of the re-zoning. Since, as of November 16, 2005 (the effective date of the Zoning Resolution amendments), Promo-Pro still had not completed the foundation work, the project's prior New York City Department of Buildings' approval was rescinded, and a stop work order was issued by the New York City Department of Buildings, dated November 22, 2005. Borokhovich asserts that this resulted in more delay, and required plaintiff to hire attorneys to appeal the zoning change to the New York City Board of Standards and Appeals. While this appeal challenging the down-zoning was ultimately successful, Borokhovich claims that this cost plaintiff significant legal fees, as well as costs resulting from the delay, such as interest, insurance, plaintiff's project manager's fees, and other costs.

Borokhovich further claims that Promo-Pro owed money to subcontractors and its own project manager, Joseph Priore, and that, due to Promo-Pro's poor management, it even borrowed money from plaintiff. In November and December 2005, plaintiff began to believe that Promo-Pro was using assets from plaintiff's construction project to fund other unrelated projects. According to Borokhovich, plaintiff nevertheless permitted Promo-Pro to continue work on the project until the end of the year, due to the extreme time pressures that it was facing.

During Promo-Pro's performance under the Contract, it submitted three applications for payment. Payment Application No. 1, which covered the period from June 1, 2005 through June 30, 2005, set forth that the total sum for the amount of work completed as of that date was \$207,500, and subtracting 10% for retainage (\$20,750), Promo-Pro claimed to be owed the amount of \$186,750. Payment Application No. 2, which covered the period from July 1, 2005 through August 31, 2005, set forth that the total sum for the amount of work completed as of that date was \$444,000,

and subtracting 10% for retainage (\$44,400) and the previous payment of \$186,750, Promo-Pro claimed to be owed the amount of \$212,850. Payment Application No. 3, which covered the period from September 1, 2005 through October 31, 2005, set forth that the total sum for the amount of work completed as of that date was \$543,000, and subtracting 10% for retainage (\$54,300) and the previous payments of \$399,600, Promo-Pro claimed to be owed the amount of \$89,100.

Checks dated between May 2, 2005 and December 17, 2005, produced by plaintiff, show payments to Promo-Pro, totaling \$388,450. In addition, plaintiff paid \$82,426 directly to Marine Bulkheading, Inc., a subcontractor of Promo-Pro, which installed the foundation piles for the Project; Marine Bulkheading, Inc. claims that it is still owed an additional \$45,976 (for a total cost of \$128,402 for its work). Plaintiff also paid \$13,400 directly to Promo-Pro's subcontractor, Well Construction, and \$19,724 to Promo-Pro's subcontractor, Suffolk Building Materials, totaling \$33,124. Thus, the total paid by plaintiff to Promo-Pro, inclusive of the sums paid or owed to Promo-Pro's subcontractors, was \$549,976.

By letter dated January 3, 2006, Promo-Pro informed plaintiff that it was electing to terminate the Contract, pursuant to section 14.1.1 of the General Conditions, because plaintiff had not made payment on a certificate for payment within the time stated in the contract documents. On January 6, 2006, plaintiff met with Promo-Pro, at which plaintiff's architect requested that Promo-Pro submit a proposal to resolve the contract dispute. By letter dated January 6, 2006, Promo-Pro proposed that it would continue the work up to the completion of the foundation, and that it would submit a proposal with the cost estimate to complete that work to the architect for approval. Promo-Pro's proposal requested that plaintiff pay it up to date for all approved payments, that plaintiff deposit the amount required for the completion of the foundation in an escrow account, that plaintiff release

payments to it in a timely fashion after approval of progress payments by the architect, and that plaintiff approve all pending change orders. Promo-Pro further proposed that it and plaintiff would try to solicit a contractor for the balance of the work, and that they would mutually agree that after the completion of the foundation, the Contract would be terminated for convenience by both parties.

By letter dated January 16, 2006 to Borokhovich, Priore, Promo-Pro's project manager, stated that he had learned that Promo-Pro wished to discontinue its relationship with plaintiff in connection with the project. Priore noted that Promo-Pro "ha[d] been unable to fulfill its contractual obligations since the construction began in May of 2005," and offered his own services in order to continue the project to completion.

By letter dated January 18, 2006 to Promo-Pro, plaintiff's counsel, Todd L. Herbst, Esq., informed Promo-Pro that Promo-Pro's election to terminate the Contract pursuant to section 14.1.1 of the General Conditions was rejected because plaintiff had paid Promo-Pro, and that such stated termination was without force or effect. Herbst, in this letter, further stated that "[w]hile [plaintiff] has grounds to terminate [Promo-Pro for cause] under [s]ection 14.2.1 of the [General Conditions], it currently elects to terminate Promo-Pro Ltd [for convenience] under section 14.4.1 of the [General Conditions] and under Section 6.3 of the Contract." Herbst, in this letter, advised Promo-Pro that plaintiff was "[t]hereby . . . formally terminated for [plaintiff's] convenience, subject to [plaintiff's] further investigation into [Promo-Pro's] performance and reclassification to a termination for cause." Herbst, in this letter, stated that Promo-Pro would be "advised in writing by [plaintiff] of what actions [it] should take in connection with [its] termination, but [it was] expressly forbidden at [that] time from cancelling any subcontracts or purchase orders that [it] may have entered into in connection with the [p]roject, and from removing any materials, equipment, tools, supplies, or other

construction related objects from the [p]roject [s]ite.” Herbst also stated that “[n]otwithstanding that [plaintiff] ha[d] declared a termination for convenience, Promo-Pro [would] remain liable for its performance to date, including the results of its actions and all exposures arising therefrom.” Herbst further stated that plaintiff “expressly reserve[d] all of its rights against Promo-Pro, Ltd.” This letter was not sent to Colonial.

By letter dated January 18, 2006, in response to plaintiff’s request, Promo-Pro submitted a statement of accounts, requesting payment in full immediately for a balance due of \$368,878.13. Thereafter, Promo-Pro did not perform any further work under the Contract. By letter dated February 7, 2006, which was sent to both Promo-Pro and Colonial, Herbst stated that “[b]ased on a preliminary investigation[, plaintiff was] now satisfied that Promo-Pro, Ltd. ha[d] materially breached its principal obligations under the [Contract] . . . including without limitation Promo-Pro[’s:] . . . failure to perform the [w]ork in accordance with the [p]lans and [s]pecifications, and with applicable law; . . . failure to exercise due care in the performance of the [w]ork causing damage and destruction to adjoining property owners [and] . . . resulting in the issuance of a stop work order by government authorities; . . failure to promptly and diligently [perform] the work; and failure to pay subcontractors and suppliers.” Herbst further stated that “[b]ased upon these and other breaches[, plaintiff was] elect[ing] to convert its termination for convenience to a termination for cause and [was t]hereby giv[ing] Promo-Pro Ltd. . . . and Colonial . . . seven (7) days’ written notice to cure pursuant to [s]ection 14.2.2 of [the General Conditions].”

On or about June 5, 2006, plaintiff entered into a contract with Metrotech Construction of New York City (Metrotech), pursuant to which Metrotech was to perform the scope of work left unfinished by Promo-Pro following the termination of the Contract (the Metrotech Completion

Contract). The Metrotech Completion Contract had a contract price of \$3,265,000. Plaintiff also entered into an Additional Work Order (the Metrotech 396 Contract) on or about November 21, 2006, pursuant to which Metrotech was to perform remedial work at 396 15th Street, Jensen's property, one of the adjoining properties that was damaged during the time that Promo-Pro was performing its work under the Contract. The Metrotech 396 Contract had a contract price of \$350,000. The work under the Metrotech Completion Contract was never completed. Plaintiff has produced proof of payment to Metrotech for work performed by Metrotech under the Metrotech Completion Contract, in the amount of only \$389,325.04.

On July 12, 2006, plaintiff filed this action against Promo-Pro and Colonial. Plaintiff alleges that Promo-Pro breached the Contract by its failure to perform the excavation and underpinning work in a proper manner and by its failure to timely complete the foundation work. Plaintiff claims that Colonial is required, under the performance bond, to indemnify it against all losses and damages arising out of Promo-Pro's failure to perform all of the terms and conditions of the Contract.

In plaintiff's response to Colonial's interrogatories, plaintiff set forth its claim for damages as including \$310,000 for additional construction costs, \$150,000 for legal fees, \$100,000 for a two point loan extension fee, \$156,000 for additional interest on its construction loan, \$1,600,000 for a loss due to down-zoning,² \$65,000 for property damage at 404 15th Street, \$350,000 for property damage at 396 15th Street, \$139,000 for the moving expenses of 396 15th Street, \$100,000 for an additional construction management fee, \$100,000 for additional architectural costs, \$15,000 for

²Plaintiff states that it has withdrawn this \$1,600,000 claim for a loss due to down-zoning since it successfully litigated this issue and preserved the prior zoning. However, plaintiff still seeks the related costs associated with the zoning change in its attorneys' fees and expenses to appeal the zoning change, and additional interest, insurance, and other carrying charges.

engineering work, \$20,000 for monitoring and controlled inspections, \$60,000 for insurance, and \$5,000 for taxes.

On May 12, 2010 Colonial filed this motion for summary judgment, which was presented in oral argument on June 16, 2010. In order to prevail on its motion, Colonial “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

DISCUSSION

In support of its motion for summary judgment, Colonial points out that plaintiff’s January 18, 2006 letter advised Promo-Pro that, in spite of plaintiff’s grounds to terminate Promo-Pro for cause pursuant to section 14.2.1 of the General Conditions, it was electing to terminate Promo-Pro for convenience pursuant to section 14.4.1 of the General Conditions. Where a contract is terminated for convenience, the owner, and not the surety, is responsible for the costs associated with completion of performance, and the owner cannot recover for the cost of curing any alleged default (*see Williams Green Constr. Co., Inc. v United States*, 477 F2d 930, 938 [Ct Cl 1973], *cert denied* 417 US 909 [1974]; *Paragon Restoration Group, Inc. v Cambridge Sq. Condominiums*, 42 AD3d 905, 906 [4th Dept 2007]; *Tishman Constr. Corp. v City of New York*, 228 AD2d 292, 293 [1st Dept 1996]; *Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.*, 180 AD2d 222, 233 [4th Dept 1992]).

A performance bond is “to be construed in accordance with its terms” (*Caravousanos v Kings County Hosp.*, 74 AD3d 716, 2010 NY Slip Op 04723, *2 [2d Dept 2010], quoting *Walter Concrete Constr. Corp. v Lederle Labs*, 99 NY2d 603, 605 [2003]). Colonial’s performance obligations, pursuant to the terms of the performance bond, were to be triggered only upon Promo-

Pro being declared in default under the Contract. Thus, since a termination for convenience is “not based upon any fault or negligence on the part of [a] contractor”(*Best Foam Fabricators, Inc. v United States*, 38 Fed Cl 627, 640 [Fed Cl 1997] [internal quotation marks and citation omitted]), Colonial’s obligations under the bond were never triggered upon such termination by plaintiff for convenience. Colonial therefore contends that the complaint against it must be dismissed.

A surety’s liability arises out of the liability of its principal, and is collateral to the obligation assumed by the principal (*see Venus Mech. v Insurance Co. of N. Am.*, 245 AD2d 559, 559 [2d Dept 1997]; *Fidelity N.Y. v Aetna Ins. Co.*, 234 AD2d 261, 262 [2d Dept 1996]; *Dimacopoulos v Consort Dev. Corp.*, 158 AD2d 658, 660 [2d Dept 1990]. Therefore, “unless a creditor reserves its rights against a surety, or the surety consents . . . a voluntary release by the creditor of the principal with knowledge of the suretyship relation between the debtor[and the surety] discharges the surety” (63 NY Jur 2d, Guaranty & Suretyship § 253; *see also Compagnie Financiere de Cic et de L’Union Europeenne v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 188 F3d 31, 34 [2d Cir 1999]). Plaintiff contends, however, that in its January 18, 2006 letter, it reserved its rights against Colonial, as well as against Promo-Pro, to reclassify its termination for convenience to a termination for cause, by stating that Promo-Pro was “formally terminated for [plaintiff’s] convenience subject to [its] further investigation into [Promo-Pro’s] performance and reclassification to a termination for cause.” In its letter, plaintiff further stated that it was expressly reserving all of its rights against Promo-Pro. Although the letter contained no reservation of rights against Colonial, and there was no mention of the performance bond, section 14.4 of the General Conditions, which sets forth the process for termination by the owner for convenience, did not require that the owner provide notice to Colonial of termination for convenience since such termination would not result in any liability under the

bond. Colonial argues that plaintiff's termination of Promo-Pro for convenience was binding and could not be altered and effectively released both Promo-Pro and Colonial.

Plaintiff argues that its reclassification of the termination for convenience as a termination for cause was proper because it required additional time to review Promo-Pro's work prior to making a final determination as to the basis for the termination. In arguing that termination for convenience may be converted to termination for cause because termination for cause may be later converted to termination for convenience, plaintiff relies upon the case of *Millgard Corp. v E.E. Cruz/NAB/Fronier-Kemper, J.V.* (2003 WL 22801519, *5 [SD NY 2003]), and upon the presence in some construction contracts of enforceable clauses which provide that a termination for cause may be automatically converted to a termination for convenience if the termination for cause is found to be unjustified because the contractor was not in default under the termination for cause provision (*see* Postner & Rubin, New York Construction Law Manual [2d ed] § 4:4, at 163).

Although both *Millgard Corp.*, and the enforceability of the aforementioned clauses not present here, involve the reclassification of a termination for cause to a termination for convenience, they do support the plaintiff's argument that the designation of termination for cause and termination for convenience are not immutable, but can be changed. In *Millgard Corp.*, the court held that the general contractor was "not bound by its initial rational[e] for termination [of the plaintiff subcontractor], provided that (1) it was not acting in bad faith, and (2) [the subcontractor] did not change its position in reliance upon the initial reason given for termination" (*id.*). The Southern District declined to grant summary judgment, finding numerous issues of fact to be determined at trial, including whether the general contractor had provided the subcontractor with reasonable notice with respect to the termination.

A failure to provide proper notice relieves a surety of liability under a performance bond (*see Gulf Ins. Co. v Fidelity & Deposit Co. of Md.*, 16 Misc 3d 1116[A], 2007 NY Slip Op 51440[U], *4 [Sup Ct, NY County 2007]). However, section 14.4 of the General Conditions, which sets forth the process for termination by the owner for convenience, did not require that notice be given to the surety. Only section 14.2, which sets forth the process for termination by the owner for cause, required plaintiff to give Promo-Pro and Colonial seven days' written notice if it were terminating Promo-Pro for cause, providing an opportunity to cure prior to termination. Plaintiff did not send Colonial the January 18, 2006 letter in which it noticed termination for convenience while reserving its right to terminate for cause. Thus, Colonial could not have changed its position in reliance thereon. Moreover, the reservation to change the termination to one for cause clearly refutes any suggestion of bad faith on plaintiff's part. Once it made its determination that termination should have been for cause, plaintiff fully complied with section 14.2 by sending the February 7, 2006 letter on seven days' notice to both Promo-Pro and Colonial, informing them that plaintiff was converting its termination for convenience to a termination for cause and providing an opportunity to cure. It is noted that Promo-Pro had initially elected to terminate the Contract on January 3, 2006 based upon plaintiff's alleged breach in failing to make timely payments and negotiations had taken place in an effort to resolve the differences between the parties even before plaintiff sent its notice of January 18, 2006.

This court finds that, having met the standard set forth in *Millgard Corp.*, plaintiff is not barred from converting its termination for convenience into a termination for cause and its election to do so, upon proper notice to both defendants, is effective. In most circumstances, such termination for cause would raise issues of fact regarding the parties' performance under the Contract, precluding

a summary determination. However, as plaintiff has not sustained any compensable damages recoverable under the performance bond, Colonial's motion must be granted.

"The purpose of a performance bond is to insure that a contract will be completed consistent with its terms" upon a default by the contractor (*U.W. Marx, Inc. v Mountbatten Sur. Co.*, 3 AD3d 688, 691 [3d Dept 2004]). "[A] surety bond attaches to the principal contract and must be construed in conjunction with it" (*Carrols Equities Corp. v Vilnave*, 57 AD2d 1044, 1045 [4th Dept 1977]). "In the event of a contractor's default, the surety's obligation is to either complete the work or to pay the obligee the amount necessary for it to have the contract completed" (*U.W. Marx, Inc.*, 3 AD3d at 691; *see also United States Seaboard Sur. Co.*, 817 F2d 956, 959 [2d Cir 1987], cert denied 484 US 855 [1987]). "Liability of the surety is generally limited to the amount of the bond and as provided in the contract" (*U.W. Marx, Inc.*, 3 AD3d at 691). Thus, plaintiff is barred from recovering from Colonial in excess of the \$1,000,000 performance bond.

Here, the "balance of the contract price," which limits the measure of Colonial's liability, is defined in the performance bond as "the total amount payable by [plaintiff] to [Promo-Pro] under the Contract and any amendments thereto, less the amount properly paid by [plaintiff] to [Promo-Pro]." Since the original contract price was \$3,865,000 and plaintiff claims that the total amount it paid to Promo-Pro and directly to Promo-Pro's subcontractors is \$549,976, the contract balance is \$3,315,024.

However, the Metrotech Completion Contract, which encompassed the remaining scope of work under the Contract, was for the contract sum of \$3,265,000, \$50,024 less than the \$3,315,024 contract balance calculated from numbers submitted in plaintiff's own memorandum of law. Thus, inasmuch as plaintiff procured a completion contract at a lesser cost than the contract balance,

plaintiff has not shown that it sustained any recoverable damages from Colonial in the completion of the Contract (see *City of Peekskill v Continental Ins. Co.*, 999 F Supp 584, 586 [SD NY 1998], affd 166 F3d 1199 [1998]).

Plaintiff contends, however, that the damages flowing from Promo-Pro's failure to timely complete the project and its role in the collapse of the Jensen property exceed the cost of the original contract price. Plaintiff argues that Promo-Pro, and by extension, Colonial, is liable for the damages resulting from the collapse of Jensen's building, including the amounts spent to stabilize and repair the Jensen building so that its construction project could continue, and costs incurred for related delays, totaling \$737,259.43. Plaintiff argues that this liability of Promo-Pro and Colonial for the damages to Jensen's property arises directly out of the Contract since section 10.2.1.3 of the General Conditions provided that Promo-Pro was required to "take all reasonable precautions for [the] safety of, and . . . provide all reasonable protection to prevent damage, injury or loss to . . . other property at the site or adjacent thereto, such as . . . structures and utilities not designated for removal, relocation or replacement in the course of construction." Plaintiff also cites applicable law regulating a contractor's liability for property damage to third parties (see Administrative Code of City of NY § 26-299; *RLI Ins. Co. v King Sha Group*, 598 F Supp 2d 438, 445 [SD NY 2009]).

However, although Promo-Pro may be held liable for property damage to third parties, "a surety's obligations are limited to those it undertakes in its bond" (*Varlotta Constr. Corp. v Sette-Juliano Constr. Corp.*, 234 AD2d 183, 183 [1st Dept 1996]; see also *U.W. Marx, Inc.*, 3 AD3d at 691). Thus, the liability of a surety under a performance bond is not always the same as a contractor's liability to the owner (see *Matter of Frontier Ins. Co.*, 73 AD3d 36, 42 [3d Dept 2010]; *Varlotta Constr. Corp.*, 234 AD2d at 183).

Plaintiff's claims for costs associated with the alleged damage to adjoining properties, i.e., to 396 15th Street and 404 15th Street, are not properly directed to Colonial. Rather, such claims for property damage caused to a third party's property are properly recoverable as against an insurer under a commercial general liability policy (see e.g. *McGroaty v Great Am. Ins. Co.*, 36 NY2d 358, 365 [1975]; *Corbetta Constr. Co. v Michigan Mut. Liab. Co.*, 20 AD2d 375, 380 [1st Dept 1964] affd 15 NY2d 888 [1965]; *Wolk v Royal Indem. Co.*, 27 Misc 2d 478, 487 [Sup Ct, 2d Dept App Term 1961]). The Contract required Promo-Pro to obtain both a surety's performance bond as well as a commercial general liability policy.

A surety's performance bond and an insurer's commercial general liability policy provide two different scopes of coverage. A performance surety is to be held liable, upon the default of its principal, for the costs of completing the Contract or conforming the principal's defective work to the terms of the Contract, whereas the general liability insurer is liable for accidental damage caused by the insured to property owned by third parties (see *J.Z.G. Resources, Inc. v King*, 987 F2d 98, 103 [2d Cir 1993], cert denied 510 US 993 [1993]; *Transportation Ins. Co. v AARK Constr. Group Ltd.*, 526 F Supp 2d 350, 356 [ED NY 2007]; *Bonded Concrete, Inc. v Transcontinental Ins. Co.*, 12 AD3d 761, 762 [1st Dept 2004]; *Parkset Plumbing & Heating Corp. v Reliance Ins. Co.*, 87 AD2d 646, 647 [2d Dept 1982]).

Here, the plaintiff's losses resulting from damage to the adjacent properties cannot be recovered under Colonial's performance bond since they are costs associated with third party property damage claims, not related to completion of the Contract. Such claims should be directed to plaintiff's liability insurers. In fact, plaintiff has admitted to submitting claims to its insurers for these very same losses. Plaintiff concedes that it had liability insurance, and that its insurer, together

with Promo-Pro's insurer, ultimately agreed to pay a significant sum to Jensen to settle his claims in the Jensen action in or around February 2010.

Plaintiff argues that its payments to Jensen were reasonable and necessary actions taken to mitigate damages and proceed with the project. Plaintiff's citation of law with respect to its duty to mitigate damages (see e.g. *Federal Ins. Co. v Walker*, 53 NY2d 24, 35 [1981]), however, is irrelevant to the issue at bar. The fact that an owner mitigated damages does not create a claim of damages against a surety that does not otherwise exist. Any remedial work performed on the adjoining properties was beyond the scope of the Contract, as evidenced by the fact that plaintiff entered into a separate contract with Metrotech (i.e., the Metrotech 396 Contract) for the performance of such remedial work. Thus, plaintiff cannot recover for the costs of remedial work for the property damage to the adjoining properties, or the additional costs and fees associated with such work, such as its claims for the moving expenses of 396 15th Street (so that Jensen could move his business from 396 15th Street to another location), Jensen's rent at his new business property, an additional construction management fee, and additional architectural costs.

Plaintiff also seeks to recover damages for its losses due to the change in the Zoning Resolution, consisting of its delay damages, its payment of attorneys' fees to appeal the zoning change, and its payment of additional interest, insurance, and other carrying charges. Plaintiff cannot recover upon these claims because they constitute consequential damages, which plaintiff specifically waived pursuant to section 4.3.10 of the General Conditions. While plaintiff contends that this exclusion in section 4.3.10 of the General Conditions was specifically limited to damages incurred by it for "rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons,"

such contention is without merit as a plain reading of the section reveals that it applied to all "consequential damages arising out of or relating to this Contract."

Plaintiff's claim for the two point extension loan fee and additional interest, which resulted from its refinancing of its construction loan, also constitutes a claim for consequential damages expressly excluded by section 4.3.10 of the General Conditions. Similarly, damages for engineering work and monitoring and controlled inspections are consequential damages which fall within the exclusion of section 4.3.10 of the General Conditions since such claim seeks "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act" (Black's Law Dictionary [8th ed 2004]). It is noted that the General Conditions specifically excluded engineering and architectural controlled inspections from the contract sum.

CONCLUSION

Thus, inasmuch as there were no damages sustained by plaintiff which may be legally compensated under the performance bond, Colonial cannot be held liable to plaintiff. Consequently, summary judgment dismissing plaintiff's complaint as against Colonial must be granted (see CPLR 3212 [b]).

This constitutes the decision, order, and judgment of the court.

E N T E R,

J. S. C.