

**Wolet Constr. Corp. v 216-20 Beach
87th St. Co., LLC**

2008 NY Slip Op 32093(U)

July 24, 2008

Supreme Court, Queens County

Docket Number: 0024233/2006

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

WOLET CONSTRUCTION CORPORATION and
NEW YORK INTERIOR CONSTRUCTION, INC.,

Plaintiffs,

- against -

216-20 BEACH 87TH STREET CO., LLC,
AIR STREAM AIR CONDITIONING CORP.,
SUNTRUST BANK, CITY OF NEW YORK and
"JOHN DOE 1-10" fictitious names
intended to be persons having or
claiming an interest in the premises
under foreclosure,

Defendants.

x

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Number 24233 2006

Motion
Date March 12, 2008

Motion
Cal. Number 31

Motion Seq. No. 1

The following papers numbered 1 to 14 read on this motion by plaintiffs for summary judgment in their favor against defendants 216-20 Beach 87th St. Co. (Beach) and Suntrust Bank (Suntrust) and directing the sale of the real property known as 216-20 Beach 87th Street, a/k/a 2-22 Beach 87th Street, Far Rockaway, New York, and strike the answer, including the affirmative defenses of defendants Beach and Suntrust and the counterclaims of defendant Beach, and for an award costs and disbursements, including reasonable attorneys' fees.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-6
Answering Affidavits - Exhibits.....	7-10
Reply Affidavits.....	11-14

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs Wolet Construction Corporation (Wolet) and New York Interior Construction, Inc. (NY Interior), affiliated corporations,

commenced this action against defendant Beach, the fee owner of the premises, and defendant Suntrust, the assignee of the rents and leases for the premises, seeking to foreclose mechanic's liens, recover damages for breach of contract for nonpayment, and in quantum meruit and unjust enrichment for services rendered. Plaintiffs allege that defendant Beach separately hired each of them, pursuant to two agreements dated July 30, 2004 and August 23, 2004 to perform construction and refurbishing work, and furnish materials for the repair and alterations of the subject premises.

Plaintiffs allege that they fully completed their work and furnished material to defendant Beach pursuant to the agreements, and demanded payment in full, but defendant Beach has made only a partial payment, and there remains an outstanding sum due and owing each of them. Plaintiffs further allege that they filed, docketed and served notices of mechanic's liens, which liens are good, valid and subsisting against the property. Plaintiff Wolet claims in its notice of lien that defendant Beach owes it \$142,462.65 for its labor performed and materials furnished. Plaintiff NY Interior claims in its notice of lien that defendant Beach owes it \$54,532.06 for its labor performed and materials furnished.

In their answer, defendants Beach and Suntrust admit that Beach requested the work performed and materials furnished by plaintiffs Wolet and NY Interior, but otherwise deny the material allegations in the complaint. Defendants Beach and Suntrust assert affirmative defenses, and defendant Beach interposes counterclaims based upon breach of contract, failure to achieve substantial completion, and wilful exaggeration of the liens. Defendants Beach and Suntrust allege that plaintiffs Wolet and NY Interior failed to perform the work within the time specified in the agreements and finish the work on the project, and that plaintiff Wolet failed to provide defendant Beach with a twenty-year warranty for the roof installed at the premises. Defendants Beach and Suntrust seek to recover damages, liquidated damages and costs and disbursements, including reasonable attorneys' fees.

Plaintiffs served a reply denying the allegations in defendant Beach's counterclaims, and asserting affirmative defenses based upon their claims that defendant Beach suffered no damages, defendant Beach is in breach of the agreements for nonpayment to plaintiff NY Interior, and the liquidated damages clauses found in the agreements are void.

Defendant City of New York (City) served an answer. The remaining defendants are in default in appearing or answering the complaint.

No note of issue has been filed.

Plaintiffs argue that they are entitled to summary judgment, and that the affirmative defenses of defendants Beach and Suntrust and the counterclaims of defendant Beach are without merit. Plaintiffs assert they are entitled to the balance due for work performed and materials furnished by them on defendant Beach's premises. They claim that defendant Beach has made only partial payment, notwithstanding their demand for full payment, and therefore, is in breach of the agreements. Plaintiffs further claim they have good and valid mechanic's liens against the premises, which remain due and owing, and are entitled to foreclose the liens. Plaintiffs deny they are in breach of the agreements or have exaggerated the amounts of their liens, and argue defendant Beach cannot establish its counterclaims asserted against them. Plaintiffs alternatively argue that defendant Beach has waived any counterclaim based upon breach of contract, including any claim for liquidated damages, because notwithstanding the delays in completion, defendant Beach never raised the issue of untimely performance, and instead continued to make payments and instructed them to carry on with the project.

Defendants Beach and Suntrust oppose the motion, asserting that plaintiffs are not entitled to any further payment on the project because plaintiffs breached the agreements by unilaterally changing the scope of the work, performing defective work, and failing to complete numerous items of construction on the project.

Defendants Beach and Suntrust also assert that the agreements provided that time was of the essence for performance and completion of the work, and plaintiffs failed to achieve substantial compliance on the project until August 26, 2005, when ACS issued a certificate of substantial completion. They further assert that under the agreements, defendant Beach is entitled to offset liquidated damages against any amount owed to plaintiffs, and demand payment of additional liquidated damages to the extent the amount of liquidated damages exceeds the amount owed plaintiffs under the agreements. Defendants Beach and Suntrust claim that the amount of liquidated damages owed by each plaintiff exceeds the respective amounts allegedly owed plaintiffs under the agreements. Defendants Beach and Suntrust also claim that plaintiffs wrongfully withheld documents from defendant Beach.

Defendant City of New York appears in relation to the motion, indicating that it does not oppose the motion.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to

judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980], supra). The court's function on a motion for summary judgment, however, is issue finding, and is not issue determination (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]) or credibility assessment (see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]).

Plaintiffs were aware that defendant Beach hired them for the purpose of preparing the premises for occupation by Administration of Children's Services (ACS), the City's child welfare agency, which intended to use the demised premises as a child care facility pursuant to a lease between defendant Beach and defendant City. The work consisted of, among other things, improvements to the roof and heating, ventilation, air conditioning system, installation of doors and a fire alarm system, plumbing, electrical, painting and exterior masonry work. Defendant City's lease with defendant Beach provided, among other things, that the lease terms, including ACS's obligation to pay rent, would not become effective until after the substantial completion date of the project, and that the City would reimburse the owner for part of the construction and repair cost. The lease allowed defendant City to dictate the timing of the project and supervise the construction, through its architects and ACS officials. The lease provided that all the work on the premises would be either "Reimbursable" work or "Landlord" work and that defendant Beach initially would pay for the cost of the Reimbursable work, but subsequently would be reimbursed in full by defendant City, whereas the cost of the Landlord work would be borne solely by defendant Beach.

The construction agreements at issue are standard forms of the American Institute of Architects (AIA) (Document A101-1997), and included, among other things, the AIA form, "General Conditions for the Contract for Construction (Document A201-1997). Under the construction agreements with plaintiffs, defendant Beach agreed to pay as the base price, the sum of \$557,510.00 to plaintiff NY Interior, and the sum of \$875,000.00 to plaintiff Wolet. The base prices were "subject to additions and deductions as provided in the Contract Documents" (Document A101-1997). Each agreement required

that defendant Beach pay, in accordance with a schedule set forth therein, an initial deposit, eight progress payments, a payment for completion of the punch list, and a retainer (Document A101-1997, Article 5, paragraph 5.1.5). The agreements provided that if the contractor substantially performed its contractual obligations, then it would be entitled to the payment due under the agreement, less a sum determined by the architect for incomplete work, the retainage applicable to such work and unsettled claims (Document A107-1997, Article 5, paragraph 5.1.9). The agreements, however, also provided, at Article 9, paragraph 9.10.3, (Document A201-1997) that if after substantial completion of the work, the "final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the architect, and without terminating the contract, make payment of the balance due for that portion of the Work fully completed and accepted." In addition, the agreements provided that the final payment, constituting the entire unpaid balance of the contract sum, be made by defendant Beach upon the contractor's full performance of the contract, including but not limited to furnishing all close-out documentation,¹ the satisfaction of other requirements, if any, which extend beyond the final payment, and the issuance of a final certificate for payment by the architect.

Article 3, paragraph 3.3 (Document A101-1997) of the Wolet agreement required Wolet to achieve substantial completion of the entire work no later than 150 days from the date of commencement. The date of commencement was identified in Article 3, paragraph 3.2 of the Wolet agreement as July 31, 2004. The NY Interior agreement (Document A101-1997) required NY Interior to achieve substantial completion of the entire work no later than 180 days from the date of commencement. The date of commencement was identified in Article 3, paragraph 3.2 of the NY Interior agreement as August 23, 2004. Thus, under the agreements, plaintiff Wolet was required to achieve substantial completion of the entire work no later than December 28, 2004, and plaintiff NY Interior was required to achieve substantial completion of the entire work no later than February 19, 2005.

Each agreement provided, at Article 3, paragraph 3.3.2 (Document A101-1997), that "[t]he Contractor recognizes that time is of the essence of this Contract and further acknowledges that

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The close-out documentation required to be submitted to the architect is set forth in the agreements at Article 9, paragraph 9.10.2 (Document A201-1997).

the Contract Time established in this Agreement is a reasonable period for performing the Work." Each agreement further provided, at Article 3, paragraph 3.4 (Document A101-1997), that:

"[t]he Contractor recognizes that its obligations for the performance of the Work within the time provided for in this agreement and the General Conditions are of the essence of this Agreement and that the Owner will suffer financial loss if the Work is not completed within the time specified in Paragraph 3.3 The parties also recognize the delays, expense and difficulties involved in determining and proving the actual loss suffered by Owner if the Work is not completed on time. Accordingly, instead of requiring any such determination or proof, Owner and Contractor agree that the Contractor shall be liable for and shall pay the Owner the sum of Five Hundred Dollars (\$500.00) for each and every calendar day of unexcused delay, as defined in the General Conditions, past the Substantial Completion Date for the first thirty (30) consecutive days of such delay, and Eight Hundred Dollars (\$800.00) for each and every calendar day of such delay thereafter, as the fair and reasonable compensation to the Owner for such losses, which compensation shall be construed as Liquidated Damages, and not as a penalty of any kind."

The agreements, at Article 3, paragraph 3.5, also provided:

"The Owner may deduct Liquidated Damages described in Paragraph 3.4 from any unpaid amounts then or thereafter due the Contractor under [the] Agreement. Any liquidated damages not so deducted from any unpaid amounts due the Contractor shall be payable to the Owner by the Contractor upon demand by the Owner, together with interest from the date of the demand equal to the highest lawful rate of interest."

The agreements, however, also provided, at Article 9, paragraph 9.10.3, that if after substantial completion of the work, the "final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the architect, and without terminating the contract, make payment of the balance due for that portion of the Work fully completed and accepted."

Plaintiffs Wolet and NY Interior claim that they diligently performed their work and were on the job every day. Plaintiff Wolet also claims that it provided defendant with a twenty-year roof warranty. Plaintiffs contend that plaintiff Wolet performed work valued at \$966,529.88, representing the adjusted base price under the Wolet agreement, and plaintiff NY Interior performed work valued at \$582,009.80, representing the adjusted base price under the NY Interior agreement. Plaintiffs admit that defendant Beach made payments pursuant to invoices sent by them to it at the completion of each phase of the project, but assert that notwithstanding their demands, defendant Beach has failed to pay final invoices sent to it reflecting balances of \$142,462.65, which remains due and owing plaintiff Wolet, and \$54,432.06, which remains due and owing plaintiff NY Interior.

Plaintiffs further contend that they achieved substantial completion of the project on July 15, 2005, and that ACS issued a certificate entitled "CERTIFICATE OF SUBSTANTIAL COMPLETION," indicating the project was 100% completed on August 26, 2005. Plaintiffs assert that such completion must be considered to be within the time allotted under their respective agreements because they did not cause any unexcused delays. Plaintiffs claim they submitted change orders for extensions of time, which were granted, and the delays thereafter, were not unexcused, because they were caused by events not within their control, including poor weather conditions, changes requested by the architect of defendant Beach and City in the scope, specifications and timing of the work, and interference with performance of the work by other contractors employed by Beach at the job site. Plaintiffs further claim additional costs were approved by defendant Beach pursuant to change orders without objection, and that they delivered invoices to defendant Beach requesting final payment, and Beach did not object to the invoices. Plaintiffs also assert that upon defendant Beach's failure to submit full payment, they filed and docketed the verified notices of their mechanic's liens on May 1, 2006, within eight months after final performance of the work, and served a copy of them upon defendant Beach.

In support of their motion, plaintiffs submit, among other things, a copy of the pleadings, the affidavit of Dean S. Larkey, the president of Wolet and NY Interior, the affirmation of their counsel, and copies of the Wolet and NY Interior agreements, various correspondence and change orders, the ACS lease, notes of construction meetings, invoices, a roofing system limited warranty, contractor's applications for payments and the notices of mechanic's lien, and affidavits of service.

Plaintiffs' submissions do not satisfy their burden of establishing a prima facie entitlement to judgment as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d at 324; Winegrad v New York Univ. Med. Center, 64 NY2d at 853; Zuckerman v City of New York, 49 NY2d at 562; cf. Blue Grey Development v Rainer Realty Corp., 269 AD2d 553 [2000]). Plaintiffs must establish timely performance (see Morgan Barrington Financial Services v Roman, 27 AD3d 385 [2006]; Sikander v Prana-BF Partners, 22 AD3d 242 [2005]), and their own papers raise questions on that issue, including but not limited to whether the work was performed in accordance with the agreements, the delays were unexcused, and all necessary close-out documents were submitted. In addition, plaintiffs' submissions do not include a copy of the issuance of a final certificate for payment by the architect or the unpaid final invoices.

Defendants Beach and Suntrust, furthermore, present in opposition to the motion, various proofs, including the affidavit of Herbert A. Licht, Beach's principal, an affirmation of their counsel, copies of correspondence, including an email dated January 30, 2006, purportedly amending the date of substantial completion to July 15, 2005, and a certificate of payment dated August 25, 2005, which raise issues of fact as to whether all of the work at the premises was satisfactorily and timely performed, and whether plaintiffs submitted all necessary close-out documents and a final certificate of payment from the architect. Mr. Licht states that plaintiffs Wolet and NY Interior failed to complete all the work, obtain substantial completion in a timely fashion, and submit all necessary close-out documents and a final certificate of payment from the architect. He avers that in May 2005, defendants Beach and Suntrust walked off the job, without completing construction on the project, and left numerous "punch list" items undone. Mr. Licht further avers that defendant Beach has incurred additional expenses for the purposes of completing and repairing plaintiffs' work on the project.

According to Mr. Licht, plaintiff Wolet failed to install self-contained air conditioning units in the mechanical rooms, as required under the agreements, and instead, "unilaterally" installed air-conditioning condensers on the roof of the premises.²

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Although Mr. Licht also states that plaintiffs never activated the fire alarm system, defendants Beach and Suntrust have not demonstrated it was plaintiffs' responsibility under the agreements to do so. The specifications indicate that the fire alarm system was to be replaced and the fire suppression system was to be connected to the alarm system. The specifications make no mention

Although plaintiffs dispute whether they met the specifications regarding the replacement of air conditioning units at "M.E.R.," citing the specification comment which reads "4 SPLIT SYSTEM-ONE 20th AND THREE 15th," the meaning of such comment is ambiguous, and is another issue of fact needing resolution at trial.

Summary judgment in favor of plaintiffs on the causes of action asserted in the complaint, therefore, is not warranted (see Jacob & Youngs, Inc. v Kent, 230 NY 239, 241 [1921]; F. Garofalo Elec. Co., Inc. v New York University, 300 AD2d 186 [2002]). That branch of the motion for summary judgment in favor of plaintiffs is denied.

Plaintiffs seek to strike the first affirmative defense asserted by defendants Beach and Suntrust in their answer, based upon failure to state a cause of action. Such defense is improperly pleaded (see Propoco, Inc. v Birnbaum, 157 AD2d 774 [1990]; Bentivegna v Meenan Oil, Inc., 126 AD2d 506 [1987]; Glenesk v Guidance Realty, 36 AD2d 852 [1971]). That branch of the motion by plaintiffs to dismiss the first affirmative defense is granted.

The second affirmative defense that any damage sustained by plaintiffs was caused by the conduct of others, the fourth and fifth affirmative defenses based upon failure to mitigate damages, and the seventh affirmative defense based upon the doctrines of waiver and estoppel are unsupported by any factual allegations or proof (see Glenesk v Guidance Realty Corp., 36 AD2d 852 [1971], supra). That branch of plaintiffs' motion seeking to dismiss the second, fourth, fifth and seventh affirmative defenses asserted by defendants Beach and Suntrust is granted.

Defendants Beach and Suntrust raise plaintiffs' culpable conduct in their third and sixth affirmative defenses. The concept of apportioning culpable conduct, however, is one related to tort. Since all of the causes of action in this case sound in theories which relate to breach of contract (including those for quantum meruit, unjust enrichment and foreclosure of mechanic's liens), as opposed to tortious conduct, an affirmative defense based on a notion of culpable conduct is unavailable herein (see CPLR 1401; Pilweski v Solymosy, 266 AD2d 83 [1999]; Nastro Contracting Inc. v Agusta, 217 AD2d 874 [1995]; Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc., 173 AD2d 1004 [1991]). That branch of the motion by plaintiffs seeking to dismiss the third affirmative

that plaintiffs were to activate the alarm system.

defense, and so much of the sixth affirmative defense, based upon the alleged culpable conduct of plaintiffs, is granted.

To the extent the sixth affirmative defense is based upon breach of contract, plaintiffs contend that defendant Beach waived any defense based upon the liquidated damages clauses, because Beach failed to raise, in a timely fashion, an objection to the timeliness of plaintiffs' completion of the work. Plaintiffs argue defendant Beach was required to object to their delay in completing the agreements within 21 days of "discovery" of the delay in accordance with Article 4, section 4.3.4 (Document A201-1997).

Contrary to the argument of plaintiffs, Article 4, section 4.3.4 (Document A201-1997) is inapplicable to the issue of whether defendant Beach may assert, as an affirmative defense, a claim of breach of contract arising out of delay in completion of the work. That provision governs claims for concealed or unknown physical conditions at the work site which were materially different from those described in the contract documents, and permits the architect to determine whether the newly encountered conditions warrant an equitable adjustment in the contract sum or time, or both. Such provision requires that any objection by the contracting parties to the architect's determination, regarding the appropriateness of such adjustment, be made within 21 days after notice of the architect's decision.

Insofar as plaintiffs intended to cite to Article 4, section 4.3.2 (Document A201-1997) of the agreements, in support of their argument, that provision likewise is inapplicable to the issue of whether defendant Beach may assert a defense based upon breach of contract due to delay in performance. Article 4, section 4.3.2 relates to the 21-day time frame for making claims for affirmative relief under the agreements and the role of the architect in determining the acceptability and fitness of workmanship and materials. It does not serve to preclude defendant Beach from raising an affirmative defense based upon breach of contract arising out of plaintiffs' alleged failure to comply with the deadlines set forth in the agreements.

Article 13, paragraph 13.4 (Document A201-1997), also provides that "[n]o action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder except as may be specifically agreed in writing."

Plaintiffs alternatively argue defendant Beach should be estopped from raising breach of contract as an affirmative defense,

because defendant Beach acquiesced in the delay, by continuing, after the contractual completion dates, to direct them regarding their work on the project. Defendant Beach, however, was entitled to expect, even after the passage of the completion dates set in the agreements, performance of the work by plaintiffs in compliance with the agreements (see Article 4, paragraph 4.3.3, Document A201-1997). It also was entitled to rely upon the contractual remedy of liquidated damages in the event of unexcused delays occasioned by plaintiffs. Nevertheless, the liquidated damages clause is only applicable to unexcused delays, and as discussed above, questions of fact exist as to whether any of the delays should be considered excused.

That branch of the motion by plaintiffs to dismiss that portion of the sixth affirmative defense based upon breach of contract is denied.

The ninth affirmative defense asserted by defendants Beach and Suntrust is based upon the expiration of the applicable statutes of limitations. A cause of action to recover damages based on breach of contract is governed by the six-year statute of limitations and accrues at that point in time when the contract in question was substantially completed (see CPLR 213; City School District of City Newburgh v Stubbins & Assoc., 85 NY2d 535 [1995]; State of New York v Lundin, 60 NY2d 987 [1983]; Sosnow v Paul, 36 NY2d 780 [1975]). In addition, a cause of action for quantum meruit and unjust enrichment has to be asserted within six years after its accrual (see CPLR 213; Erdheim v Gelfman, 303 AD2d 714 [2003]; L & L Plumbing & Heating v DePalo, 253 AD2d 517 [1998]; Lawyers' Fund for Client Protection of State of N.Y. v Gateway State Bank, 239 AD2d 826 [1997]). In this instance, plaintiffs assert that they provided labor and furnished materials in relation to the property beginning in 2004, and defendants Beach and Suntrust assert that the project was substantially completed in 2005. Plaintiffs filed their notices of liens on May 1, 2006, and their notice of pendency on November 3, 2006, the same day they commenced this action (see Lien Law § 17). Thus, that branch of the motion by plaintiffs to dismiss the ninth affirmative defense asserted by defendants Beach and Suntrust is granted.

With respect to the eighth affirmative defense, and the third and sixth counterclaims pursuant to Lien Law § 39, to set aside plaintiffs' mechanic's liens and for damages on the ground of willful exaggeration, the validity of the liens plainly turns on resolution of the dispute as to whether plaintiffs completed the work required by the agreements, or willfully or fraudulent exaggerated their liens (see Care Sys. v Laramee, 155 AD2d 770, 771 [1989]; Matter of Atlantic Cement Co. v St. Lawrence Cement Co.,

22 AD2d 228 [1964]). Such dispute cannot be resolved on these papers, and must await trial. That branch of the motion seeking to dismiss the eighth affirmative defense asserted by defendants Beach and Suntrust, and the third and sixth counterclaims interposed by defendant Beach is denied.

With respect to the first and fourth counterclaims by defendant Beach seeking liquidated damages based upon breach of contract, plaintiffs argue defendant Beach waived any claim to recover liquidated damages for breach of contract. Plaintiffs, however, failed to raise waiver as an affirmative defense in their reply. Under such circumstances, plaintiffs may not assert waiver as a ground for dismissing the first and fourth counterclaims of defendant Beach seeking recovery of liquidated damages for breach of contract (see CPLR 3018; Glenesk v Guidance Realty Corp., 36 AD2d 852 [1971], supra; see also Flynn v Rockwell, 295 AD2d 672 [2002]; McIntosh v Niederhoffer, Cross & Zeckhauser, 106 AD2d 774 [1984]).

Plaintiffs alternatively argue defendant Beach should be estopped from claiming an offset of the liquidated damages clause, because defendant Beach acquiesced in the delay, by continuing, after the contractual completion dates, to direct them regarding their work on the project. Defendant Beach, however, was entitled to expect, even after the passage of the completion dates set in the agreements, completion of the work by plaintiffs in accordance with the agreements. It was also entitled to rely upon the contractual remedy of liquidated damages in the event of unexcused delays occasioned by plaintiffs. Nevertheless, the liquidated damages clause is only applicable to unexcused delays, and questions of fact exist as to whether any of the delays should be considered excused. That branch of the motion by plaintiffs to dismiss the first and fourth counterclaims asserted by defendant Beach is denied.

With respect to that portion of the second counterclaim asserted by defendant Beach against plaintiff Wolet based upon breach of contract for failure to provide a 20-year warranty for the roof, plaintiff Wolet has produced a copy of a roofing system limited warranty, commencing on November 9, 2004 for a period of 20 years, for the building housing the day care center at subject premises, and naming defendant Beach as the building owner. Defendant Beach has failed to raise any triable issue of fact with respect to the production or sufficiency of such warranty. That branch of the motion seeking to dismiss that portion of the second counterclaim asserted by defendant Beach against Wolet based upon breach of contract for failure to provide a 20-year roof warranty is granted.

With respect to the fifth counterclaim asserted against plaintiff NY Interior and the remainder of the second counterclaim asserted against plaintiff Wolet for breach of contract, plaintiffs have made no showing that the liquidated damages clause was defendant Beach's exclusive remedy or that Beach agreed to be limited to the amount of any liquidated damages. Furthermore, questions of fact exist as to whether plaintiffs are in breach of contract. That branch of the motion seeking to dismiss the fifth counterclaim asserted against plaintiff NY Interior and the remainder of the second counterclaim asserted against plaintiff Wolet is denied.

Accordingly, this action is set down for a preliminary conference to be held on September 8, 2008 at 9:30 a.m. in the Preliminary Conference Part, courtroom 314 of the courthouse located at 88-11 Sutphin Blvd., Jamaica, N.Y.

Dated: 7/24/08

J.S.C.