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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden PART 11

Index Number : 117233/2007

BERIT REALTY, LLC

VS.

VORTEX GROUP, INC.

SEQUENCE NUMBER : 003

DISMISS

INDEX NO.

MOTION DATE 2-26-09

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision, Order + Judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 24, 2009

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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BERIT REALTY, LLC,

Plaintiff,

-against- Index No. 117233/07

VORTEX GROUP, INC.,

Defendant.

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VORTEX GROUP, INC.

Counterclaim
Plaintiff,

-against-

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, and "JOHN DOE 1" through "JOHN DOE 10," inclusive, as those persons and entities having an interest in real property located at 308 W. 58th Street, New York, New York,

Additional
Counterclaim
Defendants.

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MADDEN, J.:

This action arises out the renovation of the West Park Hotel, which is located at 308 West 58th Street, New York, New York, and owned by plaintiff Berit Realty, LLC (Berit). Defendant Vortex Group, Inc. (Vortex) was the contractor in charge of the renovation project. Berit and counterclaim defendant Fidelity and Deposit Company of Maryland[1] now move (1) to

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[1]Fidelity and Deposit Company of Maryland is in the business of writing surety bonds and has been sued as a counterclaim defendant based on its filing of an undertaking to discharge Vortex's Notice of Lien filed against the property at issue on August 13, 2008.

dismiss each of the counterclaims filed by Vortex, or, in the alternative, for summary judgment; and (2) for a declaration that the parties' written agreement, the Memorandum of Understanding, is valid and enforceable, and that, as a result, Vortex's lien is void. For the reasons set forth below, Berit's motion is granted.

Background

The following factual background is derived from the affidavits of Daniel Rosen, an authorized representative of Berit, Brian G. Lustbader, Esq., Berit's counsel who represented Berit in connection with the development and construction of the West Park Hotel, and Lazaros Agopianis, Vortex's president.

On February 6, 2004, Berit and All City Construction Group (All City) entered into a Construction Agreement (the Construction Agreement), pursuant to which Berit retained All City to act as the general contractor to renovate the West Park Hotel, and turn it into a thirteen-story, luxury boutique hotel, for the amount of $499,691 (the Project) (Lazaros Aff., ¶ 4). The Project was to be completed in two phases (Rosen Aff., ¶ 4). The first phase involved renovating an existing nine-story structure, and the second phase involved building an additional four stories on top of that existing structure (*id.*) By Letter Agreement dated October 13, 2004, All City assigned the Construction Agreement to Vortex (*id.*; *see* Aff. of Alan Kaplan, Exh B). Thereafter, Vortex submitted, and Berit accepted, revised bid documents, amending the contract amount from $499,691 to $6.2 million (Agopianis Aff., ¶ 6).

Berit asserts that, by March 2007, it became concerned that the Project was behind schedule because Vortex was not utilizing enough construction workers, and because it received numerous complaints from subcontractors informing it that they were not being paid by Vortex

(Rosen Aff., ¶ 6; Lustbader Aff., ¶ 6). In response to Berit's concerns, Vortex complained that the Project was being slowed by the amount of change orders approved by the parties (Rosen Aff., ¶ 8).

Over the course of the Project, over 130 formal change orders were issued, changing the agreed-upon contract amount, and extending the duration of the Project from 18 months to more than 46 months (Agopianis Aff., ¶ 8). As memorialized by a formal change order dated January 1, 2007, through numerous change orders, both written and verbal, the contract price was adjusted to $9,842,131 (*id.*). Vortex asserts that Berit also issued construction change directives directing it to perform work, as well as verbally directed Vortex and/or its subcontractors to perform additional work, all of which is valued at approximately $2 million, and for which it has not been paid (*id.*, ¶ 9). According to Vortex, the large majority of its claims for payment concern work that Berit orally directed Vortex to perform due to changes in the design and construction by Berit (*id.*, ¶ 11).

By May 2007, the Project was way behind schedule (Rosen Aff., ¶ 10; Lustbader Aff., ¶ 6). Berit contends that, as the hotel was set to open in the summer of 2007, it was important to immediately rectify the problems (*id.*). Berit retained Lustbader, and asked him to negotiate a resolution of all of the problems on behalf of Berit with Vortex that would get the Project back on track, and ready for the opening (Rosen Aff., ¶ 12; Lustbader Aff., ¶ 3). Berit asserts that, however, because of the seriousness of Vortex's delays, it did not want Vortex working on the Property until the issues were resolved (Rosen Aff., ¶ 13; Lustbader Aff., ¶ 6). Accordingly, by letter dated May 25, 2007, Berit provided Vortex seven days notice, pursuant to

Section 19.2.2 of the Construction Agreement, that it was terminating the Construction Agreement effective as of June 2, 2007 (Rosen Aff., ¶ 13; Lustbader Aff., ¶ 17).

Both parties agreed that the best course of action to resolve all issues would be the preparation of a Memorandum of Understanding (the MOU) (Rosen Aff., ¶ 17; Lustbader Aff., ¶ 14). Berit asserts that the concept behind the MOU was to provide a final document that resolved all financial issues outstanding between Berit and Vortex, and provided deadlines for Vortex's completion of the Project (Rosen Aff., ¶ 14; Lustbader Aff., ¶ 9).

Because the Construction Agreement terminated on June 2, 2007, Vortex's counsel requested that Berit extend its termination date so the parties could finalize the MOU, resolving all of the parties' differences, and allow Vortex to continue working on the Project (Rosen Aff., ¶ 18; Lustbader Aff., ¶ 16). Berit agreed to extend the termination date until June 5, 2007 (*id.*).

On June 4. 2007, the principals of Berit and Vortex and their counsel met together to review the MOU, and discuss all issues and disputes in a final attempt to resolve the parties' differences (Rosen Aff., ¶ 9; Lustbader Aff., ¶ 18). Although Berit disagreed with Vortex on the amount that was due on all of the written and verbal change orders, after extensive negotiation, the parties agreed on a liquidated amount that covered all of the change orders, both written and verbal, which amount was memorialized in the MOU (Rosen Aff., ¶ 20; Lustbader Aff., ¶ 14). Additionally, Berit waived its claims that Vortex had not timely completed the construction work under the original base contract (*id.*). Thereafter, on June 7, 2007, the parties executed the MOU.

As expressly stated on the first page, the MOU was signed "in order to resolve all outstanding issues" between Vortex and Berit, as well as to "resolve and settle all claims for

extras and deductions" that the parties had disputed was owed by Berit to Vortex under written and verbal change orders (MOU, ¶ 1 [Aff. of Alan Kaplan, Exh I]). In so doing, the MOU adjusted the total contract price to $10,373,163 (*id.*), which reflected the amount the parties agreed was due as of June 7, 2007 to Vortex on all change orders, whether written or verbal (Rosen Aff., ¶ 23; Lustbader Aff., ¶22). The MOU makes clear that the agreed-upon price "takes into account all change orders and increases and deductions and credits, of whatever kind, including all Contractor claims for general conditions, closeout and punch list, overhead and profit, and the like, from the beginning of the Project until the date of this Memorandum of Understanding" (MOU, ¶ 2). Moreover, Vortex acknowledged that it "understands and agrees that [it] is waiving and releasing any and all claims, including lien rights, it may have against the Owner or the Architect for any and all matters relating to the Project, up to and including the date of this Memorandum" (*id.*, ¶ 7). The MOU also provided that Vortex "shall be entitled to an additional $200,000 Bonus ... if it achieves Final Completion by no later than August 18, 2007" (*id.*, ¶ 4).

Once the MOU was executed, Berit withdrew its Termination Notice, and allowed Vortex to continue working on the Project (Rosen Aff., ¶ 24; Lustbader Aff., ¶ 25). Going forward, Berit paid Vortex all funds due under the MOU as the Project progressed (Rosen Aff., ¶ 24). On September 20, 2007, Vortex executed two lien waivers in favor of Berit, each entitled "Contractor's Partial Waiver and Release of Lien to Owner" (collectively, the "Lien Waivers") (Rosen Aff., ¶ 25; *see* Kaplan Aff., Exh J). One lien wavier was for $9,845,550.52, and the other was for $87,547, totaling $9,933,097.52. In each of the Lien Waivers, Vortex waived, released and quit claimed in favor of Berit "all rights that presently exist to [Vortex] to assert a lien upon

the land and improvements comprising the Project, but only to the extent of the sums actually received for labor and materials furnished through the 20th day of September, 2007" (Lien Waivers, ¶ 1). Vortex further warranted that all subcontractors it employed "have been paid their respective portion of prior payments" and that none of them have any claim of lien against the Project through September 20, 2007 (*id.*, ¶ 3).

Vortex and Berit both continued to operate under the MOU for several months, as reflected in Vortex's demands for payments, including Vortex's October 9, 2007 letter in which Vortex demanded "payment as stipulated in 6a, 6b, 6c, 6d, 6e of MOU" (Rosen Aff., ¶ 28; Lustbader Aff., ¶ 25; *see* Kaplan Aff., Exh K). In that letter, Vortex stated "[t]he balance is $307,000 plus change orders of $176,000.00. TOTAL DUE is $483,000.00" (*id.*).

After being advised by Berit that it disputed the amount claimed in Vortex's October 9, 2007 letter, Vortex filed a mechanic's lien against the Property in the amount of $2,620,000 on October 18, 2007 (the October 2007 Lien) (Rosen Aff., ¶ 30; *see* Kaplan Aff., Exh L). The October 2007 Lien pertained to work performed by Vortex on the Property from February 2004 until October 17, 2007, and claimed that the agreed-upon contract price was $12,401,450. It alleged that Berit had only paid $9,781,450, leaving an unpaid balance due of $2,620,000.

Thereafter, Berit made a formal request to Vortex for an itemized, verified statement of the lien claim pursuant to Section 38 of the Lien Law (Rosen Aff., ¶ 33). Vortex failed to file a sufficient response within five days of receipt of the demand, as required under

Section 38 of the Lien Law (*id.*). Berit then filed a petition[2] with this court seeking to compel Vortex to provide a verified statement pursuant to the Lien Law. While the petition was pending, Vortex provided an itemization to Berit alleging an unpaid balance of $1,700,189.97 – over $900,000 less than the amount claimed in the October 2007 Lien (*id.*, ¶ 35).

By order dated February 28, 2008, this court granted Berit's petition, and directed Vortex to provide Berit with "an itemized statement delineating 'the items of labor and/or materials and the value thereof which make up the amount for which [respondent] claims a lien, which should also set forth the terms of the contract under which such items were furnished'" (*see* Kaplan Aff., Exh M). On March 13, 2008, Vortex withdrew its October 2007 Lien, and provided Berit with a Release of Mechanic's Lien (*id.*, ¶ 38; *see* Kaplan Aff., Exh N).

On August 13, 2008, Vortex filed another lien based on the same set of facts supporting the October 2007 Lien, by filing a Notice Under Mechanic's Lien Law claiming an unpaid amount of $1,316,271 (the August 2008 Lien) (*see* Kaplan Aff., Exh O). The August 2008 Lien encumbers the same property, and pertains to the same work and Project as did the October 2007 Lien. It asserts that the contract price was $9,842,131, and claims that Vortex performed extra work due to written and oral change directives in the amount of $1,184,140, and that is owed $131,678 for unpaid contract work and retainage. The August 2008 Lien relies on the January 10, 2007 change order.

On September 5, 2008, Vortex served its itemized, verified statement of the lien claim in the form of an affidavit submitted by Lazaros Agopianis (*see* Kaplan Aff., Exh P). This

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[2] The petition commenced the instant action which, by order of this court dated September 23, 2008, was converted to a plenary action.

affidavit states that the August 2008 Lien is based upon 57 unsigned changed order requests totaling $1,184,140. Out of these 57 change order requests, 31 are dated June 14, 2006 through December 28, 2006, which predated the January 10, 2007 change order, and total $743,942.71. Another 12 are dated from January 10, 2007 through May 23, 2007, which predated the June 7, 2007 MOU. Only $141,703 of claimed unsigned change orders were allegedly performed after the MOU was signed.

On October 1, 2008, Vortex filed counterclaims in this action against Berit seeking paying on the August 2008 Lien (*see* Kaplan Aff., Exh Q). Vortex's first six counterclaims (breach of contract, breach of good faith and fair dealing, promissory estoppel, quantum meruit, unjust enrichment, and cardinal change) are all explicitly based on the allegation that Berit did not pay Vortex for the unsigned change order requests identified in Agopianis's affidavit. Similarly, in its seventh through tenth counterclaims (cumulative impact, breach of implied warranty, tortious interference with contract and tortious interference with business relations), Vortex seek damages allegedly incurred because Berit changed the Project through change orders, but did not pay Vortex for the change orders. Each of these counterclaims are based on alleged actions by Berit that occurred prior to June 7, 2007 – the date the MOU was executed – and rely on the January 10, 2007 change order.

Vortex also asserts an 11th counterclaim that seeks to rescind the MOU by claiming that it is void or voidable.

Discussion

Berit seeks to dismiss each of the counterclaims filed by Vortex, or, in the alternative, for summary judgment. CPLR 3211 (c) permits a court, "after adequate notice to the

parties," to treat a motion to dismiss pursuant to CPLR 3211 as a motion for summary judgment. In the absence of such notice, the court may treat a motion to dismiss as a motion for summary judgment when the parties have "otherwise received 'adequate notice' by expressly seeking summary judgment or submitting facts and arguments clearly indicating that they were 'deliberately charting a summary judgment course'" (*Village of Webster v Monroe Country Water Auth.*, 269 AD2d 781, 782 [4th Dept 2000], quoting *Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]; *see e.g. 441 East 57th St. LLC v 447 East 57 St. Corp.*, 34 AD3d 378, 378 [1st Dept 2006], *lv denied* 8 NY3d 934 [2007] [court found that, upon a search of the record, trial court properly granted plaintiff summary judgment "on a record plainly intended to lay bare the parties proof"]).

Here, both parties have submitted affidavits, affirmations and other relevant exhibits, including letters, change order requests and other agreements, that are properly considered on a motion for summary judgment. Thus, both parties have clearly indicated their desire to have the court treat this motion as one for summary judgment. Although Vortex argues that the court should not convert the motion to one for summary judgment because issue has not yet been joined (Vortex Mem., at 9), CPLR 3211 (c) specifically provides that "whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment." Accordingly, the court will treat Berit's motion as one for summary judgment.

In support of its motion for summary judgment dismissing all of Vortex's counterclaims, through which Vortex seeks payment from Berit in the amount of $1,316,271 for work it allegedly performed, Berit contends that Vortex's claims for payment are directly

contradicted by the express language of the MOU.

"[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *accord South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272 [2005]; *Cellular Tel. Co. v 210 East 86th Street Corp.*, 44 AD3d 77 [1st Dept 2007]). "Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact" (*Unisys Corp. v Hercules, Inc.*, 224 AD2d 365, 367 [1st Dept 1996]). Thus, construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470 [2004]).

Under the above stated principles, it is apparent that the MOU is clear and unambiguous, and should be enforced according to its terms. As stated in the first sentence of the MOU, its sole purpose was "to resolve all outstanding issues between Vortex Group, Inc., as Contractor, and Berit Realty, LLC, as Owner, regarding the West Park Hotel Project." In so doing, the MOU increased the total contract price to $10,373,163, which reflected the total amount that the parties agreed was due to Vortex on all change orders, whether written or verbal as of June 7, 2007. Indeed, the MOU expressly states that the agreed upon price "takes into account all change orders and increases and deductions and credits, of whatever kind, including all Contractor claims for general conditions, closeout and punchlist, overhead and profit, and the like, from the beginning of the Project until the date of this Memorandum of Understanding" (*id.*,

¶ 2). Moreover, in the MOU, Vortex acknowledged that it "understands and agrees that [it] is waiving and releasing any and all claims, including lien rights, it may have against the Owner or the Architect for any and all matters relating to the Project, up to and including the date of this Memorandum" (*id.*, ¶ 7).

Vortex's lien and counterclaims now seeks payment of $1,042,437.33, allegedly owed for unsigned change order requests dated from June 14, 2006 through May 23, 2007, all of which predate the MOU. Each of Vortex's counterclaims stem from the same allegations:

- Berit changed the nature of the Project by requesting changes through written and verbal change directives;
- Berit failed to properly supervise Vortex;
- Berit did not timely pay Vortex for the change orders.

(Counterclaims, ¶¶ 19-30). Those change order requests were clearly addressed and assumed by the MOU. Accordingly, Vortex's counterclaims are contrary to the parties' written agreement.

However, Vortex seeks to rescind the MOU by claiming, in its last counterclaim, that the MOU is unenforceable, void or voidable.

First, Vortex argues that the MOU violated Lien Law § 34. Lien Law § 34 provides that "any contract, agreement or understanding whereby the right to file or enforce any lien created under article two is waived, shall be void as against public policy, and wholly unenforceable." As Senator James H. Donovan, a sponsor of the bill which the Legislature ultimately enacted as Lien Law § 34, described the legislation:

> It has become prevalent in the construction industry to require contractors, subcontractors, materialmen and laborers to sign contracts or subcontracts containing clauses which waive the right of the signer to file or enforce his mechanic's lien. This legal

> barrier is thus imposed long before any work is performed or materials furnished. The surrender of such protective rights as a prerequisite to obtaining a contract or subcontract is repugnant, against public policy and should be void

(*West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 157-158 [1995], quoting Mem of Senator Donovan, L 1975, ch 74, 1975 Legis Ann., at 341). Thus, Lien Law § 34 only precludes an owner of a project from requiring a contractor to waive its right to file a mechanic's lien as a precondition for entering into a construction contract **before** any work is performed (*see West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, *supra*; *see e.g. Young's L&M Constr., Inc. v Kelley*, 13 Misc 3d 307, 310 [Sup Ct, NY County 2006] [contractual waiver pursuant to which "plaintiff agreed for the benefit of defendants to waive its right to file a mechanic's lien against the property for work **which might arise out of the contract**" was found to be "void here as against public policy and unenforceable"] [emphasis added]).

Lien Law § 34, however, expressly allows a written waiver of the right to file a mechanic's lien executed and delivered by a contractors simultaneously with or after payment for the labor performed (*see id.*). Thus, a contractor is permitted to waive and release its right to file a lien in exchange for payment for the work already performed.

Here, the MOU was negotiated and executed more than three years after the parties entered into the Construction Agreement. It was not entered into as a requirement for Vortex to begin work at the Property, but rather, as a written memorial of the parties' resolution and settlement of all of their outstanding issues, including disagreements of payment due for work already performed. Paragraph 7 of the MOU acknowledges that "Vortex understands and agrees that it is waiving and releasing any and all claims, including lien rights, it may have

against the Owner or the Architect for any and all matters relating to this Project, up to and including the date of this Memorandum" (MOU, ¶ 7). Vortex, however, expressly maintained the right to file a mechanic's lien "to enforce this Memorandum of Understanding, and Contractor's right to make claim for retainage" if payment due under the MOU was not timely received (*id.*). Accordingly, Vortex did not waive any right to file a mechanic's lien as precondition for beginning work on the Project. As such, the MOU does not violate Lien Law § 34.

In response to the summary judgment motion, Vortex claims, relying on *West-Fair*, that the MOU and the Lien Waivers violate Lien Law § 34, because they do not provide for simultaneous or past payment for the work at issue (Vortex Mem., at 14). That case, however, does not support its argument.

West-Fair involved a contract between a general contractor and its subcontractors that provided that the subcontractor would be paid only when and if the general contractor was paid by the owner. The Court held that a pay-when-paid provision "which forces the subcontractor to assume the risk that the owner will fail to pay the general contractor" is void as contrary to Lien Law § 34 (87 NY2d at 158). The Court further held that, however, a provision "which merely fixes a time for payment does not indefinitely suspend a subcontractor's right to payment upon the failure of an owner to pay the general contractor," and does not violate the Lien Law (*id.*).

Here, the MOU does not contain a pay-when-paid provision between a general contractor and its subcontractors. Rather, the MOU memorializes an agreement between the owner and general contractor to resolve all of their outstanding issues, including disagreements

of payment due for work already performed as of that date. Paragraph 7 of the MOU is not a waiver of Vortex's right to file a lien. To the contrary, the MOU expressly provides Vortex the right to file a mechanic's lien "to enforce this Memorandum of Understanding, and Contractor's right to make claim for retainage" if payment due under the MOU is not timely received. It does not indefinitely suspend Vortex's right to payment upon the failure of Berit to pay Vortex. Instead, the MOU simply sets a ceiling on the amount of the lien that Vortex could file against Berit on June 7, 2007 of $10,373,163.00, as per the parties' agreement.

Similarly, the Lien Waivers themselves are merely an acknowledgment by Vortex that it received payments from Berit totaling $9,933,097.52. By their plain language, the Lien Waivers do not waive lien rights for unpaid work, but rather, waive claim of rights "only to the extent of the sums actually received for labor and materials furnished through the 20th day of September 2007 [i.e., $9,845,550.52 and $87,547.00, respectively]" (Lien Waivers, ¶1).

Accordingly, because neither the MOU nor the Lien Waivers include a provision whereby Vortex indefinitely agrees to waive any lien rights with respect to unpaid work, and since payments are not contingent upon the acts of third parties, they do not violate Lien Law § 34.

Next, Vortex alleges that it did not receive consideration for entering into the MOU. It is a basic tenet of contract law that "consideration" is anything that bears a known value (*see St. Lawrence County Natl. Bank of Canton v Watkins*, 153 App Div 551 [3d Dept 1912]). In the context of a settlement agreement, a party need only have a good faith belief in the merit of its position that it is resolving (*see Denburg v Parker Chapin Flattau & Klimpl*, 82 NY 2d 375 [1993]; *Schuttinger v Woodruff*, 259 NY 212 [1932]). "That the party's view of the law

might ultimately prove meritless does not undermine the validity of the agreement" (*Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d at 383).

The MOU settled and resolved all outstanding issues and disputes between Berit and Vortex. Prior to the execution of the MOU, Berit disputed the amount that Vortex claimed was owed under the various change orders and verbal directives. Moreover, Berit claimed that Vortex was in breach of the Construction Agreement and, in fact, terminated the agreement and demanded that Vortex cease all work on the Property as of June 2, 2007. Berit presents unrefuted evidence that, by executing the MOU, Berit compromised its positions by, among other things:

- Agreeing to increase the contract price over half a million dollars as a liquidated amount to cover all claimed written and verbal change orders;
- Waiving its claims that Vortex had not timely completed the construction work under the original base contract;
- Waiving its right to have certain construction items completed by Vortex that were Vortex's responsibility under the amended Construction Agreement; and
- Withdrawing its termination notice and allowing Vortex to continue working on the Project

(*see* Rosen Aff., ¶¶ 20-21, 24; Lustbader Aff., ¶¶ 14, 18-20, 25).

These actions constitute "sufficient consideration" (*see Schuttinger*, 259 NY at 217 (recognizing that sufficient consideration is given where payment is made in an amount that was less than the plaintiff claimed and more than the defendant admitted in order to settle a bona fide dispute). Moreover, contrary to Vortex's assertion, it received a direct benefit by being allowed to continue as a general contractor on the Project and by obtaining additional payment

and fees, including the ability to earn an additional Final Completion Bonus in the amount of $200,000.

Vortex also challenges the adequacy of the consideration given for the MOU (Vortex Mem., at 17). However, under New York law, "[a]bsent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny" (*see Apfel v Prudential-Bache Sec., Inc.*, 81 NY2d 470, 476 [1993]). Vortex has not alleged that it was fraudulently induced into executing the MOU or that the MOU itself is unconscionable.

Vortex next argues that the increase in contract price is insufficient consideration because Berit was "already bound" to pay Vortex for the work. This argument, however, fails to take into account that at the time the MOU was executed, Berit disputed the amount that Vortex claimed was owed under the various change orders and verbal directives, and compromised its position by agreeing to a contract price which increased the previous contract price by over half a million dollars. Moreover, in agreeing to the new contract price and terms, Berit waived its claims that Vortex had not timely completed the construction work under the original base contract, and further waived its right to have certain construction items completed by Vortex that were Vortex's responsibility under the Amended Agreement. Berit's change in position constitutes "sufficient consideration" (*see Schuttinger v Woodruff*, 259 NY 212, *supra*).

Vortex also contends that Berit's withdrawal of the Notice of Termination is insufficient consideration because Vortex now "vehemently disputes" that the Notice of Termination was justified (Vortex Mem., at 18). However, the fact that Vortex now disputes the justification of the Notice of Termination is irrelevant. Rather, the proper inquiry is whether, at the time of the withdrawal, Berit had a good-faith belief that its Notice of Termination was

warranted (*see Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, *supra*). Accordingly, the MOU is supported by valuable consideration, and Vortex is estopped from now challenging it.

Vortex further argues that as Berit materially breached the MOU, it should be rescinded. "'Under New York law, only a breach in a contract which substantially defeats the purpose of that contract can be grounds for rescission. Put another way, a party is relieved of continued performance under a contract only when the other party's breach is material'" (*Donovan v Ficus Inv., Inc.*, 20 Misc 3d 1139[A], 2008 NY Slip Op. 51797[U], * 9 [Sup Ct, NY County 2008], quoting *In re Lavigne*, 114 F3d 379, 387 [2d Cir 1997]; *see also Pramco III, LLC v Partners Trust Bank*, 16 Misc 3d 351, 360 [Sup Ct, Monroe County 2007], *affd* 52 AD3d 2224 [4th Dept 2008] [a material breach of an agreement is one that is "'so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract'"] [citation omitted]). "'Under New York law, for a breach of contract to be material, it must go to the root of the agreement between the parties'" (*Donovan v Ficus Inv., Inc.*, 20 Misc 3d 1139A] at * 9, quoting *Frank Felix Assocs., Ltd. v Austin Drugs, Inc.*, 111 F3d 284 [2d Cir 1997]).

Vortex claims that Berit materially breached the MOU by preventing Vortex from earning the Final Completion Bonus (Vortex Mem., at 19). That claim, however, even if true, does not constitute a material breach of the MOU.

The purpose of the MOU was to provide a final document that resolved all financial issues outstanding between Berit and Vortex, and provided deadlines for Vortex's completion of the Project (*see* Rosen Aff., ¶ 14; Lustbader Aff., ¶ 9). In so doing, the MOU adjusted the total contract price to $10,373,163.00, which reflected the amount the parties agreed

was due as of June 7, 2007 to Vortex on all change orders, whether written or verbal (Rosen Aff., ¶ 23; Lustbader Aff., ¶ 22).

As an additional and separate term, the MOU also provided that Vortex "shall be entitled to an additional $200,000 Bonus ... if it achieves Final Completion by no later than August 18, 2007." The amount of the Final Completion Bonus is less than 2% of the total contract price. Thus, the Final Completion Bonus is not the "root" of the MOU, and accordingly, cannot serve as a basis for a material breach claim (*see Donovan v Ficus Inv., Inc.*, 20 Misc 3d 1139[A], *supra*).

Vortex also claims that it was induced into executing the MOU because "Berit maintained financial leverage over Vortex" (Counterclaim, ¶ 31). Although an agreement may be voided where it was agreed to under economic duress (*Stewart M. Muller Constr. Co. v New York Tel. Co.*, 40 NY2d 955 [1976]), financial and business pressures, "even if exerted in the context of unequal bargaining power," do not necessarily constitute economic duress (*Walbern Press v C.V. Comm.*, 212 AD2d 460, 461 [1st Dept 1995]). Moreover, "contracts induced by duress are voidable, not void; acceptance of benefits under the agreement constitutes ratification" (*Short v Keyspan Corp. Serv., LLC*, 11 Misc 3d 1076[A], 2006 NY Slip Op. 50574[U], *6 [Sup Ct, Kings County 2006] [holding that plaintiff waived his claim of duress by accepting additional monetary and other benefits under the agreement]; *Philips S. Beach LLC v ZV Specialty Ins. Co.*, 17 Misc 3d 1109[A], 2007 NY Slip Op. 51891[U], *2 [Sup Ct, NY County 2007], *affd* 55 AD3d 493 [2008] ["Having accepted the benefit under the Settlement Agreement ... it cannot now seek to reject the release contained in that agreement"]).

Here, Vortex has not presented any evidence showing how it was threatened into

entering the MOU. Moreover, even assuming *arguendo* that Vortex entered the MOU under duress, Vortex accepted benefits under the MOU and even ratified it, thereby waiving any claim of duress or that the MOU is now void (*see Short v Keyspan Corp. Svs., LLC*, 11 Misc 3d 1076[A], *supra*). In reliance on the MOU, Berit agreed to withdraw its termination notice, thereby allowing Vortex back on the Property to continue working on the Project (Rosen Aff., ¶ 24; Lustbader Aff., ¶ 25). Based on the withdrawal of the termination notice, Vortex returned to working on the Project (*id.*). In addition, Vortex continuously ratified the MOU from June 7, 2007 until it filed its October 2007 Lien (*see King v Fox*, 7 NY3d 181 [2006] [recognizing that a party to a voidable contract has the power to validate or ratify the contract, thereby rendering it valid]). Thus, for example, in its October 9, 2007 letter seeking payment, Vortex specifically stated that it was seeking "payment as stipulated in 61, 6b, 6c, 6d, 6e of MOU.".

Accordingly, even if Vortex had a viable claim that the MOU was entered into under economic duress, because Vortex accepted the benefits of the MOU and ratified it, Vortex has now waived any claim or defense that the MOU is invalid

Finally, Vortex claims that only change orders listed in Schedule "A" to the MOU are covered by the MOU, and contend that any change orders, including oral change directives, not listed on Schedule "A" or the Directive Log, survive the MOU. This interpretation is contrary to the plain terms of the MOU.

As reflected in its first sentence, the MOU's purpose was "to resolve *all outstanding issues* between Vortex Group, Inc., as Contractor, and Berit Realty, LLC, as Owner, regarding the West Park Hotel Project" (MOU, ¶ 1 [emphasis added]). The MOU also states that the agreed upon price "takes into account *all change orders and increases* and deductions and

credits, of *whatever kind*, including *all* Contractor claims for general conditions, closeout and punch list, overhead and profit, and the like, from the beginning of the Project until the date of this Memorandum of Understanding" (*id.*, ¶ 2 [emphasis added]). Vortex acknowledged that it "understands and agrees that [it] is waiving and releasing any and all claims, including lien rights, it may have against the Owner or the Architect *for any and all matter relating to the Project*, up to and including the date of this Memorandum" (*id.*) Thus, the MOU is clear as to its purpose.

The MOU specifies two exceptions which survive its execution. The MOU provides that agreed upon price takes into account all change orders and increases, "except for the following items, which survive the execution of this Memorandum:" (1) $60,431 for completed items relating to painting of facade, debris removal and fireplaces; and (2) $57,634, for which prices were to be checked, relating to pavers, three specific subcontractors, and additional balcony work (MOU, ¶ 2). There are no other exceptions for work, change orders, or other invoices that survive the MOU (*see id.*).

After delineating these exceptions, the last sentence of paragraph 2 states that "the plans, drawings, sketches and addenda covered by the Memorandum are listed in the attached Schedule A." This sentence indicates that certain documents evidencing the scope of the entire Project would be annexed to the MOU. Notably, the sentence does not mention change orders, or state that only the change orders and directives specifically mentioned or included in Schedule "A" are incorporated into the adjusted contract price. In fact, the preceding language in paragraph 2 already provides that the adjustment takes into account "all change orders ... of whatever kind." Vortex's interpretation would require the court to ignore the first sentence of

paragraph 2.

"It is an elementary rule of contract construction that clauses of a contract should be read together contextually in order to give them meaning" (*HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [1st Dept 2001]). Thus, "the court should construe the agreements so as to give full meaning and effect to the material provisions" (*Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]). A court should not adopt an interpretation which would leave any provision without force and effect (*see Beal Sav. Bank v Sommer*, 8 NY3d 318 [2007]; *see e.g. Acme Supply Co. v City of New York*, 39 AD3d 331 [1st Dept 2007], *lv denied* 12 NY3d 701 [2009] [reversing a lower court's construction of an agreement which did not give effect to all terms]). Therefore, this court cannot ignore the plain language of the MOU that makes clear that the adjusted contract price takes into account all change orders of whatever kind that predate the MOU.

Thus, Vortex is contractually barred by the MOU from claiming payment or filing a lien for any work or change order, whether written or oral, before June 7, 2007, other than as provided for in the MOU. Accordingly, Berit's motion for summary judgment dismissing Vortex's counterclaims is granted, and Berit is entitled to a declaration that the MOU is valid and enforceable.[3]

The court has considered the remaining arguments, and finds them to be without merit.

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[3]As the court has found that the MOU is valid and enforceable, it need not reach Berit's alternative argument that Vortex's has wilfully exaggerated its lien such that it is void under Lien Law § 39.

Accordingly, it is hereby

ORDERED that the motion of plaintiff Berit Realty, LLC and counterclaim defendant Fidelity and Deposit Company of Maryland for summary judgment dismissing the counterclaims of defendant Vortex Group, Inc., is granted, and the counterclaims of defendant Vortex Group Inc. are dismissed with costs and disbursements to plaintiff Berit Realty, LLC and counterclaim defendant Fidelity and Deposit Company of Maryland as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ADJUDGED AND DECLARED that the Memorandum of Understanding, entered into by plaintiff Berit Realty, LLC and defendant Vortex Group, Inc. on June 7, 2007, is valid and enforceable, and thus, the lien of defendant Vortex Group, Inc. imposed by Notice Under Mechanic's Lien Law, dated August 13, 2008 in the amount of $1,316,,271 is invalid; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 27, 2009

ENTER:

J.S.C.