SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _____ **PART** 3
Justice

Index Number : 650490/2012
APPLIED PROJECTS COMPANY, INC.
vs.
LIU, JOHN C.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 650490/12
MOTION DATE 2/13/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 **, were read on this motion to/for** dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	**No(s).** 1
Answering Affidavits — Exhibits	**No(s).** 2
Replying Affidavits	**No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7-9-13

_____, J.S.C.
EILEEN BRANSTEN
J.S.C.

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☑ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☑ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

----------X

APPLIED PROJECTS COMPANY, INC.

Plaintiff,

-against-

JOHN C. LIU in his capacity as COMPTROLLER OF THE CITY OF NEW YORK, DAVID J. BURNEY in his capacity as COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION, and THE CITY OF NEW YORK,

Defendants.

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Index No. 650490/2012
Motion Date: 2/13/2013
Motion Seq. No.: 001

BRANSTEN, J.

This matter comes before the Court on Plaintiff Applied Project Company, Inc.'s ("Applied") motion to dismiss Defendant New York City Department of Design and Construction's ("DDC") counterclaim pursuant to CPLR 3211(a)(1) and (a)(6). Defendants oppose. For the reasons that follow, Plaintiff's motion to dismiss is denied.

I. Background[1]

On June 9, 2008, Plaintiff Applied and Defendant DDC entered into a contract, under which Applied agreed to perform general construction and renovation work at the New York Theater Workshop Costume/Set Renovation Project. DDC alleges that it complied fully with the terms of the contract. (Answer ¶ 79.) However, DDC maintains

[1] The facts as described in this section are drawn from the Verified Answer unless otherwise noted.

that Applied failed to perform its obligations by, *inter alia*, performing defective work, failing to provide adequate manpower, delaying completion of its work, and failing to comply with directives issued by the construction manager. *Id.* ¶ 80.

Accordingly, DDC contends that it is entitled to recover liquidated damages from Applied pursuant to Article 15, Section 15.1 of the parties' contract. This liquidated damages provision states:

> In the event the **Contractor** fails to complete the **Work** within the time fixed for such completion in Schedule A of the General Conditions, plus authorized time extensions, or if the **Contractor**, in the sole determination of the **Commissioner**, has abandoned the **Work**, the **Contractor** shall pay to the City the sum fixed in Schedule A of the General Conditions, for each and every Day that the time consumed in completing the **Work** exceeds the time allowed therefore ... This article shall apply to the **Contractor** if it is defaulted pursuant to Chapter X of this **Contract**.

(Answer ¶ 81; Affirmation of Gregory J. Allen ("Allen Affirm.") Ex. A, § 15.1) (emphasis in original).

Plaintiff Applied disputes DDC's reading of Section 15.1, asserting that the liquidated damages provision is only triggered upon a finding that the Contractor – here, Applied – is in default. Such a determination may be made under Chapter X of the contract only under certain enumerated circumstances and only after providing the contractor notice and an opportunity to be heard. *See* Allen Affirm. Ex. A §§ 48.1, 48.2.

II. Analysis

Applied brings the instant motion pursuant to CPLR 3211(a)(1) and (a)(6). Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). CPLR 3211(a)(6) allows for dismissal of a counterclaim on the basis that it "may not be properly interposed in the action." Here, Applied's motion fails under both subsections of CPLR 3211(a).

Applied offers one argument for dismissal of DDC's counterclaim – that the liquidated damages sought by DDC are unavailing since Applied has not been found in default. This argument, however, is belied by the plain language of the contract. Section 15.1 first provides that the "Contractor shall pay" liquidated damages "[i]n the event the Contractor fails to complete the Work within the time fixed for such completion in Schedule A of the General Conditions, plus authorized time extensions . . ." or if the Contractor "has abandoned the Work." *See* Allen Affirm. Ex. A § 15.1. In either situation, under the unambiguous language of the contract, the Contractor is required to pay liquidated damages.

The next sentence of Section 15.1 provides: "This article shall apply to the Contractor if it is defaulted pursuant to Chapter X of this Contract." *Id.* Plaintiff contends that this sentence supplants the first and unambiguously renders liquidated

damages available only upon a finding of default. Such a reading, however, is not faithful to the language of the contract and would render the first sentence of Section 15.1 a nullity.

When interpreting contracts, "[a] familiar and eminently sensible proposition of law is that, when 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., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). "A written contract 'will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.' . . . The meaning of a writing may be distorted where undue force is given to single words or phrases." *Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 358 (2003).

The Court cannot read the second sentence of Section 15.1 in isolation. Instead, reading the first sentence with the second, and with the contract as a whole, the Court concludes that the contract unambiguously provides for the payment of liquidated damages upon a finding of default, as well as "[i]n the event the Contractor fails to complete the Work within the time fixed for such completion in Schedule A of the General Conditions, plus authorized time extensions . . ." or if the Contractor "has abandoned the Work." While Plaintiff may have preferred to receive notice and the ability to be heard before liquidated damages could be triggered under any circumstances,

such rights are not present in the contract as signed. "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *See, e.g., Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004). Accordingly, the Court declines to adopt Applied's reading of Section 15.1, and Applied's motion to dismiss DDC's counterclaim is denied.

III. Conclusion

Accordingly, it is

ORDERED that Plaintiff Applied Project Company, Inc.'s motion to dismiss Defendant New York City Department of Design and Construction's is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on August 20, 2013, at 10 AM.

Dated: New York, New York
July 9, 2013

ENTER:

Hon. Eileen Bransten