Bovis Lend Lease (LMB) Inc. v Lower Manhattan Dev. Corp.
2015 NY Slip Op 30631(U)
April 16, 2015
Supreme Court, New York County
Docket Number: 603243/2009
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

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BOVIS LEND LEASE (LMB) INC.,

Plaintiff,

-against-

Index No.: 603243/2009

LOWER MANHATTAN DEVELOPMENT CORPORATION,

DECISION & ORDER

Defendant.

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BOVIS LEND LEASE (LMB) INC.,

Third-Party Plaintiff,

-against-

ARCH INSURANCE CO.

Third-Party Defendant.

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SHIRLEY WERNER KORNREICH, J.

Motion Sequences 006 and 011 are consolidated for disposition.

Motions before the Court

This construction case arises out of the increased costs of the abatement and deconstruction of a building, 130 Liberty Street, New York, NY (Building), formerly known as the Deutsche Bank Building, which was damaged by the September 11, 2001 terrorist attack on the World Trade Center (9/11). The Building was further damaged by a tragic fire, on August 18, 2007 (Fire), that killed two New York City fire fighters. As a result of 9/11, the Building was contaminated with asbestos and other toxic substances. In addition, as the work on the Building progressed, human remains were discovered. The current motions concern the liability

of the surety on two performance bonds and a separate companion agreement executed by the surety after abatement costs greatly increased.

The facts underlying this action are stated in detail in this court's decisions and orders, dated May 9, 2011 (Dismissal Decision) and April 6, 2012. Docs 28 and 78.[1] For the sake of brevity, they will be repeated here only as necessary. The Dismissal Decision was modified to dismiss all of Bovis' delay damage claims against the LMDC and otherwise affirmed by the Appellate Division on May 31, 2013 (AD Decision).[2]

In Motion Sequence 006, the surety/third-party defendant, Arch Insurance Company (Arch), moves for summary judgment dismissing the third-party complaint filed by the obligee/construction manager/third-party plaintiff, Bovis Lend Lease (LMB), Inc., n/k/a, Lend Lease (US) Construction LMB Inc. (Bovis). Arch is the surety for The John Galt Corporation (Galt), Bovis' subcontractor. The ground for Arch's motion is that, as a matter of law, Arch has no liability under the two performance bonds that it issued in March 2006. Bovis opposes.

In Motion Sequence 011, Bovis moves for partial summary judgment on liability against Arch under the two bonds and a companion agreement, dated as of February 5, 2007 (Companion Contract). Arch opposes and cross-moves for summary judgment dismissing Bovis' third-party complaint to the extent that it seeks recovery of damages under the Companion Contract for costs incurred by any entity other than The John Galt Corp. (Galt), the principal named in the Arch bonds, or any work performed by contractors other than Galt.

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[1] References to "Doc" filed by a number refer to documents in this action filed in the New York State Courts Electronic Filing System.

[2] *Bovis Lend Lease (LMB), Inc. v Lower Manhattan Dev Corp.*, 108 AD3d 135 (1st Dept 2013).

Background

In October 2005, Bovis, as Contractor, entered into a contract with LMDC, as Owner (Prime Contract), for the abatement and deconstruction of the Building (Project). Doc 171. On February 13, 2006, Bovis, as Construction Manager, entered into a $25,000,000 contract with Galt, as Contractor, for deconstruction of the Building (Deconstruction Contract). Doc 528. On February 21, 2006, Bovis and Galt entered into a second, $33,500,000 contract for "Removal of ACM and World Trade Center dust materials" at the Building (Abatement Contract, with Deconstruction Contract, Trade Contracts). Doc 528. On March 10, 2006, Arch issued a performance bond, in the penal amount of $25,000,000, naming Galt, as principal, and Bovis, as obligee, which guaranteed Galt's performance under the Deconstruction Contract (Deconstruction Bond).[3] Doc 529. On the same day, Arch issued a performance bond, in the penal amount of $33,500,000, which guaranteed Galt's performance under the Abatement Contract (Abatement Bond, with Deconstruction Bond, Bonds). Doc 529.

Galt has been convicted of second degree reckless endangerment for knowingly dismantling the Building's standpipe, which supplied the only source of water to put out a fire. Doc 611, *People v The John Galt Corporation*, Indictment No. 6425/008, Decision & Order, dated10/18/11, Uviller, J., (Criminal Decision). The standpipe was dismantled eight months before the Fire occurred in the Building. *Id.* The Criminal Decision found that Galt had a duty to maintain the standpipe, pursuant to its contract with Bovis. *Id.*

Two of Bovis' site safety managers admitted, during depositions in this case, that prior to the Fire, one of them, who thought that he had inspected the standpipe daily, was in fact

[3] The Deconstruction Bond erroneously states that the Deconstruction Contract was entered into on February 21, 2006, instead of February 13, 2006.

inspecting the wrong pipe.[4] The record also contains admissions by Bovis that it didn't realize, until after the Fire, that the drawings that LMDC had supplied at the start of the job were inaccurate with respect to the location of the standpipe.[5]

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[4] One Bovis Site Safety Manager, Ray Master testified:
Q. ... did you discuss with Mr. Melofichik how he missed a 42-foot breach in the standpipe – horizontal standpipe in the upper basement of the Deutsche Bank building?
A. Yeah, I believe I probably certainly did.
Q. And what did he say?
A. He had no idea that that section was the standpipe or that was part of the standpipe system.
Doc 163, p 267.

Another Bovis Site Safety Manager, Jeffrey Melofichik testified that he failed to inspect the portion of the standpipe that was cut before the Fire:
Q. Did you inspect the portion the standpipe in the basement of the Deutsche Bank building?
A. I inspected what I believe was the whole standpipe in the basement, yes.
Q. What do you mean when you say you inspected what you believed was the whole portion of the standpipe in the ... building?
A. Like I said, when I got there I walked that standpipe during phase one with Randolph Arfsten because he was doing his inspection. It came down into the basement .... Siamese on the east to us it went into a soffit hit the concrete wall because it was a closet you could look in, see a pipe, with that pipe somewhere in that soffit there was a T that wasn't on any of the maps and that's the section of the standpipe that was cut during the abatement. ...
Q. ... When you say you thought that you inspected the portion of the standpipe in the basement ... what did you mean?
A. Well, what I was shown to be the standpipe ***I inspected every day***.
Q. Were you looking at the wrong pipe?
A. No, it was the standpipe, ... the pipe we were looking at going into the concrete wall was not the Siamese, it made a T in there or a turn. ...
Q. Let me go back to that a minute just so I understand correctly. You inspected a portion of the standpipe in the Deutsche Bank building, but not all of the standpipe...? ...
A. I inspected what I thought was a standpipe.
Q. Right.
A. I later on found out there was another piece none of us knew about.
Q. ... Basically you inspected what you believed at the time to be the entire force of the standpipe in the basement of the ... building, correct?
A. Correct.
Q. That turned out not to be accurate?
A. Correct.
Doc 162, pp 305-307 [emphasis supplied].

[5] Bovis' Project Manager, Ernest John Ignacio testified:
Q. This is an e-mail drafted by you dated September 1, 2007; is that correct sir?
A. Yes.
Q. And in this e-mail you write, while reviewing the standpipe system it has become clear that the system was modified prior to Bovis/Galt's acceptance of the building. Do you see that sir?
A. Yes.
Q. What had you undertaken to do that resulted in you concluding that it was clear that the system was modified prior to acceptance of the standpipe?

On August 28, 2007 (Termination Date), by notice to Galt and Arch, Bovis terminated the Trade Contracts for default and called upon Arch to complete the Work described in the Trade Contracts, pursuant to the terms of the Bonds (Default Notice). Doc 532. In the Default Notice, Bovis requested a meeting in its New York offices with Arch on August 30, 2007 (August Meeting). *Id.* The next day, August 29, at a Community Board Meeting, Bovis' Executive Vice President, Mark Melson, publicly stated that Galt's Trade Contracts were terminated; that neither Galt, nor any of Galt forces, were working on the Project; and that they would never work on it again. Doc 192, at Bates BOV 644680, BOV 644698 & BOV 644709.

It is undisputed that Arch and Galt, as well as their counsel, appeared at the appointed time and place for the August Meeting, but Bovis refused to allow Galt or its counsel to participate. They waited down the hall, and Bovis gave Galt's representatives a room in which to speak with Arch afterward. At the August Meeting, Bovis told Arch that Galt would not be allowed back on the site to complete the Project. James Abadie, a Bovis Senior Vice President and the principal in charge of its New York office, admitted at his deposition that Bovis told Arch that its use of Galt as completion contractor was off the table and that Bovis never changed its position on that subject. Doc 149, EBT James Abadie, pp 448-453.

A. I performed the survey of the standpipe system in basements A and B and compared them to the original drawings of the building, which were circa 1970 or something like that, and it was obvious that they were different.
Q. And these original drawings that you were provided, you were provided with those by LMDC?
A. Yes.
Q. And the drawings provided by LMDC did not accurately reflect where the standpipe was located in the building.
...
A. That's correct. ...
Q. Do you recall with any specificity how the location of the standpipe in the basement differed from what was shown in the drawings? ...
A. I know that in at the bottom of the ramp in cellar A it was almost the full column bay off from where it should be or where it was noted on the drawings.
Doc 169, pp 795-797.

On October 5, 2007, Arch wrote a letter to Abadie (October Letter). Doc 193. Arch claims that in the October Letter, it reserved its rights to challenge its liability under the Bonds on the ground that it was barred by Bovis from using Galt or its forces to complete the Project. Bovis argues that the October Letter only served to reserve Arch's right to contest Bovis' right to terminate Galt under the Trade Contracts. Arch's October Letter said, *inter alia*:

> This letter will confirm Arch's position in response to Bovis' Notice of Termination for Default dated August 28, 2007, wherein, among other things, Bovis terminated Galt for alleged default under the two captioned Trade Contracts and demanded that Arch, as surety for Galt, complete Galt's remaining work under the terms of Arch's performance bonds.
>
> Following Galt's termination, and at the request of Bovis, Arch met with Bovis on August 30, 2007 and, since that meeting, Arch has been monitoring Bovis' efforts to secure bids from potential replacement contractors ***in light of Bovis' stated position that it will not allow Galt to complete the remaining work***....
>
> Based on its knowledge of the facts and its understanding of the law, Arch believes that a genuine issue exists as to whether Bovis properly terminated Galt under the Trade Contracts....
>
> However, as representatives of the Office of the Mayor, Office of the Governor and LMDC made clear to Arch representatives at the meeting held on January 29, 2007, in light of this project's importance to the redevelopment of "Ground Zero," the project cannot await the outcome of Gait's wrongful termination suit. In the circumstances, ***without in any way admitting what liability Arch may ultimately have*** in this matter, ***but in an effort to assist in the mitigation of any potential damages*** that may be asserted by any party, ***Arch is prepared to proceed as follows***:
>
> ***While reserving all of its and Galt's rights and upon reaching an agreement with respect to the four items outlined below, Arch is prepared to proceed under paragraph 2 of its Performance Bonds, namely, to determine jointly with Bovis who is the lowest responsible bidder, to arrange for a contract between such bidder and Bovis, and to make available as the work progresses sufficient funds to pay the cost of completion for each Trade Contract less the balance of funds remaining under each Trade Contract limited, of course, to the penal amount of each respective Arch performance bond.... This correspondence and all prior or subsequent communications and/or investigative efforts are made with the express reservation of all rights and defenses which Arch or Galt has or may have at law, equity or under the terms and provisions of the performance bonds and contract documents, or otherwise.*** It is expressly understood

> that the foregoing reservation ***includes*** Galt's wrongful termination claims against Bovis and Bovis' claims against LMDC for its breach of contract for non-payment.

Doc 193 [emphasis supplied]. On its face, the October Letter reserves all of Arch's "rights and defenses" under the Bonds, and "contract documents," not just Arch's claim that Bovis wrongfully terminated of Galt, which was included in the rights and defenses that Arch reserved.

Bovis' third-party complaint against Arch contains three causes of action, numbered here as in that pleading: 1) indemnification for any judgment against Bovis on LMDC's counterclaims in the main action; 2) breach by Arch of the Companion Contract; and 3) breach of the Bonds.

Discussion

A. Arch's Liability under the Bonds -3rd Cause of Action

Arch's motion (Seq 006) seeks, *inter alia*, dismissal of the 3rd cause of action in Bovis' third-party complaint on the ground that it is discharged from liability under the Bonds because Bovis' interfered with its right to use Galt or its forces as the completion contractor pursuant to option 1 in the Bonds. Bovis opposes on the ground that Arch did not tender completion with Galt or its forces, and could not have used Galt to complete under the Terms of the Trade Contracts. Alternatively, Bovis opposes on the ground that whether Arch tendered Galt or its forces is a question of fact. Arch's motion is granted.

The Bonds have identical provisions, except for the amount and the identification of the relevant Trade Contract.[6] The Bonds provide that:

> The Surety [Arch] agrees that no change, extension of time, alteration, addition, omission or other modification of the Contract Documents, as specified in the Contract, shall in any way affect its obligations under this Bond, and the Surety

[6] The Bonds are the standard form A311 promulgated by the American Association of Architects.

hereby waives notice of any such changes, extensions of time, alterations, additions, omissions or other modifications.

> Whenever the Principal [Galt] shall be, and declared by Obligee [Bovis] to be in default, in breach, and/or have failed to perform in any manner under the Contract, the Obligee having performed its obligations thereunder, the Surety [Arch] shall promptly remedy the default by one of the following:
>
> 1. Complete the Contract in accordance with its terms and conditions.
>
> 2. Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by Surety of the lowest responsible bidder, or if the Obligee elects, upon determination by the Obligee and the Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and Obligee, and make available as Work progresses...sufficient funds to pay the cost of completion less the balance of the Contract price, but not exceeding including other costs and damages for which the Surety may be liable hereunder, and pursuant to the Contract, the amount set forth in the first paragraph hereof The term "balance of the Contract price," as used in this paragraph, shall mean the total amount payable by Obligee to the Principal under the Contract and any amendments thereto, less the amount properly paid by Obligee to the Principal.
>
> 3. Pay to Obligee the full amount of the penal sum above stated....
>
> Principal and Surety shall not be liable to the Obligee unless the Obligee has performed its obligations to the Principal in accordance with the terms of said Contract.

Doc 529.

Surety bonds are contracts and should be "construed according to their terms." *Walter Concrete Construction Corp. v Lederle Laboratories*, 99 NY2d 603 (2003). A court should give meaning to all terms of a contract [*William Press, Inc. v State*, 37 NY2d 434 (1975) (contracts should be read as whole)] and not adopt a construction that renders portions of a contract

meaningless. *Id*; *General Electric Co. v Hatzel and Buehler, Inc.*, 19 AD2d 40 (1st Dept. 1963), aff'd 14 NY2d 639 (1964).

The court grants summary judgment dismissing the third cause of action in Bovis' third-party complaint, which alleges that Arch breached the Bonds. It is well established that where an obligee [Bovis here] deprives a surety of its ability to protect itself with options contained in a performance bond, there is a material breach of the bond that renders it null and void. *Tishman Westside Construction LLC v ASF Glass, Inc.*, 33 AD3d 539 (1st Dept 2006) (surety discharged from liability on bond because plaintiff materially breached by failing to provide surety with opportunity to exercise completion options under paragraph 4);[7] *St. Paul Fire & Marine Ins. Co. v VDE Corp.*, 603 F3d 119, 123 (1st Cir Puerto Rico 2010) (unless bond provides otherwise, surety free to choose completion contractor and obligee's interference with surety's choice is material breach rendering bond null and void); *Elm Haven Constr. Ltd. P'ship. v Neri Constr. LLC*, 376 F3d 96, 101 (2d Cir 2004) (surety's performance under bond excused because obligee/general contractor deprived surety of completion options by hiring a completion contractor before allowing surety to elect option); *Hunt Constr. Group, Inc. v Nat'l Wrecking Corp.*, 542 F Supp2d 87 (DC Distr Ct 2008) (surety discharged because obligee prevented surety

[7] Bovis argues that *Tishman* did not set forth the bond language or facts underlying the opinion. Bovis Memo, Doc 525, p 17, fn 2. However, the lower court opinion makes clear that one ground for granting summary judgment excusing the surety was that the general contractor deprived the surety of its options for choosing the completion contractor. *Tishman Westside Construction LLC v ASF Glass, Inc.*, Index No 601738/2003 (Sup Ct NY Co 5/23/05), p 8 (Moskowitz, J) (nor). Paragraph 4 gave the surety options to: 1) select the principal as the completion contactor with consent of the owner (i.e., the general contractor), 2) complete the contract itself; 3) obtain bids or proposals from other contractors acceptable to the owner; or 4) waive its right to complete. However, prior to declaring the subcontractor in default, the general contractor notified the surety that it had already hired the completing contractors. The Appellate Division affirmed, holding that "RLI was discharged from its liability on its surety bond because plaintiff materially breached its contractual duties to RLI by failing to provide RLI with the opportunity to exercise its options under paragraph 4 of the bond...." *Tishman, supra*, 33 AD3d 539, 540.

from exercising options by permitting principal to complete without giving surety opportunity to choose among bond's completion options); *120 Greenwich Dev Assocs., LLC v Reliance Ins. Co.*, 2004 U.S. Dist. LEXIS 10514, 25-26 (S.D.NY June 7, 2004), citing *Vandegrift v Cowles Engineering Co.*, 161 NY 435, 443-444 (1900) (if impossibility of performance arises directly or indirectly from acts of promisee, it excuses non-performance by surety and ***tender is not required where there is refusal in advance*** to comply with terms of contract); *St. Paul Fire and Marine Ins. Co. v City of Green River, Wyo.*, 93 F Supp2d 1170, 1178 (WY Distr Ct 2000) ("courts have consistently held that an obligee's action that deprives a surety of its ability to protect itself pursuant to performance options granted under a performance bond constitutes a material breach, which renders the bond null and void."); *Fid. & Deposit Co. of Md. v Jefferson County Comm'n.*, 756 F Supp2d 1329, 1335-1337 (ND AL 2010) (surety discharged by refusal of obligee to let surety complete using defaulted principal's forces where obligee's consent not required for that option); *See also*, 4A *Brunner & O'Connor Construction Law* §12:80, p 3 ("The obligee has no right to unreasonably interfere with the surety's selection of its completion contractor, unless the bond provides otherwise."); 8-38 Corbin on Contracts § 38.7 (in aleatory contracts[8] such as suretyship, the promisor's, i.e., surety's, duty is "by operation of law constructively conditioned upon the other party's (obligee's) not materially increasing the risk, as opposed to the obligee's performance of an obligation to the surety").

[8] An aleatory contract is one in which mutual promises of performance are not present, but instead, "one party's promise is conditional upon the happening of some uncertain fortuitous event." 8-39 *Corbin on Contracts* §38-1, p1. In the case of suretyship arising from a construction bond, the surety's obligation is conditional upon future non-performance by the principal. 8-38 Corbin on Contracts § 38.7 As a result, a surety may be discharged when the plaintiff increases the surety's risk. *Id.*

Here, option 1 of the Bonds permitted Arch to complete the Trade Contracts according to their terms. Unless the language of a bond provides otherwise, when a surety chooses the option to complete the contract itself, it can choose any contractor, including the defaulting principal. When the surety elects to complete the contract itself, it assumes primary liability, which comes with the freedom to choose the completion contractor. *St. Paul Fire & Marine Ins. Co. v VDE Corp.*, 603 F3d 119, 123 (1st Cir 2010); *see also, Brunner & O'Connor Constuction Law, supra*, p 10 (surety has discretion to award completion contract to defaulted principal). "It is common practice for a surety undertaking to complete the project itself to hire the original contractor." *St. Paul v VDE, supra* at 124.

The surety's completion option choice has financial consequences for a surety. When the surety elects to complete the contract itself, its chosen completion contractor becomes the surety's agent. *St. Paul Fire & Marine Ins. Co. v VDE Corp., supra* at 124. If the surety chooses the defaulted principal, the role of the principal shifts from contractor to agent of the surety. *Id.* The surety maintains control by choosing to complete, but it may become liable for costs in excess of the bond, unless there is an agreement limiting completion costs to the penal sum of the bond. *Brunner & O'Connor, supra* at p 5-8. Where the surety instead elects to permit the obligee to select the completion contractor, it usually results in the highest completion costs to the surety, because it has no control over the completion costs or contractor. 5-17 *Construction Law* ¶17.07, §8(a), pp 8-9, Matthew Bender © 2014.

Bovis argues that Arch must prove that it affirmatively tendered performance under option 1, which it did not, or, alternatively, whether it did is a question of fact. However, as a matter of law, when the obligee does something in advance that prevents the surety from

exercising its options under a bond, tender of performance under that option is not required. For example, in *Hunt*, *supra*, the obligee allowed the defaulting principal to complete and leave the site before the surety was notified of the default. Under the bond in *Hunt*, the surety had two options: 1) promptly remedy the default; or 2) after notice to the surety from the obligee, allow the obligee to arrange for completion. The court granted summary judgment to the surety, holding that when the obligee arranged for completion before giving the surety notice, the surety was deprived of completion option 1 and the bond was discharged. In other words, depriving the surety of its choice of options invalidated the bond, even though there was no tender of performance under that option by the surety. Similarly, in *120 Greenwich Development*, *supra*, the surety argued that the obligee made performance by the surety under the bond impossible because the obligee took over the principal's work under the contract without telling the surety. The court held that if the obligee/owner failed to notify the surety of the principal's default and surreptitiously took over its work, that conduct would be active interference with the surety's right to elect from its possible completion options under the bond. Summary judgment was denied in *120 Greenwich* because there were conflicting affidavits as to whether or not the principal's work was secretly performed by the obligee. *Id.*[9]

[9] Although Bovis relies heavily on *Walter Concrete Construction Corp. v Lederle Laboratories*, 99 NY2d 603 (2003), that decision determined only that the surety was liable, despite lack of notice that the principal had been declared in default. The facts in *Walter* were that the surety had been notified by the obligee/general contractor that the subcontractor was in default by an impleader served on the surety two months after the default, but before the work was completed, yet the surety did nothing. The surety then raised lack of notice as a defense. The Court of Appeals did not address depriving the surety of its completion options, but held the surety liable on the bond because notice was not a condition precedent to the surety's liability under the provisions of the bond at issue. Bovis extrapolates that if the surety is not entitled to notice under the terms of the Bonds, which is the case here, it does not matter if Bovis interfered with Arch's performance options. That, however, would read Arch's performance options out of the Bonds. All that *Walter* held was that lack of notice was not a condition precedent to liability under the bond. It never reached the performance option issue that Arch raises here.

In this case, it is undisputed that, two days after it sent the Default Notice, Bovis told Arch in no uncertain terms that Galt would not be allowed to work on the Project. The distinction as to whether the option is taken away from the surety through lack of notice, as in *Hunt* and *120 Greenwich*, or through an announcement by the obligee that it will not accept a particular completion contractor that the surety has an option to select, as here, is a distinction without a difference. Either way, the obligee interferes with the surety's choices, which materially breaches the bond.

Bovis also urges that Arch could not have chosen Galt to complete the Project because Galt was not a responsible contractor. Paragraph 5.8 of the General Conditions of the Prime Contract, which was incorporated by reference into ¶8 of each Trade Contract, provided that, prior to employment, all subcontractors had to be submitted to and accepted by Bovis. Doc 528, General Conditions, §5.8, p 6. However, in the event that Arch used Galt or its forces to complete the Project, Galt would not have been Arch's subcontractor. As previously noted, when a surety elects to complete its principal's contract, the surety is primarily responsible for completion, and the contractor chosen by the surety to do the work becomes the surety's agent, not its subcontractor. *St. Paul v VDE, supra* at 124. *Crystal Lake Condominium Association v Colonial Surety Co.*, 2005 WL 1153732 (CT Superior Ct 4/13/05), cited by Bovis is inapposite because there the surety imposed a condition on the obligee in the takeover agreement (payment of certain monies) that the obligee was powerless to accept because all payments had to be approved by another party. Here, Arch imposed no conditions for Bovis to accept. Rather, within two days of the Default Notice, Bovis interdicted Arch's selection of Galt or its forces.

Bovis additionally contends that the LMDC would not have found Galt to be a responsible bidder. Again, Galt would have been Arch's agent, not a bidder. There is no language in the Bonds that suggest that LMDC could dictate Arch's choice of contractor under option 1. No bids are involved in option 1. Bids relate to option 2.

Finally, Bovis argues that the October Letter only reserved Arch's right to contest whether Galt was properly terminated under the Trade Contracts and that Arch failed to reserve its rights to disclaim on the ground that Bovis deprived Arch of option 1. The court disagrees. As a matter of law, where an insurer reserves its rights, it can later disclaim on a different ground than the one set forth in its reservation of rights. *Federated Department Stores, Inc. v Twin City Fire Insurance Co.*, 28 AD3d 32, 38 (1st Dept 2006), citing *Village of Waterford v Reliance Insurance Co.*, 226 AD2d 887, 891 (3d Dept 1996).

Even were this not the law, the court finds Arch's reservation of rights ***was not*** limited to contesting whether Bovis properly terminated Galt under the Trade Contracts. The October Letter expressly reserved Arch's rights and defenses "***under the terms and provisions of the performance bonds and contract documents.***" Doc 193. Arch expressly reserved its rights and defenses under the Bonds. Bovis unjustifiably reads the language regarding the Bonds out of the October Letter, which expressly reserved ***all*** of Arch's rights, including its right to choose Galt as a completion contractor under option 1. *Id.* The October Letter noted that Arch was proceeding under option 2 "***in light of Bovis' stated position that it will not allow Galt to complete the remaining work***...." There is no evidence in the record that Bovis, at any time, has disagreed with the statement that it would not allow Galt or its forces to complete the Project.

As a result, summary judgment is granted in Arch's favor dismissing the third cause of action in Bovis' third-party complaint. The record establishes as a matter of law that Bovis interfered with Arch's options under the Bonds. Contrary to Bovis' position, the lack of an "affirmative election" by Arch to use Galt or its forces is not the issue. Nor is there an issue of fact as to ***whether Bovis interfered with Arch's options*** under the Bonds. The record is clear that it did when, among other things, it told Arch that Galt was not an option. Bovis does not deny that. On a motion for summary judgment, uncontradicted facts are deemed admitted. *Costello Associates, Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 (1st Dept. 1984), appeal dismissed, 62 NY2d 942 (1984). Bovis, thus, admits that it interfered with Arch's options. In addition, the deposition testimony of Abadie and Melson's statements on the transcript of the Community Board meeting are admissions by Bovis that it would not permit Galt or its forces to complete the Project. Doc 192, Bates BOV 644680, BOV 644698 & BOV 644709; Doc 149, EBT James Abadie, pp 448-453. In sum, there is no issue of fact as to whether Bovis interfered with Arch's options. As the Bonds are discharged due to Bovis' material breach, the prong of Arch's motion for summary judgment is granted to the extent that it seeks dismissal of the third cause of action in the third-party complaint for breach of the Bonds.

Moreover, the prong of Bovis' motion for summary judgment against Arch for project completion costs and other damages resulting from Galt's default under the Trade Contracts, is dismissed to the extent that it rests on Arch's liability under the Bonds. Bovis admits that Arch's liability for Galt's breach of the Trade Contracts depends on the enforceability of the Bonds -- "Arch is responsible ***under the Bonds*** for any amounts Galt owes Bovis arising out of Galt's default under the Trade Contracts." Bovis Memo of Law, Doc 382, p 4 [emphasis supplied]

Arch is not liable under the Bonds because they are null and void. To the extent that Bovis asserts that Arch's liability for Galt's default under the Trade Contracts arises from the Bonds, Arch is not liable because the Bonds are discharged.[10]

B. Arch's Liability under the Companion Contract – 2d Cause of Action

As of February 5, 2007, Bovis and LMDC entered into a Supplemental Agreement (Supp Contract). Doc 530. Contemporaneously with the Supp Contract, Arch, Bovis, Bovis' sureties and Galt, entered into the Companion Contract, also dated as of February 5, 2007. Doc 531.

Bovis' summary judgment motion asserts that, pursuant to the Companion Contract, Arch is liable for: 1) Arch's share of excess "Actual Costs of Gross Cleaning over the Base Gross Cleaning Amount" that were funded by Bovis under the Supp Contract; and 2) Arch's share of any amounts that Bovis is ultimately required to pay to LMDC under the Supp Contract as a result of this Litigation. Bovis Memo of Law (Seq 011), Doc 382, p 2. Essentially Bovis claims that Arch's obligations under the Companion Contract are independent of its obligations under the Bonds, and that Arch must pay Bovis whatever Bovis must pay LMDC under the Supp Contract as a result of this Litigation.

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[10] The court agrees that Arch is bound on collateral estoppel principles to the criminal court's finding that Galt had a contractual obligation to maintain the standpipe and failed to do so. Collateral estoppel bars relitigation where the identical issue was decided in a prior proceeding and the party against whom estoppel is sought had a full and fair opportunity to contest it. *Schwartz v Public Administrator*, 24 NY2d 65 (1969). In the criminal trial, Galt had a full and fair opportunity to contest its contractual obligation to maintain the standpipe. Arch, as Galt's surety, is bound by that determination. *Azevedo & Boyle Contr., Inc. v J. Greaney Constr. Corp.*, 285 AD2d 571, 572 (2d Dept 2001) (for collateral estoppel purposes, surety stands in shoes of principal); *QDR Consultants & Dev Corp. v Colonia Ins. Co.*, 251 AD2d 641, 643 (2d Dept 1998), *appeal den* 92 NY2d 814 (1998) (same holding). Further, the court agrees with Bovis that failing to maintain the standpipe was a ground to terminate Galt under the Trade Contracts, General Conditions, §6.1.4, pursuant to which "any ... failure by [Galt] to perform any other term or condition" was an Event of Default. Doc 528, Bates BOV099666. However, Galt's breach does not change the fact that Arch is not responsible for it under the Bonds. Galt breached, but the Bonds are unenforceable against Arch due to Bovis' material breach of the Bond's provisions.

Arch counters, both in its affirmative motion (Seq 006) and in opposition to Bovis' motion (Seq 011), that Arch's liability under the Companion Contract is contingent on its liability under the Abatement Bond. Arch Memo of Law (Seq 011), Doc 420, pp 21-22; & Arch Memo of Law (Seq 006), Doc 258, pp 16-17. Arch argues that, as the Abatement Bond is null and void (for the reasons stated in Part A of the Discussion above), Arch has no liability under the Companion Contract. *Id.* In addition, Arch's cross-motion (Seq 011) urges that it is entitled to summary judgment to a ruling that its liability, if any, under the Companion Contract is limited to "costs incurred by Galt" for "Galt's Work", the latter of which it interprets as meaning work that Galt actually performed. Arch contends that costs incurred by Galt never exceeded the $65 million threshold for Arch's liability under the Companion Contract. Arch's Memo of Law (Seq 011), Doc 420, pp 5 & 7-8. Finally, Arch argues that Galt's Work under the Abatement Contract was not synonymous with the definition of Bovis' Work under the Prime Contract.

The Supp Contract states that it was intended to resolve a dispute as to whether LMDC owed Bovis payments for extra work under the Prime Contract for increases above a defined "Base Gross Cleaning Amount" of $35 million for the costs of "Gross Cleaning". "Gross Cleaning" was defined as "gross cleaning, abatement and decontamination of the Building, including Work related to potential human remains...." Doc 530, Supp Contract, §1(a). Arch signed the Supp Contract under the following language:

> THE UNDERSIGNED surety to Galt hereby consents to the foregoing and agrees that the payment and performance bonds issued to Galt for the Project remain in full force and effect.

Supp Contract, Doc 530, Bates LMB0253435.

Pursuant to the Supp Contract, LMDC and Bovis agreed to fund the ongoing "Actual Costs" of abatement work above $35 million, forego interim arbitration of their contractual disputes, while reserving certain claims against each other for future litigation (Litigation) upon completion of the Project. Supp Contract, §6. This action is the Litigation.

The pertinent portions of the Supp Contract, relating to "payments or costs" for which Bovis and LMDC agreed to be responsible follow:

> 1. ... (b) Main Terms of Agreement. The following payments or costs will be made or assumed pursuant to this Agreement by the party or parties indicated:
>
> > (i) LMDC - the "$9.7 Million Amount" described in par. 2(a);
> > (ii) LMDC - the "$6 Million Amount" described in par. 2(b);
> > (iii) LMDC the "Advances" described in par. 2(e)(iii) and 2(c)(v);
> > (iv) Contractor [Bovis] - the costs described in par. 2(c)(iv); and
> > (v) LMDC and [Bovis] - equal portions of the "Shared Excess Costs" described in par. 2(e)(vi). ...
>
> 2. Payment Terms and Sharing of Risks.
>
> (a) The "$9.7 Million Amount" is calculated to be the amount incurred by [Bovis] for the Actual Costs (as defined below) of the Contested Work in excess of the allocated portion of the Base Gross Cleaning Amount for Gross Cleaning completed before February 3, 2007.... The $9.7 Million Amount is nonrefundable (but subject to audit, as provided below) *and [Bovis] shall be entitled to retain the $9.7 Million Amount no matter the outcome of any litigation.*
>
> (b) LMDC shall pay for Gross Cleaning performed after February 3, 2007 on an Actual Cost basis. After completely paying out the Base Gross Cleaning Amount and the $9.7 Million Amount, LMDC shall pay the next $6 million (the "$6 Million Amount") of Actual Costs of Gross Cleaning as part of [Bovis'] normal requisition process on a non-refundable basis, but subject to audit. ... If [Bovis] fails to achieve Deconstruction Completion by December 31, 2007 (not to be extended for Excusable Delay or any other delay), the $6 Million Amount shall be automatically deemed paid as an Advance (defined below) instead of a non-

refundable payment, and the $6 Million Amount shall be subject to the provisions of par. 6 hereof on the same basis as any other Advance.[11]

(c) The excess of any Actual Costs of Gross Cleaning over the Base Gross Cleaning Amount shall be allocated as follows:

(i) From zero to $9,700,000, LMDC shall pay the $9.7 Million Amount described in par. 2(a);
(ii) From $9,700,001 to $15,700,000, LMDC shall pay the $6 Million Amount described in par. 2(b);
(iii) from $15,700,001 to $30,000,000, LMDC shall pay such Actual Costs as an advance;
(iv) from $30,000,001 to $32,000,000, [Bovis] shall bear and pay such Actual Costs without reimbursement (and ***such amount shall not be subject to contest in any litigation***);
(v) from $32,000,001 to $40,000,000, LMDC shall pay such Actual Costs as an advance; and
(vi) over $40,000,000 (such amounts in excess of $40 million, the "Shared Excess Costs"), such Actual Costs shall be allocated 50% to [Bovis] and 50% to LMDC in accordance with par. 2(d).

(Any and all advances pursuant to this par. 2(c) are referred to as "Advances.") ...

(d) LMDC shall pay its share of the Shared Excess Costs (the "LMDC Excess Portion") monthly on a non-refundable basis. ***The Shared Excess Costs shall not be part of the Dispute described in par. 6 below and are not subject to contest in any litigation.*** ...
(f) The $9.7 Million Amount, the $6 Million Amount, the Advances and the Shared Excess Costs shall include only Actual Costs (as defined below) without markup. Subject to par. 6(e) below, [Bovis] will forego all profit relating to such amounts, as well as compensation for all administrative or other costs which are not Actual Costs (defined below), in the $9.7 Million Amount, the $6 Million Amount, the Advances and the Shared Excess Costs.
(g) "Actual Costs" means all necessary direct costs of Gross Cleaning, including Labor (as defined in Article 8 of the General Conditions to the [Prime Contract]), Materials (as defined in Article 8 of the General Conditions to the [Prime Contract], permitting fees and costs, trucking, one on-staff engineer for engineering relating to the Gross Cleaning, equipment rental (including crane), insurance, utility costs, and supplies required for

[11] The Project was not completed until 2011. AD Decision, 142. Hence, the $6 million became an Advance by LMDC.

the completion of the Work. [Bovis] and all Subcontractors will be treated as a single cost center – i.e., there will be no separate markups between Subcontractors and/or [Bovis].... [4]

6. ***Litigation After Final Completion: Repayment of Advances if Bovis Unsuccessful.***
(a) LMDC and Bovis agree to forego Interim Arbitration under the [Prime Contract] relating to whether and to what extent [Bovis] may be entitled to compensation for the Contested Work (the "Dispute"). Rather, if LMDC and [Bovis] are unable to resolve the Dispute through negotiation, LMDC and [Bovis] agree to resolve the Dispute through litigation to be commenced by [Bovis] subsequent to Final Completion ... (the "Litigation"). In such Litigation, [Bovis] shall bear the burden of proving that [Bovis] is entitled to compensation for the Contested Work. Nothing in this Agreement shall preclude either party from making any claims in the Litigation. ...
(b) If [Bovis] obtains a judgment - final beyond appeal in the Litigation which establishes that [Bovis] was not entitled to be paid an amount equal to or greater than the total of all amounts paid by LMDC pursuant to this Agreement for the Gross Cleaning (the "Total Gross Cleaning Payments"), then [Bovis] shall repay to LMDC ... an amount equal to the difference between the Total Gross Cleaning Payments (other than any amounts which are non-refundable under this Agreement) and the amount of [Bovis'] final entitlement to payment for all of the Gross Cleaning as established in the Litigation. ...

7. Consent of Surety; Insurance and Indemnity.

The respective sureties of [Bovis] and Galt hereby consent to the terms of this Agreement and agree that the penal sums under their respective bonds shall not be reduced by the terms of this Agreement, or by the payments of any amounts by LMDC pursuant to this Agreement, and that ***the obligations of such sureties under their respective bonds are unaffected by this Agreement and remain in full force and effect.*** The insurance and indemnity provisions of the original [Prime Contract] will remain in effect without change. The penal sum of the Bonds shall not be increased by any amounts to be paid by LMDC pursuant to this Agreement.

[4] Actual Costs will include salaries of site personnel up to and including general superintendent (including required bonuses for superintendents of Galt (defined below) not to exceed $100,000 in the aggregate, subject to LMDC's

> approval) but no off-site personnel or other off-site costs of any kind, other than purchase of materials and equipment (or rental thereof for use on the site or the salary of one full-time bookkeeper for Galt dedicated to the Gross Cleaning and the salary of Galt's comptroller during periods when such officer spends his/her full-time on the Gross Cleaning, as same are allocable to the payment of Actual Costs for Gross Cleaning.

Supp Contract, Doc 530, [emphasis supplied][12]

Thus, any Advances by Bovis of "payments or costs" were set at a threshold of $65 million, i.e., more than $30 million above the Gross Cleaning Amount of $35 million. Paragraph 2(c) (iv) required Bovis to advance excess costs from $65 to $67 million, not subject to recoupment in the Litigation. Final liability of Bovis to repay Advances by LMDC was left to this Litigation. Of the excess costs subject to recoupment in this action, LMDC agreed to advance $28.3 million of the first $40 million. In its motion for summary judgment, Bovis seeks a ruling that Arch must pay whatever amounts Bovis must pay to LMDC as a result of this Litigation.

The Companion Contract recites that the parties to the agreement "intend to be bound to each other and to resolve their disputes consistent with the terms of the" Supp Contract. The Companion Contract states:

> Unless otherwise defined herein, "words and phrases" in the [Prime Contract] and the [Supp Contract] have the same meaning in this Companion Contract.

Doc 531, Companion Contract, fn 1.

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[12] Certain amounts that LMDC and Bovis agreed to Advance under the Supp Contract are excluded from this Litigation. Specifically, LMDC's payment of $9.7 million; $2 million that Bovis was required to pay when excess costs were between $30,000,001 and $32 million; and shared excess costs over $40 million; Respectively, Supp Contract, §§ 2(a) & 2(c)(1) (with respect to $9.7 million); 2(c)(iv) (with respect to Bovis' $2 million) & ; 2(c)(vi) & 2(d) (with respect to 50% of shared excess costs over $40 million). The Supp Contract provides that the $9.7 million was allocated to Gross Cleaning completed before February 3, 2007, i.e., 2 days before the Supp Contract. Supp Contract § 2(a).

The Companion Contract, in pertinent part, provides as follows:

WHEREAS in connection with the [Prime Contract], Bovis and Galt entered into two trade contracts ... , (collectively, "Trade Contracts"), which are incorporated herein by reference; ...

1. The terms of the [the Supp Contract] are hereby incorporated into the Trade Contracts as Contract Documents under Paragraph 8 thereof. Except as expressly modified herein, ***to the extent it relates to Galt's Work***, Galt shall be bound by all of the terms of the [Supp Contract]; and Galt hereby assumes towards Bovis all duties, obligations and responsibilities that Bovis has assumed towards LMDC in the [Supp Contract]. For its part, ***to the extent it relates to Galt's Work***, Bovis hereby assumes towards Galt all duties, obligations and responsibilities that LMDC has assumed towards Bovis in the [Supp Contract]. ...

3. With respect to the payments to be made by Bovis pursuant to par. 2 of the [Supp Contract] if the Actual Costs reach the following thresholds ... the parties to this Companion Agreement agree as follows:

(a) Galt shall be responsible in the first instance for all such costs ***incurred by Galt*** for which Bovis is responsible under the [Supp Contract]. Arch shall be jointly responsible for the first $5,000,000 of ***any such cost or payments*** required of Bovis. Thereafter, Arch and Bovis will each be responsible for 50% of ***any such additional costs***;
(b) Whether the threshold amounts have been met will be calculated ***net of any of Bovis' own costs, including overhead, administrative costs and any items that are within the definition of "Actual Costs" in the [Supp Contract]***;[2]
(c) Any payment made hereunder by Arch shall be credited against the $5,000,000 threshold payment that Arch may be required to make to Bovis or LMDC as a result of the Litigation; and
(d) As between Galt and Arch, Galt shall be responsible in the first instance to make any payment. If Galt fails to make any payment, then Arch shall make the payment.

[2] For illustrative purposes only, Galt/Arch shall be responsible to pay $2,000,000 (when Actual Costs exceed $30,000,001) ***only when the Actual Costs of Galt's*** exceed $30,000,000.

4. ... [N]othing contained herein shall be considered a waiver of any rights of recovery that Bovis may have under Article II of the Trade Contracts. ***With respect to the outcome of the Litigation***, Galt/Arch and Bovis agree to be bound by the result, and ***insofar as the determinations involve Galt's Work***, Galt/***Arch shall be bound to Bovis to the same extent that Bovis is bound to LMDC***, and Bovis shall be bound to Galt to the same extent that LMDC is bound to Bovis. In addition, the parties to this Companion Agreement agree as follows: ...

(b) In the event that Bovis is required to make payment to LMDC under paragraph 6(b) of the Supp Contract, Galt shall be responsible to repay Bovis, or to pay to LMDC at Bovis' direction, all amounts that Bovis owes LMDC ***on account of Galt's Work***. In the event Galt fails to make such payment within five days of Bovis' demand, then Arch, subject to a credit for payments made under par. 3 above, shall be responsible for the first $5,000,000 of any such payments. Thereafter, Arch and Bovis will each be responsible for 50% of any additional payments owed to LMDC; and
(c) As between Galt and Arch, Galt shall be responsible in the first instance to make such payment as directed by Bovis within five days of demand by Bovis. If Galt fails to make that payment, then Arch shall make the payment as directed by Bovis within five days of demand upon it. ...

7. All provisions of the Trade Contracts and the [Prime Contract] remain in full force and effect except as expressly modified herein or in the [Supp Contract].

8. Any payment made by Arch under this Companion Agreement or in connection with the [Supp Contract] shall automatically reduce to the penal sum of the Arch Abatement Bonds on a dollar for dollar basis. In no event shall Arch's liability under this Companion Agreement, the [Supp Contract] and the Abatement Contract exceed the penal sum of the Arch Abatement Bonds. .... ***The Arch Abatement Bonds remain in full force and effect according to their terms, conditions and limits of liability.*** The Arch Deconstruction Bonds remain in full force and effect according to their terms, conditions and limits of liability. The penal sums of any of Arch's bonds shall not be increased.

Companion Contract, Doc 531 .

The first issue is the meaning of the words "on account of Galt's Work" and "costs incurred by Galt" in the Companion Contract. The court rules that Bovis is not entitled to summary judgment on the issue of whether, pursuant to the Companion Contract, Arch must pay Bovis whatever Bovis must pay LMDC under the Supp Contract. Arch presents evidence that the language concerning costs "incurred by Galt" and "on account of Galt's Work" were inserted as changes to the original draft of the Companion Contract at the suggestion of Galt. 4/18/14 Affidavit of Greg Blinn, Doc 400, ¶¶25 -35 and exhibits referred to therein.

Section 3 of the Companion Contract expressly limited Arch's ***pre-Litigation advancement and payment*** obligations to "costs incurred by Galt." Section 3 recites the amounts that Bovis agreed to pay and advance under §2 of the Supp Contract, and then, with respect to Arch, subsection 3(a), states that in the first instance, Galt must pay "all such costs ***incurred by Galt***" for which Bovis is responsible under the Supp Contract; that Arch is jointly responsible for the first $5 million of "***any such costs or payments***" and, thereafter Bovis and Arch are each responsible for 50%. Subsection (d) provides that Arch must pay anything that Galt fails to pay in the first instance.

Bovis' interpretation of §3(a) of the Companion Contract violates fundamental rules of contract interpretation because it ignores the words "incurred by Galt". *William Press, Inc. v State, supra*; *General Electric Co. v Hatzel and Buehler, Inc., supra.* If Bovis were correct that Arch had to pay whatever Bovis had to pay under §2 of the Supp Contract, then the language "costs incurred by Galt" would be rendered meaningless. Bovis' interpretation would read the Companion Contract as providing that Arch must pay "in the first instance all such costs for which Bovis is responsible under the [Supp Contract]." The remaining sentences in 3(a) state

that Arch will be jointly responsible for the first $5,000,000 of "any such costs" and shall split with Bovis "any such additional costs." "Such costs" refers back to "costs incurred by Galt." Moreover, §3(b) and footnote 2 thereto state that in determining the threshold for Arch's payment obligation, Bovis' costs are excluded and only Galt's costs count.

With respect to payments to be made before the outcome of this Litigation, the Supp Contract and the simultaneous Companion Contract differed, and the court must assume that this was intentional. "Agreements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one." *Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 987 (1st Dept 2009), citing Flemington Natl. *Bank & Trust Co. [N.A.] v Domler Leasing Corp.*, 65 AD2d 29, 32 (Dept 1978), *affirmed* 48 NY2d 678, (1979). Even where there is ambiguity, if parties to a contract omit terms - particularly, terms that are readily found in other, similar contracts - the inescapable conclusion is that the parties intended the omission. *Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549 (2014). The maxim expressio unius est exclusio alterius, as used in the interpretation of contracts, supports precisely this conclusion. *Id*, citing Glen Banks, *New York Contract Law* §10.13 (2006); *In re Ore Cargo, Inc.*, 544 F2d 80, 82 (2d Cir 1976) (where sophisticated drafter omits term, expressio unius precludes the court from implying it from general language of agreement).

Bovis argues that the disjunctive words "cost or payments" in 3(a) of the Companion Contract means that Arch's payments were not limited to Galt's incurred costs. However, the preamble to §3 refers to advances required to be made under §2 of the Supp Contract, which must be interpreted together with the Companion Agreement. *Perlbinder v Board of Mgrs. of*

411 E. 53rd St. Condominium, supra; *Flemington* Natl. *Bank & Trust Co. [N.A.] v Domler Leasing Corp., supra*. Section 1(b) of the Supp Contract refers to the "payments or costs" that LMDC and Bovis agreed to advance before the outcome of the Litigation. Consequently, the reference to "cost or payments required of Bovis" in 3(a) of the Companion Contract, is consistent with the pre-Litigation "payments or costs" that the Supp Contract, §1(b), required Bovis and LMDC to pay. As previously noted, some of the amounts were non-refundable payments, not Advances subject to recoupment. The fact that the Companion Contract, §3(a), refers to "cost or payments" does not alter the interpretation of the phrase "costs incurred by Galt".

Here, the court construes the omission in the Supp Contract of the phrase "costs incurred by Galt" and its inclusion in the Companion Contract as meaning that Arch's obligation to pay before the outcome of Litigation was different from Bovis'. Section 2 of the Supp Contract did not limit Bovis' obligation to costs incurred by any particular contractor, while §3 of the Companion Contract limited Arch's advancement obligation to costs that Galt incurred.

Based on this interpretation of the Companion Contract, Arch had no pre-Litigation payment obligation because the record contains an admission by Bovis' expert that the actual costs incurred by Galt under the Abatement Contract were less than $65 million. Navigant Consulting Report (Bovis' Expert Report), dated 6/17/2013, Doc 168, p 92, Table VI.4-1. Bovis' Expert Report states that actual costs for abatement were $59,921,201 through Period 2, which is defined in the report as ending on August 18, 2007, i.e., 10 days before the Terminate Date of August 28, 2007. *Id*, p 10, §III.1. As Bovis does not dispute Arch's claim that Galt's costs under the Abatement Contract were less than $65 million on the Termination Date, that fact

is deemed admitted. *Costello Associates, Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 (1st Dept. 1984), *appeal dismissed*, 62 NY2d 942 (1984). Hence, Arch was not required to ***advance*** costs, pursuant to §3, because the costs incurred by Galt never reached the $65 million threshold.

Arch's cross-motion for summary judgment is granted to the extent that the court rules that it had no obligation to make pre-Litigation payments pursuant to §3 of the Companion Contract. These sophisticated parties contemporaneously signed the Supp and Companion Contracts. The Companion Contract stated that Arch's obligation to pay pursuant to §3 was limited by the phrase "costs incurred by Galt", a phrase omitted from the Supp Contract. Those costs did not meet the $65 million threshold for Arch's contribution.

Turning to Arch's ultimate liability, pursuant to §4 of the Companion Contract, the court rules that Arch's obligation to pay "on account of Galt's Work" is not limited to work Galt performed. Arch's cross-motion is denied to the extent that it is based on the theory that Galt's Work means work performed by Galt prior to the Termination Date. "Galt's Work" means the "Work" as that term is defined in the Trade Contracts, regardless of whether it was performed by Galt or another contractor. However, Bovis has not established as a matter of law that Galt's Work under the Trade Contracts was the same as Bovis' Work as defined in the Prime Contract. Therefore, the court denies Bovis' motion for summary judgment ruling that Arch must pay whatever Bovis must pay LMDC.

The Abatement Contract, required Galt to perform:

> the work generally described in Paragraph 3 hereof and Paragraph 1.10 of the General Conditions attached hereto, (herein, collectively the "Work"). [Galt] hereby agrees to perform the Work in accordance with the documents set forth in Paragraph 8 hereof (herein, the "Contract Documents").

Doc 528, Abatement Contract, p 1. Paragraph 3 provided that:

> [Galt] shall provide and furnish all labor, materials, tools, supplies, equipment, services, facilities, supervision, administration and all the items required by the Contract Documents in strict accordance with the Contract Documents:
> Removal of ACM and World Trade Center dust materials.

Paragraph 8 listed the Contract Documents. Doc 528, §8, p 3. In the Abatement Contract, Addendum 3 to the Prime Contract is not listed as one of the Contract Documents. *Id.*

The Prime Contract defined "Work" as follows:

> "Work" means all structures, equipment, plant, labor, materials and other facilities and all other things necessary or proper for, or incidental to, performing the cleaning and deconstruction of the Building as required under the Contract Documents and otherwise in compliance with the requirements of this [Prime] Contract. "Work" shall include the furnishing of all labor, services, cranes, hoists, scaffolding, transportation, insurance, temporary facilities, and other things and services of every kind for the full performance and completion of all of Contractor's [Bovis'] obligations under this [Prime] Contract, including documentation and record-keeping requirements; and "performance of Work" and words of similar import shall mean the furnishing of such facilities and the doing of all such things.
>
> "Work required by the [Prime] Contract Documents in their present form" or words of similar import shall include all Work required by the Contract Documents in their present form (whether or not mentioned in the Contract Documents), and all Work involved in or incidental to the accomplishment of the results required by the Contract Documents in its present form and/or reasonably inferable therefrom (whether or not mentioned therein or shown thereon).

Doc 171, 3/3/14 Gary Affirmation (Gary Aff), Ex 26, General Conditions, p 6, Bates LOW097.1880.075.

The phrase "Galt's Work" is not defined in any of the relevant contracts. While Bovis insists that "Galt's Work" is synonymous with the definition of "Work" under the Prime

Contract, Arch posits that Galt's Work differs. The court notes that the Companion Contract incorporates the terms of the Trade Contracts and the Supp Contract, but not the terms of the Prime Contract. Doc 531, Companion Contract, , p 1, 1st & 3rd Whereas Clauses. Although the Companion Contract states in footnote 1 that words and phrases not defined in the Companion Contract have the meanings of those terms in the Prime Contract and the Supp Contract, neither the Prime Contract nor the Supp Contract defines "Galt's Work". The Companion Contract also does not define it. The Trade Contracts and the Prime Contract define "Work".

Nonetheless, the court must ascribe meaning to the modifier "Galt's" in the Companion Contract. *William Press, Inc. v State, supra*; *General Electric Co. v Hatzel and Buehler, Inc.*, *supra*. It appears to be a reference to Work as defined in Galt's Trade Contracts or the Abatement Contract, which were incorporated into the Companion Contract, particularly because "Galt's Work" is undefined in the Prime and Supp Contracts. At best, there is a question of fact as to the meaning of "on account of Galt's Work".

According to Arch, Galt's Work differed from Bovis' because unlike the Prime Contract, the Abatement Contract, ¶11, provided that Galt accepted the Contract Documents with full responsibility for performance of the Work, "unless Owner or ***Agencies willfully or negligently interferes with or prevents the performance of the contract duties or work.***" Doc 528, Abatement Contract, p4, ¶11 [emphasis supplied].

In addition, Arch points out that the Abatement Contract stated that Galt was engaged to perform the Work described therein and the Contract Documents listed in ¶8. Arch points out that Bovis' entire Prime Contract is not part of the Contract Documents under the Abatement Contract. Specifically, ¶8 of the Abatement Contract excludes Addendum 3 to the Prime

Contract from the list of "Contract Documents." Doc 528, p3. Addendums 1 and 2 are listed. *Id.* Addendum 3 is not. *Id.*

Addendum 3, which was agreed to by Bovis and LMDC in March 2006, modified the Prime Contract after the Trade Contracts were signed. Doc 181. Bovis does not dispute that Addendum 3 was not made a part of the Contract Documents under the Abatement Contract.

Addendum 3 deleted Annex 8 of the Prime Contract, which had provided:

> This Annex includes two alternative methodologies, which are attached hereto, for the deconstruction of the Building. Contractor [Bovis] shall select the final methodology so as to comply with the CPM Schedule and applicable milestones of the [Prime] Contract and [Bovis] shall have the risk of any delays necessary to implement or change the selected methodology.

Doc 171, Gary Aff, Ex 26, Bates LOW0971880.197. Addendum 3, §9, replaced Annex 8 in the Prime Contract with the following clause:

> Delete Annex 8. Contractor's [Bovis'] means and methods shall be as approved by LMDC and applicable Government Authorities.

Doc 181, Bates GaltTW000396.

The Appellate Division has determined that Bovis' Prime Contract did not permit it to recover for extra work occasioned by delay caused by regulatory interference or standards, unless LMDC signed a written change order. *Bovis Lend Lease (LMB), Inc. v Lower Manhattan Development Corporation*, 108 AD3d 135 (1st Dept 2013) (AD Decision). The decision stated that this was true "regardless of whether that work was subject to the supplemental agreement." *Id.* Therefore, Arch argues, Galt's Work under the Abatement Contract did not include work caused by willful or negligent regulatory interference, and did not require means and methods approved by Government Authorities, while Bovis' Work did.

In addition, Addendum 3, §7, made Bovis responsible for the "maintenance operation and dismantling of a second hoist." Doc 171, Bates GaltTW000396. Prior to Addendum 3, Annex 6 stated that "the Scaffolding Contractor [not Bovis] remains responsible for maintenance and dismantling of the hoist." Doc 171, Prime Contract, Gary Aff, Ex 26, Annex 6, §P.(1), p 17 of 25, Bates LOW0971880.045. Addendum 3, §7 adds:

> LMDC has elected to have a Scaffolding Contractor erect a second hoist (the north hoist). ***Contractor [Bovis] shall be responsible*** as part of the Lump sum ***for the maintenance, operation and dismantling of such second hoist.***

[emphasis supplied] Doc 181, Bates GaltTW000396.

There is at a minimum a question of fact as to whether means and methods approved by Government Authorities, work occasioned by regulatory interference, and Bovis' second hoist responsibilities, were not part of Galt's Work, but were part of Bovis' Work as defined in the Prime Contract. As noted in the AD Decision, Bovis has taken the position in this lawsuit that regulatory authorities, with LMDC's knowledge and approval, adopted an impractically high standard for abatement that caused Bovis to perform unforeseeable, additional work for which it claimed entitlement to extra compensation. *Bovis Lend Lease*, *supra*. Bovis argued that the standard imposed by regulators was higher than the plans and specifications that Bovis relied on in bidding for and entering into the Prime Contract. *Id.* If Addendum 3 increased Bovis' Work under the Prime Contract, then Bovis' Work could be more than Galt's Work under the Trade Contracts, particularly in light of the limitation in ¶11 of Galt's Abatement Contract.[13] Similarly, the second hoist required by Addendum 3 increased Bovis' Work, but not Galt's.

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[13] Arch also points to §86, captioned "ADDITIONAL WORK", in the Scope of Work under the Abatement Contract. It provided that Galt could be compensated for work delayed by regulatory changes: "If there is a change in current codes impacting schedule and cost and regulations regarding the work, the contractor is entitled to time and money to

As Arch's obligation to pay under the Companion Contract is limited to payments "on account of Galt's Work," Bovis is not entitled to summary judgment declaring that Arch must pay whatever Bovis must repay LMDC. None of the relevant contracts define "Galt's Work". The Supp Contract included advances by LMDC for Bovis' Actual Costs, subject to recoupment in this Litigation. It cannot be said, as a matter of law, that all of those monies were "on account of Galt's Work" because Galt's Work under the Abatement Contract excluded costs caused by regulatory interference, means and methods approved by Government Authorities and a second hoist. Bovis' Work under the Prime Contract did not.

The final issue is Arch's argument that its liability under the Companion Contract depends on the enforceability of the Bonds. The court agreed in Section A of the Discussion that Bovis cannot recover against Arch for Galt's breach of the Trade Contracts or the Bonds, due to Bovis' breach of the Bonds. However, the Companion Contract is a separate agreement and nothing in its language suggests that Arch, a sophisticated party, could not bind itself to obligations in addition to the Bonds. The Companion Contract, §7, states that the Bonds "remain in full force and effect according to their terms, conditions and limits of liability," and that the "penal sums of Arch's bonds shall not be increased." The same section says that any payment made by Arch pursuant to the Supp or Companion Contract shall reduce the penal sum of the Abatement Bonds. But, the plain language means that the ***amount*** of Arch's liability under the Abatement Bonds would be decreased by Arch's payments. It cannot be construed to mean that Arch could not be held liable for payments it separately agreed to make in §4 of the Companion

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compensate for such changes." Doc 528, p 14. However, that provision in the Abatement Contract relates to the amount of Galt's compensation for Work under the Abatement Contract in the event that there is interference or code changes. It does not define the scope of Galt's "Work".

Contract. There is nothing in the Companion Agreement that says that Arch must only make payments if it is liable under its Bonds, although the amount of its liability under the Supp and Companion Contracts was capped at the penal sum of the Abatement Bonds.

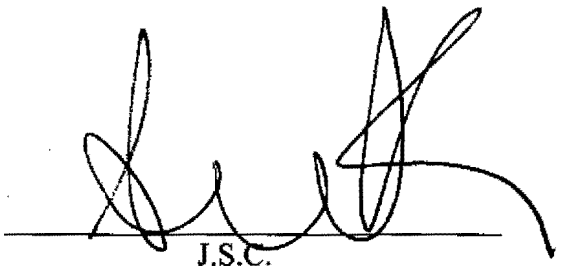
In conclusion, Bovis' motion for summary judgment is denied because the court cannot determine as a matter of law that Arch must pay all sums that Bovis must pay LMDC under the Supp Contract. Arch agreed to pay all sums Bovis must pay LMDC "on account of Galt's Work," but there is an issue of fact as to whether that includes all of Bovis' Work as defined in the Prime Contract. Arch's cross-motion is granted solely to the extent that it seeks summary judgment on the issue of whether, pursuant to §3 of the Companion Contract, it was obligated only to advance "costs incurred by Galt," which never reached the $65 million threshold. However, the remainder of Arch's cross-motion is denied. Accordingly, it is

ORDERED that the motion (Motion Sequence 006) by third-party defendant Arch Insurance Company (Arch) for summary judgment dismissing the third-party complaint is granted to the extent of dismissing the third cause of action for breach of the Bonds and any claim against Arch by third-party plaintiff Bovis Lend Lease (LMD), Inc. (Bovis), for payment on said Bonds arising from the breach by The John Galt Corp. (Galt) of the Trade Contracts; and it is further

ORDERED that the motion (Motion Sequence 011) by Bovis for summary judgment on its third-party complaint is denied; and Arch's cross-motion for summary judgment is granted solely to the extent that it's liability under §3 of the Companion Contract is limited to costs incurred by Galt, which never met the $65 million threshold, and in all other respects the cross-motion is denied; and it is further

ORDERED that the parties shall appear for a status conference on April 30, 2015 at 11 am.

Dated: April 16, 2015



J.S.C.