

<b>Beys Specialty, Inc. v STV Inc.</b>
2016 NY Slip Op 30810(U)
April 28, 2016
Supreme Court, New York County
Docket Number: 652827/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
BEYS SPECIALTY, INC.,

Plaintiff,

**DECISION &  
ORDER**

-against-

STV INCORPORATED and  
STV CONSTRUCTION, INC.,

Index No. 652827/2014

Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.:

In this construction action, defendants STV Incorporated (STV Inc.) and STV Construction, Inc. (collectively, STV) move to dismiss the complaint based on documentary evidence and for failure to state a cause of action. CPLR 3211(a)(1) & (7). Plaintiff Beys Specialty, Inc. (Beys) opposes.

For the reasons that follow, the motion is granted in part, and denied in part.<sup>1</sup>

<sup>1</sup> The parties have substantially delayed the court in issuing a decision on this motion with numerous adjournments, unsolicited letter briefs, and non-conforming motion papers. While the motion was under consideration, Beys and STV submitted at least four sets of dueling, unsolicited letters to the court, in violation of this court’s rules. *See, e.g.*, Dkt. 31, 44, 46, & 119. The letters raised multiple issues that the parties failed to address in their initial motion papers. These issues, in addition to those the court identified *sua sponte*, required supplemental briefing. The court enumerated the remaining issues in an order, and set a briefing schedule. *See* Dkt. 39 (September 2, 2015 Order). STV was to file a final supplemental brief by November 20, 2015.

On February 11, 2016, after six separate adjournments, STV submitted its final reply brief. Both Beys (37-page opposition) and STV (34-page reply) surpassed the page limit set forth in the court’s rules and September 2, 2015 order. *See* Dkt. 117 & 168. The briefs include extraneous exhibits inappropriate for a motion to dismiss. In addition, STV failed to include a table of contents or table of authorities with any of its submissions. Nonetheless, since the instant motion has now been pending for almost a year, the court is considering the parties’ supplemental papers in the interest of rendering a decision.

I. *Background*

This action arises from masonry, roofing, and asbestos abatement work that Beys, a subcontractor, performed on a New York City Housing Administration (NYCHA) project in upper Manhattan. Beys asserts claims against STV<sup>2</sup> for (1) breach of contract, (2) quantum meruit, and (3) an account stated (numbered here as in the complaint), seeking approximately \$5,249,033.76<sup>3</sup> in damages. Dkt. 1 (Summons and Complaint).<sup>4</sup>

Defendants argue that the March 30, 2010 subcontract (the Subcontract),<sup>5</sup> provides for specific procedures to settle construction disputes which preclude this action. The parties raise two issues: (1) whether Beys waived its claims by failing to strictly comply with the Subcontract's notice of claim provisions; and (2) whether article 61 of the Subcontract — which STV styles as an alternate dispute resolution (ADR) provision — binds Beys to a procedure requiring dispute determination by the New York City Housing Authority (NYCHA), subject only to discretionary Article 78 review.

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<sup>2</sup> The prime contract for the project was entered into between NYCHA and STV Inc. The subcontract was entered into between STV Construction and Beys. STV Construction was the construction manager on the project. The parties, however, treat STV Inc. and STV Construction as one entity in this action and their motions, referring to them merely as STV.

<sup>3</sup> Although the complaint seeks \$6,687,124.37 in damages, the parties agreed on January 13, 2016 that STV would pay Beys \$1,438,090.61 in undisputed retainage and contract balance. Dkt. 165 (Stipulation of Partial Settlement). Beys, therefore, now claims \$5,249,033.76.

<sup>4</sup> References to “Dkt.” refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system. Page numbers in citations to court documents refer to the page number of the .pdf filed on NYSCEF.

<sup>5</sup> Annexed to the Subcontract was a document entitled “General Conditions”, containing further contract provisions. Dkt. 26.

As set forth below, Beys bases its first cause of action for breach of contract on STV's alleged failure to pay for numerous, individual work items. To the extent that these items constitute "extra work" (i.e. work not included in the original Subcontract), the Subcontract precludes Beys' breach of contract action. With respect to Beys' claims for "contract work" (i.e. work included in the original Subcontract), however, STV's motion to dismiss Beys' breach of contract action is denied. STV's motion to dismiss Beys' second and third causes of action for an account stated and quantum meruit, respectively, is granted.

*A. History of Dispute*

As this is a motion to dismiss, the facts recited are based on the complaint and the parties' documentary evidence.

In June of 2005, STV Inc. entered into a requirements contract to serve as NYCHA's construction manager on various, unspecified, future construction projects. Dkt. 22 (June 29, 2005 Requirements Contract for Construction Management/Build Services for Various Capital Construction Projects) (the Prime Contract).<sup>6</sup> In or around December 2009 [see Dkt. 157 (December 2009 Form of Proposal)], NYCHA awarded STV Phase IIA of a housing development project at the James Weldon Johnson Houses in upper Manhattan (the Project).<sup>7</sup> STV Construction, the construction manager (CM), solicited bids to perform masonry, roofing, and asbestos abatement work on the Project.

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<sup>6</sup> The term of the Prime Contract was three years, beginning when NYCHA awarded a particular project to STV. Dkt. 22 §§ 6.1-6.2 & Ex. A. NYCHA retained an option to extend the Prime Contract for an additional year after the initial three-year term. *Id.* § 6.2.

<sup>7</sup> The Project's full name was the Major Renovations at James Weldon Johnson Houses, Phase IIA, Manhattan, NYCHA CM/Build Contract #CM5013794/Project #3836/Task Order #10. See Dkt. 157 (Beys' December 17, 2009 Form of Proposal).

In December 2009, Beys submitted a bid. Dkt. 157. Beys warranted in its bidding materials that it had “carefully examined the scope of [w]ork, all [Subcontract] Documents, and the Bid Documents” before submitting its bid. Dkt. 157 (Form of Proposal, Revised Bid Form) at 4; *see also* Dkt. 23 (March 30, 2010 subcontract agreement) § 50(C) (Contractor’s Warranties). Beys further acknowledged that it had “visited the site and examined all conditions affecting the work.” Dkt. 157 at 4. Three months later, Beys and STV Construction executed a \$22,125,791.50 Subcontract. Dkt. 23 § 3.

*1. The Project and Beys’ Claims for Unpaid Work During the Project*

On April 7, 2010, Beys began work on the Project. *See* Dkt. 4 (Exhibits A-G to October 14, 2014 Affidavit of Brent Walters, Esq.), Ex. D (July 29, 2014 Notice of Lien) ¶ 3). Over the next two-and-a-half years, Beys claims (and STV does not dispute) that Beys fully performed the contracted-for work. Dkt. 1 (Complaint) ¶ 4.

During the course of the work, Beys sent three letters to STV disputing reductions to Beys’ partial payment invoices. *See* Dkt. 23 § 41 (authorizing Beys to submit partial payment requisitions to STV up to once per month). On December 16, 2011, Beys’ vice president, Anna Kougentakis, sent a letter to Anupom Saha, STV’s project manager, and Paul Monte of the law firm of Peckar & Abramson, P.C. Dkt. 95 (December 16, 2011 Letter from Beys to STV). The letter claimed that STV understated the amount of work that Beys completed during the pay period ending on November 30, 2011, and set forth a list of items for which Beys sought additional payment. *Id.* The letter requested an immediate meeting with NYCHA and STV to discuss why STV did not approve the items for payment. *Id.* at 3. Beys alleges that it drafted the letter in response to an email from Mr. Saha that Beys received that day, which included STV’s

revised invoice for the November 2011 billing period. *See* Dkt. 93 (December 16, 2011 Email with Revised Invoice #22A).

A week later, on December 22, 2011, Beys sent another letter to Mr. Saha disputing STV's classification of spandrel beam repair work that Beys performed. Dkt. 96 (December 22, 2011 Beys Letter). The specifics of this claim are set forth in more detail below. Beys does not state when it first received notice that STV had allegedly misclassified the spandrel beam work.

On January 4, 2012, Beys sent a third letter to STV protesting the quantity of work reflected in December 28, 2012 and December 29, 2012 emails from STV.<sup>8</sup> Dkt. 97 (January 4, 2012 Beys Letter). The letter disputed multiple work items, including:

- all masonry work, including repointing, brickwork, and lintels;
- concrete work, including concrete repair;
- exterior asbestos abatement work; and
- all interior apartment work

*Id.* at 2. The January 4th letter again requests a meeting with STV and NYCHA, and mentions that the parties never scheduled a meeting to discuss the disputed items raised in Beys' earlier letters. *Id.* at 3. STV responded to this letter, via email, the same day and offered to meet with Beys the next day to discuss the disputed items. Dkt. 115 (January 4, 2012 STV Email). It is not clear whether this meeting occurred, whether NYCHA was present and, thus, whether any of Beys' claims were submitted to NYCHA for review.

### 3. *Substantial Completion*

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<sup>8</sup> December 28, 2012 was a Friday, December 29 was a Saturday and New Year's day fell on Tuesday.

In August 2012, NYCHA determined that Beys had substantially completed its work on the Project. Dkt. 24 (October 17, 2012 Substantial Completion Letter). The parties dispute whether Beys ever submitted a substantial completion requisition.<sup>9</sup> It is undisputed, however, that STV never accepted a substantial completion requisition from Beys and that Beys never accepted a substantial completion payment. On March 14, 2014, NYCHA issued a certificate of acceptance of all Project work. Dkt. 3, Ex. E (Verified Petition to Vacate Lien) ¶ 17.

#### 4. *Beys' February 2014 Letter*

In February 2014, while waiting for final payment, Beys submitted a letter to STV containing a lengthy list of disputed or additional work items totaling over \$6 million. Dkt. 25 (February 26, 2014 Letter from Beys to STV). Beys asserts that the claims in the February 2014 letter are “nearly identical” to the claims previously submitted in Beys’ December 16, 2011, December 22, 2011, and January 4, 2012 letters. Dkt. 117 at 33. The following eleven claims were enumerated.

##### *Claim 1. Misclassification of Spandrel Beam Replacement Work*

Beys reasserted its December 2011 claim that STV misclassified spandrel beam repair work Beys performed, resulting in STV underpaying Beys by \$155,907.42. *Id.* at 3. Beys contended that it repaired approximately 500 feet of roof spandrel beams at buildings 5 and 6 of the Project. According to Beys, STV should have classified this repair work as “Recasting Roof Spandrel Beam-Type 3.1” work under the Subcontract. Instead, STV classified the work as less

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<sup>9</sup> STV initially took the position, at oral argument, that Beys had submitted a substantial completion requisition. Dkt. 34, April 14, 2015 Tr. at 11:2-17. STV later changed course and stated that Beys had not submitted one. Dkt. 35 (April 29, 2015 Letter from Joshua G. Oberman) at 2. In its supplemental brief, however, STV again takes the position that Beys submitted a substantial completion requisition. Dkt. 71 (STV Supplemental Brief) at 13.

expensive “Beam Spall-Type D” repair work. Beys sought \$155,907.42, the price differential between the two classifications. Alternatively, Beys requested compensation based on its time and material records, independent of any work classification. *Id.*

In addition, Beys claimed that some of the work it performed while repairing the spandrel beams at buildings 5 and 6 fell outside the scope of the Subcontract. *Id.* Beys asserted that STV ordered it to perform saw cutting, demolition, drilling, and patching work in connection with the spandrel beam replacement. *Id.* Beys stated that “[t]hese items were not included in the contract documents under the *Recasting Roof Spandrel Beam-Type 3.1* procedure and are therefore extra work.” Beys sought \$51,340.00 for extra work. *Id.*

*Claim 2. Lintel Replacement and Associate Brickwork*

Beys also complained that STV improperly reduced the amount of brickwork it performed on the 14th floor of all Project buildings by 6,075.99 square feet. *Id.* at 4. The reduction led to a \$420,476.76 decrease in the Subcontract price.

Further, Beys stated that the brick work it performed at window lintel locations was much more difficult and time consuming than simple brick replacement work. *Id.* Beys claimed that the work at lintel locations differed so drastically from the contract work that the parties could not have contemplated that STV would compensate Beys at the same rate for that work. *Id.* Beys sought \$1,380,540.00 for extra work.

*Claim 3. Vinyl Asbestos Tile Removal*

Beys next claimed that STV improperly reduced the quantity of vinyl asbestos tile removal work that Beys performed by 29,031.41 square feet. *Id.* Beys stated that it removed multiple layers of tile, and that the Subcontract provided for a set unit price for each square foot

of tile removed, regardless of layer. *Id.* Beys sought to recover the price difference between the actual amount of tile removal it performed and the reduced amount. *Id.*

*Claim 4. Change in Concrete Slab Repairs*

Next, Beys alleged that size, quantity, location, type, shape, and method of concrete slab repair work that the Subcontract required significantly differed from the work that Beys actually had to perform. *Id.* at 5. According to Beys, these differences “effectively changed the nature and scope of the work contemplated by the contract documents.” *Id.* Beys sought an extra \$576,932.38.

*Claim 5. Labor and Scaffolding to Assist STV in Inspection of Building Elevations*

Beys asserted, further, that STV directed Beys to provide additional scaffolding and labor on building elevations beyond what the Subcontract required. *Id.* For this service, Beys sought an additional \$130,872.00. *Id.*

*Claims 6-8. Increased Costs from Inefficiency Due to the Performance of Repointing in Areas of Limited Space; Additional Scaffolding Costs (7); Additional Cleaning Costs (8); Labor Costs*

Beys also complained that it contracted to perform a set amount of brick pointing work, and that STV redesigned the project to include an additional 150 locations comprised of smaller areas. *Id.* at 6. The redesign caused Beys to perform additional work and incur extra costs, for which it sought an additional \$81,000.00. *Id.* Moreover, as a result of the masonry redesign, Beys sought to recover extra scaffolding rental costs of \$605,000 and cleaning costs of \$168,000. *Id.* at 6-7.

*Claim 9. Increased Costs from Inefficiency Due to the Performance of Brick Replacement in Areas of Limited Space*

Beys went on to claim that STV expanded the area in which Beys was to perform brick replacement work to include an additional 183 locations within more limited work space. *Id.* at 7-8. As a result, Beys contended had to employ an additional worker to comply with scaffolding regulations. *Id.* Beys contended that “given the significantly different nature and cost of the work,” STV should compensate Beys for the extra cost of that worker, or \$103,488.00

*Claim 10. Reduction of Overruns Over 125%*

Beys alleged that STV reduced by 15.98776% the total compensable amount for overruns which exceeded 125% of the Subcontract estimate, without any explanation and without affording Beys the opportunity to challenge the reduction. *Id.* at 8.

*Claim 11. STV's Erroneous Method of Calculating Credit Amounts Due*

Finally, Beys claimed that in STV's proposed change order number 3, STV overstated the credits to which STV was entitled for work underruns. *Id.*

*5. The Subcontract*

The parties incorporate multiple documents into the Subcontract, including the Prime Contract between STV Inc. and NYCHA [Dkt. 22], STV's General Conditions annexed to the Subcontract (the General Conditions) [Dkt. 26], and Beys' Form of Proposal (collectively, the Subcontract Documents). Dkt 157. Understandably, the parties do not submit all of the Subcontract Documents, which are voluminous. The parties omit copies of the Contract Drawings, Specifications, and Addenda, which set forth Beys' specific construction means and methods. Dkt. 23 § 4. The relevant portions of the Subcontract Documents include the following.

*(a) Unit Price Contract*

The Subcontract Documents state that the parties based the Subcontract's \$22,125,791.50 price on Beys' estimate of unit prices and quantities for work and materials, and that those quantities could change. Beys' Form of Proposal states that "[i]ncreases and/or decreases in the quantity of an Item of Work will result in a change in the [Subcontract] value on a per unit basis ... [NYCHA] may at any time order an increase or decrease in Item of Work quantities." Dkt. 157 (Form of Proposal) at 4.

Similarly, Section 11.6.1 of the General Conditions, entitled "Unit Price Work", states that "[t]he estimated quantities of Unit Price Work [in the Subcontract] are not guaranteed and are solely for the purpose of comparison of Bids and determining an initial [Subcontract] Price." Dkt. 26. General Conditions section 11.6.2 goes on to state that "[e]ach unit price will be deemed to include an amount considered by [Beys] to be adequate to cover [Beys'] general conditions, overhead [,] and profit for each separately identified item." *Id.*

The Subcontract gives STV and STV's architect/engineer, Haks [Dkt. 154 (September 25, 2015 NYCHA Denial Letter) at 3], the authority to determine work quantities and classifications. As stated in section 11.6.1 of the General Conditions, "[d]eterminations of the actual quantities and classifications of Unit Price Work performed by [Beys] will be made by [STV] and [the Architect/Engineer]..." Dkt. 26. Section 5.7 of the General Conditions echoes this provision. *Id.*

Where Beys performs unit price work in quantities exceeding those set forth in the Subcontract's bid schedule, article 26 of the Subcontract provides for payment at unit price for up to 125% of the estimated quantity. Dkt. 23 § 26 (A). For quantities above the 125% limit, STV reserved the right to negotiate a new price, not to exceed the original unit bid price. *Id.*

*(b) Payment Provisions*

During the course of the work, article 41 authorizes Beys to submit partial payment requisitions to STV up to once per month. *Id.* § 41. STV must then issue partial payments to Beys based on the percentage of total Subcontract work completed during a particular payment period. *Id.* Article 21 directs STV to deduct and retain 5% of the value of all work certified for payment in each partial payment voucher until substantial completion. *Id.* § 21. Upon substantial completion, article 42 of the Subcontract requires Beys to submit a substantial completion requisition to STV. *Id.*

Once NYCHA deems Beys' work substantially complete, the General Conditions require STV to reduce its retainage to 1% of every remaining partial payment. Dkt. 26 (General Conditions) §§ 7.4.3 & 11.15.1(1)(iii). STV also must release the entire Subcontract balance, including any retainage, "less twice the amount [STV] considers necessary to ensure completion of the balance of the Work. . ." on substantial completion. *Id.* § 11.15.2.<sup>10</sup>

After completing any outstanding work following substantial completion, Beys must submit a final payment requisition to STV. Dkt. 23 § 43. NYCHA, in turn, must certify the Project complete. Dkt. 23 § 43.2 ("Final payment shall be made upon satisfactory completion and acceptance by NYCHA of all services required by [Beys] pursuant to [the Subcontract] . . ."). STV then must make final payment to Beys, including retainage, within a reasonable time of receiving final payment from NYCHA. Dkt. 26 § 11.18. The specific requirements of the substantial completion requisition and final payment requisition are set forth below.

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<sup>10</sup> General Conditions section 11.20 also authorizes STV to withhold 1% of the value of the total amount dispersed at substantial completion for 1 year and 30 days from the date of substantial completion. § 11.20.1. Once NYCHA certifies to STV that the Project is complete, STV is to release the 1% security with interest. *Id.* § 11.20.2. Similarly, Subcontract article 20 requires Beys to post performance and payment bonds equal to 100% of the total Subcontract price. *Id.* § 20.

(c) *Notice of Claim Provisions*

(i) *All Claims*

The Subcontract contains two notice of claim provisions that apply to any claim “in any way connected with or arising out of [the Subcontract].” Dkt. 23 §§ 42(A) & 43.2(A). The first provision is contained in article 42 of the Subcontract, entitled “Substantial Completion Payment”. It states that unless Beys includes a verified statement of claims with Beys’ substantial completion requisition, on accepting a substantial completion payment, Beys waives any claims it has up to that point.<sup>11</sup> *Id.* Article 43 of the Subcontract, entitled “Final Payment”, contains a similar notice of claim provision for claims arising after substantial completion but before final payment. *Id.* That provision states that unless Beys includes an amended verified statement of claims with Beys’s final payment requisition, Beys waives any post-substantial completion claims by accepting final payment. *Id.*

Article 44 of the Subcontract essentially repeats section 43, and provides that if Beys accepts final payment, Beys releases STV from any liability for claims not properly preserved

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<sup>11</sup> The relevant text of article 42 reads:

A FINAL VERIFIED STATEMENT of any and all alleged claims against [STV], in any way connected with or arising out of this Contract (including those as to which details may have been furnished pursuant to Article 29 hereof) setting forth with respect to each such claim the total amount thereof, the various items of labor and materials included therein, and the alleged value of each item; and if the alleged claim be one for delay, the alleged cause of each such delay, the period or periods of time, giving the dates when [Beys] claims the performance of the work or a particular part thereof was delayed, and an itemized statement and breakdown of the amount claimed for each such delay. . .

... [Beys] is warned that unless such claims are completely set forth as herein required, [Beys] upon acceptance of the substantial completion payment pursuant to this, will have waived any such claims.

As noted in n. 9, *supra*, the parties dispute whether a substantial completion requisition was submitted.

under sections 42 and 43. *Id.* This provision excepts any claims for amounts STV deducts or retains from the contract price. *Id.* In addition, article 44 includes a more robust release of claims provision, encompassing

any and all claims of and liability to [Beys] for anything therefore done or furnished for or relation to or arising out of [the Subcontract] and the work done hereunder, and for any prior act, neglect or default on the part of [STV] and/or NYCHA or any of their officers, agents or employees, excepting only a claim against [STV] for the amounts deducted or retained in accordance with the terms and provision of [the Subcontract] or by law, and excepting [sic] a claim, not otherwise waived, which is contained in the verified statement filed with [Beys] substantial and final [payment] requisitions pursuant to Articles 42 and 43 hereof . . .”

*Id.*

Article 44 goes on to state that Beys “shall not be barred from commencing an action for breach of [c]ontract under this provision[,], provided that a detailed and verified statement of claim is served upon [STV] and [NYCHA] not later than forty (40) days after the mailing of such final payment.” *Id.*

(ii) *Extra Work Claims*<sup>12</sup>

In addition to the notice of claim requirements that apply to all claims, the Subcontract contains a separate set of notice requirements for “extra work” claims. The Subcontract defines “extra work” as “work other than that required by the [Subcontract] at the time of its execution.” *Id.* § 2(L). This definition of “extra work” differs from the one contained in the General Conditions, which refers to “work not reasonably foreseeable at the time of the execution of the Project or reasonably not inferable from the Construction Documents.” Dkt. 26 § 1.1.15. The Subcontract distinguishes “extra work” from “contract work”, which it defines as “everything

<sup>12</sup> General Conditions Article 9 provides for changes in contract work through change orders.

required to be furnished and done by [Beys] by any one or more of the [Subcontract Documents], except extra work. . .” Dkt. 23 § 2(J).

To preserve a claim for extra work, article 25 of the Subcontract requires a written change order. Article 25 reads, in relevant part:

Changes may be made to [the Subcontract] only as duly authorized by [STV]. Contractors deviating from the requirements of an original purchase order or contract without a duly approved change order document, or written [Subcontract] modification or amendment do so at their own risk. . .

*Id.*

Article 25 limits the scope of any change orders to “work necessary to complete the work included in the original scope of the [Subcontract Documents], and for non-material changes to the scope of the [Subcontract].” *Id.* It continues: “[Beys] shall be entitled to a price adjustment for extra work performed pursuant to a written change order.” *Id.* The parties are to compute the price adjustment by (1) agreement or a fixed price; (2) unit prices specified in the [Subcontract]; (3) time and material records; and/or (4) any other manner that STV approves. *Id.*

In addition to requiring a written change order for extra work, the Subcontract requires Beys to provide daily updates to STV on the status of any ongoing extra work. Subcontract article 29, entitled “Performance of Extra or Disputed Work”<sup>13</sup> states that while Beys is performing extra work pursuant to a written change order, disputed work, or protest work, Beys must provide STV with three daily copies of a written statement signed by Beys’ representatives at the Project site that include:

- The name and number of each Worker employed on such Work or engaged in complying with such determination or order, the number of hours employed thereon, and the character of the Work each is doing; and

<sup>13</sup> The Subcontract does not define “disputed work”.

- The nature and quantity of any materials, plan[s] [sic][,] and equipment furnished or used in connection with the performance of such Work or compliance with such determination or order, and from whom purchased or rented.

*Id.* § 29(A-B).

The Subcontract requires Beys to strictly comply with all notice of claim requirements to preserve any claim for extra work. Thus, article 29(D) states that the “[f]ailure to comply strictly with these requirements shall constitute waiver of any claim for extra compensation or damages on account of the performance of [extra work] . . .” *Id.* Likewise, article 51 of the Subcontract provides that Beys can assert no claim for “breach of contract or compensation for extra work . . . unless [Beys] shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims as herein provided.” *Id.*

Beys argues that in practice, the parties did not follow the Subcontract’s procedures for performing extra work. It claims that STV would direct Beys to perform extra work without issuing a change order, Beys would perform, and the parties would execute a change order later. Beys asserts that STV frequently issued payment for extra work performed before STV issued a change order. Dkt. 75 (November 13, 2015 Affidavit of Anna G. Kougentakis) ¶¶ 16-19; Dkt. 89 (Change Order Request #16); Dkt. 90 (Charge Order Request #19). Beys admits that it never complied with the notice requirements set forth in article 29.

### (iii) Contract Claims

General Conditions 5.8.1 provides that the architect/engineer (A/E) was to be the initial interpreter of the contract documents, which interpretation was to be binding upon the [sub]contractor. Dkt. 26. Therefore, where a [sub]contractor believed there was to be an adjustment in the contract price, it was to give “written notice to the matter after the start of the occurrence or event giving rise thereto promptly, but in no event later than three (3) days, . . .,

and written supporting data will be submitted to [STV], within an additional three (3) days unless [STV] allows an additional period of time for the submission of additional or more accurate data in support of such matter.” *Id.* at 5.8.3. The A/E’s rendering of a decision on the matter is a condition precedent to the assertion of the claim under the contract. *Id.* at 5.8.4.

*(d) Dispute Resolution Provisions*

Subcontract article 61, entitled “Dispute Resolution”, precludes Beys from bringing a lawsuit against STV for certain claims. The purpose of article 61, as set forth therein, is to avoid delaying the Project to litigate disputes over compensation:<sup>14</sup>

A fundamental intent of this [Subcontract] is that all Work required hereunder shall be promptly performed to [NYCHA and STV]’s satisfaction . . . [Beys] shall, under no circumstances, cause or allow any delay of, [the] Work during any dispute as to the Work or compensation or the meaning of the specifications or plans or drawings, or because of any dissatisfaction with any decision of [STV] or NYCHA, but shall ensure that Work is proceeded with promptly.

Dkt. 23 § 61.1

Article 61 contains two distinct ADR procedures, set forth in article 61.2-4, and 61.5, respectively. Article 61.2-61.4 applies to claims for extensions of time or “increase[s] in the amount payable to [Beys]” that “arise *during performance of the [work]*.” *Id.* §§ 61.2 – 61.3 (emphasis added). Article 61.2 states that “[w]hen [Beys] requests interpretation of the contract document (i.e. submits an RFT) that may result in either an extension of time to the contract or may result in an increase in the amount payable to [Beys], [Beys] shall note the propensity of that increase within the body of the RFT...” *Id.* § 61.2. Article 61.3 requires Beys to promptly notify STV of any claim under 61.2. It states: “[Beys] shall promptly give written notice to [STV] of any dispute or claim that may or does arise during performance of the Work, along with all relevant documentation related to its claim. [STV] shall thereafter be required to submit

<sup>14</sup> General Conditions Article 6 similarly provides for dispute resolution for the same reasons.

such notice and all documents related to the dispute or the claim to NYCHA, along with [STV]'s analysis and recommendation as to how such a dispute should be resolved.” *Id.* § 61.3.

After NYCHA makes a determination on a claim, Article 61.4 provides:

NYCHA’s determination regarding [Beys’] claim for an extension or for an increase of the monies to be paid hereunder shall be final and binding on all parties. In the event that NYCHA so elects, any party may seek review of NYCHA’s decision solely in the form of a challenge, in a court of competent jurisdiction of the State of New York, that resides in the City and County of New York, pursuant to Article 78 of the Civil Practice Law and Rules. Such review by the court shall be limited to the question of whether or not NYCHA’s decision was made in violation of lawful procedure, was affected by an error [sic] of law, or was arbitrary and capricious or an abuse of discretion.

In short, Article 61.2-61.4 prescribe a three-step dispute resolution process requiring that:

(1) Beys submit the claim to STV for review; (2) STV analyze the claim and submit the claim to NYCHA with a recommendation as to whether NYCHA should approve or deny the claim; and (3) NYCHA make a final and binding decision on the claim. *Id.* §§61.2-61.4. If NYCHA elects, either party then can challenge the NYCHA decision through an Article 78 petition in the Supreme Court of New York, New York County. *Id.*

For claims that fall outside the scope of 61.2-61.4, article 61.5 prescribes another resolution process. *Id.* Article 61.5 applies to “any claim or controversy arising out of or relating to [the Subcontract] or its breach which do not require a determination by NYCHA for an extension of time and/or claims for additional payment as set for above in article 61.2 . . .” *Id.* It requires Beys to attempt to resolve any disputes through informal discussions and mediation. *Id.* If those steps fail, 61.5 grants Beys the right to file an action in the New York County Supreme Court. *Id.* § 61.5(D). Under 61.5(A-B), Beys must file a written request for mediation with the American Arbitration Association in New York (and STV) within a reasonable time after Beys’

claim arises. The parties then agree to complete mediation within 60 days of Beys' request. *Id.* § 61.5(A).

(e) *Entire Agreement and No Waiver Clauses*

The Subcontract contains an entire agreement clause:

[The Written Agreement] contains all the terms and conditions agreed upon by the parties hereto, and no other agreement, oral or otherwise, regarding the subject matter of this agreement shall be deemed to exist or to bind any of the parties hereto, or to vary any of the terms contained herein.

*Id.* § 58. Similarly, 16.15 of the General Conditions states that the contract contains all of the terms and conditions of the parties' agreement and no other oral or other agreement binds the parties. Dkt. 26.

Section 16.12 of the General Conditions states:

None of the provisions of the [Subcontract] shall be considered waived by either party thereto unless such waiver is reduced to writing and signed by the party to be charged. No such waiver shall be construed as a modification of any of the provisions of the [Subcontract] or as a waiver of any past or future default or breach hereof, except as expressly stated in such waiver.

*Id.* Then too, 16.20 of the General Conditions permits modification "in a writing signed by both parties in order to carry out and complete more fully and perfectly the Work agreed to be performed under this Contract..." *Id.*

The Subcontract also contains a "Contract Interpretation" clause, which requires Beys to request a clarification from STV of "any errors, inconsistencies, ambiguities, or discrepancies, including typographical errors." Dkt. 23 § 62(A). The clause states that "[i]n the event of a conflict or inconsistency between or among portions or provisions of this Contract and STV's General Conditions, the more stringent provision/requirement will control . . ." *Id.* § 62(B).

B. *Lawsuit and NYCHA Decision*

In August 2014, STV forwarded Beys' February 2014 letter to NYCHA along with STV's recommendation that NYCHA deny all of Beys' claims. Dkt. 28 (August 1, 2014 Letter from STV to NYCHA). STV provided no analysis of Beys' claims in its August 1, 2014 submission, but stated that STV, NYCHA, and Beys had discussed the claims on multiple occasions, and could not resolve them. *Id.* STV's submission stated that the dispute "relates to the quantity of work performed by Beys." *Id.*

Ultimately, informal negotiations between Beys and STV over final payment broke down. On September 17, 2014, Beys filed the instant lawsuit. Dkt. 1 (Summons and Complaint). Five days later, Beys served STV and the AAA with a demand for mediation. Dkt. 4, Ex F (September 22, 2014 Mediation Demand). In an October 2014 letter, STV refused to attend the mediation, citing the ADR process set forth in Subcontract article 61.2-61.4. Dkt. 4, Ex. G (STV October 1, 2014 Letter to John Fenimore of the AAA).

On June 10, 2015, Beys submitted a final payment requisition with a verified statement of claims to STV. Dkt. 113 (June 10, 2015 Final Payment Requisition). The requisition is for \$1,438,090.57. *Id.* The verified statement of claims incorporates the claims in Beys' February 2014 letter, which total \$3,673,542.56. This total does not include damages for claims 3, 10, and 11, which Beys does not calculate.<sup>15</sup>

On September 25, 2015, NYCHA denied all of Beys' claims.<sup>16</sup> Dkt 46 (September 25, 2015 NYCHA Decision). NYCHA concluded that (1) the Subcontract was a unit price contract

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<sup>15</sup> It is not clear what portion of Beys' total remaining damages (\$5.25 million) consist of the claims in Beys' February 2014 letter (\$3.67 million).

<sup>16</sup> NYCHA's decision came over a year after STV submitted Beys' claims for review, and after the court directed STV to draft a letter to NYCHA indicating that if NYCHA failed to render a decision by September 25, 2015, the court would add NYCHA as a party to this suit.

rather than a contract for a lump sum; (2) that all of Beys' work fell within the scope of the Subcontract Documents; and (3) that Beys had the opportunity to inspect the worksite and contract documents before bidding. *Id.* Moreover, NYCHA determined that STV's instructions to bidders required Beys, after inspection, to report any discrepancies between site conditions and the Subcontract Documents to STV. *Id.*

NYCHA cited additional grounds for denying particular claims, including the following:<sup>17</sup>

- As to claim 1 (misclassification of spandrel beams), NYCHA determined that STV and NYCHA's consultant, Haks, properly classified Beys' beam replacement work. *Id.* at 2.
- As to claim 7 (additional scaffolding), NYCHA claims that there was no project "redesign". According to NYCHA, STV did not require additional scaffolding, and STV fully compensated Beys for any scaffolding services that Beys did provide. *Id.* at 7.
- As to claim 10 (improper reduction of overruns), NYCHA claims that Beys failed to obtain a written change order or negotiate a new unit price for overruns above 125% of the Subcontract estimate. Dkt. 46 at 4. As a result, STV issued an impasse change order, and paid Beys an appropriate, reduced price for the overruns. *Id.* at 4.
- As to claim 11 (excess credit for underruns), NYCHA claims that STV used the appropriate, unit-price multiplier for underruns. *Id.*, citing Subcontract §29(D).

NYCHA states that it issued the decision pursuant to article 29 of the Prime Contract. *Id.* at 1.

On January 25, 2016, Beys instituted an Article 48 lawsuit against NYCHA and STV, seeking to vacate NYCHA's determination. *See Beys Specialty, Inc. v New York City Housing Auth.*, Dkt. No. 150607/2016 (Sup Ct, New York County 2016) (Freed, J.). That action is pending.

<sup>17</sup> Although the NYCHA decision addresses each claim individually, it denies most claims for the same general reasons.

## II. Discussion

On a motion to dismiss under CPLR 3211(a)(7), the court will “liberally construe the pleading, accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to favorable consideration.” *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint. *Leon*, 84 NY2d at 88. The criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one. *Id.*

Where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 (2002) (citation omitted). Documentary evidence includes unambiguous, legally operative documents like contracts, deeds, wills, and mortgages. *See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 (1st Dept 2004).

### A. Breach of Contract

The elements of a breach of contract are existence of a valid contract, plaintiff’s performance of its obligations under the contract, defendant’s breach, and resulting damages. *See Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 (1st Dept 2007). To determine whether a breach has occurred, the court must interpret the contract “in accord with the parties’ intent.” *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). In New York, “[t]he best evidence of what parties to a written agreement intend is what they say in their writing. Therefore, a

written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” *Id.* “A contract is unambiguous if the language it uses has ‘a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.” *Id.*, quoting *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 (1978). Further, it is well settled that “a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties.” *Cole v Macklowe*, 99 AD3d 595, 596 (1st Dept 2012), citing *In re Lipper Holdings, LLC*, 1 AD3d 170, 171 (1st Dept 2003) (citations omitted); see generally *Macy’s Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 54 (1st Dept 2015).

#### *1. Nature of Beys’ Underlying Claims*

As set forth above, the Subcontract distinguishes between claims for non-payment for contract work (i.e. work included in the original Subcontract) and claims for non-payment for extra work (i.e. work exceeding the scope of the original Subcontract or unexpected work).

Hence, to start, the claims must be separated into contract and extra work.

#### *Claim 1. Misclassification of Spandrel Beam Replacement Work*

Claim 1 includes claims for non-payment of both contract and extra work. The first portion of the claim, for misclassification of spandrel beam repair work, is a claim for contract work. Beys alleges that STV and Haks, the Architect/Engineer, misclassified the work that Beys performed under the Subcontract, leading to STV improperly reducing the Subcontract balance by \$155,907.42. Beys does not seek additional compensation for work not included in the original Subcontract. However, the second portion of this claim is for extra work. Beys alleges that STV directed Beys to perform *additional* work above and beyond what the Subcontract

required. *See* Dkt. 25 at 3 (“Beys is entitled to an additional \$52,340.00 for the extra work required.”). This claim falls squarely within the Subcontract’s definition of extra work.

*Claim 2. Lintel Replacement and Associated Brickwork*

Claim 2 also contains both contract and extra work allegations. Beys’ contends that STV improperly reduced the amount of brickwork Beys performed. It does not seek an increase in the amount payable to Beys under the Subcontract. Rather, it disputes STV’s reduction of the Subcontract price. This is a claim for contract work.

The remainder of claim 2 is for extra work -- brickwork performed at window lintel locations that differed drastically from the work outlined in the Subcontract Documents. Beys identifies this brickwork as extra work. *See id.* at 4 (“Given that the . . . work differs so drastically from that . . . indicated on the contract documents . . . this work . . . is extra Work.”).

*Claim 3. Vinyl Asbestos Tile Removal*

Beys’ claim that STV improperly reduced the quantity of vinyl asbestos tile removed is a claim for contract work. The contract provided for payment by tile, and Beys does not seek payment beyond that allowed under the Subcontract. Beys alleges that STV agreed with Beys’ calculation of the amount of tile that Beys removed, but, nonetheless, improperly reduced the amount of tiles for which it paid.

*Claim 4. Change in Concrete Slab Repairs*

Beys’ fourth claim is a claim for extra work. Beys admits that the work STV directed it to perform “significantly differed from the work” that the Subcontract required. *Id.* at 5. Extra work is by definition beyond “the nature and scope of the work contemplated by the contract documents,” which is precisely what Beys claims occurred here.

*Claim 5. Labor and Scaffolding to Assist STV in Inspection of Building Elevations*

Claim five is also a claim for extra work. Beys claims that STV directed Beys to provide additional scaffolding and labor on building elevations beyond what the Subcontract required. *Id.*

*Claims 6-8. Increased Costs from Inefficiency Due to the Performance of Repointing in Areas of Limited Space; Additional Scaffolding Costs (7); Additional Cleaning Costs (8); Labor Costs*

Claims 6-8 are all claims for extra work. Beys claims that it contracted to perform a set amount of brick pointing work, but performed additional work outside the scope of the Subcontract due to a Project “redesign”. Claims 7 and 8 are both derivative of claim 6, and are therefore extra work claims.

~~*Claim 9: Increased Costs from Inefficiency Due to the Performance of Brick Replacement in Areas of Limited Space*~~

Claim 9 is a claim for extra work. Beys claims that STV expanded the area in which Beys was to perform brick replacement work beyond what the Subcontract required, necessitating additional workers to account for the “significantly different nature and cost of work.” *Id.* at 7.

*Claims 10-11. Reduction of Overruns Over 125% (10); STV's Erroneous Method of Calculating Credit Amounts Due (11)*

Claims 10 and 11 are claims for contract work. Both claims seek compensation to which Beys claims it was entitled under the original Subcontract, but which STV improperly reduced.

It is not – at least on the surface -- a claim for extra money.

In sum, claims 1 and 2 are for both contract and extra work; claims 3, 10 and 11 are for contract work; and claims 4, 5, 6, 7, 8 and 9 are for extra work.

## 2. Notice Provisions

### (a) Extra Work Claims

Applying the Subcontract’s notice of claim provisions to Beys’ extra work claims (which form part of its breach of contract action), those claims must be dismissed. Beys failed to

procure written change orders for any of the extra work it identifies in its February 2014 letter. In doing so, Beys performed that work, as cautioned by the contract, “at its own risk.” See Dkt. 23 § 25. Beys does not allege that it attempted to procure change orders for the work underlying its extra work claims, or that STV wrongfully refused to issue them. Consequently, under article 25, Beys cannot collect for extra work performed without a written change order. See *Bovis Lend Lease (LMB), Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 145 (1st Dept. 2013) (lack of written change order barred claims for extra work on construction contract).

Nor did STV, as Beys argues, waive article 25’s change order requirement by not always insisting on a change order before Beys performed extra work. Beys cites to *Joseph F. Egan, Inc. v City of New York*, 17 NY2d 90 (1966) and *Tridee Assoc. v New York City School Constr. Auth.*, 292 AD2d 444 (2nd Dept. 2002) in support of its contention that a contractor can waive the requirement that extra work be authorized by a written change order. In *Joseph F. Egan*, however, the contractor submitted 91 claims for extra work of which 89 were paid or settled on their merits. That court, therefore, found that the course of conduct in *Joseph F. Egan* “indicate[d] the intent of the parties to follow a procedure other than that provided by the written agreement.” *Id.* at 97. Moreover, the *Egan* Court found that the original plans required major revisions – more than 400 change orders -- and in order to avoid delay, the work was done without awaiting change orders. *Id.* The *Tridee* contract also is distinguishable from this case. In *Tridee*, the contract contained no provision for change orders or extra work. *Tridee Assoc., supra.*

Here, unlike the situation in *Joseph F. Egan*, the plans were not faulty, requiring numerous, quick revisions. Nor is this a case like *Tridee* where no provision exists in the contract for change orders. In the instant case, the contract specifically provides that STV does

not waive any of the Subcontract's requirements without a written, signed waiver. Moreover, it twice provides for change orders and warns Beys against proceeding without them. Under the circumstances here, Beys has not demonstrated that STV knowingly relinquished its right to insist on a change order. *See Bovis Lend Lease(LMB), Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 146 (1<sup>st</sup> Dept 2013).

Further, Beys admits that it failed to comply with article 29 of the Subcontract. Beys never provided STV with signed statements identifying the workers or materials involved in performing extra work. As a result, under article 29(D), Beys waived any claim for additional compensation for extra work not performed in accordance with article 29.

Finally, Beys warranted in its bidding materials that it "carefully inspected the worksite" and would notify STV of any differences between actual site conditions and those contained in the Subcontract. Dkt. 157 at 4. To the extent that Beys extra work claims arise from unexpected site conditions – e.g., Beys' claim for additional brick replacement work at window lintel locations – those claims contradict Beys' express warranties. In light of the foregoing, the Subcontract precludes Beys' claims for extra work.

#### (b) Contract Work Claims

Although the Subcontract's notice provisions preclude Beys' extra work claims, they do not bar Beys' claims for contract work. Here, Beys' claims for contract work include the first portion of claims 1 and 2, in addition to claims 4, 10, and 11 in Beys' February 2014 letter.

Articles 25 and 29 of the Subcontract apply only to extra work claims, not claims for contract work. That leaves only articles 42-44 and 61.3, which contain notice of claim

requirements that arguably apply to Beys' contract work claims.<sup>18</sup> None of these provisions, however, "irrefutably" preclude Beys' contract work claims.

Articles 42 to 44 of the Subcontract do not apply here. As set forth above, article 42 governs the procedure for issuing a substantial completion payment. That provision requires Beys to submit a verified statement of claims with its substantial completion requisition, or else Beys waives all claims on accepting a substantial completion payment. Here, however, it is undisputed that STV never accepted a substantial completion requisition from Beys, and that Beys never accepted a substantial completion payment. Thus, article 42 does not apply.

Articles 43 and 44 also do not bar Beys' contract work claims. Beys submitted a verified statement of claims with its June 2015 final payment requisition – albeit over a year after NYCHA certified the Project complete -- thereby preserving contract work claims under articles 43 and 44. Beys did not waive its claims by accepting STV's payment of the undisputed \$1.4 million Subcontract balance. Dkt. 165 (Stipulation of Partial Settlement). Rather, STV and Beys specifically stipulated that by accepting payment from STV, Beys was not releasing STV from the claims at issue in this case. *Id.* Moreover, article 44 allows Beys to proceed with a breach of

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<sup>18</sup> STV argues in its supplemental brief that section 11.3.1 of the General Conditions, entitled "Notice of Conditions Causing Damages," precludes Beys' claims. Dkt. 71 (Supp. Br.) at 4. That provision requires that Beys notify STV within three days of the start of any condition that may cause Beys damages "by reason of any act or omission of STV, including conditions for which [Beys] may be entitled to an adjustment in the [Subcontract] price...". Dkt. 27 § 11.3.

The court notes that STV improperly raises this argument for the first time in its supplemental brief. The court did not ask the parties to brief this issue in their supplemental papers. Nevertheless, the court finds that section 11.3 does not apply to Beys' contract work claims. Section 11.3 is located in the portion of the General Conditions dealing with the cost of work. It sets forth the procedure for giving notice of conditions that may increase Beys' construction costs or result in an adjustment of the Subcontract price. Here, the only remaining claims are for contract work for which Beys claims STV underpaid Beys. Beys does not allege – at least with respect to these claims – that any condition arose that increased its construction costs or entitled it to more money. Section 11.3 does not apply to Beys' contract work claims.

contract claim against STV so long as Beys serves STV with a verified statement of claim within 40 days of STV mailing final payment. Dkt. 23 § 44. Beys has done so here. In light of the foregoing, the court finds that articles 43 and 44 do not preclude Beys' contract work claims as a matter of law.

Only article 61.3 of the Subcontract contains a notice provision that could conceivably apply to Beys' contract claims. That provision calls for "prompt" notice of all claims. STV argues that Beys did not give notice of any claims until February 2014, one and a half years the August 2012 substantial completion. Beys, however, submits three letters to STV, from December 2011 to January 2012, in which Beys raises nearly all of the claims contained in Beys' February 2014 letter.<sup>19</sup> Beys' January 2012 letter, in particular, references many of the same work items that Beys included in its February 2014 letter, including

- all masonry work, including repointing, brickwork, and lintels (claim 2 in February 2014 letter);
- concrete work, including concrete repair (claim 4 in February 2014 letter);
- exterior asbestos abatement work; and
- all interior apartment work (claim 3 in February 2014 letter)

Dkt. 97 at 2. Beys claims that it sent the January 2012 letter in response to inaccurate work quantities contained in two STV emails from December 28 and December 29, 2011, less than a week earlier. *Id.* The court cannot conclude that Beys failed to give "prompt" notice of these claims.

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<sup>19</sup> Indeed, these letters also would appear to fulfill the notice requirements of General Conditions 5.8.

Similarly, Beys' December 22, 2011 letter included notice of Beys' dispute over STV's classification of Beys' spandrel beam repair work (claim 1 in February 2014 letter). Dkt. 96 (December 22, 2011 Beys' Letter). Because neither party states when Beys first received notice that STV had (allegedly) misclassified the spandrel beam work, the court cannot determine as a matter of law whether Beys' December 22, 2011 constituted a prompt notice of that claim.

Article 61.3 also does not preclude Beys' remaining contract work claims (claims 10 and 11 contained in Beys' February 2015 letter). According to Beys' February 2014 letter, claim 10 (for improper reduction of overruns over 125%) first arose in October 2013, four months earlier. Nevertheless, STV did not provide a spreadsheet detailing the price reductions underlying claim 10 until February 3, 2014, just three weeks earlier.

Likewise, claim 11 in Beys' February 2014 letter (for erroneous calculation of credit amount due) first arose when STV issued change order 3, which included the proposed credits. See Dkt. 25 at 8. STV issued change order 3 on July 30, 2012. Dkt. 159 (Change Order #3). Page three of the change order, however, includes, in Beys' signature line, the notation: "contractor refused to sign. See emails in CR's cost estimate TAB." *Id.* at 4. Based on this language, a question of fact exist as to whether Beys notified STV of Beys' dispute over the amount of STV's proposed credits contained in change order 3. If Beys did give prompt notice of claim 11, then Subcontract article 61.3 would not preclude claim 11 as a matter of law.

The court further notes that it is not entirely clear that article 61.3 applies to claims for contract work at all. As noted above, article 61.3 forms part of the Subcontract's first dispute resolution procedure. Dkt. 23 § 61.3. That procedure applies to claims for "extensions of time" or "increase[s] in the amount payable" to Beys. *Id.* § 61.2. It is not apparent that any of Beys'

contract work claims seek an extension of time or an increase in the Subcontract price. Hence, the Subcontract's notice provision do not "irrefutably" preclude Beys' contract work claims.

### 3. ADR Provisions

The crux of STV's motion argues that the Subcontract's ADR provisions preclude Beys from bringing any action against STV. In particular, STV argues that the ADR provision in subcontract articles 61.2-4 governs any claim for "extra money". Because Beys' contract work claims seek money damages here, Beys' only recourse, according to STV, is to challenge NYCHA's decision via an article 78 proceeding on the grounds that it was "arbitrary and capricious" or an abuse of discretion. Beys, on the other hand, argues that NYHCA lacks the authority to render a determination on Beys' claims at all, and that article 61.2-4 does not apply to Beys' claims.

New York courts routinely uphold voluntary contractual ADR clauses, so long as they are "clear, explicit and unequivocal" and do not "depend [on] implication or subtlety." *Thomas Crimmins Contracting Co. v City of New York*, 74 NY2d 166, 171 (1989). "[ADR clauses] are well recognized as an effective and expeditious means of resolving disputes between willing parties desirous of avoiding the expense and delay frequently attendant to the judicial process." *Westinghouse Elec. Corp. v New York City Transit Auth.*, 82 NY2d 47, 53-54 (1993) (citations omitted). Even ADR clauses that give an employee or interested party the power to adjudicate a contract dispute are enforceable. *Westinghouse Elec. Corp.*, 82 NY2d at 54; *see also Yonkers Contracting Co. v Port Auth. Trans-Hudson Corp.*, 208 AD 2d 63, 66-67 (2d Dept) *aff'd*, 87 NY2d 927 (1996) ("Public policy is not violated by an alternate dispute resolution provision that authorizes an employee of a party to a contract dispute (even where such employee is personally

involved in the dispute) to make conclusive, final, and binding decisions on all questions arising under the contract.”).

Nevertheless, because “parties consenting to arbitration surrender many of their normal rights under the procedural and substantive law of the [s]tate . . . it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent.” *Thomas Crimmins*, 74 NY2d at 171. Likewise, the court should interpret any ambiguities in an agreement “most strongly against the draftsman,” as long as the particular interpretation would not lead to an absurd result. *See William A. White/Tishman E., Inc. v Banko*, 171 AD2d 401, 402 (1st Dept 1991).

(a) NYCHA had authority to render a determination on claims subject to articles 61.2-4 of the Subcontract

Here, article 61 of the Subcontract properly designates NYCHA as arbitrator of claims for extensions of time or “increases in the amount payable” to Beys. Dkt. 23 § 61. Beys was aware of article 61 and understood its implications and risks before entering into the Subcontract. The court sees no reason why it should relieve Beys of this particular provision now. *See Westinghouse Elec. Corp. v New York City Tr. Auth.*, 82 NY2d 47, 54 (1993) (noting that the [plaintiff] “understood the implications of the ADR clause prior to undertaking its business and legal risks under the whole of the multimillion dollar agreement. To allow it, after the fact, to secure the assistance and power of the courts to relieve it of a particular procedural provision, while retaining the benefits of the rest of the publicly bid public works contract, is not compelled by our precedents and would have destabilizing commercial law consequences.”).

Beys reliance on *Abiele Construction, Inc. v New York City School Construction Authority*, 91 NY2d 1 (1997), does not change this result. In that case, unlike this one, the contract at issue contained no clear ADR provision. *Id.* at 10 (“There is no evidence that ...

Abiele unequivocally declared its intention to surrender substantive or procedural rights to seek redress in a plenary action.”). Similarly, *Navillus Tile, Inc. v Bovis Lend Lease, LMB, Inc.*, 74 AD3d 1299, 1302 (2d Dept 2010), another case cited by Beys, is not on point. *Navillus Tile* stands for the proposition that a general contractor must specifically incorporate an ADR provision in its prime contract into the contractor’s subcontracts. Here, STV and Beys included an ADR provisions in the Subcontract itself.

Beys further argues that its claims against STV arose after Beys had already completed work on the Project and, thus, did not “arise during performance of the work” under article 61.3.

Beys admits, however, that it notified STV of “nearly all” of its claims in its December 2011 and January 2012 letter to Beys. Beys authored those letters while the Project was ongoing. Additionally, all of Beys’ claims are for non-payment of work that, by definition, occurred on the Project. Consequently, all of Beys’ claims “arose” during Beys’ performance of the work.

*(b) Articles 61.2-4 do not preclude Beys’ contract work claims as a matter of law*

Nonetheless, Beys’ contract claims are not dismissed. The court finds that The Subcontract’s two ADR provisions do not apply to the contract claims or, at best, their application to claims other than extra work claims is ambiguous.

STV argues that the parties intended 61.2-4 to govern any claim for “extra money,” regardless of whether the claim is for contract work or extra work. According to STV, any claim for money damages under the Subcontract would be subject to NYCHA review. This reading of Subcontract article 61.2-4 (the NYCHA procedure), however, would render several other Subcontract provisions meaningless. *See Thomas Crimmins Contracting Co.*, 74 NY2d 166, 172 (1989) (the court must read the ADR provision in the context of the entire contract); *Solco Plumbing Supply, Inc. v Hart*, 123 AD3d 798, 800 (2d Dept 2014) (“A court should not read a

contract so as to render any term, phrase or provision meaningless or superfluous, but should give effect to all of the contract's provisions."); *Suffolk Cty. Water Auth. v Vill. of Greenport*, 21 AD3d 947, 948 (1st Dept 2005) ("[A]n interpretation which renders language in the contract superfluous is unsupportable.").

Article 61.5, for example, applies to "other claims" not covered under articles 61.2-4. Article 61.5 defines these claims as "any claim or controversy arising out of [the Subcontract] or its breach which do not require a determination by NYCHA for an extension of time and/or claims for additional payment as set forth above in section 61.2 . . ." Dkt. 23 § 61.5. The plain implication of article 61.5, then, is that certain types of claim are subject to NYCHA review, while others are not. *See Big Apple Physical Therapy, P.C. v Fire Dep't of City of New York*, 24 AD3d 168, 169 (1st Dept 2005) ("Had FDNY desired to include all disputes arising under the contract, there would be no sense to the phrase "of the kind delineated in this section"). . .

Other provisions further suggest that the parties intended to distinguish between claims for extra work and claims for contract work, and that the Subcontract contemplates the possibility of a breach of contract action. For example, article 44, provides that Beys "shall not be barred from commencing a breach of contract action" provided that Beys filed a proper notice of claim. Dkt. 23 § 44. Article 44 specifically carves out an exception for a breach of contract action from among the other types of claims covered under that article, which include "any and all claims of and liability to [STV] for anything therefore done or furnished for or relating to or arising out of [the Subcontract]...and for any prior act, neglect or default on the part of [STV] or [NYCHA]..."Dkt. 23 § 44.

Article 51, likewise, distinguishes between breach of contract claims and extra work claims. It states that "no claim against [STV] for damages for breach of contract *or* compensation

for extra work shall be made or asserted in any action or proceeding at law” unless Beys complies with all notice requirements. *Id.* § 51 (emphasis added). The Subcontract provisions distinguishing extra work from contract work, and allowing a breach of contract action, would make little sense if the parties intended article 61.2-4 to subsume any claim for “extra money”.

STV argues that article 61.5 comports with its interpretation of article 61.2-4. According to STV, article 61.5 applies to other types of claims not involving “extra money”, such as a wrongful termination claim. The court disagrees. It is difficult to imagine any claim arising from a commercial construction contract that would not involve “extra money”. Even a claim for wrongful termination may, in fact, entitle a successful plaintiff to money damages. *See, e.g., Poley v. Rochester Cmty. Sav. Bank*, 184 AD2d 1027, 1027 (4th Dept 1992). A claim for wrongful termination would also not encompass all “breach of contract” actions, although articles 44 and 51 both explicitly refer to “breach of contract” actions.

More plausible than STV’s reading of 61.2-4 is that 61.2-4 applies to claims for extra work, while article 61.5 governs claims for breach of contract or contract work. Article 61.2 explicitly refers to claims that may result in “an *increase* in the amount payable to [Beys].” § 61.2 (emphasis added). Here, however, Beys’ contract work claims do not seek any increase in the amount payable to Beys under the Subcontract. Rather, Beys seeks to recover the money that Beys claims it was already entitled to under the original Subcontract. A natural and unstrained reading of article 61.5 indicates that the parties contemplated that the courts would have jurisdiction over a properly preserved breach of contract claim. *See Thomas Crimmins Contracting Co.*, 74 NY2d at 173. At most, the Subcontract is ambiguous as to the claims to which 61.2-4 and 61.5 apply –

hardly evidencing the “clear intent” necessary to give article 61 the broad preclusive effect that STV seeks.<sup>20</sup>

Finally, the parties’ limited ability to obtain judicial review of a NYCHA decision weighs in favor of narrowly defining the class of claims subject to NYCHA review. Article 61.4 states that “[i]n the event that NYCHA so elects” any party may seek review of NYCHA’s decision via an article 78 proceeding. Dkt. 23 § 61.4 (emphasis added). It is unclear, however, what incentive NYCHA would have to allow either party to bring an article 78 action against it. Once NYCHA renders a decision, the parties are, for all intents and purposes, stuck with that decision. Only if NYCHA elects would the parties have any judicial recourse. The court declines to apply article 61.4 to Beys’ contract work claims.

Applying article 61.5 to Beys’ contract work claims, the court concludes that Beys may proceed with its at-law action against STV. 61.5(A-C) calls for informal talks and mediation before litigation. STV refused to participate in mediation. *See Long Island Savings Bank v Geloda/Briarwood Corp.*, 190 AD2d 64 (1st Dept 1993) (preventing a condition precedent to contract provision excuses it). Under 61.5(D), Beys is entitled to bring the instant action with respect to its contract work claims -- portions of claims 1 and 2, and claims 3, 10 and 11 contained in Beys’ February 2014 letter and verified statement of claims.

### *B. Quantum Meruit*

<sup>20</sup> STV argues that Subcontract article 62(B) requires the court adopt the “more stringent” provision in the event of any inconsistency between Subcontract provisions. That provision, however, applies to inconsistencies “between or among” portion of the Subcontract and General Conditions, not provision within the Subcontract itself. Moreover, interpreting 61.5 to apply to contract work claims and 61.2-4 to apply to claims for extra work and additional time eliminates any inconsistency among Subcontract provisions.

Beys' second cause of action for quantum meruit action is dismissed. In New York, "[i]t is impermissible...to seek damages in an action sounding in quasi contract where the suing party has... performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." *Navillus Tile, Inc. v George A. Fuller Co.*, 83 AD3d 919, 919-20 (2d Dept 2011), quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987).

*C. Account Stated*

Beys' third cause of action for an account stated action also is dismissed. Under New York law, "[a]n account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. An account stated assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists." *Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250-51 (1st Dept 2007).

Here, STV has never agreed with Beys on the correct amount of money due under the Subcontract. Beys' lawsuit in this matter arose, in part, from the fact that STV reduced the amount of money to which Beys claims it is entitled. The parties resolved any undisputed account stated when they entered into the June 2015 stipulation of partial settlement. Dkt. 165.

That settlement encompassed all of Beys undisputed claims for retainage and contract work. No account stated remains. Accordingly, it is

ORDERED that STV's motion to dismiss is granted as to the second and third causes of action for quantum meruit and an account stated; and it is further

ORDERED that STV's motion to dismiss the first cause of action for breach of contract is granted only to the extent of dismissing any claims for extra work as set forth in the second portion of claims 1 and 2 and in claims 4-9 of Beys' February 26, 2014 letter [Dkt. 25], and

denied as to Beys' claims for contract work as set forth in the first portion of claims 1 and 2, and claim 3, 10, and 11 of the February 2014 letter; and it is further

ORDERED that within 30 days of the entry of this decision on the NYSCEF system, Beys will e-file and serve on STV a single, verified statement containing each of Beys' remaining claims for contract work, consistent with this opinion. The statement will in no event include any claim not specifically contained in Beys' February 2014 letter or addressed in this decision. Beys will further include in the statement a calculation of the damages it attributes to each remaining claim, including such items as prejudgment interest or costs; and it is further

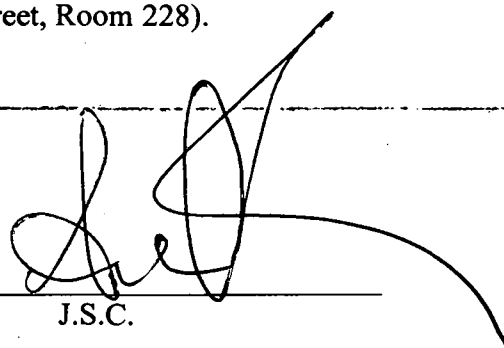
ORDERED that should it become clear, during the course of discovery, that claims that Beys alleged to be for contract work were in fact claims for extra work, STV may move for summary judgment on those claims; and it is further

ORDERED that within 5 days of the entry of this order on the NYSCEF system, defendants shall serve a copy of this order with notice of entry upon plaintiff by overnight mail; and it is further

ORDERED that an in-person preliminary conference will be held in this matter on Thursday, May 12, 2016 at 10:00 a.m. (at 60 Centre Street, Room 228).

Dated: April 28, 2016

ENTER:



J.S.C.

**SHIRLEY WERNER KORNREICH**  
J.S.C.