

437 W. 16th St. LLC v 17th & 10th Assoc. LLC

2016 NY Slip Op 32689(U)

June 27, 2016

Supreme Court, New York County

Docket Number: 600100/07

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

_____ x

437 WEST 16TH STREET LLC,

Index No.: 600100/07

Plaintiff,

– against –

DECISION/ORDER

17TH AND 10TH ASSOCIATES LLC, et al.,

Defendants.

_____ x

This is an action by plaintiff 437 West 16th Street, LLC, the owner of a building located at 437 West 16th Street in Manhattan, against defendants 17th and 10th Associates, LLC, the owner and developer of an adjacent property, and The Related Companies, L.P., the guarantor of the owner’s obligations, for damage to plaintiff’s building as a result of construction at the adjoining property.¹ After a 12-day bench trial, this court issued a decision and order, dated April 17, 2015 (Decision or Prior Decision), which determined the categories of damage that were caused by the construction. The Decision held in pertinent part:

“ . . . [P]laintiff has demonstrated that it is entitled to costs for repairs to cracks across the north and south facades, cracks to interior finishes throughout the building, sloped floors throughout the building, misaligned doors and windows throughout the building, and the entire basement slab. The court further holds that plaintiff has demonstrated that it is entitled to the cost of replacement of the roof deck, as it was extensively damaged by use of the roof as a staging area for the construction.”

¹ As used in this decision, “construction” means all phases from demolition, dewatering, and underpinning through the construction of the building.

(Decision at 10.) The Decision also held that “the specific amount of damages” could not be determined on the record at the trial for two reasons: Plaintiff sought damages based not on invoices but on an estimate by its consultant, Erwin Lobo & Bielinski (Erwin Lobo); and plaintiff failed to demonstrate that all of the work that was performed was remediation. (See id. at 11.) The court held judgment for plaintiff in abeyance pending continued trial, and directed that, at the continued trial, plaintiff must:

“correlate the amount of damages awarded for the items the court has allowed with specific invoices, and not merely with amounts in an estimate. Moreover, plaintiff must provide evidence with a reasonable level of detail that the work that was actually performed for which reimbursement is sought was remediation in kind.”

(Id. at 11-12.)

At a conference held after the Decision was issued, the court emphasized that plaintiff must demonstrate that the work performed was remediation, not an improvement:

“Remediation in kind means that if a floor was covered with linoleum it not be replaced with a wood floor, that it be replaced with a reasonably comparable material. If a wall had sheetrock, it not be replaced with Venetian plaster. If a bathroom that had to be taken up because the floors were sloping had a standard toilet, it not be replaced with a Toto washlet.

So, I want to make sure that we have reasonably comparable work, and if there was an improvement, the plaintiff will be permitted at this trial or this continuation of the trial to produce evidence of what it actually paid for the improvement, but that amount will not be awarded. What will be awarded is evidence of what remediation in kind would have cost at the time the work was done.”

(6/3/15 Tr. at 8-9.)

The continued trial was held on May 2, 3, and 23, 2016. Based on the credible evidence at the trial, the court now holds that plaintiff has documented the specific invoices that it received for work performed at the subject building following the damage from construction of the

adjacent building, and the payments made by plaintiff for such work. Exhibits 63 (A-1)-(D-1), which consist largely of invoices from multiple vendors and copies of checks used for payment of each vendor's invoices, were admitted into evidence at the trial for the limited purpose of showing that these were invoices received by Paul Kleinberg, and that payments were made on these invoices. (11/6/13 Tr. at 54.) At the continued trial, Mr. Kleinberg gave credible testimony that expanded on the foundation for these checks and invoices. In particular, he testified that copies of the checks and related invoices were made at the time of payment to evidence the payment, and a computer record was kept by his business of the invoices and checks. (5/3/16 Tr. at 185-190, 209.) Contrary to defendants' contention, cancelled checks are not the only competent evidence of payments. Plaintiff's business records are sufficient to make a prima facie showing of payment. (See generally Commissioners of the State Ins. Fund v Allou Distributors, Inc., 220 AD2d 217 [1st Dept 1995].)

The court further holds that plaintiff's prima facie showing of payment was not rebutted by defendants. The court does not find, however, that all of the work for which payment was made was work for repairs needed to the building as a result of damage caused by the adjacent construction – that is, work that fell within the categories allowed by this court in its prior decision (Allowed Work). (See Prior Decision at 10.) As held during the trial, the invoices were not admitted for the purpose of showing that work was needed at the building as a result of the construction. (11/6/13 Tr. at 40-41.) Rather, as noted above, plaintiff was specifically directed to provide evidence with a reasonable level of detail that the work for which reimbursement is sought was remediation. (Prior Decision at 11-12.)

In seeking to demonstrate that the work was remediation, plaintiff relied on the testimony of Sharon Lobo, who was qualified at the trial as an expert in architecture, damage assessment

remediation, and cost estimation, based on her extensive experience in these fields. (Prior Decision at 5-6.) At the continued trial, she testified repeatedly that the work was “in kind” or constituted “interior finishes.” (5/2/16 Tr. at e.g. 20 [tile], 23 [blinds], 25 [interior glass], 26 [ductwork], 37 [venetian plaster].) This court, however, approved remediation of cracks to interior finishes (Prior Decision at 10), not each and every item of work performed in the interior of the building. It is noted that although the court previously found that Ms. Lobo gave credible testimony that items were replaced “in kind” to match existing color, material, and style, the testimony to which the court referred was testimony regarding replacement of floor finishes and doors. (See Prior Decision at 11.) At the continued trial, Ms. Lobo used the terms “in kind” and “interior finishes” to refer to all interior work. That blanket characterization cannot be accepted for the reasons stated below.

Significantly, Ms. Lobo did not give testimony, and plaintiff did not otherwise demonstrate, that work performed on the fourth and fifth floors of the building to reconfigure the layout was work needed as a result of the adjacent construction. More particularly, when Ms. Lobo was asked on direct examination to “describe, generally, the repairs or remediation that you believed needed to be done to the fourth floor,” she responded with the following list of repairs: “The southwest [] corner of the building, I recommended a masonry crack remediation, interior crack remediation at the west and south walls, sloped finished floor remediation along the west wall and in to the central part of the building, sloped finished floor remediation, interior cracks.” (10/30/13 Tr. at 393-394.) She stated further that she “recommended to remove existing mill work,” which she defined as “custom cabinetry,” and “to investigate what was going on, if there were any cracks behind it and to reinstall that mill work.” (Id. at 394.) Ms. Lobo also testified that she recommended the following additional work: interior crack remediation at the bathrooms

because of cracks in the grout and moldings and “sealant splits all along the length of the wall” (id.); “removing the doors and replacing in kind, and masonry crack remediation at the rear stairwell and separation between wood joists and the bearing walls” (id.); and, “[a]t the west wall . . . removing dirt and debris and install[ing] new mortar” and “fill using non-shrink grout underneath the joist pockets.” (Id. at 394-395.) When asked whether these repairs could have been “undertaken with tenants on the fourth floor,” Ms. Lobo responded that they could not “[b]ecause the floors would have needed to have been taken up. The interior walls would have been needed [sic] to be removed in order to re-level the floors and in order to rebuild the door openings and fix the cracks.” (Id. at 395.)

Ms. Lobo then testified that the nature of the needed repairs to the fifth floor was “[v]ery similar to the floors below.” (Id. at 395.) She identified “[t]he separation between the wood joists, and the bearing walls at the west wall”; “installing the non-shrink grout underneath the joists”; “[s]loped finished floor remediation. Removing the existing finished floor, shimming up the existing sub-floor so that it is level and installing a new finished floor to match the existing”; “[i]nterior crack remediation”; “[r]emoving the material locally around the crack area and patching, with an appropriate patching [] material. Install a new finish to match the existing in color, material and style”; “masonry cracks as well as interior cracks at the rear stairwell and at the front stairwell”; “door remediation, for 11 doors, to remove the existing door and frame and replace in kind”; “[a]nd two custom doors.” (Id. at 395-396.) As with the fourth floor, Ms. Lobo testified that the remediation could not be done with the tenants in place because “you would need to remove walls in order to do that, and you would need to then rebuild the doors.” (Id. at 396.)

Notably absent from this list of repairs is any mention of a need to reconfigure the layout of the fourth or fifth floor. As the above summary of Ms. Lobo's testimony shows, she did not testify that there was any need, as a result of the damage from the adjacent construction, to create new spaces, move bathrooms or a kitchen, design a new electrical layout, or change the HVAC system. (See id. at 394-396.)

Extensive work was, however, performed to reconfigure the fourth and fifth floors. Mr. Kleinberg testified that "the whole fourth floor was demo'd" (11/6/13 Tr. at 9), eliminating the Kleinberg's apartment. Ultimately, the fourth floor became additional office space for his company, Kleinberg Electric Inc. (Kleinberg Electric) (id.), with relocated bathrooms and a relocated kitchen. (Lobo Testimony, 5/2/16 Tr. at 140, 147-148.) Kleinberg Electric continued to maintain its former office space on the fifth floor (Kleinberg Testimony, 5/3/16 Tr. at 220), but a new gym and gym bathroom were added. (Lobo Testimony, 5/2/16 Tr. at 139.)

The reconfiguration of these floors required substantial plumbing, electrical, and mechanical work. Mr. Kleinberg testified that in connection with this work, they "had to add" an air conditioning unit on the roof and to run waste lines for additional bathrooms. (11/6/13 Tr. at 9-11.) He also testified that because the fourth floor was "a total gut[,] [w]e disconnected all of the electric on the fourth floor." (5/3/16 Tr. at 177.) Mr. Kleinberg's testimony corroborated Ms. Lobo's earlier testimony that substantial changes were made to the fourth and fifth floors. She testified that the building "ended up with the same number of bathrooms that there were originally," but she acknowledged that these bathrooms were "put . . . in different places," requiring reconfiguration of the plumbing and "some" new electrical wiring. (5/2/16 Tr. at 140.) Ms. Lobo testified that the kitchen on the fourth floor was also moved to a different location, requiring plumbing and electrical work. (Id. at 147-148.) In fact, according to Ms. Lobo, the

entire electrical layout of the fourth floor and fifth floor was changed: “The office layout was changed on the fourth and fifth floor, so you needed a new lighting layout. We also modified the power layout. And, generally, all the changes to the HVAC system had to be electrified. So, there were changes based on the mechanical needs.” (Id. at 31-32.) These mechanical needs were also substantial: new “ductwork, thermostats, heating units and air conditioning units,” which were “mainly” installed on the fourth and fifth floors. (Id. at 25-26.)

At the conclusion of the continued trial, this court directed the parties to submit designations of testimony in the trial transcript regarding the reconfiguration of the fourth floor, and the reasons why repairs could not be made to the Kleinberg apartment. (5/3/16 Tr. at 320.) The parties’ designations (see joint letter, dated May 13, 2016 [NYSCEF No. 259]) refer to the fact that the reconfiguration occurred; but nothing in the designations provides a cogent explanation as to why the reconfiguration was necessary due to the damage to the building from the adjacent construction.

Plaintiff appears to assert that the reconfiguration of the fourth and fifth floors was necessary to keep tenants in place during the repairs to the building. In support of this contention, plaintiff offered Ms. Lobo’s testimony that at some point “it was determined that the tenants that were living in the building or working in the building could not be lost or moved out of the building. And the concept of removing tenants from one floor to another was explored and ultimately chosen so that the building would not be vacated for an extended period of time.” (10/30/13 Tr. at 422-423.) In its Proposed Findings of Fact and Conclusions of Law (Pl.’s Proposed Findings), plaintiff suggests that duplicating Kleinberg Electric’s fifth floor office on the fourth floor was a necessary part of this phased repair plan. (Pl.’s Proposed Findings ¶¶ 26-27.) Plaintiff states: “As a result of the phased repairs, the fourth floor required repair work to

accommodate additional people (who otherwise [would] have been on the fifth floor) who were placed on the [fourth] floor while repair work on the fifth floor was undertaken.” (Id. ¶ 27.)

While the court accepts that a tenant could not occupy a floor while it was being repaired, it does not follow that phased repairs required a complete renovation of the fourth floor, or that gutting the fourth floor entirely and duplicating the fifth floor office on the fourth floor constituted remediation. Plaintiff’s argument is in effect that a temporary relocation required a permanent reconfiguration.

Plaintiff also argues that the reconfiguration of the fourth floor was required because it was not possible, given requirements of the Building Code, to repair the “caretaker” apartment that the Kleinbergs had occupied on the fourth floor. This contention is supported only by Ms. Lobo’s conclusory testimony to that effect, without citation to any provision of the Building Code. (See 5/2/16 Tr. at 79-80.) Even assuming that the apartment could no longer be legally occupied, plaintiff fails to explain why the space could not have been used without reconfiguration of the layout and of plumbing, mechanical, and electrical lines. Moreover, as Ms. Lobo candidly testified, the expense of “new electric” and “new plumbing” could possibly have been avoided had the bathrooms been restored in their original locations. (5/2/16 Tr. at 142.)

In summary, the decision to create an additional office space for Kleinberg Electric on the fourth floor necessitated, among other things, new plumbing, mechanical, and electrical work in connection with the relocation of bathrooms and the kitchen, installation of a new HVAC system, and preparation of architectural and design drawings for the reconfiguration. These changes involved additional costs, but have not been shown to have been necessary as a result of damage caused by the adjacent construction. Plaintiff also has not given a convincing explanation for the

reconfiguration of the fifth floor, with the addition of a new gym. The court therefore holds that the reconfiguration of the fourth and fifth floors was an improvement, and that the costs for plumbing, mechanical, electrical, and design work associated with the reconfiguration of the fourth and fifth floors are not recoverable. In addition, there was evidence that plaintiff purchased new furniture and fixtures. Yet, plaintiff failed to demonstrate that the previously existing furniture and fixtures were damaged or, if so, could not have been repaired. The court therefore also holds that damages for such items are not recoverable.

The court notes that after the issuance of the Prior Decision, plaintiff reviewed its summary of damages and prepared a new summary which purported to eliminate work other than work that had been allowed by that Decision. The revised summary reduced the claimed damages from approximately \$4.92 million to \$2.86 million. (See Vendors Summary Sheet, dated Apr. 18, 2016, Pl.'s 64 [A] for id.) Ms. Lobo testified credibly, for example, that she removed mechanical items such as a chimney exhaust fan and a sprinkler system for the new stairway and lobby. (5/2/16 Tr. at 41-43.) Plaintiff did not, however, elicit detailed testimony from Ms. Lobo or any other witness as to the specific items or invoices that were removed. In any event, plaintiff continues to maintain claims for reconfiguration of the fourth and fifth floors and for new furnishings and fixtures, and does not claim to have removed these items from the original summary.

At the continued trial, defendants offered the testimony of Barry Brower, an expert in construction cost assessment and analysis. (5/3/16 Tr. at 240-241, 245-246.) He testified that he reviewed, among other things, the binders with invoices and checks, the Erwin Lobo scope of work estimate, the court's Prior Decision, and various trial transcripts. (Id. at 247-248.) Mr. Brower's review was undertaken for the purposes of identifying construction costs that were not

allowed by the Prior Decision, and correlating checks with specific invoices. (Id. at 251.) He also prepared spreadsheets for “the more major vendors,” showing the floors to which the work pertained, and “trying to segregate out . . . where the costs were spent and on what the costs were spent [].” (Id. at 253.) He then testified, using a summary spreadsheet (Defs.’ Ex. LLL for id.) to “refresh recollection,”² as to four categories of items: 1) items that he accepted on the ground that they were allowable under the court’s Prior Decision and were supported by copies of checks (Accepted Amounts); 2) items that he would accept as allowable if there were acceptable corresponding checks (Accepted Amounts If Checks Were Complete); 3) items, primarily involving work on the fourth and fifth floors, which he found to be “lacking support” because he could not determine whether the invoices were for repairs or improvements (Items Lacking Support); and items that he did not accept because they were not allowed by the Prior Decision, or because he considered them “straightforward” items such as furniture, which did not, in his opinion, qualify as remediation (Unaccepted or Rejected Amounts). (5/3/16 Tr. at 295-296.)

Most important, Mr. Brower credibly testified that he accepted the fourth and fifth floor work where he could determine that it was attributable to work allowed by this court in its Prior Decision. An example of the careful, nuanced distinctions that Mr. Brower made was his rejection of invoices by Caroline Schweyer Architect for design services for the Kleinberg Electric fifth floor offices, including design of a new gym for that office (Pl.’s Ex. 63 [A-1]), but his acceptance of flooring for the gym because repair of sloped floors throughout the building had been allowed by the court. He thus testified that the gym invoices involved design work. “This is not repairing. This is changing the use within the floors. So, that kind of thing I did not accept.” (5/3/16 Tr. at 282.) In contrast, he testified that “[i]f there was, for example,

² Ms. Lobo and Mr. Brower both relied heavily, without objection, on summary spreadsheets in testifying about the costs of repairs due to damage from the adjacent construction.

coordination with Norwegian Wood [a flooring contractor], I would accept that, because that . . . was related to the slope[d] floors which was allowed by the decision order.” (Id.)

In its cross-examination of Mr. Brower and its Proposed Findings, plaintiff emphasizes that Mr. Brower did not inspect the building before the damage was repaired and did not confer with certain engineers who had inspected the damage. (Pl.’s Proposed Findings ¶¶ 18, 20.) This contention ignores that Mr. Brower did not give testimony for the purpose of establishing what damage required repair – an issue that had already been decided by this court. Rather, his testimony was given for the purpose of analyzing the costs attributable to the work allowed by the court for repair of damage. Further, in its Proposed Findings, plaintiff gives “examples” of just two contractors’ invoices (Allied Contracting II Corp. and Con-Tech Painting Inc.) which, it contends, should not have been rejected. (Pl.’s Proposed Findings ¶ 23 n 3.)

As discussed further below, the invoices illustrate the difficulty the court faces in evaluating the costs recoverable for Allowed Work. The fact that this court may disagree with certain judgment calls made by Mr. Brower, or even that he may have made an occasional mistake in reviewing thousands of pages of invoices and checks at issue, does not undermine what the court finds to be the high degree of reliability of his analysis. In so holding, the court finds that many of the invoices do not contain detail necessary to enable the court to differentiate between Allowed Work and improvements. Moreover, with limited exceptions discussed below, plaintiff has made no showing that invoices rejected by Mr. Brower or found to be Lacking Support, on the basis that they covered reconfiguration or other work that was not previously allowed by the court, were in fact invoices for work that was Allowed Work or was not attributable to reconfiguration. Indeed, plaintiff briefly cross-examined Mr. Brower only about nine vendors’ invoices that he rejected in whole or in part. Plaintiff did not question either Mr.

Brower or Ms. Lobo in any detail about whether the specific invoices contained charges for Allowed Work, although it had the burden of proof on this issue.

It is well settled that the “plaintiff bears the burden of proving the extent of the harm suffered.” (J.R. Loftus, Inc. v White, 85 NY2d 874, 877 [1995] [internal quotation marks and citation omitted].) Particularly in contract actions, “when it is clear that some injury has been occasioned, recovery will not necessarily be denied a plaintiff when it is apparent that the quantum of damage is unavoidably uncertain, beset by complexity or difficult to ascertain. The law is realistic enough to bend to necessity in such cases.” (Berley Indus., Inc. v City of New York, 45 NY2d 683, 687 [1978] [internal citations omitted].) Indeed, it has been held that in appropriate circumstances, where it was impossible to calculate damages “with an absolute certainty and, so long as the figure arrived at had a reasonable basis of computation and was not merely speculative, possible or imaginary, the [finder of fact] had the right to resort to reasonable conjectures and probable estimates and to make the best approximation possible through the exercise of good judgment and common sense in arriving at that amount.” (Matter of Rothko, 43 NY2d 305, 323 [1977].)

Here, the court relies not on estimates, which the court previously rejected (Prior Decision at 11), but on invoices for work actually performed. The court holds that Mr. Brower’s analysis distinguishing costs for improvements from repair costs, while applying the rates for material and labor contained in the invoices, constitutes a reasonable basis of computation. The court therefore accepts, as a starting point for the calculation of damages and with certain adjustments discussed below, Mr. Brower’s analysis that the damage to the building from the adjacent construction amounted to at least \$890,230.29. This sum is comprised of \$388,362.46 for Accepted Amounts, and \$501,867.83 for Accepted Amounts If Checks Were Complete. As

held above, plaintiff's records of checks, and corroborating testimony, adequately demonstrated payments made by plaintiff for work allowed by this court's Prior Decision.³

As noted above, plaintiff cross-examined Mr. Brower about nine vendors' invoices. The court has reviewed these invoices, and makes the following findings:

Allied Contracting II Corp. (Allied): Plaintiff requests \$191,102 in damages for work done by Allied, the vendor responsible for facade work. Mr. Brower characterized \$62,500 of the amount requested as an Accepted Amount. (5/3/16 Tr. at 272.) One of the rejected items on Allied's "Continuation Sheet" was item 9 – "furnish and install new sidewalk & facade shoring." (Ex. 63 [A-1].) Mr. Brower testified that he did not allow this item because the description included the word "sidewalk" (5/3/16 Tr. at 318-319), an item for which the court had declined to award damages, as it had not been shown that sidewalk repair was needed due to the adjacent construction. (Prior Decision at 10.) The court credits Ms. Lobo's testimony that this item relates to the repair of the facade and that a sidewalk bridge was necessary in order to repair the cracks. (5/2/16 Tr. at 10, 13). The court therefore awards an additional \$77,200 for item 9. The court declines to award any additional claimed items of work done by Allied. For example, plaintiff requests \$21,250 for "thorocoating" of the north facade. Ms. Lobo testified that thorocoat is a type of elastomeric paint that makes walls more weather resistant. (Lobo Testimony, 5/2/16 Tr. at 12-13.) Plaintiff made no showing that the north facade had thorocoating before the adjacent construction, or that its application was necessary in connection with repairs to the cracks on the facade.

Ann Sacks Tile & Stone, Inc (Ann Sacks): Mr. Brower did not allow \$16,134.94 for Ann Sacks because this cost was not on Ms. Lobo's original repair scope and because Ann Sacks

³ This holding does not apply to the Kleinberg Electric charges, discussed below.

appeared to be a high-end company. (Brower Testimony, 5/23/16 Tr. at 10.) Ms. Lobo testified credibly that this tile was for three bathrooms on the fifth and fourth floor and was “[i]n kind.” (5/2/16 Tr. at 17-18.) The Ann Sacks charge will be awarded, as replacement of floor tiles was necessitated by the repairs to the sloping floors, an allowed item.

BlindTek Designer Systems, Inc. (Blindtek): Mr. Brower found this item for new blinds, in the amount of \$7,222.34, to be Lacking Support. This item will be allowed based on Ms. Lobo’s credible testimony that due to the damage to the building, “the windows wracked and the shades were damaged. . . .” (5/2/16 Tr. at 23.)

Con-Tech Painting Inc. (Con-Tech): Mr. Brower rejected the entire sum of \$16,500 because the invoice stated 457 West 18th Street, not 437 West 16th Street. (5/23/16 Tr. at 12.) The court credits Mr. Kleinberg’s testimony that this error in the address was clerical (see 5/3/16 Tr. at 222), but rejects this cost for a different reason. The Con-Tech invoice states that it was for “sandblasting and sealer work.” (Pl.’s Ex. 63[A-1].) Ms. Lobo testified that this work was done on the fourth floor to replicate the interior beam ceiling on the fifth floor. (5/2/16 Tr. at 54.) This aesthetic alteration was not shown to have been necessitated by the adjacent construction.

Frostline Cooling Mechanical Corp. (Frostline): Mr. Brower categorized Frostline’s invoices, totaling \$105,650, as Lacking Support. (5/23/16 Tr. at 13-14.) The court declines to award compensation for these invoices, as they involve mechanical items such as heat pumps, ductwork, and air conditioning units. As discussed earlier, costs associated with mechanical work on the fourth and fifth floors are not recoverable, and plaintiff has not elicited any testimony to enable the court to differentiate reliably between the mechanical work on these floors and work that may have been allowable in other areas of the building.

Goodwin Heart Pine Company (Goodwin Heart): Mr. Brower denied this item for

\$3,446.32 due to lack of proof of payment. (5/23/16 Tr. at 14.) The court finds that the evidence adequately establishes payment for this item. This item will be allowed, as sloped floors were required to be remediated throughout the building, and Ms. Lobo gave credible testimony that this vendor provided “in kind” wood flooring on the third floor after the remediation. (Lobo Testimony, 5/2/16 Tr. at 64.)

Manhattan Mini and Other Storage: Mr. Brower disallowed Manhattan Mini’s storage charges, in the amount of \$20,193. He appears to have rejected this item at least in part due to the time span. (5/23/16 Tr. at 15.) These charges will be allowed. Storage of furniture, fixtures, and files was not unreasonable, given that it was necessary to remediate sloped floors throughout the building. In addition, as the work occurred over a protracted period, the time span was not unreasonable. Although not the subject of the cross-examination of Mr. Brower, the court also awards charges by Grainger (\$1,785.06), Storage Plus (\$5,080), and The Container Store (\$2,792.72). These charges are for moving and storage related expenses. In defendants’ Proposed Findings of Fact and Conclusions of Law (Defs.’ Proposed Findings), these vendors’ charges, in slightly lower amounts, are listed as charges that the court should award. (See Defs.’ Proposed Findings, Ex. A entitled “Vendor by Vendor Analysis of Plaintiff’s Invoices.”)

Old Time Mechanical LLC (Old Time Mechanical): Mr. Brower rejected the invoices of this vendor for \$112,352 and accepted its invoices only for \$23,645. Old Time Mechanical’s invoices show that it performed HVAC and plumbing work throughout the building, including relocation and installation of new vents and pipes on the fourth and fifth floors. Plaintiff has failed to undertake a detailed analysis identifying the mechanical work on the fourth and fifth floors for reconfiguration which, as held above, does not qualify as remediation, and has not elicited any testimony to enable the court to differentiate reliably between the mechanical work

on these floors and work that may have been allowable in other areas of the building. Plaintiff also has not shown that Mr. Brower eliminated any mechanical items that may have been allowable. The court accordingly accepts Mr. Brower's analysis as to the amounts that should be rejected.

Supreme General Contracting (Supreme): Plaintiff seeks \$474,785 in damages for Supreme invoices, of which Mr. Brower found \$305,080 to be for Allowed Work, rejected \$21,550, and found \$158,425 Lacking Support. Ms. Lobo testified that Supreme did work in the basement, as well as miscellaneous work throughout the building. (5/2/16 Tr. at 69-72.) Again, plaintiff has not shown that Mr. Brower eliminated any items that may have been allowable. It is noted that plaintiff's total may have included items on a spreadsheet showing paid Supreme invoices (Ex. 63 [D]-[1], page 8]), which lists various items that are not Allowed Work, including \$85,000 for an a/c system, \$6,000 for a roll down door, and \$5,000 for costs labeled "storefront." This spreadsheet also includes a \$15,000 charge for windows, although Ms. Lobo testified that Panorama was the windows contractor. (5/2/16 Tr. at 67-69.) Plaintiff has not met its burden of proving that it is entitled to more compensation for Supreme invoices than the \$305,080 Mr. Brower allowed.

Given the magnitude of the invoices and plaintiff's failure to provide a detailed analysis of the invoices for which it seeks compensation, it has not been feasible for this court to review all of the invoices that were not cited by plaintiff in cross-examining Mr. Brower. The court has, however, reviewed the major invoices, and makes the following findings.

Kleinberg Electric: The court holds that the Kleinberg Electric charges, in the amount of \$300,082.90, should be denied in their entirety. As previously held, Kleinberg Electric and plaintiff are close corporations controlled by Carol and Paul Kleinberg. (Prior Decision at 11.)

The records generated by Kleinberg Electric consist of “Daily Reports” and untitled summary sheets, not invoices, and they are not supported by copies of checks. Under these circumstances, the court does not accept the records as proof that the costs were actually billed to and paid for by plaintiff. In addition, as discussed above, a substantial portion of the electrical work was performed in connection with the reconfiguration of the fourth floor and is therefore an improvement.

At the trial, the court inquired of Ms. Lobo whether it would be possible to identify charges for new electric work and to remove these charges if the court determined that the charges were for improvements, not remediation. Ms. Lobo responded that “it could be done” by looking at the electrical invoices. (5/2/16 Tr. at 142-143.)⁴ The Kleinberg Electric documents identify work done on a daily basis by various workers on the different floors. In order to calculate the charges for electric work, however, the court would need to sort through nearly one thousand pages to determine what work was done in what locations, and thereby to identify what work was for reconfiguration, and then to calculate the cost of labor and materials. This task is one that is not feasible for a court, and should have been performed by plaintiff as the party that had the burden of proof.

L.P. Deco-Painting & Woodworking Inc. (LP Deco): Plaintiff seeks \$265,792 for costs associated with LP Deco. (Lobo Testimony, 5/2/16 Tr. at 38.) According to Ms. Lobo, LP Deco “provided labor and material for cabinetry, closets, the interior venetian plaster on the walls and around two skylights” (Id. at 36.) Mr. Brower accepted \$84,200. (5/3/16 Tr. at 300.) After reviewing the LP Deco invoices, the court finds similarly that a substantial portion of these

⁴ The court put the same question to Ms. Lobo about plumbing work, and her response was the same. (5/2/16 Tr. at 142-143.) As held above, the court was unable, by looking at the invoices of Old Time Mechanical, to differentiate reliably between plumbing work for repairs and that for improvements.

invoices covers costs that cannot be considered remedial. Among the items claimed as damages were new cabinets in the gym with special attachments for bar weights (invoice 863), a 14 foot ballet bar (invoice 1581), custom shelves under the steps on the first floor (invoice 805), custom drawers installed in a desk on the fourth floor (invoice 1482), and a new conference room table (invoice 1483). These costs are for improvements and new furnishings, not repairs. The court also notes that Ms. Lobo testified that she originally recommended reinstallation of the existing mill work on the fourth floor. (10/30/13 Tr. at 393-394.) Plaintiff thus has not met its burden that the requested amount, \$265,792, was for repairs.

Other Furnishings: As this court has not allowed compensation for new furnishings and fixtures, the court will not award the invoices of Master Communications, Inc. (\$11,952.04 for telephone equipment), National Cathode Corp. (\$1,110.69 for lighting), Think Space NY (\$41,850.08 for file cabinets), and USM Modular (\$41,439.46 for furniture, including two lacquered glass tables, each costing \$5,894.55, and a credenza costing \$10,090.05).

Erwin Lobo: Finally, plaintiff seeks \$636,838 for fees charged by Erwin Lobo. (Lobo Testimony, 5/2/16 Tr. at 94). Mr. Brower neither accepted nor rejected Erwin Lobo's invoices. The court accepts Ms. Lobo's testimony that these invoices were paid, and that she reviewed these invoices and removed approximately \$230,000 in charges for work that was not allowed by the court. (Id.) These invoices contain numerous items for services such as "Project Management," "Shop Drawing Review," and "Site Investigation," but generally do not identify the specific work for which each of these services was performed. Some of the invoices list specific items of work that this court has held were not needed as a result of the adjacent construction (Disallowed Work) and no Allowed Work. Some of the invoices list specific items of Allowed Work and no Disallowed Work. For example, invoice 1071, dated February 1, 2009,

and covering the period from January 5 to January 29, 2009, lists three entries for Site Investigation starting January 5, 10 entries for Project Management starting January 6, and two entries regarding plumbing permits and drawings on January 29. Invoice 1205, dated June 1, 2009 and covering the period May 4 through June 11, 2009, lists 14 entries for Project Management starting on May 4, nine entries for Site Visit or Site Investigation starting on May 4, and one entry for a meeting about the facade on June 11. To the extent that these invoices do contain more detailed descriptions of the work performed, a substantial number include non-remedial work, such as installation of a glass canopy, design and construction of new egress stairs, and redesign of the lobby and facade. (See e.g. Invoices 169 [exit stairs, plumbing]; 400 [shop front, canopy, stone headers]; 436 [wine cellar, canopy]; 478 [canopy, exit stairs, store front]; 598 [HVAC design for basement office]; 558 [bathroom exhausts, overall building]; 557 [stair drawings preparation, basement ventilation system for relocated Photo Lab]; 704 [sidewalk drawings]; 810 [interior restacking & lobby, exhaust system design]; 916 [site investigations, duct modifications, mechanical meeting with contractor, north wall exterior cracks].) While some of these invoices may well have been removed, the record does not identify the specific invoices that Ms. Lobo culled.

Although many of the invoices do not enable the court to differentiate between Allowed Work and improvements, Erwin Lobo unquestionably performed extensive services at the building that were necessitated due to damage from the adjacent construction. Ms. Lobo credibly testified that during the early stages of the adjacent construction, “between January 2007 and well into 2008,” she made 60 or more site visits. (10/29/13 Tr. at 302.) It is undisputed that she and her firm continued to perform services at the building until the “Project Closeout” in March 2011. (See Invoice 807, dated March 1, 2011.) The court will not award Erwin Lobo

invoices if the nature of the categories of work performed cannot be ascertained from the face of the invoices. The court will also not award invoices if the specified item(s) of work are only for Disallowed Work or are overwhelmingly for Disallowed Work. In contrast, the court will award invoices if the specified item(s) are only for Allowed Work or are overwhelmingly for Allowed Work. While not an exact science, this methodology provides a reasonable basis for calculating damages, taking into account the settled precept that “absolute certainty” is not required. The following Erwin Lobo invoices are awarded:

Invoice 300: Dated January 31, 2007, for \$20,773.42 [e.g. client meeting, repair scope prep, drawings]

Invoice 327: Dated February 28, 2007, for \$6,625.41 [e.g. client meeting, repair scope prep, drawings, cost estimate revisions]

Invoice 335: Dated March 30, 2007, for \$13,573.94 [e.g. repair cost estimate prep, revisions to cost estimate, site visit and field report]

Invoice 360: Dated April 30, 2007, for \$11,120.25 [e.g. site visits and site investigations]

Invoice 385: Dated May 31, 2007, for \$15,917.90 [e.g. site visits and site investigations] is allowed only in the amount of \$2,875.00, the total of the entries. It appears to be missing a page.

Invoice 416: Dated June 26, 2007, for \$14,146.02 [e.g. site investigations and research of building codes]

Invoice 446: Dated July 26, 2007, for \$7,228.09 [e.g. site investigations]

Invoice 447: Dated July 26, 2007, for \$1,191.80 [e.g. south & north elevation “reclad” due to damage caused by Plaza]

Invoice 467: Dated August 30, 2007, for \$16,469.44 [e.g. site investigations]

Invoice 499: Dated October 1, 2007, for \$1,462.50 [e.g. preconstruction survey]

Invoice 634: Dated February 1, 2008, for \$26,581.91 [e.g. inspection-floors & windows, site investigations, front elevation investigation, floor levelness survey]

Invoice 650: Dated February 1, 2008, for \$16,280 [e.g. construction administration support – basement]

Invoice 705: Dated March 31, 2008, for \$4,335.08 [e.g. windows]

Invoice 757: Dated June 1, 2008, for \$1,375 [e.g. meeting with Plaza construction, gutter detail development, south facade survey preparation]

Invoice 826: Dated August 1, 2008, for \$250 [e.g. roof investigation]

Invoice 965: Dated November 1, 2008, for \$14,986 [e.g. drafting – north wall exterior cracks, site investigations, project management]

Invoice 1156: Dated April 1, 2009, for \$1,250 [e.g. crack surveys]

Invoice 1190: Dated June 1, 2009, for \$879.40 [e.g. fifth floor beam pocket inspection]

Invoice 104: Dated October 1, 2009, for \$5,232.95 [e.g. site investigations, crack surveys]

Invoice 435: Dated July 1, 2010, for \$908.57 [e.g. bid for new wood decking]

Finally, the court notes that plaintiff and defendants have both taken unreasonable positions throughout this trial as to the amount of damages to be awarded. At the outset of the trial, defendants admitted that the building was damaged. (Defs.' Opening Statement, 10/28/13 Tr. at 20 [Defendants "don't sit here and say to you, the building wasn't damaged. From day one they acknowledged there was damage to the building".]) Moreover, their own experts prepared damages estimates totaling hundreds of thousands of dollars. As held in the Prior Decision, as far back as 2007, even Joseph Buongiorno, defendants' structural engineer whom the court did not find credible, prepared the Rimkus estimate, acceding to damage in the amount of \$614,626. (Prior Decision at 8-9, Defs.' Ex. DDD-1.) Mr. Brower, whom the court found highly credible, prepared a damage estimate of \$890,230.29, while recognizing that plaintiff may be entitled to greater damages. Defendants nevertheless continue to argue that plaintiff is entitled only to "nominal damages." (Defs.' Proposed Findings at 10.) Conversely, plaintiff continues to seek damages attributable to improvements undertaken in connection with a gut rehabilitation of the

building. At the outset of the trial, plaintiff maintained a claim for approximately \$4.92 million, which plaintiff reduced at the continued trial to \$2.86 million. Notwithstanding this court's express directive that plaintiff prove damages for remediation, not improvements, at the continued trial, plaintiff continued to seek damages for extensive improvements principally attributable to the reconfiguration of the fourth and fifth floors. In the face of the parties' regrettably extreme positions, and in recognition that plaintiff's building indisputably sustained extensive damage due to the adjacent construction, this court's damages calculation is intended to provide a reasonable basis for compensation not for improvements but for repair of such damage.

It is hereby ORDERED as follows:

Judgment is awarded in favor of plaintiff 437 West 16th Street, LLC against defendants 17th and 10th Associates, LLC and The Related Companies, L.P. in the amount of \$1,191,629.45 (representing \$890,230.29 found to be for Allowed Work by defendants' expert, Barry Brower, plus \$133,854.38 for adjustments allowed by this court for vendors other than Erwin Lobo, plus Erwin Lobo invoices in the amount of \$167,544.78); and it is further

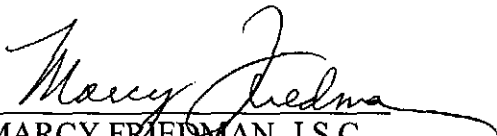
ORDERED that entry of judgment shall be held in abeyance and until further directive of the court, pending the following: 1) Plaintiff shall notify the court, within 10 days of the date of this order, if plaintiff has removed from its Vendors Summary Sheet (Exhibit 64[A] for id.) any of the invoices or any item(s) in any invoice for which this court awarded adjustments; and, if so, plaintiff shall identify such invoices and state the amount of any removed items; and 2) The parties shall serve supplemental briefs on the following issue: the date from which interest should be awarded. The briefs shall not address any other issue. Plaintiff's brief shall be served by July 11, 2016, defendants' brief by July 25, and plaintiff's reply brief by August 1. The

moving and opposition briefs shall not exceed 15 pages each. The reply brief shall not exceed 5 pages. Two hard copies of the briefs shall be filed with the Clerk of Part 60 by August 2;⁵ and it is further

ORDERED that the issue of the amount of plaintiff's attorney's fees shall be held in abeyance pending plaintiff's attorney's service of affidavit(s) setting forth the legal services performed and the charges for the legal services, attaching back-up time records and invoices, and attesting that the rates charged are usual and customary. Plaintiff's affidavits shall be served by July 11, defendants' opposing affidavit, if any, by July 25, and any reply affidavit by August 1. Two hard copies of the briefs shall be filed with the Clerk of Part 60 by August 2.

This constitutes the decision and order of the court.

Dated: New York, New York
June 27, 2016


MARCY FRIEDMAN, J.S.C.

⁵ Plaintiff requested interest from January 10, 2007, but did not explain the significance of this date (although it appears to be the date of filing of the above action). Nor did plaintiff submit legal authority supporting this date as the starting date for the award of interest. (Pl.'s Proposed Findings, Conclusion.) Defendants did not discuss interest, as they took the position that only nominal damages should be awarded. (Defs.' Proposed Findings, ¶ 22.)