SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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GRACIANO CORPORATION,

Plaintiff,

- v -

LANMARK GROUP, INC. and FEDERAL INSURANCE COMPANY,

Defendants.

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LANMARK GROUP, INC.,

Third-Party Plaintiff,

- v -

LIBERTY MUTUAL INSURANCE COMPANY,

Third-Party Defendant.

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Index No. 652750/14

Motion Date: 2/23/2018

Motion Seq. Nos. 003-004

DECISION AND ORDER

BRANSTEN, J.

Defendants Lanmark Group, Inc. ("Lanmark") and Federal Insurance Company ("Federal") move for (1) summary judgment dismissing the Complaint, (2) partial summary judgment as to liability on Lanmark's counterclaim against Plaintiff Graciano Corporation ("Graciano") and (3) summary judgment on Lanmark's Third-Party Complaint against Third-Party Defendant Liberty Mutual Insurance Company ("Liberty") (Motion Sequence Number 003). Graciano moves for summary judgment on all of its claims (Motion Sequence Number 004). Motion Sequence Numbers 003 and 004 are hereby consolidated for disposition.

For the reasons that follow, Defendants' motion is granted in part, such that the second cause of action in the Complaint is dismissed, and otherwise denied. Plaintiff's motion is denied.

I. BACKGROUND

This action arises from a construction project at P.S. 204(K) in Brooklyn, New York. In June 2013, the New York School Construction Authority ("SCA"), as owner, entered into a contract with Lanmark, as general contractor, known as "Exterior Masonry, Parapets, Roof, Flood Elimination, Paved Areas at PS 204(K) in Brooklyn, New York," to perform exterior renovation on two buildings, denominated the "1929 building" and the "1999 building" (the "Project"), at a contract price of $14,893,000.00 (the "Prime Contract"). (Affidavit of George Manouselakis ("Manouselakis Affid.") ¶ 3.) The Prime Contract contemplated that the Project would be completed by January 2015.

In addition, Lanmark, as principal, and Federal, as surety, executed and furnished a labor and material payment bond (Bond No. 8217-17-11) to SCA, guaranteeing prompt payment for labor and materials used for the Project. (*Id.*)

A. The Subcontract and Subcontract Performance Bond

By written subcontract dated September 4, 2013, Lanmark retained Graciano as the masonry subcontractor for the Project, to perform a "complete masonry installation" at a contract price of $5,320,000.00 (the "Subcontract"). (Manouselakis Affid. Ex. A,

Art. 2.1.) The Subcontract provides that the substantial completion date for the Subcontract was November 30, 2014 and the final completion date was December 31, 2014. (*Id.*, Art. 3.1.)

The Subcontract specifically excludes "out of sequence work operations except for coordination with other trade installation, and premium/overtime/extended shifts unless required due to subcontractor's fault." (*Id.*, Art. 2.1.) Furthermore, the Subcontract provides that Lanmark, "at any time, in any quantity or amount, without notice to the sureties and without invalidating or abandoning the contract, may add or delete, modify or alter the Work to be performed under this Agreement including, without limitation, ordering Changes or Extra Work." (*Id.*, Art. 8.1(a).) Graciano was not allowed to perform any change in the work unless it received a duly signed Change Order or Field Order from Lanmark. (*Id.*) If Graciano believed it was or would be entitled to additional compensation for Extra Work, it was obligated to provide Lanmark with written notice of the claimed extra work within ten work days after Graciano had knowledge or should have had knowledge of the event giving rise to the extra work. (*Id.*, Art. 8.1(b).)

On September 5, 2013, Liberty issued a Subcontractor Performance Bond for the Project in the amount of $5,3000,000.00, naming Graciano as principal and Lanmark as obligee (the "Performance Bond"). (Cooke Affirm. Ex. A.) In the event of Graciano's default, the Performance Bond provides, in part:

> (1) Surety may promptly remedy the default subject to the provisions of paragraph 3 herein or;
> (2) Obligee after reasonable notice to Surety may, or Surety upon demand of Obligee may arrange for the performance of Principal's obligation under the contract subject to the provisions of paragraph 3 herein;
> (3) The balance of the contract price, as defined below, shall be credited against the reasonable cost of completing performance of the contract. If completed by the Obligee, and the reasonable cost exceeds the balance of the contract price the Surety shall pay to the Obligee such excess, but in no event shall the aggregate liability of the Surety exceed the amount of this bond . . . . The term 'balance of the contract price,' as used in this paragraph, shall mean the total amount payable by Obligee to Principal under the contract and any amendments thereto, less the amounts heretofore properly paid by Obligee under the contract.

(*Id.* at 4.)

B. Disputes Between Graciano and Lanmark

While work on the Project was ongoing, numerous disputes arose between Lanmark and Graciano about delays in Graciano's work and the cause of those delays. (Affidavit of Glenn Foglio ("Foglio Affid.") ¶¶ 37-50.) As a result, in May 2014, Graciano sought an additional $500,000.00 from Lanmark for increased manpower, supervision, and additional summer shifts in order to complete the work as originally scheduled. (Foglio Affid. ¶ 21, Ex. DD.)

On August 27, 2014, Lanmark issued an addendum to the Subcontract ("Addendum No. 3"), that deleted a substantial portion of the masonry work, as follows:

> Delete remaining demo on window openings in 1929 South, 1929 West and 1929 North Elevations. In addition, delete the remaining masonry work at the 1929 South, 1929 West and 1929 North Elevations including but not limited to, back up brick, parging, waterproofing, stabilization, facebrick, APC and GFRC.

(Manouselakis Affid. Ex. S.) At that time, Graciano had completed approximately 30% of the work contemplated by the Subcontract. (*Id.* ¶ 41, Ex T.) Addendum No. 3 deleted approximately 30% of the Subcontract price, inclusive of claimed change orders. (*Id.*) Accordingly, following Addendum No. 3, approximately 35-40% of Graciano's Subcontract work remained. (*Id.* ¶ 42.)

By letter dated September 8, 2014, Graciano responded to Addendum No. 3 and notified Lanmark that it would immediately stop working on the Project. (Manouselakis Affid. ¶ 42, Ex. U.) Lanmark replied, by letter dated September 12, 2014, that it was terminating the Subcontract due to Graciano's material breaches and abandonment of the Project. (*Id.* ¶ 44, Ex. W.) By letter dated September 18, 2014, counsel for Lanmark notified Liberty of Graciano's termination and requested that Liberty complete the Project pursuant to its Performance Bond obligations. (Cooke Affirm. ¶ 8, Ex. A.) Liberty refused to complete the Project and Lanmark completed the work under the Subcontract using its own forces and other consultants/subcontractors. (Cooke Affirm. ¶ 8; Manouselakis Affid. ¶ 46.)

C. The Instant Action

Prior to Lanmark's termination of the Subcontract, Graciano commenced this action by filing a Summons with Notice on September 9, 2014. Graciano filed the Complaint on November 5, 2014, alleging causes of action for breach of contract and *quantum meruit* against Lanmark, and recovery under the payment bond against Federal. (Cooke Affirm. Ex. B.) The gravamen of the Complaint is that Lanmark delayed and interfered with Graciano's work on the Project and wrongfully deleted a substantial portion of the masonry work from the Subcontract, resulting in substantial damage to Graciano. (*Id.* ¶¶ 10-18.)

Issue was joined on December 9, 2014, when Lanmark and Federal filed an Answer and Counterclaim. (*Id.* Ex. C.) In the counterclaim, Lanmark alleges that Graciano breached the Subcontract by failing to perform the work in accordance with the Subcontract requirements; performing defective work; delaying completion of the work; and abandoning performance of the Subcontract in September 2014. Lanmark also commenced a third-party action against Liberty seeking to recover the cost of completing the work under the Subcontract from the Performance Bond. (*Id.* Ex. D.) Liberty filed an Answer to the Third-Party Complaint on February 17, 2015. (*Id.* Ex. E.)

Defendants now seek summary judgment dismissing the Complaint. Defendants also seek partial summary judgment as to liability on its counterclaim for breach of contract against Graciano and summary judgment on its third-party claim against Liberty. Graciano seeks summary judgment on the Complaint.

II. DISCUSSION

It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 N.Y.2d at 562. However, mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *Id.*

A. Graciano's Claim and Lanmark's Counterclaim for Breach of Contract

Both Graciano and Lanmark allege that the other breached the Subcontract. To plead a claim for breach of contract, plaintiff must allege "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

In its motion for summary judgment, Graciano argues that it was justified in stopping work on the Project because Lanmark delayed and interfered with Graciano's work on the Project, and wrongfully deleted a substantial portion of the masonry work from the Subcontract. Graciano blames the delays on events unrelated to the scaffolding,

such as installation of steel by another subcontractor, change orders, and delayed responses to requests for information needed to process submittals and shop drawings, and seeks more than $900,000.00 for, among other things, increased costs.

In opposition, and in support of its motion for summary judgment, Lanmark argues that Article 8.1 of the Subcontract expressly permits it to delete a portion of the work to be performed by Graciano, and that Graciano materially breached the Subcontract by abandoning the Project in response to the deletions outlined in Addendum No. 3. Lanmark also asserts that Graciano's breach of the Subcontract precludes it from recovering damages, and warrants dismissal of the Complaint. Lanmark further maintains that it is not responsible for Graciano's increased costs, especially since the scope of the work contemplated by the Subcontract was unchanged and the means and methods of completing the work was solely Graciano's responsibility.

It is beyond dispute that clauses in a construction contract that permit the deletion of work are commonplace and enforceable. *See Polo Elec. Corp. v. N.Y. Law Sch.*, 114 AD3d 419, 419 (1st Dep't 2014) ("The motion court [ ] properly determined that plaintiff was not wrongfully terminated and that, under the contract, defendants could reduce plaintiff's contractual work."). However, courts have generally construed such clauses to permit deletions in contracts so long as they "do not alter the essential identity of the main purpose of the contract." *Peter Scalamandre & Sons, Inc. v. New York*, 65 A.D.3d 774, 777 (3d Dep't 2009). Enforcement of an omission clause also requires a finding that

defendant's actions in omitting portions of the contract were not arbitrary or capricious. *Id.*

Here, as stated, the purpose of the Subcontract was "complete masonry installation." At the very least, a question of fact exists as to whether Addendum No. 3, which, among other things, deleted the remaining masonry work, eliminated substantial and material portions of the work contracted for, and had the effect of altering the essential identity and main purpose of the Subcontract. *See Gallagher v. Hirsh*, 45 A.D. 467, 473 (1st Dep't 1899) (stating that a contract provision could not be construed to allow the defendant to take two-thirds of the work from the plaintiff and then compel the plaintiff to complete the rest). As such, Lanmark has not established as a matter of law that Graciano breached the Subcontract by stopping work on the Project after receiving Addendum No. 3, which deleted a majority of the work contemplated by the Subcontract. Furthermore, the numerous disputes between Graciano and Lanmark about events of delay and who caused those delays also raise triable issued of fact regarding the claims for breach of contract. Thus, the branches of Defendants' and Plaintiff's motions for summary judgment on their breach of contract claims must be denied.

B. Graciano's *Quantum Meruit* Claim

Graciano's cause of action for *quantum meruit* against Lanmark must be dismissed, given the existence of a valid and enforceable Subcontract between the parties. *See Parker Realty Grp., Inc. v. Petigny*, 14 N.Y.3d 864, 865-66 (2010). The assertion

that Lanmark intentionally abandoned the Subcontract by issuing Addendum No. 3 is unavailing. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388 (1987). Thus, the branch of Defendants' motion that seeks summary judgment dismissing Graciano's claim for *quantum meruit* is granted.

C. Graciano's Claim for Recovery Under the Payment Bond

Federal furnished a labor and materials payment bond to SCA for the Project. Section 137(1) of the New York State Finance Law requires a bond "guaranteeing prompt payment of moneys due to all persons furnishing labor or materials to the contractor" under a contract for a public improvement for the state of New York. The purpose of Section 137 is to guarantee payment to contractors on public improvement projects even when there are insufficient funds against which a lien could be filed. *See Harsco Corp. v. Gripon Const. Corp.*, 301 A.D.2d 90, 93 (2d Dep't 2002). Here, the Project involved the exterior renovation of certain buildings owned by the SCA. Thus, the labor and materials bond issued to Citnalta was required under Section 137 of the New York State Finance Law.

State Finance Law §137(3) provides, in part:

> Every person who has furnished labor or material, to the contractor or to the subcontractor of the contractor, in the prosecution of the work provided for in the contract and who

> has not been paid in full thereof before the expiration of a period of ninety days after the day on which the last of the labor was performed or material was furnished by him for which the claim is made, shall have the right to sue on such payment bond in his own name for the amount, or the balance thereof, unpaid at the time of commencement of the action; provided, however that a person having a direct contractual relationship with a subcontractor of the contractor furnishing the payment bond but no contractual relationship express or implied with such contractor shall not have a right of action upon the bond unless he shall have given written notice to such contractor within one hundred twenty days from the date on which the last of the labor was performed or the last of the material was furnished, for which his claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or for whom the labor was performed.

Here, Graciano had a direct contractual relationship with Lanmark, the general contractor who furnished the payment bond. However, the papers submitted on summary judgment reveal a sharp dispute regarding the amount, if any, owed to Graciano. In particular, the parties dispute whether Graciano is entitled to compensation for acceleration costs due to increased manpower and other expenses resulting from the delay in completing the Project. The Court, on the record before it, simply cannot determine whether Graciano is entitled to compensation under the payment bond. Moreover, the Court is not persuaded that a waiver reportedly executed by Graciano in July 2014 bars a claim for subsequent work on the Project. Thus, the competing requests for summary judgment on the payment bond claims are denied.

D. Lanmark's Third-Party Claim Against Liberty

Finally, Lanmark seeks summary judgment on its third-party claim against Liberty for payment under the Performance Bond for the cost of completing the work under the Subcontract. The request is denied in light of the existence of triable issues of fact as to the enforceability of Addendum No. 3, and whether Graciano's work stoppage following the receipt of Addendum No. 3 constituted a breach of the Subcontract, requiring Lanmark to complete the remaining work.

III. CONCLUSION

Accordingly, it is

ORDERED that Defendants' motion for summary judgment is granted in part, to the extent of dismissing the second cause of action for *quantum meruit*, and the motion is otherwise denied; and it is further

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: New York, New York
December 28, 2018

ENTER

HON. EILEEN BRANSTEN
J.S.C.