Kirchoff-Consigli Constr. Mgt., LLC v Dharmakaya, Inc.
2018 NY Slip Op 33852(U)
August 28, 2018
Supreme Court, Dutchess County
Docket Number: 51167/2015
Judge: Maria G. Rosa
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

KIRCHOFF-CONSIGLI CONSTRUCTION MANAGEMENT, LLC,

Plaintiff,

-against-

DHARMAKAYA, INC.

Defendant.

DECISION AND ORDER

Index No: 51167/2015

On April 6, 9 and 10 of 2018 a bench trial was held on the issue of damages in this contract case. The plaintiff offered the testimony of its former project executive, Michael Winters; former project manager, Angelo Germano; former site superintendent, Brian Van Kleeck, and the operations manager for subcontractor Shawnlee Construction, Gerald Zimmer. The defendant, Dharmakaya, Inc., offered the testimony of its construction manager, Bart Mendel and an expert witness, William Guernier. The caption has been amended to reflect that by decision and order dated October 15, 2015 this action was dismissed as to defendant SBBC Associates, Inc. d/b/a Stonemark Construction Management.

On July 23, 2014 the subject construction contract, in evidence as Plaintiff's Exhibit 1, was entered into between Plaintiff and Defendant. The contract was for construction management services to be provided both pre-construction and during construction by Plaintiff to Defendant for four buildings on the site of the Mahamudra Buddhist Hermitage in Cragsmoor, New York, two residential buildings and two buildings for assembly, retreat and mediation space with health spa facilities.

The initial budget by the owner's representative, Stonemark Construction Management, was given in March 2014 at $11,789,272.00. According to the testimony of Plaintiff's first witness, Michael Winters, the project executive, as of August of 2014 they were only in the schematic and design development phase which was insufficient for the start of the project. Mr. Winters testified that he therefore took over finding four design subcontractors to prepare the mechanical, electrical and plumbing designs ("the MEPs").

The arrangement, in sum, was for costs plus a fee plus insurance with a guaranteed maximum

price ("GMP"). The GMP was supposed to be established after the project drawings were reviewed and the costs could be reasonably estimated, but the GMP was never established. Pay application 6 from Plaintiff to Defendant, which was a final pay application, has the total contract sum to date (April 17, 2015) at $12,388,310.63. The difference is represented as change orders, the total of which is $599,038.63.

Plaintiff was to be paid for pre-construction phase services, pre-construction project management time, construction phase services, design-build MEPs and subcontractor default insurance. The pre-construction work included review of architectural drawings, engineering, engaging and working with subcontractors, estimating the cost of the work, and preparing project schedules and written estimates. Even though the total costs according to the plaintiff for these pre-construction services was $45,277.00, the defendant was charged and paid $30,000.00 because in accordance with Section 4.1.2 of the contract, $30,000.00 was the cap for pre-construction services. For pre-construction management time, the plaintiff billed $13,200.00 which was less than the cap provided in the contract at Section 2.3.1.2 which was $23,851.92. Construction includes bid preparation and review, contract preparation and execution, project coordination and management and supervision of the work including of subcontractors.

If the GMP had been set, the parties were supposed to execute an amendment to the original contract so stating. Defendant terminated the contract on March 23, 2015, effective March 30, 2015, alleging termination for cause. On April 21, 2017, this court issued a decision and order holding that defendant did not properly follow the contractual requirements for terminating the contract for cause. Pursuant to the contract, since Defendant terminated the contract for convenience and no GMP had yet been established, Plaintiff is entitled to damages. Article 10 of the contract sets forth the procedure for calculation and payment of damages, for Plaintiff's compensation under those circumstances. In sum, it is the cost of the work done and materials used or committed to use as of the date of termination, plus the construction manager's fee (also as established in the contact) plus insurance and costs of termination, minus the total of defendant's prior payments for Plaintiff's construction phase services. Per Section 15.5 of the contract, the prevailing party in litigation regarding the contract is also entitled to reasonable counsel fees and costs.

Throughout the project Plaintiff submitted pay applications numbered 1 through 5 (Plaintiff's Exhibit 13 in evidence) which Defendant and his architect approved per the contract. Pay applications 1 through 4 were approved and paid. Pay application 5 was approved, but not paid. Pay application 6 was neither approved nor paid. Labor costs were determined by direct entry by employees of their time and the entry by the superintendent of laborers of his own time and his laborers' time. Plaintiff's first witness, Michael Winters, the project executive reviewed those entries between once every couple of weeks and once per month, according to his testimony. Pay applications 1 through 5 were approved per contract by the architect, Mr. Cutsumpas of Lothrop Associates, but again, only pay applications 1 through 4 were paid. Mr. Winters spoke with Bart Mendel once per week by phone because Mr. Winters was in California during the project. Each approved pay application was certified by the architect on the pay application itself and stated: "based on on-site observation and data comprising the [pay] application...that work has progressed

to the point indicated...the quality of the work is in accordance with the contract...and the contractor [is] entitled to payment." (Plaintiff's Exhibit 13 in evidence). Section 10.1.2 of the contract provides that in the event of a termination prior to the establishment of a GMP, plaintiff is to be equitably compensated for pre-construction phase services performed prior to the receipt of a notice of termination. Plaintiff seeks damages for pre-construction phase services in the sum of $30,000.00 agreeing to that cap because Section 4.1 of the contract which is also referenced in Section 10.1.2 limits Plaintiff's compensation for pre-construction phase services to that amount. Section 2.3.1.2 of the contract limits payment to Plaintiff for project management time incurred during that period to $23,851.92. Defendant does not dispute Plaintiff's claim for project management services between March 1, 2014 and July 12, 2014 for which Plaintiff seeks $13,200.00.

In addition to the $30,000.00 and $13,200.00 above is the cost of work to date of computation based on termination for convenience which includes the construction phase costs. The charges and supporting documents are in evidence as Plaintiff's Exhibits 4 through 7. Per Section 2.3.1.2 of the contract, the construction phase began on August 11, 2014. There were four categories with supporting invoices for administration $310,750.00, laborers $72,435.00, non-labor internal costs $154,677.25, and subcontractors costs $1,900,446.99 for a total of $2,438,309.24. Mechanical, electrical and plumbing costs ("MEPs") totaled $16,510.00 as of the date of termination. Per Section 5.1.1.1(b) Plaintiff claims it is entitled to subcontractors' default insurance ("SDI") in the sum of $28,506.70. Per Section 5.1.1.1(c) Plaintiff claims it is entitled to construction manager's insurance ("CMI") of $37,897.88. According to Plaintiff, Defendant does not oppose these numbers, and that brings the grand total to $2,564,423.82 plus per Section 10.1.3.2 Plaintiff claims it is entitled to a construction management fee of 4.5% of the cost of the work or $115,399.07. Plaintiff also seeks post-termination costs totaling $35,932.51 pursuant to Section 14.4.2 of the contract. Mr. Winters testified that Plaintiff did work after termination to "button-up" the site, move off of the premises, and finalize all contracts and purchase orders per Section 14.4.2 of the contract. The post-termination costs of $35,932.51 are included in pay application 6, as stated. The grand total is $2,715,755.40. Plaintiff credits defendant with payment to subcontractors of $381,401.85 and claims the balance due is therefore $1,166,604.85.

Since this court determined in its decision and order of April 21, 2017 that Defendant's termination of Plaintiff was without cause, for convenience, and since pay applications 1 through 5 were approved, this means that Defendant has already paid for pay applications 1 through 4 plus owes what was demanded in pay application 5, $208,277.70. Except as otherwise provided herein, Defendant's claims for damages for breach of contract against those services already approved pursuant to the contract by Defendant's architect are denied. Plaintiff's claims for sums in excess of pay applications 5 and 6 plus interest are also denied as hereinafter discussed.

The remaining questions include what portion of pay application 6 for $982,246.68 is due from Defendant to plaintiff and to what credits, if any, Defendant is entitled. Plaintiff's claim may be summarized as pay application 5 for $208,277.70 plus pay application 6 for $982,246.68 for a total of $1,190,524.38. The parties to this litigation both offered different numbers during trial than those proposed in their draft findings of fact and conclusions of law. In consideration of all of the

numbers submitted in the documentary evidence and the testimony, these are the numbers the court finds most accurately reflect Plaintiff's claim and Defendant's counterclaim and as may be considered in accordance with the terms of the subject contract. Further, as Defendant's counsel points out in their proposed findings, although pay application 6 was in the same format as the prior pay applications, in the cost binders in evidence as Plaintiff's Exhibits 2 - 9 Plaintiff did not break down its claimed costs into individual cost coded items or into general conditions, subcontractor work and change order categories, but instead intermingled those costs and presented everything as administration, laborers, non-labor internal costs or subcontractors which actually contains a mix of general conditions, subcontractors, and change order costs. Although some of the costs are connected with codes with which the parties are familiar, many are not. Even so, Defendant agrees that the total dollar amounts presented in pay application 6 and the binders submitted in evidence are only slightly different.

In addition to the $30,000.00 for pre-construction services, Defendant paid $1,167,748.70 for construction phase services which would leave a balance of $1,518,006.70 when deducted from plaintiff's total demand of $2,715,755.40. Defendant claims it also made direct payments to plaintiff's subcontractors totaling $489,256.66. Defendant's Exhibit 76 in evidence containing supporting documentation shows this sum was paid to subcontractors as follows:

$200,000.00 to AJS Masonry
$45,000.00 to AJS Masonry
$8,759.25 to Calculated Fire Protection Company, Inc.
$30,475.00 to Comalli Group, Inc.
$26,640.60 to Elite Plumbing and Heating
$79,660.00 to Family Danz Mechanical LLC
$6,975.00 to Mercurio-Norton-Tarolli Engineering and Land Surveying, P.C.
$28,892.00 to Rochester Structural LLC
$41,799.00 to Shawnlee Construction, LLC (not credited by plaintiff)
$6,945.25 to Tri-State Foundation Waterproofing (not credited by plaintiff)
$14,110.81 to Tri-State Foundation Waterproofing (not credited by plaintiff)

For pay applications 1 through 4, it is undisputed that defendant paid for

pay application 1 $464,638.82
pay application 2 $318,022.23
pay application 3 $198,297.68
pay application 4 $186,789.97

for a total of $1,167,748.70.

Approved but not paid was pay application 5 in the sum of $208,277.70 which brings the total approved to $1,376,026.40. Plaintiff agrees with all of the above plus acknowledges Defendant's credit of $30,000.00 as the cap for pre-construction phase services. Plaintiff also agrees

with all but $45,000.00 which defendant paid to AJS Masonry since plaintiff claims that was for work performed after Plaintiff's termination. Pursuant to defendant's Exhibit 76 in evidence, the $45,000.00 to AJS Masonry was for "Agreed Rental Costs Offset Since 4/1/15" which is post the effective date of Defendant's termination of Plaintiff's work. Therefore, Defendant should be credited with $444,256.91 in direct payments to subcontractors, that is $489,256.91 minus $45,000.00. Plaintiff only credited Defendant with $381,401.85 for subcontractors. Therefore, Defendant is entitled to a further credit of the difference, $62,855.06

Plaintiff's claimed costs at trial are not what was billed. The total costs less payments per the testimony at trial is $1,520,117.97. The total billed was $2,511.164.90. The total paid was $1,167,748.70. The difference is $1,343,416.20 but Plaintiff is seeking $1,166,604.85. Further, the final bill (Defendant's Exhibit 57) includes costs billed to Defendant but marked "not approved". $21,590.00 for general conditions costs were rejected by Defendant and removed from a prior pay application.

Pursuant to Section 6.2.1 of the contract only stated personnel were part of the costs of work and only on-site unless the owner or Mr. Mendel approved it. On cross-examination Mr. Winters acknowledged that no explicit approval was given by Defendant for off-site work. However, pay applications 1 - 5 were approved (Plaintiff's Exhibit 13 in evidence) even though some work was done, as all were aware, in the home office, and off-site, which included, for example, administrative work by Danielle Kierman regarding design and "buyout" as well as by Mitchell Wacholder. Mr. Mendel acknowledged he was aware that Plaintiff's personnel were performing work in the home office and he approved payment for that work. Again, Mr. Winters was in California and spoke with Mr. Mendel weekly.

Pursuant to Article 6 of the contract, there was a cap which could be charged for on-site construction for general conditions, $640,190.00. That limit on general conditions is pursuant to Section 5.1.1.2 of the contract. The items not approved because the percentages were beyond the proportionate share of the work done relate to that cap. Plaintiff did not dispute this. Defendant argues that Plaintiff agreed as demonstrated in Plaintiff's Exhibit 13 showing "this period" zero dollars. Mr. Winters testified that it was agreed between Plaintiff and Defendant that this would be reconsidered later and not paid if the aggregate would be more than $640,190.00. Defendant and its expert argued that where there is a contractual limit for general conditions it is commonplace for general conditions to be apportioned monthly, arguing that one twelfth of the total sum to date of termination times seven months is what Plaintiff should be entitled to receive as opposed to the $405,120.77 sought for general labor conditions in pay application 6. Even with zero dollars in pay application 4 for the month of January, 2015, Mr. Germano was at 74% of the cap. Mr. Winters and Mr. Mendel both acknowledged that they were concerned as to where the project stood overall. Since pay application 6 indicates that the contract sum to date was $12,388,310.63 and that the total completed to date was $2,620,303.43, arguably only about 21% of the job was complete six to seven months into the project. Both discussed agreeing to agree at a later date, "I am aware of the excess P.M. time" and " We'll review it later" (Plaintiff's Exhibit 22, email from Mr. Germano). However, that type of promise is unenforceable. What is enforceable is the contract which does not say that

upon termination the general conditions fees are proportionate. Mr. Winters testified that Plaintiff intended to get paid and would discuss it at the time of the GMP. He noted that while there were discussions about the "burn rate", the maximum of $640,190.00 was never reached.

In addition to Defendant's expert William Guernier's testimony that it is accepted construction industry practice that general condition costs be incurred in steady amounts over the course of a project, Defendant claims that the $405,120.77 claim is not an accurate accounting of the amount of general conditions actually and necessarily incurred by Plaintiff and should not be paid by Defendant. To the contrary, Mr. Winters testified that Plaintiff was allowed to bill and collect the general conditions as quickly as necessary. Defendant also argues against the $405,120.77 on the basis that it includes pre-construction services billed as general conditions during the construction phase. Defendant concludes that since Mr. Winters did not testify as to specific employees or the time spent on pre-construction services during the construction phase, there is no way to know how much plaintiff improperly billed for pre-construction services that should have been covered by the fix fee os $30,000.00. Therefore, Defendant further concludes that the pro-rata approach is fair. The pro-rata amount would be one-twelfth of the $520,960.00 total to the date of termination, per month, so $43,413.33 per month for seven months or $303,893.31. This court disagrees. There is no proof that pre-construction services over what is credited herein were included in the $405,120.77. The parties are bound by what is provided in the contract. There is nothing in the contract that states that the general conditions are to be incurred or apportioned equally on a monthly basis. In fact, this defies logic. The court found credible Mr. Winters' testimony that there was more work necessarily incurred at the beginning of the contract and throughout the months up until plaintiff's termination. Moreover, pay applications 1 through 5 were approved with the language cited above. Therefore, the court finds that the full sum of $405,120.77 with respect to pay application 6 is due, though Defendant is entitled to certain credits including against pay application 6 as set forth above and below. The parties agreed that the sum due for the general conditions for materials was $26,818.61.

Per Defendant's second witness, William Guernier, Plaintiff had originally budgeted $137,000.00 for building excavation and backfill/foundation by A.W. Coon and Sons, Inc. ("Coon"). According to defendant's Exhibit 60 in evidence, 80% of this work was done. Therefore, even though Coon billed plaintiff $252,000.00 which is 80% of its own projected fee of $315,000.00, defendant argues that defendant should have only been billed 80% of the budgeted $137,000.00. Mr. Guernier and Mr. Mendel acknowledged that Mr. Mendel reviewed and approved A.W. Coon's quote and billing but testified that although A.W. Coon completed the excavation work, it did very little, or none, of the backfill work. According to Mr. Mendel, backfill work comprises approximately 30% of the job. Coon allotted $315,000.00 for excavation and backfill and billed 80% of it or $252,000.00 which is consistent with this testimony. Pay application 6 includes charges for Coon totaling $300,400.00. Defendant says this billing was front-end loaded to benefit Plaintiff and Coon and argues that since this is a termination for convenience, Defendant should only pay for the actual excavation work done at a value of $152,257.00. The court agrees. Therefore Defendant is entitled to a credit of $99,743.00. Defendant has not offered sufficient proof to warrant further credits, either of $17,500.00 or of $9,400.00 against Coon's billed work.

As to the change orders of $599,038.83, and as to Defendant's proof regarding entitlement to certain credits, the court finds as follows: A cap for winter conditions was agreed to as set forth in Defendant's Exhibit 13 in evidence of $175,000.00. Therefore, the sum sought by Plaintiff, $278,839.67, is reduced by $103,839.67. In addition, the court finds that the parties agreed to a reduction of $55,723.19 for soil relocation, capping it at $30,000.00 instead of the sum sought by Plaintiff which was $85,723.19. (Defendant's Exhibit 13 in evidence). Plaintiff also seeks $10,320,00 for lowering slabs to accommodate the change from a two pipe system to a four pipe system in the design of the mechanical systems. Defendant says it should pay zero for this change because both the original design and the change were reviewed by Plaintiff and the change was recommended by Plaintiff and was a result of poor management by Plaintiff. The court finds Defendant's proof in this regard credible and therefore finds a reduction of $10,320.00 is warranted.

Defendant is also entitled to a credit of $50,000.00 since Plaintiff agreed to remove charges originally sought for Mr. Germano not approved by Defendant. Mr. Winters acknowledged that when he prepared pay application 6 he and Gregory Burns, the president of Plaintiff, decided to put the charges that Plaintiff had agreed to remove, including from pay application 4, back into pay application 6. Mr. Winters acknowledged putting Mr. Germano's previously removed charges along with previously unbilled charges into pay application 6 "even though that took [the Project Manager line item] to 134% of his overall value." Defendant's claim that "unnecessary early superintendence" warrant a credit of $13,600.00 is not credited as not sufficiently proven. Defendant claims that "unapproved personnel and unapproved work off-site" warrants a credit of $45,723.00 but is not credited because there was insufficient proof in this regard. As previously discussed, consent was obtained and defendant knew that work was being done off-site, and in fact, Mr. Mendel participated in and approved that work. In essence, the parties' practice became their consent as reflected not only in their conduct but in writing by virtue of the first five approved pay applications. As to defendant's claim that it was double billed $8,620.00 for certain labor which Defendant claims was inadvertently billed twice in both payment applications 2 and 3, the records do not support this. The labor breakdown for pay application 2 ends with November 14, 2014. The labor breakdown in pay application 3 has as its earliest date November 17, 2014.

Defendant claims $30,775.00 should be deducted from Plaintiff's claim for general condition costs incurred after plaintiff's termination became effective on March 30, 2015. This is the sum Plaintiff billed in general condition costs after that date. This sum, according to defendant, reflects costs Plaintiff claims to have incurred after March 30, 2015. Pursuant to the March 23, 2015 notice of termination per Section 14.4.2 of the contract, Plaintiff had seven days from then to the effective date of the termination to conduct its post-termination work. Mr. Winters acknowledged that Plaintiff continued charging Defendant for work done after March 30, 2015.

Finally, as to Shawnlee, Defendant argues that of $358,742.00 in pay application 6 Defendant should pay only $211,048.00 because the original bid was almost $350,000.00 less than the actual proposal accepted by Plaintiff and that would be the proportionate sum. That is, the price went from $1,090,620.00 to $1,436,700.00, an increase of $346,080.00. Defendant argues that of the $358,742.00 charged for Shawnlee in pay application 6, it would be fair to reduce it to $211,048.00

because that would be payment for the 90% of the work Plaintiff agrees that Shawnlee completed for Building B0 plus the value of the other materials fabricated by Shawnlee which Defendant was able to use. It would reduce each of those to 76% which is the approximate percentage (actually 75.91%) of the original estimate compared to the ultimate subcontract amount. Defendant further claims that Shawnlee manufactured materials that were not usable by the Defendant after being "value engineered", in other words, reduced back down to the budget. Mr. Mendel speculates that he would have done that had Plaintiff not been terminated from the project. However, it was clear from the credible testimony offered at trial that there were design changes throughout the project which frequently caused increased costs to Plaintiff and its subcontractors, all of which were discussed with Mr. Mendel. It was further adduced from the credible testimony at trial that Mr. Mendel put the responsibility of negotiating with Shawnlee into Plaintiff's hands and consented to whatever reasonable number could be reached though he testified that they discussed a limit of an additional $20,000.00. While it was acknowledged at trial by both Mr. Winters and Mr. Mendel that the Plaintiff did not obtain Defendant's written approval prior to entering into the subcontract with Shawnlee, both Mr. Mendel and Mr. Germano testified that they agreed to use Shawnlee, even after the increased scope of work, for the best price they could get. The minutes from meeting number 17 reflect that Shawnlee was hired on January 8, 2015 (Plaintiff's Exhibit 35 in evidence). Per Plaintiff's contract with Shawnlee, Plaintiff had the right to reduce the scope of the work. Further, pay applications 4 and 5 which were approved by Defendant in writing included the scheduled value of Shawnlee's work. Moreover, Plaintiff is not seeking the additional sum in this litigation, and issued a deduction for Shawnlee based on Defendant's objection. Shawnlee billed only for work actually done and materials actually used.

It was further adduced from the credible testimony at trial that the increased costs by Shawnlee were, in fact, reasonable given the changes in the scope of the work. Section 6.1.1 of the contract defines the "cost of the work" as the "costs actually and necessarily incurred by [Plaintiff] in the proper performance of the work." Approved costs in pay applications are part of the "cost of work".

The court has considered the arguments and proof as discussed in this decision and all arguments and proof presented by both parties at trial and as set forth in their proposed findings of fact and conclusions of law. In sum, the court finds that Plaintiff is entitled to the total of pay applications 5 and 6 less the credits herein set forth as follows:

Pay application 5	$208,277.70	
plus pay app 6	$982,246.68	
equals	$1,190,524.38	
minus	$30,000.00	for pre-construction services paid for by Defendant
minus	$47,861.00	for pre-construction services billed in pay application 6 already paid by the fixed $30,000.00 fee
minus	$62,855.06	for subcontractors paid for directly by

minus	$21,590.00	Defendant for work done through termination not credited to Defendant for general conditions costs previously rejected by Defendant and removed from Plaintiff's prior pay app which should not have been added to pay application 6;
minus	$99,743.00	for the reduction in A.W. Coon's cost;
minus	$103,839.67	for winter conditions;
minus	$55,723.19	for soil relocation;
minus	$10,320.00	for slabs;
minus	$50,000.00	for Mr. Germano's time not previously billed but added to pay application 6;
minus	$30,775.00	for unrecoverable post-termination general conditions costs incurred after March 30, 2015; which
equals	$677,817.46.	This sum less the contractual reductions discussed below is what is due by Defendant to Plaintiff.

This sum must be further reduced to reflect the concomitant reduction in the construction manager's 4.5% fee, in the 1.5% construction manager's insurance (CMI) fee, and in the 1.5% subcontractor's default insurance (SDI) fee. The $115,399.07 sought by Plaintiff for the construction manager's fee is based on $2,715,755.40 and must be reduced by 4.5% of the total credits and reductions granted herein. They total $512,706.92 which when multiplied by 4.5% equals $23,071.81. The $37,897.88 for CMI is also based on $2,715,755.40 and must be reduced by 1.5% of $512,706.92 or $7,690.60. The $28,506.70 is based on subcontractors' costs of $1,900,446.99 against which Defendant is credited $228,641.25 (that is $55,723.19 plus $10,320.00 plus $99,743.00 plus $62,855.06). 1.5 x $228,641.25 = $3,429.62. $677,817.46 minus $23,071.81 minus $7,690.60 minus $3,429.62 = $643,625.43.

Therefore, it is hereby

ORDERED that Defendant shall pay to Plaintiff the sum of $643,625.43 plus interest as set forth below within sixty days of entry of this decision and order. Plaintiff seeks interest at the statutory rate of 9% from the date of termination, March 23, 2015. Pay application 6 is dated April 17, 2015. Interest is awarded from May 7, 2015, the date payment of pay application 6 would have been due, which is 20 days post the date of pay application 6 per contract Exhibit C, page 7 Section V(D). Interest per the contract is 7% per Exhibit C, Section V(A)(2). Therefore, if Defendant fails to timely make payment, Plaintiff may enter judgment in the sum of $643,625.43 with interest

running at 7% from May 7, 2015 to entry of judgment and at the statutory 9% from the date of entry. Plaintiff is entitled to enforcement of its mechanic's lien to that extent and shall have execution thereon. Beyond that the lien shall be extinguished as soon as practicable; and it is further

ORDERED that although the court discussed with counsel the submission of post-decision and order applications for counsel fees which could be made by the prevailing party, the court finds that in this case neither party has prevailed. The Plaintiff is not entitled to as much as they seek. The Defendants are not entitled to as many credits as they seek. Accordingly, each party is responsible for its own counsel fees and costs incurred in this litigation.

The foregoing constitutes the decision and order of the Court.

Dated: August 28, 2018
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

Robert A. Banner, Esq.
Ingram, Yuzek, Gainen, Carroll & Bertolotti, LLP
250 Park Avenue
New York, NY 10177

James J. Barriere, Esq.
Hinckley, Allen & Snyder, LLP
30 South Pear Street, Suite 901
Albany, NY 12207

Scanned to the E-File System only

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.