American Indus. Corp. of N.Y. v Pioneer Window Mfg. Corp.
2018 NY Slip Op 33880(U)
October 29, 2018
Supreme Court, Nassau County
Docket Number: 610100-16
Judge: Timothy S. Driscoll

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

AMERICAN INDUSTRIES CORP. OF NEW YORK,

Plaintiff,

-against-

PIONEER WINDOW MFG. CORP.,

Defendant.

PIONEER WINDOW MFG. CORP.,

Third-Party Plaintiff,

-against-

LENDLEASE (US) CONSTRUCTION LMB INC.
formerly known as BOVIS LEND LEASE LMB, INC.,

Third-Party Defendant.

TRIAL/IAS PART: 11
NASSAU COUNTY

Index No: 610100-16
Motion Seq. No. 2
Submission Date: 10/16/18

Papers Read on this Motion:

Notice of Motion, Ulon Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Solomon Affirmation in Support.....x
Affidavit in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Ulon Supplemental Affirmation and Exhibits.....x
Reply Memorandum of Law in Further Support.....x
Correspondence dated 9/27/18 and 9/28/18.....x

This matter is before the court on the motion filed by Third-Party Defendant Lendlease (US) Construction LMB Inc. f/k/a Bovis Lend Lease LMB, Inc. ("Lend Lease") on September 11, 2018 and submitted on October 16, 2018. For the reasons set forth below, the Court grants the motion and dismisses the Third-Party Complaint.

BACKGROUND

A. Relief Sought

Lend Lease moves for an Order, pursuant to CPLR § 3211, dismissing the Third-Party Complaint of Defendant/Third-Party Plaintiff Pioneer Window Mfg. Corp. ("Pioneer"). Plaintiff American Industries Corp. ("AIC" or "Plaintiff") provides an affirmation in support of the motion.

Pioneer opposes the motion.

B. The Parties' History

The parties' history is set forth in detail in the prior decision ("Prior Decision") of the Court dated May 8, 2017 and the Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, the Verified Complaint ("Complaint") alleges as follows:

AIC is a company that is engaged in the business of furnishing and installing windows and related products with respect to the improvement of commercial and residential premises. Pioneer is a company that is engaged in the business of manufacturing, fabricating, supplying, furnishing and selling custom architectural windows, curtain walls, window walls and related accessories with respect to the improvement of commercial and residential premises. Pioneer held itself out as having extensive knowledge and expertise regarding the manufacturing of window wall systems in commercial and residential premises.

29 Flatbush Associates, LLC ("Owner") is the owner of premises ("Premises") located at 29 Flatbush Avenue, Brooklyn, New York, on which the Owner sought to construct a forty two (42) story building consisting of residential units, retail space, a parking garage and amenity spaces, known as "29 Flatbush" and now known as "66 Rockwell Place" ("Project"). On or about December 20, 2010, Lend Lease (US) Construction f/k/a Bovis Lend Lease LMB, Inc. ("Lend Lease") entered into an agreement with the Owner pursuant to which Lend Lease agreed

to provide construction management services as the agent for the Owner for the Project.

In or about July 2010, AIC received a bid package from Lend Lease, for whom AIC had previously performed work, with respect to furnishing and installing the exterior facade, a window wall system, for the Project. The documents in the bid package ("Bid Package") included the proposed contract to be entered into by Lend Lease with the contractor who had the successful bid, drawings and specifications. AIC contacted Pioneer about furnishing the materials for the exterior facade for the Project, with the intention that AIC would install the materials for the exterior facade, a window wall system, for the Project ("Project System").

Pioneer advised AIC that Pioneer would not only furnish the materials for the Project System, but was also willing to enter into a subcontract with a third party, other than AIC, to install the materials for the Project System and, in exchange for AIC bringing the business opportunity to Pioneer to furnish and install the Project System, Pioneer would compensate AIC as follows: after paying costs for labor and materials, Pioneer would divide the profit equally with AIC. AIC thereafter provided the bid package to Pioneer.

In or about April 2011, AIC, accompanied by Pioneer, went to a "close the job" meeting with Lend Lease (Comp. at ¶ 12) ("Meeting") to discuss the construction of the Project System. At the Meeting, Lend Lease agreed to award the contract for the furnishing and installing of the Project System to AIC for the sum of $7,750,000.00, with Pioneer having advised AIC that the cost for materials and labor would be $6,644,083.00. At the Meeting, Lend Lease also stated that the construction schedule was being delayed for ten (10) months due to issues relating to the foundation, and asked whether the Project System could be changed ("Initial Change") from a window wall system to a fusion wall system, with the price to be not more than the price for a window wall system. After confirming with Pioneer that the Initial Change was acceptable and could be implemented without a change in the cost of materials and labor, AIC agreed to the Initial Change.

On or about April 29, 2011, Lend Lease and AIC, with the knowledge and consent of Pioneer, entered into an agreement ("AIC/Lend Lease Agreement") pursuant to which AIC agreed to perform the work and furnish the materials for the fusion wall Project System for the agreed price of $7,750,000.00, as discussed as the Meeting. Shortly thereafter, Pioneer advised AIC that the third party with whom Pioneer intended to subcontract was unable to obtain the

requisite bonding and, therefore, Pioneer did not have a third party to install the System. Pioneer and AIC then discussed entering into a joint venture pursuant to which Pioneer would manufacture the materials for the Project System and AIC would install the materials provided by Pioneer for the Project System. In or about May 2011, Pioneer and AIC entered into an oral joint venture agreement ("Joint Venture Agreement") pursuant to which AIC and Pioneer agreed that: 1) Pioneer would manufacture the materials for the Project System in accordance with the terms of the AIC/Lend Lease Agreement, including but not limited to the schedule and costs for the fabrication of the materials as set forth in the AIC/Lend Lease Agreement, specifically $4,922,365.00; 2) AIC would install the materials provided by Pioneer for the Project System in accordance with the terms of the AIC/Lend Lease Agreement, including but not limited to the schedule and costs for the installation of the materials as set forth in the AIC/Lend Lease Agreement, specifically $1,721,718.00; 3) each party would contribute its expertise to the Joint Venture, with Pioneer bringing its expertise in manufacturing and fabricating wall systems to the Joint Venture and AIC bringing its expertise in installing wall systems to the Joint Venture; and 4) after payment of costs for materials and installation, anticipated profits of approximately $1.1 million would be divided equally between AIC and Pioneer, provided that any losses would also be equally divided between the parties.

On or about January 25, 2011, Pioneer provided proposed drawings for the Project System ("Proposed System Drawings") to AIC which, with Pioneer's knowledge, sent the Proposed System Drawings to Lend Lease. The Proposed System Drawings reflected that the exterior facade would be a fusion wall system that featured machined curtain wall components that were notched at the slab level to bypass the slab edge while sitting directly on and below the floor slabs to which they were mechanically fastened and set from within the building.

Pursuant to the Joint Venture Agreement, AIC discussed with Pioneer a fabrication schedule for the Project System as depicted in the Proposed System Drawings. Pioneer advised AIC that the fabrication schedule ("Initial Fabrication Schedule") for the Project System as depicted by the Proposed System Drawings would be as follows: delivery of the first set of panels by mid-December 2011; thereafter, panels for a minimum of two (2) floors per week would be delivered in accordance with the AIC/Lend Lease Agreement; and, as required by the AIC/Lend Lease Agreement, completion of the Project System would be achieved within 355

calendar days of the first delivery of panels in mid-December 2011. AIC, with Pioneer's knowledge, conveyed to Lend Lease the Initial Fabrication Schedule.

Pursuant to the Joint Venture Agreement, Pioneer thereafter manufactured a built-in mock-up ("Mock-Up") of the panels for the Project System as depicted by the Proposed System Drawings. During Lend Lease and AIC's review of the Mock-Up at Pioneer's plant, it became apparent that the Proposed System could not be manufactured as depicted by the Proposed System Drawings, and Pioneer advised AIC that modifications were needed. In or about late September 2011, Pioneer advised AIC, which advised Lend Lease, that the Project System as depicted by the Proposed System Drawings failed to account for mating the in-corners and the out-corners which, by design, required panels to be installed sequentially and, therefore, the Project System as depicted by the Proposed System Drawings could not be properly assembled. Pioneer proposed to AIC, which proposed to Lend Lease and other parties, that the Proposed System should be modified ("Second Change") from a fusion wall system to a standard curtain wall system, with notched mullions connecting to top slabs which, Pioneer represented, Pioneer had successfully installed at other projects. In accordance with the Joint Venture Agreement, Pioneer advised AIC that there would be no cost change associated with making the Second Change. On or about November 1, 2011, Pioneer provided AIC with proposed drawings for the Second Change ("Second Proposed System Drawings") and AIC, with Pioneer's knowledge and consent, provided the Second Proposed System Drawings to Lend Lease.

On or about December 31, 2011, pursuant to the Joint Venture Agreement, Pioneer advised AIC that the fabrication schedule ("Revised Fabrication Schedule") for the curtain wall System under the Second Change would be as follows: delivery of the first set of panels by mid-June 2012; thereafter, panels for a minimum of two (2) floors per week would be delivered in accordance with the AIC/Lend Lease Agreement; and, as required by the AIC/Lend Lease Agreement, completion of the Project System would be achieved within 355 calendar days of the first delivery of panels in mid-June 2012. AIC, with Pioneer's knowledge, conveyed to Lend Lease the Revised Fabrication Schedule for the Project System under the Second Change.

Shortly thereafter, Pioneer advised AIC that the first set of panels under the Revised Fabrication Schedule under the Second Change could not be delivered until mid-July 2012 rather than mid-June 2012. AIC, with Pioneer's knowledge, conveyed to Lend Lease the change in the delivery date for the first set of panels under the Revised Fabrication Schedule under the Second Change. Pioneer then manufactured a set of panels as proposed by the Second Change to be tested at Architectural Testing, Inc., an independent performance testing company located in

Pennsylvania ("Performance Mock-Up"). At the Performance Mock-Up, the set of panels passed the specific performance requirements of the Project to the satisfaction of the consultants of the Owner for the Project.

Unbeknownst to AIC, the "fully tested" (Comp. at ¶ 39) System in the Second Change was similar to a "Sotawall" system (Comp. at ¶ 39), for which a patent was held by Sotawall, Inc., which was then being used on exterior facades on other buildings. On May 15, 2012, Sota Glazing, Inc. ("Sota") advised Lend Lease that the notched mullions in the fully tested System proposed in the Second Change, and accepted by Lend Lease, AIC and other parties, violated the patent owned by Sota. To avoid the delay that would result if there were litigation with Sota, in accordance with the Joint Venture Agreement, Pioneer proposed to AIC, which proposed to Lend Lease and other third parties, that the Project System be changed again ("Third Change") from a fully tested standard System to a "true" curtain wall system (Comp. at ¶ 41) where the mullions are not notched but the faces of the slabs are pulled back to allow the mullions to "fly past" (*id.*). To accommodate the Third Change, the Owner of the Project had to have the architect and structural engineer for the Project revise the drawings for the Project because the Third Change required the face of the slabs to be pulled back to accommodate the true curtain wall, thereby reducing the interior sizes of the apartments for the Project.

Pursuant to the Joint Venture Agreement, on or about June 12, 2012, Pioneer advised AIC that the fabrication schedule ("Further Revised Fabrication Schedule") for the true certain wall system for the Project System under the Third Change would be as follows: panel deliveries would commence on or about July 26, 2012 and end on or about December 6, 2012, which would have allowed AIC to install the panels commencing on or about August 8, 2012 and ending on or about January 6, 2013. AIC, with the knowledge of Pioneer, conveyed to Lend Lease the Further Revised Fabrication Schedule for the true Project System under the Third Change.

The Complaint contains three (3) causes of action:

1) Pioneer breached the Joint Venture Agreement by a) failing to provide panels for the true Project System under the Third Change pursuant to the Further Revised Fabrication Schedule as follows: i) the first panels were not provided until October 2012, rather than the end of July 2012; ii) panel deliveries were sporadic through the remainder of 2012 and 2013; and iii) the last panels were delivered in 2014; b) improperly fabricating panels and related accessories for the Project System resulting in numerous leaks throughout the true Project System and otherwise providing defective, nonconforming and unusable materials for the Project System; and c) increasing the costs for the fabrication of the materials above the costs set forth in

the AIC/Lend Lease Agreement. AIC alleges that, as a result of that breach, 1) AIC was delayed in the installation of the Project System; 2) AIC was caused to pay Pioneer amounts of monies exceeding the costs for materials set forth in the AIC/Lend Lease Agreement; 3) AIC was caused to incur other costs and expenses for materials and labor in excess of what was contemplated under the AIC/Lend Lease Agreement; and 4) AIC was caused to breach the AIC/Lend Lease Agreement. Although AIC sought an adjustment to the contract sum under the AIC/Lend Lease Agreement, Lend Lease refused any adjustment to the contract sum and threatened to sue AIC for breach of the AIC/Lend Lease Agreement by delaying the Project. AIC alleges that it performed all of the terms, conditions and work under the Joint Venture Agreement that it was required to perform.

2) Alternatively, if the Court does not find that there was a Joint Venture Agreement as alleged, AIC originally engaged Pioneer to manufacture, fabricate, furnish and install the Project System pursuant to the following agreement ("AIC/Pioneer Subcontract"): Pioneer would manufacture, fabricate, furnish and install the Project System in accordance with, including the cost set forth in, the AIC/Lend Lease Agreement, for which AIC would pay $6,644,083.00 for materials and labor, and the resulting profit, then estimated to be approximately $1.1 million, would be divided equally between AIC and Pioneer. Thereafter, Pioneer advised AIC that Pioneer was able to manufacture, fabricate and furnish the materials for the Project System but was unable to install the Project System, which resulted in a modification of the AIC/Pioneer Subcontract to an agreed price of $4,922,365.00. Plaintiff alleges that Pioneer breached the AIC/Pioneer Subcontract by 1) failing to provide panels for the true Project System under the Third Change under the Further Revised Fabrication Schedule as follows: a) the first panels were not provided until in or about October 2012, rather than at the end of July 2012; b) panel deliveries were sporadic throughout the remainder of 2012 and 2013; and c) the last panels were delivered in 2014; 2) improperly fabricating panels and related accessories for the Project System resulting in numerous leaks, and otherwise providing defective, nonconforming and unusable materials for the Project System; and 3) increasing the costs for the fabrication of the materials above the costs set forth in the AIC/Lend Lease Agreement. AIC alleges that, as a result of that breach, 1) AIC was delayed in the installation of the Project System; 2) AIC was caused to pay Pioneer amounts of monies exceeding the costs for materials set forth in the AIC/Lend Lease Agreement; 3) AIC was caused to incur other costs and expenses for materials and labor in excess of what was contemplated under the AIC/Lend Lease Agreement; and 4) AIC was caused to breach the AIC/Lend Lease Agreement. Although AIC sought an adjustment to the contract

sum under the AIC/Lend Lease Agreement, Lend Lease refused any adjustment to the contract sum and threatened to sue AIC for breach of the AIC/Lend Lease Agreement by delaying the Project. AIC alleges that it performed all of the terms, conditions and work under the AIC/Pioneer Subcontract that it was required to perform.

3) Pioneer failed to provide a warranty and perform warranty work based on the allegation that Pioneer, whether as a joint venturer or subcontractor, agreed, and was required, upon the completion of the true Project System, to provide a five (5) year warranty ("Warranty") for the materials to AIC, which in turn was required to provide the Warranty to Lend Lease for delivery to the Owner pursuant to the AIC/Lend Lease Agreement. Pioneer provided "the form of warranty" to AIC (Comp. at ¶ 64) but refused to provide a signed Warranty to AIC. As a result of AIC's inability to deliver to Lend Lease a signed Warranty from Pioneer, AIC had to execute and deliver a Warranty to Lend Lease for delivery to the Owner pursuant to the AIC/Lend Lease Agreement. Thereafter, AIC received written notices from the Owner stating that water was leaking into the building through the System. AIC has provided written notices to Pioneer requesting that Pioneer repair the System to prevent the leaks, but Pioneer has ignored those requests. As a result, AIC has incurred costs for which Pioneer is responsible, in whole or in part, in the sum of $188,267.00, which amount will continue to increase because there are approximately 2 and ½ years remaining under the Warranty that AIC provided to Lend Lease which was delivered to the Owner.

As also noted in the Prior Decision, in its Verified Answer with Counterclaims ("Answer"), Pioneer asserts the following four (4) Counterclaims:

1) breach of contract based on the allegations that a) AIC enlisted Pioneer's assistance for the Project and, in doing so, requested that a specific product by manufactured by Pioneer for use at the Project; b) all pricing negotiations were based on the presumption that this specific product would be used at the Project; c) AIC repeatedly altered its requests, from basic windows to a substantially more involved curtain wall, and went from asking Pioneer to initially take care of the installation to AIC wanting to perform the installation itself; d) AIC and/or nonparties over whom Pioneer lacks privity or control "fell victim to what was essentially an extortion letter" (Answer at ¶ 85) which falsely asserted that the curtain wall used violated a patent and, as a result, needlessly required Pioneer to redo its work by making new units to comply with the demands set forth in the letter; e) Pioneer was not compensated for this additional labor or the supplies necessitated by it; f) in light of the foregoing, AIC breached its obligations, contractual or otherwise, to Pioneer; g) these breaches have caused, and continue to cause, damage to

Pioneer; and h) Pioneer performed all of its obligations to AIC, contractual or otherwise.

2) unjust enrichment based on the allegation that a) Pioneer worked with AIC with the understanding that AIC would abide by the terms and spirt of their agreement, contractual or otherwise; b) Plaintiff failed to uphold its obligations, whereas Pioneer upheld its own; c) as a result of AIC's conduct, Pioneer has been unjustly enriched by the amount of time, labor and expenses that it incurred; and d) as a result of the foregoing, Pioneer has been damaged, and continues to be damaged..

3) *quantum meruit* based on the allegation that a) AIC is liable to Pioneer in *quantum meruit* for the reasonable value of the goods delivered and services performed by Pioneer to AIC; and b) by reason of the foregoing, Pioneer has been damaged, and continues to be damaged.

4) breach of the duty of good faith and fair dealing based on the allegation that a) New York State law imposes a duty of good faith and fair dealing on all parties to a contract; b) this duty requires each contracting party to refrain from doing anything that may have the effect of destroying or injuring the other party's rights to receive benefits under the contract, and includes an affirmative promise to abide by any promises that a reasonable party would be justified in expecting under the contract; c) the parties entered into an agreement, written or otherwise, in New York State, where AIC filed this action, and accordingly the agreement incorporates the covenant of good faith and fair dealing in the course of the performance of their respective obligations; and d) AIC breached this covenant, resulting in damages to Pioneer.

The Prior Decision addressed the prior motion ("Prior Motion") by Plaintiff for an Order dismissing the four counterclaims asserted by Pioneer. In the Prior Decision, the Court denied the Prior Motion but directed that Defendant would only be permitted to pursue its Counterclaims as they related to work, if any, performed by Defendant after February 6, 2014, the date of the Release at issue. The Court noted that while Plaintiff had raised meritorious arguments regarding the viability of the Counterclaims in light of the Release, the Court could not say, as a matter of law, that the Release conclusively established a defense as a matter of law. The Release did not explicitly state the dates of work covered by the Release, and contained language that was arguably consistent with Defendant's position that the Release did not apply to work performed by Defendant after the date of the Release. In consideration, however, of the fact that 1) the Counterclaims did not specify the dates of work for which Defendant sought compensation; 2) Defendant had argued that the Release did not apply to work performed after February 6, 2014; and 3) Defendant provided an affidavit of Defendant's representative stating that Defendant provided work after February 6, 2014 for which it was entitled to compensation,

the Court directed that Defendant would only be permitted to pursue its Counterclaims as they related to work, if any, performed by Defendant after February 6, 2014, the date of the Release.

In support of the motion now before the Court, counsel for Lend Lease ("Lend Lease Counsel") provides copies of the following (Exs. 1-6 to Ulon Aff. in Supp.): the Final Waiver of Lien and Release dated February 6, 2014 and executed by Pioneer (Ex. 1); the Prior Decision (Ex. 2); the Agreement for Construction Management Services and Guaranteed Maximum Price dated December 20, 2010 (Ex. 3); the Complaint (Ex. 4); the affidavit of Vincent J. Amato, Jr. dated March 15, 2017 (Ex. 5), submitted in opposition to the Prior Motion; and Pioneer's Third-Party Complaint dated July 17, 2018 (Ex. 6).

In the Third-Party Complaint, Pioneer alleges that in the main party action, AIC alleges, in part, that Pioneer as manufacturer of the window wall system for the construction of the Project was delayed in its manufacturing of the window wall system. AIC alleges, in turn, that as the installer of the window wall system manufactured by Pioneer, AIC was delayed in the installation of the window wall system at the Project, sustaining damages of not less than $5 million.

Pioneer alleges, further, that the recent deposition testimony of Gary Plutzer ("Plutzer"), the President of AIC, undermines the allegations in the Complaint. Pioneer alleges that this deposition testimony demonstrates that if any of the delays were attributable to any entity other than AIC, then such delays were caused by the acts and/or omissions of Lend Lease and/or its subcontractors, not Pioneer. It is for this reason that AIC already pursued the recovery of its alleged delay damages from Lend Lease. Pioneer also alleges that Plutzer's testimony confirms that, notwithstanding AIC's allegations to the contrary in its Complaint, AIC never entered into a written contract with Pioneer to govern their work together on the Project.

The Third-Party Complaint alleges that on or about December 20, 2010, Lend Lease entered into an agreement with the Owner of the Premises, for construction management services for the Project. As construction manager, Lend Lease was responsible for most, if not all, phases of the construction as well as retaining subcontractors, and directing, supervising and/or overseeing all trades during the construction.

In or about July 2010, AIC received a bid package from Lend Lease with respect to furnishing and installing the exterior facade, a window wall system, for the Project. AIC contacted Pioneer about furnishing the window wall system, and Pioneer agreed to furnish the system. On or about December 13, 2010, AIC was presented with a form subcontract from Lendease for the installation of the window wall system. In or about April 2011, at a meeting

with AIC, Pioneer and Lend Lease, Lend Lease requested that the window wall system be changed to a fusion wall system. On or about April 29, 2011, Lend Lease, as construction manager and agent for the Owner, entered into a subcontract with AIC for the windows/fusion wall installation.

Due to circumstances beyond Pioneer's control, it became apparent that the fusion wall system that Lend Lease had requested was not feasible "in the eyes of AIC and Landlease" (TPC at ¶ 18). It was proposed that they return to the window wall system, but that proposal was rejected. The fusion wall system was changed to, in AIC's terms, a modified curtain wall system, with notched mullions that connect the wall panels to the concrete slab.

On or about May 15, 2012, Sota advised Lend Lease that they owned a patent on the notched mullions being used on the modified curtain wall system. Without any confirmation of the patent by Landlease, Pioneer was forced to change the modified curtain wall system to a true curtain wall system without additional compensation to Pioneer. For each of the modifications, from a window wall system to a fusion wall system to a modified curtain wall system to a true curtain wall system, plans, drawings, designs, specifications, "mock ups" and testing had to be completed. Pioneer alleges that any delays attributed to Pioneer were caused, in whole or in part, by the constant design changes implemented by Landlease. Pioneer incurred great monetary loss due to additional costs for time, material, labor and expenses in providing a superior full glass facade product for a window wall price, for which it was not compensated. Pioneer alleges that the main parties "ultimately agree that Landlease received a "superior and highly expensive product for a cheap and inequitable price" (TPC at ¶ 22)

At the meeting in or about April 2011 with AIC, Pioneer and Lend Lease, Lend Lease stated that there was a 10-month delay in the construction due to foundation issues. This was the first of many delays in the construction of the Project over which Pioneer had no control. Rather, the delays were caused by employees of Lend Lease and/or subcontractors retained by Lend Lease. Examples include: 1) the superstructure concrete was not installed in accordance with shop drawings and architectural plans, resulting in delays caused because concrete slab edges on various floors throughout the Premises were poured too short or over-poured beyond the point that they should have been; 2) on various floors throughout the building, the edge of the concrete was intentionally cut back by the concrete subcontractors hired by Lend Lease, at Lend Lease's direction, requiring remedial work to correct the cutting back of the concrete which took approximately 4 months to correct; and 3) on various floors throughout the building, the epoxy bolts which hold the remedial plates into the concrete were inadequate, causing delays because

the engineer and testing agency had to inspect and perform more tests on the bolts being used.

The Third Party Complaint contains two (2) causes of action:

1) against Lend Lease for indemnification based on the allegation that the underlying defects and delays in the construction and installation of the curtain wall window system were caused, in whole or in part, by the negligence, wrongdoing and/or delays caused by Lend Lease; and

2) against Land Lease for contribution based on the allegation that should judgment be recovered from Pioneer, it will be entitled to contribution from Land Lease for all or any part of the amount of the judgment on the basis of apportionment of responsibility as shall ultimately be determined at the trial of this action.

In further support of the motion, counsel for AIC ("AIC Counsel") joins in the motion, for the reasons set forth by Lend Lease in its motion. AIC Counsel submits that the Third-Party Complaint "is nothing more than a baseless attempt by Pioneer to delay this action and avoid responsibility for damages suffered by AIC arising from Pioneer breaching its agreement with AIC and failing to perform which delayed [the Project]" (Solomon Aff. in Supp. at ¶ 4). AIC Counsel submits that the Prior Decision upheld the legitimacy of the Release executed by Pioneer and delivered to AIC. AIC Counsel submits that the Prior Decision, which was not appealed, determined that the Release is valid and binding, and Petitioner may not seek to re-litigate the rulings in the Prior Decision concerning the Release by filing the Third-Party Complaint.

AIC Counsel notes that page 2 of the Release includes the following language (bold in original)::

> [**Pioneer**] agrees and acknowledges that the **RELEASE** contained herein runs not **only to 29 Flatbush Avenue, Brooklyn, NY 11217, but to the OWNER, 29 Flatbush Associates, LLC** and its agents, [**AIC**], any lender (whether of the **OWNER** of the **PROJECT** or the **CONTRACTOR**) and/or the bonding company of [**AIC**], any of which may rely upon the **RELEASE** contained herein. [**Pioneer**] further agrees and acknowledges that the **RELEASE** contained herein includes, but is not limited to, any and all claims that [Pioneer] has or may have against the bonding company of [**AIC**].

AIC Counsel submits that Lend Lease, as construction manager of the Owner, was the agent of the Owner and, therefore, the Release is applicable to Lend Lease as well as others, including

AIC. AIC Counsel submits that the Release is devoid of any language suggesting that Pioneer reserved indemnification or contribution claims against Lend Lease. Thus, he submits, the Release expressly precludes Pioneer from asserting third-party indemnification and contributions claims against Lend Lease.

In opposition, Amato submits that Lend Lease was not a party to the Release. Amato affirms that Pioneer had little or no direct dealings with Lend Lease on the Project, and did not enter into any contract with Lend Lease. In addition, Pioneer was not directly compensated for its work by Land Lease.

Amato submits that Lend Lease is confusing Pioneer's counterclaims against AIC, which seek additional money for its work performed on the Project, with Pioneer's third-party claims seeking common law indemnification and contribution from Lend Lease for the delay claims that AIC wrongly asserts against Pioneer. As Amato recently testified at his deposition, any delays on the Project were caused not by delays in Pioneer's work, but rather by the problems with the building's superstructure and concrete, which needed to be rectified before much of the building facade work, with which Pioneer was involved, could be performed.

Amato affirms, upon information and belief, that Lend Lease was responsible for performing and/or overseeing superstructure and concrete work in its capacity as the construction manager of the Project. In that capacity, Amato submits, it was also responsible for rectifying the ongoing problems associated with that work. These problems caused the Project to be significantly delayed, as confirmed by AIC's own field reports, of which Amato provides a sampling (Ex. A to Amato Aff.in Opp.), as well as the testimony of Plutzer. Further delays were caused by Lend Lease's insistence that the facade be switched midway through the Project. Pioneer complied but was never fully compensated, which forms the basis for its counterclaims. Lend Lease's request for these changes forced Pioneer to essentially start from the beginning and begin its design and manufacturing work at the Project anew. Amato reiterates Pioneer's denial of any liability for the delay damages asserted by AIC against Pioneer, and submits that Lend Lease is the more appropriate target of such claims, as outlined in the Third-Party Complaint.

In his supplemental affirmation, Lend Lease Counsel provides copies of the following (Exs. A-F to Ulon Supp. Aff.): a letter dated May 9, 2012 (Ex. A); a letter dated July 30, 2012 (Ex. B); Defendant's Verified Bill of Particulars (Ex. C); Pioneer's March 15, 2017

Memorandum of Law in opposition to AIC's prior motion in the instant action (Ex. D); Pioneer's Answer and Counterclaim dated February 15, 2017 (Ex. E); and excerpts of the Plutzer May 15, 2018 deposition (Ex. F).

By letter to the Court dated September 27, 2018, counsel for Lend Lease requested that the Court stay discovery pending decision on the instant motion, reaffirming his contention that the instant motion is meritorious. By letter to the Court dated September 28, 2018, counsel for Pioneer opposed that application, submitting that Lend Lease is not a party to the Release, directly or otherwise, and disputing Lend Lease's contention that it was the agent of the Owner. The Court denied the application for a stay.

C. The Parties' Positions

Lend Lease submits that dismissal of the Third-Party Complaint is warranted on the grounds that 1) the law of the case doctrine precludes the Third-Party Complaint because the Court, in the Prior Decision, correctly determined that the Release constitutes an effective waiver of all of Pioneer's claims against the beneficiaries of the Release for any work performed on the Project prior to February 6, 2014, 2) Lend Lease, as the construction manager for the Project, is clearly an agent entitled to the protections afforded by the Release as evidenced by the fact that a) per the Management Agreement, Lend Lease agreed to provide construction management services on behalf of 29 Flatbush and act in the interests of 29 Flatbush; and b) in binding itself to the Management Agreement, Landlease submitted to 29 Flatbush's substantial direction and control over the Project's timeline and the work performed in connection with the Project; 3) Pioneer is not entitled to indemnification or contribution because AIC is seeking recovery for purely economic loss, as evidenced by the nature of its claims which are for breach of a joint venture agreement, breach of a subcontract, and failure to provide a warranty and perform warranty work; and 4) where, as here, there is no contractual relationship or privity between Pioneer and AIC, the Court must interpret and assess Pioneer's indemnification claim as one asserted under the common law, and such a claim is not viable in light of the fact that a) AIC is not seeking to hold Pioneer vicariously liable for the negligence of Lend Lease; rather, AIC seeks to hold Pioneer liable for Pioneer's breach of its contractual obligations relating to the manufacture of the materials required for construction of the window wall; and b) Pioneer fails to make a prima facie showing that it is without culpability with respect to the claims that AIC

asserts against it, which is required for Pioneer to maintain a cause of action for common law indemnification against Lend Lease.

Pioneer opposes the motion submitting that 1) Lend Lease is not a party to the Release, as evidenced by the fact that the Release makes no direct reference to Lend Lease, and the contract submitted in support of the motion does not refer to Lend Lease as an agent of the Owner bur, rather, characterizes Lend Lease as the "Construction Manager;" 2) even assuming Lend Lease's privity to the Release, its terms are inapplicable to the third-party claims for common-law indemnification and contribution, as the Court has already held that the only impact of the Release is that it bars those aspects of Pioneer's counterclaims against AIC seeking additional compensation for work performed prior to February 6, 2014; 3) the law of the case doctrine is inapplicable because the Court's Prior Decision, which was issued before Lend Lease was a party to this action, never contemplated or addressed, much less resolved, Pioneer's third-party claims asserted over a year later against Lend Lease sounding in indemnification and contribution; and 4) the Third-Party Complaint states a valid claim for common law indemnification and contribution based on Pioneer's contention that AIC's delay claims are misdirected at Pioneer, instead of Lend Lease in its capacity as the Construction Manager responsible for "moving the project along" (Pioneer Memo. of Law in Opp. at p. 10), as reflected in the terms of the contract between Lend Lease and the Owner which speak to Lend Lease's obligation in this regard.

In reply, Lend Lease submits that Pioneer's arguments in opposition to the motion range from "meritless to preposterious" (Landlease Reply Aff. at p. 1). Lend Lease submits that the Management Agreement between Lend Lease and Pioneer creates a classic agency relationship under well established-law, and that the labels ascribed to the parties is not controlling. In its role as construction manager, Lend Lease was subject to 29 Flatbush's control and was delegated significant responsibilities by 29 Flatbush to manage and oversee the Project. As Lend Lease was 29 Flatbush's agent, it is a party shielded from liability by Pioneer's knowing and voluntary execution of the Release.

Lend Lease contends, further, that there is no merit to Pioneer's contention that it did not have a contract with AIC. Pioneer has pleaded that it had a contract with AIC, and Pioneer's written correspondence to AIC, dating as far back as 2012, makes explicit reference to the contract that Pioneer now claims did not exist. In addition, Pioneer, in response to AIC's

Demand for a Verified Bill of Particulars, stated that "AIC and Pioneer entered into an agreement in which Pioneer would supply the window system...at the Project" (Ex. C to Ulon Supp. Aff.). In light of these facts, Pioneer cannot plausibly deny the existence of the contract or avoid the implications that the contract has on its indemnification and contribution claims. As a party cannot recover on contribution and indemnification claims for a purely economic loss stemming from a breach of contract, and AIC seeks to hold Pioneer liable only for damages stemming from Pioneer's breach of the parties' contract, and not vicariously liable for any negligence on the part of Lend Lease, the losses at issue are purely economic and Pioneer cannot recover against Lend Lease on its third-party claims for those losses.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

B. Release

Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release. *Matter of Boatwright*, 114 A.D.3d 856, 858 (2d Dept. 2014), citing *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276 (2011), quoting *Global Mins. & Mteals Corp. v. Holme*, 35 A.D.3d 93, 98 (1st Dept. 2006), *lv. den.*, 8 N.Y.3d 804 (2007). A release is governed by principles of contract law, *Sicuranza v. Philip*

Howard Apts. Tenants Corp., 121 A.D.3d 966, 967 (2d Dept. 2014), quoting *Mangini v. McClurg*, 24 N.Y.2d 556, 562 (1969), and one that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms, *Sicuranza v. Philip Howard Apts. Tenants Corp.*, 121 A.D.3d at 967, quoting *Alvarez v. Amicucci*, 82 A.D.3d 687, 688 (2d Dept. 20122).

The plain language of a release is controlling, regardless of one party's claim that he intended something else. *Sicuranza v. Philip Howard Apts. Tenants Corp.*, 121 A.D.3d at 967, quoting *Matter of Brooklyn Resources Recovery, Inc.*, 309 A.D.2d 931, 932 (2d Dept. 2003). Where the scope of the release is unambiguous, the court may not look to extrinsic evidence to determine the parties' intent. *Sicuranza v. Philip Howard Apts. Tenants Corp.*, 121 A.D.3d at 967, quoting *Koufakis v. Siglag*, 85 A.D.3d 872, 873 (2d Dept. 2011). Whether or not a writing is ambiguous is a question of law to be resolved by the courts. *Sicuranza v. Philip Howard Apts. Tenants Corp.*, 121 A.D.3d at 967, quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

General Obligations Law ("GOL") § 15-108(a) specifically states that a release given to one or more persons liable or claimed to be liable in tort for the same injury "does not discharge any of the other tortfeasors*** unless its terms expressly so provide." *F.W. Woolworth Co. v. Southbridge Towers, Inc.*, 101 A.D.2d 434, 439 (1st Dept. 1984), quoting GOL § 15-108(a).

C. Contribution and Indemnification

A party's right to indemnification may arise from a contract or may be implied based on the law's notion of what is fair and proper as between the parties. *McCarthy v. Turner Construction, Inc.*, 17 N.Y.3d 369, 374-375 (2011), quoting *Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680, 690 (1990). A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances. *Baillargeon v. Kings County Waterproofing Corp.*, 936 N.Y.S.2d 298, 300 (2d Dept. 2012), citing *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777 (1987), quoting *Margolin v. New York Life Ins.* Co., 32 N.Y.2d 149, 153 (1973). Implied, or common law, indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other. *McCarthy v. Turner Construction, Inc.*, 17 N.Y.3d at 375,

quoting *Mas v. Two Bridges Assocs.*, 75 N.Y.2d at 690, citing *McDermott v. City of New York*, 50 N.Y.2d 211, 216-217 (1980), *reh. den.*, 50 N.Y.2d 1059 (1980). Common law indemnification is generally available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer. *McCarthy v. Turner Construction, Inc.*, 17 N.Y.3d at 375, quoting *Mas v. Two Bridges Assocs.*, 75 N.Y.2d at 690.

The rules governing contribution, as set forth in *Dole v. Dow Chem Co.*, 30 N.Y.2d 143, 147-153 (1972) and codified in CPLR Article 14, enable a joint tortfeasor who has paid more than his or her equitable share of damages to a plaintiff to recover the excess from the other torfeasor. *O'Gara v. Alacci*, 67 A.D.3d 54, 57 (2d Dept. 2009). Ordinarily, the other tortfeasor's liability for contribution flows from a breach of a duty owed to the plaintiff. *Id.*

Claims for contribution and indemnification are not available in actions seeking recovery for purely economic loss resulting from the breach of contractual obligations. *Lawrence Devel. Corp. v. Jobin Waterproofing, Inc.*, 186 A.D.2d 634, 636 (2d Dept. 1992), citing *Board of Educ. v. Sargent, Webster Crenshaw & Folley*, 71 N.Y.2d 21, 26 (1987).

D. Relevant Agency Principles

Agency is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act; the duties of an agent are defined by the terms of the agreement that gave rise to the agency. *GK Alan Assoc. Inc. v. Lazzari*, 66 A.D.3d 830, 833 (2d Dept. 2009), *lv. app. den.*, 14 N.Y.3d 703 (2010), quoting *Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142, 146 (2d Dept. 1993) and *GK Alan Assoc. Inc. v. Lazzari*, 44 A.D.3d 95, 101 (2d Dept. 2007), *aff'd*, 10 N.Y.3d 941 (2008). An agent may be appointed to do the same acts and achieve the same legal consequences as if the principal had personally acted. *Kingland Group, Inc. v. JB Satchin Realty Corp.*, 16 A.D.3d 380, 381-382 (2d Dept. 2005), citing *Central Trust Co., Rochester v. Sheahen*, 66 A.D.2d 1015 (4th Dept. 1978).

E. Law of the Case

The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned. *Clark v. Clark*, 117 A.D.3d 668, 669 (2d Dept. 2014) quoting *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975).

F. Application of these Principles to the Instant Action

The Court grants the motion and dismisses the Third-Party Complaint. The Court concludes that Lend Lease was an agent of the Owner and is thereby entitled to the protections afforded by the Release. Lend Lease, as the construction manager for the Project, was an agent entitled to the protections afforded by the Release in consideration of the fact that a) per the Management Agreement, Lend Lease agreed to provide construction management services on behalf of 29 Flatbush and act in the interests of 29 Flatbush; and b) in binding itself to the Management Agreement, Landlease submitted to 29 Flatbush's substantial direction and control over the Project's timeline and the work performed in connection with the Project. The Court notes that this conclusion is consistent with Plaintiff's allegation in the Complaint that Lend Lease "entered into an agreement with the Owner pursuant to which Lend Lease agreed to provide construction management services as the agent for the Owner of the Project" (Comp. at ¶ 6). In addition, Pioneer is not entitled to indemnification or contribution because AIC is seeking recovery for purely economic loss, as evidenced by the nature of its claims which are for breach of a joint venture agreement, breach of a subcontract, and failure to provide a warranty and perform warranty work.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The court reminds counsel for the remaining parties of their required appearance before the Court for a Pre-Trial Conference on January 11, 2019 at 9:30 a.m.

ENTER

DATED: Mineola, NY
October 29, 2018

HON. TIMOTHY S. DRISCOLL
J.S.C.