Weinshanker v Vilabuilt, LLC
2019 NY Slip Op 30017(U)
January 7, 2019
Supreme Court, New York County
Docket Number: 114537/2010
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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JOEL WEINSHANKER,

Plaintiff,

- against -

VILABUILT, LLC, CHRIS VILA, and SCOTT SASSOON,

Defendants.

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DECISION AND ORDER
Index No.: 114537/2010

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

Defendants Vilabuilt, LLC (Vilabuilt) and Chris Vila (Vila) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against Vila and dismissing plaintiff's claim for delay damages and his claim for the costs related to constructing a new roof substructure. Plaintiff Joel Weinshanker opposes the application and cross-moves for summary judgment against Vilabuilt on his breach of contract claim for Vilabuilt's failure to construct a rooftop enclosure and for liquidated damages for its failure to achieve substantial completion by a date certain. For the reasons set forth below, defendants' motion is granted in part, and plaintiff's cross-motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is the owner of a penthouse apartment located at 56 East 11th Street, New York, New York 10003 (the Building) (complaint [NY St Cts Elec Filing (NYSCEF) Doc No. 2], ¶ 1). Vila formed Vilabuilt as a domestic limited liability company (defendants' Rule 19-a Statement of Material Facts [NYSCEF Doc No. 42], ¶ 2).

In October 2008, plaintiff and defendants discussed the possibility of defendants performing work on plaintiff's apartment[1] (the Project) (*id.*, ¶ 6). In addition to renovating the interior of the unit, the exterior work would include constructing an enclosed living space on the roof of the Building (plaintiff's Counter Rule 19-a Statement of Material Facts [NYSCEF Doc No. 64], ¶ 6). Shortly thereafter, defendants presented plaintiff with an initial deal memo outlining the proposed scope of defendants' work on the Project along with different cost estimate ranges per square foot for the interior and exterior work (the Deal Memo) (affirmation of Howard Jacobowitz

[1] The parties dispute whether plaintiff approached Vila to discuss the work (defendants' Rule 19-a Statement of Material Facts [NYSCEF Doc No. 42], ¶ 6) or if Vila first approached plaintiff (plaintiff's Counter Rule 19-a Statement of Material Facts [NYSCEF Doc No. 64], ¶ 6).

[Jacobowitz affirmation], exhibit F [NYSCEF Doc No. 31] at 1). Plaintiff signed the Deal Memo on October 7, 2008 (*id.* at 2).

In February 2009, defendants presented plaintiff with a construction budget of $840,000, with $130,750 allocated for the "exterior and roof work" (the Construction Budget) (Jacobowitz affirmation, exhibit G [NYSCEF Doc No. 32] at 1). Defendants retained nonparty Bailey Humbert Heck (Heck) to prepare the architectural drawings for the Project (the Contract Drawings) (plaintiff's Rule 19-a Statement of Material Facts [NYSCEF Doc No. 63], ¶ 5).

Defendants also presented plaintiff with an AIA A101/Cma-1992 Standard Form Agreement Between Owner and Builder dated February 17, 2009 (the AIA Agreement). The proposed AIA Agreement identified plaintiff as the owner, Vilabuilt as the builder, and Vila and defendant Scott Sassoon (Sassoon) as the two project managers[2] (Jacobowitz affirmation, exhibit H [NYSCEF Doc No. 33] at 1). The AIA Agreement fixed the contract price at "Eight Hundred and Forty Thousand Dollars ($840,000.00) subject to additions and deductions as provided in the Contract Documents and the Construction Budget" (*id.* at 2) (emphasis in original). It also included at Article 7, a procedure for "CHANGES IN WORK" (*id.* at 3).

Article 3 of the AIA Agreement set forth the dates for substantial completion. Specifically, paragraph 3.2 states that Vilabuilt "shall achieve Substantial Completion of the interior Work not later than August 15th, 2009 and the exterior Work no later than September 15th, 2009" (*id.* at 2) (emphasis in original). Importantly, if final completion was "materially delayed through no fault of the Builder, Vilabuilt, LLC will not be held responsible . . . ." (*id.*). Paragraph 3.3 also provides that if Vilabuilt "cannot achieve Substantial Completion of the entire Work by the Contract Time set in Paragraph 3.2, then [Vilabuit] agrees to job delay penalties of Seven Hundred and Fifty Dollars ($750.00) per week until Substantial Completion is achieved . . . ." (*id.* [emphasis in original]).

The Contract Drawings, identified as "Progress Set 2" dated January 17, 2009, and the Construction Budget were incorporated into the AIA Agreement (*id.* at 3-4). Significantly, the section titled "Additional Notes Regarding Building Department Procedures and Responsibilities" of the Contract Drawings partially reads, "Plan Approval: Owner is responsible for obtaining plan approval from the building department through the architects' office" (Jacobowitz affirmation, exhibit I [NYSCEF Doc No. 34] at 2). It was also Vilabuilt's responsibility to secure "the permit

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[2] Plaintiff submits that he previously stipulated to discontinue the action against Sassoon (affirmation of Edward Cohn [Cohn affirmation] [NYSCEF Doc No. 47], ¶ 2. A stipulation of discontinuance has not been e-filed.

from the building department once plans are approved" for the work, and to ensure that the work complied with all governmental rules and regulations (*id.*).

In response, plaintiff proposed a rider to the AIA Agreement (the Rider) with new terms that "supersede and govern the provisions set forth in the printed form of the AIA [Agreement]" (Jacobowitz affirmation, exhibit J [NYSCEF Doc No. 35] at 1). The Rider defined the phrase "substantial completion" as "the Date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents" (*id.* at 3). It set liquidated damages at $1,500 for each day the Project ran past the date set for substantial completion (*id.* at 9).

Neither the AIA Agreement nor the Rider were signed.

Vilabuilt commenced work on the Project in April 2009 (defendants' Rule 19-a Statement of Material Facts [NYSCEF Doc No. 42], ¶ 14). During the course of the Project, Vilabuilt rendered 13 invoices to plaintiff (Jacobowitz affirmation, exhibit K [NYSCEF Doc No. 36]), and plaintiff paid Vilabuilt $1,096,182 for its work (complaint [NYSCEF Doc No. 2] ¶ 13).

Defendants state that, after the construction work began, the New York City Department of Buildings (DOB) declined to approve the rooftop structure depicted in the Contract Drawings because of zoning issues (defendants' Rule 19-a Statement of Material Facts [NYSCEF Doc No. 42], ¶ 16). Plaintiff, though, asserts that defendants never submitted the application for approval of the rooftop enclosure (plaintiff's Counter Rule 19-a Statement of Material Facts [NYSCEF Doc No. 64], ¶ 16). Plaintiff subsequently terminated Vilabuilt before it could complete the Project (defendants' amended answer [NYSCEF Doc No. 4], ¶ 68; defendants' Rule 19-a Statement of Material Facts [NYSCEF Doc No. 42], ¶ 17). He then hired nonparty Soho Construction Group, Inc. (Soho) to complete the interior punch list work and the exterior roof work (plaintiff's Counter Rule 19-a Statement of Material Facts [NYSCEF Doc No. 64], ¶ 17), and he hired nonparty Matthew Bremer, R.A. (Bremer) to furnish additional architectural services (defendants' 19-a Statement of Material Facts [NYSCEF Doc No. 42], ¶ 17). The rooftop enclosure illustrated in the Contract Drawings was never built because, in addition to the lack of DOB approval, the roof substructure required significant replacement or repair (plaintiff's 19-a Statement of Material Facts [NYSCEF Doc No. 63], ¶¶ 19 and 27).

Plaintiff commenced this action alleging that defendants failed to timely complete the interior and exterior work on the Project and failed to obtain the requisite building permits and approvals, which resulted in the issuance of fines and notices of violation. The complaint asserts causes of action for breach of contract, unjust enrichment, negligence, and promissory estoppel and seeks damages of $700,000 on each claim.

THE CONTENTIONS

Defendants argue that Vila bears no personal liability in this action because he represented Vilabuilt, the limited liability company he formed in 2007, on the Project (Vila aff [NYSCEF Doc No. 25], ¶ 4). The Deal Memo and the Construction Budget all appeared on Vilabuilt's letterhead (*id.*, ¶ 8), and the AIA Agreement and Rider identified Vilabuilt as plaintiff's contractor.

Defendants also urge the court to dismiss plaintiff's $275,000 demand for contractual delay damages. First, plaintiff cannot describe how he calculated that amount. Indeed, at his deposition, plaintiff could not testify to the number of days of delay attributable to defendants (Jacobowitz affirmation, exhibit M [NYSCEF Doc No. 38] [Weinshanker tr] at 38). Likewise, plaintiff was unable to specify the out-of-pocket damages he sustained. Plaintiff resided in a rental apartment during the Project, but he could not recall his monthly rent (*id.* at 41). The parties had originally contemplated a six-month work schedule, but plaintiff was forced to pay an additional seven months of rent (*id.*). Second, the parties never agreed to the amount of liquidated damages plaintiff could recover. Although the Rider indicated a daily penalty of $1,500, Vila avers that he struck the penalty provision from the Rider and handwrote "750 per week" in its place (Vila aff [NYSCEF Doc No. 25], ¶ 12). Plaintiff testified that he did not who know made that handwritten notation (Weinshanker tr [NYSCEF Doc No. 38] at 21). Nevertheless, plaintiff testified that it was his understanding the "penalty and bonus" provision stood as a disincentive for delay, and that a $1,500 per day penalty was a "fairly standard number" (*id.* at 21-22). Furthermore, he understood the provision to require a payment of $10,500 per week for delay because "no one ever came to me and said 'We need to make an adjustment or change anything'" (*id.* at 25).

Defendants also assert that plaintiff cannot recover the cost of repairing the roof substructure from Vilabuilt. The scope of Vilabuilt's work and the Contract Drawings did not reflect any structural repair work. Nor did the Construction Budget set aside any funds for such work, as Vila explained that the line item for the roof work reflected only the costs for a new roof membrane, decking and structure (Vila aff [NYSCEF Doc No. 25], ¶ 23). Bremer, plaintiff's architectural expert, agreed with defendants, testifying that defendants would have been entitled to additional compensation for performing structural work (Jacobowitz affirmation, exhibit N [NYSCEF Doc No. 39] [Bremer tr] at 39). In addition, Bremer testified that structural work was not within the scope of the Contract Drawings (*id.* at 42). In fact, Bremer expressed that he never saw any structural drawings other than those prepared by SWE Engineering, Bremer's or Soho's structural engineering consultant (*id.* at 26).

Plaintiff, in response, submits that the liquidated damages provision is enforceable, as defendants have not argued that the provision imposes an unenforceable penalty. The AIA Agreement proposed a $750 per week payment for delay. Because Vilabuilt breached their agreement in August 2010, plaintiff claims he is entitled to liquidated damages of $37,500 for a 50-week delay for the interior work and $34,500 for a 46-week delay for the exterior work.

With regards to the roof substructure, plaintiff avers that he has the exclusive right to use the roof of the Building (plaintiff aff [NYSCEF Doc No. 61], ¶ 25). He invited Vila to provide him with a quote for the construction of additional living space on the roof (*id.*, ¶¶ 4 and 8). Heck, at Vila's direction, prepared extensive plans that included a glass enclosed rooftop living space and direct access to that space from inside his unit (*id.*, ¶¶ 8 and 25). The Construction Budget and AIA Agreement defendants had prepared set the total cost for the Project at $840,000, inclusive of all exterior and roof work. Defendants never described the "cost of the Project [as] being dependent or 'subject to' any set of facts . . . presently unknown to Vilabuilt" (*id.*, ¶ 17). Defendants were also aware that plaintiff was contractually obligated to provide the Building with a new roof (*id.*, ¶ 25).

Plaintiff avers that Vila informed him after work began that DOB would not issue a building permit for the rooftop work (plaintiff aff [NYSCEF Doc No. 61], ¶ 22), and that he later learned from Bremer that DOB "would <u>never</u> [have] issue[d] a building permit for the new living space" (*id.*, ¶ 23 [emphasis in original]). Bremer and defendants' architectural expert, Theresa Beyer (Beyer), both concluded that constructing the additional space would have violated existing zoning laws for two reasons. First, the Building's existing interior square footage was already in excess of what was legally permissible in the area (Cohn affirmation, exhibit G [NYSCEF Doc No. 54] [unsworn Bremer report] at 1-2 and exhibit H [NYSCEF Doc No. 55] [unsworn Beyer report] at 1). Second, a zoning analysis would have revealed that the proposed construction would have violated regulations governing the sky exposure plane (*id.*).

Plaintiff also posits that the roof substructure work does not constitute "extra work" because defendants contracted to construct an enclosed living space and roof deck. Bremer and Beyer agreed that performing structural probes was necessary to ensure that the roof could bear the additional weight of any new structure (unsworn Bremer report [NYSCEF Doc No. 54] at 2 and unsworn Beyer report [NYSCEF Doc No. 55] at 2). As such, it was incumbent upon defendants to ensure that the roof support system was adequate. While the experts dispute when the probes should have been conducted and by which entity, plaintiff submits that Vilabuilt would have learned eventually of the significant deterioration of the structural steel beams in the

substructure, and that the condition would have had to be remediated (plaintiff aff [NYSCEF Doc No. 61], ¶ 37), as the existing roof could not have supported any type of structure, whether it was the large glass-enclosed living room, bathroom and kitchen plaintiff had envisioned originally or the significantly scaled-back bulkhead Soho built after Vilabuilt had been terminated (*id.*, ¶¶ 35-38). Therefore, the condition of the roof substructure was not an unanticipated condition that may be classified as extra work. Plaintiff also asserts that he is entitled to recoup the amount he paid to complete that portion of the Project from defendants.

Defendants, in reply, repeat their claim that the delays were caused mostly by plaintiff, that the parties never settled on an amount in the liquidated damages clause, and that plaintiff may not recover costs for repair of the roof substructure. Defendants also refute plaintiff's contention that plaintiff did not retain Heck's services because the unsigned contract with Heck indicated that Vilabuilt served as plaintiff's representative (Vila reply aff [NYSCEF Doc No. 66], ¶ 7).

LEGAL STANDARDS

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

DISCUSSION

A. Vila's Personal Liability

"A member of a limited liability company 'cannot be held liable for the company's obligations by virtue of his [or her] status as a member thereof'" (*Matias v Mondo Props. LLC*, 43 AD3d 367, 367-368 [1st Dept 2007], quoting *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [1st Dept 2005]; *see also* Limited Liability Law § 609 [a]). As plaintiff does not oppose this part of the motion and consents to discontinuing the action against Vila [Cohn affirmation

[NYSCEF Doc No. 47], ¶ 2), Vila is entitled to summary judgment. Accordingly, the complaint is dismissed as against him.

B. Damages for Delay

The court now turns to the claims against Vilabuilt.

According to the verified bill of particulars, plaintiff seeks "$275,000 in contractual damages as a result of the fact that the work was not completed in a timely and/or proper manner" (Jacobowitz affirmation, exhibit D [NYSCEF Doc No. 29], ¶ 10).

Generally, "[l]iquidated damages constitute the compensation which should be paid in order to satisfy any loss or injury flowing from a breach of contract" (*Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 423-424 [1977]). Further, "[p]arties to a contract may provide for anticipatory damages in the event of failure to complete performance within the time specified, as long as such agreement is neither unconscionable nor contrary to public policy" (*X.L.O. Concrete Corp. v Brady & Co.*, 104 AD2d 181, 183 [1st Dept 1984], *affd* 66 NY2d 970 [1985], citing *Mosler Safe Co. v Maiden Lane Safe Deposit Co.*, 199 NY 479, 485 [1910]). A provision that provides for fixed damages that are "plainly disproportionate to the injury" constitutes a penalty and will not be enforced (*X.L.O. Concrete Corp.*, 104 AD2d at 183). Thus, a party seeking to avoid a liquidated damages provision "must demonstrate that 'the amount fixed is plainly or grossly disproportionate to the probable loss'" (*Moskowitz v Pavarini McGovern LLC*, 83 AD3d 438, 439 [1st Dept 2011], quoting *Truck Rent-A-Ctr.*, 41 NY2d at 425; *see also JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005] [stating that "[t]he burden is on the party seeking to avoid liquidated damages . . . to show that the stated liquidated damages are, in fact, a penalty"]).

Vilabuilt has not argued that the liquidated damages provision is a penalty that is unenforceable as a matter of law nor has it argued that plaintiff is limited to recover only his actual damages. Instead, Vilabuilt submits that plaintiff is foreclosed from pursuing delay damages because he cannot specifically enumerate the damages attributable to the delay. This contention is unavailing. A party moving for summary judgment must "establish his [or her] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his [or her] favor" (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979], quoting CPLR 3212 [b). Thus, a movant cannot meet its prima facie burden "merely by pointing to gaps in plaintiff's proof" (*McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015] [citation omitted]). As applied herein, Vilabuilt cannot meet its burden on summary judgment solely by arguing that plaintiff was unable to testify as to the exact amount of damages he sustained.

Vilabuilt also argues that plaintiff cannot recover liquidated delay damages because there was no "meeting of the minds" as to the amount that could be imposed (defendants' memorandum of law [NYSCEF Doc No. 41] at 7).

Apart from the initial Deal Memo, there are no other signed documents evincing a written agreement between the parties. Nevertheless, "an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*Flores v Lower E. Side Serv. Ctr.*, 4 NY3d 363, 369 [2005], *rearg denied* 5 NY3d 746 [2005]; *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977] [stating that the court must look "to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds"]). The elements of an enforceable contract are "an offer, acceptance of the offer, consideration" (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 59 [1st Dept 2015], *affd* 31 NY3d 100 [2018] [citation omitted]). An acceptance "must comply with the terms of the offer and be clear, unambiguous and unequivocal" to be effective (*id.* at 59-60 [internal quotation marks and citation omitted]). Moreover, an acceptance that modifies the terms of the offer "constitutes both a rejection and a counteroffer which extinguishes the initial offer" (*Thor Props., LLC v Willspring Holdings LLC*, 118 AD3d 505, 507 [1st Dept 2014] [citation omitted]). In addition, "'[a] meeting of the minds must include agreement on all essential terms'" (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d at 59, quoting *Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). "If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *rearg denied* 75 NY2d 863 [1990], *cert denied* 498 US 816 [1990]).

Applying these precepts to the present action, the court finds that the parties never came to an agreement on a material term in the liquidated damages provision, namely the amount of damages to be imposed. Whereas Vilabuilt submits the parties had consented to damages of $750 per week for a delay, plaintiff testified they had agreed to a $1,500 per day deterrent.

Furthermore, plaintiff has not demonstrated how he calculated the $72,000 in liquidated damages he now seeks, especially when he has furnished contradictory evidence whether such damages accrued weekly or daily.[3] By his account, he is entitled to $72,000, divided into $37,500

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[3] In addition to his testimony, plaintiff has alleged in the verified complaint that "[d]efendants would be responsible for a per diem assessment of $750.00 per day" for a delay (complaint [NYSCEF Doc No. 2], ¶ 16). The court notes that "[s]uch a statement in a pleading constitutes a formal judicial admission and evidence of the fact admitted" (*Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 674 [1st Dept 2010], citing *Bogoni v Friedlander*, 197 AD2d 281, 291-292 [1st Dept 1994], *lv denied* 84 NY2d 803 [1994]). In view of the foregoing, the court concludes that plaintiff did not accept Vilabuilt's counteroffer of $750 per week.

for the interior work and $34,500 for the exterior work, or a cumulative delay of 96 weeks ($72,000 ÷ $750 = 96 weeks). Paragraph 3.3 of the AIA Agreement, though, permitted recovery of liquidated damages if "Substantial Completion of the *entire work*" could not be achieved (Jacobowitz affirmation, exhibit H [NYSCEF Doc No. 33], at 2 [emphasis added]). The Rider did not provide for separate recoveries based on when Vilabuilt achieved substantial completion of the interior or exterior work (Jacobowitz affirmation, exhibit J [NYSCEF Doc No. 35] at 9).

Accordingly, Vilabuilt's motion insofar as it seeks summary judgment dismissing plaintiff's claim for liquidated damages for delay is granted, and plaintiff's cross motion for summary judgment on this issue is denied.

C. Damages for the Roof Substructure

Vilabuilt also moves for summary judgment dismissing plaintiff's claim for damages related to the roof substructure, and plaintiff cross-moves for summary judgment on his breach of contract claim as it pertains to the roof substructure.

Vilabuilt's reliance on the "economic betterment doctrine," as discussed in *St. Joseph Hosp. v Corbetta Constr. Co.*, (21 Ill App 3d 925 [App Ct, Il 1974]), to support its contention that plaintiff cannot recoup his costs for the roof substructure work is misplaced. At the outset, no New York court has adopted the economic betterment doctrine. Additionally, the facts of the Illinois action do not directly correspond to those in the present action. The plaintiff hospital in that action had contracted with the defendant contractor to construct a new hospital building (21 Ill App 3d at 929). After the building was substantially completed, it was discovered that the wall panels installed by the contractor, as specified by the defendant architect, were not compliant with the Chicago Building Code, and had to be replaced (*id.*). The replacement panels, which were code compliant, were more costly and difficult to install than the wall panels specified in the contract documents (*id.* at 935). The Court rejected the hospital's attempt to recoup the replacement costs in full, agreeing with the defendants' arguments that such an award "unjustly enriches the Hospital by giving it, free of charge, better and more expensive wall paneling than it had bargained for and thus puts it in a better position than it would have been had the original contracts been fully performed" (*id.*). Here, the glass-enclosed structure in the Contract Drawings could not have been built under current zoning regulations. This prohibition is unrelated to issues concerning replacement of the roof substructure.

In any event, it is well settled that "[c]ontract damages are ordinarily intended to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed"

(*Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 373 [1992] [citation omitted]). A discussion pertaining to what damages plaintiff may recover, though, is immaterial if the structural roof work was not part of the parties' contract, discussed infra.

To prevail on a cause of action for breach of contract, plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The parties herein do not contest that they had contracted for Vilabuilt to perform certain exterior work. However, a clear dispute exists whether their agreement contained a structural roof repair component.

According to the Deal Memo, Vilabuilt proposed to "demo existing roof (Asbestos ACP-5 report and removal is not included)" and "[i]nstall new roof and repair flashing" (Jacobowitz affirmation, exhibit F [NYSCEF Doc No. 31] at 2). The Deal Memo did not define whether the "new roof" encompassed the substructure. Nor did the document refer to the replacement or repair of the underlying support system. Significantly, the Deal Memo was not incorporated into the AIA Agreement. According to the Contract Drawings, which were made part of the AIA Agreement, the exterior work entailed removal of the existing roof membrane, insulation and flashing and installation of a new roof membrane, insulation and flashing over the existing structural roof deck (Jacobowitz affirmation, exhibit I [NYSCEF Doc No. 34] at 3-4). The drawings did not propose any work to the roof substructure, and the parties' architectural experts, Bremer and Beyer, concede that the Contract Drawings do not call for any structural work. Nevertheless, as the phrase "new roof" is not defined in any of the written documents, and as the parties' submissions do little to clarify the issue, the phrase is ambiguous (*Arnell Constr. Corp. v New York City Sch. Constr. Auth.*, 144 AD3d 714, 717 [2d Dept 2016]).

Plaintiff's attempt to cast the substructure work as contracted-for work, as opposed to extra work, fails to dispel questions of material fact, especially in light of the ambiguity noted above. "Extra work has been defined as something necessarily required in the performance of the contract which arises from conditions which could not be anticipated" (*Savin Bros. v State of New York*, 62 AD2d 511, 516 [4th Dept 1978], *affd* 47 NY2d 934 [1979] [citation omitted]). "A contractor may properly recover payment for extra work that is not contemplated by the terms of the original agreement, and which is performed at the direction of the [owner]" (*Arnell Constr. Corp.*, 144 AD3d at 715-716 [citation omitted]). However, "the general rule is that where the contract is for construction of an entire work at a stipulated price the contractor cannot recover for additional work or expense caused by unforeseen difficulties or casualties" (*Savin Bros.*, 62 AD2d at 516). The signed Deal Memo provides only a vague price "estimates" setting forth dollar ranges per

square foot (NYSCEF Doc. No. 31 at p. 1). The unsigned AIA Agreement set a fixed price of $840,000 for Vilabuilt's work, "subject to additions and deductions as provided in the Construction Documents and Construction Budget" (NYSCEF Doc. No. 33 at 2).

"[W]here, as here, 'the parties intended the contractor to rely upon its own investigation, no recovery for extra work may be had, absent a showing of fraud'" (*Barsotti's, Inc. v Consolidated Edison Co. of N.Y.*, 245 AD2d 178, 179 [1st Dept 1997], quoting *Savin Bros.*, 62 AD2d at 515). In this regard, the Contract Drawings contain the following statement: "[t]hose items not noted, but implied as necessary for the completion of the work are to be part thereof. The G.C. shall verify all dimensions, quantities and details in the field prior to commencement of work" (Cohn affirmation, exhibit F [NYSCEF Doc No. 53] at 2).

Bremer testified that before submitting a proposal for the Project, Vilabuilt ought to have undertaken structural probes to determine if the roof could bear the additional weight (Bremer tr [NYSCEF Doc No. 39] at 39 and 60). Given the Building's age, Bremer explained that Vilabuilt should have devised a contingency in the Construction Budget for an unanticipated or unforeseen structural condition that was discovered after it commenced work (*id.* at 39 and 47). Plaintiff, therefore, concludes that had Vilabuilt constructed the planned-for living space and roof deck, it would have had to repair the roof substructure at no extra cost because the deterioration of the steel supports would not have been an unforeseen or unanticipated condition.

The issue of whether a contractor is entitled to be paid for extra work, though, must be determined by looking at the contract and at the parties' intent (*Savin Bros.*, 62 AD2d at 515). It appears from the unsigned documents and the Contract Drawings that Vilabuilt never intended for the exterior work to include repair of the roof support system, and Vila avers that he never contemplated repairing the roof substructure. Moreover, Bremer and Beyer concluded that Vilabuilt would have been entitled to additional compensation for performing structural work, thereby undermining plaintiff's contention that repair of the roof substructure was not extra work. Accordingly, a triable issue of fact exists concerning the scope of the contracted-for roof work.

Lastly, plaintiff avers that he was obligated under a contract with the Building's board to provide a new roof, but he has not explained whether his agreement with the board meant that the new flashing, insulation and roof membrane, as illustrated in the Contract Drawings, was sufficient or if their agreement required additional repair work. Notably, Bremer testified that the Building would bear some of the cost for the substructure repair because the tenants, collectively, benefited from the new roof (Bremer tr [NYSCEF Doc No. 39] at 74-75). Hence, assuming plaintiff can

recoverfor substructure repair, he may not be entitled to recover the full cost of the repair, irrespective of Vilabuilt's alleged breach.

Thus, neither plaintiff, nor Vilabuilt, is entitled to summary judgment as it relates to repair of the roof substructure.

Accordingly, it is

ORDERED that the motion of defendants Vilabuilt, LLC and Chris Vila for summary judgment is granted to the extent of dismissing the complaint against defendant Chris Vila and dismissing plaintiff's claim for liquidated damages, and the balance of the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment on the first cause of action for breach of contract, insofar as the claim relates to roof substructure repair and liquidated damages, is denied; and it is further

ORDERED that the complaint is dismissed in its entirety against defendant Chris Vila, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court shall bear the following amended caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
---X
JOEL WEINSHANKER,

Index No.: 114537/2010

Plaintiff,

- against -

VILABUILT, LLC and SCOTT SASSOON,

Defendants.
---X
and it is further

ORDERED that counsel for defendant Vilabuilt, LLC shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that counsel for the parties shall appear at an initial pre-trial conference on Tuesday, January 29, 2019 at 11:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: January 7, 2019

E N T E R,

O. PETER SHERWOOD J.S.C.