

Five Star Contr. Cos. Inc. v Board of Trustees of the Fashion Inst. of Tech.
2020 NY Slip Op 30688(U)
March 3, 2020
Supreme Court, New York County
Docket Number: 650707/2013
Judge: Jennifer G. Schechter
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JENNIFER G. SCHECTER PART IAS MOTION 54EFM

Justice

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INDEX NO. 650707/2013

FIVE STAR CONTRACTING COMPANIES INC.,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 007, 008

- v -

THE BOARD OF TRUSTEES OF THE FASHION
INSTITUTE OF TECHNOLOGY, ELIZABETH PEEK, ROBIN
BURNS-MCNEILL, AMSALE ABERRA, RICHARD
ANDERMAN, JAY BAKER, JUDITH BYRD, EDWIN
GOODMAN, YAZ HERNANDEZ, JOAN HORNIG, GEORGE
KAUFMAN, JAQUI LIVIDINI, BEVERLY MACK, CHRIS
CASSON MADDEN, DEIRDRE QUINN, ROBERT SAVAGE,
ANUBHUTI SWARUP, F.I.T. STUDENT HOUSING
CORPORATION, NEW YORK CITY DEPARTMENT OF
EDUCATION PANEL FOR EDUCATIONAL POLICY,
DORMITORY AUTHORITY OF THE STATE OF NEW
YORK, THE FASHION INSTITUTE OF TECHNOLOGY

**DECISION & ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 288, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 427, 428

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 287, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Motion sequence numbers 007 and 008 are consolidated for disposition.

Defendant Fashion Institute of Technology (FIT) moves for summary judgment (seq. 007) against plaintiff Five Star Contracting Companies, Inc. (Five Star). Five Star opposes and moves for partial summary judgment (seq. 008). FIT opposes Five Star's motion. The parties' motions are granted in part.

Introduction

In January 2011, the parties executed a contract in which Five Star agreed to perform construction work on the facades of eight buildings owned by FIT. The contract was for the total sum of \$3,378,250, subject to modifications. Between April and October 2011, FIT paid Five Star \$1,616,998.32 and held back \$179,666.48 in retainage. Five Star continued performing work between November 2011 and September 2012, when it was terminated, purportedly for cause. Five Star was not paid anything for its work over these last ten months. Five Star claims that, as of the date of its termination – when it had completed work on six of the eight buildings – it was owed more than \$3.9 million. It now seeks damages in excess of \$3.5 million, including \$581,731.57 for unpaid work within the original scope of the contract, more than \$2 million for “extra work,” and \$757,623.57 in lost profits for work on the remaining two buildings that was completed by a replacement contractor.

Background & Procedural History

The Contract

In June 2010, FIT distributed an Invitation to Bid on its construction project (*see* Dkt. 248 [the Invitation]). In August 2010, Five Star submitted a detailed bid form with a total bid of \$3,378,250 (*see* Dkt. 250 at 39). As required by the Invitation, the bid form

contained the projected cost of the work for each of the eight buildings and a breakdown of what that work entailed (*see, e.g., id.* at 4). By letter dated December 7, 2010, FIT's architect, Leon Geoxavier of RAND Engineering & Architecture, PC (Rand), informed Five Star that its bid was the lowest and, subject to certain due diligence, would be the winner (Dkt. 327).

On January 28, 2011, the parties executed the contract governing Five Star's work (Dkt. 249 [the Contract]). The Contract provides that Five Star "shall perform all Work of every kind or nature whatsoever required and all other things necessary to complete in a proper and workmanlike manner the [project] in strict accordance with the Contract Documents as defined in the General Conditions (and of which a listing of specifications and drawings are attached hereto) and in strict accordance with such changes as are ordered and approved pursuant to the Contract" (*id.* at 2). The project was to be completed by November 15, 2011 (*id.*).¹ While the Contract itself is only two pages, it incorporates the Contract Documents defined in the General Conditions, which are a robust set of rules governing the work listed in the Invitation (*see* Dkt. 248 at 57).

General Conditions 11(a) and (b) provide that "Progress payments will be made to the Contractor based on actual work completed" and that "Payment requests shall be submitted to FIT's Facility Director on AIA Documents G702 and G703" (*id.* at 66). General Condition 11(e) states that "No progress payments will be processed without submission by the Contractor of properly executed Affidavit of Payment and Release of

¹ The Invitation dictates when work on each of the buildings was to be completed (*see id.* at 73).

Liens (AIA Documents G706 and G706A or equivalent forms as may be requested by FIT), up-to-date weekly written reports and timeline in bar chart form, and all submittals, certificates, permits, etc. required pursuant to the terms of the contract” (*id.* at 67). General Condition 11(f) requires “10% retainage” to be “deducted from all progress payments” (*id.*).

General Condition 12(d) states that FIT’s architect “will be the final judge as to whether the work is satisfactorily performed, and shall have the authority to order that any work deemed unacceptable or not in conformance with the Contract Documents be redone by the Contractor at no cost to [FIT]” (*id.*).

General Condition 13, which governs change orders, provides:

- a. FIT may order changes in the work of any quantity and without invalidating this Agreement so long as the Contract Sum and/or Contract Time are adjusted accordingly. ***All such changes in the work shall be authorized by written Change Order.*** All Change Orders shall be prepared by Architect and authorized by a representative of FIT.
- b. No work shall be performed by the Contractor unless it is specifically included in the Base Contract Scope ***or authorized in advance by written Change Order signed by all parties.***
- c. Any sums to be paid to Contractor as a result of any Change Order or any sums to be credited to FIT as a result of any Change Order shall be computed by one of the following methods:
 - (1) As agreed upon between the parties to the contract ***in writing prior to commencement of the work required by the Change Order,*** or;
 - (2) By Unit Prices detailed in the Contract Documents or subsequently agreed upon (Dkt. 248 at 67-68 [emphasis added]).

General Condition 17(a) provides that “Final payment (retainage) shall be released to the Contractor thirty (30) days after the project has been signed off by FIT and Architect and the Contractor has satisfied all requirements of the Contract Documents” (*id.* at 70).

There is a second set of contract terms called “General Conditions” attached to the Invitation (*see id.* at 127). Section 2.02 of these General Conditions, titled “Conflicting Conditions,” provides that “Should any provision in any of the Contract Documents be in conflict or inconsistent with any of the General Conditions or Supplements thereto, the General Conditions or Supplements thereto shall govern” (*id.* at 132). For the sake of clarity, the court refers to these General Conditions as the “Second General Conditions.”²

Section 8.01(A) of the Second General Conditions provides that “No claims for Extra Work shall be allowed unless such Extra Work *is ordered in writing by the Owner/Architect*” and that “No changes in the Work shall be made unless such Work is ordered *in writing by the Owner/Architect or Owner’s Representative*” (*id.* at 140 [emphasis added]). The amount to be paid for Extra Work is set forth in section 8.01(B), and the documentation that must be provided by Five Star is detailed in the following subsections (*see id.* at 141-42). Section 8.02(A) provides that Five Star is to be paid 20%

² There also are separate “General Requirements” and “Bid Terms and Conditions” (*see id.* at 229, 266). The Contract lists the portions of the Invitation that are part of the Contract, such as the “General Conditions.” Moreover, the Contract Documents are defined to include “The Contract, Notice to Bidders, Information for Bidders, Form of Bid, General Conditions, General Requirements, Bonds, Drawings, Specifications, **Addenda**, Change Orders and any supplementary data together with all provisions of law deemed to be inserted in the Contract” (Dkt. 248 at 131 [emphasis added]). Though this list omits the “Terms and Conditions,” the parties’ conduct unequivocally demonstrates that they understood that the Terms and Conditions applied. Importantly, the provision dictating Five Star’s 20% profit margin appears in a provision that the parties agree is part of the Contract (*see id.* at 142). The parties’ disputes over which provisions of the Contract govern do not raise material questions of fact on these motions.

profit on the base cost of its Extra Work (*see id.* at 142). Relatedly, section 8.03 provides that Change Orders (those governed by General Condition 13) must be processed on an attached FIT change order form and that “No alteration to this form shall be acceptable to the Owner and no payment for Extra Work shall be due the Contractor ***unless it executes a Change Order on said form***” (*id.* at 143 [emphasis added]).

Section 10.01 of the Second General Conditions governs if and how FIT may terminate Five Star “for cause,” providing:

In the event that any provision of the Contract is violated by the Contractor or by any Subcontractor, the Owner may serve written notice upon the Contractor and upon the Contractor’s surety, if any, of the Owner’s intention to terminate the Contract; ***such notice shall contain the reasons for the intention to terminate the Contract upon a date specified by the Owner.*** If the violation or delay shall not cease or arrangements satisfactory to the Owner shall not be made, the Contract shall terminate upon the date so specified by the Owner. In the event of any such termination, the Owner may take over the Work and prosecute same to completion by Contract or otherwise for the account and at the expense of the Contractor, and the Contractor and Contractor’s surety shall be liable to the Owner for all costs occasioned the Owner thereby. In the event of such termination the Owner may take possession of and may utilize such materials, appliances and plant as may be on the Site and necessary or useful in completing the Work (*id.* at 145).

The Bid Terms and Conditions contain a differently worded termination clause that requires FIT to provide Five Star with “a reasonable opportunity to cure” prior to termination for cause (*see id.* at 275-76).³

³ The difference in wording is immaterial. That is because, regardless of which termination provision governs, the court does not see a meaningful difference between “if the violation or delay shall not cease or arrangements satisfactory to the Owner shall not be made” and “a reasonable opportunity to cure” as predicates to termination. It is undisputed that Five Star was not given an opportunity to “cease” or “cure” its violations (it was terminated the same day the letter was issued).

Article 11 of the Second General Conditions governs “disputes,” beginning with a process to resolve disputes over Extra Work, set forth in section 11.01:

A. If the Contractor claims that any Work which the Contractor has been ordered to perform will be Extra Work, or that any action or omission of the Owner is contrary to the terms and provisions of the Contract and will require the Contractor to perform Extra Work the Contractor shall:

1. Promptly comply with said order.
2. File with the Owner and the architect within fifteen (15) working days after being ordered to perform the Work claimed by the Contractor to be Extra Work or within fifteen (15) working days after commencing performance of the Work, whichever date shall be earlier, or within fifteen (15) working days after the said action or omission on the part of the Owner occurred, a written notice of the basis of the Contractor's claim, including estimated cost, and request for a determination thereof.
3. Proceed diligently, pending and subsequent to the determination of the Owner with respect to any said disputed matter, with the performance of the Work in accordance with all instructions of the Owner.

B. ***No claim for Extra Work shall be allowed unless the same was done pursuant to a written order of the Owner.*** The Contractor's failure to comply with any or all parts of this Article shall be deemed to be:

1. a conclusive and binding determination on the part of the Contractor ***that said order, Work, action or omission does not involve Extra Work*** and is not contrary to the terms and provisions of the Contract,
2. ***a waiver by the Contractor of all claims for additional compensation or damages as a result of said order, Work, action or omission.***

C. The value of claims for Extra Work, if allowed, shall be determined by the methods described in the Contract. (*id.* at 146 [emphasis added]).

Section 11.03 then sets forth the time to contest FIT's determinations:

- A. Any decision or determination of the Architect, Owner or the Owner's Representative shall be final, binding and conclusive on the Contractor unless the Contractor shall, ***within ten (10) working days after said decision***, make and deliver to the Owner ***a verified written statement*** of the Contractor's contention that said decision is contrary to a provision of the Contract. The Owner shall determine the validity of the Contractor's contention. Pending the decision of the Owner, the Contractor shall proceed in accordance with the original decision.
- B. Wherever it is required in the Contract that an application must be made to the Owner or a determination made by the Owner, the decision of the Owner on said application or the determination of the Owner under the Contract shall be final, conclusive and binding upon the Contractor unless the Contractor, within ten (10) working days after receiving notice of the Owner's decision or determination, ***files a written statement*** with the Owner that the Contractor reserves the Contractor's rights in connection with the matters covered by said decision or determination (*id.* at 147-48 [emphasis added]).

The Bid Terms and Conditions further state that "Any change in work shall be made in writing by FIT, and the Contract price shall be adjusted accordingly" (*id.* at 272).

The Work

FIT directed Five Star to begin work on April 11, 2011. As required by the Contract, Five Star began to "examine and sound" the buildings (the Scoping). Geoxavier, the architect at Rand hired by FIT, insisted that rather than observing this process from the ground, which supposedly is the industry norm, Five Star allow the architect to observe the process up close (*see* Dkt. 256 at 2-3). According to Five Star, this served "no purpose" and created significant extra work for which it was agreed that Five Star would be paid \$5 per square foot (*see id.* at 3). Yet, despite the architect insisting on being so heavily involved, he apparently failed to document his work.

This proved problematic in June 2011, when Rand replaced Geoxavier with a different architect, John Monroe, who “entirely discarded all work performed by his predecessor” (*id.* at 4). Monroe also sought to renegotiate the \$5 per square foot price (*id.*). But most significantly, he insisted on “starting over,” requiring Five Star to repeat the “entire ‘Scoping’ process” (*id.*). Five Star explains that

As with the first Scoping, this added significant extra work because no repair work could be conducted while the architect was being ferried up and down the scaffold. This new method was significantly more costly to Five Star because instead of providing Five Star marked up drawings, all work would be directed by the Consultant in the field. Consultant’s decision to designate work inch-by-inch rather than provide drawings or otherwise use the examination/sounding performed by Five Star was not only duplicative, it was a deviation from Five Star’s means and methods, which prevented Five Star from completing the work efficiently and significantly damaged Five Star’s productivity (*id.*).

Five Star claims that FIT agreed to pay \$6,000 “for each drop provided to the Consultant” but that FIT later “renege” and refused to pay for the second round of Scoping (*see id.* at 4-5).

That was not the only issue. While Five Star was Scoping, it discovered that the pre-bid estimates provided by FIT as to how much work was required was materially inaccurate. Five Star explains that

When determining the scope for a public façade repair project, the owner or its architect typically inspects a representative sample and extrapolates from that to estimate the scope of work. Using this practice, industry standard is for estimates on public façade projects to be accurate within a maximum twenty percent (20%) margin for error. The “estimated” scope of work identified in the Contract ... was grossly misleading and failed by a wide margin to meet industry standards for minimally acceptable accuracy. ***Out of the forty-one (41) base bid line items of work to be performed, twenty-eight (28) of them were inaccurate by more than sixty percent (60%), and seventeen (17) of the estimates were inaccurate by more than ninety***

percent (90%)! In order to prepare for and execute the Project, Five Star was required to incur substantial costs, many of them up front, that were not associated with any specific repair but were directly connected to FIT's grossly inaccurate estimates as to the scope of work. These costs are known as "general conditions"⁴ and they included, inter alia, insurance (3% of the contract price), bonding (fixed amount based upon contract price), overhead, mobilization, submittals, coordination meetings, temporary utilities such as lighting and electric, storage, etc. For this Project, the cost to Five Star of fulfilling the general conditions was nearly thirty percent (30%) of the contract price. Frequently, general conditions are included as a separate line item in a bid. Where, as here, there was no separate line item for general conditions, they are allocated to the total price for the project line items. Another cost bidders must consider for façade repair work is access. Absent pipe scaffolding, which was not allowed here, façade work takes place suspended above ground-level. Accessing the work can therefore be very costly and comprise a significant portion of the cost to conduct the repairs. General conditions, access, bonding capacity, staffing, and scheduling are all calculated by a contractor bidding on a façade repair project based upon the owner's representation regarding the estimated scope of work. (*id.* at 5 [emphasis added]).

Five Star claims and FIT disputes that the Contract was "for a lump sum" and, in purported keeping with that understanding, Geoxavier had "approved payments to Five Star on a percentage completion basis" (*id.* at 6; *see* Dkt. 258). According to Five Star, this permitted it to "be fairly compensated for its general conditions, access, and other considerations such as scheduling, bonding capacity, and staffing regardless of the total amount of repairs that were ultimately necessary" (*see* Dkt. 256 at 6). But when Monroe came on board, he took a different position, contending the Contract only permitted payment on a per-unit basis (*id.*). This, according to Five Star, was absurd.⁵

⁴ Remarkably, this is a third iteration of "general conditions."

⁵ *See* Dkt. 256 at 7 ("In one instance, the estimates specified 2000 square feet of work, which Plaintiff agreed to perform for a lump sum price of \$160,000.00. Accordingly, Five Star provided as many as five (5) employees plus a supervisor per-day to (i) examine/sound an entire façade, (ii)

For the first eight months, FIT paid Five Star \$1,616,998.32 on a percentage completion basis while holding back \$179,666.48 in retainage and increasing the total contract price to \$3,911,533. But for the next ten months of work, Five Star was not paid for any of its work. “In that time, Five Star’s work on six of the eight buildings, as well as all work along the bridge and the façade of Building A that faces a courtyard, had been accepted as complete and approved by FIT” (*id.* at 7). “The work performed in 2012 included all repair work performed by Five Star on Building A/B” (*id.* at 8).

Termination and This Action

By letter dated September 6, 2012, FIT notified Five Star that it was terminated, for cause, as of the close of business that day (Dkt. 262). Five Star listed the following reasons for termination: (1) failure to provide a certified payroll in accordance with sections 8.01(F), 17.01(E), and 20.11(D) of the Second General Conditions; (2) failure to check-in with Rand at the beginning of each work day (*see* Dkt. 248 at 264); (3) failure to certify the percentage of debris discarded (*see id.* at 59); (4) failure to attend meetings and conference calls (*see id.* at 137); and (5) failure to provide Rand with proper certification cards. Five Star was not given an opportunity to cure these alleged breaches, nor does the letter explain why providing such an opportunity would be futile.

facilitate three (3) separate examinations by FIT's Consultant, and (iii) perform repair work spread across five (5) different floors from a hanging scaffold. Once completed, Five Star had repaired a total five (5) square feet of stone. FIT took the position that Five Star was owed a total of four hundred dollars (\$400.00) for this work -- despite Plaintiff having incurred approximately \$3,500 for each drop of the hang”).

Five Star commenced this action on March 1, 2013, shortly before the shortened contractual limitations period was set to expire (*see* Dkt. 248 at 171 [requiring lawsuits to be brought within six months of termination]). Five Star's original complaint, however, did not name FIT as a defendant (*see* Dkt. 1 at 1). Instead, Five Star sued FIT's board, its individual board members, and two governmental entities – none of which are in contractual privity with Five Star – and, unsurprisingly, they moved to dismiss. Five Star stipulated to the dismissal of the government defendants but defaulted on the motion to dismiss filed by the board and its members. By order dated November 14, 2013, the court granted the motion and dismissed the action (Dkt. 44). Less than a year later, Five Star moved to vacate its default on the ground of law firm error. The court granted the motion on March 26, 2015 and ordered Five Star to file an amended complaint naming only FIT as a defendant (Dkt. 95; *see* Dkt. 96 [3/26/15 Tr.]). FIT did not appeal that decision.

Five Star filed an amended complaint on April 13, 2015, asserting claims for breach of contract and unjust enrichment (Dkt. 97 [the AC]). FIT answered on July 2, 2015 (Dkt. 101). After completion of fact and expert discovery, the parties filed their respective summary judgment motions on January 29, 2019.

FIT argues that (1) all of Five Star's claims are barred by the statute of limitations; (2) its claims for extra work are entirely barred by its failure to comply with the Contract's writing requirements and because it signed lien waivers – or are at least partially barred due to some of the work not being “extra” or even part of the Contract; (3) its claims for work performed in 2012 are barred because it failed to comply with the Contract's writing requirements and did not prove the actual work performed; and (4) recovery of lost profits

is barred because the Contract is not a lump-sum agreement. Five Star contends that (1) it was improperly terminated for cause; (2) the Contract was for a lump sum, thereby entitling it to lost profits; and (3) it is entitled to partial summary judgment on damages for certain work that is not in dispute.

Discussion

Legal Standard

Summary judgment may only be granted if there are no material disputed facts (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The moving party bears the burden of making a prima-facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). If a prima-facie showing has been made, then the burden shifts to the opposing party to produce evidence sufficient to establish the existence of a material question of fact (*Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). The evidence must be construed in the light most favorable to the opposing party and the motion must be denied if there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]; *Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Mere conclusions, unsubstantiated allegations or expressions of hope, however, are insufficient to defeat summary judgment (*Zuckerman*, 49 NY2d at 562).

Statute of Limitations

This action is not time-barred. The relation-back doctrine renders Five Star's claims timely. CPLR 203(f) provides that claims "asserted in an amended pleading [are] deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" (*see Beach v Touradji Capital Mgmt., LP*, 142 AD3d 442, 443 [1st Dept 2016]). It is well settled that where, as here, the plaintiff made a mistake and sued the wrong party who is united in interest with the proper party, if the proper party had knowledge of the claims at the time of the original filing and there is no prejudice in substituting it, the claims against the proper party relate back the original complaint (*Nardi v Hirsh*, 250 AD2d 361, 364 [1st Dept 1998]; *see Buran v Coupal*, 87 NY2d 173, 178 [1995]).

That is what occurred here. While FIT's board and trustees were sued, the original complaint clearly alleged FIT's breach of the Contract (*see* Dkt. 1 at 10 ¶ 36). No reasonable attorney could assume that allegations in the original complaint could give rise to personal liability on the part of the trustees. Indeed, in the original motion to dismiss, the same counsel that now represents FIT specifically argued that FIT was the proper defendant (*see* Dkt. 17 at 6). FIT does not and cannot deny that it knew of the case: its board was a named defendant. Nor can it contend that it is not united in interest with its own board. FIT, moreover, did not appeal the court's 2015 decision to vacate the default and substitute FIT as the defendant. If FIT believed it was prejudiced or that it could prevail on such a straightforward issue of law capable of resolution on an early summary judgment

motion, it would not have conducted years of expensive discovery.⁶ Under these circumstances, relation-back is clearly warranted (*see Marvin Neiman, P.C. v Adar Importing & Distrib. Co.*, 243 AD2d 408, 409 [1st Dept 1997]). Summary judgment is therefore granted to Five Star on FIT's statute-of-limitations defense.

Validity of Five Star's Termination

Five Star is entitled to summary judgment on its claim that it was not properly terminated for cause. Regardless of which for-cause provision governs, both require an opportunity to cure. It is undisputed that FIT did not permit Five Star the opportunity to do so for any of the breaches alleged in the September 6, 2012 letter. Though an opportunity to cure need not be provided where doing so would be futile (*see Wender v GA Glob. Markets, LLC*, 147 AD3d 663 [1st Dept 2017], citing *J. Petrocelli Constr., Inc. v Realm Elec. Contrs., Inc.*, 15 AD3d 444, 446 [2d Dept 2005]), that is not the case here. FIT's contention that Five Star's violations are tantamount to an unequivocal repudiation of its intention of ever abiding by the Contract is unsupported by the record. In fact, the record reveals, as is unfortunately common with construction contracts, that the parties often did not follow the letter of the Contract.⁷ It would be unreasonable to infer an

⁶ FIT's reliance on *27th St. Block Assn. v Dormitory Auth. Of State of N.Y.* (302 AD2d 155 [1st Dept 2002]) is misplaced. There, the court held that FIT and DASNY – a governmental agency – are not united in interest (*see id.* at 164). While DASNY was also originally sued here, Five Star's relation-back argument is predicated on FIT being united in interest with its own board, not with DASNY.

⁷ Five Star is not the only guilty party in this regard. For instance, there is evidence that FIT consistently demanded that Five Star perform work without contemporaneously signing off on purchase orders as required by the Contract, thereby making its complaint about Five Star's own failure to abide the writing requirements hypocritical. On a construction project, it is understood that parties have unequal power, especially where, as here, the owner can fire the contractor

unequivocal repudiation from Five Star's past violations here and it would result in an unfair forfeiture. If such an inference was permitted, it is likely that all contractors could be terminated with cause due to some persistent technical breach without ever being given an opportunity to cure. The exception would swallow the rule and cure provisions would be meaningless.

Excusing a failure to provide the requisite notice and cure period is ordinarily reserved for extreme situations (*see Kleinberg Elec., Inc. v E-J Elec. Installation Co.*, 111 AD3d 410 [1st Dept 2013] ["plaintiff repudiated the subcontract by abandoning the work site"]). Had FIT explicitly stated that it was refusing to comply or if compliance was impossible, FIT could validly contend that Five Star should not have been given an opportunity to cure (*see J. Petrocelli Const.*, 15 AD3d at 446 [contractor admitted in meeting that he could not get the needed personnel to work on the project]; *see also Prince Fashions, Inc. v 60G 542 Broadway Owner, LLC*, 149 AD3d 529, 530 [1st Dept 2017] [failure to maintain requisite insurance coverage for prior years where such policies are occurrence-based and where retroactive coverage was not procured]). Although FIT submits evidence that Five Star's non-compliance was raised at meetings, the meeting minutes do not show that Five Star unequivocally refused to comply. Repeatedly raising

without cause. When the owner demands that the contractor perform in a way that is not strictly in conformity with the contract, the contractor is placed in an untenable position of having to choose between refusing and risking termination or conceding and risking being stiffed due to merely following oral, rather than, written directions. That is why the law provides contractors leeway under these circumstances.

issues at a meeting is not a substitute for providing a formal opportunity to cure with the requisite notice of termination as required by the parties' agreement.

Indeed, the very point of notice and a cure period is to alert the breaching party, in no uncertain terms, that its failure to remedy the problem will result in a for-cause termination before it is a fait accompli. The requirement is specifically meant to allow the breaching property to remedy a breach before termination. When parties expressly bargain for this "last-chance" opportunity to make things right, they are supposed to be protected if, faced with the stark reality of termination, they decide to right the ship.

Here, Five Star may well have decided to cure when faced with impending termination. It is impossible to know whether it would have done so. It is clear, however, that FIT did not provide it with that opportunity as mandated by the Contract. Without doing so, FIT did not have the right to affect a for-cause termination (*New Image Constr., Inc. v TDR Enters. Inc.*, 74 AD3d 680, 681 [1st Dept 2010], citing *MCK Bldg. Assocs., Inc. v St. Lawrence Univ.*, 301 AD2d 726, 728 [3d Dept 2003]; see *Mike Bldg. & Contr., Inc. v Just Homes, LLC*, 27 Misc 3d 833, 843-44 [Sup Ct, Kings County 2010] [Demarest, J.] [collecting cases]). Thus, summary judgment is granted to Five Star on its claim that it was improperly terminated for cause.⁸

⁸ With certain exceptions, Five Star only seeks summary judgment on liability at this time, with damages to be determined at trial. The determination that Five Star was not validly terminated for cause permits recovery of lost profits on the unperformed portion of the Contract.

Nature of the Contract

The parties dispute whether the Contract was a “requirements” contract or a “lump sum/fixed-price” contract.⁹ Five star argues the latter because it seeks its lost profits (*see Inspectronic Corp. v Gottlieb Skanska, Inc.*, 135 AD3d 707, 709 [2d Dept 2016] [“As to the claim for lost profits in connection with completion of the four remaining base work items, the general measure of damages in an action for breach of a fixed-price construction contract, where full performance of the contract is prevented by the owner, is the contract price, less payments made and less the cost of completion”], quoting *Hydraulitall, Inc. v Jones Inlet Marina, Inc.*, 71 AD3d 1087, 1089 [2d Dept 2010], quoting *New Era Homes Corp. v Forster*, 299 NY 303, 307 [1949]).

“A requirements contract is one in which the buyer agrees to purchase his requirements exclusively from the other party to the contract. In a standard requirements contract, the buyer agrees to purchase from the seller, who agrees to sell to the buyer’s goods in such quantities and types as are ordered, subject to available supply” (28A N.Y. Practice, Contract Law § 26:39; *see L & M Bus. Corp. v New York City Dept. of Educ.*, 71 AD3d 127, 137 [1st Dept 2009], *affd as mod* 17 NY3d 149 [2011]; *Berkshire Fashions, Inc. v F.W. Woolworth Co.*, 256 AD2d 246, 247 [1st Dept 1998]). In construction, this is often called a “unit price contract,” which

sets forth the price for each unit delivered to the contractee (typically the contractor). The unit may be, for example, a pound of nails, a door, a heating system, a modular building, or a cubic yard of excavation. The contract may

⁹ FIT also strangely suggests that perhaps the Contract is neither a lump sum nor a requirements contract, but rather “some other type of contract” (Dkt. 324 at 19).

specify a particular number of units or may state that the supplier will furnish all units needed or a specified percentage of needed units. For example, if the contract is for excavation, it might state that the excavator would be paid five dollars per cubic yard of material excavated from the site. Anything which can be measured in units can be the basis of a unit price contract (33 N.Y. Practice, N.Y. Constr. Law Manual § 1:20; *see also Laws Const. Corp. v Town of Patterson*, 135 AD3d 830 [2d Dept 2016]; *Harrison & Burrowes Bridge Constructors, Inc. v State*, 42 AD3d 779, 780 [3d Dept 2007]).

By contrast, a lump-sum contract “is one in which the contractor agrees to do specified construction for a price set forth in the contract. The only changes allowed to the fixed price are for extras or change orders” (33 N.Y. Practice, N.Y. Constr. Law Manual § 1:19; *see Inspectronic*, 135 AD3d at 708-09).

Here, the Contract’s terms and conditions provide that “FIT will indicate in the Specifications [] whether this is a requirements contract” (Dkt. 248 at 272). The Contract further provides that, if FIT does so, estimates are to be provided “only for bid analysis and evaluation and not as a guarantee and shall not be incorporated or otherwise read into this Contract other than for such limited purposes” and that “quantities actually required by FIT may be more or less than estimated” (*id.*). However, the Contract provides that if it “is not a requirements contract, FIT reserves the right to increase or decrease the quantity of goods or services up to twenty percent (20%) from those set forth in the Specifications at the unit prices established by contract” (*id.*).¹⁰ Notwithstanding the forgoing provisions, the term

¹⁰ The court rejects FIT’s argument that this provision is not part of the Contract. Paragraph E of the terms and conditions on each purchase order *issued by FIT* refutes its own position (*see* Dkt. 335 at 1 [“FIT reserves the right to increase or decrease the quantity of goods or services up to twenty percent (20%) from those set forth in the Specifications at the unit prices established by contract”]). Thus, even if there was some ambiguity as to which portions of the Invitation are part of the Contract, the parties’ clear course of conduct demonstrates that they understood the 20% provision was part of the Contract. No reasonable finder of fact could conclude otherwise.

“requirements contract” cannot be found elsewhere in Specifications or in the 282 pages of the Invitation. Because FIT did not indicate that this is a requirements contract, pursuant to the foregoing terms and conditions, the Contract is a lump-sum contract subject to the specified 20% rule.

Additionally, the same conclusion is mandated even in the absence of this contractual provision and even ignoring the parties’ fact and expert testimony entirely (*see Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]). That is because the Contract was awarded to Five Star based on a lump-sum bid of \$3,378,250, subject only to modifications based on changes to the scope of work or for extra work. The agreement is the hallmark of a lump-sum contract. While Five Star’s bid was broken down based on the amount it expected to spend for each item within the scope of work, deviations from the fixed amount due could only be accomplished by an agreement to perform extra work for additional sums certain, which would have had to have been negotiated on a case-by-case basis (as was done with the Scoping).

The Contract does not, as it could have, require FIT to pay Five Star based on the volume of work it performed multiplied by the amount of money quoted in its bid estimates. That is why, at the outset, FIT was paid on a percentage completion basis. No matter how much work was done, unless Five Star qualified for extra payment, it was limited to progress payments based on the lump-sum amount.

Moreover, if the Contract was a requirements contract, it would have included a fixed price list for all additional tasks that would need to be performed. For instance, if the contract provided that Five Star was obligated to perform a certain number of repairs to the

façade and that all additional repairs would be paid for at a fixed rate, that would be a requirements contract. When Monroe required Five Star to redo the Scoping, Monroe took the position that the work would have to be redone for free. That would never occur with a requirements contract (especially if, as here, there seems to be no dispute that the need to redo the work was not Five Star's fault) To be sure, while the parties dispute whether the redone work falls within the original scope of work or is extra work for which there was an agreement on price, neither took the position at the outset, *before* that work was done, that the Contract itself required a particular amount be paid for it. On the contrary, it was the subject of negotiations. If FIT was correct that the Contract was a requirements contract, however, such haggling would not have been necessary.

Extra Work

FIT moves for summary judgment on certain categories of extra work,¹¹ concedes that a trial is necessary for others,¹² and does not contest liability on some of the extra work.¹³ The extra work for which FIT seeks summary judgment was admittedly performed

¹¹ FIT “only moves to dismiss the following claims for Extra Work: (i) Facilitating Consultant’s ‘Scoping’ via boom lift, (ii) Facilitating ‘Re-Scoping’ and Examination of all Prep-Work via scaffold, (iii) Providing ‘Site Safety Plans’, and (iv) Demobilizing/Remobilizing” (Dkt. 385 at 13).

¹² FIT “does not move to dismiss the following Extra Work claims: (i) Repair Work at Building A/B, a portion of which is base bid work, (b) Emergency Work at Building D, (c) Additional Months of Shedding, and (d) Shedding at Building A/B” (*id.*). For these categories, the circumstances of the work will have to be addressed at trial to see if Five Star is entitled to payment. However, based on the rulings in this decision, FIT will be foreclosed from arguing that Five Star’s failure to comply with the Contract’s writing requirements is an absolute bar to recovery and will be limited to arguing that the legal standard set forth was not met.

¹³ FIT “concedes sixty-eight thousand four hundred twelve dollars (\$68,412) plus ten percent (10%) retainage and a five percent (5%) hold back should be paid to Plaintiff for sidewalk shedding

and FIT does not argue that there was anything deficient about the work or contend that it was unnecessary. Rather, FIT argues that Five Star is not entitled to any compensation for this extra work because it (1) failed to comply with the Contract's writing requirements; and (2) signed lien waivers.

The first issue is one of the most recurring in construction litigation. It seems that virtually every major construction contract has writing prerequisites to payment – yet, in practice, compliance with such requirements is the exception, not the rule. Thus, unsurprisingly, there is ample caselaw addressing when such failure is an absolute bar to recovery and when it is not. It is well settled that “oral directions to perform extra work, or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorization or notice of claims” (*Barsotti's, Inc. v Consolidated Edison Co. of N.Y.*, 254 AD2d 211, 212 [1st Dept 1998]; see *Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 494 [1st Dept 2010]). “Provisions requiring written authorization for extra work are waived where the conduct of the parties demonstrates an indisputable mutual departure from the written agreement and the changes were clearly requested by [the owner] and executed by [the contractor]” (*Peter Scalamandre & Sons, Inc. v FC 80 Dekalb Assocs., LLC*, 129 AD3d 807, 809 [2d Dept 2015]).

Five Star claims it was directed by FIT to perform the subject extra work and that “[t]he process of agreeing on a price and directing extra work be performed with the

extras” (*id.*). This amount, along with others being ordered, shall be reduced to judgment now, and the remainder of the claims are severed and will be decided after trial.

understanding that a change order would be subsequently issued [] became the standard course of conduct for the parties” (Dkt. 385 at 17). Indeed, “of the 36 executed change orders, *not a single change order was signed before the work was performed*” (*id.* [emphasis added]). FIT does not deny this, and thus Five Star has raised a question of fact as to whether compliance with the Contract was waived due to the parties’ course of conduct; namely, that FIT required Five Star to perform work without having signed the requisite change order. Five Star claims that it was expressly directed by FIT to perform work yet, consistently, FIT refused to contemporaneously execute change orders. FIT sufficiently raises questions of fact about who was really at fault for there not being proper documentation.¹⁴

The parties further dispute whether certain work was really “extra.” First, while the parties agree that Scoping needed to be performed and was initially within the Contract’s scope of work, the extent of the Scoping demanded by both of Rand’s architects was arguably more onerous than the Contract required, which Geoxavier arguably conceded by agreeing to pay Five Star additional money for the first round. Likewise, the redone Scoping may only have been necessary due to Rand’s own negligence; thus, a reasonable finder of fact might conclude that the work should be deemed extra since the Contract did not contemplate a second round. As discussed, the failure by Five Star to perfectly document the extra work in accordance with the Contract is not necessarily fatal if Five

¹⁴ The purported reasons for Five Star’s termination did not include this issue.

Star proves at trial that it was specifically directed to do the work.¹⁵ These questions of fact must be resolved at trial.

There also are questions of fact about whether the demobilization/remobilization was extra work. While it is undisputed that the Contract provides that the cost of mobilization is to be borne by Five Star, Five Star claims there was no need to demobilize for the winter and that it intended to keep working, which it claims it could have done given the mild temperatures that year. FIT does not conclusively rebut this argument. As with the second round of Scoping, if the demobilization was not really necessary and was not contemplated at the outset, the finder of fact might conclude that the associated costs should be considered extra. The parties' dueling accounts preclude summary judgment.

That said, FIT claims, and Five Star does not dispute, that there was only a single mobilization at Kaufman Hall and Building A/B, so those costs cannot be considered extra. Summary judgment is granted to FIT on this limited issue.

FIT refused to pay for the site safety plans for Alumni Hall and Co-Ed Hall because Rand determined that they were not required, and thus Five Star's change order was rejected. That rejection, however, allegedly occurred after FIT directed Five Star to develop the plans. Thus, Five Star has raised a question of fact as to its entitlement to compensation for these plans. Because FIT does not dispute that it agreed to the change

¹⁵ FIT complains about Five Star's lack of documentation; ironically, it was its own architect's record-keeping problems that necessitated the very second round of Scoping for which it refuses to pay.

order for the Kaufman Hall safety program, Five Star is entitled to summary judgment for that amount, which indisputably is \$2,500 (*see* Dkt. 277 at 18).

That Five Star signed lien waivers as a condition of partial payment does not defeat its claims for extra work. Where partial payment is conditioned on a waiver of claims for other unpaid compensation, “the waiver form is construed as merely a receipt for the monies referenced in the waiver” (*West End Interiors, Ltd. v Aim Constr. & Contr. Corp.*, 286 AD2d 250, 251-52 [1st Dept 2001]). The “waiver” does not preclude claims for other amounts allegedly owed (*see Penava*, 71 AD3d at 495 [“R & R does not dispute that Absolute was required to sign these waivers whenever it received partial payment, and, as demonstrated by the fact that payments were made after waivers were given for work performed before the waivers, the parties treated the waivers as mere receipts of the amounts stated in the waivers, not as complete waivers of all claims to that point”]). Thus, the lien waivers here (*see, e.g.*, Dkt. 259 at 27) do not absolutely bar Five Star’s claims (*Global Precast, Inc. v Stonewall Contr. Corp.*, 78 AD3d 432 [1st Dept 2010] [“where a waiver form purports to acknowledge that no further payments are owed, but the parties’ conduct indicates otherwise, the instrument will not be construed as a release”]).

Damages

Five Star is entitled to lost profits because FIT improperly terminated the lump-sum Contract.¹⁶ Here, “where full performance of the contract [was] prevented by [FIT],” Five

¹⁶ Section 8.02 of the Second General Conditions provides that Five Star is entitled to 20% profit on extra work (*see* Dkt. 248 at 142).

Star is entitled to damages in the amount of “the contract price, less payments made and less the cost of completion” (*Inspectronic*, 135 AD3d at 709). While the actual amount of such damages will be determined at trial, the parties seek summary judgment on whether “the cost of completion” element is to be calculated based on FIT’s estimates as to the scope of the remaining work at the time of Five Star’s termination or the amount FIT actually spent on completion costs using the contractor that was hired to replace Five Star.

“[I]t is well settled that the actual cost of completion, when available, is to be used over an expert’s opinion” (*George A. Fuller Co. v Kensington-Johnson Corp.*, 234 AD2d 265, 267 [2d Dept 1996]; *see Matter of Chrystie St. v Bermant*, 236 App Div 321, 326 [1st Dept 1932], *affd* 260 NY 583 [1932]).¹⁷ Here, rather than seeking to rely on an expert’s opinion, FIT proposes using its own estimates. The court rejects this proposal, regardless of whether such estimates were inflated. There is no meaningful difference between an expert’s opinion and an owners’ projections. Experts are, for good reason, often asked to make projections about the costs of completion when actual projections or data do not exist. A party’s own projections are arguably less reliable and certainly inferior to actual data. Indeed, since the cost of completion reduces the damages award, the greater the cost of completion, the lower the award. It makes no sense to permit an owner to unilaterally dictate the balance of its improperly terminated contractor’s compensation. If an owner was permitted to rely on its own estimates instead of actual completion costs, it would be

¹⁷ This is consistent with the rule that “expectation damages ... is the general measure of damages in a breach of contract case under New York law,” which requires “putting plaintiff in the same economic position he would have occupied had the breaching party performed the contract” (*Emposimato v CICF Acquisition Corp.*, 89 AD3d 418, 421 [1st Dept 2011]).

incentivized to document inflated estimates at the time of termination to minimize its liability to the contractor. Five Star's damages, therefore, shall be computed based on FIT's actual completion costs, inclusive of extra work performed by the replacement contractor.

The court now turns to the categories of work indisputably performed by Five Star without any complaint as to quality by FIT and for which the amount owed cannot be contested. First, it is undisputed that at the time of termination, FIT held \$179,666.48 in retainage (*see* Dkt. 247 at 2 ¶ 14). Retainage is a holdback from payment for work in the event there is a problem with its quality. Absent such a problem, which is not alleged by the FIT, retainage must be paid. Thus, Five Star is entitled to the \$179,666.48. Five Star also seeks 1% on retainage held in excess on the statutory maximum (*see* Dkt. 425 at 8, citing N.Y. State Fin. Law § 139-f). FIT concedes this point by not responding to it, and thus Five Star is entitled to an additional 1% interest on \$89,893.24 on top of the usual 9% pre-judgment interest (which will run from September 6, 2012 in accordance with CPLR 5001[b]).

Next, Five Star is entitled to be paid for the substantial work performed on six of the buildings between November 2011 and September 6, 2012 – for which it was paid nothing. There is no question that FIT must pay Five Star for this work because it admitted that all of this work was “necessary” and was “accepted as complete and approved by FIT” (Dkt. 247 at 2 ¶ 10). FIT does not proffer any challenge to Five Star's itemization of this work, which totals \$402,065 (*see* Dkt. 425 at 9). Rather, in opposition, FIT merely states that “Five Star is not entitled to the amounts sought in connection with work performed at

the six completed buildings ... for the reasons set forth in Point III(B) of FIT's moving memorandum" (Dkt. 324 at 32). But in that portion of its moving brief, FIT merely argues that Five Star has failed to prove that it actually did the work for which it seeks compensation (*see* Dkt. 246 at 27-28). This argument is insufficient to defeat summary judgment. The scope of the work performed and the amount that was to be paid for it is set forth in detail in the Contract. By admitting that Five Star did in fact do all of the required work on six of the buildings, FIT is obligated to pay for that work. FIT itself recognizes that that Five Star calculates the amount owed "by simply subtracting payments it received from the total amount of its bid for work on those buildings" (*id.* at 28; *see* Dkt. 285 at 29-31). That is exactly what is required by the Contract (*see* Dkt. 248 at 66), is how Five Star was paid at the outset and is the only sensible way to calculate damages. FIT cannot admit that Five Star performed exactly the work required under the Contract, admit that there is nothing wrong with the work, and yet refuse to pay the amount attributable to that work. The Contract was, as discussed, for a fixed sum, so Five Star is entitled to the pro rata amount for the work performed.

In sum, Five Star is entitled to \$652,643.48 (\$2,500 for the Kaufman Hall safety program, \$68,412 for the sidewalk shedding extras, \$179,666.48 in retainage, and \$402,065 for the completed work). All other damages, including the amount of Five Star's lost profits, must be determined at trial.

Accordingly, it is

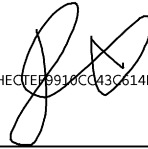
ORDERED that FIT's motion for summary judgment is granted only with respect to Five Star's claims for the mobilization at Kaufman Hall and Building A/B and is otherwise denied; and it is further

ORDERED that Five Star's motion for summary judgment is granted to the extent that: (1) FIT's statute-of-limitations defense is dismissed; (2) FIT did not validly terminate Five Star for cause; (3) the Contract is a lump-sum agreement; (4) Five Star's failure to provide written notices to FIT is not necessarily a basis to deny it payment for any of the work performed; (5) the lien waivers signed by Five Star do not preclude any of its claims; (6) Five Star is entitled to be paid \$2,500 for the Kaufman Hall safety program; (7) Five Star is entitled to its lost profits for the scope of the remaining work at the time of Five Star's termination based on the actual completion costs of the replacement contractor; (8) Five Star is entitled to \$68,412 for the sidewalk shedding extras; (9) Five Star is entitled to \$179,666.48 in retainage, plus an additional 1% (on top of normal 9% pre-judgment interest) on \$89,893.24; (10) Five Star is entitled to \$402,065 for the work it completed; and (11) Five Star's motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Five Star and against FIT in the amount of \$652,643.48 plus 9% pre-judgment interest from September 6, 2012 to the date judgment is entered, plus an additional 1% interest on \$89,893.24 for the same period; and it is further

ORDERED that the balance of Five Star's claims are hereby severed and shall continue; and it is further

ORDERED that a telephone conference will be held on March 18, 2020, at 3:30 p.m., before which the parties shall meet and confer about continuing their mediation efforts in light of this decision.

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JENNIFER G. SCHECTER, J.S.C.

3/3/2020
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE