

<b>New Empire Bldr. Corp. v 47-51 Bridge St. Prop. LLC</b>
2020 NY Slip Op 31348(U)
May 11, 2020
Supreme Court, Kings County
Docket Number: 503696/2017
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 503696/2017  
Motion Date: 3-2-20  
Mot. Cal. No.:

-----X  
NEW EMPIRE BUILDER CORP.,

Plaintiff,  
-against-

**DECISION/ORDER**

47-51 BRIDGE STREET PROPERTY LLC,  
  
Defendant.  
-----X

The following sets of papers numbered 1 to 3 were read on this motion:

<b>Papers:</b>	<b>Numbered:</b>
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Other.....	

Upon the foregoing papers, the motion is decided as follows:

By Notice of Motion dated November 12, 2019, the defendant, 47-51 Bridge Street Property LLC ("Defendant"), moves for an order (i) pursuant to CPLR § 3212, granting summary judgment in its favor against plaintiff New Empire Builder Corp. ("Plaintiff"); (ii) dismissing plaintiff's Verified Complaint, dated February 14, 2017, in its entirety; and (iii) granting defendant such other and further relief as this Court deems just and proper.

**Background:**

In support of the motion, Defendant submitted admissible proof, which included the affidavit of Defendant's development manager, Thomas Ryan, sworn to November 11, 2019 (the

“Ryan Aff”) and the contract between the parties which demonstrated the following: Defendant was the owner of real property located at 47 Bridge Street, Brooklyn, New York (the “Property”). On or around October 9, 2014, Plaintiff and Defendant entered into a contract, which included General Conditions and a Schedule of Values, pursuant to which Plaintiff agreed to serve as the general contractor on a construction project for a ground up construction of an eight-floor apartment building with 25 luxury apartment units located at the Property (the “Project”). The contract was a “Cost of the Work Plus a Fee with a Guaranteed Maximum Price” of \$9,500,000.00, subject to approved Change Orders and other additions or deductions agreed to by the parties. In or around early 2016, Plaintiff sought a “final payment” for the Project and according to the Defendant, submitted an incomplete and unsigned draft Certificate of Application for Payment. When the Defendant refused to make final payment, Plaintiff filed this lawsuit.

Mr. Ryan states in his affidavit, the issuance of the final payment from the owner to the general contractor is particularly significant. He maintained that the issuance of final payment by the owner means that the owner, general contractor and project architect, among others, agree that the construction project is complete, and the work was performed in accordance with the contract documents and applicable building code. He further averred that issuance of a final payment also means that the parties agree that all subcontractors and trade persons have been fully paid for their work. In other words, according to Mr. Ryan, the issuance of final payment means that the construction project is over and there is no further work to be done.

Defendant contends that Section 12.2 of the contract entitled “FINAL PAYMENT: sets forth strict pre-conditions that Plaintiff had to satisfy to become eligible to receive a final payment. This provision provides:

§ 12.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when

1. the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as provided in Section 12.2.2 of AIA Document A201-2007 as modified by the Parties, and to satisfy other requirements, if any, which extend beyond final payment;

2. the Contractor has submitted a final accounting for the Cost of the Work, all supporting documentation and a final Application for Payment have been submitted by the Contractor and approved by the Owner; and

3. a final Certificate for Payment has been issued by the Architect or Owner; and

4. in addition to the documentation required for each Application for Payment set forth in this Agreement, the Contractor shall furnish the following all in form and substance satisfactory to the Owner and the Lender in compliance with the applicable New York State statutes: (1) A duly executed and acknowledged Contractor's sworn statement and final affidavit in the statutory form; (2) a duly executed unconditional waiver and final lien release by the Contractor and all subcontractors, sub-subcontractors or suppliers of which the Owner has actual or constructive knowledge; (3) Contractor's consent of surety to the Final Payment; and (4) such other information, documentation and materials as the Owner, Architect and Construction Lender may require as further set forth in the Agreement, General Conditions as modified by the Parties, and Supplementary Conditions, including but not limited to completed record drawings, final certificate(s) of occupancy if not withheld through no fault of the Contractor by all governing authorities, and duly executed and completed warranties for all material, equipment and workmanship as required by the Contract Documents.

Defendant further contends that Section 9.10 of the General Conditions, entitled "**FINAL COMPLETION AND FINAL PAYMENT**", sets forth additional requirements that Plaintiff must satisfy to become eligible to receive a final payment and provides:

§ 9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Owner (1) a final affidavit complying with the applicable New

York Statutes, that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. In addition, the Owner also requires that (i) a Certificate of Final Payment has been issued by the Architect, (ii) all "punchlist" items have been fully completed to the reasonable satisfaction of Owner and Architect (except for disputed items), (iii) the final certificate of occupancy or completion and all final governmental and utility authority permits have been issued, (iv) Contractor has delivered to Owner all previously undelivered manufacturer and subcontractor guarantees and warranties; (v) Contractor has delivered to Owner release of lien as well as satisfactions of lien for any claims of lien filed on account of the Work (unless transferred to bond by Contractor), the final affidavit, and such other waivers and releases as Owner, the Lender and its title insurer may reasonably require in order to assure lien-free completion of all of the Work (including any equitable lien claims), subject to the condition that the final payment being made to the Contractor is paid within the aforementioned time period; (vi) Contractor has delivered to Owner and Architect "as built" drawings for the Work detailing all changes or deviations from the original Contract Documents; and (vii) Contractor has fully cleaned and restored the site with respect to all of the final punchlist work including, without limitation, removal of all excess materials, rock, sand, paving and miscellaneous debris, supplies, equipment and trailers; (viii) all temporary utilities are disconnected; and (ix) Contractor has complied with all other requirements of the Contract Documents....

Mr. Ryan averred that the Plaintiff did not provide Defendant with all the documents and materials required by the contract in order to be eligible to receive a final payment, including the following:

- a final accounting for the Cost of the Work with all supporting documentation and a final Application for Payment approved by the Owner as required by Section § 12.2.1.2 of the Contractor Agreement;
- a final Certificate for Payment issued by the Architect as required by Section § 12.2.1.3 of the Contractor Agreement;
- a duly executed and acknowledged Contractor's sworn statement and final affidavit in the statutory form as required by Section § 12.2.1.4(1) of the Contractor Agreement;
- a duly executed unconditional waiver and final lien release by the Contractor and all subcontractors, sub-subcontractors or suppliers as required by Section § 12.2.1.4(2) of the Contractor Agreement;
- Contractor's consent of surety to the Final Payment as required by Section § 12.2.1.4(3) of the Contractor Agreement;
- record drawings and duly executed and completed warranties for all material, equipment and workmanship as required by Section § 12.2.1.4(4) of the Contractor Agreement;
- a final affidavit complying with the applicable New York Statutes, that payrolls, bills for materials and equipment, and other indebtedness connected with the work for which the Owner or the Owner's property might be responsible or encumbered have been paid or otherwise satisfied as required by Section 9.10.2(1) of the General Conditions;
- a Contractor's release of lien as well as satisfactions of lien for any claims of lien filed on account of the work as required by Section 9.10.2(5)(v) of the General Conditions;
- "as built" drawings for the work detailing all changes or deviations from the original Contract Documents as required by Section 9.10.2(5)(iv) of the General Conditions; and
- all previously undelivered manufacturer and subcontractor guarantees and warranties as required by Section 9.10.2(5)(vi) of the General Conditions. (Ryan Aff).

Defendant contends that Plaintiff effectively conceded that it failed to provide these documents. Defendant pointed out that Plaintiff's president and majority shareholder, Bentley Zhao, acknowledged at his deposition that the project's architect did not issue a final certificate for payment as required by Section 12.2.1(.3) of the contract (Temchin Aff., Exhibit D, 127:13-

16, 128:8-10). Mr. Zhao also could not (or would not) aver that Plaintiff did not provide Defendant with a certification that all work had been performed in accordance with the requirements of the contract documents (Temchin Aff., Exhibit D, 138:6-25 - 139:2-5).

Plaintiff's accountant/bookkeeper, secretary and minority shareholder, May Lu, conceded that Plaintiff did not submit a final accounting for the cost of the work with all supporting documentation and a signed and sworn certificate of application for a final payment as required by Section 12.2.1 (.2) of the Contractor Agreement (Temchin Aff., Exhibit H, 197:23-25 198:2-4). She also confirmed that Plaintiff failed to provide Defendant with a "duly executed and acknowledged Contractor's sworn statement and final affidavit in the statutory form" as required by Section 12.2.1(4)(1) of the Contractor Agreement (Temchin Aff., Exhibit H, 201:25 - 202:2-14). Finally, she acknowledged that Plaintiff failed to provide Defendant with any of the documents, information and materials required under Section 9.10.2 of the General Conditions (Temchin Aff., Exhibit H 203:3-22).

Defendant contends that since there is no genuine dispute of material fact that Plaintiff failed to comply with the disclosure requirements set forth in Section 12.2.1 of the Contractor Agreement and Section 9.10.2 of the General Conditions, Plaintiff is not entitled to the final payment for the Project and now seeks summary judgment dismissing the action.

**Analysis:**

"[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself" (*River St. Realty Corp. v. N.R. Auto., Inc.*, 94 A.D.3d 848, 849, 942 N.Y.S.2d 163, quoting *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645, 884 N.Y.S.2d 211, 912 N.E.2d 43). Accordingly, "when parties set down

their agreement in a clear, complete document, their writing should ... be enforced according to its terms” (*River St. Realty Corp. v. N.R. Auto., Inc.*, 94 A.D.3d at 849–850, 942 N.Y.S.2d 163, quoting *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 807 N.E.2d 876). A condition precedent is “an act or event, other than [the] lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises” (*Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690, 636 N.Y.S.2d 734, 660 N.E.2d 415, quoting Calamari and Perillo, *Contracts* § 11–2, at 438 [3d ed.]). Express conditions are those agreed to and imposed by the parties themselves, as opposed to implied or constructive conditions, which are “imposed by law to do justice” (*Oppenheimer & Co. v. Oppenheim Appel, Dixon & Co.* 86 N.Y.2d at 690, 636 N.Y.S.2d 734, 660 N.E.2d 415 [internal quotation marks omitted]; *Stars Jewelry by A Jeweler Corp. v. Hanover Ins. Group, Inc.*, 104 A.D.3d 670, 960 N.Y.S.2d 465; *River St. Realty Corp. v. N.R. Auto., Inc.*, 94 A.D.3d at 850, 942 N.Y.S.2d 163). Express conditions must be literally performed (*see River St. Realty Corp. v. N.R. Auto., Inc.*, 94 A.D.3d at 850, 942 N.Y.S.2d 163).

To succeed on a motion for summary judgment, the moving party must first “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *see also* CPLR 3212[b]). If the moving party makes a prima facie showing, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). “

Here, defendant made a prima facie showing of entitlement to summary judgment dismissing plaintiff's complaint by demonstrating that the plaintiff failed to comply with the conditions precedent to final payment. Plaintiff failed to raise a triable issue of fact.

Defendant's contention that it should be excused from complying with the requirements to final payment because it would otherwise suffer a disproportionate forfeiture is without merit. The only case defendant cites in support of this argument is *Danco Elec. Contractors, Inc. v. Dormitory Auth. of State*, 162 A.D.3d 412, 413, 75 N.Y.S.3d 28, 29. Here, however, defendant's submissions demonstrated that plaintiff's non-compliance with the conditions to final payment were substantial and not *de minimis* as in *Danco*.

Defendant's contention that plaintiff is precluded from asserting defendant's non-compliance with the conditions to final payment by failing to "specifically and with particularity" plead such non-compliance in their answer in accordance with CPLR 3015[a] is also without merit. The plain and unambiguous terms of the contract between the parties entitled plaintiff to final payment only if certain conditions were met. In the complaint, the plaintiff alleged that it fulfilled all the obligations contained in the contract (*see* Plaintiff's Complaint, Paragraph 11). Defendant's denial of this allegation in their answer was sufficient for purposes of CPLR 3015[a] to place the non-performance or non-occurrence of the conditions precedent to final payment at issue (*see Carr v. Birnbaum*, 75 A.D.3d 972, 973, 905 N.Y.S.2d 705, 706–07, citing *Allis-Chalmers Mfg. Co. v. Malan Constr. Corp.*, 30 N.Y.2d 225, 233–234, 331 N.Y.S.2d 636, 282 N.E.2d 600; *United States Fid. & Guar. Co. v. Delmar Dev. Partners, LLC*, 22 A.D.3d 1017, 1022, 803 N.Y.S.2d 254).

Finally, the Court rejects defendant's argument that the defendant waived the conditions to final payment by the course of conduct between the parties. It is well-settled that waiver is a "voluntary and intentional relinquishment of a known and otherwise enforceable right" (see, e.g., *Golfo v. Kyda Assocs., Inc.*, 45 A.D.2d 531,532, 845 N.Y.S.2d 122,124; *Peck V. Peck*, 232 A.D.2d 540, 540, 649 N.Y.S.2d 22, 23). The Plaintiff made no showing that the Defendant waived its right to insist on the conditions to final payment.

All the evidence Plaintiff refers to in its opposition papers purporting to demonstrate a course of conduct between the parties involves periodic progress payments that were made during the project. This action only involves plaintiff's right to final payment. Progress payments and the final payment are treated substantially differently under the contract with their own set of terms, conditions and requirements. Unlike progress payments, in order to receive final payment, the contract documents require Plaintiff to provide specifically identified Project Closeout Documents.

Moreover, Section 15.6.1 of the Contractor Agreement contains a broad and express no waiver clause, stating, in relevant part, "[n]o provision of the Contract Documents shall be deemed to have been waived by either party, either expressly, impliedly or by course of conduct, unless such waiver is in writing and signed by such party, which waiver shall apply only to the matter described in the writing and not to any subsequent rights of such party." No such writing has been submitted.

The Court has considered Plaintiff's remaining Arguments in opposition to the motion and find them to be without merit.

Accordingly, it is hereby

**ORDRED** that Defendant's motion pursuant to CPLR § 3212 for summary judgment against plaintiff New Empire Builder Corp. dismissing plaintiffs Verified Complaint, dated February 14, 2017, is **GRANTED**.

This constitutes the decision and order of the Court.

Dated: May 11, 2020



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020