SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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FIVE STAR ELECTRIC CORP.,

Plaintiff,

- v -

THE TRUSTEES OF COLUMBIA UNIVERSITY, LEND LEASE (US) CONSTRUCTION LBM, INC. FORMERLY KNOWN AS BOVIS LEND LEASE LMB, INC., JOHN DOE NOS 1 - 10, THE NAME JOHN DOE BEING FICTITIOUS, THE TRUE NAMES OF THE DEFENDANT BEING UNKNOWN

Defendant.

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INDEX NO.	655947/2018
MOTION DATE	09/06/2019, 09/06/2019
MOTION SEQ. NO.	003 004

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 228, 230

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 229, 231, 232

were read on this motion to DISMISS.

Defendant Lend Lease (US) Construction LBM, Inc. ("Lend Lease") (Motion 003) and Defendant The Trustees of Columbia University ("Columbia") (Motion 004) move for partial dismissal Plaintiff's First Amended Complaint ("FAC") pursuant to CPLR 3211 (a) (1) and (a) (7).[1]

[1] Lend Lease moves to dismiss the entire complaint against it and alternatively the first, second, third, and fifth causes of action. Columbia seeks dismissal of the first, second, third, fifth, and sixth causes of action.

Background[2]

This action arises from a construction project involving a new building at Columbia University's Manhattanville campus (the "Project"). Columbia, the owner, engaged Lend Lease to serve as the Project's construction manager by executing an agreement on October 15, 2010 (CM Contract) (NYSCEF Doc. 223). Lend Lease then engaged Plaintiff to perform electrical-related services as a Project subcontractor on January 24, 2013 and they executed a Rider to that agreement the following day (together, the "Subcontract") (*see* NYSCEF Docs. 167-168). Lend Lease assigned its rights and obligations under the Subcontractor Agreement to Columbia by agreement effective as of July 1, 2013 ("Assignment") (NYSCEF Docs. 224 [Assignment], 166 [Columbia aff], 177, ¶ 9 [FAC]; *see also* NYSCEF Doc. 207 at 10 [Plaintiff's mem opp] [stating it is "undisputed" the assignment was effective as of July 1, 2013]).

Motions to dismiss complaints relating to the same Project but commenced by different subcontractors were addressed by this Court and the First Department (*see WDF Inc. v The Trustees of Columbia Univ. in the City of New York*, 2016 N.Y. Slip Op. 33062[U], 9 [Sup Ct, NY County 2016] [granting in part the motions to dismiss of Lend Lease and Columbia], *affd sub nom. WDF Inc. v Trustees of Columbia Univ. in City of New York*, 2017 N.Y. Slip Op. 08744 [1st Dept 2017]; *E.E. Cruz/Nicholson Joint Venture, LLC v Lend Lease (US) Const. LMB, Inc.*, 2016 N.Y. Slip Op. 30207[U] [granting in part Columbia's cross motion to dismiss]).

The Subcontract and Plaintiff's FAC

Here, the Subcontract provided that Plaintiff would perform "Core and Shell" electrical installation for the Project. Under the Subcontract, those services were intended to be performed

[2] The facts are taken from the FAC except where otherwise noted.

according to various plans and schedules prepared by Defendants (collectively, the "Plans") and, specifically, prior to the "Fit Out" services to be provided by other subcontractors. In short, Plaintiff alleges that the Plans were defective, that it relied on the defective plans in making its bid and planning to perform its obligations, and that the defects in the Plans caused Plaintiff to incur significant delays, costs, and labor in completing its work.

Plaintiff identifies the following general categories of Defendants' failures to abide by and permit Plaintiff to timely perform its obligations under the Subcontract: defective Plans, including drawings and schedules; delayed access to Plaintiff's work areas, including delayed completion of the superstructure, delays due to late completion of the electrical closets in which Plaintiff's electrical work would be performed; restricted/congested access to the work areas that caused Plaintiff to change the method and manner of its work; delays prohibiting Plaintiff from timely completing short circuit studies and sub-metering system installation; and changes to Plaintiff's work causing lost productivity and increased costs not contemplated in the Subcontract (NYSCEF 177, ¶¶ 23-106).

Plaintiff concludes that Defendants' various failures "materially delayed [Plaintiff's] performance of its work and . . . timely completion of the Project," and that the "delays, inefficiencies, disruptions and interferences . . . were caused by Defendants' bad faith, willful, malicious, recklessly indifferent or grossly negligent conduct" (*id.* ¶ 106). Plaintiff also alleges that Defendants' acts and/or omissions "were so unreasonable that they constituted an intentional abandonment of the Subcontract and/or" constituted "Defendants' breach of [their] fundamental obligations under the Subcontract" (*id.*).

Plaintiff seeks the following relief in its six causes of action[3]:

(1) Compensation of, at least, $15 million for unpaid "Extra Work" performed under the Subcontract for which Change Orders were not issued, as well as unpaid "contract balance" including various items, such as disputed work, "and compensatory damages" (*see id.* ¶¶ 107-111 [first cause of action]);

(2) Compensation of $5 million for Defendants' breach of the Subcontract for, among other things, "Defendants' failure to supervise and/or coordinate the work of the subcontractors"; Defendants' changes, delays, interferences, and resequencing of work; "differing site conditions; unanticipated structural and safety work"; and defective Plans (*id.* ¶¶ 112-117 [second cause of action]);

(3) Compensation in an amount to be determined for Defendants' breach of the Subcontract in their "failure to issue a base line critical path method ('CPM') schedule and any updates thereto and/or" properly manage/coordinate the work (*id.* ¶¶ 118-126 [third cause of action]);

(4) Interest in an amount to be determined for late/overdue payments issued to Plaintiff for work performed under the Subcontract (*id.* ¶¶ 127-130 [fourth cause of action]);

(5) Compensation in an amount to be determined for Defendants' "resequencing" of subcontractor obligations, changes, and various breaches of the Subcontract relating to Plaintiff's performance such that Defendants' changes "varied so significantly from the original plan, . . . and altered the essential identity or main purpose of the [Subcontract], . . . that the work . . . performed constituted a new undertaking rising to the level of a cardinal change" (*id.* ¶¶ 131-135 [fifth cause of action]); and

(6) Foreclosure on the $14,121,786.70 mechanic's lien (Lien) on the underlying property that Plaintiff previously filed (*id.* ¶¶ 136-143 [sixth cause of action]).

ANALYSIS

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994] [internal citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not

[3] Plaintiff's first, second, and third claims are somewhat amorphous and overlapping but appear to assert various breaches of the Subcontract relating to Extra Work/disputed work, delay damages, and poor supervision/inept planning damages. The gist of the claims is that Defendants' poor planning and lack of supervision caused various delays and extra work, damaging Plaintiff.

"accorded their most favorable intendment" (*Summit Solomon & Feldman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under subsection (a) (1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88).

1. Motion 003: Assignment of the Subcontract

In Motion 003, Lend Lease contends that the FAC must be dismissed against it because its assignment of the Subcontract to Columbia constitutes a novation. Plaintiff concedes, in its counsel's memorandum of law in opposition to Motion 003, that "[i]t is undisputed on July 1, 2013, Lend Lease assigned the Subcontract to Columbia, and the assignment was . . . effective as of that date" (NYSCEF 207 at 10).

Given Plaintiff's concession, the Assignment's express provision that privity will exist between only Columbia and Plaintiff as of July 1, 2013 (*see* NYSCEF 161 [Assignment]), and the Subcontract's provision that Lend Lease "may assign th[e] Subcontract at any time without the consent of [Plaintiff]" or Plaintiff's sureties/guarantors (NYSCEF 159, art. 18), the Court agrees with Plaintiff's alternative argument that privity with Lend Lease was not extinguished for the pre-Assignment period from January 24, 2013 through July 1, 2013.

Accordingly, Motion 003 is granted in part and the FAC is dismissed against Lend Lease for any liability arising under the Subcontract on or after July 1, 2013.

2. Motions 003 and 004: Article 39's Extra Work Notice Requirements

Defendants argue that Plaintiff's claims seeking compensation for Extra Work are barred under the Subcontract due to Plaintiff's failure to timely submit written notice of the occurrences and/or omissions that caused the alleged Extra Work to be performed. Plaintiff asserts it timely

provided notice but identifies only two letters, dated August 13, 2015 and November 19, 2015, in regard to the matters it complains of in this action.

To the extent that Plaintiff's claims seek compensation for Extra Work for which COs were not issued and for which Plaintiff was not paid, they are, at least initially, controlled by Article 39 of the Subcontract. Article 39 provides that for "any dispute as to whether any work item is within the scope of the Work to be performed" or "any such work constitutes Extra Work," "or if [Five Star] considers any directive, ruling or decision of [Defendants] to be incorrect or contrary to the intent of the Subcontract, or if [Five Star] disputes any other matter related to the execution and progress of the Work," Five Star "shall submit such claims or protests in writing to [Lend Lease]" (NYSCEF 159, art. 39). Any such claim or protest must "state clearly and in detail [the] objections and reasons therefore and shall be submitted within five (5) days of the occurrence of the event which led to the claim or protest" (*id.*). Furthermore, "[t]he notice of claim shall be given by [Five Star] before proceeding to execute the disputed or claimed Extra Work" and, absent timely notice under Article 39, Five Star "will have waived its rights to any and all claims for Extra Work, damages and/or extensions of time" (*id.*).

Should the claim or protest be determined to be ordinary Work within the scope of the Subcontract, Five Star is then required to notify Lend Lease in writing within three days that the "work is being performed, or that the determination and direction is being complied with, under protest" to "reserve its right to claim compensation for such work or damages resulting from compliance" (*id.* [emphasis added]). Oral objections and protests have no effect whatsoever, and *"[f]ailure to strictly comply with [Article 39's] requirements shall constitute a waiver of any*

claim for extra compensation or damages on account of the performance of such work or compliance with such determination or order" (*id.*).[4]

Notice provisions such as those in Article 39 "are strictly enforceable and treated as a condition precedent to recovery" (*WDF Inc. v The Trustees of Columbia Univ. in the City of New York*, 2016 N.Y. Slip Op. 33062[U], 9 [Sup Ct, NY County 2016], *affd sub nom. WDF Inc. v Trustees of Columbia Univ. in City of New York*, 2017 N.Y. Slip Op. 08744 [1st Dept 2017] [concerning an almost identical subcontract for a different subcontractor working on the same Project]; *see e.g. F. Garofalo Elec. Co., Inc. v New York Univ.*, 270 AD2d 76, 80 [1st Dept 2000]). That said, a condition precedent to a claim for damages need not be pleaded with particularity under CPLR 3016 (b), and Plaintiff has alleged, thinly, that "ample notice" was given to Defendants "from the inception of the changed field conditions" and the August and November 2015 letters do not utterly refute the pleading. Plaintiff has also alleged that "CO's have not been issued for the Extra Work even though Plaintiff performed the work, and Defendants have acknowledged this Extra Work is beyond the scope of the Subcontract" (*id.* ¶ 108). Moreover, the records before the Court on these pre-answer motions lack adequate detail as to the dates on which the alleged events, changes, omissions, or work occurred such that it cannot be said with certainty that all Extra Work claims under Article 39 have been waived. Defendants have also failed to submit any documentary evidence conclusively refuting Plaintiff's allegation that it submitted notice in compliance with Article 39. Self-serving affidavits submitted by Defendants denying receipt of notice alone are insufficient to support these motions to dismiss.

[4] Under Article 14, all written notice required under the Subcontract "shall be deemed given if delivered in person or by certified mail, . . . return receipt requested, to" certain specific representatives of the Defendants (NYSCEF 159, art. 14).

Accordingly, the prongs of Motions 003 and 004 that seek dismissal of Plaintiff's first, second, third, and fifth causes of action under Article 39's notice requirements are denied without prejudice to a new motion based on a more complete record. Targeted discovery on the narrow issue of whether the required notice was provided may be appropriate to quickly get to the bottom of this question.

3. Motions 003 and 004: Article 12's No-Damages-For-Delay Provision

Lend Lease further contends that Plaintiff's first, second, and third causes of action are barred by the no-damages-for-delay exculpatory provisions in the Subcontract and Columbia asserts that Plaintiff's second and third causes of action are barred by the no-damages-for-delay provision.

Plaintiff's second and third causes of action seek to generally recover for delay damages, which are subject to Article 12 of the Subcontract and any qualifying exceptions thereto (*see* NYSCEF 177, ¶¶ 115 [second claim, alleging Defendants "materially delayed" "and disrupted, delayed and interfered" with Plaintiff's performance], 118-125 [third claim, alleging that Defendants' failure to issue a critical path method and update work schedules "caused Plaintiff to suffer delays, inefficiencies, disruptions and interferences"]).

Even assuming that Plaintiff complied with Article 12's notice provisions,[5] Article 12 provides the following waiver:

> "All *extensions of time shall be in lieu of and in liquidation of any claims for compensation of damages* against the Contractor or Owner. . . . [Plaintiff] expressly agrees not to make, and hereby waives, any claim for damages, including without limitation those resulting from increased labor or material costs, on account of any hindrances, obstructions or delays from any cause whatsoever, including, without

[5] Under Article 12, Plaintiff "must give" Lend Lease detailed "written notice within 72 hours after the commencement of the occurrence, omission or happening which . . . resulted or will result in a delay in the Work," and failure to comply with Article 12's notice requirements "shall be deemed" "waive[r] [of Plaintiff's] right to an extension of time" (NYSCEF 163, art. 12).

> limitation, ordering changes, corrections, suspension, or rescheduling of the Work, whether or not the delays or their causes or their length were foreseeable or contemplated by the parties when they entered into this Subcontract, and whether the delays are the fault of the Contractor, Owner, Architects, separate subcontractors or otherwise. The parties agree that *an extension of time*[] . . . shall be the *sole remedy* of [Plaintiff] for, and [Plaintiiff] *waives its right to any claim for damages* to the extent arising from, any (i) delay in the commencement, prosecution or completion of the Work, (ii) interferences caused by delay, (iii) cumulative impact, (iv) hindrance or obstruction in the performance of the Work, (v) loss of productivity, or (vi) other similar claims."

(NYSCEF 163, art. 12 [Rider amendment]).

As in the two related actions involving the same Project commenced by different subcontractors, *WDF* and *E.E. Cruz*, the no-damages-for-delay provision—which is strictly applied in construction cases—is subject to the controlling precedent set forth in *Corinno Civetta Const. Corp. v City of New York* (67 NY2d 297 [1986]). Under *Corinno*, such provisions are valid and enforceable and are "not contrary to public policy if the clause and the contract of which it is a part satisfy the requirements for the validity of contracts generally" (*id.* at 309). Delay damages may be available if the allegations adequately fit within one of four exceptions: "(1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract" (*Corinno Civetta Const. Corp.*, 67 NY2d at 309). "Exceptions to no-delay clauses are strictly construed" (*E.E. Cruz/Nicholson Joint Venture, LLC v Lend Lease (US) Const. LMB, Inc.*, 2016 N.Y. Slip Op. 30207[U] [Sup Ct, NY County 2016], citing *Bovis Lend Lease, Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 147 [1st Dept 2013] ["A party seeking to invoke any of the exceptions to the general rule that no damages for delay clauses are enforceable bears a heavy burden."]).

Here, the no-delay provision is valid and enforceable (*see e.g. WDF Inc. v The Trustees of Columbia Univ. in the City of New York*, 2016 N.Y. Slip Op. 33062[U], *7 [Sup Ct, NY County 2016], *affd sub nom. WDF Inc. v Trustees of Columbia Univ. in City of New York*, 2017 N.Y. Slip Op. 08744 [1st Dept 2017] [finding nearly identical provision valid in a different subcontractor's agreement with Lend Lease for this same Project]). Further, Plaintiff has not adequately alleged that Defendants' delays, poor planning, or lack of supervision damages qualify for any of the *Corinno* exceptions (*see WDF Inc.*, 2016 N.Y. Slip Op. 33062[U], *7, *affd sub nom. WDF Inc. v Trustees of Columbia Univ. in City of New York*, 2017 N.Y. Slip Op. 08744 [1st Dept 2017] [dismissing delay-related damages claims from subcontractor's original complaint as inadequately alleged]). The First Department, after affirming the trial court's denial of the motion to amend the complaint in *WDF*, explained that the motion to amend was properly denied because:

> "Plaintiff merely alleges additional details regarding the delays due to failure to erect the steel work for the building in a timely fashion, not enclosing the building's floors in the winter months, interfering with plaintiff's plan to complete its work on a floor-by-floor basis, having to deal with extreme revisions to change orders and redesigned mechanical work, and failing to provide a complete project schedule. Plaintiff's allegations amount to 'inept administration or poor planning' and do not constitute bad faith or willful, malicious, or grossly negligent conduct. Furthermore, these alleged delays were within the contemplation of the broad no-damages-for-delay clause of the subcontract"

(*WDF, Inc. v Trustees of Columbia Univ.*, 170 AD3d 518, 519 [1st Dept 2019] [internal citations omitted] [analyzing similar allegations to those here in the context of a nearly identical exculpatory clause from the same Project]).

The allegations deemed without merit in connection with the no-delay provision in *WDF* are analogous to those asserted in the FAC in this action. Thus, Plaintiff has failed to meet its burden to qualify for a *Corinno* exception to the broad exculpatory clause in Article 12. Plaintiff's "allegations regarding delays encountered by [Plaintiff] due to issues such as

defendants' failure to supervise and coordinate work, extensive construction changes and interferences, out-of-sequence work, and excessive redesign of building systems" "are precisely the type of contemplated damages barred by *Corinno*" (*WDF, Inc.*, 2016 N.Y. Slip Op. 33062[U], *10, citing *LoDuca Assoc., Inc. v PMS Const. Mgtmt. Corp.,* 91 AD3d 485 [1st Dept 2012] [noting that delays caused by faulty architectural drawings were within the contemplation of the exculpatory clause, regardless of the length of the delays]). "[W]hile the [exact] conditions themselves may not have been anticipated, the possibility, however unlikely, of their arising was contemplated and addressed by the parties in their agreement" (*Blau Mech. Corp. v City of New York*, 158 AD2d 373, 375 [1st Dept 1990], quoting *Buckley & Co. v City of New York,* 121 AD2d 933, 934 [1st Dep't 1986], *lv dismissed* 69 NY2d 742 [1987] [finding that delay damages caused by interference of local community groups resulting in work suspension were not "uncontemplated"]).

To the extent that the second and third causes of action pertain "to delays related to poor contract administration and scheduling issues," they "fall squarely within Article 12" (*see e.g. WDF, Inc.*, 170 AD3d at 519; *WDF, Inc.*, 2016 N.Y. Slip Op. 33062[U], *10-12; *see also Commercial Elec. Constrs., Inc. v Pavarini Constr. Co., Inc.,* 50 AD3d 316, 318 [1st Dept 2008], citing *S.N. Tannor, Inc. v A.F.C. Enters.,* 276 AD2d 363 [1st Dept 2000]; *E.E. Cruz/Nicholson Joint Venture, LLC*, 2016 N.Y. Slip Op. 30207[U]).

Accordingly, Motions 003 and 004 are granted as to Plaintiff's claims for the alleged delay. The second and third causes of action are dismissed in their entirety, and the portion of the first cause of action which seeks damages for "design errors and omissions" is dismissed.

4. Motions 003 and 004: Cardinal Change

Both Lend Lease and Columbia assert in their respective motions that Plaintiff's fifth cause of action must be dismissed as Plaintiff has not adequately alleged a cardinal change of the Subcontract.

"A leading construction law treatise explains that the doctrine [of cardinal change] typically serves to delineate whether a change order will be sufficient to govern the unexpected condition: 'Change orders may only change work 'within the general scope of the contract,' a crucial phrase interpreted to exclude application of the 'changes' clause to 'cardinal' changes beyond the contract's scope" (*Mikada Group, LLC v T.G. Nickel & Assoc., LLC*, 2014 WL 7323420, at *17 [SDNY Dec. 19, 2014], quoting 1 Bruner & O'Connor Construction Law § 4:5). Effectively, a claim that seeks relief under the "cardinal change doctrine" seeks rescission of the contract and relief under a quasi-contract theory, such as quantum meruit, on the basis that the change was so drastic that it constituted an abandonment of the original contract; however, the "number or character of the changes" does not necessarily "alter or destroy the essential identity of the thing contracted for" (*Phoenix Elec. Contr., Inc. v Lehr Const. Corp.*, 219 AD2d 467, 468 [1st Dept 1995] [considering evidence adduced at nonjury trial]).

"The test to be applied is whether the supplemental work ordered so varied from the original plan, was of such importance, or so altered the essential identity or main purpose of the contract, that it constitutes a new undertaking" (*Albert Elia Bldg. Co., Inc. v New York State Urban Dev. Corp.*, 54 AD2d 337, 343 [4th Dept 1976] [noting further that "[t]he nature and scope of the work included in the change order . . . is determinative of the question whether the (supplemental) work was merely incidental to the main contract or rather a new undertaking"]).

While claims made under the cardinal change doctrine often involve issues of fact that cannot be resolved on a motion to dismiss, the claim in this case is barred by Article 13 of the Subcontract which controls Extra Work. Extra Work is defined as "work required by [Defendants] which, in [their] judgment, is in addition to that required by the Subcontract at the time it is executed. The performance of Extra Work may be required pursuant to Article 13" (NYSCEF 159, art. 1.). A CO is a written order to Plaintiff from Lend Lease "authorizing a change in the Work or an adjustment in the Price or the Subcontract Time and fully describing or enumerating any Extra Work to be performed" or omitted, and any change in price or time for the work (*id.*). "The Price . . . may be changed *only* by a [CO]" (*id.*; *see id.* art. 13 [providing procedures and conditions for issuance of and payment, if any, for COs]). Notably, the Subcontract further provides that Plaintiff "shall not be entitled to an increase in the Price and/or an extension of time if necessitated as a result of the cumulative impact of changes to the Work and *expressly waives any such rights to make a cumulative impact claim*" (NYSCEF 163, art. 13 [Rider amendment]).

Moreover, the Subcontract provides:

> "The Contract Documents are to be treated by [Five Star] as 'scope' documents which indicate the general scope of the total work pursuant to the [CM Contract] in terms of the architectural design concept, the overall dimensions, the type of structural, mechanical, electrical, utility, and other systems and an outline of major architectural elements. As 'scope' documents, the Contract Documents do not necessarily indicate or describe all items required for the full performance and proper completion of the Work. . . . [and] there is no obligation to issue such additional documents"

(NYSCEF 159, art. 3 [Subcontract]).

The Subcontract further assigned to Plaintiff, in numerous places, the risks of differing site conditions, changes, errors or omissions from Subcontract documents, and the burden of identifying any "ambiguity, inconsistency, or error therein which should have been discovered"

in the Plans or site conditions (*e.g. id.* art. 3). Plaintiff assumed those risks and "expressly waived" any right to make claims for resulting damages.[6]

Accordingly, the fifth cause of action is dismissed as against both Defendants.

5. Motion 004: Notices of Pendency and the Mechanics Lien

Columbia asserts that Plaintiff's summons and complaint were not timely served within 30 days of its filing of the original notice of pendency and, therefore, Plaintiff's notices of pendency must be cancelled pursuant to CPLR 6513 and 6514 and Plaintiff's sixth cause of action to foreclose on the Lien should be dismissed.

Under CPLR 6512, "[a] notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant." Additionally, CPLR 6514 (a) requires the Court to direct the County Clerk to cancel a notice of pendency "if service of a summons has not been completed within the" 30-day period specified in CPLR 6512.

It is undisputed that Plaintiff did not effectuate service of the summons on Columbia until after the expiration of the relevant 30-day period following the filing of its notice of pendency. Plaintiff responds, instead, that its service of an amended notice of pendency with its amended summons and complaint after that 30-day period cured that procedural defect.

"A notice of pendency is an 'extraordinary privilege' which demands 'strict compliance' with applicable statutory requirements" (*Old World Custom Homes, Inc. v Crane*, 33 AD3d 600, 600-601 [2d Dept 2006] [internal citations omitted]). Further, a party "should not be afforded a second chance to file a new notice of pendency upon correcting the very pleading defect that led to the cancellation of the original notice" (*id.*; *cf.* CPLR 6516 [c] ["(A) notice of pendency may

[6] The Subcontract also contains a no-waiver clause providing that no provision of the contract can be amended, waived, or modified except in a writing signed by an authorized Lend Lease representative (*see id.* art. 41 [c] [stating no waiver or amendment by conduct of the parties]).

not be filed in any action in which a previously filed notice of pendency affecting the same property had been cancelled or vacated or had expired or become ineffective."]).

Here, though Columbia had not yet moved to cancel the original notice of pendency, the original notice was procedurally defective and could not be resuscitated by service of an amended notice of pendency with an amended summons. Thus, the original and amended notices of pendency will be cancelled and the underlying sixth cause of action seeking to foreclose on Plaintiff's mechanic's lien is dismissed (*see Gallo Bros. Constr. Inc. v Peccolo*, 281 AD2d 811, 813 [3d Dept 2001] [a lien expires "by operation of law" when the corresponding notice of pendency becomes ineffective]). Here, Plaintiff did not seek an extension of time to serve the original summons on Columbia and its argument that it served the non-owner Defendant, Lend Lease, with the summons within the original 30-day period makes no difference to this analysis. As a nonowner, the sixth cause of action has no bearing against Lend Lease, however, and is dismissed against it for that reason.

Accordingly, Motion 004 is granted and Plaintiff's sixth cause of action is dismissed.

* * *

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that Motion 003 is **granted in part and denied in part**; it is further

ORDERED that Motion 004 is **granted in part and denied in part**; it is further

ORDERED that Plaintiff's Second, Third, Fifth, and Sixth Causes of Action are **dismissed entirely**, and the portion of the First Cause of Action seeking damages for "design errors and omissions" is **dismissed**, against Defendants; it is further

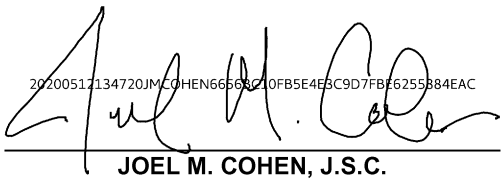
ORDERED that the remainder of Plaintiff's First Cause of Action, and the entirety of its Fourth Cause of Action, may proceed; it is further

ORDERED that Movants shall serve a copy of this decision and order with notice of entry upon the County Clerk and the County Clerk is directed to cancel the notice of pendency and amended notice of pendency filed against the underlying real property at Block 1996, Tax Lots 14, 23, 56 and 61, a/k/a Columbia University Manhattanville, Jerome L. Greene Science Center, Mind Brain Institute, located at 605 West 129th Street, New York, New York; it is further

ORDERED that Defendants shall answer the remainder of the First Amended Complaint within 20 days of the Court's entry of this decision and order on NYSCEF; and it is further

ORDERED that the Parties shall appear for a preliminary conference on June 30, 2020 at 10:00 AM, subject to restrictions applicable at the time with respect to in-court appearances.

This constitutes the decision and order of the Court.



5/12/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE