SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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PIZZAROTTI, LLC,

Plaintiff,

-against-

X-TREME CONCRETE INC., a/k/a XTREME CONCRETE INC., and MICHAEL FALCO,

Defendants

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ENGINEERED DEVICES CORP.,

Plaintiff

-against-

XTREME CONCRETE INC., MICHAEL FALCO, ZURICH AMERICAN INSURANCE COMPANY, COLONIAL AMERICAN CASUALTY AND SURETY COMPANY, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Defendants

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**DECISION AND ORDER**

Index. No. 655471/2017
Mot. Seq. 005

Index. No. 451148/2018
Mot. Seq. 001

NERVO, J.:

The instant motions were prematurely decided, by Decision and Order of February 9, 2021, prior to the return date, truncating the parties' time submit further papers (*see* Decision and Order of February 9, 2021; Index No. 655471/2017 NYSCEF Doc. No. 178; Index No. 451148/2018 NYSCEF Doc. No. 70). Thereafter, the Court recalled and vacated its decision, set a new briefing schedule for opposition and reply papers, and set a return date of March 15, 2021 for these motions (*see* Order of February 19, 2021; Index No. 655471/2017 NYSCEF Doc. No. 180; Index No. NYSCEF Doc. No.

75). The Court received opposition from Engineered Devices Corp. and reply in support of motion sequence 001 (451148/2018 NYSCEF Doc. No. 77 & 79).

In these related matters, Pizzarotti seeks partial summary judgment dismissing X-treme Concrete's (hereinafter "Xtreme") counterclaims against it. Fidelity and Deposit Company of Maryland, Zurich American Insurance Company, and Colonial American Casualty and Surety Company (hereinafter "Fidelity," "Zurich," and "Colonial," respectively) seek summary judgment dismissing Engineered Devices claims as against them.

As an initial matter, movants incorrectly contend that this matter, bearing index number 451145/2018, was consolidated with *IMT Steel v. X-treme Concrete, Inc.* (451314/2018) by a January 14, 2019 decision and order (*see* notice of motion, NYSCEF Doc. No. 38).[1] The IMT Steel matter (451314/2018) was not consolidated and remained before a different Justice of this Court.[2] On October 3, 2019, Justice Billings, the Justice to which the IMT Steel matter was assigned, dismissed the matter for the parties' repeated failures to appear at preliminary conferences.[3] Consequently, to the extent the instant motion purports to seek relief in the IMT Steel matter, such relief is inappropriate (*see* notice of motion, NYSCEF Doc. 38 at (ii), "granting F&D and Zurich

[1] Consolidation was found to be inappropriate. The Court ordered the matters under index numbers 451148/2018, 451314/2018, and 154342/2018 be jointly tried (Index No. 655471/2017 NYSCEF Doc. No. 87).

[2] The three related matters were ordered to be jointly tried (NYSCEF Doc. No. 38 & 60). However, full consolidation was not granted as it would inappropriately result in a party being both a plaintiff and defendant in the proposed consolidated action.

[3] The Court notes that Justice Billings decision was uploaded to NYSCEF on December 21, 2020, after the filing of the instant motion.

summary judgment dismissing all claims asserted by IMT in the action entitled IMT Steel, LLC v. X-treme Concrete, Inc., et al [NY Co. Sup. Ct., Index No, 451314/2018]"). Accordingly, the relief before the Court is: (1) Pizzarotti's summary judgment motion against Xtreme and (2) Fidelity, Zurich, and Colonial's summary judgment motion against Engineered Devices.

These related disputes arise out of a construction project. WC 28 Realty hired Pizzarotti to perform construction management services for its project, a residential building on 28th Street called the Jardim, and the agreement was reduced to a written contract. Thereafter, Pizzaarotti subcontracted the building's concrete superstructure work to Xtreme. Engineered Devices and IMT Streel acted as suppliers to Xtreme. Engineered Devices and IMT steel allege they were not paid by Xtreme for their supplies, and filed mechanics liens on the project. Pizzarotti subsequently dismissed Xtreme and entered into another subcontract with MDB Development to complete the work originally performed by Xtreme. Following Xtreme's termination, it filed a mechanics lien against the project.

**SUMMARY JUDGEMENT STANDARD**

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). "Where a defendant moves

for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact" (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

**PIZZAROTTI - SUMMARY JUDGMENT MOTION (655471/2017)**

Pizzarotti alleges Xtreme was paid in excess of the work it actually performed, and that Pizzarotti was required to pay MDB an amount that exceeded the balance remaining on the Xtreme contract, in order to complete the work. Xtreme alleges, inter alia, it suffered damages as a result of delay, Pizzarotti was unjustly enriched, and Xtreme was not fully paid for its services. Pizzarotti moves to dismiss Xtreme's counterclaims.

The subcontract between Pizzarotti and Xtreme unambiguously waives claims for delay under the "No Damage for Delay Clause"

> The Subcontractor [Xtreme] expressly agrees for itself, its sub-subcontractors and suppliers not to make, and hereby waives, any claim for damages on account of any delay, obstruction or hindrance. The Subcontractor's sole remedy for any delay, obstruction, or hindrance shall be an extension of the time in which to complete the Work

(*see* subcontract, NSYCEF Doc. No. 130 at section 3.3).

Consequently, Xtreme may not recover for those causes of action that it has waived, absent a showing that enforcement of the waiver is unequitable (*see generally*, *Hack v. United Capital Corp*, 247 AD2d 300 [1st Dept 1998]). Xtreme has not demonstrated enforcing the waiver would be unequitable under these circumstances. Thus, the waiver bars Xtreme's causes of action for delay.

Xtreme also alleges it was not fully paid for the work performed in January, August, and December of 2016. Section 4.2 of the subcontract required Xtreme to waive and release payment for work done to date at the time it received payment (NYSCEF Doc. No. 130 at section 4.2; *id*. at Exhibit I "Subcontractor's Partial Waiver and Release"). Xtreme waived its claims to any unpaid "work, labor, services, materials, supplies and/or equipment", in accordance with the subcontract agreement, for the periods it alleges in its counterclaim (*see* NYSCEF Doc. No. 132). "[a] general release bars an action on any cause of action arising prior to its execution" (*Hack v. United Capital Corp*, 247 AD2d at 301). A party seeking to set aside a release bears the burden of "demonstrate[ing] that it does not apply to their claim or to establish [an] equitable basis to vitiate its effect" (*id*.). Xtreme has failed to so demonstrate.

To the extent that Xtreme has asserted actions for *quantum meruit* and unjust enrichment, those claims must fail as a matter of law. A quasi-contract claim may be maintained only "in the absence of an express agreement," as it is a legal obligation to prevent unjust enrichment (*Clark-Fitzpatrick, Inc. v. Long Is. R.R.*, 70 NY2d 382 [1987]). The "contract" in an unjust enrichment or *quantum meruit* claim is a legal fiction, imposed where, '"there has been no agreement or expression of assent, by word

or act, on the part of either party involved' in order to assure a just and equitable result" (*id*. quoting *Bradkin v. Leverton*, 26 NY2d 192, 196 [1970]). Here, the parties entered into a written contract, and thus no action in quasi-contract can be maintained.

Finally, Xtreme's claims under Article 3A and Section 77 of the Lien Law must fail, as they have not been properly brought as a class-action and fail to set forth evidentiary facts to support the claim *(see e.g. Callender v. Shirell Air, Inc.*, 282 AD2d 564 [2d Dept 2001]; *Matros Automated Elec. Const. Copr. v. Libman*, 37 AD3d 313 [1st Dept 2007]).

Accordingly, Pizzarotti has demonstrated its defense, as a matter of law, to Xtreme's counterclaims. Xtreme has not raised a triable issue of fact related to the contract that precludes summary judgment in Pizzarotti's favor on Xtreme's delay-based counterclaims or claims predating February 14, 2017.

**FIDELITY, ZURICH, AND COLONIAL - SUMMARY JUDGMENT MOTION (451148/2018)**

Fidelity, Zurich, and Colonial, (together the "Insurers") move for summary judgment dismissing Engineered Devices fourth cause of action seeking foreclosure of its mechanic's lien. The Insurers contend that the liens must be dismissed as there is no money due Xtreme from Pizzarotti, and thus no fund to which Xtreme's suppliers could attach a valid lien.

The fund to which a subcontractor may attach a lien is the money still due from the contractor/construction manager to the subcontractor at the time the lien is filed,

and any sums subsequently earned (New York Lien Law § 4; *Van Clief v. Van Vechten*, 130 NY 571, 574 [1892]). Thus, where a contractor, or surety, seeks summary judgment dismissing a sub-contractor's lien, they must establish that no funds were due the subcontractor (*NGU, Inc., v. City of New York*, 189 AD3d 850 [2d Dept 2020]).

The contract between Xtreme, as subcontractor, and Pizzarotti, as construction manager, was terminated on April 1, 2017. At that time, no money was due Xtreme from Pizzarotti (*see* application and certificate for payment, NYSCEF Doc. No. 131; see also NSYCEF Doc. No. 135). Consequently, there is no fund to which Engineered Devices may attach a lien, and therefore summary judgment dismissing the lien of Engineered Devices is proper.[4] Any acknowledgment by Pizzarotti that Engineered Devices was unpaid by Xtreme is irrelevant to the determination that a fund was not created by which Xtreme's subcontractors could affix a lien. Stated differently, Engineered Devices claim regarding this acknowledgment is a non-sequitur, unsupported by case law or statute, and contrary to the appellate authority on this issue (*see e.g. NGU, Inc.*, supra; *Van Clief*, supra).

Accordingly, it is

ORDERED that to the extent movants seek relief in IMT Steel v. X-treme Concrete, Inc. (451314/2018) the motion is denied, as that matter has been dismissed; and it is further

[4] To the extent the Insurers seek relief as to the lien filed by IMT steel, such relief is not before this Court and cannot be considered in these actions (*see supra* at p. 2).

ORDERED that Pizzarotti's summary judgment motion dismissing Xtreme's counterclaims is granted and Xtreme's counterclaims against Pizzarotti are dismissed; and it is further

ORDERED that the motion of Fidelity and Deposit Company of Maryland, Zurich American Insurance Company, and Colonial American Casualty and Surety Company is granted to the extent of dismissing Engineered Devices claims, and cancelling and vacating the lien, as against Fidelity and Deposit Company of Maryland, Zurich American Insurance Company, and Colonial American Casualty and Surety Company and otherwise denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: March 31, 2021

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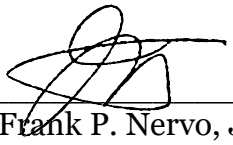

Hon. Frank P. Nervo, J.S.C.