

<b>Hilt Constr., Inc. v New York City Sch. Constr. Auth.</b>
2022 NY Slip Op 30619(U)
February 28, 2022
Supreme Court, New York County
Docket Number: Index No. 653868/2019
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LYLE E. FRANK PART 11**

*Justice*

-----X

HILT CONSTRUCTION, INC.

Plaintiff,

- v -

NEW YORK CITY SCHOOL CONSTRUCTION  
AUTHORITY,

Defendant.

-----X

INDEX NO. 653868/2019  
MOTION DATE 10/20/2021  
MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 176, 177, 178, 179, 180, 181, 182, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235

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

This action arises out of a construction contract (Contract) dispute between plaintiff Hilt Construction, Inc. (Hilt) and defendant New York City School Construction Authority (SCA) for renovation and construction work at Public School 333 in Manhattan (Project).<sup>1</sup> By this motion (motion sequence no. 2), Hilt seeks partial summary judgment, pursuant to CPLR 3212, on the issue of the amount payable to Hilt upon contract termination pursuant to section 10.02 (B) of the Contract as well as pursuant to the parties' Limited Settlement Agreement. SCA opposes Hilt's motion for partial summary judgment. For the reasons stated herein, the motion for partial summary judgment is denied.

**Background and Relief Requested**

<sup>1</sup> The Court would like to thank Johnson Ng, Esq. for assistance with this motion.

The factual background allegations for the instant motion, unless otherwise stated herein, are primarily based upon the affirmation of Hilt's counsel Andrew Muchmore (Plf. Affirmation; NYSCEF Doc. No. 129) and Hilt's vice president Gangadhar Reddy (Reddy Aff.; NYSCEF Doc. No. 130) in support of the motion.

On July 3, 2019, when the Project was about half complete, Hilt filed a complaint against SCA asserting claims for breach of contract, breach of the implied duty of good faith and fair dealing, indemnification, injunction and declaratory judgment (Plf. Affirmation, ¶ 4). At that time, SCA had directed Hilt to perform "millions of dollars of additional work without the approval of corresponding change orders," and Hilt had expended "millions of dollars of its own funds performing additional work" without getting paid by SCA, which rendered Hilt insolvent and faced foreclosure of its principal office (*id.*). On March 10, 2020, SCA filed a motion to dismiss the complaint (motion sequence no. 01) on the basis that it was both untimely and premature, and Hilt cross moved for leave to file an amended complaint providing detail with respect to its delay claims (*id.*, ¶ 7). By order dated November 13, 2020 (NYSCEF Doc. No. 115), this court denied SCA's motion to dismiss and granted Hilt's cross motion (*id.*, ¶ 8).

On September 17, 2019, approximately two months after Hilt's filing of the complaint, SCA notified Hilt that it was exercising its right under section 10.02 (B) of the Contract to "terminate the contract for convenience" (Plf. Affirmation, ¶ 9). Hilt asserts that the amount due and owing to Hilt upon contract termination was \$2,784,285 (*id.*, ¶ 15). Computation for the amount, as supported by the Reddy Affidavit and relevant documentation, is pursuant to the "Termination for Convenience Clause" of the Contract (Contract; NYSCEF Doc. No. 133), which includes, among other things, the "value of acceptable work in place . . . including change orders and retainage;" the reasonable cost of "SCA approved materials specifically fabricated;"

the reasonable cost of any “work done to protect the work in place;” and five percent of the “residual value of the current Contract price” after deduction of specified items (*id.*, ¶¶ 16-21). Hilt asserts that, in this motion, it seeks payment “only for sums which are not subject to any material dispute,” and that such sums *do not* include its “delay claims and change orders for work under Notice of Directive 8, 10 and 13,” which constitute “a majority of its claims,” because they involve disputed fact issues (*id.*; ¶ 22).

Hilt also points out that, on January 9, 2020, the parties entered into the Limited Settlement Agreement (LSA; NYSCEF Doc. No. 152), whereby Hilt agreed to continue furnishing sidewalk sheds and scaffolding at the Project in exchange for “agreed rental payments” of such items for the period of May 11, 2018 to September 17, 2019 (Plf. Affirmation, ¶ 10). Hilt asserts that SCA breached section 1 of the LSA by failing to pay \$474,086, but released this payment when “Hilt agreed to sell its scaffolding to the completion contractor for less than its market value” (*id.*, ¶¶ 11-12). Hilt further asserts that SCA breached section 2 of the LSA by failing to pay for the scaffolding rental cost during the “transition period” of September 18, 2019 to May 1, 2020, in the amount of \$127,974 (*id.*, ¶¶ 13-14). Additionally, Hilt asserts that SCA failed to pay for the “site maintenance costs” under the LSA in the amount of \$157,780 (*id.*).

With respect to the so-called “unpaid lienors and assignees,” Hilt asserts that it has executed several assignments (NYSCEF Doc. No. 161) on forms issued by SCA to allow SCA to directly pay such lienors where Hilt was able to agree with them on the balance owed (Plf. Affirmation, ¶ 27). Hilt also asserts that other lienors have refused to finalize or negotiate a settlement by assignment (NYSCEF Doc. No. 164) because SCA ignored requests as to when it would release payments pursuant to such potential assignments (*id.*). Hilt further asserts that it

“not only paid down all funds received from SCA, but [also] borrowed about \$2 million against its principle office to keep the work progressing while it awaited payment from SCA,” but SCA has failed to take any “meaningful action” to pay the lienors by assignment even where the lien amounts are undisputed (*id.*; referencing Reddy Aff., ¶¶ 48-63). Based on the “lien docket” (NYSCEF Doc. No. 166), the active liens on the Project totaled \$912,789 (Plf. Affirmation, ¶ 28).

Based upon the asserted allegations, Hilt requests an order of this court granting it partial summary judgment, in the amount of \$2,912,259, pursuant to section 10.02 of the Contract as well as the LSA, which amount is comprised of the following: (1) \$127,794 for scaffolding rental under the LSA; (2) \$1,913,921 for “acceptable work in place,” pursuant to section 10.02 (B) (1) of the Contract, consisting of “certified totals per Requisition 25,” Including undisputed Change Orders (\$1,080,133) and retainage (\$269,820), but excluding amounts paid to Hilt under section 1 of the LSA; (3) \$340,722 for “materials specifically fabricated,” pursuant to section 10.02 (B) (2); (4) \$157,790 for “work done to protect the work in place” and \$128,709 for “demobilization cost,” in the sum of \$286,499, pursuant to section 10.02 (B) (4); and (5) \$241,587.05 for five percent of the “residual value of the current Contract Price,” pursuant to section 10.02 (B) (5) (Plf. Affirmation, ¶¶ 32, 38). Hilt further requests that, with respect to the total damages amount of \$2,912,259, this court should either (i) allow SCA to retain the lien amount of \$912,789 pursuant to Lien Law 21 (6) and issue judgment to Hilt for \$1,000,469, or (ii) allow SCA to retain 150% (\$1,369,184) of the total lien claims pursuant to Lien Law 21 (6-A), issuing an immediate judgment to Hilt for \$1,543,075; and in either event, “SCA must disburse the reminder to Hilt once the liens are discharged” (Plf. Affirmation, ¶ 39).

### **Applicable Legal Standards**

By this motion, Hilt requests that this court grant partial summary judgment in its favor and against SCA in connection with the contract claims. With respect to a summary judgment motion, the movant must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate disputed material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The motion should be denied if the movant fails this showing (*id.*). However, where this showing is made by the movant, the burden then shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact which requires a trial of the action (*id.*).

Further, in weighing a summary judgment motion, “evidence should be analyzed in the light most favorable to the party opposing the motion” (*Martin v Briggs*, 235 AD2d 192, 196 [1<sup>st</sup> Dept 1997]). The motion should be denied if there is any doubt about the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Where different conclusions may reasonably be drawn from the evidence, the motion should also be denied (*Jaffe v Davis*, 214 AD2d 330 [1<sup>st</sup> Dept 1995]). On the other hand, bare allegations or conclusory assertions are insufficient to create genuine issues of fact to defeat the motion (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Rotuba Extruders, Inc., v Ceppos*, 46 NY2d 223, 231 [1978]). Also, witness credibility issues are generally inappropriate for resolution in a summary judgment motion (*Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 436 [1<sup>st</sup> Dept 2013]).

### **Discussion**

#### Hilt’s Prima Facie Showing

As noted above, the allegations in support of this motion are based upon the Plaintiff Affirmation (NYSCEF Doc. No. 129), which incorporates and summarizes the allegations of the Reddy Affidavit (NYSCEF Doc. No. 130), which in turn sets forth the details for the calculation

of contract damages and the documentation reflecting same (NYSCEF Doc. Nos. 131-173; Exhibits A to Z and AA to QQ). Notably, the Reddy Affidavit asserts that while Hilt's amended complaint seeks \$8,672,481 in total damages, the instant motion only seeks \$2,912,259, an amount that is "immediately due to Hilt under the Contract's Termination for Convenience Clause and the Limited Settlement Agreement," and that the amount does not implicate "Hilt's remaining claims and SCA's counterclaims for alleged correction costs [which] involve more complicated issues of fact that Hilt does not seek to resolve in this motion" (Reddy Aff., ¶ 10). Specifically, in respect to the amounts due under the termination for convenience clause – section 10.2 (B) of the Contract -- the Reddy Affidavit asserts as follows: (1) pursuant to Requisition 25 of October 29, 2020, the Project's final requisition, "the total value of uncompensated base contract work" completed is \$1,040,054, and when this amount is credited against the \$474,086 paid by SCA under the LSA, the balance due is \$563,968, "exclusive of undisputed change orders and retainage" (*id.*, ¶¶ 22-25); (2) Hilt performed \$1,080,133 worth of work for Undisputed Change Orders, which constitutes "acceptable work in place," and none of which has been paid or substantively disputed by SCA (*id.*, ¶¶ 26-30; referencing Exhibits G to R); (3) Hilt was owed \$269,820 in "retainage" upon contract termination on September 17, 2019, and SCA was notified of same in May 2020 when Hilt submitted its Final Verified Statement of Claims, which SCA has not contested (*id.*, ¶¶ 31-35); (4) Hilt purchased \$340,277 of materials fabricated for the Project (consisted of brick and limestone), which were approved but unpaid by SCA, and SCA has been notified of same when Hilt submitted its Final Verified Statements of Claims (*id.*; ¶¶ 36-38); (5) Hilt incurred \$157,790 of "site maintenance cost" and "demobilization cost" of \$128,709 for the Project, and these amounts had been submitted to SCA for payment, but remained unpaid and uncontested (*id.*, ¶¶ 39-44); and (6) based on section

10.02 (B)(5) and Requisition 25, Hilt is entitled to payment “for five percent of the residual value of the Contract, representing the lost profit on the work not performed,” and this amount is \$241,587 (*id.*, ¶¶ 45-47). Separately, with respect to the claims of lienors, the Reddy Affidavit asserts that there are 16 liens or stop work orders on the Project, but Hilt has not been able to satisfy the claims of lienors due to SCA’s failure to pay Hilt for the work performed at the Project, SCA’s refusal to provide certain lienors with executed assignments and lien releases or SCA’s refusal to provide guidance as to when the lienors could expect payments (*id.*, ¶¶ 49-55). The Reddy Affidavit further asserts that, in spite of SCA’s conduct, Hilt is committed to pay the lienors, and to that end, should this court determine that Hilt is entitled to \$2,912,259 from SCA, Hilt will “ensure that all lienors are promptly paid and all liens will have adequate security,” and that “SCA can retain a sum from this balance equal to between 100% and 150% of the lien claims pursuant to Lien Law 21” (*id.*, ¶ 62).

Based upon the foregoing, Hilt has apparently made a prima facie case in support of its partial summary judgment motion.

Notably, apart from the partial summary judgment motion, Hilt, via its vice president Reddy, submitted a supplemental affidavit (Supp. Reddy Aff.; NYSCEF Doc. No. 176) to provide “evidence of additional damages of \$118,708.22 arising from SCA’s two-year delay in issuing Hilt’s termination for convenience payment,” which amount includes “audit fees, attorneys’ fees and liquidated damages due to certain union fringe benefit funds, but excludes interest,” because such damages are “direct and foreseeable consequences” of SCA’s failure to issue payment to Hilt that became due under section 10.02 of the Contract (Supp. Reddy Aff., ¶ 2).

#### SCA’s Opposition

In response to the motion, SCA submits its memorandum of law to opposition to the motion (Def. Brief; NYSCEF Doc. No. 184), an affirmation of counsel Thomas Gardner (Gardner Affirmation; NYSCEF Doc. No. 186, with supporting exhibits), as well as an affidavit of Gordon Tung, a licensed professional engineer employed by SCA who supervises all construction management projects for SCA, including this Project (Tung Affidavit; NYSCEF Doc. No. 185).

In its preliminary statement, SCA contends, among other things, that (1) at the start of the Project, Hilt committed critical safety violations that forced SCA to implement shop work orders; (2) Hilt was incapable of performing the masonry work specified in the Contract; (3) Hilt fell significantly behind schedule and SCA terminated Hilt when less than 20% of the work was satisfactorily completed; (4) Hilt “contorted the Contract to suit its unsubstantiated, disputed claims for extra work and more money;” (5) Hilt failed to pay subcontractors despite receiving over \$5 million from SCA, which resulted in nearly \$1 million of liens recorded against the Project, and Hilt refuses to use the payment bond it was obligated to obtain while wrongly claims that SCA is withholding funds needed to pay lienors, notwithstanding that “SCA is prohibited from releasing these funds by New York Lien Law § 21 (6-a);” (6) after terminating Hilt, SCA engaged in settlement meetings with Hilt in an effort to reach consensus on disputed costs, and SCA stopped remediation work for an extended period for Hilt to document its work, even though Hilt was contractually required to do so throughout the Project; and (7) Hilt’s defective work for the Project has cost New York City over \$5.4 million (Def. Brief at 1-2).

Specifically, SCA contends that there are disputed issues of material fact precluding summary judgment: (a) Hilt’s assertion that the change orders are “undisputed” is flawed (Def. Brief at 4-10; SCA contending that 5 of the 12 change orders are not entitled to additional

payment because Hilt did not perform the work and the remaining 7 were Hilt's obligations under the Contract; and referencing statements in the Tung Affidavit and exhibits to the Gardner Affirmation to controvert the statements in the Reddy Affidavit); (b) Hilt's claim for "uncompensated work" based on "Requisition 25" has no merit because Requisition 25 was a draft document that was never signed and certified by SCA, and cannot bind SCA (*id.* at 11-12), and SCA cannot determine the value of Hilt's "acceptable work in place" because of its non-conforming work and its delays in correcting same, which made it impossible to calculate the "retainage or the residual contract balance" under section 10.2 (B) (1) of the Contract until the value of "acceptable work" can be determined (*id.* at 12-14); and (c) Hilt fails to substantiate its claims for "demobilization costs" and "site maintenance costs" because they were actually incurred in remediating "site safety issues" identified by SCA, and Hilt is not entitled to be paid because such work was within the scope of its contractual obligation and identified by SCA as safety deficiencies; also, Hilt's claim for the "cost of materials fabricated and purchased for the Project" is deficient because Hilt fails to identify the specific materials that were incorporated into the Project but not paid for, and admits that this claim is "based upon information and belief [that] some of these materials were incorporated by SCA and others were not" (*id.* at 15-16; controverting relevant statements in the Reddy Affidavit and related exhibits).

As to the liens against the Project, SCA contends that, even though it does not dispute Hilt's entitlement to \$127,974 under the LSA, Hilt is not entitled to the release of this sum under the LSA because Lien Law § 21 (6-a) prohibits such release (Def. Brief at 16; contending that the statute mandates that a public authority, such as SCA, withhold "one-half times the amount stated to be due in said notice of lien, and said sum so deducted shall be withheld until said lien is otherwise discharged"). In particular, SCA contends that Hilt "erroneously argues that the

Lien Law is no impediment to SCA releasing funds” because Hilt’s position is “based upon its assumption that Hilt is in fact due the full \$2,912,259.17 that it seeks on this motion,” such that “SCA can withhold 150% of the total amount of liens and pay Hilt a balance of approximately \$1.5 million” (*id.* at 16-17; referencing Plf. Affirmation; ¶¶ 31-33). Indeed, SCA contends that Hilt is not entitled to the funds it seeks in this motion (for the reasons explained above), and is also not entitled to an amount equal to “150% withholding threshold to which SCA must adhere under the Lien Law,” especially where “Hilt’s entire argument here is based on its unilateral assertion that it is due an amount that is sharply disputed by the parties” (Def. Brief at 17). Further, SCA contends that the lienors-subcontractors can be promptly paid under Hilt’s payment bond, which is required to be posted under the Contract (in an amount over \$11 million that far exceeds the sum of all liens), but Hilt refused “to avail itself of this contractual remedy and instead chooses to default on its payment obligations to its subcontractors” (*id.*).

With respect to Hilt’s supplemental claim for consequential damages, SCA contends that (1) the “new damage claims are outside the scope of relief that Hilt seeks on its motion” as they are not due under the Contract and the LSA; (2) Hilt has not paid or incurred any of the claim damages because they are subcontractors’ claims in pending litigation that are speculative or contingent at this time; (3) these claims should be denied because Hilt advanced no legal basis to make SCA liable, and they are a direct result of “Hilt’s failure to pay its subcontractors despite receiving over \$5 million under the Contract for its faulty work,” and its refusal to pay subcontractors using the available payment bond (*id.* at 18-20).

Based on the foregoing, SCA’s contentions and its supporting documentations (including many exhibits) raise significant disputed issues of fact which, unless fully rebutted by Hilt in its reply (as discussed below), precludes partial summary judgment in Hilt’s favor.

### Hilt's Reply

Responding to SCA's opposition, Hilt counters in its reply brief (Plf. Reply; NYSCEF Doc. No. 235) that the payment to Hilt under the termination clause of the Contract (section 10.02 thereof) became due two years ago when SCA terminated Hilt for convenience, and SCA cannot extend the payment period with "no end in sight" by alleging that SCA is currently unable to determine a liquidated sum representing the value of the acceptable work in place (Plf. Reply at 1-3). More specifically, Hilt asserts that where "SCA chooses to terminate the Contract for convenience under section 10.02, payment becomes due **upon** receipt of the Notice of termination ..." (*id.* at 3, partially quoting section 10.02 [emphasis added by Hilt]). Relying on the truncated quote, Hilt argues that "SCA has failed to offer any alternative interpretation of section 10.02. To stretch the meaning of '**upon**' to excuse payment for over two years would render that language meaningless" (*id.* at 4).

Hilt's argument is unavailing. First, by using truncated language, Hilt has somehow mischaracterized the actual text of the Contract, which states in relevant part, that "[U]pon receipt of the Notice of termination, the Contractor [Hilt] shall act promptly to minimize the expenses from such termination. The SCA shall pay the Contractor the following ..." (Contract, section 10.02 [B]). Based on its plain meaning, the Contract should be interpreted to mean that upon receipt of the termination notice, Hilt must promptly minimize the expenses related to such termination, which is a condition that co-exists with SCA's obligation to pay. Did Hilt act promptly to minimize expenses, a condition that co-existed with payment? According to SCA, Hilt failed to do so, which delayed SCA's review and remediation of Hilt's work (Tung Affidavit, ¶¶ 16-18). Secondly, the Contract further states that SCA is to pay "the value of

acceptable work in place,” and to also consider “the schedule of values and the Schedule, including Change Orders and retainage” (Contract, section 10.02 [B][1]). The foregoing does not mean that SCA shall pay Hilt all requested amounts, but must take into consideration other relevant factors. Thirdly, other payments under the Contract are prefaced by the words “reasonable cost,” which require an objective or fair market valuation of such costs (*id.*, section 10.02 [B][2],[3] and [4]). In any event, Hilt’s argument relating to contract interpretation, which is raised for the first time in its reply in support of this motion, that the “Courts may not, under the guise of contract interpretation, distort the meaning of the terms used” (Plf. Reply at 4), is without merit.

Hilt also asserts that SCA’s counterclaim is barred by time and its prior determinations, because SCA has “already certified the acceptable work in place in Requisitions 23, 24 and 25” (Plf. Reply at 5-9). However, SCA “categorically disputes the assertion that the document Hilt calls Requisition No. 25 is an accurate description of the value of Hilt’s work at the Project, particularly since it was never countersigned by a SCA representative and is not marked CERTIFIED” (Tung Affidavit, ¶¶ 11-15; attaching Requisition No. 23 as an exhibit to show the “standard procedure” and comparing same against Requisition No. 25). Hilt does not dispute SCA’s contention that Requisition No. 25 was never “certified” and “finalized” pursuant to the “standard procedure,” which undermines its argument that “SCA has reviewed and approved Hilt’s work in Requisition 25 and those preceding it” (Plf. Reply at 1). In an attempt to remedy the foregoing, Hilt asserts that it “nevertheless signed, notarized, and resubmitted [Requisition 25] to SCA on October 2020” without any alterations, which “represents a mirror-image offer and acceptance creating an enforceable agreement” (*id.* at 6). Yet, based on the Tung Affidavit, “if a contractor fails to provide the required supporting documentation, the requisition does not

get certified and processed for payment unless and until all such information is submitted by the contractor to SCA” (Tung Affidavit, ¶ 12). The foregoing raises an issue of fact as to whether Hilt submitted the “required supporting documentation,” which precludes summary judgment. As a fallback position, Hilt then concedes that, “in the alternative, SCA is bound by its certifications of Requisitions Nos. 23 and 24” (Plf. Reply at 7-8).

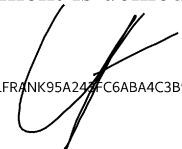
With respect to the costs for site maintenance and demobilization (as well as for the specifically fabricated materials), Hilt asserts that “these costs were submitted to SCA on May 13, 2021, but SCA failed to respond,” and by failing to respond, such costs “should be deemed acknowledged and due” (Plf. Reply at 9-10). In the Tung Affidavit, dated September 8, 2021, SCA disputes such costs submitted by Hilt, as well as the additional compensation sought for the alleged extra work performed by Hilt (Tung Affidavit, ¶¶ 7-10). This also raises disputed issues of fact that precludes summary judgment. As to the payment of subcontractors’ liens, Hilt asserts that SCA has paid \$474,086 to Hilt under the LSA, which was “issued with the same liens in place that it now claims prevent payment,” but SCA now attempts to “recalculate the amounts approved under the prior requisitions with a new assertion that its counterclaim is incalculable,” and the “Court should not indulge this argument” (Plf. Reply at 11-12). Yet, as noted above, SCA contends that Hilt erroneously believes that the Lien Law does not impede SCA’s releasing funds because Hilt’s belief is premised on its “unilateral” assumption that it is due the full \$2.91 million requested in this motion, but ignores that the amount due is “sharply disputed by the parties” (Def. Brief at 16-17). Also, Hilt fails to respond to SCA’s contention that the subcontractors can be paid under Hilt’s payment bond that is required to be posted under the Contract, but Hilt has refused to “avail itself of this contractual remedy” (*id.* at 17).

In light of the foregoing, there are substantial issues of disputed fact, which preclude the granting of partial summary judgment in favor of Hilt.

**Conclusion**

Based on all of the foregoing, it is hereby

ADJUDGED that plaintiff's motion for partial summary judgment is denied.

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**LYLE E. FRANK, J.S.C.**

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