SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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L & M FABRICATION & MACHINE, INC.,

Plaintiff,

- v -

THE LANE CONSTRUCTION CORP., SCHIAVONE CONSTRUCTION CO., LLC, LIBERTY MUTUAL INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY

Defendants.

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INDEX NO. 152899/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to AMEND COMPLAINT.

On this motion, Plaintiff L & M Fabrication & Machine, Inc. ("Plaintiff" or "L&M") seeks leave to file an amended complaint ("FAC") adding a cause of action for quantum meruit based on alleged "cardinal changes" in the construction work at issue (NYSCEF 26 ¶¶ 35-43). For the reasons set forth below, the motion is granted.

Under CPLR 3025 [b], leave to amend "shall be freely given" "in the absence of evidence of substantial prejudice or surprise or that the proposed amendments were palpably insufficient or patently devoid of merit" (*JPMorgan Chase Bank, N.A. v Low Cost Bearings N.Y. Inc.*, 107 AD3d 643, 644 [1st Dept 2013]). Defendants do not contend that Plaintiff's proposed amendment would cause "prejudice or surprise," so the only issue here is whether the proposed amendment is "palpably insufficient or patently devoid of merit." And in deciding that issue, "the court must examine the underlying merits of the causes of action asserted therein, since to

do otherwise would constitute a waste of judicial resources" (*Glenn Partition, Inc. v Trs. of Columbia Univ. in N.Y.*, 169 AD2d 488, 489 [1st Dept 1991]). Therefore, "[a] proposed amendment that cannot survive a motion to dismiss should not be permitted" (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001]).

Here, the proposed quantum meruit claim is not "palpably insufficient or patently devoid of merit." Recovery in quantum meruit may be appropriate "in the face of a 'cardinal change'" to a construction contract, where the change "effect[ed] an alteration to the essence of [the] contract sufficient to constitute an intentional abandonment of the original contract" (*Laquila Group, Inc. v Hunt Const. Group, Inc.*, 44 Misc 3d 1203(A), *11-12 [Sup Ct, Kings County 2014]). To constitute a cardinal change, the change to the work must "affect 'the essential identity or main purpose of the contract,' such that it 'constitutes a new undertaking'" (*Tutor Perini Corp. v City of New York Off. of Admin. Trials and Hearings Contr. Dispute Resolution Bd.*, 193 AD3d 665, 666 [1st Dept 2021], quoting *Albert Elia Bldg. Co. v New York State Urban Dev. Corp.*, 54 AD2d 337 [4th Dept. 1976]). "Whether there has been a cardinal change sufficient to invalidate a contract is generally a question of fact" (*Laquila*, 44 Misc 3d 1203(A), *12, citing *Bovis Lend Lease LMB v GCT Venture*, 6 AD3d 228, 229 [1st Dept 2004]).

In the proposed FAC, L&M alleges that "the changes to the work orchestrated by Unionport were radical and fundamentally changed the essential identity and main purpose of the Purchase Order from that planned for and otherwise contemplated by the parties" (FAC ¶ 37). Among other things, as a result of the changes "L&M was required to provide *permanent* steel components for the Project, rather than the initially contemplated temporary steel components," which L&M alleges increased the cost, time, and complexity of its work (*id.* [emphasis in

original]). In the end, L&M asserts that the changes nearly doubled the cost of its work (*see id.* ¶¶ 37-43).

Those factual allegations are sufficient to warrant granting leave to amend the complaint under the permissive standard of CPLR 3025 [b] (*see Laquila*, 44 Misc. 3d 1203(A) at *11 [denying motion to dismiss quantum meruit claim because "plaintiff has pleaded that the scope and extent of changes made to the Project, resulting in additional costs of nearly half the Subcontract price, constituted a cardinal change to the contract"]; *see also Bovis Lend Lease*, 6 AD3d at 229 [finding triable issues of fact on motion for summary judgment regarding whether "changes in the contracted work [were] so dramatic" as to constitute abandonment of original contract]; *Crane-Hogan Structural Sys., Inc. v State*, 88 AD3d 1258, 1260 [4th Dept 2011] [noting lower court's determination that new construction plans issued by defendant during project "constituted a cardinal change to the contract" and "quantum meruit is the proper measure of damages"]).

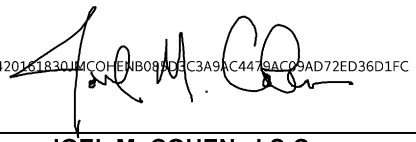
* * *

Accordingly, it is

ORDERED that Plaintiff's motion for leave to amend the complaint herein is GRANTED, and Plaintiff may file on NYSCEF an amended complaint substantially in the form annexed to the moving papers (NYSCEF 26); and it is further

ORDERED that Defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date such amended complaint is filed by Plaintiff on NYSCEF.

This constitutes the Decision and Order of the Court.



4/20/2022
DATE

JOEL M. COHEN, J.S.C.

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