At an IAS Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of May, 2022.

PRESENT:
HON. GINA ABADI,
J.S.C.

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GRACIANO CORPORATION,

Plaintiff,

-against-

Index No.: 517662/2016
Motion Seq.: 2, 3, 4, 5

AWL INDUSTRIES, INC., JOHN DOE SURETY COMPANY NO. 1 (real name and address unknown), NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION, and CITY OF NEW YORK,

DECISION/ORDER

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of these motions/cross motions:

| Papers | NYSCEF Numbered |
|---|---|
| Notice of Motion/Cross Motion, Affirmations (Affidavits), and Exhibits Annexed | 47-96; 98-131; 134-184; 188-207 |
| Affirmations (Affidavits) in Opposition and Exhibits Annexed | 233-236; 237-241; 208-232; 250-251 |
| Reply Affirmations (Affidavits) and Exhibits Annexed | 243-247; 248; 250-251; 252-253 |

Upon a careful review of the entirety of the foregoing cited papers, the Decision/Order on these motions/cross motions is as follows:

Seq. No. 2. Defendants the City of New York and the New York City Department of Design and Construction (collectively, the "City") move, pursuant to CPLR § 3211 (a) (2) and CPLR § 3212, for an order (1) dismissing in its entirety the sixth cause of action of plaintiff Graciano Corporation ("Graciano") under the payment-guarantee provisions of Article 20 of the general contract between the City and defendant AWL Industries, Inc. ("AWL") (the "general contract"), or, in the alternative, partially dismissing such cause of

action to the extent that it is based on the costs of alleged extra work that is not recoverable under the general contract and/or to the extent that the City has already paid for such work, and (2) partially dismissing Graciano's fifth cause of action to foreclose a mechanic's lien to the extent such cause of action is based on the costs of alleged extra work that is not recoverable under the general contract and/or to the extent that the City has already paid for such work.

The City's motion in Seq. No. 2 is *denied in its entirety*. *First and foremost*, although Graciano has a direct claim against the City by virtue of the payment-guarantee provisions of Article 20 of the general contract, the papers submitted on summary judgment (both by the City in Seq. No. 2 and, separately, by Graciano in Seq. No. 4 referenced below) reveal a sharp dispute regarding the amount, if any, owed by the City (and/or AWL) to Graciano; and, in particular, whether Graciano is contractually entitled to compensation for the increased manpower, "premium time," and other expenses which it allegedly incurred as a result of the City/AWL's request to have Graciano complete a portion of the façade-renovation phase of the project by October 31, 2014; and whether (among other defenses) the contract-work defense bars Graciano's claims in whole or in part (*see Graciano Corp. v Lanmark Group, Inc.*, 2018 NY Slip Op 33388[U] [Sup Ct, NY County 2018], *affd* 184 AD3d 435 [1st Dept 2020]; *see also Terry Contr., Inc. v State*, 23 NY2d 167, 174 [1968], *rearg denied* 23 NY2d 921 [1969]; *Lanmark Group, Inc. v New York City School Const. Auth.*, 148 AD3d 603, 604 [1st Dept 2017]; *Bovis Lend Lease (LMB), Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 145-146 [1st Dept 2013]). *Second*, contrary to the City's contention, Graciano *did* satisfy its statutory notice of claim requirement under Administrative Code § 7-201 (a), inasmuch as (1) Graciano's verified notice of claim

explicitly referenced (in each instance, by number) the general contract and the underlying job order, as well as explicitly sought recovery for the "unpaid extra work and unpaid contract balance and retainage, and any other amounts which remain unpaid for construction work performed [by Graciano] for AWL [and the City] under the . . . Contract," and (2) the verified amended complaint (in ¶ 7 thereof) recites the requisite statutory language (*cf. EMD Const. Corp. v New York City Dept. of Hous. Preserv. & Dev.*, 70 AD3d 893 [2d Dept 2010]). *Third*, the four-month notice requirement in Section 20.3.3 of Article 20 of the general contract is unenforceable as against Graciano under State Finance Law § 137 (4) (b) which imposes its own one-year limitations period (counting from the date of completion and acceptance of the public improvement) for prosecution of the labor/materials claims in connection with public improvements. *Fourth*, the 120-day notice requirement in State Finance Law § 137 (3) does not apply to Graciano because the latter is a first-tier (rather than, a second-tier) subcontractor (*compare Navillus Tile, Inc. v Bovis Lend Lease LMB, Inc.*, 98 AD3d 953, 954-955 [2d Dept 2012] [which, like the case here, involved a first-tier subcontractor and is "on all fours" with this case] *with MJJ Trucking LLC v BD Haulers, Inc.*, 2010 WL 2089322, *4 [ED NY 2010] [which, unlike the case here, involved a second-tier subcontractor], *affd* 404 Fed Appx 535 [2d Cir 2011]).[1] *Fifth and finally*, as well as contrary to the City's contention (and likewise contrary to Graciano's position taken in this action), Graciano is *not* subject to (nor is it

[1] Insofar as State Finance Law § 137 (3) applies to Graciano as a *first*-tier subcontractor, the latter is required to *wait* 90 days *before* asserting a claim. In contrast, State Finance Law § 137 (3) requires a *second*-tier subcontractor (and, to reiterate, that is not the case with Graciano) to *assert* a claim *within* 120 days.

bound by) the ADR provisions set forth in Article 27 of the general contract because those provisions were *not* explicitly incorporated into Graciano's subcontract with AWL (the "subcontract") by way of Sections 1.1 and 1.2 thereof[2] (*see Navillus Tile, Inc. v Bovis Lend Lease LMB, Inc.*, 74 AD3d 1299, 1300-1303 [2d Dept 2010]).

Seq. No. 3. The City also moves for an order, pursuant to CPLR § 3212, dismissing AWL's cross claims for indemnification as against it. The City's motion in Seq. No. 3 is *granted*. In light of the one-way flow of indemnification (as expressly limited by Sections 7.4 and 17.12 of the general contract) for the benefit of the City only, AWL's extra-contractual claim for common-law indemnification cannot withstand summary judgment in the City's favor; hence, *AWL's cross claims*, as pleaded in its Verified Amended Answer and Cross-Claims, dated August 14, 2017, are *stricken* (*see Service Sign Erectors Co., Inc. v Allied Outdoor Adv., Inc.*, 175 AD2d 761, 763 [1st Dept 1991], *appeal dismissed* 79 NY2d 823 [1991], *appeal denied* 79 NY2d 754 [1992], *rearg denied* 79 NY2d 1041 [1992]).

Seq. No. 4. Graciano moves (or, more accurately, cross-moves) for an order, pursuant to CPLR § 3212, granting it summary judgment: (1) on its first cause of action for breach of contract as against AWL in the sum of $851,011.11 or, in the alternative, for an inquest hearing for damages; (2) on its fifth cause of action to foreclose its mechanic's lien as against the City; (3) on its sixth cause of action under the payment-guarantee

[2] Section 6.4 of the subcontract, though referencing the ADR provisions of the general contract, is limited in scope, inasmuch as it only requires Graciano to cooperate with AWL "so as to enable [the latter] to comply with the requirements of [the City's] Alternative Dispute Resolution rules, practices, and procedures."

provisions of Article 20 of the general contract; and (4) dismissing certain of the City's affirmative defenses; in particular: the second affirmative defense of lack of contractual privity between the City and Graciano; the fourth affirmative defense that no quasi-contractual claims can be recovered by Graciano against the City; the sixth affirmative defense that the City's Department of Design and Construction is a "suable entity"; the seventh affirmative defense that Graciano failed to comply with the conditions precedent set forth both in Article 20 and in State Finance Law § 137; and the eighth affirmative defense that Graciano's sixth cause of action under the payment-guarantee provisions of Article 20 is time-barred by Section 20.3.3.

For the reasons noted above in connection with the denial of the City's preceding motion in Seq. No. 2, among others, Graciano's cross-motion in Seq. No. 4 is *granted solely to the extent* that the City's *seventh and eighth affirmative defenses* (*i.e.*, those predicated on Article 20 of the general contract and on State Finance Law § 137) are *stricken* from the City's Amended Answer and Cross Claim, dated September 20, 2017, and the remainder of Graciano's cross-motion is denied. For the avoidance of doubt, the City's second, fourth, and sixth affirmative defenses remain unaffected by this Decision/Order.

Seq. No. 5. Finally, AWL cross-moves for an order, pursuant to CPLR § 3212(e), granting it partial summary judgment by limiting its liability to Graciano for any and all alleged extra or change work to the sum of $90,455.22. AWL's cross motion in Seq. No. 5 is *denied in its entirety*. As stated, the Court is unable to determine at the summary-judgment stage how much, if anything, is owed to Graciano in connection with what is referred to in the record as Graciano's "Supplemental 2."

Accordingly, motion sequences 2 and 5 are denied in their entirety. Motion sequences 3 is granted. Motion sequence 4 is granted to the extent.

The foregoing constitutes the decision and order of this Court.

ENTER,

HON. GINA ABADI
J. S. C.