SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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JDS DEVELOPMENT LLC D/B/A JDS DEVELOPMENT GROUP, and JDS CONSTRUCTION GROUP LLC,

Plaintiffs,

- v -

PARKSIDE CONSTRUCTION BUILDERS CORP., and ALLIED WORLD INSURANCE COMPANY,

Defendants.

INDEX NO. 655477/2018

MOTION DATE _____

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 545, 546, 547, 548, 549, 567, 568, 569, 570, 571, 572, 577, 584

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 573, 574, 575, 576, 578, 581, 582

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

Upon the foregoing documents, it is

In this action, plaintiffs JDS Development LLC and JDS Construction Group LLC (collectively, JDS) seek recovery of damages against defendant Parkside Construction Builders Company (Parkside) under a construction contract (Subcontract) between JDS and Parkside, and against defendant Allied World Insurance Company (Allied) under a

surety-performance bond (Bond) issued by Allied in favor of JDS in connection with a construction project located on West 57th Street, New York City (Project). (NYSCEF Doc. No. [NYSCEF] 464, March 18, 2015 Subcontract; NYSCEF 474, Bond.) JDS asserts two claims: breach of contract against Parkside, and recovery under the Bond against Allied. (NYSCEF 1, Complaint, ¶¶ 21-27.) JDS seeks $60,031,791[1] in damages. (NYSCEF 291, Patrick A. McGeehin,[2] Update to Expert Damages Report, at 8/23.)[3] Parkside failed to appear in this action, and JDS obtained a default judgment against it. (NYSCEF 257, March 9, 2020 Decision and Order; NYSCEF 262, March 23, 2020 Supplemental Order.)

In motion sequence 006, Allied moves pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety or, in the alternative, granting it partial summary judgment dismissing JDS' claims for damages and declaring that the performance bond is limited to the cellar through the 36th floor of the superstructure concrete work.

In motion sequence 007, JDS moves pursuant to CPLR 3212 for summary judgment in damages in the amount of $24,940,383 (the Bond amount) as well as prejudgment interest along with costs and disbursements and severing for future consideration its claim for attorneys' fees.

The motions are consolidated for disposition, and for the reasons stated below, the Allied Motion is granted and, correspondingly, the JDS Motion is denied.

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[1] Delay costs of $55 million and contract costs such as the rigging grew, concrete safety manager and "self-leveling concrete" of $4.7 million. (NYSCEF 291, McGeehin, Update to Expert Damages Report, Schedule 2.0 Damage Summary.)
[2] Patrick A. McGeehin is JDS's damages expert.
[3] Pages refer to NYSCEF generated pagination.

Background

On June 15, 2015, JDS (as construction manager) executed the Subcontract with Parkside (as subcontractor) to provide superstructure, steel, rebar and concrete work for the Project, which involved the construction of an 85-story building the Steinway Building for $39,700,000. (NYSCEF 464, Subcontract at 26/155.) If Parkside did not fulfill its contractual obligations, the subcontract sets forth the extent of Parkside's liability including the following:

> • Section 7 of the Subcontract contains an indemnification provision pursuant to which Parkside agreed to indemnify parties associated with the Project for "damages, losses and expenses" arising out of Parkside's "acts or omissions," Parkside's "performance of, or failure to perform, the Work," and/or Parkside's breach of the Subcontract. (NYSCEF 464, Subcontract, at JDS0000030-31 [3-4/155] [definitions of Construction Manager, Owner, Indemnitees and Developer], § 7 [Indemnity] at JDS0000034 [6/155]]; NYSCEF 472, May 16, 2018 Contract Amendment.)
>
> • Section 25(e) of the Subcontract provides that if Parkside "shall delay the timely progress of the Work . . . then [Parkside] shall reimburse Construction Manager [and] Owner . . . for such loss." (NYSCEF 464, Subcontract, § 25[e] at JDS0000043 [15/155].)
>
> • Section 25(c) of the Subcontract provides that, if Parkside should "fail, refuse or neglect to supply a sufficiency of workmen or to deliver the materials with such promptness as to prevent the delay in the progress of the Work" or "fail in the performance of any of the covenants of this Agreement," Construction Manager is entitled to furnish additional labor at Parkside's cost. (NYSCEF 464, Subcontract, § 25(c) at JDS0000043 [15/155].)
>
> • Section 26 of the Subcontract provides that, if Parkside is terminated and "the expense incurred by Construction Manager in finishing the Work, including overhead, attorneys' fees and damages incurred through the default of Contractor" exceeds the unpaid balance of the Subcontract, "[Parkside] shall pay the difference to Construction Manager." (NYSCEF 464, Subcontract, § 26 at JDS0000043-44 [15-16/155].)

Parkside was required to perform "all work from the cellar slab up in Superstructure scope" in accordance with the following schedule (the Project Milestone Dates):

> "Foundation (Completion) August 2015
> Tower Crane (Installation) June 2015

> Shear walls and Core through Steinway March 2016
> Superstructure @ 26th floor Curtain wall start August 2016
> Superstructure concrete topped out September 2017
> Tower Cap Topped Out December 2017"

(NYSCEF 464, Subcontract Rider D § B.42 at JDS0000126 [98/155], Rider D § D.3 at JDS0000130, at 102/155.)

In early 2016, Allied was asked to execute a performance bond and a payment bond on Parkside's behalf in connection with the Subcontract. (NYSCEF 272, Hale[4] Depo. tr at 116:17-117:16, 119:10-120:6; NYSCEF 273, Donato[5] Depo. tr at 72:17-73:12.) Allied declined because Allied lacked the capacity under its reinsurance treaty to execute bonds in connection with transactions in excess of $25 million. (NYSCEF 272, Hale Depo. tr at 64:18-21, 116:17-117:16, 119:10-120:6, 161:10-162:12; NYSCEF 273, Donato Depo. tr at 48:3-10, 69:2-73:12.)

Allied asserts that to induce Allied to execute bonds on Parkside's behalf for the Project, another subcontract with Parkside was prepared, which was limited in scope to Parkside's work from the cellar through the 36th floor (the 36 Floor Subcontract). JDS circulated draft versions of the 36 Floor Subcontract internally. (NYSCEF 275, March 23, 2016 email; NYSCEF 274, Szekalski[6] Depo. tr at 75:1-10.) On March 24, 2016, a copy of the proposed 36 Floor Subcontract was emailed to Allied by a broker representing Parkside. (NYSCEF 276, March 24, 2016 email; NYSCEF 272, HaleDepo. tr at 152:5-20.) Hale stated in an email:

> "In review of the contract pertaining to the captioned project, we note that the trade has been specified to the construction of the superstructure from the cellar to the 36th floor. While it is our intent that our bond only include that work

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[4] Jason Hale is a senior underwriter employed by Allied. (NYSCEF 272, Hale Depo. tr at 29:5.)
[5] Donato is Hale's supervisor. (NYSCEF 273 Donato tr at 49:22-50:17.)
[6] John Szekalski is JDS's Project Director. (NYSCEF 274, Szekalski Depo tr at 7:19-20.)

> associated from the cellar to the 36" floor, we believe that a rider to the contract would better serve our intention to limit our liability to the cellar to the 36th floor. The reason for this is because the contract still contains numerous references to the entire project for which JDS has contracted with Park Side for. In order to be in a position to support this contract, we will require JDS to add the following language to the contract by rider: "Regardless of the scope of work outlined in Rider "D", this contract applies only to the work associated with the construction of the superstructure beginning from the cellar to the thirty-sixth floor". Once we have confirmation that this rider is approved for addition to the contract we can be in a position to authorize the release of the final bond to Park Side. (NYSCEF 277, March 29, 2016 email)

On March 29, 2016, Szekalski emailed in response an "updated Rider D" identifying Parkside's "trade" as "Superstructure (Cellar through 36th Floor)" and clarifying that the Rider's description of the "Work" included "the following items, clarifications and/or modifications as they pertain to the construction of the superstructure from the cellar through the 36th floor." (NYSCEF 277, March 29, 2016 email at JDS 0047271 to 0047274.) Szekalski testified that his purpose in sending this email and its attachment was to assist Parkside in obtaining surety bonds. (NYSCEF 274, Szekalski Depo. tr at 90:5-91:20.) While JDS challenges this document, for among other reasons, the document was never executed by either Parkside or JDS (NYSCEF 295, JDS Interrogatory Response No. 2), for the purposes of this motion, JDS concedes that the Bond covers Parkside's work up to the 36th floor, not beyond. (NYSCEF 544, JDS's Memo of Law in Support of its Motion for Summary Judgment (Seq. 07), fn 4.)

On April 6, 2016, Allied, as "Surety," and Parkside, as "Contractor," executed a performance bond and payment bond in favor of "JDS Development Group" as "Owner." (NYSCEF 474, Bond.) Allied provided JDS with the Bond, guaranteeing the full and timely performance of Parkside's work under the Subcontract, up to an amount of

$24,940,383 for the superstructure work in the cellar to the 36th Floor.[7] (NYSCEF 474, Bond.) The Bond was signed for Allied by Donato, pursuant to a written power-of-attorney which states: "Single Transaction Limit: $25,000,000."

The Bond is an industry standard form known as an "AIA A312," drafted by the American Institute of Architects. (§ 5:2. American Institute of Architects (AIA) standard forms, 2 Bruner & O'Connor Construction Law § 5:2.) Paragraph 3 of the Bond contains three express conditions precedent that JDS must satisfy to trigger Allied's obligations thereunder. (NYSCEF 474, Bond at ¶ 3.) The Bond defines "Construction Contract" as: "[t]he agreement between the Owner and Contractor identified on the signature page, including all Contract Documents and changes thereto." (*Id*. at ¶12.2.) It defines "Contractor Default" as "[f]ailure of the Contractor, which has neither been remedied nor waived, to perform or otherwise comply with the terms of the Construction Contract." (*Id*. at ¶12.3.) "Balance of the Contract Price" is defined as "[t]he total amount payable by the Owner to the Contractor under the Construction Contract after all proper adjustments have been made . . . reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract." (*Id*. at ¶12.1.) The Bond, by its terms, relates to a "Construction Contract" in the amount of $24,940,383.00, dated March 18, 2016, for the superstructure work in the "Cellar - 36th Floor" of the Project. (*Id*.)

On May 24, 2016, Szekalski internally circulated an email listing 10 "Potential default items for Parkside." (NYSCEF 466, June 10, 2015 email; NYSCEF 463,

[7] Under the heading "CONSTRUCTION CONTRACT", the Bond includes the following information: "Date: 03/18/2016", "Amount: $24,940,383.00" and "Description (Name and Location): Superstructure (Cellar - 36th Floor) Located at 105-111 West 57th Street, New York, New York 10019." (NYSCEF 474, Bond.)

Szekalski Depo. tr at 128:11-19.) First, JDS listed Parkside's failure to provide a rigging crew. (NYSCEF 463, Szekalski Depo tr at 129:17-130:5.) JDS provided a rigging crew for two years, at a cost $8,500 per day, without terminating Parkside or notifying Allied. (*Id*. at 129:25-137:5.) JDS also claimed that Parkside failed to provide or pay for a concrete safety manager. (*Id*. at 140:13-141:24.) In response, JDS hired its own concrete safety manager, who worked throughout 2016 and 2017. (*Id*.) Finally, JDS listed "difficulties" with "keeping Parkside on schedule," and explored the idea of terminating Parkside and replacing it with another contractor, SSC Highrise. (*Id*. at 123:21-126:3.) JDS determined, however, that "the cost to make that switch would be worse and more damaging than fighting through the job with Parkside until the end," because SSC Highrise lacked the "crews to immediately start." (NYSCEF 508 Stern[8] Depo. tr at 115:13-116:15.) These payments were generally funded by 111 West 57th Street Holdings LLC. (NYSCEF 293, JDS Response to Notices to Admit, at ¶¶ 34, 36, 38.)

In 2017, JDS discussed its dissatisfaction with Parkside. "Well, I discussed his woeful performance and inadequacies in performing his contractual obligations. He conceded that he had not met his contractual obligations, and basically threw up his hands and said he needed more money despite acknowledging that contractually he wasn't owed any more money." (NYSCEF 508, Stern Depo. tr. at 20:25-21:7.) In October 2017, JDS and Parkside negotiated a written "change order" for a "contract adjustment", which had the effect of (retroactively) increasing the price of the 85 Floor Subcontract by $19,308,442.54, to $59,008,442.54. (NYSCEF 281, Heller[9] Depo tr at

[8] Stern is President of JDS. (NYSCEF 299, Stern Affidavit ¶1.)
[9] Heller is JDS's project manager. (NYSCEF 281, Heller Depo tr at 7:25-8:2.)

59:24-61:8; NYSCEF 282, October 20, 2017 email at JDS 0022627, JDS 0022635.) However, the change order was not signed by JDS. (NYSCEF 282, October 16, 2017 email; NYSCEF 283, October 16, 2017 email at JDS0022635; see also NYSCEF 281, Heller tr at 48:13-15, 48:21-49:20.) JDS requested that Parkside sign and return the Contract Adjustment and the Revised SOV. (NYSCEF 12, October 16, 2017 email; NYSCEF 284, October 24, 2017 email; NYSCEF 281, Heller Depo. tr at 119:6-121:4.) Parkside made changes and signed those modified documents rather than the documents it received. (NYSCEF 283, October 16, 2017 email at JDS0022970; NYSCEF 284, October 24, 2017 email at JDS0025368; NYSCEF 281, Heller Depo tr. at 79:19- 80:17, 83:16-84:8.)

Parkside delivered the 36th floor of the superstructure on October 30, 2017, over one year late. (See, e.g., NYSCEF 506, Daily Construction Report for October 30, 2017, at JDS 0000251-52; NYSCEF 489, Berkowitz[10] Rep. ¶¶ 1, 94-95; NYSCEF 507, Cosmai[11] Rep. at 69; NYSCEF 479, Cosmai Depo. tr. at 260:17-261:4, 270:10-14, 271:14-19, 286:8-15; NYSCEF 478, September 12, 2018 email at AW00875- 85.) The Revised SOV annexed to that document indicated that Parkside had completed 100% of its superstructure work through the 36th floor. (NYSCEF 288, November 28, 2017 email.)

On May 16, 2018, Parkside was indicted for wage theft and fraud. (NYSCEF 462 Press Release; NYSCEF 462 Keating[12] Depo. tr at 64:8-17, 162:7-163:4.) As a result of these indictments, "Parkside ceased to be a functional company" and "did not have the

[10] Berkowitz is JDS's expert. (NYSCEF 489.)
[11] Cosmai is Allied's expert. (NYSCEF 507.)
[12] Keating is an assistant vice president at Allied for claims. (NYSCEF 462, Keating Depo tr at 18:16-19.)

ability to make payroll." (NYSCEF 508, Stern Depo. at 122:7-24; NYSCEF 299, Stern Aff. at ¶ 5.) At the time of the indictments, Parkside was performing work at (or around) the 60th floor. (NYSCEF 508, Stern Depo. tr at 123:14-124:2.)

On June 1, 2018, due to Parkside's "numerous deficiencies" in performing its work, JDS notified Parkside and Allied by letter that JDS was considering declaring Parkside in default of its Subcontract obligations. (NYSCEF 4, First Notice.)

On August 8, 2018, JDS hired a new contractor, Manhattan Concrete LLC, to complete Parkside's remaining work. (NYSCEF 290, Manhattan Concrete Agreement.)

On August 9, 2018, JDS notified Parkside and Allied of Parkside's default under the Subcontract. (NYSCEF 5, Default Notice.)

On August 14, 2018, JDS notified defendants that it "formally terminated" the Subcontract and Parkside's right to complete the Project. (NYSCEF 6, Termination Notice.)

On August 21, 2018, JDS notified Allied that it was obligated to JDS under the Bond. (NYSCEF 7, August 21, 2018 Letter.)

On August 24, 2018, JDS provided Allied with a notice itemizing the damages incurred by JDS. (NYSCEF 8, August 24, 2018 Letter.)

On September 19, 2018, Allied sent JDS a letter denying its claim due to the "lack of substantiation," but reserved further rights and defenses. (NYSCEF 62, September 19, 2018 Letter.)

"[E]ffective" as of November 1, 2018, 111 Holdings, 111 West 57th Street Property Owner LLC ("111 Owner"), and JDS executed a document titled "Liquidating Agreement." (NYSCEF 294, Liquidating Agreement.) Under the "Liquidating Agreement," 111 Holdings and 111 Owner released JDS from any liability for Parkside-

related damages and agreed that JDS can retain any recovery that it obtains in this litigation. (*Id.*)

On November 2, 2018, JDS commenced this action against Parkside and Allied. (See NYSCEF 1, Complaint.)

Legal Standards

On a motion for summary judgment, the movant must make a 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].) Where this showing is made, the burden 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.*) Also, 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 [1st 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." (*Sommer v Fed. Signal Corp.,* 79 NY2d 540 [1992].) 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, 562 [1980].) Also, witness credibility issues are generally inappropriate for resolution in a summary judgment motion. (*Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013].)

Discussion

JDS contends that since Parkside breached the Subcontract, Parkside is liable for the damages caused by its breaches of the Subcontract. Allied's liability as surety is coextensive with that of Parkside, which also had indemnification and other payment obligations in the event that it breached the subcontract. Therefore, JDS insists Allied is liable for all of these damages.

Allied opposes liability arguing that Parkside completed the work to the 36th floor and beyond and was paid in full; JDS failed to satisfy the Bond's conditions precedent; JDS elected its remedy when it allowed Parkside to complete the work to the 36th floor and beyond after alleged defaults; JDS cannot sue Allied for damages sustained by others without a liquidating agreement; JDS's alleged liquidating agreement is missing the essential pass-through term.

As a preliminary matter, New York prohibits terminating a construction contractor for default after it has substantially completed its work. (See, e.g., *845 UN Ltd. P'Ship v Flour City Architectural Metals, Inc.*, 28 AD3d 271, 272 [1st Dept 2006] ["Since undisputed record evidence amply demonstrates that defendant substantially completed its work, plaintiff owner was powerless to terminate the contract for defendant's alleged default . . ."].) The "substantial performance rule precludes contract termination and limits a contracting party to a specific damage remedy." (*Id.*) Here, the approved and paid payment requisitions establish that, as of October 31, 2017, Parkside had completed 100% of its work through the 36th floor. (NYSCEF 288, November 28, 2017 email; NYSCEF 289, November 29, 2017 email; NYSCEF 8, JDS initial damages summary.)

The Bond

First, Allied asserts that JDS did not comply with the conditions precedent in the Bond. JDS insists that the conditions precedent cannot impose a timely notice requirement, and it nonetheless complied with the literal requirements of sections 3.1 and 3.2 of the Bond by sending the various notices.

Courts should read a contract "as a harmonious and integrated whole" to give effect to its purpose and intent and should not "add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreements." (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital Inc.*, 30 NY3d 572, 581 [2017] [internal citations omitted]). "Surety bonds—like all contracts—are to be construed in accordance with their terms." (*Walter Concrete Const. Corp. v Lederle Labs.*, 99 NY2d 603, 605 [2003].) "A surety bond attaches to the principal contract and must be construed in conjunction therewith, so that, if no underlying agreement ever came into existence, there is nothing to which the surety's obligation can attach and it is, therefore, a nullity." (*Hall & Co. v Continental Cas. Co.*, 34 AD2d 1028, 1029 [3d Dept 1970], *affd*, 30 NY2d 517 [1972].) "[T]he conditions contained in paragraph 3 of the AIA 312 performance bond . . . constitute conditions precedent that require strict compliance, and that the failure to strictly comply with these conditions precedent are fatal to an obligee's claim under a performance bond." (*E. 49th St. Dev. II v Prestige Air & Design, LLC,* 33 Misc 3d 1205(A) [Sup Ct, Kings County 2011] [citations omitted]. *See also Tishman Westwide Constr. LLC v ASF Glass, Inc.*, 33 AD3d 539, 540 [1st Dept 2006] ["Similarly, [surety] was discharged from its liability on its surety bond because plaintiff materially breached

its contractual duties to [surety] by failing to provide [surety] with the opportunity to exercise its options under paragraph 4 of the bond and with a 15-day notice.)[13]

153 Hudson Development, LLC v. DiNunno, 8 AD3d 77 [1st Dept 2004]), is directly on point. In *153 Hudson*, the First Department affirmed summary judgment in favor of a surety on an A312 performance bond, concluding that the obligee's "failure to comply with the notice provisions of the performance bond . . . precludes it from now maintaining this action for damages against the bond's surety." (*Id.* at 77.) An examination of the underlying trial court's decision reveals a number of similarities to this case. There, as here, the bond's principal substantially completed its work. (*153 Hudson Dev., LLC v DiNunno*, 2003 WL 25520440 [Sup Ct, NY County, May 13, 2003].) The principal ceased work prior to completing certain "punch list" items, and the obligee alleged that the principal's work was defective and untimely. (*Id.*) Rather than formally terminating the principal, the obligee engaged others to perform and repair the work. (*Id.*) "Several months later, [the obligee] first sought relief under the Performance Bond" in a "flurry of letters," including a letter purporting to formally terminate the principal and letters purporting to comply with paragraphs 3.1, 3.2, and 3.3 of the bond. (*Id.*) The obligee then sued the surety, seeking to recover damages resulting from the principal's allegedly late and defective work. (*Id.*) Rejecting these claims, the court held

> "[T]he court concludes that the actions of [obligee] in retaining replacement contractors to complete the work on the renovation project, and waiting one and a half years to notify [surety] of [principal's] alleged default or otherwise attempting to comply with the default and terminate requirements in paragraph 3 precludes any claim for relief under the Performance Bond. [Obligee's] actions unreasonably deprived [surety] of the ability to investigate or remedy the immediate consequences of [principal's] alleged default, and, thus, the claims

[13] The court acknowledges receipt of *Arch Insurance v Graphic*, 2022 WL 1763151 (June 1, 2022), a Massachusetts decision supplied to the court via a Rule 18 letter. (NYSCEF 584.)

against it, including the delay claims, must be dismissed. Thus, [surety] is entitled to summary judgment dismissing the complaint against it." (*Id.*)

Section 3 of the Bond sets forth the conditions precedent to Allied's obligations to pay claims. (NYSCEF 3, Bond, § 3.) If these conditions are met, section 4.1-4.3 outlines Allied's options to control its loss by completing the protected work. (*Id.* at § 4.) The Bond provides:

> 3. If there is no Owner Default, the Surety's obligation under this Bond shall arise after:
>
> 3.1 The Owner has notified the Contractor and the Surety at its address described in Paragraph 10 below that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default;
>
> 3.2 The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract. Such Contractor Default shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Subparagraph 3.1; and
>
> 3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a contractor selected to perform the Construction Contract In accordance with the terms of the contract with the Owner.
>
> 4. When the Owner has satisfied the conditions of Paragraph 3, the Surety shall promptly and at the Surety's expense take one of the following actions:
>
> 4.1 Arrange for the Contractor, with consent of the Owner, to perform and complete the Construction Contract; or
>
> 4.2 Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors;
>
> 4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and the contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surely equivalent to the

> bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Paragraph 6 in excess of the Balance of the Contract Price incurred by the Owner resulting from the Contractor's default. (NYSCEF 3, Bond.)

The above sections are clear and require JDS to notify Allied of Parkside's defaults giving Allied an opportunity to take action. The undisputed facts reflect that the notices were untimely, since Parkside had committed many prior defaults, completed the work from the cellar to the 36th floor, a year behind schedule, and the notices were sent eight months thereafter.

JDS failed to satisfy the conditions precedent of the Bond which is fatal to JDS's claim.

Application of the Conditions Precedent to JDS' Claim for Delay Damages

JDS argues that, even if the Bond's conditions precedent apply here, they do not preclude JDS's delay damages. JDS relies on *1199 Hous. Corp. v Intl. Fid. Ins. Co.*, 14 AD3d 383 [1st Dept 2005], but its reliance is misplaced.

1199 Housing arises from a motion to amend and a motion for discovery. (*Id.*) The court did not analyze delay or default damages but mentioned delay damages in the context of summarizing the trial court's decision. Instead, its analysis focused upon the parties' burden of pleading conditions precedent in the context of the "specificity and particularity" requirement of CPLR 3015 (a).

By contrast, the court in *153 Hudson Dev*. squarely rejected plaintiff's theory. The appellant in *153 Hudson* asked the First Department to determine:

> "2. Did the IAS Court correctly hold that notice and termination provisions of a surety bond, which by their language apply to demands that a surety undertake to physically complete or obtain physical performance of a contract, constitute conditions precedent to suit by an owner where the owner seeks to have a surety, who has bound itself to the performance of a construction contract, compensate it for delay (and other) damages pursuant to a provision in the bond making the surety liable for such delay (and other) damages even when the

> owner unquestionably complied with the deadline in the bond for filing an action against the surety? The IAS Court held that the notice and termination provisions were a condition precedent to any claim against the surety, including a claim for delay damages."

(See Brief for Appellant in *153 Hudson*, 8 AD3d 77, available at 2004 WL 5472010 at *iii.) The appellant in *153 Hudson* added that the surety "is bound to answer in damages under Paragraph 1 and 6 of the Bond whether or not *153 Hudson* complies with the notice provisions of the Bond. Parenthetically, this is an issue which has never been determined by a court in this state." (*Id*. at *3.) The court held that "[p]laintiff's failure to comply with the notice provisions of the performance bond issued by Reliance precludes it from now maintaining this action for damages against the bond's surety. Contrary to plaintiff's contention that these notice provisions are not conditions precedent to recovery against the surety, this bond mandates that predefault notification be given to the contractor and surety by the owner." (*153 Hudson Dev., LLC v DiNunno*, 8 AD3d 77, 78 [1st Dept 2004] [citations omitted].) Therefore, the court rejects JDS's delay damages distinction.

Damages Sustained by Third Parties and the Liquidating Agreement

Allied argues that JDS cannot recover damages incurred by third parties because JDS concedes that these damages were not incurred or paid by JDS and the Liquidating Agreement does not contain a "pass-through provision." (NYSCEF 514, Liquidating Agreement.) JDS acknowledged that JDS is neither a borrower under, nor a guarantor of, the Project's construction loan. (NYSCEF 508, Stern Depo. tr at 76:14-77:1, 83:16-85:4.) In its responses to Allied's Notice to Admit, JDS admitted that the various delay damages and charges alleged were paid by others. (NYSCEF 293, JDS's Responses to Notice to Admit at ¶¶ 15, 17, 22, 23, 28, 30, 34, 36, 38.)

JDS relies on *Menorah Home and Hosp. for the Aged and Infirm v Fireman's Fund Ins. Co.*, 04-CV-3172(FB) CLP, 2007 WL 1109079, [EDNY Apr. 13, 2007] for the proposition that because the Liquidating Agreement states that the Project Owners agree that JDS may retain its recovery from Parkside in satisfaction of JDS' losses incurred in connection with the Project, this arrangement satisfies the third element.

"Liquidation agreements have three basic elements: (1) the imposition of liability upon the general contractor for the subcontractor's increased costs, thereby providing the general contractor with a basis for legal action against the owner; (2) a liquidation of liability in the amount of the general contractor's recovery against the owner; and, (3) a provision that provides for the "pass-through" of that recovery to the subcontractor." (*Bovis Lend Lease LMB Inc. v GCT Venture, Inc.,* 285 AD2d 68, 70 [1st Dept 2001].) Generally, a subcontractor cannot sue the project owner due to lack of contractual privity, when the latter caused delay which increased the former's cost. "A liquidation agreement is designed to overcome these legal impediments and allow contractors to bring an action against the owner on behalf of their subcontractors." (*Id*. at 69-70.) Allied's opposition focuses on the third element which requires that the agreement provide a pass-through of the recovery by the general contractor from the project owner to the subcontractor, when the owner's delay causes financial damages to the subcontractor. (*See id.* at 70.)

In *Menorah*, Fireman's Fund Insurance Company (FFIC), as surety, issued a bond on behalf of the general contractor (GC), as principal under the bond, and Menorah Home and Hospital for the Aged and Infirm (Menorah), as owner-obligee. (2007 WL 1109079 at *1.) After GC defaulted on the contract, FFIC took over the project, and Menorah sued FFIC alleging that FFIC breached the bond by failing to

timely complete the project. (*Id.*) FFIC counterclaimed to hold Menorah liable for FFIC's repair costs of a boiler, but Menorah disclaimed liability and asserted a third-party claim against The Trane Company (Trane), which was responsible for the boiler's maintenance and repair. (*Id.*) Menorah and FFIC executed a liquidation agreement wherein they settled all of their claims other than the boiler claim. (*Id.* at *2.) The agreement provided that: Menorah admitted liability on FFIC's boiler claim; Menorah agreed to liquidate its liability on the claim in such amount that it might recover from Trane; and to compensate Menorah due to FFIC's delay in completing the project, FFIC agreed that Menorah could retain its recovery from Trane on account of the boiler claim. (*Id.*) Trane moved for summary judgment dismissing Menorah's third-party action, arguing that the agreement was invalid because it lacked a pass-through, since Menorah was allowed to retain any recovery from Trane. (*Id.* at * 2-3.) Menorah responded that the liquidation agreement was valid because any recovery from Trane would pass-through to FFIC because it would satisfy one of FFIC's obligations. (*Id.*) The court agreed with Menorah and ruled that "the liquidating agreement should not be invalidated based on what is essentially an accounting issue between Menorah and FFIC, and cannot serve as a vehicle for Trane to avoid liability." (*Id.* at *3.)

Here, JDS conceded that under the Liquidating Agreement, the claimed damages were indeed incurred by the Project Owners. (NYSCEF 577, Oral Argument Tr. 36:20-23.) Nonetheless, JDS argues that this Liquidating Agreement is similar to that in *Menorah*, because the pass-through here is basically an accounting issue or a credit between JDS and the Project Owners and is, thus, valid.

Allied counters that an affidavit filed in *Menorah* showed that there was a factual foundation for a $900,000 credit. (NYSCEF 571, Menorah Affidavit in Opposition to

Motion for Summary Judgment ¶¶ 5, 7.) JDS must lay bare its facts on this summary judgment motion and show a similar credit or offset. Instead, JDS argues that its Liquidating Agreement is valid, simply because it is purportedly similar to the agreement in *Menorah* and bridges any gap in privity that would otherwise allow Allied to escape liability. Without a pass through, JDS's liquidation agreement is not valid. (S*ee I.T.R.I Masonry Corp. v State of New York*, 21 AD3d 990 [2005] [purported "liquidating agreement" without evidence showing a valid pass-through of the right of action to sue was not a valid or effective liquidating agreement].)

Waiver, Estoppel and Election of Remedies

The court also rejects JDS's procedural objection to Allied's waiver and estoppel arguments. Allied argues that by continuing to allow Parkside to continue working and to pay Parkside despite Parkside's defaults, JDS elected its remedy and relinquished its right to terminate the Subcontract. JDS insists that it was not required to declare default because it negotiated certain terms in the Subcontract which also binds Allied.[14] JDS relies on the following:

> • "The failure of Construction Manager to insist in any one or more instances upon a strict compliance with any provision of this Agreement, or to exercise any option herein conferred, shall not be construed as a waiver or relinquishment of the right of Construction Manager thereafter to require a compliance with such provision of this Agreement, or a waiver of the right of Construction Manager thereafter to exercise such option, but such provision or option will remain in full force and effect." (NYSCEF 464 § 31 at JDS0000046, [18/155]);

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[14] The bond is not default insurance. JDS could have purchased "subcontractor default insurance" to maintain speedy control over the project in case of subcontractor default. (Robert J. Dietz, *Mitigating Subcontractor Default Risk-Subcontractor Default Insurance v. Performance and Payment Bonds*, Construction Law, Summer 2018, at 6.) SDI allows an insured to "respond to a default situation quickly, using its own internal expertise, and without having to wait for a surety's response or permission." (2 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner & O'Connor on Construction Law § 11:582 [2020].)

> • "[N]o payment made under this Agreement, shall be conclusive evidence of the performance of this Agreement, either wholly or in part, nor shall it be construed to be an acceptance of defective Work or improper material, or an approval of any of the items in any requisition made or bill rendered." (NYSCEF 464 § 34 at JDS0000047, [19/155]); and
>
> • "Permission by Construction Manager for delayed finishing shall not be construed as a waiver of Construction Manager's right to be compensated by Contractor for damage resulting from any such delay." (NYSCEF 464 § 25(e) at JDS0000043, [15/155].)

Allied pled waiver as an affirmative defense and expanded upon it in its response to interrogatories. (NYSCEF 12, Answer; NYSCEF 32, Allied's Responses 4.) However, Allied was not required to list in its answer election of remedies as a defense. (CPLR 308[b].) JDS fails to cite any authority for its objection that Allied failed to identify the conditions precedent which formed the basis in Allied's September 2018 denial. Indeed, the law is otherwise. Plaintiff must show detrimental reliance or prejudice, which is not asserted here. (*East 49th Street Development II v Prestige Air & Design*, LLC, 2011 WL 4599708 [Sup Ct, Kings County 2011]; *Chester v Mutual Life Ins. Co. of N.Y.*, 290 AD2d 317 [1st Dept 2002] [where an insured failed to prove a "clear manifestation of intent" by the insurer to waive a defense, and there was no evidence of conduct by the insurer lulling the insured into inaction nor determinantal reliance upon such conduct].)

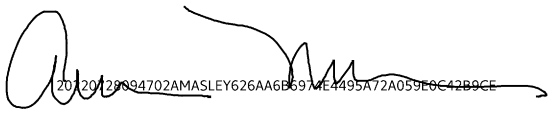
The court has considered the parties' remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that the motion for summary judgment (motion sequence 06) by defendant Allied World Insurance Company is granted, and plaintiffs' complaint is dismissed, with costs and disbursements to Allied as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion for summary judgment by JDS (motion sequence number 07) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Allied accordingly.



7/28/2022
DATE

ANDREA MASLEY, J.S.C.

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