SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY – COMMERCIAL DIVISION

PRESENT: **HON. JOEL M. COHEN** **PART** 03M

Justice

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GRACIANO CORPORATION,

INDEX NO. 652750/2014

Plaintiff,

- v -

LANMARK GROUP, INC., FEDERAL INSURANCE COMPANY,

Defendants.

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DECISION AFTER NON-JURY TRIAL

This is a breach of contract case. Defendant Lanmark Group. Inc. ("Lanmark"), a general contractor, entered a contract ("Prime Contract") with non-party the New York City School Construction Authority ("SCA") to restore a public school in Brooklyn, including a landmarked historic building ("Project"). Lanmark then entered a subcontract ("Subcontract") with Plaintiff Graciano Corporation ("Graciano") to perform masonry work on the Project. The primary issue at trial was whether Lanmark's issuance of "Addendum 3" to the Subcontract purporting to "delete" certain work constituted a "cardinal change" to the Subcontract or whether Graciano's election to treat the Subcontract as abandoned was a breach.

The Project was delayed from its inception, and disputes arose between the parties with each blaming the other for causing the delays. Among other things, Graciano criticizes Lanmark for not properly coordinating the various subcontractors, notably those performing scaffolding and steel work, which forced Graciano to perform work inefficiently and out of sequence. Further, conditions at the Project site were different from those in the Prime Contract. As a

result, Graciano sought additional compensation from Lanmark, including but not limited to acceleration costs before Addendum 3 was issued.

Lanmark, for its part, asserts that Graciano did not complete work in a timely manner, did not properly schedule work and did not sufficiently staff the Project. However, the evidence at trial established that Graciano was ready, willing, and able to complete its work (including out of sequence work and double shifts not required by the Subcontract) and that delays caused by Lanmark or other subcontractors within the control of Lanmark impeded Graciano from completing its work.

In the end (or near end), following Graciano's request for additional payments and refusal to accept Lanmark's settlement proposal conditioned on a waiver of future delay claims, Lanmark issued Addendum 3 under Article 8.1(a) of the Subcontract entitled "**Change Orders**" that "deleted" a substantial portion (at least 30%) of Graciano's masonry work. However, the work was not "deleted" from the Prime Contract and was instead completed by Lanmark. Of note, the Subcontract includes Article 13 which authorized Lanmark to terminate Graciano for "cause" (Article 13.1), or for "convenience" (Article 13.2), or to "suspend" Graciano's work (Article 13.3) that were not invoked by Lanmark. At trial, Lanmark's representative testified that Addendum 3 was designed to avoid Graciano's claims.

According to Graciano, the deleted work included all the high-margin restorative and decorative masonry work that was the essential purpose of the Subcontract (and its reason for bidding on the Subcontract in the first place), leaving it with only low-margin demolition and basic masonry work that would result in losses to Graciano. Graciano promptly asserted that Addendum 3 constituted an improper termination of the Subcontract and began to demobilize

from the Project. Lanmark directed Graciano to return to the Project and, shortly thereafter, issued a Termination Notice.

Lanmark asserts that it was within its rights to unilaterally modify Graciano's work – including by deleting work without Graciano's consent and reassigning it – through Addendum 3 rather than the contractual termination or suspension clauses, and that it was Graciano that improperly terminated the contract by withdrawing from the job site. Lanmark further claims that Graciano breached the Subcontract before termination, and that Lanmark suffered damages.

After a non-jury trial, the Court finds that Addendum 3 constituted a cardinal change to and an abandonment of the Subcontract by Lanmark. Graciano is entitled to damages for breach of the Subcontract and to recover on its payment bond claim for the work it completed before demobilizing from the Project. Graciano is not entitled, however, to lost profits for work it did not complete. Lanmark's Counterclaim and Third-Party Complaint are dismissed.

PROCEDURAL HISTORY

Graciano filed a Summons with Notice (NYSCEF 1) on September 9, 2014, and a Complaint on November 5, 2014 (NYSCEF 6). The Complaint alleges, generally, that Lanmark directed "extra work" on the Project which brought the Subcontract's total value to $6,783,841.87 and that Lanmark "unreasonably delayed Graciano's work, and interfered with and disrupted Graciano's operations. . ." before issuing Addendum 3 which constituted an "abandonment and/or Cardinal Change" to the Subcontract by Lanmark (Cplt. ¶¶7-17). The Complaint asserts claims for (1) breach of contract against Lanmark; (2) quantum meruit against Lanmark; and (3) a payment bond claim against Defendant Federal Insurance Company ("Federal" and with Lanmark "Defendants"), the issuer of Payment Bond No. 8217-17-11 ("Payment Bond"). Graciano's Complaint seeks, at minimum, $3,133,626.30 in damages.

Defendants filed their Answer and Counterclaim (NYSCEF 7) on December 9, 2014, denying the allegations in the Complaint and counterclaiming for breach of contract against Graciano. Defendants denied Graciano's allegations of breach but admitted the existence of the Prime Contract, the Subcontract, Addendum 3, and the Payment Bond. (Answer ¶¶5-6, 14, 23). Graciano filed a Reply (NYSCEF 8) on December 15, 2014, generally denying the allegations made in Defendants' Counterclaim and an Amended Reply on December 17, 2014 (NYSCEF 12) adding certain affirmative defenses.

On January 12, 2015, Defendant Lanmark filed a Third-Party Summons and Complaint (NYSCEF 15) against Third-Party Defendant Liberty Mutual Insurance Company ("Third-Party Defendant" or "Liberty") to recover on a performance bond ("Performance Bond"). On February 17, 2015, Liberty filed an Answer (NYSCEF 18).

On April 18, 2018 the parties moved for summary judgment. The Court (Bransten, J) largely denied the parties' respective motions for summary judgment, dismissing only Graciano's claim for quantum meruit because of "the existence of a valid and enforceable Subcontract between the parties" (*Graciano Corp. v Lanmark Group, Inc.*, 2018 N.Y. Slip Op. 33388[U] [N.Y. Sup Ct, New York County 2018], *affd,* 184 AD3d 435 [1st Dept 2020]). Justice Bransten determined that "the purpose of the Subcontract was 'complete masonry installation.'" (*Id.*). Justice Bransten determined that whether Addendum 3 constituted a breach of the contract was an issue of fact requiring a trial. (*Id.*) The First Department's decision provides that a breach would relieve Graciano "from the effect of the no damages for delay clause" (*Graciano,* 184 AD3d 435 *citing Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]).

The case came before the Court for an eight-day bench trial via Microsoft Teams commencing on June 23, 2021, and concluding on July 2, 2021 (NYSCEF 480-487 [Trial Transcripts]). The parties submitted Post-Trial Memoranda (NYCEF 581, 588) and Reply Memoranda (NYSCEF 593, 594), including proposed findings of fact and conclusions of law.

EVIDENCE PRESENTED AT TRIAL

1. Graciano presented live (via Teams) testimony from Glenn Foglio. (Tr. 13:14-692:20).
2. Graciano also presented deposition designations from Lanmark's George Manouselakis, Anthony Staknis and Dariusz Sikora. (Tr. 691:17-692:16; NYSCEF 488 [Manouselakis EBT Tr.]; NYSCEF 489 [Sikora EBT Tr.]; NYSCEF 490 [Staknis EBT Tr.]).
3. Defendants presented live testimony (via Teams) from George Manouselakis. (Tr. 692:21-1186:5).
4. Defendants also presented deposition designations from Graciano's Robert Burkavage and Glenn Foglio. Graciano provided counter-designations. (Tr. 690:22-691:6; NYSCEF 574-575 [Burkavage EBT Tr.]; NYSCEF 576-579 [Foglio EBT Tr.]).
5. The Court admitted over one hundred exhibits into evidence at trial (NYSCEF 367-479 [Pl. Exs. 1-111]; NYSCEF 492-573 [Def. Exs. A-DDDD]).

FINDINGS OF FACT

The Court makes the following findings of fact based on the evidence admitted at trial, including its evaluation of the credibility of the testifying witnesses:

A. The Contracts and Related Documents

1. The Prime Contract (Def. Ex. B), Subcontract (Pl. Ex. 1) and Addendum 3 (Pl. Ex. are all authentic documents and Federal issued the Payment Bond (Complaint and Answer ¶¶5-6, 14, 23; NYSCEF 365 [Marked Complaint]).

2. Graciano, founded in 1916, specializes in historic and masonry restoration. Glenn Foglio ("Foglio"), Graciano's witness at trial, has been President of Graciano since 1991 and previously served in other capacities at Graciano. (Tr. 14:18-18:9).

3. Graciano has served as both a general contractor and subcontractor on other public projects in New York. However, the Project was Graciano's first job on a SCA project. (Tr. 17:4-22, 329:4-7). Graciano never worked with Lanmark before the Project. (Tr. 33:13-15).

4. Graciano is qualified to and has performed work on historic landmarked projects in New York including the MetLife Building, Rockefeller Center, the Waldorf Astoria, and St. Bartholomew Church. (Tr. 17:23-19:6, 328:1-5).

5. Graciano entered into collective bargaining agreements ("CBA") with skilled labor unions in New York including Local 1 Bricklayer and Allied Craft which includes, among others, pointer, caulkers, cleaners, sone masons and others who worked on the Project. Local 79 laborers employed by Graciano generally handle demolition and clean-up work. (Tr. 30:3-33:6).

6. In July 2013, the SCA awarded the Prime Contract known as Exterior Masonry/Parapets/Roof/Flood Elimination/Paved Areas (Contract No. 000013118) to Lanmark in the amount of $14,893,000.00 to complete the Project to renovate P.S. 204(K) ("PS 204").

The Project included, among other things, restoration of the two buildings; a landmarked building built in 1929 ("29B") and a building built in 1999 ("99B") along with a courtyard between them. (Def. Exs. B [Contract], C [Project Labor Agreement or "PLA"], D [SCA General Conditions and Specifications prepared by Architect Nelligan White]).

7. The Prime Contract included a substantial completion date of January 19, 2015 (Def. Ex. E [Notice to Proceed dated July 15, 2013]). The Prime Contract included a $3,000 per day liquidated damages provision against Lanmark for each day after January 19, 2015 that the Project was not substantially completed. (Tr. 704:1-3; Def. Ex. B).

8. Approximately one-third of the Project was masonry work. (Tr. 711:24-712:2).

9. Other aspects of the Project included steel work, roofing, windows, concrete, electrical, HVAC and plumbing work. (Tr. 707:10-16).

10. Lanmark had completed work on multiple prior projects for SCA including several on which Lanmark self-performed masonry work. (Tr. 706:10-25).

11. However, Lanmark subcontracted all the work on the Project, including the masonry work. (Tr. 707:1-13).

12. Following the award of the Prime Contract, Lanmark solicited a price from Graciano to perform the masonry component of the Project. (Tr. 33:16-20).

13. Graciano was interested in the Project because, among other things, it included restoration of 29B, the landmarked building, and included winter work. The restoration work included work in which Graciano specialized, including rebuilding a façade, waterproofing, rebuilding masonry and stonework. (Tr. 34:5-35:5).

14. Graciano based its price quotation submitted to Lanmark on the SCA Specifications. (Tr. 35:12-15).

15. Following negotiations, in August 2013, Lanmark and Graciano executed the Subcontract wherein Graciano agreed to perform the masonry work on the Project for $5,320,000. (Tr. 338:18-24). Article 2.1 of the Subcontract provides, in pertinent part:

> 2.1 Scope of Work Contract Work shall include, but not be limited to, all labor and materials necessary to perform, deliver and install the work as shown and described more fully set forth in the Contract Specification and Drawings:
>
> FURNISH ALL LABOR, MATERIALS, AND EQUIPMENT FOR A COMPLETE MASONRY INSTALLATION INCLUDING BUT NOT LIMITED TO: ....
>
> Subcontractor shall be responsible for the installation of all work as shown and described in the Plans, Specifications, General Conditions of this project necessary to constitute complete Work as hereinbefore defined in Section 2.1 Scope of Work.

16. The Subcontract excluded "OUT OF SEQUENCE WORK OPERATIONS EXCEPT FOR COORDINATION WITH OTHER TRADE INSTALLATION, AND PREMIUM TIME/OVERTIME/EXTENDED SHIFTS UNLESS REQUIRED DUE TO SUBCONTRACTOR'S FAULT." (Subcontract ¶2.1).

17. The Subcontract required Graciano to work according to "THE APPROVED PROGRESS SCHEDULE AS APPROVED BY [SCA] AND PROVIDED TO [GRACIANO] BY [LANMARK]." (Subcontract ¶3.1).

18. Under Paragraph 6.5 of the Subcontract, Lanmark was **RESPONSIBLE FOR THE COORDINATION OF THE VARIOUS TRADE WORK.** (Pl. Ex. 1 [emphasis in original]).

19. Graciano's scope of work for 29B included removal of one wythe (or thickness) of brick façade, removal of parapets, cleaning and painting steel, replacing backup brick with infill brick, parging backup brick, waterproofing, installing new brick and parapets at multiple locations or "elevations." Graciano's scope of work at 99B was limited to the parapets.

Graciano's scope of work is shown in the contract drawings. (Tr. 35:3-11, 38:3-39:9; Pl. Exs. 2 [SCA Drawings] and 3).

20. Foglio oversaw Graciano's work on the Project assisted by project manager Robert Burkavage ("Burkavage"), foreman Rob McIntyre, superintendent Richard Fitzpatrick and bricklayer foreman Joe Cumberland. (Tr. 37:14-25, 53:12-56:3, 56:4-60:22).

21. Lanmark's personnel included testifying witness George Manouselakis ("Manouselakis"), superintendent Alejandro Spadotta, project manager Dariusz Sikora ("Sikora") and senior project manager Anthony Staknis ("Staknis"). Manouselakis was at the Project site approximately "once every two weeks." (Tr. 709:18-711:8, 756:11-14).

22. As elaborated upon below, the Project was delayed from its inception due, in part, to a lack of coordination by Lanmark of the various subcontractors, the failure by Lanmark to establish and maintain a Project schedule, and differing site conditions encountered at the Project site from the SCA Drawings requiring input from the SCA and Architect. (Pl. Exs. 8-72).

B. Lanmark Fails To Provide An Approved Schedule To Its Subcontractors Including Graciano

23. Pursuant to the SCA Specifications, Lanmark was required to submit a "baseline" project schedule to the SCA that showed the sequence of work and, further, that all subcontractors, including Graciano, Transcontinental (steel), Sukhmany (scaffolding) and others, agreed with the Baseline Detailed Project Schedule. (Tr. 707:10-23, 714:4-6, 988:24-989:7; Def. Ex. D). However, no initial scheduling meeting was held between Lanmark and its subcontractors. (Staknis EBT Tr. 63:4-12).

24. On September 4, 2013, Lanmark sent a preliminary schedule ("Preliminary Schedule") to Graciano. In his cover email, Manouselakis wrote that Lanmark would "assume

that [Graciano] will be working on multiple elevations at a time so we can complete the project before the beginning of winter 2014." The Preliminary Schedule showed Graciano demolishing – as is standard – brick from top to bottom and re-building from the bottom up at 29B and 99B. (Pl. Ex. 7; Def. Ex. F).

25. Thereafter, Lanmark presented a schedule known as the "R2" to SCA including a "detailed work plan with logic and sequence" for the Project which was approved by SCA on November 18, 2013 during Biweekly Progress Meting No. 7 (not attended by Graciano) and which Graciano would be obligated to follow under the terms of the Subcontract. (Tr. 987:4-990:9, 993:16-25; Def. Ex. G; Pls. Exs. 1, 7, 19 [SCA Meeting Minutes]).

26. However, Manouselakis testified on behalf of Lanmark that there was "no email or transmittal" of the approved R2 schedule to Graciano. (Tr. 992:1-4).

27. On October 11, 2013 – prior to the SCA's approval of the R2 schedule - Lanmark sent Graciano a schedule known as the "B000" schedule with a cover email simply reading "[s]chedule is attached." (Pl. Ex. 8).

28. A major distinction between the R2 and B000 schedules is that the former shows Graciano starting work at 29B in January of 2014 and 99B in May of 2014 and the later shows Graciano starting work at both 29B and 99B in January of 2014. (Pl. Exs 7-8).

29. Graciano could not begin its primary work until scaffolding was erected at the Project site by Sukhmany which, like Graciano, did not receive the R2 schedule approved by SCA from Lanmark. Manouselakis described scaffolding as part of the "critical path" necessary before other work – including masonry - could procced. (Pl. Ex. 9 at Activity 1130; Tr. 82:25-834, 1005:2-14, 1018:10-13).

C. Scaffolding Delays Caused By Lanmark's Failure To Properly Schedule The Project Prevented Graciano From Commencing Its Work Through No Fault Of Its Own

30. The first problem Graciano encountered was a delay in the installation of scaffolding by Sukhmany, without which (as explained above) Graciano could not access its work site. (Tr. 82:25-83:2, 93:21-94:7). Before Graciano ever arrived on the Project site it provided written "Notice of Schedule Delay" to Lanmark on January 27, 2014. The next day, January 28, 2014, Lanmark responded with an email reading "see attached schedule. . ." and attaching the R2 schedule dated October 30, 2013. (Pl. Ex. 13).

31. On February 14, 2014 a status meeting took place between Lanmark and SCA. The meeting was called because "SCA CM had concern regarding completing the project on time" and the first item in the minutes reads "SCA CM pointed out that six and a half moths had passed since NTP date (7/20/13), however, scaffold erection is only about 50% complete, and no elevations work had started yet." (Pl. Ex. 13). SCA directed Lanmark to provide a Project schedule through completion, which Lanmark provided to SCA, but not Graciano. (Tr. 114-15-115:16, Manouselakis EBT Tr. 74:4-22; 76:13-24; 77:13-79:17; 80:22-81:7; 81:24- 82:4, Staknis EBT Tr. 27:19-28:9).

32. Graciano mobilized at the Project site on February 19, 2014. (P. Ex. 14 [Graciano Daily Report Summary]).

33. As stated above, Lanmark hired Sukhmany to install the scaffolding at 99B and 29B, but the evidence at trial showed that Lanmark did not take efforts to ensure that Sukhmany followed the sequence of work Lanmark had provided to Graciano and others. (Tr. 1018:5-1020:19). Thus, even though the R2 showed Graciano's demolition work starting in early January 2014 at 29B, and no work at 99B until May 2014, the scaffolding contractor completed the scaffolding at 99B first. (Tr. 1018:10-10:20:19). Accordingly, although Graciano was

supposed to begin work at 29B, it was forced to start its work out of sequence on the roof of 99B in mid-February 2014 while Sukhmany was still in the process of installing scaffolding at 99B. (Tr. 107:8-108:23, 112:8-113:9; Pl. Ex. 10, Pl. Ex. 14 at 29, 32). According to the schedule provided by Lanmark, Graciano should have been performing demolition work in the courtyard of 29B at that time. (Tr. 102:25-113:24). The evidence does not establish what, if any, schedule Lanmark was using at the time Graciano commenced its work in February-March of 2014. (Tr. 115:25-116:5)

34. By March 7, 2014, Graciano had completed its parapet demolition of 99B, had no more available work, and reduced its on-site manpower to three workers. (Tr. 116:6-117:22; Pl. Ex. 14). On March 12, 2014, Graciano sent another written "Notice of Schedule Delay" to Lanmark due to the "incomplete installation and SCA sign off of the supported scaffolding" and on March 18, 2014, Lanmark rejected the claim because other necessary Project items were not "currently on site." (Pl. Ex. 16).

35. By mid-March 2014, Graciano still had no access to the bulkhead areas of 99B, preventing it from demolishing the parapet at those locations. (Tr. 123:19-124:22; Pl. Ex. 19 at 96, Item 906, Pl. Ex. 10). After Graciano was finally able to demolish the existing parapets, it could not work on rebuilding them until the Architect responded to requests for information ("RFI") regarding design issues. Graciano's relevant RFI was submitted through Lanmark which informed the Architect that the project was "on hold" pending the Architect's directive. (Tr. 124:23-128:22; Pl. Exs. 20-21).

36. The scaffolding was finally erected by Sukhmany at most locations by late March 2014, causing a 3-month delay from the original completion date of December 27, 2013 set forth in the R2. (Tr. 1062:18-1064:11; Pl. Ex. 108 at 47; Pl. Exs. 9 at 3, Activity No. 1130).

37. Promptly after the scaffold at 29B was inspected on March 24, 2014, Graciano began demolition of the bulkhead parapets at 99B and demolition at 29B. (Tr. 128:23-131:2; Pl. Ex. 14 at 53-54, 58; Pl. Ex. 22; Manouselakis EBT Tr. 90:16-92:15)

38. Under the R2, which was based on start to finish activities, the demolition work should have been completed sequentially rather than concurrently, and Lanmark's failure to follow the schedule caused delays and imposed costs on Graciano . (Tr. 131:3- 132:9; Pl Ex. 9 at 5, 7-8). R2 showed Graciano completing work at 29B in a sequential manner, finishing face brick demolition at one "elevation" before starting the next. (Tr. 87:6-93:20, 135:10-136:21; Pl. Ex. 9 at 5-6, Pl. Ex. 10).

39. Graciano maintained sufficient manpower at the Project to complete work in March and April of 2014. (Tr. 133:19-21, 138:25-139:2). As a result of the scaffold delay, Graciano was not able to start demolition in the courtyard of 29B until the end of March 2014, although it was supposed to start in early January 2014. (Tr.132:14-25). In April of 2014 Graciano completed demolition work anywhere it could (as opposed to any schedule) at Lanmark's instructions. (Tr. 136:22-138:24; Pl. Ex. 14). Because of the late start at 29B, Graciano was forced to accelerate its work resulting in added manpower and supervision costs. (Tr. 133:1-18; Pl. Ex. 14).

D. Lack of Coordination and Insufficient Manpower to Complete Steel Work Further Delayed Graciano

40. Once the scaffolding delays were resolved, a new set of sequencing challenges arose involving the steel subcontractor, Transcontinental. The Project schedule required the installation of steel as a necessary precursor to Graciano's parging, waterproofing and installation of face brick at every elevation and floor of 29B. (Tr. 1023:1-11; Pl. Ex. 9 at 9,

Activity Nos. 3550, 3560 & 3570). The steel work included, among other things, steel framing around windows and hung lentils or angles at each floor of the façade of 29B. (Tr. 143:16-146:11, 713:15-714:6, 1021:7-1022:5; Pl. Ex. 3 at 39). The proper sequencing of the steel work was critical to Graciano's work. In particular, the steel contractor had to lay out where it needed Graciano to sawcut the openings around the windows so that the steel could be properly positioned for "Window Kerf" work. (Tr. 149:18-150:19; Tr. 1023:12-15, 1025:19-1026:5).

41. As it turned out, Transcontinental fell behind and either was unaware of the coordinated schedule or did not have (or did not provide) sufficient manpower to meet it. Article 3.1 of Lanmark's subcontract with Transcontinental required Lanmark to provide Transcontinental with a "Coordinated Schedule" (i.e., the R2) but it never did. (Tr. 1023:16:1025:14; Pl. Ex. 103 at 11).

42. In a May 5, 2014 email, Graciano informed Lanmark that a lack of coordination with the steel contractor was causing delays and would require a change order. (Pl. Ex. 25). Once Transcontinental provided relevant information to Graciano, Graciano commenced Window Kerf work. (Tr. 153:5-156:6; Tr. 1027:25-1030:18; Pl. Ex. 26 at 2; Pl. Ex. 14 at 9). However, although Lanmark was aware that Transcontinental needed to complete steel work before Graciano could complete its masonry work (including Window Kerf work) (Tr. 167:20-168:18; Pl Ex. 27 at 1), Transcontinental provided insufficient manpower (*i.e.*, two crews of three to four men) per the terms of its subcontract with Lanmark while Graciano had forty or more men at the Project and Lanmark failed to address the disparity in manpower until after Graciano demobilized from the Project. (Tr. 169:19-170:16, 170:17-24; Pl. Exs. 27 and 103 at 12).

43. Following Lanmark's receipt of Graciano's email, Lanmark began holding coordination meetings with its subcontractors on May 21, 2014 and kept minutes of each meeting. (Tr. 166:21-167:19; Pl. Ex. 27 [Meeting Minutes]; Manouselakis EBT Tr. 159:10-160:7; Staknis EBT Tr. 62:4-63:3). During a May 28, 2014 meeting Lanmark confirmed that "Transcontinental needs to be ahead of Graciano's schedule so Graciano can follow behind him. . . Transcontinental only anticipated two crews (3 -4 men per crew) to perform work." (Tr. 167:20-168:18; Pl. Ex. 27). Lanmark's Coordination Meeting Minutes are replete with references to the facts that Graciano was prevented from completing work by the steel delay, offered to work double shifts to make-up time and asserted claims for additional compensation. For instance, Lanmark's Meeting Minutes show that on June 11, 2014 "Glenn from Graciano informed Terry that there will be an acceleration claim." (Pl. Ex. 27).

44. The lack of steel installation through June 2014 at 29B prevented Graciano from doing any work other than basic demolition. (Tr. 217:12-25). Graciano could not install backup brick, paint steel, parge, waterproof or install face brick as indicated in the R2 schedule until the steelwork was completed. (Tr. 164:23-166:16, 1052:3-22). Through July 2014, the steel work was only ten percent (10%) complete in the courtyard and barely begun at all other elevations of 29B, causing Graciano to veer further off schedule. (Tr. 218:3-219:9; Pl. Ex. 49 at 12).

45. Ultimately, Lanmark deleted– at Transcontinental's request – as of September 22, 2014, work under its subcontract (Tr. 1045:3-16, 1049:1-9; Def. Ex. QQ) and began completing the steel work itself in September of 2014, after Graciano demobilized from the Project. (Tr. 1045:17-1047:21, 1050:12-16; Def. Ex. TT). (Tellingly, in October 2014, when Lanmark was completing the steel work on its own, SCA maintained that there were *still* an insufficient number of ironworkers on the Project site. [Tr. 1047:22-1048:8, 1054:14-23; Pl. Ex. 107]).

E. Design Defects, Failure to Coordinate and Mismanagement by Lanmark Further Delayed Graciano and Lanmark Attempted to Shift the Blame to Graciano

46. The SCA sent Lanmark a "Project Delay" notice dated April 16, 2014. Lanmark responded that, as of March 31, 2014, that the Project was "32 working days behind schedule" due primarily to poor weather. (Pl. Ex. 18).

47. Thereafter, throughout May of 2014 Graciano informed Lanmark through RFIs of design issues that were causing delays. (Tr. 178:17-179:22, 183:7-15; Pl. Exs. 32-33, 35, 36 [RFI Book],[1] 37; Manouselakis EBT Tr. 88:17-89:1; Staknis EBT Tr. 34:16-35:7, 37:20- 38:11). On May 19, 2014, the SCA sent Landmark a "2nd Notice" of "Unsatisfactory Progress" and on May 20, 2014 Lanmark in turn informed the SCA on May 20, 2014 that it (really, Graciano) could not complete any masonry work absent a "redesign or clarification" for reasons beyond Graciano's control. As Lanmark stated: "Per our baseline schedule, the masonry work and demolition work is to be completed concurrently, so the inability to complete or even start any masonry work at this time is seriously impacting and delaying this project." (Pl. Ex. 37).

48. Following its receipt of Graciano's complaint, on May 20, 2014 Lanmark provided update no. 5 to Burkavage without any commentary. (Pl. Ex. 11).

49. Although Lanmark at times defended the masonry delays in its meetings and correspondence with SCA, in the end it sought to shift the blame to Graciano. For example, despite Lanmark's correspondence with the SCA concerning the delays on the Project (Pl. Ex. 37) and the R2s schedule to contrary showing sequential masonry work, in May 2014 Lanmark demanded that Graciano increase its manpower on the site even though the lack of steel workers

[1] Graciano submitted eighty-seven (87) RFIs on the Project from October 23, 2013 – August 20, 2014 indicating various difference between the Project site and the Drawings as well as the Specifications.

and the unforeseen conditions cited in Lanmark's letter to SCA made an increase illogical. (Tr. 184:21-191:16; Pl. Exs. 9 at 5-11, 10, 14 at 9, 38 at 2).

50. Lanmark's demand seems to have been an effort to appease the SCA and make it appear that work was progressing when it was not. Manouselakis testified that Lanmark was in the business of public work; that the project included fourteen (14) schedule modifications and, that in his experience with the SCA, the delay claims would be addressed"[o]nce the work is completed," that the SCA could direct Lanmark "to take whatever steps are necessary to improve the progress" and that, should the SCA terminate the Prime Contract, Lanmark would have to "disclose that termination on all our future bids and prequalifications with all the other public owners, including SCA, and we might not get awarded projects." (Tr. 726:110-729:4). Manouselakis further testified that absent a "NOD or Notice of Direction" from the SCA, that a contractor could not later claim a change order for disputed work. (Tr. 765:19-766:2). Manouselakis described Lanmark's status as a general contractor as "fighting the battle on both sides" and that in "dealing with the SCA, if we say our subcontractors are failing, then it shows that we are failing. So we're constantly -- we're trying to protect ourselves and our rights for time extension." (Tr. 807:17-24).

51. In May 2014, SCA required Lanmark and Graciano to attend a "cure meeting" to address delays on the project. (Tr. 198:16-23). In advance of the cure meeting, Graciano informed Lanmark that it "estimated a minimum cost of $500,000" to accelerate its operations as a result of the delays "outside of the control of Graciano." (Pl. Ex. 43).

52. Delays attributable to scaffolding and steel work were discussed at the "cure meeting." In what seems to have been an intent to show SCA some progress was being made on the Project, Lanmark sought to have Graciano undertake demolition work throughout the site

without regard to the sequencing set out in the project schedule. As Graciano argues, demolishing all elevations at 29B made little sense because it would expose the building to the elements without the ability to rebuild in lockstep with the demolition. Nevertheless, Graciano complied with Lanmark's demand to increase manpower from twenty to forty workers in May 2014, though Graciano's position that adding more manpower to demolition made little sense until the site was available for rebuilding work to commence. As a result of Graciano's agreement to increase manpower to recoup lost time, Graciano substantially completed the demolition of 29B by July 31, 2014. However, because of the scaffolding and steel subcontractor delays, Graciano could not start the rebuild in an orderly fashion. (Tr. 198:16-206:6; Pl. Exs. 14 [Graciano Daily Logs], 42-44).

F. Graciano Requests Change Orders For Acceleration and Other Costs and Lanmark – After its Counterproposal was Rejected – Serves a Notice to Cure on Graciano Foreshadowing This Litigation

53. On May 28, 2014, Graciano submitted a proposed change order (Proposed CO No. 004.00) for additional work concerning the "additional two wythes of brick" that were not included in the Drawings for $1,002,775.62. (Pl. Ex. 42).

54. On June 24, 2014, Graciano submitted a proposed change order (Proposed CO No. 012.00) for $190,635.75 concerning the accelerated demolition and disruption costs in May and June caused by, among other things, Graciano maintaining a larger workforce and working out of sequence. Lanmark made a counterproposal on June 25, 2014, of $190,000 that would cover all "past or future costs. . .as a result of alleged project delays" and Graciano rejected the proposal on June 26, 2014 but continued to staff the Project. (Tr. 135:10-136:21, 206:7-212:12, 640:2-646:20; Pl. Ex 45; Def. Exs. MMM, RRR [Graciano Job Cost Ledger]). Manouselakis testified that Lanmark offered $190,000 to Graciano – conditioned on a waiver of claim for

future delays – despite the Subcontract's "no damage for delay clause" because Lanmark was "trying to work with [Graciano]" (Tr. 777:17-778:17).

55. The day after Graciano sent its change order, on June 25, 2014, Lanmark's counsel sent Graciano a Notice to Cure (including a threat to terminate the Subcontract) claiming that Graciano failed to coordinate with the steel subcontractor, Transcontinental, and Graciano responded to the effect that its Subcontract excluded surveys and layouts and it was instead Transcontinental that failed to meet its obligations. (Tr. 213:6-215:3, 1075:23-1076:1; Subcontract ¶2.1; Pl. Ex. 46). Manouselakis testified that Lanmark served a Notice to Cure while also attempting to settle with Graciano because "we're trying to basically protect ourselves. We have, again, the SCA on our backs, reminding us every month or so the project is behind schedule and liquidated damages could be assessed against us." (Tr. 779:10-20).

56. Also on June 25, 2014, the same day that Lanmark sent its Notice to Cure to Graciano, Lanmark began searching for a replacement masonry subcontractor. (Pl. Exs. 47, 49). However, in a subsequent July 8, 2014 letter, counsel for Lanmark informed counsel for Graciano that "it is not in the best interest of Lanmark to default your client in the middle of the project" and offered a "non-compensable 35 day time extension" for Graciano to complete its work. (Def. Ex. NNN). Graciano thereafter increased its manpower at the Project despite correspondence between Foglio and Manouselakis indicating that litigation was inevitable. (Tr. 216:1-217:11; Pl. Exs. 14 at 50, 48).

57. Shortly thereafter, Lanmark advised the SCA that Transcontinental "may have to pull off the project" (as it ultimately did vis-à-vis the request to delete its subcontract) until RFI 87 was resolved (Pl. Ex. 55 at 4 Staknis EBT Tr. 53:10-54:20). The parties as well as the SCA agree that RFI 87 was delaying steel work which in turn was delaying masonry including parging

and brick installation, and that absent resolution of field conditions and other RFIs, masonry work could not commence despite Graciano's offer to work double shifts. (Tr. 140:14-141:16).

58. In July of 2014, Graciano sought and the SCA approved a change order concerning the parapet at 99B. (Pl. Ex. 91 [Change Order No. 18]).

59. On July 2, 2014 the SCA sent Lanmark a Fourth Notice of Delay and on July 9, 2014, Lanmark replied – contrary to its attorney's June 25, 2014 letter to Graciano – that the SCA "also mentioned that Graciano promised to work double shifts. Graciano cannot work double shifts, as promised, until we resolve the steel issues that you are aware of. The project, in general, is being delayed due to numerous RFIs and redesigns, and also because of extra change order work." (*Cf.* Pl. Exs. 46, 59). Lanmark's July 7, 2014 email to the SCA detailed the numerous unresolved structural steel issues on the Project site. (Pl. Ex. 57).

60. On July 10, 2014, Lanmark submitted Addendum 2 to Graciano proposing a forty-five (45) day extension of time. Graciano replied by letter dated July 21, 2014, that the proposal was insufficient and expressed that it would incur approximately $500,000 in acceleration costs. (Pl. Ex. 92). Notably, Manouselakis testified that that Lanmark was not intending to pay Graciano for the extended time based upon the "no damage for delay" clause in the Subcontract. (Tr. 789:8-18). However, in describing the Subcontract's sequencing requirements, Manouselakis testified that "[m]eans and methods are theirs. However, we have the right to update the progress schedule and the way that the activities should be performed." (Tr. 809:10-15).

61. Lanmark's communications with Graciano were very different than its parallel conversations with the SCA. On July 18, 2014 Lanmark's Staknis wrote to Graciano's Foglio:

> Your request for additional compensation is denied. Your contract clearly dictates that you have to work at multiple locations at the same time. In addition, you need to

> coordinate your work with the other trades in order to ensure that the work continues per the progress schedule for this project. Lanmark will exercise all of our options per the subcontract agreement, including but not limited to completing the parapet work with our own forces and back charging your contract accordingly.

Foglio replied the same day as follows:

> As usual you completely underestimate the situation. You clearly do not understand this work. We will not perform this work in the manner you are describing without its associated costs. It is not simply working in several areas at the same time. Go ahead and exercise your options and I will see you in court. Glenn

(Pl. Ex. 63).

62. On July 23, 2014 Graciano's Burkavage sent a list of items – notably steel and lead paint related – holding up Graciano's work, and those items were not fully addressed until August 20, 2014, when Lanmark again attempted to blame Graciano for the delays. (Pl. Ex. 67). In a more formal intervening July 25, 2014 letter to Graciano, Lanmark took the position that the Subcontract required Graciano, and not Lanmark, to coordinate the subcontractors' work and that it was Graciano that had delayed the other trades despite Lanmark's prior contrary representation to the SCA. (Pl. Ex. 64). Further, in an August 11, 2014 letter to the SCA, Lanmark again represented that numerous RFIs were delaying the Project and, importantly, "the masonry parging and waterproofing, which proceeds all brickwork, cannot be completed in it's entirety at any elevation, has been delayed by the impact on the steel work incurred by the numerous design changes and differing site conditions" supporting Graciano's version of what transpired at the Project. Moreover, Graciano's daily logs show that it was adequately staffing the Project. (Pl. Ex. 14).

63. On August 12, 2014, counsel for Lanmark wrote to Liberty claiming, "deficiencies in Graciano's performance" and requested a meeting – without Graciano – to discuss "Liberty's future role in overseeing Graciano's work." (Def. Ex. HHH).

64. On August 13, 2014, counsel for Graciano wrote to SCA complaining that Lanmark had not paid Graciano for its SCA-approved payment applications for May and June of 2014. (Pl. Ex. 76).

65. On August 27, 2014 Lanmark issued Addendum 3 (Pl. Ex. 74) to Graciano which provides in relevant part:

> **ARTICLE 2.1 SCOPE OF WORK IS revised as follows:**
>
> > **DELETE REMAINING DEMOLITION WORK ON THE WINDOW OPENINGS AT THE 1929 SOUTH, 129 WEST AND 1929 NORTH ELEVATIONS. IN ADDITION, DELETE THE REMAINING MASONRY WORK AT THE 1929 SOUTH, 1929 WEST AND 1929 NORTH ELEVATIONS, INCLUDING, BUT NOT LIMITED TO, BACK UP BRICK, PARGING, WATERPROOFING, STABILIZATION, FACEBRICK, APC AND GFRC.**

Addendum 3 is not signed by either party although signature lines were included.

66. At minimum, Addendum 3 eliminated thirty percent (30%) of Graciano's work under the Subcontract. (Pl. Ex. 80). However, Manouselakis testified that at the time Addendum 3 was issued, that the deleted work "still had to get performed" with the "overall work remain[ing] the same" and that Lanmark issued Addendum 3 because it feared being assessed liquidated damages by the SCA. (Tr. 905:5-906:4).

67. Manouselakis testified that Graciano's unwillingness to increase manpower or work in the parapet were the reasons Addendum 3 was issued. (Tr. 905:19-25). However, as stated above, Graciano was being prevented from completing its work and Graciano was not in default of the Subcontract when Addendum 3 was issued. (Manouselakis EBT Tr. 229:23-230:16; Staknis EBT Tr. 83:25- 84:21). Instead, on cross, Manouselakis admitted that Addendum 3 was issued, at least in part, to "work around" Graciano's request for acceleration costs. (Tr. 1104:22-1105:15; Manouselakis EBT Tr. 229:2-14)

68. Manouselakis testified vis-à-vis Addendum 3 that deletions from a subcontract would generally be the result of deletions by the owner but that, in this case, Lanmark intended to perform Graciano's work when it issued Addendum 3. (Tr. 906:10-908:12; Manouselakis EBT Tr. 242:15-24). This is consistent with Staknis' representation in July of 2014 that Lanmark would use its own forces to complete Graciano's work under the terms of the Subcontract. Staknis testified at his deposition that the Subcontract authorized Lanmark to "reassign the work. . .at their discretion to other contractors or their own forces." (Staknis EBT Tr. 91:10- 92:2). Nevertheless, Manouselakis testified that Lanmark never considered terminating Graciano for convenience under Article 13.2 of the Subcontract. (Manouselakis EBT Tr. 255:11-256:3).

69. As threatened by Staknis, on September 2, 2014 Lanmark sought to back-charge Graciano $133,920.72 for various items of work including dust cleaning, scaffolding repair and work for Transcontinental through August 19, 2014 that were either not withing Graciano's scope-of-work or which were paid by the SCA pursuant to approved change orders. (Tr. 275:23-279:24, 915:1-925:24; 1128:2-1130:11, Subcontract at 9 [Exclusions], Def. Exs. XX, KKK at 33, WWW; Pl. Exs. 24, 76).

70. Also on September 2, 2014, Lanmark submitted a Time Extension Proposed Change Order to SCA that, among other things, referenced delays with the steel work but did not attribute any fault to Graciano for the delays. (Pl. Ex. 110).

71. On September 5, 2014, Graciano submitted Application No. 7 for payment to Lanmark (Pl. Ex. 83). According to Application No. 7, Graciano completed 30% of its contract work through August 2014 in the amount of $1,619,935, less payments previously made of $1,141,164.00, leaving a balance due of $465,098. (Tr. 304:3-308:14).

72. On September 8, 2014 Graciano replied by letter to Lanmark's Addendum 3 stating, in relevant part, that "the deleted work represents the main identity and purpose of the Subcontract" and that Addendum 3 was issued "in an arbitrary and capricious manner" resulting in a "cardinal change to the Subcontract" constituting "Lanmark's abandonment of the Subcontract." (Def. Ex. LL).

73. Graciano proceeded to demobilize from the Project on September 8, 2014 and commenced this action on September 9, 2014 (NYSCEF 1; Pl. Ex. 14 at 24).

74. On September 11, 2014 Lanmark issued a NOTICE TO CURE and directed Graciano to "immediately return to the jobsite" or risk "termination off your subcontract for cause. . ." (Def. Ex. MM).

75. Lanmark issued a NOTICE OF TERMINATION to Graciano on September 12, 2014. (Def. Ex. NN).

76. Lanmark did not seek any other subcontractor estimates to complete Graciano's work under the Subcontract nor did it make a demand upon Liberty, Graciano's performance bonding company, for it to complete the work. (Pl. Ex. 111; Manouselakis EBT Tr. 266:6-15). Instead, Graciano's work, including the work eliminated from the Subcontract by Addendum 3, was ultimately completed by Lanmark, with its own labor force, in October of 2015. (Tr. 912:19-23; Manouselakis EBT Tr. 189:2-190:14, 260:8-12; Pl. Ex. 108 at Item 4815).

77. In response to Lanmark's subsequent claim under the Performance Bond, Liberty requested information from Lanmark including "contemporaneous correspondence from [Lanmark] to Graciano regarding the basis or reasons for the deletion of work set forth in Addendum #3. Further, please advise as to how the work that was deleted in Addendum #3 was ultimately completed. . .or is in the process of being completed. . ." Lanmark did not respond in

writing to Liberty's request for information, resulting in the denial of its claim. (Pl. Ex. 111, Tr. 1136:12-1138:10).

78. According to Graciano's Application No. 7 for payment sent on September 5, 2014 – in between its receipt of and reply to Addendum 3 – the balance left on the Subcontract as of August 31, 2014 was $3,810,022.61. (Pl. Ex. 83). Foglio testified on Graciano's behalf that Graciano sought lost profits on the work deleted by Addendum 3 valued at "[a]pproximately $3,800,000" in the amount of "10 percent" based on "[h]istorical data, and, you know, what I had estimated it to be" even though he believed "gross margin was 18 percent." (Tr. 325:24-327:2). However, no other evidence was entered at trial to support Graciano's claim for lost profits after it demobilized from the Project other than the claimed contract balance. (Tr. 595:5-597:10-16).

79. Pursuant to a change order agreed to by Lanmark and SCA in September of 2017, the Project was substantially completed as of December 11, 2015 and no liquidated damages were assessed by the SCA. (Def. Exs. XXX, DDDD).

CONCLUSIONS OF LAW

A. Addendum 3 Constitutes a Cardinal Change and Breach by Abandonment of the Subcontract By Lanmark Entitling Graciano to Damages

To recover for breach of contract, Graciano must establish (i) the existence of a valid contract; (ii) Graciano's performance; (iii) Lanmark's breach; and (iv) resulting damages (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]). The existence of the Subcontract is not in dispute (*Graciano, supra* 184 AD3d at 436).

A contract may be breached by repudiation or an abandonment (*E. Empire Constr. Inc. v Borough Constr. Group LLC*, 200 AD3d 1, 6 [1st Dept 2021]). Whether a contract has been abandoned is a question of fact (*Matter of Rothko's Estate,* 43 NY2d 305, 324 [1977]). The Court may consider the language of the contract as a whole in determining whether there was a wrongful termination (*New Image Const., Inc. v TDR Enterprises Inc.*, 74 AD3d 680, 681 [1st Dept 2010] *citing MCK Bldg. Assoc., Inc. v St. Lawrence Univ.*, 301 AD2d 726, 728 [3d Dept 2003], *lv. dismissed* 99 N.Y.2d 651, 760 N.Y.S.2d 104, 790 N.E.2d 278 [2003]). The Court holds that the Subcontract was abandoned by Lanmark excusing Graciano from further performance (*see MCK Bldg. Assoc., Inc.,* [holding a construction contract was wrongfully terminated for default, not convenience as argued by the defendant, based upon the language employed in the termination notice]).

New York recognizes the "cardinal change doctrine" (*CAC/BHL Joint Venture, LLC v Tishman Const. Corp. of New York*, 2022 N.Y. Slip Op. 31718[U], 3 [N.Y. Sup Ct, New York County 2022]). Under New York law, a "cardinal change" to a contract constitutes a material breach of a construction contract (*see* § 6:4. Basic clause coverage—The cardinal change doctrine, 33 N.Y.Prac., New York Construction Law Manual § 6:4 [2d ed.] [collecting cases]). The cardinal change doctrine prohibits a change that seeks to "alter or destroy the essential

identity" of the contract (*Natl. Contr. Co. v Hudson Riv. Water Power Co.*, 192 NY 209, 217 [1908]).

Like other breaches, whether a cardinal change has occurred is a question of fact to be determined by the Court (*Laquila Group, Inc. v Hunt Const. Group, Inc.,* 44 Misc 3d 1203(A) [NY Sup Kings Co. 2014] *citing Bovis Lend Lease LMB Inc. v GCT Venture, Inc.,* 6 AD3d 228, 229 [1st Dept 2004]; [*see Mikada Group, LLC v T.G. Nickel & Assoc., LLC*, 13 CIV. 8259, 2014 WL 7323420, at *17 [SDNY Dec. 19, 2014] [applying New York law]). The Court determines the credibility of the witnesses at a bench trial (*Saperstein v Lewenberg*, 11 AD3d 289 [1st Dept 2004]). The Court finds that Foglio testified credibly at trial concerning the Project and the termination of the relationship between Graciano and Landmark occasioned by Addendum 3.

It is not unusual for complex municipal construction projects to encounter delays, and the Project was no exception (*Corinno Civetta Const. Corp. v City of New York*, 107 AD2d 610, 611 [1st Dept 1985], *affd,* 67 NY2d 297 [1986] [discussing the common use of "no-damage-for-delay" clauses in City contracts]). However, a breach by the contractor absolves the non-breaching party of the effects of a no-damage-for-delay clause (*Graciano, supra* 184 AD3d 435 *citing id.*). Here, Graciano's ability to perform its work timely and efficiently was undermined by sequencing delays that were beyond its control and were apparent to Lanmark before Graciano ever arrived at the Project site and were repeatedly called to Lanmark's attention by Graciano. Differing site conditions resulting in numerous RFIs further delayed Graciano through no fault of its own. The Court agrees that the initial scaffolding issues resulted in a "snowball effect" that ultimately caused Lanmark to abandon its Subcontract with Graciano (Tr. 1018:5-9). The Court holds that Addendum 3 constitutes a cardinal change to, and therefore a material breach of, the Contract (*Natl. Contr. Co.,* 192 NY at 216-17; *Crane-Hogan Structural Sys., Inc. v*

State, 88 AD3d 1258, 1260 [4th Dept 2011] [cardinal change existed where rehabilitation of a bridge was changed to a replacement during the project]).

Upon the breach, Graciano appropriately elected the remedy of terminating its performance and commencing this action (*Rebecca Broadway Ltd. Partnership v Hotton*, 143 AD3d 71, 80 [1st Dept 2016]). Justice Bransten determined on summary judgment that provisions like Article 8.1(a), upon which Lanmark relies, are permissible "so long as they 'do not alter the essential identity of the main purpose of the contract. Enforcement of an omission clause also requires a finding that defendant's actions in omitting portions of the contract were not arbitrary or capricious'" (*Graciano* 2018 N.Y. Slip. Op. 33388[U] *8-9 *quoting Peter Scalamandre & Sons, Inc. v. New York*, 65 A.D.3d 774, 777 [3d Dept 2009]). Permitting Lanmark to delete substantially all the remaining masonry work integral to the Subcontract through Addendum 3 would eliminate the "essential identity" of the Contract. Moreover, allowing Lanmark to compel Graciano to complete the delayed work with no guarantee of payment (given Lanmark's issues with the SCA) pursuant to Article 8.1 rather than a compensable termination for convenience or suspension of work under Article 13 would be arbitrary and capricious (*Matter of Richter v Delmond,* 33 AD3d 1008, 1009 [2d Dept 2006][collecting cases]).

There is no dispute that Addendum 3 deleted (and ultimately reassigned) the premium work that Foglio credibly testified was the core of the masonry Subcontract. The evidence shows that Lanmark intended to utilize its own forces to complete Graciano's work by late June 2014 when the Project was experiencing (potentially non-compensable) significant delays. Lanmark's election to utilize Addendum 3 was made in response to Graciano's request for acceleration payments and failure to accept Lanmark's counterproposal that would result in

Graciano waiving future delay claims that could have been rejected by the SCA. Stated differently, Lanmark sought to simultaneously transfer the risks associated with the delays to Graciano while wielding the "no damage for delay" clause as a sword.

Lanmark's arguments to the contract are not persuasive. Contrary to Lanmark's contention that Addendum 3 is not a "change order" under the terms of the Subcontract (NYSCEF 593 at 10-16 [Defendants' Post-Trial Reply Brief]), Article 8.1 invoked by Lanmark is titled "**Change Orders"** and the text of Article 8.1(a) expressly requires a written "[c]hange Order or Field Order duly signed. . ." (As noted above, Addendum 3 was not signed). Here, the purported deletion was not a deletion at all – it was a *reassignment* (from Graciano to Lanmark) of the core masonry work under the Subcontract, demonstrating the cardinal nature of the changes sought to be achieved through Addendum 3 (*N. Star Contr. Corp. v The City of New York,* 2009 N.Y. Slip Op. 31719[U] [N.Y. Sup Ct, New York County 2009] ["the deletion of the East 78th Bridge from the Contract constitutes a cardinal change because it is a material change that alters the very nature of the Contract"]; *In re Liquidation of Union Indem. Ins. Co. of New York*, 220 AD2d 339, 340 [1st Dept 1995] [change order "materially altered the terms of the original contract"]).

The primary cases advanced by Lanmark do not compel a different result (*Polo Elec. Corp v New York Law School*, 2012 N.Y. Slip Op. 33564[U] [N.Y. Sup Ct, New York County 2012], *affd sub nom.* , 2014 N.Y. Slip Op. 00604 [1st Dept 2014] [work could be "completed by other contractors if PMG determined that plaintiff committed any act of default. . ."). Here, Lanmark did not (and, based on the facts, could not) declare Graciano to be in default of the Subcontract. Instead, Graciano immediately disputed Addendum 3 and considered the Contract breached, which is consistent with a claim of a cardinal change amounting to an abandonment

(*CAC/BHL Joint Venture, LLC, supra* *3 "[Further, it appears that plaintiff continued to perform and is not really seeking a release from all the Subcontract terms, which would be the result if a cardinal change were established"]); *Mikada Group, LLC, supra* at *17 [continued performance may not be consistent with a finding of cardinal change]).

Moreover, permitting Article 8.1(a) to authorize Addendum 3 for the purposes advanced by Lanmark would render Article 13 of the Subcontract meaningless because Lanmark could effectively terminate the Subcontract through a change order without compensating Graciano. That result would eliminate the contractual requirements that Lanmark establish a "for cause" termination under Article 13.1 (which permits Lanmark to "have the Work completed by such means as it deems necessary for timely completion of the Project") or that it pay all costs, including reasonable overhead and profit, under Article 13.2, Termination for Convenience of Contractor, or that Graciano award a corresponding time extension for suspending the work under Article 13.3 (Suspension of Work) . Under New York law,
"a contract should not be read so as to render any term, phrase, or provision meaningless or superfluous" (*R.C. Diocese of Brooklyn v Christ the King Regional High School*, 164 AD3d 1390, 1393 [2d Dept 2018] *citing God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006] [other citations omitted]); (*Natixis Real Estate Capital Tr. 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 133 [1st Dept 2017] [collecting cases]).

With further respect to the cardinal nature of the change, the Court rejects Lanmark's contention (Defendants' Post Trial Reply Brief at 19) that Addendum 3 was not a cardinal change because the Subcontract was for a "routine masonry replacement project." The Project was in fact a "complete masonry installation" that involved high-end craftsmanship in a

landmarked building, warranting the retention of a specialist firm like Graciano (*Laquila Group Inc., supra,* *11 [collecting cases]). Lanmark's "argument fails commons sense" on these facts (especially given Justice Bransten's summary judgment order as affirmed by the First Department) and would, if "[c]arried to its logical conclusion," permit Lanmark to replace subcontractors at its sole discretion at any time (e.g., re-bid ongoing work) and terminate by 'deletion' any subcontractor without facing the repercussions of the termination provisions. (*Natixis, supra,* *139). To be clear, this is not to suggest that Lanmark (with SCA's assent) could not have changed the nature and scope of the masonry work required for the Project, but that is not what happened. The nature and scope of the work remained the same – Lanmark simply determined that it would do the work rather than Graciano.

With respect to Lanmark's allegations that delays were the fault of Graciano, the Court rejects the contentions that scheduling as well as coordination of subcontractors was Graciano's responsibility or that Lanmark repeatedly requested a schedule from Graciano. (Defendants' Post-Trial Reply Brief at 4-5). Section 3.1 of the Subcontract provides that Graciano was to work according to **THE APPROVED PROGRESS SCHEDUDLE AS APPROVED BY THE OWNER AND PROVIDED BY THE CONTRACTOR** which was not provided by Lanmark to Graciano**.** The exhibits cited by Defendants show Lanmark proposing a schedule and counsel for Lanmark (through counsel) subsequently seeking to shift the burden to Graciano as the Project faltered (and contradicting representations made to SCA by Lanmark). (Defendants' Post-Trial Reply Brief at 4). The record establishes that Lanmark failed to adhere to its initial scheduling obligations; caused confusion between the R2 and B000 schedules; and ultimately failed to adhere to any schedule resulting in fourteen modifications. Lanmark's argument that Graciano was responsible for its scheduling problems fails when the contract is "read as a whole

to determine its purpose and intent" (*Natixis, supra, quoting W.W.W. Assoc., v. Giancontieri,* 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990]).

Similarly, the Court rejects Lanmark's arguments that Graciano failed to provide Notice of Delay pursuant to Article 3.4 of the Subcontract or request Extension of Times pursuant to Article 3.5 of the Subcontract or commit any other violation resulting in a waiver. (Defendants' Post-Trial Reply Brief at 1-3, 5). As stated above, Lanmark failed to properly schedule the Project; did not provide notice of the approval of the R2; and was notified in writing on many occasions (and in fact represented to the SCA) that the Project was delayed through no fault of Graciano.

The evidence at trial did not support Lanmark's contention (Defendants' Post-Trial Reply Brief at 21) that Graciano had a "master plan to abandon the Project. . ." Graciano was delayed from the start of the Project by Lanmark's failure to coordinate work; could not increase its production despite offers to do so because of scaffolding and steel delays; was prevented from working due to design deficiencies; increased manpower at Lanmark's (unreasonable) request; Lanmark attempted, unsuccessfully, to replace Graciano before issuing Addendum 3; and Foglio credibly testified that Graciano was willing to undertake demolition and other work (including out-of-sequence work) in order to proceed to the high-value restorative work at 29B.

Finally, the Court rejects Lanmark's contention that Mr. Foglio was not credible. Notably, Lanmark contends that Mr. Foglio was untruthful when he testified that he "never contemplated that entire elevations of work could be deleted from the Subcontract" under Article 8.1 of the Subcontract by citing to a portion of the transcript in which the Court sustained Plaintiff's counsel's objections to the pertinent question. (Defendants' Post-Trial Reply Brief at 4). Mr. Foglio's credibility cannot be assailed by reference to an objectionable line of

questioning and as stated above, the Court finds Foglio to be a credible witness (*Boruch v Morawiec*, 51 AD3d 429, 430 [1st Dept 2008]).

The Court concludes, based on the testimony and documents admitted at trial, that Addendum 3 constitutes a material breach, by abandonment, of the Subcontract and that Graciano is entitled to damages (*DeGraw Constr. Group, Inc. v HPDC2 Hous. Dev. Fund Co., Inc.,* 189 AD3d 405, 406 [1st Dept 2020] (evidence at non-jury established that plaintiff subcontractor appropriately walked-off the project and was entitled to damages plus per-judgment interest).

B. Damages

Following trial, and based upon the evidence, Graciano seeks damages as follows:

Unpaid Contract Work through August 2014;	$465,098.00
Unpaid Contract Work in September 2014:	$86,181.00
Window Kerf CO:	$180,783.00
Acceleration CO:	$190,635.00
Parapet CO:	$33,521.74
Lost Profit on Remaining Work:	$380,000.00
Subtotal:	$1,336,218.74
Less Credit for Addendum 1:	($30,485.91)
Total:	**$1,305,732.83**

(Plaintiff's Proposed Findings of Fact ¶ 225 [NYSCEF 581]). With the exception of the request for lost profits on remaining work ($380,000), the Court finds that the preponderance of the evidence at trial supports Graciano's claim.

Article 13.2(b) of the Subcontract provides:

> In the event of a termination of this Agreement pursuant to this Section, Subcontractor shall be paid by Contractor, only the apportioned costs incurred by Subcontractor and arising out of said termination INCLUDING REASONABLE OVERHEAD AND PROFIT. Contractor shall have no liability for lost profit or overhead on any unperformed Work.

Article 21.4 of the Subcontract authorizes an award of money damages but does not expressly provide for lost profits. Under New York law, "[d]amages are intended to return the parties to the point at which the breach arose and to place the nonbreaching party in as good a position as it would have been had the contract been performed. Thus, damages for breach of contract are ordinarily ascertained as of the date of the breach" (*Brushton-Moira Cent. School Dist. v Fred H. Thomas Assoc., P.C.*, 91 NY2d 256, 261 [1998]).

In the construction context, where "a contract has been terminated prior to completion, quantum meruit is the appropriate measure of damages" (*Silver Erectors, Inc. v Chelsea Dynasty LLC* [N.Y. Sup Ct, New York County 2017] *quoting MCK Bldg. Assoc., Inc., supra*. "The customary method of calculating damages on a *quantum meruit* basis in construction contract cases both on completed contracts and contracts terminated before completion is actual job costs plus an allowance for overhead and profit minus amounts paid" (*Najjar Indus., Inc. v City of New York,* 87 AD2d 329, 331-32 [1st Dept 1982], *affd sub nom.*, 68 NY2d 943 [1986]). This is true when the breach is occasioned by a cardinal change (*Crane-Hogan Structural Sys., Inc. v State,* 88 AD3d 1258, 1260 [4th Dept 2011] *citing id*). Accordingly, the Court holds that Graciano is entitled to damages calculated on a *quantum meruit* basis for all work it completed at the Project through demobilization.

However, the Court holds that Graciano is not entitled to recover for lost profits for work that Graciano did not complete. Addendum 3 improperly sought to accomplish a termination for convenience which could have been done under Article 13 of the Subcontract. Article 13.2 provides for profits on work completed but excludes lost profits for uncompleted work. Lost profits may be awarded on a contract claim where they were within the contemplation of the parties and can be proven with reasonable certainty (*Awards.com, LLC v Kinko's, Inc.*, 42 AD3d

178, 183 [1st Dept 2007], *affd,* 14 NY3d 791 [2010] ["Supreme Court properly disposed of the lost profits claim. To recover such damages in a breach of contract claim, a plaintiff must establish that such damages were actually caused by the breach, that the 'particular damages were fairly within the contemplation of the parties to the contract at the time it was made' and that the alleged loss is 'capable of proof with reasonable certainty'"]; *MG W. 100 LLC v St. Michael's Prot. Episcopal Church,* 127 AD3d 624, 626 [1st Dept 2015] [finding "no evidence in the record that lost profits were within the contemplation of the parties" to a construction contract and dismissing contract claim to the extent it sought lost profits]). On these facts, and considering the Subcontract as a whole, the Court finds that the parties did not intend to provide for recovery of lost profits for work that was not completed due to a termination.

The fact that Graciano's contract damages may be calculated on a *quantum meruit* basis does not alter the result because "the measure of recovery generally is limited to the reasonable value of the services rendered" (*ProSource Tech., LLC v Hous. Tr. Fund Corp.*, 49 Misc 3d 1205(A) [NY Sup Albany County 2015] *citing Davis v. Cornerstone Tel. Co., LLC,* 78 A.D.3d 1263, 1264, 910 N.Y.S.2d 254 [3d Dept 2010]). Although lost profits may be recovered because of a cardinal change, they are typically recoverable where the work is completed and not where the subcontractor elects to treat the contract as abandoned (*N. Star Contr. Corp. v The City of New York*, 2009 N.Y. Slip Op. 31719[U] [N.Y. Sup Ct, New York County 2009] *citing McMaster v State*, 108 NY 542, 554 [1888]). Thus, on these facts, a *quantum meruit* award may not include hypothetical profits for construction work not completed (*Miranco Contr., Inc. v Perel*, 57 AD3d 956, 958 [2d Dept 2008] *citing Najjar Indust.* 87 AD2d 331-332).

Finally, Foglio's testimony concerning lost profits is insufficient for the Court to award the $380,000 amount sought (*Jay Martin Sys., Inc. v Ogilvy Group, Inc.,* 293 AD2d 410, 411 [1st

Dept 2002]). Given the problems on the Project, the fact that Graciano could have been terminated for convenience (or had its work suspended), and the increased costs facing Graciano, the Court finds that – even if the Subcontract authorized lost profits for uncompleted work – that Graciano cannot "demonstrate lost profits to a reasonable degree of certainty" based solely on the amount allegedly remaining on the Subcontract (*Networks USA, LLC v HSBC Bank USA, N.A* [N.Y. Sup Ct, New York County 2011], *affd sub nom.* 94 AD3d 638 [1st Dept 2012]).

Accordingly, Graciano's damages are **$925,732.83** (that is, the full amount sought minus the demand for $380,000 in lost profits on work not completed), plus pre-judgment interest from September 8, 2014, pursuant to CPLR 5001.

CONCLUSION

It is, therefore:

ORDERED AND ADJUDGED that Plaintiff Graciano is entitled to relief on its first cause of action for breach of contract in the amount of **$925,732.83,** with pre-judgment interest from September 8, 2014, to be calculated by the Clerk of Court; and it is further

ORDERED AND ADJUDGED that Plaintiff Graciano is entitled to relief on its third cause of action for recovery under the Payment Bond to the same extent as its first cause of action (though it may recover the amount only once); and it is further

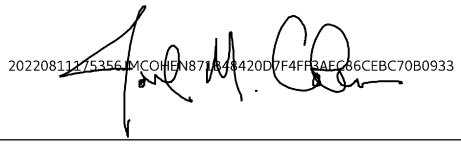
ORDERED AND ADJUDGED that Defendant Lanmark's counterclaim for breach of contract is **DISMISSED** with prejudice; and it is further

ORDERED AND ADJUDGED that Defendant Lanmark's third-party complaint is **DISMISSED** with prejudice; and it is further

ORDERED that the parties settle a judgment based upon this Decision After Non-Jury Trial. The parties are strongly encouraged to agree as to the form of judgment and submit a proposed judgment on NYSCEF and with a Word copy to sfc-part3@nycourts.gov on consent

within ten (10) days of the filing of this Decision (without prejudice to any party's right to appeal the substance of the judgment). If the parties cannot agree on a form of judgment, Plaintiff shall submit a proposed judgment within fourteen (14) days of the filing of this Decision and Defendants shall submit any proposed counter-judgment within five (5) days thereafter.

ENTER:



DATE: 8/11/2022 **JOEL M. COHEN, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**