STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

LARDON CONSTRUCTION CORP.,

Plaintiff,

- against -

MARK CERRONE, INC., and
THE HANOVER INSURANCE COMPANY,

Defendants.

8TH JUDICIAL DISTRICT
COMMERCIAL DIVISION
DECISION, ORDER, AND JUDGMENT
Index No.: E169766-2019

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **GEFFREY GISMONDI, LLC**
Geffrey Gismondi, Esq., Of Counsel
Attorneys for Plaintiff

DUKE HOLZMAN PHOTIADIS & GRESENS LLP
Charles C. Ritter, Esq., Of Counsel
Thomas D. Lyons, Esq., Of Counsel
Attorneys for Defendants

WALKER, J.

Defendants, Mark Cerrone, Inc. ("Cerrone") and The Hanover Insurance Company ("Hanover"), have applied for an order (Motion 1; Doc. 22) dismissing the Complaint (Doc. 1) in its entirety and granting summary judgment on their counterclaim in the amount of $327,085.26, together with interest, attorney's fees, and costs.

BACKGROUND

The following facts are undisputed:

1. This action case arises out of a construction project known as the Chautauqua

County Landfill Phase IV Expansion ("Project"). The Project involves the expansion of the Chautauqua County landfill located along Towerville Road in the Town of Ellery, New York. Towerville Road bisects the landfill from east to west; thus, the landfill is located north and south of Towerville Road (Doc. 23, ¶5).

2. Cerrone and the County entered into the Prime Contract, dated June 1, 2017 relating to the Project (Doc. 26).

3. From the Project's inception, the County of Chautauqua ("County") emphasized that scheduling was a primary concern, including building into the Prime Contract's Specifications that the County anticipated the Project to span three (3) construction seasons. The Prime Contract provided that the County could impose certain penalties on Cerrone if the Project's completion was delayed by Cerrone or its subcontractors (Doc. 23, at ¶8). Accordingly, all of the subcontracts between Cerrone and its subcontractors include a "time is of the essence provision" regarding Project completion (*Id*., at ¶9).

4. The Project was phased, and included the south phase (south of Towerville Road) and the north phase (north of Towerville Road), with work initially commencing on the south phase (*Id*., at ¶¶7, 10).

5. Both phases required that all shrubs, bushes, trees, stumps, roots, stones, and/or other large-style debris/items had to be removed from the soil at the Project site ("Site"). Defendants referred to the removal of such material as the Site being "cleared and grubbed" (*Id*., at ¶10).

6. Following the removal of such material, the topsoil throughout the Project site was stripped and screened to remove any remaining debris. Different levels of screening were

required for the topsoil, depending on the intended use(s) for the topsoil in the landfill. For example, topsoil that was screened to remove any debris larger than one (1) inch would be stockpiled for use as "structural fill," while topsoil screened to three (3) inches would be used as "low permeability" soil (*Id*., at ¶¶11-12).

7. Cerrone entered into a subcontract with non-party, Chautauqua Timber Management, LLC ("Chautauqua Timber"), dated July 6, 2017, to perform "logging" work at the Site south of Towerville Road. The logging work involved the removal of timber from the Site, but left behind brush and other materials (such as limbs), referred to as "slash" (*Id*., at ¶¶13-14; Doc. 27).

8. Cerrone entered into a subcontract with Lardon, dated July 31, 2017, relating to the Project ("Subcontract") (Doc. 28). The Subcontract required Lardon to leave the Site "stump grounded and root raked such that material left behind shall be wood chips small enough not to impede topsoil stripping and re-use[.]" (*Id*., at p. 1).

9. Work on the south side of Towerville Road began in early July 2017, with Chautauqua Timber commencing logging work (Doc. 23, ¶17; Doc. 57).

10. Lardon commenced the following two (2) actions that have been consolidated into the above-captioned matter: (i) a lawsuit against Cerrone only, claiming Lardon is owed lost profit, in an unstated amount, for "soil screening" work ("Screening Claim"); and (ii) a lawsuit against Cerrone and Hanover, claiming Lardon is owed $263,138.28 for extra costs relating to the Project, and seeking to enforce a mechanic's lien for that amount against the lien-discharge bond issued by Hanover ("Extra Costs Claim").

11. Cerrone issued Subcontract Change Order #2 to Lardon, dated August 8, 2017,

signed by Lardon on August 24, 2017, regarding "Logging south side of Towerville Rd," by which Lardon agreed to perform the following:

> 1. Pond #1 Stockpile/Screening Area #2 (9 acres) shall be logged to the side of the road by 8-22-2017.
>
> 2. Pond #2 && (sic) Long Term Soi1 Storage Area #2 (9 acres) to be logged by 9-8-2017.
>
> 3. Contractor to provide 4 days assistance with side of ravines that stump grinder can't get access too.
>
> 4. Work to be performed in coordinated simultaneous effort with base bid clearing & stumping and [Cerrone] crews to allow for continued project progress.
>
> Add to point 3. or the reasonable time frame that it takes to stump the sides of the ravines.

(Doc. 28, p. 20; Doc. 23, ¶20).

12. The Subcontract identifies three (3) methods to be used to clear the Site of trees and vegetation, including "slash removal, hydroaxe clearing and stump grinding" (Doc. 28, p. 1).

13. Slash removal involves clearing vegetation using tools (Doc. 64, ¶29).

14. Hydroaxe clearing is a method of shredding and chopping trees and vegetation into wood chips by using blades attached to machinery, such as a Bobcat on treads (*Id.*, at ¶30).

15. Stump grinding means grinding stumps in place (in the ground) into wood chips (*Id.*, at ¶31).

16. According to Cerrone, Lardon represented to Cerrone that it could perform the topsoil screening work cheaper and faster than if Cerrone rented or purchased its own equipment, because Lardon owned the required screening equipment (Doc. 23, ¶24).

17. As a result, Cerrone issued Subcontract Change Order #4 to Lardon, dated

September 22, 2017, which Lardon signed on September 29, 2017. Subcontract Change Order #4 added all of the logging work for the north side of Towerville Road and certain topsoil screening work to Lardon's Subcontract (Doc. 28, pp. 23-24).

18. Upon entering into Subcontract Change Order #4 with Lardon and receiving assurances from Lardon that it would continuously work on the Project in order to meet a February 28, 2018 deadline (with respect to both the south and north sides of Towerville Road), Cerrone closed out is subcontract with Chautauqua Timber. By October 12, 2017, Lardon had completed all of its work south of Towerville Road (Doc. 23, ¶¶29-31).

19. Over the summer of 2017, the Project experienced delays in terms of logging and stump removal, which interfererd with topsoil stripping and related activities. According to Lardon, the delays were caused by the three (3) methods Cerrone required Lardon use to clear the Site (i.e., slash removal, hydroaxe clearing, and stump grinding), all of which Lardon claims are both time-consuming and labor intensive. Accordingly, Cerrone and Lardon agreed that Lardon should instead begin removing the stumps from the ground and placing them in piles to be removed off-site. This new methodology was outside the Subcontract and required different machinery and equipment, such as bulldozers, excavators, and haul trucks. According to Lardon, Cerrone and Lardon worked together to timely complete the logging work on the south side of Towerville Road according to the new methodology required by Cerrone (*Id*., at ¶¶21, 22; Doc. 64, ¶¶32-39).

20. Cerrone paid Lardon for all work Lardon performed on the south side of Towerville Road, and Lardon has not asserted a claim related to that work (Doc. 64, ¶40).

The remaining facts are disputed.

With respect to the north side of Towerville Road, Cerrone contends that Lardon failed to timely complete the logging work that was the subject of Subcontract Change Order #2, and that such delays interfered with, and delayed topsoil stripping and related work in accordance with the Project's schedule. Cerrone further contends that Lardon reneged on its promise to work continuously from October 2017 through February 2018 to meet a February 28, 2018 Project deadline. Rather, according to Cerrone, by October 15, 2017, Lardon withdrew substantially all of its manpower from the Project (Doc. 23, ¶¶28-37).

In response to these contentions, Lardon contends that it was "willing, and able to start working on the north side in the same manner as south side," but that Cerrone failed to work with Lardon on the north side in the same manner that it assisted Lardon on the south side of Towerville Road; that is, by lending its "bulldozers, operators, and haul trucks" to the north side work (Doc. 64, ¶¶70-73).

Cerrone further contends that, as a result of Lardon's failure to complete its work on the north side of the Site by February 28, 2018, Cerrone commenced stripping topsoil from the Site (out of sequence) by working around Lardon. As a result, Cerrone consistently worked around Lardon, and was forced to increase its manpower and incur extra costs to make up time that was already lost, and being lost, due to Lardon's failure to timely complete what Cerrone describes as "clearing and grubbing" (Doc. 23, ¶¶43-44).

With respect to the screening work, Cerrone contends that Lardon refused to perform such work because it misunderstood the scope and nature of the work. According to Cerrone, Lardon left the Site abruptly, requiring Cerrone to rent screening equipment and self-perform the screening work (*Id*., at ¶¶46-50).

The screening work was the subject of Subcontract Change Order #4. Cerrone, with a full reservation of rights, issued Subcontract Change Order #6, which deducted from Subcontract Change Order #4 each aspect of the screening work from Lardon's Subcontract. Lardon never signed and returned Subcontract Change Order #6 (*Id*., ¶¶51-52).

Lardon disputes Cerrone's contentions regarding the screening work, and contends that while Lardon was "ready, willing, and able to do the screening" and "more than capable of doing the work", Cerrone refused to permit Lardon to do it (Doc. 64, ¶¶77-83).

DISCUSSION

Cerrone seeks dismissal of Lardon's claims on the grounds that they are barred by the express terms of the Subcontract and that Lardon did not complete the work required by the Subcontract.

Whether Lardon's Claims Are Barred by the Subcontract

Lardon has asserted five (5) causes of action in connection with the Extra Costs Claim, including *quantum meruit*; unjust enrichment; breach of contract; mechanic's lien foreclosure; and breach of payment bond.

***Quantum Meruit* and Unjust Enrichment**

Lardon's *quantum meruit* and unjust enrichment claims must be dismissed, as duplicative of the breach of contract claim (*Cox v. NAP Const. Co., Inc*., 10 NY3d 592, 607 [2008] ["[A] party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter"]; *Jakes-Johnson v. Gottlieb*, 200 AD3d 1679, 1680 [4th Dept 2021 ["Plaintiffs' causes of action for *quantum meruit* and unjust enrichment are precluded by the existence of the valid and enforceable [contract]"]).

Breach of Contract

Lardon's Extra Costs Claim is reflected in four invoices, dated July 16, 2018, totaling $205,480.00, for work allegedly performed between April 24, 2018, and June 21, 2018, including transporting Lardon's equipment to the Site; bulldozing stumps from piles on Site to off-Site load areas; hauling stumps away from the load areas; and stripping topsoil (Doc. 25, pp. 115-128, 133-37, 147, 242-43; Docs. 37-40).

In the context of a construction contract,

> [t]he ultimate guide in determining whether or not the contractor is to be paid for extra work is the contract itself . . . . Recovery cannot be had for extra work which actually falls within the contract or the plans and specifications . . .

Bros, Inc. v. State, 62 AD2d 511, 515-16 [4th Dept 1978]).

Lardon's scope of work is set forth in §2.01 of the Subcontract, as follows:

> In strict accordance with all specifications, drawings and addenda[1] issued by the Owner and by the Architect / Engineer, the Subcontractor hereby agrees to furnish all labor, materials, equipment and supervision necessary to complete the following Scope of Work which includes but is not limited to the following:
>
> Perform slash removal, hydroaxe clearing and stump grinding for the entirety of the project site as defined by our surveyor Wendel (71 acres total). Site will be stump ground and root raked such that material left behind shall be wood chips small enough not to impede topsoil stripping and re-use.
>
> Price includes multiple mobilizations[.] Work on the area South of Towerville Road to begin immediately and shall be completed in a fashion not to hold up [Cerrone's] operations.

[1] The Subcontract referenced and incorporated all of the drawings, conditions (general, supplementary, and other), specifications, addenda modifications and other documents (collectively, "Contract Documents") that are part of the Prime Contract between Cerrone and the County.

(Doc. 28).

Lardon's contention that its "logging work" was not the equivalent of "clearing and grubbing" is belied by its pay applications, Mr. Palmer's deposition testimony, and the Project's Specifications.

Each pay application - which Lardon prepared, refers to the Subcontract as a "Contract For: Clearing and Grubbing" (Docs. 29-33).

Mr. Palmer testified that he understood "Clearing and grubbing" to "mean that basically you take all the trees down, you take all the stumps out, you process all of the material and then you ship it off" (Doc. 25, p. 34). Mr. Palmer's understanding is consistent with the plain meanings of the words "clearing" and "grubbing", as defined by Merriam-Webster. "Clearing" is defined as "the act or process of making or becoming clear; a tract of land cleared of wood and brush," while "Grubbing" is defined as "to clear by digging up roots and stumps; to dig up by or as if by the roots" (https://www.merriam-webster.com/dictionary/clearing; https://www.merriam-webster.com/dictionary/grubbing).

Finally, the term "clearing and grubbing" and its meaning appear throughout the Project's Specifications, as follows:

> SECTION 01150 - MEASUREMENT AND PAYMENT
> . . .
> 2.11 Item G13 - Clearing and Grubbing
> . . .
> ii. Basis of Payment - Payment of the unit price for this item shall be considered full compensation for furnishing and installing all labor, materials, tools, equipment and incidentals necessary to complete the work as shown, specified or directed, including but not limited to clearing and grubbing within required areas, loading, hauling and

on-site stockpiling or off-site disposal, as required, of cleared and grubbed materials.

(Doc. 55, p. 25)

SECTION 02110 - SITE CLEARING
. . .
1.01 DESCRIPTION OF WORK

A. Clearing vegetation and on-site disposal of cleared material.

B. Stripping topsoil and stockpiling stripped material on site.

C. The Contractor shall furnish all labor, materials, equipment and incidentals required to perform all clearing and grubbing as shown and specified.

(*Id.*, at p. 72).

SECTION 02110 - SITE CLEARING
. . .
PART 3 - EXECUTION

3.01 CLEARING AND GRUBBING

A. Limits of clearing shall be the areas shown on the Drawings. Damage outside these limits caused by the Contractor's operations shall be corrected at the Contractor's expense.

B. Trees, stumps and other cleared and grubbed material shall be disposed of at locations shown on the Contract Drawings or where otherwise directed or approved. Cleared or grubbed material shall not be used in backfills or structural fill/embankments.

(*Id.*, at p. 73).

As the above-quoted language from the Project's Specifications reflects, the removal of stumps was included as part of the requirements for clearing and grubbing, and payment for clearing and grubbing included all costs associated with all labor and equipment necessary to

mobilize, remove, and haul the cleared and grubbed material. Accordingly, Lardon cannot recover "extra costs" beyond the Subcontract price for performing work that was contemplated by, and expressly described in the Project's Specifications (*Savin Bros., Inc. v. State*, 62 AD2d 511, 515-16 [4th Dept 1978] ["Recovery cannot be had for extra work which actually falls within the contract or the plans and specifications"); *Ludemann Elec., Inc. v. Dickran*, 74 AD3d 1155, 1156 [2d Dept 2010] ["[A] contractor may not recover for any purported extra work that was actually covered by the terms of the original contract")].

Turning to Lardon's Screening Claim, Lardon has no basis to seek payment for topsoil screening, because it did not perform any such work, as contemplated by the Subcontract.

Compensable topsoil screening related to removing the soil and then screening it to remove any remaining debris. As explained above at undisputed fact no. 6, different levels of screening were required for the topsoil, depending on the intended uses for the topsoil in the landfill. For example, topsoil that was screened to remove any debris larger than one (1) inch would be stockpiled for use as "structural fill," while topsoil screened to three (3) inches would be used as "low permeability" soil (Doc. 23, at ¶¶11-12; Doc. 55, pp. 74-75).

Lardon, however, did not perform that type of stripping and screening. Rather, as Mr. Palmer confirmed at his deposition, Lardon removed topsoil solely for the purpose of removing wet soil and mud to enable its equipment to reach areas within the Site to perform the clearing and grubbing work:

> Q. On this project, the topsoil stripping, can you in your own words describe for me what that entailed?
>
> A. Okay. What stripping topsoil entails? Okay. What that means is that the topsoil, your top layer of soil, okay, needs

to be taken off. Most generally the stripping of the topsoil is not done by the land clearing guy. With this job in particular, because of the demands that were set forth by Mark Cerrone Construction, we had to get equipment into the site and you couldn't do that without stripping the topsoil. Because of the time of year, the wetness, so on and so forth. If you understand what I mean by that. Obviously it's mud. Right?

Q. Okay. So again, I mean, the time frame we're talking about is April 24th through May 8. Spring, right?

A. Right. Spring on the Chautauqua ridge.

Q. So what you're saying then is, **this stripping topsoil, it wasn't contracted for stripping of topsoil?**

A. **No.**

Q. This was, you are saying Lardon had to strip this topsoil so it could get its equipment in to do clearing and grubbing?

A. To do the removal of the stumps.

Q. Right. I mean, what we -- again, I'm not going to rehash old wood. What we talked about when it's stumping, what you were actually doing couldn't be done?

A. Right.

(Doc. 25, pp. 122-23) (emphasis added).

As demonstrated above, Lardon is not entitled to extra costs in connection with its claims for clearing and grubbing, because the entirety of such work was the subject of the Subcontract. Nor is Lardon entitled to extra costs associated with topsoil screening, because it did not perform any topsoil screening work.

In addition, there is no basis to compensate Lardon for extra costs, to the extent such costs could be characterized as outside the four corners of the Subcontract (and any change

orders), but otherwise necessary to complete the Project, because Lardon failed to comply with a required condition precedent to seeking such extra costs, set forth in §5.05 of the Subcontract.

Section 5.05 of the Subcontract provides as follows, in relevant part, regarding changes in Lardon's work and related claims for "extra costs":

> Subcontractor shall make all changes in its Work, whether such changes increase or diminish its Work, when ordered to do so in writing by Contractor. Subcontractor shall within three (3) working days after receipt of a change order request from Contractor, or within such lesser period of time as may be provided in the Contact Documents, notify Contractor, in writing if Subcontractor claims that such change order increases or decreases the cost or time for performance of its Work. If no additional time or money is so indicated within such time period, it shall be construed that there is no additional time or money to be allowed.
>
> Subcontractor agrees to furnish Contractor with written quotations for changes in the Work within a mutually agreeable time after such notification. Any change in the cost or time of performance shall be agreed upon in writing before such changes in Subcontractor's Work commences and no payment shall be made to Subcontractor for such changes unless such changes are properly authorized by written change order. Any changes to Subcontractor's Work performed by Subcontractor without a written change order shall be at Subcontractor's sole risk and expense.

(Doc. 28, p. 9).

It is undisputed that Lardon did not comply with the pre-conditions set forth in §5.05.

Compliance with pre-conditions provisions, such as §5.05, are particularly important where, as here, the Project is being funded with public money (*Rifenburg Const., Inc. v. State*, 90 AD3d 1498, 1498-99 [4th Dept 2011] [where public money is being used, notice requirements for claims associated with "extra costs" are much more strictly enforced, because "[t]hose

requirements are expressly designed to alert defendant to cost over-runs at the earliest possible time in order to allow it to take steps to avoid such extra expenses in the interest of protecting the public fisc"]).

Lardon's failure to comply with the pre-condition requirements of §5.05 resulted in a waiver of its Extra Costs Claim (*Fahs Rolston Paving Corp. v. County of Chemung*, 43 AD3d 1192, 1193-94 [3d Dept 2007]).

Finally, there is no support for Lardon's causes of action grounded in mechanic's lien foreclosure; and breach of payment bond because, as demonstrated above, Lardon is not entitled to any extra costs.

Cerrone's Counterclaims

With respect to clearing and grubbing on the north side of Towerville Road, Mr. Palmer contends in opposition to the application that Lardon was "willing, and able to start working on the north side in the same manner as south side" but that Cerrone failed to work with Lardon on the north side in the same manner that it assisted Lardon on the south side of Towerville Road; that is, by lending its "bulldozers, operators, and haul trucks" to the north side work (Doc. 64, ¶¶70-73). These contentions are unsupported by they record, and Lardon has not submitted any admissible evidence to support them.

Moreover, while Cerrone may have assisted Lardon with clearing and grubbing on the south side of Towerville Road, the Subcontract did not require Cerrone to do so, nor did it require Cerrone to do so on the north side of Towerville Road.

With respect to topsoil screening, Mr. Palmer testified that Lardon never attempted to contact Cerrone about returning to perform the screening work; and it never mobilized its

equipment to perform the screening work (Doc. 25, pp.243-49). Mr. Palmer indicated that by June 21, 2018, Lardon "wanted to be out of there" (*Id*., at pp. 224-25), and that he told a representative of Cerrone that he was "more than willing to sign something" for Lardon "not to do the screening" (*Id*., at 232-34). He also admitted that Cerrone did not prevent Lardon from performing the screening work (*Id*., at 243-249).

Indeed, Mr. Palmer testified that Lardon left the Site in June 2018, and never returned to perform topsoil screening (Doc. 25, pp. 243-249).

Accordingly, the court finds that Lardon abandoned the Project, and as a result, breached the Subcontract by (i) failing to timely complete clearing and grubbing work; (ii) requiring Cerrone to incur additional costs to assist Lardon with completing the clearing and grubbing work; (iii) requiring Cerrone to incur additional costs in performing the topsoil screening work by having to perform the work out of sequence and around Lardon's untimely clearing and grubbing work; and (iv) failing to perform any of the topsoil screening work.

When a subcontractor (Lardon) fails to complete its work, the non-breaching party (Cerrone) is entitled to the cost to complete the work as well as the monies expended repairing any defective work (*Home Const. Corp. v. Beaury*, 149 AD3d 699, 702 [2d Dept 2017] ["The Supreme Court properly concluded that the defendants were entitled to be compensated for the cost of completion of the construction work and the correction of defects in Home Construction's work, and the proper measure of damages is the fair and reasonable market price for correcting the defective installation or completing the construction"]); *American Std. v. Schectman*, 80 AD2d 318, 321 [4th Dept 1981]["In the usual case where the contractor's performance has been defective or incomplete, the reasonable cost of replacement or

completion is the measure"]).

The rule set forth in *Beaury* and *Schectman* "is merely a recognition of the precept that damages are intended to place the injured party in the same position as if there had been no breach" (*Brushton-Moira Cent. School Dist. v Fred H. Thomas Assoc., P.C.*, 91 NY2d 256, 262 [1998]).

Cerrone was required to self-perform topsoil screening work, topsoil stripping, and excavating work after Lardon abandoned the Project on June 21, 2018. In doing so, Cerrone incurred costs for, *inter alia*, renting equipment, fuel, and labor (including overtime to make up for time lost after Lardon abandoned the Project). These additional costs totaled $327,085.26 (Doc. 23, ¶¶57), and Lardon has not disputed the amounts.

The court notes, for purposes of the record, that Cerrone submitted a detailed memorandum of law (Doc. 63) and reply memorandum of law (Doc. 69) which, together, provided the court with the applicable law and analyzed the relevant provisions of the Contract Documents. Lardon, on the other hand, chose not to submit a memorandum of law and has not otherwise refuted the case law submitted by Cerrone, or Cerrone's interpretation of the Contract Documents.

In light of the foregoing, it is hereby

ORDERED, that Cerrone's application is granted in all respects and the Complaint (Doc. 1) is hereby dismissed; and it is further

ORDERED, that Cerrone shall, and hereby does, have judgment against Lardon on its counterclaim in the amount of $327,085.26, together with interest; and it is further

ORDERED, that Cerrone shall have leave to make an application for attorneys' fees and

costs (*see* §5.08 of the Subcontract; Doc. 28), and such application shall be made on or before May 11, 2022.

This constitutes the Decision and Order of this court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this court shall not constitute notice of entry.

Dated: April 11, 2022
Buffalo, New York

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District