SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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PIZZAROTTI IBC, LLC n/k/a PIZZAROTTI LLC,

Plaintiff,

-against-

A.L. ONE CONSTRUCTION, INC, A.L. ONE INC., and WILLIAM FELCONE,

Defendants

FELDMAN LUMBER-US LBM, LLC,d/b/a FELDMAN LUMBER f/k/a SAMUEL FELDMAN LUMBER CO., INC. d/b/a FELDMAN LUMBER

Plaintiff,

- v -

PIZZAROTTI, LLC , A.L. ONE INC., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144

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

BACKGROUND

These consolidated actions relate to construction projects known as the "Jardim Project" located at 527 West 27th Street, New York, New York and the "Ritz Carlton Project" located at the Ritz Carlton Residences, North Hills, New York. The Projects' owners retained Pizzarotti IBC, LLC n/k/a Pizzarotti LLC (Pizzarotti) to perform construction management services.

Pizzarotti entered into a written subcontract agreement with A.L. One Construction, Inc, A.L. One Inc (AL One) to perform specified carpentry work at the Jardim Project and to perform drywall work at the Ritz Carlton Project.

PENDING MOTION

On January 20, 2023, Pizzarotti moved for an order, pursuant to CPLR §3212, granting Pizzarotti summary judgment dismissing the counterclaims asserted by AL One and dismissing all claims asserted by Feldman Lumber - US LBM, LLC d/b/a Feldman Lumber f/k/a Samuel Feldman Lumber Co., INC. d/b/a Feldman Lumber (Feldman) as against Pizzarotti.

On February 17, 2023, the motion was fully submitted and the court reserved decision. For the reasons stated below, the motion is granted.

PROCEDURAL HISTORY

In July 2018, Pizzarotti commenced an action for breach of contract under Index Number 653514/2018 against AL One in relation to both Projects. AL One asserted counterclaims in that action for breach of contract and foreclosure of its Mechanic's Lien.

In November 2018, unaware of the Pizzarotti Action, Feldman commenced two actions in Nassau County for foreclosure of the Jardim and Ritz Carlton Liens. Pursuant to the order of the Honorable Jeffrey S. Brown dated July 2, 2019, the Pizzarotti Action was consolidated with the Feldman Actions and the Feldman Actions were moved to New York County before this Court.

All pleadings were served, and paper discovery was done. Pizzarotti, by Notice of Motion dated November 4, 2020, moved for summary judgment seeking the same relief sought in the pending motion. Pursuant to a decision and order dated July 30, 2021, the court (Kelly, J) denied the motion as premature, as discovery had not been completed.

Following denial of Pizzarotti's Motion for Summary Judgment, depositions were conducted and plaintiff filed Note of Issue on July 15, 2022.

ALLEGED FACTS

On or about February 22, 2017, AL One entered into a written agreement with Pizzarotti, in connection with the Jardim Project. Pursuant to the terms of the Jardim Subcontract, Pizzarotti agreed to pay AL One the lump sum price of $2,085,000. Section 4.2 of the Jardim Subcontract provided that Pizzarotti would pay AL One within ten calendar days of receipt of the Pizzarotti's receipt of payment from the owner, together along with a waiver and release of lien executed by AL One.

Pizzarotti approved a total of twelve (12) requisitions submitted by AL One seeking payments for work performed under the Jardim Subcontract, totaling $951,677.50. Pursuant to Section 4.2 of the Jardim Subcontract, with each payment requisition submitted to Pizzarotti, AL One was required to, and did, provide a signed and notarized waiver and release for the applicable payment period.

Pursuant to the express terms of the Jardim Releases, upon AL One's receipt of payment for work performed during the applicable billing cycle, AL One agreed to waive any and all claims up to and including the date of the waiver of lien and release. Additionally, by signing the Jardim Releases, AL One acknowledged and warranted that all its subcontractors and suppliers had been paid in full as of the date of the given release.

The last requisition submitted by AL One and approved by Pizzarotti was application No. 12, seeking payment in the amount of $122,379.50. Application No. 12 corresponding release, dated June 1, 2018, which was signed by AL One on June 15, 2018, confirmed that: (i) AL One acknowledged that Pizzarotti had paid AL One a total of $922,834.00; and (ii) upon its receipt of

the amount requisitioned for application No. 12 ($122,379.50), AL One understood and agreed that the Release was a

> … knowing and willful acknowledgement that [al one] has been fully paid for all work, labor and materials or equipment provided by [al one], its sub-contractors and suppliers through the above-referenced date in accordance with terms of this waiver of lien and release.

During the Jardim Project Pizzarotti learned that AL One had not paid Feldman, who had filed a mechanics lien, on or about July 24, 2018, in the amount of $196,991.65. Thereafter, Pizzarotti sent formal notices to AL One advising of liens that had been filed by Feldman and demanding that AL One immediately discharge the liens in accordance with its obligations under the Jardim Subcontract. As a result of AL One's failure to discharge Feldman's mechanic's lien, Pizzarotti posted lien bonds issued by its sureties, Fidelity & Deposit Company of Maryland and Zurich American Insurance Company.

Pizzarotti terminated the Jardim Subcontract by notice dated June 29, 2018. Pizzarotti alleges that they then engaged several replacement contractors and incurred over eleven million dollars in damages for corrective work, delay costs and to discharge mechanics liens.

On or about November 10, 2016, AL One entered into a written agreement with Pizzarotti, in connection with the Ritz Carlton Project. Pursuant to the terms of the Ritz Carlton Subcontract, Pizzarotti agreed to pay AL One the lump sum price of $3,100,000.

Pizzarotti approved a total of ten (10) requisitions submitted by AL One seeking payments for work performed under the Ritz Carlton Subcontract, totaling $2,635,064.90. Pursuant to Section 5.1(c) of the Ritz Carlton Subcontract, with each payment requisition submitted to Pizzarotti, AL One was required to provide a signed and notarized waiver and release for the applicable payment period, like those for the Jardim Project.

The last requisition submitted by AL One and approved by Pizzarotti was application No. 10, seeking payment in the amount of $104,947.80. The corresponding release provided that upon its receipt of the amount requisitioned for application No. 10 ($104,947.80), AL One agreed that "In the event [AL ONE] or any of its second or third tier vendors, supplier, materialmen, makes claim, commences an action, files a Notice of Mechanic's Lien or makes any claim, or commences an action in breach of this agreement, then [AL One] does hereby agree, the company named herein, to become liable to [Pizzarotti] for costs, judgments, expenses, including reasonable attorney fees and court costs incurred either in the enforcement of this document or in defense or arising out of claim and/or action or in connection with the discharging of any lien…".

On or about August 2, 2018, Feldman filed a mechanic's lien against the Ritz Carlton Project premises in the amount of $491,283.64. Thereafter, Pizzarotti sent formal notices to AL One advising of liens that had been filed by Feldman Lumber and demanding that AL One immediately discharge the liens. AL One did not discharge Feldman Lumber's mechanic's lien, and Pizzarotti was posted lien bonds issued by its sureties.

Pizzarotti terminated the Ritz Carlton Subcontract for cause by formal notice on June 29, 2018. As of the date of the Ritz Carlton Subcontract's termination, AL One had requisitioned a total amount of $2,635,064.90 to Pizzarotti for work completed under the Ritz Carlton Subcontract, while Pizzarotti had made payments to AL One totaling $2,749,978.68, which they allege represents an overpayment to AL One for services rendered under the Ritz Carlton Subcontract in the amount of $114,913.78.

As with the Jardim Project, Pizzarotti then asserts its hired replacement contractors and incurred over four million dollars in damages for corrective costs, delays and to clear the liens.

AL One has filed counterclaims against Pizzarotti on both projects alleging over two million dollars in outstanding payments are due.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324).

"[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

Because the Court Denied Pizzarotti's Motion as Premature Pursuant to CPLR §3212(f) Pizzarotti is permitted to seek summary judgment after the completion of discovery

Both Feldman and AL One argue that Pizzarotti's motion must be denied as an improper successive motion for summary judgment. While it is generally true that successive motions for summary judgment should not be entertained without a showing of justification (*Jones v 636 Holding Corp*. 73 AD3d 409), where the previous motion has been denied not on the merits, but as premature pursuant to CPLR §3212(f), it is reasonable to assume that a further motion is permitted after the completion of discovery (*Maggio v 24 West 57 APF, LLC* 134 AD3d 621; *Torres v Kalmar* 136 AD3d 457; *Colantonio v Mercy Medical Center* 135 AD3d 686; *Conte v Servisair/Globeground* 63 AD3d 981).

AL One's Claims Are Barred by The Releases

AL One's claims are barred by multiple written releases which were executed by AL One. As a general principle, it is well settled that releases are contracts that, unless their language is ambiguous, must be interpreted to give effect to the intent of the parties as indicated by the language employed and that releases bar suits on causes of action arising on or prior to the date of their execution. *Rubycz-Boyar v. Mondragon*, 15 AD3d 811, 812 (3d Dep't 2005).

"In the absence of fraud, duress, illegality or mistake, a general release bars an action on any cause of action arising prior to its execution." *Hack v. United Capital Corp*., 247 AD2d 300, 301 (1st Dep't 1998). Moreover, "it is not a prerequisite to the enforceability of a release that the releaser be subjectively aware or [sic] the precise claim he or she is releasing." *Id*.

In the context of construction-related disputes, contractual releases operate to bar any claims that may have accrued prior to the execution of the release. *See, Diontech Consulting, Inc. v. New York City Hous. Auth*., 78 AD3d 527, 528 (1st Dep't 2010); *Martin Iron & Const. Corp.*

v. E.W. Howell Co., Inc., 242 AD2d 608, 609 (2d Dep't 1997); *Teller Paving & Contracting Corp. v. City of New York*, 73 AD2d 589 (1st Dep't 1979); *Mars Assocs., Inc. v. City of New York*, 70 AD2d 839 (1st Dep't 1979) aff'd 53 NY2d 627 (1981).

Here, as a condition for receiving payments for work performed, AL One executed a series of waivers and releases in favor of Pizzarotti and others in connection with its payment applications. As set forth above, New York courts have clearly and consistently held that a contractor or subcontractor is barred, as a matter of law, from pursuing claims accruing prior to the execution of an unambiguous waiver or release. It cannot be refuted that AL One's claims accrued prior to AL One's last Releases on the Jardim and Ritz Carlton Projects, as even the owner of AL One during his deposition confirmed that AL One stopped performing work for Pizzarotti in June 2018, exactly at the time when the last payment applications and releases were executed by AL One on the Jardim and Ritz Carlton Projects. Therefore, as a matter of law, AL One is barred from pursuing such claims in this action.

These type of releases were recently upheld as enforceable by the Appellate Division First Department which held:

> Xtreme's breach of contract counterclaim is barred by the unambiguous language of the releases themselves. Contrary to its assertions, there is no evidence of any conduct on the part of plaintiff demonstrating that plaintiff intended to treat the clear and unambiguous waivers and releases as mere receipts of progress payments (*cf. West End Interiors v. Aim Constr. & Contr. Corp.*, 286 A.D.2d 250, 251–252, 729 N.Y.S.2d 112 [1st Dept. 2001]; *Penava Mech. Corp. v. Afgo Mech. Servs., Inc.*, 71 A.D.3d 493, 495, 896 N.Y.S.2d 349 [1st Dept. 2010]).

Pizzarotti, LLC v. X-Treme Concrete Inc., 205 A.D.3d 487, 489 (2022).

Feldman Lumber's Lien Claims Must Be Dismissed as There Exists No Lien Fund to Which the Claims May Attach

Pursuant to New York Lien Law § 4, a mechanic's lien is valid only to the extent of the "the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum

subsequently earned thereon." N.Y. Lien Law § 4; *see also, Bruce v. Fahey*, 72 Ad2d 632 (2d Dep't 1979). The money that is still due and owing from the construction manager to its direct subcontractor at the time the lien is filed, plus any sums subsequently earned thereon, is known as the "lien fund." N.Y Lien Law § 4; *Van Clief v. Van Vechten*, 130 NY 571 (1918); *Trustees of Hanover Square Realty Investors v. Weintraub*, 52 AD2d 600 (2d Dep't 1976).

In a foreclosure action, a plaintiff must show that a lien fund existed at the time the lien was filed to prove that it possesses a valid and enforceable mechanic's lien. A lien attaches only to funds owed to the party directly above the lienor at the time the lien is filed. *Philan Dept. of Borden Co. v. Foster-Lipkins Corp*., 39 AD2d 633 (4th Dep't 1972) aff'd 33 NY2d 709, 349 NYS2d 676 (1973). Each tier of subcontractors, materialmen, and laborers has its own lien fund and may look only to its own lien fund for recovery, and if no lien fund exists at the time the mechanic's lien is filed, the lien is void as a matter of law and no recovery can be had thereon. *See, M&V Concrete Contracting Corp. v. Modica*, 76 AD3d 614 (2d Dep't 2010); *SMI Bldg. Sys., LLC v. West 4th Street Development Group*, LLC, 83 AD3d 687 (2d Dep't 2011).

Here, Feldman may not enforce its liens for any amount in excess of the amounts owed to Feldman by AL One, the amount owed by Pizzarotti to AL One or, the amount of money owed by the owner to Pizzarotti. *Peri Formwork Sys., Inc. v. Lumbermens Mut. Cas. Co*., 112 AD3d 171, 177 (2d Dep't 2013). Feldman may only enforce its liens against the properties to the extent that monies were owed by Pizzarotti to AL One at the time the liens were filed. *See, Philan Dep't of Borden Co. v. Foster Lipkins Corp*., 39 A.D.2d 633, 634 (4th Dep't 1972), aff'd without opinion, 33 N.Y.2d 709 (1973). The subcontracts were terminated on June 29, 2018, and at that point there were not any monies due or to become due AL One for work performed at the Projects. Therefore, since Feldman's liens were filed on July 24, 2018, and on August 2,

2018, there was no lien fund available to which those liens could attach, rendering both liens void and unenforceable as a matter of law. N.Y. Lien Law § 4; see also, *Bruce v. Fahey*, 72 Ad2d 632 (2d Dep't 1979).

During his deposition, the owner of AL One, William Felcone (Felcone), admitted that he did not have the ability to pay the vendors, including Feldman. Felcone testified that Feldman provided materials and/or services to AL One for the Projects before June 2018. Therefore, all the materials and/or services by Feldman for the Projects were provided to AL One before the last releases signed and AL One.

To the same extent, based on the period of time when the materials and/or services were provided by Feldman as confirmed during the deposition, the amounts due in connection with such materials and/or services were included in AL One's payment requisitions, already paid by Pizzarotti to AL One.

Once Pizzarotti released all the payments to AL One and the replacement contractors, the lien fund was extinguished. As per the Lien Law, no individual mechanic's lien can exceed the total amount owed by the construction manager to the subcontractor, and the vendor's right to recover is derivative of the right of the subcontractor to recover, and if the subcontractor is not owed any amount under its contract, then the vendor may not recover. Because the lien fund is zero, Feldman has no enforceable lien rights against the bonds, and all claims asserted against Pizzarotti and the sureties must be dismissed.

Pizzarotti provided a detailed breakdown in support of its motion listing all the payments issued to AL One, with copies of each check and wire in support, showing for each requisition submitted by AL One for each Project the corresponding check or wire used for payment of the

same. The breakdown shows in detail that each single requisition submitted by AL One on both projects has been paid in full by Pizzarotti.

On the Jardim Project, AL One requisitioned a total amount of $951,677.50, and on the Ritz Carlton Project, AL One requisitioned a total amount of $2,635,064.90 – meaning a total of $3,586,742.40 for both Projects. Pizzarotti paid to AL One the total amount of $3,997,664.18 for both Projects. Notably, AL One did not object to these accounting summaries, and failed to provide any evidentiary proof contradicting the accounting provided by Pizzarotti.

Feldman argues that because Pizzarotti alleges over payments on both projects to AL One and the overpayment is not explained, the discrepancy is sufficient to create an issue of fact warranting denial of Pizzarotti's summary judgment motion. The Court disagrees, notwithstanding any alleged overpayment, no sums were due to AL One upon AL One's execution of the waivers. Nor is the court persuaded by Feldman's completely unsupported conjecture that the replacement contractors may have been paid less than the total of the original amount of the contracts with AL One.

CONCLUSION

WHEREFOR IT IS HEREBY:

ORDERED that Pizzarotti's motion for dismissal of all claims asserted against it by AL One is granted; and it is further

ORDERED that Feldman's claims against Pizzarotti are also dismissed; and it is further

ORDERED that, within 20 days from entry of this order, Pizzarotti shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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3/28/2023
DATE

SABRINA KRAUS, J.S.C.

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