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

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DANIEL W. DIENST and JILL C. DIENST,

Plaintiffs,

- v -

CARY PAIK and PAIK CONSTRUCTION, INC.,

Defendants.

INDEX NO. 651450/2013

MOTION DATE _____

MOTION SEQ. NO. 020 021

DECISION + ORDER ON MOTION

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PAIK CONSTRUCTION, INC.

Plaintiff,

-against-

PERFORMANCE MECHANICAL CORP., AUTOMATED BUILDING MANAGEMENT SYSTEMS, INC., AUDIO COMMAND SYSTEMS, INC., and THE PRIVATEBANK AND TRUST COMPANY,

Defendants.

Third-Party
Index No. 590064/2014

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 020) 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 588, 589, 590, 591, 592, 593, 594, 595, 596, 617, 618, 619, 620, 621, 622, 623, 638

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

The following e-filed documents, listed by NYSCEF document number (Motion 021) 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 624, 639

were read[1] on this motion to/for JUDGMENT - SUMMARY.

[1] The court has reviewed and where appropriate considered additional documents mentioned in the parties' papers but omitted in this autogenerated caption for both motions.

In motion sequence number 020, plaintiffs Daniel W. Dienst (Daniel[2]) and Jill C. Dienst (Jill, together with Daniel, Owners) move, pursuant to CPLR 3212, for partial summary judgment on their first cause of action[3] for breach of contract against defendant Paik Construction Inc. (Contractor)[4] and dismissing the Contractor's counterclaim for breach of contract. In motion sequence number 021, the Contractor moves, pursuant to CPLR 3212, for (1) summary judgment on its first counterclaim (breach of contract) and second counterclaim (foreclosure of its mechanic's lien) and (2) to dismiss the Owners' complaint. The Contractor alternatively seeks relief on an unpled account stated theory. All movants seek an award of their reasonable attorneys' fees and costs.

During the oral argument on October 26, 2022, the court denied the Contractor's motion as to its unpled account stated claim for the reasons stated on the record. (NYSCEF Doc. No. [NYSCEF] 638, tr at 38:9-15 [mot. seq. nos. 020, 021].) The court will address the remainder of the motions here.

Background

On April 19, 2011, the Owners and Contractor executed a contract (Contract), appointing the Contractor as the general contractor for the construction of the 5th and 6th floors of 397 West 12th Street, New York, NY (Project). (NYSCEF 521, Joint Statement of Undisputed Facts [JSUF] ¶ 1.) "The Contract included an AIA 'Standard Form of Agreement Between Owner and Contractor' [AIA Form] and a seven-page

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[2] The court respectfully refers to Daniel W. Dienst as Daniel and Jill C. Dienst as Jill to avoid confusion between parties sharing the same surname.
[3] In their amended complaint, the Owners also allege claims for breach of warranty and willful exaggeration of mechanic's lien. (NYSCEF 500, Verified Amended Complaint.)
[4] Cary Paik is the principal of Paik Construction.

rider" (Rider). (*Id.* ¶ 2.) The Rider provides that, in the event of a conflict between the Rider and the AIA Form or any other Contract Documents, the Rider controls. (NYSCEF 505, Contract at 24[5] [R1].)

In the Contract, the parties designated Asfour Guzy Architects (Asfour) as the Architect. (NYSCEF 505, Contract at 1.) In connection with the Project, the Owners also hired the Moon Group, whose principal was Richard Moon, as Consultant.[6] (NYSCEF 504, Daniel aff ¶ 5 [May 5, 2022].)

Relevant Provisions of the Contract

Payments

The Contract provides for progress payments based on the percentage of the work completed for the billing period. (NYSCEF 505, Contract at 4 [§ 4.1].) Pursuant to Section 4.1, the Contractor had to submit monthly Applications for Payments (AFPs) to the Architect. (*Id.* [§§ 4.1.1 and 4.1.2].) Section 4.1.3 of the Contract provides that, if an AFP "is received by the Architect not later than the 1st of the month, the Owners shall make payment … to the Contractor by the 10th of the month;" if an AFP is received by the Architect after the first of the month, then Owners must make payment within ten days after the Architect receives the AFP. (*Id.* [§ 4.1.3].) Paragraph R 14 (a) of the Rider provides that each AFP "shall be:

> (i) certified by Contractor (A) as correct and a proper basis for payment of the amount sought by such Application in accordance with the terms of this Agreement by Contractor and (B) that there are no written claims of

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[5] NYSCEF pagination

[6] On multiple occasions, the Contractor refers to Richard Moon as the Architect. (*See e.g.*, NYSCEF 588, Paik aff ¶ 3; NYSCEF 638, tr at 20:5.) However, Asfour is the sole entity designated as Architect in the Contract (NYSCEF 505, Contract at 1.); Asfour's principal, Edward Asfour, was retained as the New York Architect of Record. (NYSCEF 504, Daniel aff ¶ 5.)

> mechanics' or materialmen's liens submitted to the Contractor at the date of such Application for Payment, (C) that the Contractor has no knowledge of any filed mechanics' or materialmen's liens with respect to the Work which shall have been paid to date or shall be paid from the proceeds of such Application for Payment and (D) that there is no known basis for the filing of any mechanics' or materialmen's liens on account of the Work; and (ii) accompanied by waiver of liens and other documentation from Subcontractors and Sub-subcontractors as may be reasonably required by the Consultant."

(*Id.* at 25-26 [R. 14].)

Section 15.2.1 provides that

> "[t]he Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Section 15.2.3."[7]

(*Id.* at 16 [§15.2.1].) "The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluations of the Work and the data comprising the [AFP], that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents." (*Id.* [§15.2.2].)

The Contract also allows the Owners to withhold retainage amounting to seven and one-half percent during the operation of the Contract, and upon substantial completion, reduced to three and one-half percent (or such other sum agreed between the parties). (*Id.* [§ 4.1.4].)

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[7] The architect can withhold the Certificate for Payment, in whole or in part, if the architect believes the representations in Section 15.2.2 cannot be made. (*Id.* at 16 [§15.2.3].) Section 15.2.3 also enumerates seven additional reasons that the architect may withhold the Certificate for Payment.

Changes in the Work

Section 13 of the Contract addresses changes in the enumerated Work[8] after the execution of the Contract. For example, the Owners may order changes in the Work consisting of additions, deletions or other revisions; the Contract Sum[9] and the Contract Time[10] would be adjusted accordingly. (*Id.* at 14 [§ 13.1].) "Such changes in Work could only be authorized by written Change Order signed by the Owner, Contractor and Architect; or by written Construction Change Directive signed by the Owner and the Architect, or by written Construction Change Directive signed by the Owner and Architect." (*Id.*)

Section 13.2 provides that

> "[a]djustments in the Contract Sum and Contract Time resulting from a change in the Work shall be determined by mutual agreement of the parties or, in the case of a Construction Change Directive signed only by the Owner and Architect, by the Contractor's cost of labor, material, equipment, and reasonable overhead and profit, unless the parties agree on another method for determining the cost or credit. Pending final determination of the total cost of a Construction Change Directive, the Contractor may request payment for Work completed pursuant to the Construction Change Directive. The Architect will make an interim determination of the amount of payment due for purposes of certifying the Contractor's monthly Application for Payment. When the Owner and Contractor agree on adjustments to the Contract Sum and Contract Time

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[8] Section 7.3 defines the term Work as "the construction and services required by the Contracts Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project." (NYSCEF 505, Contract at 9 [§7.3].)

[9] The Contract Sum "shall be Six Million One Hundred Ninety Thousand Seventy-Eight Dollars and Ninety-Four
Cents ($6,190,078.94), subject to additions and deductions as provided in the Contract Documents." (*Id.* at 3 [§§ 3.1, 3.2].)

[10] The date of the Contract is the date of commencement (April 19, 2011). (*Id.* at 2 [§ 2.1].) The Contract Time is "measured from the date of commencement." (*Id.* at 3 [§ 2.2].) January 31, 2012 was set as the date that the Contractor was to achieve substantial completion, subject to adjustments. (*Id.* [§ 2.2].)

> arising from a Construction Change Directive, the Architect will prepare a Change Order." (*Id.* at 14-15 [§ 13.2].)

Substantial Completion

Section 15.4.1 defines substantial completion as "the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use." (*Id.* at 17 [§ 15.4.1].) When the Contractor considers the Work, or a portion of the Work which the Owners agreed to accept separately, substantially complete, the Contractor then has to prepare and submit a comprehensive list of items to be completed or corrected to the Architect, and upon receipt of this list, the Architect then inspects the Premises to determine whether the Work is substantially complete. (*Id.* [§§ 15.4.2-15.4.3].) After the architect's determination that the Work is substantially complete, the architect then issues a Certificate of Substantial Completion which "shall establish the date of Substantial Completion, establish responsibilities of the Owners and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and fix the time within which the Contractor shall finish all items on the list accompanying the Certificate". (*Id.* [§ 15.4.3].) This Certificate of Substantial Completion is submitted to the Owner and the Contractor for written acceptance of the responsibilities assigned to them. (*Id.* [§ 15.4.4].) After such acceptance, the Owner must make "payment of retainage applying to such Work or designated portion thereof." (*Id.*)

Operation of the Contract

On April 20, 2011, the Owners paid the Contractor a down payment of $928,511.84. (NYSCEF 521, JUSF ¶ 3.) Between May 2011 and August 2012, the

Owners made payments on AFPs 1 through 12.[11] (NYSCEF 504, Daniel aff ¶¶ 12, 13; NYSCEF 522, Contractor's Redacted Bank Records.) Each of the 12 AFPs contained a certification by the Contractor that the work specified in that AFP was completed and conformed to the Contract's requirements. (NYSCEF 506, Collection of AFPs.) Paik claims that during the Project, Moon requested that the Contractor provide a signed, notarized version of the application for payment for Moon Group's records; these requests were often made after the payment was approved. (NYSCEF 588, Paik aff ¶ 15.) Paik further claims that the Owners made payments on several unsigned AFPs. (NYSCEF 588, Paik aff ¶ 15; NYSCEF 638, tr at 21:21-22, 24-25; 22:1-2.)

On November 30, 2011, the subject apartment flooded, resulting in the performance of additional work (Flood Work) in the amount of $614,346.39. (NYSCEF 524, Paik aff ¶ 68.) Paik avers that Moon requested that this amount be billed separately from the normal AFPs. (*Id.* ¶ 69.) Accordingly, the Contractor issued a Flood Work Requisition on February 15, 2012 for $429,481.62 after completing 70% of the Flood Work (Flood Work Requisition). (*Id.* ¶ 70; NYSCEF 549, Feb 15 Email.) On February 22, 2012, Moon sent Daniel an email regarding the Flood Work Requisition, stating that "[t]he percentage seems fine with me… we should try to get this paid." (NYSCEF 550, Feb 22 Email.) On April 30, 2012, the Contractor submitted a second flood work requisition, stating that the Flood Work was 100% complete and requesting

[11] The Contractor asserts that in certifying and making payments on these 12 AFPs, the Architect and Owners did not comply with the 7-day period to either certify an AFP (or provide notice of the reason for withholding payment) and the 10-day period after receipt of AFPs to make payment respectively. (NYSCEF 588, Paik aff ¶ 6.) However, since the Contractor accepted these payments without objection, it cannot now claim contractual breaches regarding these payments. This argument was rejected by the court. (NYSCEF 638, tr at 42:22-25; 43:1.)

payment for $614,346.39, the entire amount due (Second Flood Work Requisition). (NYSCEF 555, Second Flood Work Requisition; NYSCEF 524, Paik aff ¶ 80.) On April 30, 2012, the Owners paid the Contractor $250,000 as partial payment on the Flood Work Requisition with $179,481.62 remaining unpaid on that first requisition. (NYSCEF 524, Paik aff ¶ 81.)

During the Project, several Change Orders were approved to implement changes to the scope of Work under the Contract. (NYSCEF 598, Daniel aff ¶ 3; NYSCEF 524, Paik aff ¶ 35.) As part of the AFP Process, adjustments to the Contract Sum pursuant to these Change Orders were approved and were listed on the first page of the relevant AFP in the "Change Order Summary," as well as the table at the bottom of the second page of a final certified AFP. (NYSCEF 598, Daniel aff ¶¶ 3, 4; NYSCEF 506, Collection of AFPs.)

The Owners moved into the apartment during the July 4, 2012 weekend. (NYSCEF 504, Daniel aff ¶ 18; NYSCEF 524, Paik aff ¶ 98.) The Owners claim that, despite pending work under the Contract, they moved into the apartment because the lease for their previous apartment had been terminated. (NYSCEF 504, Daniel aff ¶ 18.) On the contrary, the Contractor alleges that the Project was substantially complete when the Owners returned. (NYSCEF 524, Paik aff ¶ 98[12].)

The Contractor claims that after such substantial completion, Moon abandoned the formal change order process in favor of a running list of all post-Substantial Completion change orders by price and completion. (*Id.* ¶ 100.) The Contractor

[12] Paik states that "Application #12, covering work through July 27 – 100% of the Project – was submitted and eventually approved." (*Id.*) The court notes that parts of the copy of AFP 12 submitted are illegible. (*See* NYSCEF 506, Collection of AFPs.)

stopped submitting AFPs and instead submitted "punch list change orders" both as an invoice and statement of account. (NYSCEF 588, Paik aff ¶ 21.)

On September 17, 2012, Paik emailed Moon an uncertified AFP - "Application #13/ AIA DOCUMENT G702" (AFP 13) - for $304,689.33 along with a document entitled "397 W 12 Punch List."[13] The 397 W 12 Punch List indicates that $72,679.78 was paid with $99,402.76 still owing for completed change orders. (NYSCEF 510, Sept. 17 Email at 4.) On September 21, 2012, the Contractor submitted an updated version of AFP 13, indicating that $33,940.94 was owed for Flood Work. (NYSCEF 511, Sept. 21 Email.) By email dated September 24, 2012, Moon informed the Contractor that Asfour's members were on vacation, and therefore, AFP 13 could not be immediately reviewed. (NYSCEF 569, Sept. 24 Email; *see also* NYSCEF 524, Paik aff ¶ 115.)

On October 14, 2012, the Contractor resubmitted AFP 13 with an updated punch list change order indicating that $129,694.36 was owed for completed change order work. (NYSCEF 512, Oct. 14 Email; NYSCEF 524, Paik aff ¶ 116.) While the Owners did not object to AFP 13, they did not make the payment due under this AFP. (NYSCEF 524, Paik aff ¶ 121.) On October 24, 2012, Asfour sent the Contractor an updated punch list (Oct 24 Punch List) identifying incomplete and corrective work remaining on the Project. (NYSCEF 515, Oct. 24 Email and Punch List.)

On October 26, 2012, the Contractor sent another uncertified AFP, AFP 14, to Moon. (NYSCEF 513, Oct. 26 Email.) The Contractor informed Moon that the Owners still owed $388,630.27 under AFP 13, which was included in the total amount due under

[13] Paik characterizes this document as an updated punch list change order. (NYSCEF 524, Paik aff ¶ 113.)

AFP 14. (*Id.*) The Contractor received no response to AFP 14. (NYSCEF 524, Paik aff ¶ 127.) On October 29, 2012, Hurricane Sandy hit New York City. (NYSCEF 521, JUSF ¶ 4.) After the Sandy, the Contractor did not return to the Project. (*Id.* ¶ 5.)

By email dated October 31, 2012 to Asfour, the Contractor objected to Asfour's "never-ending, confusing 'punch list'" and complained of the Owners' failure to make timely payments which in turn resulted in a failure to make timely payments to the subcontractors and suppliers. (NYSCEF 516, Oct 31 Email.) Having received no response to this email, the Contractor sent another email to the Owners, Asfour, and Moon on November 12, 2012, asking for a response before the Contractor would be forced to "put this in the hands of my attorney and move on." (NYSCEF 577, Nov 12 Email; NYSCEF 524, Paik aff ¶ 130.) On November 14, 2012, Daniel responded, stating "[o]bviously do not agree with your view of the world but will touch base when I get back and we can figure out where we're heading then." (NYSCEF 578, Nov. 14 Email.) On November 21, 2012, the Contractor filed a mechanic's lien in the sum of $424,000.87. (*See* NYSCEF 25, Verified Answer, Counterclaims and Third-Party Complaint ¶ 93; NYSCEF 119, Verified Answer and Counterclaims to Amended Complaint with Third-Party Complaint ¶ 126.)

On December 27, 2012, the Contractor served the Owners with a Request for Mediation. (NYSCEF 521, JUSF ¶ 6.) On December 28, 2012, the Contractor served the Owners with a Notice of Termination, relying on Section 20 of the Contract which allows the Contractor to terminate the Contract if the architect fails to certify payment for a period of 30 days through no fault of the Contractor, or if the Owners fail to make payment for a period of 30 days. (*Id.* ¶ 7; NYSCEF 518, Contractor's Notice of

Termination.) On January 3, 2013, the Owners served a Notice of Termination on the Contractor. (NYSCEF 521, JUSF ¶ 8; NYSCEF 519, Owners' Notice of Termination.)

Discussion

Legal Standard

Summary judgment is a drastic remedy that will be granted only where the movant demonstrates that no genuine triable issue of fact exists. (*See Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) On a motion for summary judgment, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].) Where this showing is made, the burden shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact which requires a trial of the action. (*Id.*) In deciding a summary judgment motion, the "evidence must be analyzed in the light most favorable to the party opposing the motion." (Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997] [citation omitted].) The motion should be denied if there is any doubt about the existence of a material issue of fact. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), however, bare allegations or conclusory assertions are insufficient to create genuine issues of fact to defeat the motion. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citations omitted].)

Breach of Contract (Owners' First Cause of Action and Contractor's counterclaim)

Both parties assert a claim for breach of the Contract. The Owners allege that the Contractor breached the Contract when it issued the December 28, 2012 Notice of Termination because (i) no payments were due under the Contract; (ii) Rider 19 prohibits the Contractor from stopping work during the pendency of a *bona fide* dispute between the Owners and the Contractor; and (iii) the Notice of Termination was an anticipatory repudiation and material breach of the Contract. The Contractor alleges that the Owners' breached by failing to make payments due under the Contract.

Payments under the Contract

The Owners assert that their only contractual obligation under the Contract was to make payments of certified AFPs and they met this obligation by making payments due under the certified AFPs 1-12. The Owners do not dispute that they did not pay the amounts due under AFPs 13 and 14; instead, they assert that the Contractor did follow the proper procedures required by the Contract's terms, and thus, they do owe payment. Specifically, the Owners assert that the Contractor failed to comply with Rider 14, which requires that the Contractor certify the AFP. The Owners argue that the Contractor's submission of a certified AFP is a condition precedent to the architect's obligation under Section 15.2.1 to review the AFP and determine whether to certify an amount or withhold payment.

Rider 14 provides, in relevant part, that each AFP shall be

> certified by Contractor (A) as correct and a proper basis for payment of the amount sought by such Application in accordance with the terms of this Agreement by Contractor and (B) that there are no written claims of mechanics' or materialmen's liens submitted to the Contractor at the date of such Application for Payment, (C) that the Contractor has no knowledge of any filed mechanics' or materialmen's liens with respect

> to the Work which shall have been paid to date or shall be paid from the proceeds of such Application for Payment and (D) that there is no known basis for the filing of any mechanics' or materialmen's liens on account of the Work." (NYSCEF 505, Contract at 25 [R14].)

"A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises." (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 194 [1st Dept 2019] [internal quotation marks and citations omitted].) However, Rider 14 "does not contain any conditional language, let alone unmistakable conditional language such as if, unless and until, or null and void." (*Id.* at 195 [internal quotation marks and citations omitted].) Thus, "in absence of such unmistakable conditional language," this court will not interpret Rider 14 as a condition precedent to the architect's obligation under Section 15.2.1. (*Id.* [citations omitted].) Further, Section 15.2.3 provides, in part, that the architect "may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Section 15.2.2 cannot be made." This is a very broad provision which could include withholding a Certificate for Payment if the AFP is not certified by the Contractor. The seven specific reasons for withholding listed in Section 15.2.3 are additional reasons and do not limit the broad language of this portion of the provision.

Section 15.2.1 requires the architect to notify the Contractor and Owners in writing of the architect's reason for withholding certification. There is no evidence that this was done here. Rather, Daniel instructed Moon to "not let [Asfour] stamp this til you review with me." (NYSCEF 571, Oct 15 Email.) Since AFPs 13 and14 are admittedly unpaid, and Asfour failed to notify the Contractor as the reason why certification was

withheld, it cannot be a determined on this motion that the Owners do not owe payments due under the Contract.

Issues of fact exist particularly regarding whether the parties abandoned the formal Change Order and AFP process. While the court acknowledges that Section 7.1 of the Contract provides that "[a] Modification is (1) a written amendment to the Contract signed by both parties, (2) Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect," "oral directions to perform extra work, or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorization." (*Saeteros v Seven Up Realty, LLC*, 187 AD3d 559, 559 [1st Dept 2020] [citation omitted].) There is an issue of fact as to whether the parties waived the contractual requirement of Section 7.1.

An issue of fact also exists as to the unpaid Flood Work Requisitions. The Owners did not object to the Flood Work Requisitions and even made a partial payment of $250,000. However, they now claim that the Flood Work was not part of the Contract and administered through separate Flood Work Requisitions. Again, it cannot be determined on this record whether the Flood Work was part of the Contract. The Flood Work Requisitions reference the Contract date and state that the "Application is made for Payment, as shown below, in connection with the Contract." (NYSCEF 549 & 550, Flood Work Requisitions.) However, the Contractor acknowledges that he was asked to bill separately for the Flood Work. (NYSCEF 524, Paik aff ¶ 36 [i].) Nevertheless, billing Flood Work separately does not firmly establish that the Flood Work, which was allegedly a redo of Work performed under the Contract, was outside the Contract.

Contractor's obligation to complete the Work under the Contract

It also cannot be determined on this record as to whether the Project was substantially complete. The Owners assert that the Contractor walked off the project when Hurricane Sandy hit, leaving a significant amount of Work uncompleted under the Contract. The Contractor, however, asserts that the Project was substantially completed in July 2012 when the Owners moved into the apartment and only change order work remained open.

Section 15.4.1 of the Contract provides that "Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its-intended use." (NYSCEF 505, Contract at 17 [§15.4.1].) Section 15.4.2 requires the Contractor to prepare and submit a comprehensive list of items to be completed or corrected to the architect when the Contractor believes the Work is substantially complete. Upon receipt of this list and inspection, the architect issues a Certificate of Substantial Completion.

The Owners assert that no such certificate was issued here, and thus, there could not be substantial completion. They rely on an Appellate Division, Fourth Division decision wherein the Appellate Court held that the unilateral determination of a party of substantial completion was irrelevant where a contract provision requiring a determination by the architect of substantial completion existed. (*Board of Educ. of Palmyra-Macedon Cent. Sch. Dist. v Flower City Glass Co., Inc.*, 160 AD3d 1497, 1499 [4th Dept 2018] [finding that "the parties agreed in their contract that the determination of when the work was substantially completed would be determined by the project

architect, and thus, a "unilateral determination of the [] defendants of when the 'physical work' was complete is irrelevant"].) Here, however, there is evidence of a mutual determination that the Work was substantially complete in July 2012. (See NYSCEF 506, Collection of AFPs; NYSCEF 593, June 2012 Email [correspondence between Moon and Daniel discussing that the Contractor was entitled to 3% retainage which admittedly is the percentage when there is substantial completion]; NYSCEF 524, Paik aff ¶ 36 [ii] ["at Mr. Moon's urging, after Substantial Completion in July 2012 (when the Plaintiffs moved into the apartment and Application for Payment No. 12, indicating 100% completion as of July 2012, was approved … , Mr. Moon abandoned a formal change order process in favor of having us maintain a running list of all post Substantial Completion change orders …].) Thus, whether the Work was substantially completed is a triable issue of fact.

The Owners assert that, even assuming that the Work was substantially completed, the Contractor still had the obligation to fix defects or non-confirming work identified by the plaintiffs. The Owners rely on Section 18.2 of the Contract which provides that if any Work is not found to be in accordance with the requirements of the Contract Documents, "the Contractor shall correct it promptly after receipt of written notice from the Owner to do so" unless such condition has been accepted previously in writing. (NYSCEF 505, Contract at 20 [§ 18.2].) The Owners assert that the October 24, 2012 punch list suffices as written notice. The Contractor claims that the punch list cannot be a notice of defective work as all notices must be given, made or served by registered or certified mail. (*Id.* at 28 [R29].)

The parties also disagree over the meaning and nature of a punch list. The Owners claim that a punch list only served as a notice of work to be completed or defective work. The Contractor claims that in common industry practice, a punch list refers to "minor work after substantial completion, limited to small or minor fixes that must be completed before a project is officially closed out." (NYSCEF 524, Paik aff ¶ 102.)

The term 'punch list' is only used once in the Contract in Rider 10 - "[t]he Premises may not be occupied for residential purposes by the Owner, in whole or in part, prior to Substantial Completion and the issuance of a punch list." (NYSCEF 505, Contract at 25 [R10].) "Punch list" is not defined in the Contract. Here, the parties have two very different and frankly contrary understandings of the concept of punch lists within the context of the operation of the Contract. Therefore, whether the Contractor still had an obligation to fix and/or correct the Work before filing the Notice of Termination is a triable issue of fact.

Walkout or Locked Out

The Owners allege that the Contractor walked off the Project after Hurricane Sandy and never returned in breach of Rider 19, which provides, in relevant part, that "[i]n no event shall the Contractor stop the Work during the dependency of a bona fide dispute between the Owner and the Contractor." (NYSCEF 505, Contract at 27 [R19].) There is no dispute that the Contractor did not return to the Project following Hurricane Sandy. (NYSCEF 521, 19-A JUSF ¶ 5.) However, the Contractor avers that it was locked-out and prevented from coming back to the Apartment after October 2012 in order to cure any allegedly defective Work. (NYSCEF 524, Paik aff ¶¶ 134, 135, 137.)

Again, whether the defendant walked off the Project or whether it was locked out is another triable issue of fact.

Anticipatory Repudiation

In light of the foregoing issues of fact, it also cannot be determined whether the Contractor's Notice of Termination constitutes anticipatory repudiation. "To support the claim of anticipatory repudiation, there must be "an unqualified and clear refusal to perform with respect to the entire contract." (*Highbridge Dev. BR, LLC v Diamond Dev., LLC*, 67 AD3d 1112, 1115 [3d Dept 2009] [internal quotation marks and citations omitted].)

Contractor's counterclaim for Foreclosure of its Mechanic's Lien

The Contractor filed its mechanic's lien on November 21, 2012. (NYSCEF 119, Verified Answer and Counterclaims to Amended Complaint with Third-Party Complaint ¶ 126.) Whether the plaintiffs owed money to the defendant as on November 21, 2012 is an issue of material fact.

All remaining arguments have been considered and do not alter the court's determination.

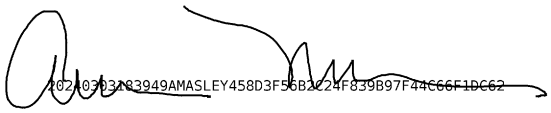
Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment, is denied; and it is further

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED motions *in limine* shall be filed within 60 days of the date of this decision and order or otherwise waived; and it is further

ORDERED that the parties are to appear for a remote pretrial conference on May 13, 2024 at 4 pm.



3/3/2024
DATE

ANDREA MASLEY, J.S.C.

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