

Interebar Fabricators LLC v C.B. Contr. Corp

2024 NY Slip Op 33527(U)

September 25, 2024

Supreme Court, New York County

Docket Number: Index No. 655852/2021

Judge: Nancy M. Bannon

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 61M

Justice

-----X

INTEREBAR FABRICATORS LLC,

Plaintiff,

INDEX NO. 655852/2021

MOTION DATE 7/1/2024

MOTION SEQ. NO. 001, 002

- v -

C.B. CONTRACTING CORP, LIBERTY MUTUAL
INSURANCE COMPANY, TRAVELERS CASUALTY AND
SURETY COMPANY OF AMERICA, FIDELITY AND
DEPOSIT COMPANY OF MARYLAND/ZURICH AMERICAN
INSURANCE COMPANY, FEDERAL INSURANCE
COMPANY, THE CONTINENTAL INSURANCE COMPANY,
BERKSHIRE HATHAWAY SPECIALTY INSURANCE
COMPANY, AMERICAN HOME ASSURANCE COMPANY,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

C.B. CONTRACTING CORP,

Third-Party Plaintiff,

Third-Party
Index No. 595132/2022

-against-

E.E. CRUZ & COMPANY, INC., NEW YORK CONVENTION
CENTER DEVELOPMENT CORP., URBAN DEVELOPMENT
CORP. D/B/A EMPIRE DEVELOPMENT CORP., LENDLEASE
(US) CONSTRUCTION LMB INC., TURNER CONSTRUCTION
COMPANY JOINT VENTURE,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 136, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 192, 200, 202, 203, 204, 206, 208, 210

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 137, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 193, 194, 195, 196, 197, 198, 201, 205, 207, 209, 211, 212, 213, 214, 215, 216, 217, 218, 219

were read on this motion to/for SUMMARY JUDGMENT.

INTRODUCTION

In this breach of contract and payment bond action, the plaintiff, Interebar Fabricators LLC (“Interebar”), as successor in interest to non-party Metal Partners Rebar LLC d/b/a FGH Rebar (“FGH Rebar”), moves for partial summary judgment pursuant to CPLR 3212(e) on its first cause of action for payment on a bond under State Finance Law § 137 against all seven insurer defendants - Liberty Mutual Insurance Company, Travelers Casualty and Surety Company of America, Fidelity and Deposit Company of Maryland/Zurich American Insurance Company, Federal Insurance Company, The Continental Insurance Company, Berkshire Hathaway Specialty Insurance Company, and American Home Assurance Company (collectively, the “Sureties”), and on its second cause of action for breach of contract against the remaining defendant, C.B. Contracting Corp (“CBC”) (MOT SEQ 001). CBC and the Sureties oppose the motion.

CBC moves separately pursuant to CPLR 3212(e) for partial summary judgment on (i) the first cause of action in its third-party complaint and cross claims for breach of contract against third-party defendant E.E. Cruz & Company, Inc. (“Cruz”), (ii) the third cause of action in its third-party complaint and cross claims for breach of payment bond against the Sureties, and for (iii) dismissal of Cruz’s breach of contract counterclaim (MOT SEQ 002). Cruz and the Sureties oppose CBC’s motion.

Interebar’s motion is granted and CBC’s motion is granted in part.

BACKGROUND

This case arises from a series of agreements to provide goods and services for the renovation of the Jacob K. Javits Convention Center (the “Javits Center”). In February 2017, third-party defendant and owner of the Javits Center, New York Convention Center Development Corporation, executed a design-build agreement naming third-party defendant Turner Construction Company Joint Venture (the “JV”) as the design-builder for the project. This being a public improvement project, pursuant to State Finance Law § 137 the JV and the Sureties executed a Payment Bond for Materials and Labor (the “Payment Bond”), which guaranteed the “prompt payment of monies due to all persons furnishing [the JV] or any subcontractor of the [JV] with labor or materials....”

In September 2017, the JV executed an agreement with Cruz designating Cruz as the contractor for the excavation and foundation of the Javits Center project (the “Trade Contract”).

In October 2017, Cruz and CBC executed a subcontract for CBC to furnish and install concrete reinforcing for the project (the “subcontract” and, collectively with the Trade Contract, the “Contract Documents”).

Pursuant to the subcontract’s “Scope of Work” provision, CBC agreed to furnish, *inter alia*, all labor, supervision, and materials “required to engineer, bend, and install the concrete reinforcing” for the Javits Center, as well as prepare shop drawings to be submitted to Cruz for approval, either by Cruz or the JV, prior to the fabrication and installation of said concrete reinforcing. The subcontract’s “Additional Terms and Conditions” required CBC to “prepare, check and submit for approval all working drawings, shop drawings, and as-built drawings . . . as required by the Contract Documents for its scope of work.”

Section 4.3 provided, *inter alia*, for CBC to submit monthly payment requests to Cruz, and for Cruz to pay “the amount of such request, as approved by [Cruz] and for which payment has been received from [the JV] (as a condition precedent to any obligation of [Cruz] to make payment to [CBC])[.]” Section 4.4 further provided that final payment to CBC, including of any amounts deducted from its payment requests as retainage, was conditioned on CBC having “submitted to [Cruz] all required as-built drawings”

Section 6.2.1 provided that CBC “shall prepare all samples, shop drawings, and other items requiring Owner’s or [the JV’s] approval (hereinafter “Submittals”)[,]” and further stated that “[CBC] is not authorized to commence any Work before receiving required approvals.” Section 6.2.3 provided that “[CBC] shall prepare or cause its vendors to prepare, check and submit for approval all working, shop, as-built and any other drawings . . . as required by the Contract Documents, for its scope of Work.”

In December 2017, CBC contracted to purchase steel reinforcing bars (“rebar”) from FGH Rebar (the “Supply Contract”). Interebar is the successor in interest to FGH Rebar. For ease of reference, the court will hereinafter refer to the two companies simply as Interebar.

Pursuant to the Supply Contract, Interebar agreed to fabricate and deliver rebar requested by CBC in accordance with approved shop drawings. The Supply Contract did not provide for Interebar to play any role in the installation of the rebar after delivery. Section 2 of the Supply Contract provided that “[Interebar] assumes towards [CBC] all of the obligations and responsibilities that [CBC] assumes in the Subcontract . . . in so far as they are applicable to this [Supply Contract].” Section 9 provided that Interebar “shall promptly provide all submittals,

information and samples required by the Contract Documents[,]” and that “[r]equired approvals by Owner or its engineer are the responsibility of [Interebar].” Section 9 further provided that, when required by CBC, “[Interebar] shall prepare and submit . . . original and revised shop drawings to [CBC] for approval before [Interebar] commences work.”

It is undisputed that Interebar fabricated and furnished rebar materials to the Javits Center worksite but was not paid in full for the materials delivered, as there remains an outstanding balance on its invoices to CBC of \$172,495.93. CBC, in turn, claims it is owed \$1,118,030.18 from Cruz, which sum purportedly consists of \$548,921.37 in retainage and \$569,108.81 in unpaid invoices.

In October 2021, Interebar commenced the instant action alleging seven causes of action including, as relevant here, breach of the Supply Contract against CBC and a payment bond claim against the Sureties, both of which seek to recover the \$172,495.93 allegedly owed to Interebar on its unpaid invoices. CBC, in turn, commenced a third-party complaint asserting, as relevant here, a third-party claim for breach of the subcontract against Cruz seeking the allegedly unpaid amounts due on its invoices and withheld as retainage. CBC also asserted three additional causes of action including, as relevant here, a payment bond cross-claim against the Sureties for the same amounts sought from Cruz based on the Sureties’ alleged failure to pay on a bond furnished by Cruz as principal (the “Cruz Bond”). Cruz answered CBC’s third-party complaint and asserted a single counterclaim (also denominated as its twentieth affirmative defense) alleging that CBC breached the subcontract by, *inter alia*, failing to provide as-built drawings for all the rebar it purportedly installed. Discovery was completed and a note of issue was filed in October 2023. The instant motions ensued.

DISCUSSION

The proponent of a motion for summary judgment pursuant to CPLR 3212 must establish *prima facie* entitlement to judgment as a matter of law by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). If the movant fails to meet that burden, the motion must be denied regardless of the sufficiency of the opposing papers. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986). However, should the movant meet its burden, it then becomes incumbent upon the party opposing the motion to come forward with proof in admissible form sufficient to raise a triable issue of fact. See id.;

Winegrad v New York Univ. Med. Ctr., *supra*; Zuckerman v City of New York, *supra*; O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010).

- i. Interebar's Motion (MOT SEQ 001)
 - a. Breach of Contract Claim Against CBC

The elements of a cause of action for breach of contract are (1) the existence of a contract; (2) the plaintiffs' performance under the contract; (3) the defendant's breach of that contract; and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). In support of its motion, Interebar submits, *inter alia*, the Supply Contract, the subcontract, the affirmation of its Chief Financial Officer, Joseph Tedesco, its invoices to CBC, and bills of lading for the rebar it delivered to the worksite. The Supply Contract and bills of lading establish the formation of a contract and Interebar's performance thereunder, while Tedesco's affirmation and the invoices he identifies as unpaid demonstrate CBC's breach and resulting damages. As such, Interebar has carried its *prima facie* burden.

CBC, in opposition, fails to raise a triable issue of fact. CBC does not dispute that it has failed to fully pay Interebar's invoices. Rather, it contends it cannot pay Interebar because it has not been paid by Cruz, which has withheld payment based on CBC's alleged failure to furnish as-built drawings for the rebar it installed. CBC disputes that the subcontract requires it to provide any as-built drawings to Cruz for installed rebar, but claims that, to the extent it is required to provide as-built drawings, that obligation "flows down" to Interebar pursuant to Sections 2 and 9 of the Supply Contract, and that Interebar's failure to satisfy that obligation excuses CBC's nonpayment of Interebar's invoices. This contention is unavailing.

No provision in the Supply Contract expressly requires Interebar to produce as-built drawings. Nor is there any basis to hold that such an obligation "flows down" to Interebar from CBC. As will be discussed further below in connection with CBC's third-party breach of contract claim against Cruz, there is no provision in the Contract Documents requiring CBC to produce as-built drawings of installed rebar. There is thus no obligation in the first instance pertaining to the production of as-built drawings that could flow down to Interebar. Moreover, even assuming, *arguendo*, that the subcontract did require CBC to produce as-built drawings, neither Section 2 nor Section 9 of the Supply Contract would serve to shift that obligation onto Interebar.

Pursuant to Section 2 of the Supply Contract, Interebar assumes towards CBC all obligations assumed by CBC in the subcontract, but only “in so far as they are applicable to this [Supply Contract].” Section 9 of the Supply Contract requires Interebar to “provide all submittals . . . required by the Contract Documents[,]” and to “prepare and submit . . . shop drawings to CBC for approval before [Interebar] commences work.” Section 6.2.1 of the subcontract defines “Submittals” as “all samples, shop drawings, and other items requiring Owner’s or [the JV’s] approval[,]” and further provides that CBC “is not authorized to commence any Work before receiving required approvals.” Section 9 thus relates to the provision of shop drawings and other submittals requiring approval prior to the commencement of any work. “As-built” drawings, by contrast, are not “submittals” to be approved before work commences, but rather depict the subject work “as-built,” which here would mean the rebar as actually installed. However, whereas CBC contracted with Cruz to both furnish and install the rebar for the Javits Center, Interebar was subcontracted by CBC solely to fabricate and deliver the subject rebar, but not to install it, which installation remained CBC’s responsibility. As such, the provision of as-built drawings does not fall within the scope of Section 9, nor could any obligation to provide as-built drawings “flow down” from CBC to Interebar pursuant to Section 2 because such an obligation would not be “applicable” to the Supply Contract, which only provides for fabrication and delivery of the subject rebar, but not its installation.

Similarly unavailing is CBC’s next argument, that its nonpayment of Interebar’s invoices should be excused because of Interebar’s purported failure to comply with the notice requirement of Section 19 of the Supply Contract. That provision requires that “claims for additional compensation or time or any other damage, whether arising out of alleged differing site conditions, changes, delay or otherwise, must be submitted to [CBC] within three (3) days of the direction, circumstance or condition giving rise to the claim....” That provision is inapplicable to the present dispute because Interebar does not seek “additional compensation” arising out of any “direction, circumstance or condition” affecting its work. Rather, it simply seeks complete payment pursuant to the terms of the Supply Contract it executed with CBC.

Therefore, Interebar’s motion is granted to the extent it seeks summary judgment on its second cause of action for breach of contract against CBC.

b. Payment Bond Claim against the Sureties

“State Finance Law § 137 requires, in relevant part, the posting of a bond to secure payment for, among others, all persons furnishing materials to a subcontractor for use in ‘the

prosecution of a public improvement [project]' (State Finance Law § 137[1]) and permits such persons to sue on the bond if they are not paid in full for such materials (see State Finance Law § 137[3])." Erie Materials, Inc. v Universal Grp. of New York, Inc., 101 AD3d 1529, 1530 (3rd Dept. 2012). As discussed above, Interebar's submissions establish that, pursuant to a contract for the prosecution of a public improvement, Interebar furnished materials to CBC, a subcontractor of the JV, and has not been paid in full. Interebar has also submitted a copy of the Payment Bond as an exhibit to its complaint, thereby establishing that the Sureties are liable for such nonpayment. As such, Interebar has satisfied its threshold burden of demonstrating its *prima facie* entitlement to judgment as a matter of law. See id.

In opposition, the Sureties contend their liability under the Payment Bond is limited to the liability of the JV, the principal on the Bond, and argue, in effect, that the JV is not liable for any further payments in connection with Interebar's work. Specifically, they argue the JV's liability extends no further than that of Cruz, the JV's direct subcontractor, that Cruz is not liable for any further payments to CBC, having purportedly already paid CBC for the total amount of rebar installed at the Javits Center, and thus the Sureties cannot be held liable to Interebar because doing so would extend their liability under the Payment Bond beyond that of the JV. This argument fails, however, given the grant of CBC's third-party breach of contract claim against Cruz, as discussed further below. In brief, CBC's unrebutted submissions establish that it installed substantially all the rebar that Interebar fabricated and delivered to the worksite, but Cruz did not pay CBC for all the rebar thus installed, prompting CBC to withhold payment from Interebar. As such, the Sureties fail to raise a triable issue of fact.

Therefore, Interebar's motion is also granted to the extent it seeks summary judgment on its first cause of action against the Sureties seeking payment on the Payment Bond.

- ii. CBC's Motion (MOT SEQ 002)
 - a. Breach of Contract Claim against Cruz

CBC alleges Cruz breached the subcontract by failing to fully pay its invoices for the rebar it installed at the Javits Center and by holding retainage funds. CBC submits, *inter alia*, the subcontract, deposition testimony of its CEO, Carol Burt, as well as Raymond Burt, one of its general foremen who was on site at the Javits Center, shipment reports for Interebar's deliveries of rebar, and its invoices to Cruz. These submissions supply *prima facie* evidence that CBC performed under a valid contract and that Cruz breached said contract by failing to make complete payment to CBC, resulting in damages. With respect to CBC's performance, in

particular, the shipment reports it submits show that 8,876,853 pounds of rebar were delivered to the worksite by Interebar, while the deposition testimony of Carol and Raymond Burt establish, *prima facie*, that CBC installed substantially all the rebar delivered. Further, CBC's invoices and Carol Burt's testimony establish that CBC's invoicing totaled \$13,445,467.48, but that Cruz paid CBC only \$12,204,085.33, and that Cruz owes CBC \$569,108.81 in unpaid invoices as well as \$548,921.37 that Cruz continues to hold in retainage. In opposition, Cruz fails to raise a triable issue of fact.

Cruz argues that CBC fails to adequately establish its performance under the subcontract because it does not demonstrate that it produced as-built drawings for the rebar it installed, as purportedly required by the Contract Documents. However, there is no provision in the subcontract requiring CBC to produce as-built drawings of installed rebar. Rather, the subcontract obligates CBC to provide as-built drawings only to the extent that such drawings are otherwise required by the "Contract Documents" for its scope of work. Specifically, Item 9 of the "Additional Terms and Conditions" provision of the subcontract obligates CBC to "prepare, check and submit for approval all working drawings, shop drawings, and as-built drawings . . . as required by the Contract Documents for its scope of work." With respect to CBC's scope of work, the "Scope of Work" provision in the subcontract stipulates only that CBC must prepare shop drawings but does not mention as-built drawings. As for the "Contract Documents," Cruz points to various provisions in the Trade Contract that reference the provision of as-built drawings "as required," but fails to identify any provision that expressly imposes a requirement on CBC to produce "as-built" drawings for installed rebar or that otherwise delineates when such drawings may be required, if at all.

Further, to the extent Cruz asserts that CBC failed to provide required shop drawings, it does not submit proof sufficient to raise a triable issue of fact on that score. Raymond Burt testified on behalf of CBC that "no work related to the rebar was performed without approved shop drawings." This testimony was echoed by Carol Burt, who likewise testified that all rebar for the Javits Center was fabricated and installed based on approved shop drawings. Cruz attempts to challenge this evidence relying on the deposition testimony of one of its Vice Presidents, Volkan Yargici. However, Yargici himself testified that CBC did not install any rebar without approved shop drawings. To the extent Yargici suggests that CBC failed to provide approved shop drawings, his testimony, read in context, conflates shop drawings with as-built drawings, as it refers to requests by Cruz that CBC provide approved shop drawings for rebar that was already installed—in effect, as-built drawings—which, as just discussed, CBC was not

required to produce under the Contract Documents. In any event, the relevant provisions of the subcontract all concern CBC's provision of shop drawings for approval *prior* to commencing its work. As such, Yargici's testimony regarding CBC's purported failure to furnish approved shop drawings for already completed work does not demonstrate any failure of performance, as it implicitly acknowledges the subject shop drawings were duly submitted and approved before CBC commenced installation.

Cruz next argues it is excused from paying CBC the withheld retainage because payment of those funds to CBC is subject to a "pay-when-paid" provision of Section 4.3 of the subcontract, and the JV has not yet released the equivalent funds to Cruz. This argument is likewise unavailing. On its face, this provision is unenforceable as "void and against public policy." See Bank of Am., N.A. v ASD Gem Realty, 205 AD3d 1, 6 (1st Dept. 2022); Nevco Contracting Inc. v R.P. Brennan Gen. Contractors & Builders, Inc., 139 AD3d 515 (1st Dept. 2016). Section 4.3 of expressly states that Cruz's receipt of payment from the JV is a condition precedent to its obligation to pay CBC. The distinction between an enforceable "pay-when-paid" term and an unenforceable "pay-if-paid" term turns on whether the provision merely dictates the timing of a contractor's payment to a subcontractor after receipt of payment from the owner, which is considered an enforceable timing mechanism that does not "improperly force[] the subcontractor to assume the risk of the owner's nonpayment," or if it makes payment to the subcontractor contingent on the owner first paying the contractor, which is an unenforceable condition precedent. See Bank of Am., N.A. v ASD Gem Realty, *supra*; see West-Fair Elec. Contr. v Aetna Casulaty & Surety Co., 87 NY2d 148 (1995); Hugh O'Kane Elec. Co., LLC v MasTec North Am., Inc., 19 AD3d 126 (1st Dept. 2005).

Moreover, even if Section 4.3 were otherwise enforceable, the delay in payment here renders it unenforceable since "a pay-when-paid clause can have the same improper effect as a pay-if-paid clause when payment is unduly delayed." Bank of Am., N.A. v ASD Gem Realty, *supra* at 6. It is undisputed that CBC completed its work no later than August 2021, yet Cruz has still failed to release the withheld retainage more than three years later. Indeed, Cruz has effectively taken the position that there is no further payment to be expected from the JV in connection with CBC's work, and that it therefore plans to withhold the subject retainage indefinitely. As such, even if Section 4.3 could be considered a pay-when-paid clause, Cruz's unreasonable three-year delay in making payment to CBC would render the provision unenforceable. See A.E. Rosen Elec. Co. v Plank, LLC, 63 Misc 3d 1207(A) (N.Y. Sup. Ct. 2019), *aff'd*, 181 AD3d 1080 (3rd Dept. 2020) (cited favorably in Bank of Am., N.A. v ASD Gem

Realty, supra, and holding that two-year delay was unreasonable); see also Power Partners MasTec, LLC v Premier Power Renewable Energy, Inc., No. 14CV8420, 2015 WL 774714, at *2 (SDNY Feb. 20, 2015) (three-year delay unreasonable).

Similarly unavailing is Cruz's argument that CBC's documentary evidence, in particular the shipment reports, is not properly authenticated. Rodger Look, a former Interebar employee, authenticates the shipment reports in his deposition testimony, wherein he establishes that the reports are business records, prepared and maintained by Interebar, that summarize the information contained in Interebar's bills of lading, which are likewise admissible as business records and have themselves been submitted by Interebar in support of its own summary judgment motion. Further, Carol Burt, in an affidavit, authenticates the documents submitted as true and accurate copies of the shipment reports issued to CBC by Interebar and thereafter maintained by CBC in its own records. In any event, in response to the argument raised in Cruz's opposition challenging Look's testimony as insufficient to establish the accuracy of the shipment reports, CBC submits additional records obtained from Interebar in discovery, which reflect identical bottom-line numbers and thus corroborate the figures in the shipment reports. Because these additional records were obtained from an adverse party in response to a discovery demand, their authenticity is presumed. See CPLR 4540-a.

Notably, and notwithstanding its unsuccessful attack on the authenticity of the shipment reports, Cruz has not claimed, let alone demonstrated, that the 8,876,853 pound figure reflected in the shipment reports as the total weight of rebar delivered to the Javits Center project by Interebar is inaccurate. Nor has Cruz submitted evidence sufficient to create an issue of fact as to whether CBC installed substantially all the rebar fabricated and delivered to the worksite by Interebar. Cruz contends that CBC installed only approximately 8.3 million pounds of rebar. In support of this contention, it relies on Yargici's deposition testimony and a spreadsheet purporting to show Cruz's prospective estimate of the amount of rebar required to be installed at the worksite based on design drawings and approved shop drawings (the "takeoff analysis"). However, neither the takeoff analysis nor Yargici's testimony raises a triable issue of fact.

Purporting to rely on Yargici's testimony, Cruz contends that a substantial amount of the rebar delivered was disposed of as waste. However, this contention is not actually supported by Yargici's testimony. When asked about the waste issue, Yargici testified that he did not know whether, or to what degree, rebar delivered to the worksite was lost to wastage, stating: "I don't know. It was, like, there were, I would say, thousands of trucks going in and out, some with

waste rebar, some with excavated materials, some with broken materials, some with waste disposal, some with deliveries. So I really cannot opine on that.”

As for the takeoff analysis spreadsheet, it is precluded from consideration as inadmissible hearsay. The spreadsheet is unsworn, was not prepared by Yargici, and is not claimed, let alone shown to be, a business record prepared in the ordinary course. As such, neither the spreadsheet nor Yargici’s testimony based on it are sufficient to defeat summary judgment. See Matter of Hassine, 222 AD3d 522 (1st Dept.2023); Nevco Contracting Inc. v R.P. Brennan Gen. Contractors & Builders, Inc., *supra*; compare 703 Lenox LLC v New York City Dept. of Fin., 103 AD3d 540 (1st Dept. 2013) (sufficient indicia of reliability qualified spreadsheets as business records).

Therefore, CBC’s motion is granted to the extent it seeks summary judgment on its third-party breach of contract claim against Cruz. For the reasons discussed above, CBC’s motion is likewise granted to the extent it seeks the dismissal of Cruz’s breach of contract counterclaim, which alleges that CBC breached the subcontract by failing to provide shop drawings and as-built drawings for all the rebar it installed.

b. CBC’s Bond Claim against the Sureties

As the movant, CBC is required to submit evidence in admissible form showing the absence of a triable issue of material fact. See Winegrad v New York Univ. Med. Ctr., *supra*. Here, CBC does not submit a copy of the Cruz Bond or any other evidence to establish the liability of the Sureties for Cruz’s nonpayment of CBC’s invoices and withholding of retainage. To be sure, in reply, CBC submits a copy of a notice of claim on the Cruz Bond along with a letter from the Sureties acknowledging their receipt of said notice as well as the existence of the Cruz Bond, the bond number, that Cruz was the principal, and that the bond covered work on the Javits Center project. However, the court does not consider evidence submitted for the first time in reply. See Ruland v 130 FG, LLC, 181 AD3d 441 (1st Dept. 2020). Therefore, because CBC has not carried its *prima facie* burden, its motion is denied to the extent it seeks summary judgment on its payment bond claim against the Sureties.

CONCLUSION

Accordingly, upon the foregoing documents and after oral argument, it is

ORDERED that the plaintiff’s motion for partial summary judgment on its first and second causes of action (MOT SEQ 001) is granted; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, Interebar Fabricators LLC, and against defendants Liberty Mutual Insurance Company, Travelers Casualty and Surety Company of America, Fidelity and Deposit Company of Maryland/Zurich American Insurance Company, Federal Insurance Company, The Continental Insurance Company, Berkshire Hathaway Specialty Insurance Company, American Home Assurance Company and C.B. Contracting Corp, jointly and severally, in the sum of \$172,495.93, together with statutory interest from June 25, 2020; and it is further

ORDERED that the third through seventh causes of action of the main complaint are severed and continued; and it is further

ORDERED that defendant/third-party plaintiff C.B. Contracting Corp.’s motion for partial summary judgment (MOT SEQ 002) is granted to the extent it seeks summary judgment on the first cause of action against third-party defendant E.E. Cruz & Company, Inc. and dismissal of the third-party defendant’s sole counterclaim and that counterclaim is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter judgment in favor of the defendant/third-party plaintiff C.B. Contracting Corp. and against third-party defendant E.E. Cruz & Company, Inc. in the sum of \$1,118,030.18, together with statutory interest from June 18, 2021; and it is further

ORDERED that the first cause of action of the third-party complaint is severed and that action shall continue as to the remaining causes of action of that complaint; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

9/25/2024

DATE



NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER