Mohawk Constr. & Supply Co., Inc. v Walsh/Consigli JV
2024 NY Slip Op 35552(U)
March 1, 2024
Supreme Court, Dutchess County
Docket Number: Index No. 2021-52921
Judge: Maria G. Rosa
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

MOHAWK CONSTRUCTION AND SUPPLY COMPANY, INC.,

Plaintiff,

-against-

WALSH/CONSIGLI JV, WALSH CONSTRUCTION COMPANY II, LLC, individually and doing business as WALSH/CONSIGLI JV, CONSIGLI CONSTRUCTION NY, individually and doing business as WALSH CONSIGLI JV, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, FEDERAL INSURANCE COMPANY, and JOHN DOE "1" through JOHN DOE "10" and ABC CORPS. "1" through "10" and being fictitious names, the real names being unknown to Plaintiff at this time, and being intended to designate individuals, corporations, or other legal entities who may claim an interest in the property sought to be foreclosed hereon,

Defendants.

DECISION AND ORDER

Index No.: 2021-52921

Motion Sequence: 4

The following papers were read and considered on Defendants' motion for partial summary judgment:

Document:	NYSCEF Doc. No(s).:
NOTICE OF MOTION	142
AFFIRMATION IN SUPPORT and EXHIBITS 1–10	143–153
AFFIDAVIT IN SUPPORT and EXHIBITS 1–9	154–163
STATEMENT OF MATERIAL FACTS	164
MEMORANDUM OF LAW	165
AFFIRMATION IN OPPOSITION and EXHIBITS 1–9	201–210
AFFIDAVIT IN OPPOSITION and EXHIBITS 1–72	211–283
RESPONSE TO STATEMENT OF MATERIAL FACTS	284

BACKGROUND

This action arises out of a construction dispute between Plaintiff and Defendants Walsh/Consigli Joint Venture, Walsh Construction Company II, LLC, and Consigli Construction NY, LLC[1] (collectively, "WCJV") regarding façade work that WCJV subcontracted to Plaintiff for the expansion of Vassar Brothers Medical Center in the City of Poughkeepsie, New York (the "Project"). The Project involved the construction of an eight-story patient pavilion containing approximately 750,000 feet of new hospital space and a conference center. The initial cost was estimated to be more than $500 million. The Project owner, Health Quest Systems, Inc. n/k/a Nuvance Health, Inc., hired WCJV to serve as the construction manager (*sometimes referred to herein as* "general contractor"). WCJV then entered into a subcontract with Plaintiff to supply materials and labor for the construction of the Project's façade (the "subcontract"). The subcontract, dated August 2, 2017, required Plaintiff to fabricate, deliver and install stone honeycomb panels and terra cotta rain screen panels, along with related façade work, for total payment of $6,484,177.00. The subcontract included several exhibits, including an approximately 41-page construction schedule dated April 13, 2017 (Exhibit L) which indicated a construction start date in October 2016 and Project completion on August 20, 2020.

On September 21, 2017, Plaintiff entered into a one-page contract, referred to as "PO Number: 6311," with non-party Viking Erectors Corp. ("Viking") by which Plaintiff subcontracted "all necessary labor, tools, supervision, scaffolding, ladders and any other necessity required" for field work on the Project to Viking, for the sum of $1,987,306.00.

On February 20, 2018, Plaintiff's president and sole owner, Robert Quarture, Jr., executed a large change order referred to by the parties as "Change Order #1," which added metal wall panels and column covers to Plaintiff's scope of work, for an additional payment of $11,068,269.00, bringing the total subcontract price to $17,552,446.00. Change Order #1 also stated the following with respect to the schedule: "Anticipated start date of July 2018 and end date of April 2019;" and "[i]t is also mutually understood and agreed that these dates represent the intention of [WCJV] and [Plaintiff] and that in the event the actual dates are adjusted to suit project conditions, [Plaintiff] will adjust its sequence and duration to timely complete its work in accordance with the adjusted schedule."[2] Subsequent additive and deductive change orders issued by WCJV during the course of the Project revised the total subcontract value downward to $16,848,716.00.

[1] Incorrectly captioned as "Consigli Construction NY."
[2] Exhibit 5 to the Affidavit of Robert J. Quarture, Jr. sworn to December 14, 2023 (NYSCEF Doc. No. 216) at "WCJV-Mohawk-0143375."

During the course of construction, Plaintiff asserts that its scope of work was excessively delayed by other subcontractors that were responsible for completing predecessor work, inadequacies or defects in predecessor work that required corrective actions, work areas and material storage areas not being available, a deficient project schedule managed by WCJV, and other causes. Plaintiff further asserts that its work was commenced on August 20, 2018 and concluded on December 31, 2020, a total duration of approximately 28 months, rather than the approximately ten- and one-half-month duration stated in Change Order #1. During the course of work on the Project and since its conclusion, the parties have disputed the nature of the delays, their causes, and which of them bore the risk.

Plaintiff commenced this action on July 23, 2021 against WCJV and Vassar Brothers Medical Center. Plaintiff's complaint asserted claims for breach of contract, *quantum meruit*, cardinal change, constructive rescission, and foreclosure of a mechanic's lien in the amount of $2,087,827.44 that had been filed against the property on June 23, 2021. Plaintiff alleges that it suffered at least $6,221,961.47 in damages as a result of WCJV's delays and mismanagement, as well as its failure to pay for certain work and materials for the Project. An amended complaint filed November 8, 2021 added four additional entity defendants alleged to be related to and part of WCJV. In February 2022, WCJV filed a bond to discharge Plaintiff's mechanic's lien, which was procured from Defendants Travelers Casualty and Surety Company of America and Federal Insurance Company (the "Surety Defendants"). By Decision and Order dated March 30, 2022, the four defendants added in the amended complaint were dismissed from this action. The parties thereafter stipulated to discontinue Plaintiff's claims against Vassar Brothers Medical Center and to add the Surety Defendants to this action. The parties further stipulated to the filing of a second amended complaint, which occurred on June 17, 2022 (*hereinafter*, the "complaint"). On July 20, 2022, Defendants filed an answer to the complaint, in which Defendants assert twenty-two affirmative defenses, including defenses of lack of standing and offset pursuant to Section 3.12 of the subcontract, as well as a counterclaim for breach of contract seeking the recovery of a portion of Defendants' attorneys' fees and other defense costs.

During discovery, Plaintiff produced an expert report further specifying its alleged contractual damages as follows: an outstanding balance due under the contract of $919,848.19, unpaid change order requests totaling $971,809.78, and damages caused by delays totaling $4,188,841.86, for a total damages claim of $6,080,499.83.

Following the close of discovery, Defendants moved for partial summary judgment seeking dismissal of Plaintiff's first four causes of action.

DISCUSSION

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party," but such a motion "shall be denied if any party shall show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]). Summary judgment is designed to expedite civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law. Since it deprives litigants of their day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). The function of the Court on such a motion is issue finding, rather than issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 505 [2012]).

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of a triable issue of fact using admissible evidence (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding a motion for summary judgment, "the trial court must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and the facts must be considered favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553 [1997]). Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiff's Cause of Action for Breach of Contract

The complaint alleges several independent grounds for breach of contract by Defendants, each of which is subject to a different analysis.

Claims Based upon the Outstanding Contract Balance

Initially, Defendants' motion does not address that portion of Plaintiff's breach claims which seek damages for WCJV's alleged failure to pay the outstanding contract balance of $919,848.19. As Plaintiff has not moved for summary judgment on this ground, nor moved for dismissal of Defendants' affirmative defense based on WCJV's alleged contractual right to "back charge" and offset excess Project costs against amounts due Plaintiff, the issue of any amount Plaintiff may be owed pursuant to the subcontract remains disputed and will require a trial.

Claims Based on Additional Costs due to Delays

Plaintiff alleges as its principal grounds for breach of contract that WCJV caused delays in Plaintiff's scope of work by mismanaging the Project, failing to maintain and distribute accurate schedules, requiring Plaintiff's subcontractor, Viking, to inefficiently re-sequence its work around unavailable work areas, and failing to provide adequate space at the Project site for material storage and staging. In support of this delay claim, Plaintiff furnished a detailed expert report which asserts that these delays caused field labor inefficiencies estimated at $2,600,000.00, extended general conditions costs of $1,392,697.00 (*i.e.*, costs related to overseeing and maintaining the worksite), and wage escalation costs of $196,144.86 (*i.e.*, costs due to increases in hourly labor rates that occurred beyond the anticipated 10.5-month timeframe).

In moving to dismiss the delay claims, Defendants argue that the claims are barred by various provisions of the parties' contract; that by failing to strictly comply with the relevant procedure in the contract Plaintiff did not preserve the claims; that Plaintiff waived and released the claims by executing unconditional waivers in connection with progress payments; and that Plaintiff lacks standing to assert the claims based on the fact that its sub-subcontractor, Viking, incurred the additional costs, not Plaintiff. In opposition, Plaintiff argues that its claims were sufficiently preserved via numerous letters identifying causes of delay, that the contractual provisions relied upon by Defendants are subject to applicable exceptions found in New York case law, and that Plaintiff has standing to assert claims on behalf of Viking.

Before reaching the merits of Defendants' contract-based arguments, the challenge to Plaintiff's standing must be addressed. Generally, "[i]t is established law that the general contractor on a construction project which has itself sustained no injury may not bring suit on behalf of a subcontractor for additional costs caused by the owner's delays" (*Barry, Bette & Led Duke Inc. v State*, 240 AD2d 54, 56 [3d Dept 1998], *lv. denied* 92 NY2d 804 [1998]). The parties do not dispute that this rule also applies where, as here, the delay claim belongs to a sub-subcontractor (Viking) that is seeking to recover against a general contractor (WCJV), and the subcontractor (Plaintiff) that hired the sub-subcontractor has not directly incurred additional costs due to delays. In such situations, the sub-subcontractor lacks privity of contract with the general contractor and therefore cannot assert a breach of contract claim against the general contractor (*I.T.R.I. Masonry Corp. v State*, 21 AD3d 990 [2d Dept 2005]; *see also Degnon Contr. Co. v City of New York*, 235 NY 481, 486 [1923]).

To bridge this "privity gap," New York law recognizes the remedy of entry into a "liquidating agreement" between the damaged sub-subcontractor and the undamaged subcontractor, whereby the subcontractor admits liability to the sub-subcontractor for the delays and resulting damages, in exchange for the sub-subcontractor's agreement to be compensated for those damages only in the form of any recovery the subcontractor may obtain from the general contractor (*I.T.R.I. Masonry Corp.*, 21 AD3d at 990; *N. Moore St. Developers, LLC v Meltzer/Mandl Architects, P.C.*, 23 AD3d 27, 30 [1st Dept 2005]). "An enforceable liquidating agreement requires (1) the imposition of liability upon the [subcontractor] for the [sub-]subcontractor's increased costs, thereby providing the [subcontractor] with a basis for legal action against the owner; (2) a liquidation of liability in the amount of the [subcontractor's] recovery against the [general contractor]; and, (3) a provision that provides for the 'pass-through' of that recovery to the [sub-]subcontractor" (*Rad and D'Aprile, Inc. v Arnell Constr. Corp.*, 159 AD3d 971, 972–973 [2d Dept 2018], quoting *Bovis Lend Lease LMB Inc. v GCT Venture, Inc.*, 285 AD2d 68 [1st Dept 2001]). While such an agreement "need not take any particular form" (*Barry, Bette & Led Duke*, 240 AD2d at 56), it must be an express agreement and not implied from other agreements or circumstances (*id.*; *N. Moore St. Developers*, 23 AD3d at 32).

Here, it is undisputed that Plaintiff did not furnish any labor on the Project, and that all of its labor and site work were sub-subcontracted to Viking. Accordingly, Defendants correctly argue that any increased costs caused by delays on the Project, as alleged in the complaint and enumerated by Plaintiff's expert, were incurred by Viking, not Plaintiff. Defendants have met their *prima facie* burden to establish Plaintiff's lack of standing to assert a delay claim on Viking's behalf by proffering the deposition transcripts of two of Plaintiff's representatives, Quarture and

David Kowcheck, who testified that there was no liquidating agreement between Plaintiff and Viking. Defendants also proffered a copy of PO (Purchase Order) Number: 6311 issued by Plaintiff to Viking to sub-subcontract the labor and site work, and the document does not contain any language satisfying the elements of an enforceable liquidating agreement. Moreover, the complaint neither refers to Viking nor to any agreement (or other basis) between Viking and Plaintiff for Plaintiff to assert claims arising from the Project on Viking's behalf.

In opposition, Plaintiff submits an affidavit from Quarture who asserts, in his capacity as president and sole owner of both companies, that notwithstanding his deposition testimony, PO Number 6311 was "cover[ed]" by a "blanket subcontract" between Plaintiff and Viking dated September 15, 2004, and that the two companies "informally agreed to liquidate" Viking's "delay and schedule impact damages" claims so that Plaintiff could assert them in this action. As set forth above, New York law does not recognize implied liquidating agreements (*Barry, Bette & Led Duke*, 240 AD2d at 57; *N. Moore St. Developers*, 23 AD3d at 32), rendering Plaintiff's claim of such an implied agreement based upon the close relationship of the companies insufficient to raise a triable issue of fact.

Regarding the purported blanket subcontract, it does not appear that it applies to all purchase orders issued by Plaintiff to Viking, including the purchase order at issue in this action. Aside from being dated thirteen years prior to PO Number 6311, the document is entitled "SUBCONTRACT," and vaguely states that it applies to "execution and completion of [Viking's] work described in Article II hereof . . . in connection with the construction of: All subcontracts and PO's issued . . . all in accordance with the terms of this Subcontract, and the Construction Contract entered into by and between Mohawk and their customer[.]" Article II of the document states: "[Viking's] work shall be as follows: Supply the necessary labor, supervision, tools, scaffolding, ladders, and other work required to install the material listed below: Sheet Metal Siding;" and such work was to be performed "in strict accordance with the Drawings and Specifications attached hereto as Exhibit 'A' and made a part hereof." The document does not contain an "Exhibit 'A,'" and there appears to be a page missing between the pages numbered "12" (signature page) and "14" (labeled "Exhibit #2"). As set forth above, Plaintiff's scope of work on the Project did not include installation of sheet metal siding; and were Plaintiff to argue that the metal wall panels which were within the scope of work qualify as sheet metal siding, that item was added to the scope by Change Order #1 and was not included in Plaintiff's original subcontract scope. Therefore, pursuant to its terms, the document did not apply to the sub-subcontract at issue in this action, and Quarture's conclusory statement that the document "indicates that it covers" the sub-subcontract is contradicted by the document itself and cannot raise a triable issue of fact.

Additionally, the only language in the document which is claimed to satisfy the elements of an express liquidating agreement is: "[Viking] Agrees that in the event it has a claim against Mohawk, arising out of or relating to any action or decision of the Owner/Contractor, then [Viking] will cooperate in and be bound by the results of any such arbitration or litigation between the Owner/Contractor and Mohawk with regard to such claims, whether or not [Viking] is a formal party to such proceedings." This language does not indicate Plaintiff's admission of liability for any increased costs incurred by Viking due to WCJV's alleged delays, nor an agreement by Viking to liquidate its claims against Plaintiff in the amount of any recovery obtained by Plaintiff from Defendants. "Absent a showing of actual contractual liability in [Plaintiff], there can be no liquidating agreement, and [Plaintiff's] mere agreement to prosecute [Viking's] claim against [Defendants] and pay over any sums recovered would amount to nothing more than an assignment of [Viking's] contract rights, which would subject [Plaintiff], as assignee, to [the] defense of lack of privity" (*Barry, Bette & Led Duke*, 240 AD2d 54, 57; *cf. Schiavone Const. Co., Inc. v Triborough Bridge & Tunnel Auth.*, 209 AD2d 598, 599–600 [2d Dept 1994]). Based upon Plaintiff's failure to demonstrate that the 2004 subcontract applied to the Project and the document's lack of enforceable liquidating agreement language, Plaintiff has failed to raise a triable issue of fact as to its standing to assert delay claims that belong to Viking.

As a final matter on this issue, Plaintiff submitted a liquidating agreement dated November 30, 2023 in opposition to Defendants' motion, signed by Quarture on behalf of both companies (Plaintiff and Viking). That document was not produced during discovery in this matter, nor could it have been since it did not exist prior to the close of discovery and the filing of Defendants' motion. The existence of, or ability to generate, such a document was within Quarture's control. Therefore, it is not admissible in evidence in this matter (*see Nunez v Laidlaw*, 150 AD3d 1124, 1126 [2d Dept 2017]), and cannot satisfy Plaintiff's burden in opposition (*Zuckerman*, 49 NY2d at 562). Moreover, Defendants demanded the disclosure of agreements between Plaintiff and Viking during discovery and questioned Plaintiff's representatives regarding the existence of liquidating agreements between the companies, and no liquidating agreement was identified or disclosed. Such evidence that is not properly disclosed but is instead first proffered (and here, first created) in opposition to a summary judgment motion may not be considered, regardless of its materiality to the dispute (*C.K. v City of NY*, 216 AD3d 753, 757 [2d Dept 2023]; *Dunson v Riverbay Corp.*, 103 AD3d 578 [1st Dept 2013]). Accordingly, Plaintiff's recently created liquidating agreement also cannot defeat Defendants' entitlement to summary judgment on its affirmative defense of lack of standing.

Even if the Court were to find that Plaintiff may have standing to assert claims for delay damages, those claims are barred by the subcontract and Change Order #1.

A clause in a construction contract limiting or eliminating the general contractor's liability for costs due to delays[3] is generally enforceable, subject to four recognized exceptions: "(1) delays caused by the [general contractor's] bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the [general contractor], and (4) delays resulting from the [general contractor's] breach of a fundamental obligation of the contract" (*Corinno Civetta Const. Corp. v City of New York*, 67 NY2d 297, 309 [1986] [*hereinafter*, "*Corinno*"]). If the exculpatory clause is found to be unenforceable due to one of the foregoing exceptions, the express conditions precedent for submitting delay claims are also unenforceable (*e.g., R-J Taylor Gen. Contr., Inc. v Fairport Cent. School Dist.*, 170 AD3d 1603 [4th Dept 2019]). The substance of Plaintiff's delay

[3] Often referred to as a "no damages for delay" clause. *See* 33 N.Y.Prac., New York Construction Law Manual § 7:32 (2d ed.), "No damage for delay provisions." The applicable clause here, Exhibit A, §4.4 of the subcontract, contains an unusual sentence: "[Plaintiff] and [WCJV] agree that the language in this article shall not be interpreted as no damages for delay." The legal intent of this sentence is unclear. However, given that §4.4 of Exhibit A is plainly intended to "exculpate[ ] [WCJV] from liability to a contractor for damages resulting from delays in the performance of the latter's work" (*Corinno*, 67 NY2d at 309), and the parties have briefed the issue based on case law discussing "no damage for delay" clauses, the clause will be referred to as an "exculpatory clause" (*Id.*) and interpreted according to its terms.

claims must therefore be examined prior to addressing Defendants' other arguments based upon the contractual procedures for submission of claims.

The parties do not dispute that the subcontract contains a broad exculpatory clause regarding delays in §4.4 of Exhibit A to the subcontract ("Terms and Conditions"), which provides, in relevant part:

> If the progress of [Plaintiff's] Work is substantially delayed, hindered, interfered, disrupted, obstructed, suspended, accelerated, constructively accelerated, or impacted by out-of-sequence work, changes to the unchanged work, cumulative impacts, mismanagement, or other similar event, (collectively referred to as "Delay") through no fault or responsibility of [Plaintiff] and [Plaintiff] has fully complied with the Claim provisions of this Agreement, then [WCJV] shall either: (i) extend the time for the performance of [Plaintiff's] Work by Change Order, but such extension shall be limited to that amount of time which will enable [WCJV] to meet its obligation to Owner to complete the Project in accordance with the Contract Documents, or (ii) require [Plaintiff] to accelerate or complete its Work with additional manpower and the expediting of materials, but [WCJV] shall be obligated to pay only for the costs of expediting material and costs recovered under the Owner Related Disputes provisions of this Agreement.
>
> Provided [Plaintiff] has complied fully with the Claim requirements of this Agreement, the failure of which the Subcontractor agrees will have caused it to waive its Claim for Delay, . . . [WCJV] shall not be liable to [Plaintiff] for any damages or additional compensation as a consequence of Delay caused by [WCJV]; or by reason of fire, casualty, act of God or any other reason beyond [WCJV's] control. [Plaintiff] and [WCJV] agree that the language in this article shall not be interpreted as no damages for delay. [Plaintiff] acknowledges that in agreeing to the Subcontract Amount it has assessed the potential impact of this article of the Agreement on its ability to recover additional compensation in connection with a Delay, and agrees that these limitations will apply regardless of the accuracy of [Plaintiff's] assessment or actual costs incurred by [Plaintiff].
>
> Regardless of whether or not [Plaintiff] has provided the notice required for a Claim, except as stated herein, it is expressly understood and agreed that [Plaintiff's] sole and exclusive remedy for any Delay shall be an extension in the

> time for performance of [Plaintiff's] Work or for the costs of expediting material or costs recovered under the Owner Related Disputes provisions of this Agreement."

The subcontract contained a further clause regarding out-of-sequence work in §9.3 of Exhibit B.1 ("Scope Clarifications, Alternates, Unit Prices and Contract Breakdown"), which Plaintiff argues is an exception to the exclusive remedy of additional time set forth in the foregoing exculpatory clause:

> [Plaintiff] shall perform out-of-sequence work if required by the [WCJV] to permit the coordination of the work with other trades. If this out of sequence work is required thru [*sic*] no fault of [Plaintiff] and causes a financial burden to [Plaintiff] the agreed upon costs will be reimbursed.

Addressing the *Corinno* exceptions first, Plaintiff argues that all four of the exceptions apply in this matter. "[O]n a motion for summary judgment, a defendant seeking to dismiss a cause of action to recover damages arising from a delay bears the initial burden of demonstrating *prima facie* that none of the exceptions to the 'damages for delay' clause are present" (*Blue Water Envtl., Inc. v Inc. Vil. of Bayville*, 44 AD3d 807, 810 [2d Dept 2007]). If the defendant makes this *prima facie* showing, the plaintiff then must meet a "heavy burden" of demonstrating that one of the exceptions applies (*Bovis Lend Lease*, 108 AD3d at 147; *see also Weydman Elec., Inc. v Joint Schools Const. Bd.*, 140 AD3d 1605, 1607 [4th Dept 2016]; *Lakhi Gen. Contr., Inc. v New York City School Const. Auth.*, 147 AD3d 917 [2d Dept 2017]).

Defendants have met their *prima facie* burden by submitting: (i) the complaint, which contains only conclusory allegations in support of the four exceptions; (ii) the subcontract, which contains the above-quoted exculpatory clause (*Lakhi Gen. Contr.*, 147 AD3d at 917); (iii) the affidavit of a representative of WCJV, who asserts that with respect to Plaintiff's delay claims: "While difficulties were encountered [on the Project], that is expected and inherent to any project of this size and complexity;" (iv) the sworn interrogatory responses and deposition testimony of Plaintiff's representatives, who identified WCJV's alleged mismanagement of the Project and other subcontractors as the cause of the delays and associated costs; and (v) a set of over forty letters sent by Plaintiff to WCJV during the course of the Project asserting various causes of delay, none of which asserts facts to support an exception to the exculpatory clause, as further discussed below (*Blue Water Envtl.*, 44 AD3d at 810). This evidence is sufficient to demonstrate, *prima facie*, that the delays encountered on the Project were within the categories of possible delay enumerated in the exculpatory clause or were otherwise contemplated in the subcontract or reasonably foreseeable (*see id.*) and were due to "garden variety" issues encountered in large construction projects (*Corinno*, 67 NY2d at 313; *see also Ecoline, Inc. v Heritage Air Sys., Inc.*, 161 AD3d 1045 [2d Dept 2018]).

In opposition, Plaintiff failed to raise a triable issue of fact with respect to any of the four exceptions:

Delays caused by WCJV's alleged bad faith or willful, malicious, or grossly negligent conduct. Other than bare allegations and conclusory statements, Plaintiff has not proffered any evidence that WCJV acted in bad faith or in any other manner which "smacks of intentional wrongdoing" (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]). While Plaintiff's evidence may arguably show "inept administration or poor planning" by WCJV, such evidence is insufficient to defeat an exculpatory clause even if the delays are significant (*see Corinno*, 67 NY2d at 315 [two-year delay]; *Plato Gen. Const. Corp./EMCO Tech Const. Corp. v Dormitory Auth. of State*, 89 AD3d 819, 823 [2d Dept 2011] [526-day delay]; *Commercial Elec. Contractors, Inc. v Pavarini Const. Co., Inc.*, 50 AD3d 316, 317 [1st Dept 2008] [20-month delay]; *see also Blue Water Envtl.*, 44 AD3d at 810 ["There is no exception for delays resulting from inept administration, as distinguished from willful interference"); *Martin Mech. Corp. v P.J. Carlin Const. Co.*, 132 AD2d 688, 689–690 [2d Dept 1987]).

Uncontemplated Delays: A review of the voluminous letters, emails and other documentation of delays in the record reveals that all of the claimed delays were of a sort contemplated by the parties' contract or were otherwise reasonably foreseeable (*Corinno*, 67 NY2d at 310). By means of summary, Plaintiff categorizes the causes for delay as "(i) defective predecessor work; . . . (ii) lack of a Project schedule and . . . accurate schedule information; . . . (iii) incomplete predecessor work and resequencing of Mohawk's work; . . . (iv) material handling and site congestion issues; . . . and (v) unplanned winter weather work." However, the exculpatory clause covers delays due to out-of-sequence work, mismanagement, obstructions, suspensions, and "other similar event[s]" (Exhibit A, §4.4). Other relevant provisions of the subcontract contemplate potential delays due to: changes or deviations in the Project schedule or sequencing of Plaintiff's scope of work (Exhibit A §§ 2.1, 4.4; Exhibit B.1, §8; Exhibit E, §11); changes to the scope of work (Exhibit A, §4.1; Exhibit E, §13); WCJV allocating "work areas, utilities, storage space, and other characteristics of the Project site and Project work" to others ahead of Plaintiff at WCJV's discretion to maintain "optimum" progress on the Project (Exhibit A, §5.1); winter weather conditions (Exhibit B.1, §5.36); coordination with other subcontractors (Exhibit A, §6.2; Exhibit B.1, §§ 5.36, 9.4 and 9.7), and referring specifically to the "Air and Vapor barrier [AVB] subcontractor" (Exhibit B.1, §5.45), which was mentioned in many of Plaintiff's communications regarding delays and Viking's daily reports; defective predecessor work (Exhibit A, §6.2); and off-site material storage (Exhibit B.1, § 9.11). Furthermore, as a façade subcontractor on a large project, Plaintiff should have been aware that its work would necessarily follow the work of several other subcontractors. Thus, the numerous claims of delay based upon untimely or "[d]efective and incomplete predecessor work" were reasonably foreseeable (*see McNamee Const. Corp. v City of New Rochelle*, 60 AD3d 918, 919 [2d Dept 2009] [excavation contractor "must have reasonably foreseen the possibility" of being delayed due to previously unidentified underground utilities]). Finally, the Project did have a detailed schedule which WCJV could update at its discretion (or not) per the subcontract, and the failure to maintain a fully accurate and up-to-date Project Schedule should be considered a reasonably foreseeable eventuality on a complex construction project (*see Plato Gen. Const. Corp.*, 89 AD3d at 824 [even total abandonment of updating the master project schedule does not support an exception to the exculpatory clause]).

Abandonment of the Subcontract: It is not disputed that Plaintiff's scope of work was completed, albeit 18 months later than anticipated, and that the Project itself was ultimately completed. Plaintiff has not produced any evidence that its work was suspended for any legally meaningful length of time, or that WCJV considered ceasing work on the Project. Accordingly, there can be no claim that any delays caused by WCJV were "so unreasonable that they connote a relinquishment of the contract . . . with the intention of never resuming it" (*Corinno*, 67 NY2d at 313; *Kalisch-Jarcho*, 58 NY2d at 386 n.8).

Fundamental Breach of the Subcontract: The record does not support a claim for WCJV's fundamental breach of the subcontract based upon the failure to maintain an accurate Project schedule or properly manage the work of other subcontractors (*see Plato Gen. Const. Corp.*, 89 AD3d at 824). Rather, such delays, even if fully and solely attributable to WCJV, were contemplated by the parties' contract (*Id.*) as breaches for which only the remedy of an extension of time was available, as set forth above. Plaintiff nevertheless argues that WCJV had a fundamental contractual obligation to provide for a "logical" sequence of work as assumed in Plaintiff's pre-subcontract proposal, or to strictly adhere to a 10.5-month schedule as represented prior to entry into Change Order #1. These arguments are undermined by Plaintiff's agreement to a clause in Change Order #1 (that happens to immediately follow the clause containing the anticipated 10.5-month duration) which obligated Plaintiff to "adjust its sequence and duration to timely complete its work" in the event that the Project schedule was "adjusted to suit project conditions," as well as to similar schedule-adjustment clauses in the subcontract cited above. The subcontract also contains two merger-type clauses excluding "all prior negotiations, representations, or agreements" (Exhibit A, §13.5) and "previous quotes, estimates, *proposals* or correspondence" from the parties' agreement (Exhibit B.1, §4.1 [emphasis added]). Accordingly, Plaintiff cannot raise a triable issue of fact that the aforementioned causes of delay represented fundamental contractual obligations of WCJV.

Based on the foregoing, Plaintiff has not raised a triable issue of fact as to the enforceability of the exculpatory clause in the subcontract.

Turning to the alleged contractual exception to the exculpatory clause permitting reimbursement for "out of sequence work" "required by [WCJV]," §9.3 of Exhibit B.1, Plaintiff argues that the exception applies because it "seeks to recover damages incurred due to re-sequencing of its work." In reply, Defendants argue that the subcontract should be read such that the exception applies only to delays caused by the owner or third parties, and should not be read to create a carve-out from the otherwise comprehensive exculpatory clause.

The parties effectively dispute the interpretation of the phrase "except as stated *herein*" (emphasis added) in the final paragraph of the exculpatory clause. Defendants argue that the phrase is intended to limit the contractual exceptions to those listed within §4.4 of Exhibit A, which are "the costs of expediting material and costs recovered under the Owner Related Disputes provisions" of the subcontract. Plaintiff admits that it incurred no costs for expediting material. As to the "Owner Related Disputes" provision, §11.3 of Exhibit A, that section applies to claims that Plaintiff may have against the Project owner or a third party, such as other subcontractors, and Plaintiff is not asserting any claims against any parties other than Defendants. Defendants contend, therefore, that Plaintiff has failed to demonstrate that either exception in §4.4 of Exhibit A applies here, and that §9.3 of Exhibit B.1 does not provide any additional exception or carve-out from the exculpatory clause. Plaintiff disagrees, and argues that the word "herein" should instead be interpreted to refer to the subcontract as a whole, and that the plain language of §9.3 of Exhibit B.1 constitutes such an exception to the exculpatory clause.

"[U]nambiguous provisions of [a] contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675, 682 [2017]). Black's Law Dictionary notes, however, that the term "herein" is "inherently ambiguous," and may refer to "a document, section, or paragraph" (HEREIN, Black's Law Dictionary (11th ed. 2019)). Nevertheless, the subcontract should be "read as a whole to determine its purpose and intent," (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]), and "conflicting contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect" (*Natixis Real Estate Capital Tr. 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 133–134 [1st Dept 2017]). Moreover, "a contract which confers certain rights or benefits in one clause will not be construed in other provisions completely to undermine those rights or benefits" (*Ronnen v Ajax Elec. Motor Corp.*, 88 NY2d 582, 590 [1996]). Applying these principles, and observing that §9.3 of Exhibit B makes no mention of delays or reference to the exculpatory clause, it appears that the provision does not provide a further exception thereto. The clause does not assert, and Plaintiff does not argue, that out-of-sequence work *necessarily* results in a delay in the work. It is conceivable, for example, that WCJV could have required (and did require) Viking to perform façade installation work on a certain part of the Project before working on other parts that, according to the Project schedule, were scheduled to be completed first, without any impact on Plaintiff's overall time to complete its full scope of work. The clause then provides that the parties could agree on the costs of performing the work out-of-sequence and that those costs would be reimbursed. The subcontract contains a mechanism for addressing such claims in the "Changes" and/or "Claims" provisions (Exhibit A, §§ 4.1 and 4.3, respectively). Interpreted in this manner, the provision of the exculpatory clause limiting Plaintiff's remedy for delays to an extension of time remains intact, and §9.3 of Exhibit B remains a viable avenue for relief for costs for out-of-sequence work regardless of whether there was a resulting delay.

Since the exculpatory clause is enforceable, Plaintiff was required to follow the procedure for submitting claims for costs incurred due to out-of-sequence work as a contractual condition precedent to recovering on those claims. The record demonstrates that Plaintiff did not submit any claims for any specific additional costs due to Viking being required to perform out-of-sequence work.[4] Section 4.3 of Exhibit A makes clear that all claims were thereby waived. Even if the more than 40 letters that Plaintiff sent to WCJV are deemed valid notices of claim pursuant to §4.3 of Exhibit A, the letters do not list any specific costs of performing out-of-sequence work nor furnish any required backup documentation. Plaintiff's expert report also does not contain separate records or analysis of such costs. While Plaintiff's opposition affidavit mentions re-sequencing, no specific correspondence or documents are cited that demonstrate particular instances of re-sequencing. Those documents that are cited to indicate work areas not yet being available due to incomplete or deficient predecessor work, causing Plaintiff to run out of work and/or demobilize—do not demonstrate that WCJV required Plaintiff to move elsewhere on the Project to perform

[4] For example, Viking's daily logs during the fall and early winter of 2018 – 2019 reference rented equipment that could not be used on the east elevation due to defective/incomplete predecessor work, and that Viking crews performed work on other areas of the Project while that equipment sat idle. The record in this matter contains no specific claim submitted to WCJV for these presumably excess rental costs.

other work out-of-sequence while waiting for the in-sequence worksite to become available. Therefore, there is no triable issue of fact regarding costs for out-of-sequence work that can be gleaned from Plaintiff's opposition submissions.

Based on the foregoing, Plaintiff's breach of contract claims based on Project delays should be dismissed as a matter of law.

Claims Based upon Unpaid Change Order Requests

With respect to the final component of Plaintiff's breach of contract claims—the $971,809.78 in unpaid change order requests ("CORs") for additional work required by WCJV—Defendants argue that these claims were waived and/or released by Plaintiff via a change order and a lien waiver executed by Plaintiff. Defendants argue that Change Order #11, executed by Plaintiff on May 29, 2020, waived any other CORs based upon extra work that occurred prior to that date, due to the inclusion of the following language:

> The price increase associated with each individual change ("Change") listed in this Change Order and/or any time extension granted under this Change Order constitute full and final payment to the [Plaintiff] for all of its additional costs and time associated both with the Change *and with any and all other events that have occurred, whether or not a claim has been asserted by the [Plaintiff] based on any such event . . . from the date that the [Plaintiff] entered into the Subcontract/Purchase Order through the date of the execution of this Change Order*. [Plaintiff's] costs and time extensions resolved through this Change Order include, without limitation, all of [Plaintiff's] known and unknown direct costs, indirect costs, delay costs, overhead costs, general and administrative expenses, profit, home office expenses and all of [Plaintiff's] other costs (direct, indirect and consequential, including but not limited to, impacts, changes/impacts to unchanged work, and ripple effects) and time on all other Subcontract/Purchase Order Work, *whether or not such Subcontract/Purchase Order Work was changed by the Change or this Change Order*. [emphasis added].

Additionally, Defendants argue that a document entitled "Partial Waiver and Release of Claims for Payment – Unconditional – Joint Venture," sworn to by Plaintiff on March 18, 2021 (*referred to by Defendants and herein as the* "Unconditional Lien Waiver"), included a waiver of payment claims arising prior to that date, which was over two months after Plaintiff's work on the Project concluded. The relevant language is:

> [Plaintiff], for and in consideration of . . . $142,129.00 . . ., and in consideration of such sum and other good and valuable considerations, the receipt whereof is hereby

> acknowledged, do(es) . . . hereby waive and release [WCJV], the parties comprising [WCJV], [WCJV's] surety, [and] the surety of each of the parties comprising [WCJV] . . . from any and all suits, debts, demands, torts, charges, causes of action and claims for payment . . . with respect to and on [the] Project, and the improvements thereon, . . . and on the material, fixtures, apparatus or machinery furnished . . . arising out of or relating in any way to the labor, services, material, fixtures, equipment, apparatus or machinery furnished by [Plaintiff], on the . . . Project from the beginning of time through the date indicated below [March 18, 2021], including extras*.
>
> *Extras include but are not limited to changes, both oral and written, to the contract, and Claims as defined in [Plaintiff's] contract with [WCJV].

Below this language, under a section with the heading "Contractor's Affidavit," the document further contains:

> [Plaintiff], being duly sworn, deposes and says . . .
> That it has received payment of $15,648.094.00 prior to this payment.
> That all waivers and releases are true, correct and genuine and delivered unconditionally and that there is no claim either legal or equitable to defeat the validity of said waivers or releases.

In opposition, Plaintiff argues that "the execution of lien waivers was a perfunctory act required as a step in the payment process," and the documents effectively constituted mere receipts for payment. Plaintiff points to provisions of the subcontract that conditioned payments to Plaintiff on "receipt of waivers and affidavits" from Plaintiff (Exhibit A, §§ 3.6[iv], 3.10) and the requirement of using the waiver forms annexed to the subcontract (Exhibit I). Thus, Plaintiff argues, its execution of waiver forms provided by WCJV as a condition precedent to getting paid did not demonstrate an actual waiver of any claims for additional payment.

Waivers and releases executed during the course of a construction project in exchange for progress payments are generally enforceable pursuant to their terms unless the party seeking enforcement "intended to treat the . . . waivers and releases as mere receipts of progress payments" (*Pizzarotti, LLC v X-Treme Concrete Inc.*, 205 AD3d 487 [1st Dept 2022]). Such intent may be shown by contractual provisions requiring the execution of waivers and releases as a conditions precedent to payment (*Spectrum Painting Contractors, Inc. v Kreisler Borg Florman Gen. Const. Co., Inc.*, 64 AD3d 565, 578 [2d Dept 2009]; *see also Penava Mech. Corp. v Afgo Mech. Services, Inc.*, 71 AD3d 493 [1st Dept 2010]) and by conduct of the parties evincing an acknowledgement of the right to obtain additional payment notwithstanding the execution of waivers and releases (*Glob. Precast, Inc. v Stonewall Contr. Corp.*, 78 AD3d 432 [1st Dept 2010]).

Here, although Plaintiff was contractually required to execute waivers and releases on WCJV's forms prior to receiving progress payments, Plaintiff has not proffered any evidence that Defendants acknowledged the validity of Plaintiff's CORs or otherwise impliedly waived their rights under the Unconditional Lien Waiver. Plaintiff furnished correspondence and documentation related to certain change orders that were approved by WCJV, but which do not comprise any part of Plaintiff's claims in this action. No similar records are furnished with respect to the 60 allegedly outstanding CORs listed in Plaintiff's expert report, and the list itself is not supported by any authentication or backup documentation. It must further be noted that Viking's representative testified that requests for payment for additional work were submitted to Plaintiff via written extra work orders ("EWOs"), and that Change Order 6, which was dated December 20, 2019 and approved by WCJV May 30, 2020 (Quarture Aff. at Exhibit 60), contains references to numerous EWOs incorporated into that change order. Notwithstanding this factual context, Plaintiff's 32-page opposition affidavit with 72 exhibits nowhere mentions the CORs, any related EWOs, or any evidence of WCJV's acknowledgement of financial responsibility for the alleged extra work. Plaintiff was required to "lay bare [its] proof and disclose evidentiary facts sufficient to raise triable issues of fact" in opposition to Defendants' motion (*Forest Glen Realty, LLC v T11 Funding*, 208 AD3d 1312, 1318 [2d Dept 2022]), yet it has not submitted any admissible evidence indicating that WCJV requested the work in the CORs, that Plaintiff performed it, or that WCJV impliedly acknowledged an obligation to pay for it. As a result, Plaintiff has failed to raise a triable issue of fact as to the enforceability of the Unconditional Lien Waiver, or that at least some of the allegedly outstanding CORs were not waived by incorporation into Change Order #11, and its breach of contract claims premised on unpaid CORs should therefore be dismissed.

Based on the foregoing, it is hereby

ORDERED that the branch of Defendants' motion for summary judgment as seeks dismissal of Plaintiff's first cause of action for breach of contract is granted other than with respect to Plaintiff's claimed unpaid contract balance of $919,848.19, and Plaintiff's right to recover under the mechanic's lien bond.

Plaintiff's Remaining Claims for Quantum Meruit, "Cardinal Change", and Constructive Rescission

Given the comprehensiveness of the subcontract and subsequently-executed change orders, Plaintiff's alternative claim for *quantum meruit* is barred by the well-settled rule that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]). Plaintiff's second cause of action should therefore be dismissed.

With respect to Plaintiff's claim of a "cardinal change" constituting a *de facto* breach of the subcontract (*see* 33 N.Y.Prac., New York Construction Law Manual § 6:4 Basic clause coverage—The cardinal change doctrine (2d ed.)), Plaintiff failed to raise a triable issue of fact that any change made to Plaintiff's contractual obligations by Defendants "affect[ed] the essential identity or main purpose of the contract, such that it constitute[d] a new undertaking" (*Tutor Perini Corp. v City of New York Off. of Admin. Trials and Hearings Contr. Dispute Resolution Bd.*, 193

AD3d 665, 666 [1st Dept 2021], *lv. denied* 38 NY3d at 903). Rather, it is undisputed that Plaintiff's scope of work on the Project from the outset was supplying and installing a substantial portion of the building façade, and none of the change orders or Project conditions altered that main purpose. As a result, Plaintiff's third cause of action should be dismissed, as well.

Finally, as Plaintiff's constructive rescission claim rests upon the argument that the 18-month delay in Plaintiff's scope of work constituted a breach of contract, and as that argument was rejected for the reasons set forth above, Plaintiff's fourth cause of action should also be dismissed.

Based on the foregoing, it is hereby

ORDERED that those branches of Defendants' motion for summary judgment as seek dismissal of Plaintiff's second, third, and fourth causes of action are granted, and those causes of action are dismissed.

Defendants' Request for Defense Costs

Defendants' final argument asserts that they are entitled to recover some portion of the costs incurred to defend Plaintiff's claims. Defendants' request is based on §4.3 of Exhibit A to the subcontract which provides, in relevant part:

> If [WCJV] or [WCJV]'s surety is the prevailing party, even partially, against [Plaintiff's] Claim or claim against [WCJV]'s bond, [Plaintiff] shall reimburse all of [WCJV]'s and [WCJV's] surety's costs incurred in investigating, responding to, defending against, and resolving such Claims and claims, including, but not limited to, their in-house costs and outside attorneys' fees.

Given that Defendants have prevailed at least partially in dismissing Plaintiff's complaint, Defendants may be entitled to recover some of their attorneys' fees and other defense costs. A determination will have to await the results of trial, however, as even where there is a contractual provision shifting such costs it must be shown that the party seeking the costs was "successful with respect to the central relief sought" (*Blinds to Go (U.S.), Inc. v Times Plaza Dev., L.P.*, 191 AD3d 939 [2d Dept 2021]) and that the costs and/or fees sought are reasonable. "Such a determination requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope" (*Id.* [internal quotation marks omitted]). The issues remaining in this case are Plaintiff's breach of contract claim to the extent of seeking any outstanding balance due under the subcontract, subject to Defendants' right of offset under the subcontract, and Plaintiff's right to recover against the mechanic's lien bond. As the sums remaining in dispute are still significant notwithstanding the dismissal of the bulk of Plaintiff's breach of contract claims, any determination of a right to recovery attorneys' fees must await the conclusion of trial.

Based on the foregoing, it is hereby

ORDERED that the branch of Plaintiff's motion for summary judgment as seeks an award of attorneys' fees and other defense costs is denied without prejudice, subject to renewal following a final adjudication of the merits of this matter; and it is further

ORDERED that a pretrial settlement conference is scheduled for April 4, 2024 at 9:15 a.m., at which time counsel should be prepared and have authority to discuss settlement. Individual clients with settlement authority should either be present or available by phone.

The foregoing constitutes the decision and order of the Court.

Dated: March 1, 2024
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

Scanned to the E-File System only

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

Welby, Brady & Greenblatt LLP
11 Martine Avenue, 15th Floor
White Plains, NY 10606

Hinckley, Allen & Snyder LLP
30 South Pearl Street, Suite 301
Albany, NY 12207