VCL Constr. Inc. v H&Z Bldg. Consulting Inc.
2025 NY Slip Op 34797(U)
December 10, 2025
Supreme Court, New York County
Docket Number: Index No. 655928/2024
Judge: Emily Morales-Minerva
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. EMILY MORALES-MINERVA** **PART** **42M**

Justice

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VCL CONSTRUCTION INC.,

Plaintiff,

- v -

H&Z BUILDING CONSULTING INC., LEON CHEN

Defendants.

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INDEX NO. 655928/2024

MOTION DATE 06/21/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20

were read on this motion to/for DISMISS DEFENSE.

APPEARANCES:

Peraino Malinowski LLP, New York, NY (Matthew Corey Schwartz, Esq., of counsel), for plaintiff.

Alpha Law, LLC, Flushing, NY (Lina Li, Esq., of counsel) for defendants.

EMILY MORALES-MINERVA, J.S.C.

In this action for breach of a settlement agreement, plaintiff VCL CONSTRUCTION INC. moves, by notice of motion (seq. no. 01), for an order dismissing the counterclaim of defendants H&Z BUILDING CONSULTING INC. and LEON CHEN a/k/a LIANG CHEN[1] (see CPLR § 3211 [governing motions to dismiss]).[2] Defendants appear and submit written opposition to the motion.

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[1] The answer with counterclaim refers to defendant LEON CHEN as follows: "LIANG CHEN (aka *LEON CHEN*") (New York State Court Electronic Filing System [NYSCEF] Doc. No. 06, answer with counterclaims).

[2] CPLR § 3211 (a) (5) provides, "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the

For the reasons set forth below, the Court grants plaintiff's motion and dismisses defendants' counterclaim.

BACKGROUND*[3]

On or around December 29, 2021, plaintiff VCL CONSTRUCTION INC., a general contractor, and defendant H&Z BUILDING CONSULTING INC., a subcontractor, executed a subcontract (see New York State Electronic Filing System [NYSCEF] Doc. No. 01, summons and verified complaint, ¶ 6).[4] Thereby, plaintiff (contractor) retained H&Z BUILDING CONSULTING INC. (subcontractor) to perform work at the premises known as 8107 Kew Gardens Road, Queens, New York (premises). Subcontractor then retained lower tier subcontractors and suppliers to complete tasks within the scope of the project (see id. at ¶ 7).

Inevitably, disputes surrounding the project arose between contractor, subcontractor and subcontractor's senior manager, defendant LEON CHEN a/k/a LIANG CHEN (Chen) (see id. at ¶ 8). Consequently, on or around May 03, 2023, subcontractor filed a

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cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds."

[3] The following facts are set forth in the complaint and counterclaim, which this Court must accept as true for the limited purpose of this motion to dismiss (see Leon v Martinez, 84 NY2d 83 [1994]).

[4] While not disputing this written agreement exists, neither contractor nor subcontractor attach this written agreement.

$708,700.00 mechanics' lien against the premises for unpaid work (see id. at ¶ 9).

The parties and non-party 8043 KG LLC, owner of the premises, attempted to resolve their dispute outside of court. To this end, on or around September 19, 2023, contractor and subcontractor executed a written settlement agreement (see NYSCEF Doc. No. 10, summons and complaint, exhibit 1, settlement agreement, dated September 19, 2023 [signed in counterparts]).

Among other things, therein the parties agreed that contractor would pay subcontractor $435,000.00 in full satisfaction of all amounts owed for work performed (see id., exhibit 1, settlement agreement, § 2 [A]).[5] In exchange for the $435,000.00, subcontractor agreed to complete and notarize a lien waiver, attached to the settlement agreement as "Exhibit A" (see id., settlement agreement, at § 3[A] and exhibit a).

Said lien waiver explicitly provides:

> ". . . the undersigned [subcontractor] hereby represents and warrants to VCL CONSTRUCTION INC. [contractor] and 8043 KG LLC [owner] as follows:
>
> "1. That it [subcontractor] has been fully and finally paid for all labor, material, supplies, insurances, taxes, services and equipment furnished by and/or on behalf of the undersigned [subcontractor] in

[5] The settlement agreement provides, among other things: "In full and final settlement of all claims between the Parties, and upon the full execution and delivery of this Agreement [], [plaintiff] shall issue a one-time payment in the amount of [$435,000.00] to [subcontractor] by wire transfer . . ." (id., at § 2A).

> connection with the project known as and located at 8107 Kew Gardens Road, Queens, New York (the "Project").
>
> "2. That it [subcontractor] has performed no other work nor supplied any other materials at the Project during the past twelve (12) months other than work for which it has received payment in full"

(NYSCEF Doc. No. 10, summons and complaint, exhibit 1, settlement agreement, exhibit A [emphasis added]). In addition, this final lien waiver states plainly:

> "The undersigned [subcontractor] has no outstanding and unpaid applications, invoices, retentions, holdbacks and/or expenses of any kind or nature with respect to the Project [8107 Kew Gardens Road, Queens, New York] and no such applications shall hereafter be made"

(id. at exhibit 1, settlement agreement, exhibit A [emphasis added] [emphasis added]).

The settlement agreement also included a proposed exhibit C, entitled "SATISFACTION OF LIEN," for subcontractor to execute (see id. at exhibit 1, settlement agreement, exhibit C). This document intended to certify:

> "that a Mechanic's Lien in the sum of $708,700.00 filed by H&Z Building Consulting Inc. [subcontractor] . . . against . . . Owner: 8043 KG LLC, Contractor: VCL Construction Inc. [and] Address: 8107 Kew Gardens Road . . . is hereby satisfied in whole and the undersigned [subcontractor] consents that the same be discharged of record"

(id. at exhibit 1, settlement agreement, exhibit C [emphasis added]).

Finally, the settlement agreement provided that the executed copies of the lien waiver and satisfaction of lien, quoted above, would remain in escrow until subcontractor confirmed receipt of contractor's $435,000.00 payment (id. at ¶ 3D).

It is undisputed that, on or around September 21, 2023, contractor wired the agreed upon $435,000.00 payment to subcontractor and that subcontractor executed both exhibit A and exhibit C of the settlement agreement; subcontractor confirmed receipt of payment (see NYSCEF Doc. No. 06, answer with counterclaims, ¶ 23 ["Defendants received Plaintiff's wire transfer" on September 22, 2023]; see also NYSCEF Doc. No. 09, affidavit of Yong Chen, dated February 14, 2025, ¶¶ 7, 8 and 10; NYSCEF Doc. No. 11, email correspondence between plaintiff's counsel and subcontractor's counsel, dated September 21, 2023, and September 23, 2023).

Later, a problem arose between the parties when lower-tier subcontractors filed mechanics' liens and/or threatened to file such liens against the premises (NYSCEF Doc. No. 01, complaint, ¶ 17). They alleged unpaid "labor and/or materials" on the project, and subcontractor declined to indemnify/defend contractor against these circumstances.

Consequently, contractor commenced this action (1) against subcontractor, alleging breach of contract against subcontractor for its failure to, among other things, defend, indemnify and hold contractor harmless against the lower tier subcontractors, pursuant to section 3 (B) of their settlement agreement; and (2) against both subcontractor and Chen, alleging violation of Lien Law for diverting funds intended to be used for subcontractor's direct payments to lower tier subcontractors (see Lien Law § 70 [defining trust funds] and § 71 [governing the purpose of the trust]). Contractor seeks damages of more than $1,000,000.00 on the breach of contract claim, and of not less than $435,000.00, plus interest, costs and attorneys' fees, on its second cause of action (see NYSCEF Doc. No. 01, complaint, p 5-6).

Defendants answer and counterclaim, asserting contractor's breach of the subcontract for failure to pay defendants no less than $273,700.00 for work, labor, services and materials expended on the project (see NYSCEF Doc. No. 06, answer with counterclaim, p 5). Contractor now moves, by notice of motion (seq. no. 01), for an order dismissing said counterclaim based on the release in the parties' settlement agreement (see CPLR § 3211 (a)(5) [governing dismissal based on release]; see also NYSCEF Doc. No. 08, notice of motion to dismiss defendants' counterclaim).

Appearing in opposition, defendants contend that the settlement agreement is void as against New York public policy because it includes a "pay-when-paid" provision in violation of Lien Law § 34 and, therefore, the release therein is unenforceable (see NYSCEF Doc. No. 18, affirmation in opposition to plaintiff's motion to dismiss). Assuming the success of this argument, defendants maintain that they may sue for work performed on the project based on breach of the subcontract.

ANALYSIS

CPLR § 3211, upon which contractor relies, provides:

> "[a] A party may move for judgment dismissing one or more causes of action asserted against [them] on the ground that:
>
> . . .
>
> "5. the cause of action may not be maintained because of . . . release . . ."

(see also Jacobus v Battery Park Hotel Mgt., LLC, 81 AD3d 572 [1st Dept 2011] [granting a motion to dismiss the complaint where the plaintiff "knowingly and voluntarily executed an agreement explicitly releasing the [same claims] against the defendant"]).

A release is "'a jural act' binding on the parties'" thereto (see Centro Empresarial Cempresa S.A. v Am. Móvil,

S.A.B. de C.V., 17 NY3d 269, 276 [Ciparick, J.] [2011], quoting Booth v 3669 Delaware, 92 NY2d 934, 935 [1988], and Mangini v McClurg, 24 NY2d 556, 563 [1969]; see also Global Mins. & Metals Corp. v Holme, 35 AD3d 93, 98 [1st Dept 2006]). It is not a proper start to litigation unless "'any other result [would cause] a grave injustice'" (Centro, 17 NY3d at 276, quoting Mangini, 24 NY2d at 563).

Indeed, a release has the force of a written contract; otherwise, no one could settle a dispute and feel secure that it would not be revived later (see generally Allen v Riese Org., Inc., 106 AD3d 514, 516 [1st Dept 2013] [Without valid releases the "'settlement of disputes would be rendered all but impossible'"]; see generally Philips S. Beach, LLC v ZC Specialty Ins. Co., 55 AD3d 493, 493 [1st Dept 2008] ["Settlement agreements are judicially favored and may not be lightly set aside"]).

Accordingly, a release may be invalidated only where a traditional basis for "setting aside written agreements [are established], namely, duress, illegality, fraud, or mutual mistake" (Centro, supra, 17 NY3d at 276; see also Allen, supra, 106 AD3d at 516; Johnson v Lebanese Am. Univ., 84 AD3d 427 [1st Dept 2011]).

Further, where a party invokes a release for dismissal of a claim, the initial burden rests on the moving party to establish

that the claim being asserted is the subject of a valid and properly executed release (see Centro, supra, 17 NY3d at 276). The proffer of such "signed release shifts the burden" to the opposing party "to show that there has been fraud, duress, or some other fact which will be sufficient to void the release" (Centro, supra, 17 NY3d at 276, quoting Fleming v Ponziani, 24 NY2d 105, 111 [1969]).[6]

Applying these principles here, the Court finds contractor has met its burden; it submits the written settlement agreement between the parties, which contains a mutual release (see NYSCEF Doc. No. 10, settlement agreement, § 7 ["Release by HZ" (subcontractor)] and § 8 ["Release by VCL (contractor) and Owner"]). The "Release by HZ [subcontractor]" -- which subcontractor does not dispute presents their agreement in this regard -- explicitly states:

> ""Effective upon [subcontractor's] receipt of the settlement payment . . . and in consideration of the promises set forth herein, [subcontractor], for itself and its successors . . . does hereby release . . . and forever discharge [contractor] . . . of and from all and every manner of action and actions, cause and causes of action, claims

[6] but see Mangini, which provides: "[T]he releasor, whether the issue arise[s] in reformation or on construction of the instrument, must sustain the burden of persuasion if he is to establish that the general language of the release, valid on its face and properly executed, is to be limited because of a mutual mistake, or otherwise does not represent the intent of the parties. Where, however, the release is challenged on grounds of duress, illegality, or fraud, the burden of persuasion remains with the releasee" - the person benefiting from the release's protection (24 NY2d at 563 [emphasis added] [citations omitted]).

> and counterclaims . . . including, without limitation, all claims relating to or arising out of: (i) the Project; (ii) the Work; (iii) the Premises, and (iv) the Contract [subcontract]"

(id. [emphasis added]).

In response, defendants have not established their shifted burden that the release should be set aside for duress, illegality, fraud or mutual mistake (see generally Centro, supra, 17 NY3d at 276). Defendants' sole contention is that the entire settlement agreement is void because section three therein constitutes a "pay-when-paid" provision at odds with the public policy set forth in section 34 of the Lien Law. This assertion is unsupported on this record.

"A pay-when-paid clause" is a timing mechanism, involving "a contractor agreeing to pay the subcontractor within a certain period after receipt of the owner's payment" (see Bank of Am., N.A. v ASD Gem Realty LLC, 205 AD3d 1, 6, n 3 [1st Dept 2022] [emphasis added], citing Welsbach Elec. Corp. v Mastec N. Am., Inc., 7 NY3d 624, 628, n 2 [2006]). As such, this provision "does not expressly shift the risk of the owner's nonpayment to the subcontractor" (Carney and Cizek, Payment Provisions in Construction Contracts and Construction Trust Fund Statutes: A Fifty-State Survey, 24 Constr. Lawyer 5). To the contrary, a "pay-if-paid clause" is a condition precedent "where the contractor's payment to the subcontractor is contingent on the

owner first paying the contractor" (Bank of Am., N.A., 205 AD3d at 6, n 3). This provision shifts the risk of nonpayment to the subcontractor.

Despite the distinction, both "pay-when-paid" and "pay-if-paid" provisions have been found to violate New York public policy as set forth in section 34 of the Lien Law (see West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co., 87 NY2d 148, 153 [Smith, J.] [1995] [answering in the affirmative the Second Circuit Court of Appeals' question "whether a pay-when-paid provision in a subcontract, which transfers the risk of an owner's default from a general contractor to a subcontractor, violates New York public policy"]; see also Welsbach Elec. Corp., 7 NY3d at 626 [Rosenblatt, J.] [stating the same as to a "pay-if-paid" provision]).

Indeed, section 34 of the Lien Law provides, in pertinent part, that provisions "of any other law, any contract, agreement or understanding [which waives] the right to file or enforce any lien created under article two. . ., shall be void as against public policy and wholly unenforceable" (Lien Law § 34; see also West-Fair, supra, 87 NY2d at 153; Welsbach, supra, 7 NY3d at 626]).

Here, review of the plain language in section three of the parties' settlement agreement reveals no clause in which subcontractor's right to payment is impliedly or expressly

conditioned upon contractor's receipt of payment from the owner or any third-party. Nothing even hints at subcontractor being entitled to payment when or if owner pays contractor.[7]

To the contrary, the settlement agreement unambiguously provides that contractor shall directly pay subcontractor $435,000.00 in acknowledgement of the work subcontractor performed with no reference to contractor receiving payment (see NYSCEF Doc. No. 10, settlement agreement [reproduced here at n 7]). Further, the agreement's provision -- requiring that simultaneous with contractor making the $435,000.00 payment, subcontractor was to execute a lien waiver and satisfaction of the lien -- is consistent with the black letter law of Lien Law

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[7] "3. Lien Waivers and Satisfaction of Lien

"A. Simultaneously with the execution and delivery of this Agreement between the Parties, HZ shall provide to VCL's counsel, Quinn McCabe, LLP ("QM") a fully executed and notarized lien waiver in the form annexed hereto as Exhibit A.

"B. Simultaneously with the execution and delivery of this Agreement between the Parties, HZ shall provide to QM fully executed and notarized lien waivers from all sub-subcontractors in the form annexed hereto as Exhibit B. The Sub-subcontractors for which HZ will provide a lien waiver are as follows: JK Concrete Ready Mix Inc, 17801 Liberty Avenue, Jamaica, NY 11433; 72 Steel Group, LLC, 134-19 33rd Avenue, Flushing, NY 11354. In addition, HZ shall defend, indemnify, and hold harmless Owner, VCL, and any of their parents, members, directors, lenders, and/or officers ("Indemnified Parties") against any costs, damages, or losses in the event any Sub-subcontractor files any lien against the Premises or otherwise makes any claim or files any litigation against any Indemnified Party.

"C. Simultaneously with the execution and delivery of this Agreement between the Parties, HZ shall provide QM a fully executed and notarized satisfaction of lien in the form annexed hereto as Exhibit C.

"D. All lien waivers and satisfaction of lien executed and delivered hereunder shall be held in escrow by QM until it receives written confirmation from HZ of its receipt of the settlement payment [$435,000.00] set forth in Paragraph 2 (a) above, at which time such documents may be released from escrow to VCL" (NYSCEF Doc. No. 10, summons and complaint, exhibit 1, settlement agreement [emphasis added]).

§ 34 (see J.T. Magen & Co Inc. v Nissan N. Am., Inc., 2022 NY Slip Op 34168[U] [Sup Ct NY Cnty 2022] ["this is not a case where payment was made to the contractor contingent on the receipt of a lien waiver" which would violate public policy], affd 223 AD3d 523 [1st Dept 2024]).

Lien Law § 34 explicitly states, in pertinent part, that it "shall not preclude a requirement for a written waiver of the right to file a mechanic's lien executed and delivered by . . . subcontractor, . . . simultaneously with . . . payment for the labor performed" [emphasis added]). Further, section 34 of Lien Law provides that it is not applicable to void "a written agreement to . . . release or satisfy all or part of [a mechanic's] lien made after a notice of lien has been filed" (Lien Law § 34 [emphasis added]; see also U.W. Marx, Inc. v Koko Contracting, Inc., 97 AD3d 893, 895 [3d Dept 2012] [lien waivers, pursuant to Lien Law § 34, "may only be required either at the time payment is made or thereafter"]).

The Court next turns to defendants' unavailing argument that the settlement agreement is void because it requires subcontractor to obtain lien waivers from lower tier subcontractors in contravention of Lien Law § 34. The settlement agreement is not between contractor and the lower tier subcontractors, and it does not force lower tier subcontractors into a "pay-when-paid" or "pay-if-paid" scenario.

Indeed, the settlement agreement contemplates the possibility of such liens. It includes subcontractor's promise to, among other things, defend, indemnify and hold contractor harmless against the lower tier subcontractors who may file related liens against the subject premises (see NYSCEF Doc. No. 10, summons and verified complaint, exhibit 1, settlement agreement, § 3 [B]).

Accordingly, it is hereby

ORDERED that plaintiff VCL CONSTRUCTION INC.'s motion (seq. no. 01) to dismiss defendants H&Z BUILDING CONSULTING INC. and LEON CHEN's counterclaim for breach of contract is granted; it is further

ORDERED that defendants H&Z BUILDING CONSULTING INC. and LEON CHEN's counterclaim for breach of contract is dismissed; it is further

ORDERED that plaintiff shall serve defendants with this order and notice of entry within ten days of such entry, and shall file with the Court proof of the same; it is further

ORDERED that the parties shall appear before this Court for a preliminary conference in Part 42M, Courtroom 574, on February 04, 2026 at 11:30 A.M.; and it is further

ORDERED that the Clerk of Court shall mark the file accordingly.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

12/10/2025
DATE

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