Cases for class 9

198 A.D.2d 871 (1993)
604 N.Y.S.2d 439
Reliance Insurance Company et al., Respondents-Appellants,
v.
County of Monroe, Appellant-Respondent
Appellate Division of the Supreme Court of the State of New York, Fourth Department.
November 19, 1993

Present — Callahan, J. P., Green, Lawton, Boomer and Boehm, JJ.

Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: In this action for damages arising out of a sewer construction contract, Supreme Court properly denied the motion of defendant County of Monroe (County) for partial summary judgment. The court erred, however, in denying plaintiffs' cross motion for partial summary judgment to dismiss the County's first affirmative defense asserting that the general contractor, John B. Pike & Son, Inc. (Pike) waived all claims for additional compensation arising out of a modification of the contract.

Pike and the County entered into a contract whereby Pike would serve as the general contractor on a project for the repair and construction of a sewer system along the Genesee River. The plans called for the sewer pipe to be installed using an "open cut trench" method above the riverbed. The original agreement anticipated that contaminated soil might be encountered during the project. Thus, the agreement contained an extensive section pertaining to "CONTAMINANT CONTAINMENT" and also a "DIFFERING SITE CONDITIONS" provision. 872 *872 Subsequently, Pike proposed a design modification to install the pipe in a tunnel to be bored 30 feet beneath the riverbed at no additional cost to the County. On October 25, 1984, the parties executed "FIELD CHANGE ORDER NO. 1," which modified the contract to allow for the proposed alternative construction. Thereafter, while boring the tunnel, Pike encountered creosote or a coal tar-like substance leaking into the tunnel. That substance was toxic and hazardous, causing work stoppage and additional expenses to the project. The County approved certain expenditures resulting from the toxic substance but denied all other claims by Pike. Plaintiffs, as Pike's sureties/assignees, commenced this action to recoup the additional costs incurred by Pike because of the encounter with the contaminants.

In resisting payment of additional funds, the County asserted several affirmative defenses. Relying on its first affirmative defense, the County moved for partial summary judgment dismissing plaintiffs' causes of action related to the tunnel, arguing that, under the plain language of "FIELD CHANGE ORDER NO. 1," Pike had specifically assumed the risks attendant upon the alternative tunnel proposal, and had waived all rights to claim additional compensation for work activities associated with the modification. Plaintiffs contended that the hazardous and toxic substance was "completely outside and beyond the intent and contemplation of the parties" and, thus, that there was no waiver of the differing site conditions clause. Plaintiffs cross-moved for partial summary judgment dismissing the County's first affirmative defense, and granting them judgment. The court denied both motions.

Both parties agree that the terms of the agreement are to be decided as a matter of law, acknowledging that it is the responsibility of the courts to interpret the terms of written agreements (*see*, *Hartford Acc. & Indem. Co. v Wesolowski*, 33 N.Y.2d 169). From a review of "FIELD CHANGE ORDER NO. 1," including Pike's proposal (particularly the clauses relating to Pike's assumption of responsibility and waiver claims), together with a review of the "DIFFERING SITE CONDITIONS" clause in the original agreement, we conclude that Pike did not assume the responsibility for, nor waive the right to make claims because of, unforeseen conditions such as an encounter with hazardous and toxic substances. Further, the documents constituting the modification make no reference to the "DIFFERING SITE CONDITIONS" clause, while the proposal states that Pike would "continue to be bound by the terms and requirements of the original contract documents". Those documents 873*873 fail to indicate that the parties' contemplation extended into the realm of the "DIFFERING SITE CONDITIONS" clause. Thus, the exculpatory clauses in the modification cannot be read to preclude claims arising from an unforeseen problem such as an underground encounter with toxic substances.

Plaintiffs are granted partial summary judgment on liability with respect to their Type II differing site conditions claims. The contract contained both Type I and Type II differing site condition clauses. Plaintiffs have established the three elements necessary to recover on a Type II claim (*see*, *Lathan Co. v United States*, 20 Cl Ct 122, 128). Plaintiffs established that Pike did not know about the toxic substance found in the subsurface, that the contractor could not have anticipated the condition from inspection or general experience, and that the condition varied from the norm in similar tunnel boring operations. Plaintiffs concede, however, that the issues relating to damages and the amount thereof have yet to be resolved at this stage of the litigation.

We disagree with plaintiffs' contention that they have established the six elements necessary to recover on a Type I claim as set forth in *Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.* (180 AD2d 222, 226). We conclude that there is a triable issue of fact whether the damages claimed under paragraph 17 (a) (1) were solely attributable to the materially different subsurface conditions.

2016 NY Slip Op 30207(U)

E.E. CRUZ/NICHOLSON JOINT VENTURE, LLC, Plaintiff,

v.

LEND LEASE (US) CONSTRUCTION LMB, INC., formerly known as BOVIS LEND LEASE LMB, INC., TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, FACILITIES DEVELOPMENT CORPORATION, BANK OF NEW YORK MELLON, as Collateral Agent and Custodian, NEW YORK CITY FIRE DEPARTMENT, NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK CITY PARKING VIOLATIONS BUREAU, and NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, Defendants.

Docket No. 650716/2014.

Supreme Court, New York County.

February 4, 2016.

DECISION & ORDER

SHIRLEY WERNER KORNREICH, Judge.

Defendant Lend Lease (US) Construction LMB, Inc. (Bovis) moves, pursuant to CPLR 3211(a)(1), to dismiss the fourth through seventh causes of action in the amended complaint (the AC). Defendant Trustees of Columbia University in the City of New York (Columbia) cross-moves to dismiss the ninth cause of action. Plaintiff E.E. Cruz/Nicholson Joint Venture, LLC (ECN) opposes both motions.[1] For the reasons set forth below, Bovis' motion is granted in part and denied in part, and, as a result, Columbia's cross-motion is granted in part and denied in part.

1. Factual Background

As this is a motion to dismiss, the facts recited are based upon the complaint and the documentary evidence.

This case involves a dispute between Bovis, the general contractor for the Columbia-Manhattanville Development Project (the Project), and ECN, a subcontractor for phase one of the Project. The Project involves the construction of multiple buildings covering a five-block radius in upper Manhattan, to provide Columbia with academic and research facilities, graduate student housing, and retail stores.

Bovis executed an October 2010 construction manager agreement (the Contract) with Columbia, the owner of the development. On September 13, 2010, Bovis issued an invitation to multiple subcontractors, including ECN, to bid on the construction of slurry walls and building foundations for the Project. *See* Dkt. 54 (Invitation to Bid). Bovis included construction plans and specifications in the bidding materials. AC ¶ 13. The specifications prescribed the scope of work to be performed, the work schedule, and the basic means and methods by which the subcontractor

was required to perform the work. *Id.* The plans also described field and subsurface conditions at the Project site, including subsurface soil quantities and groundwater elevation levels. ¶¶ 13, 51-58. The prospective subcontractors had 11 days to review the bid materials, investigate the Project site, and submit final bids for the work. *See* Dkt. 54.

In December 2010, Bovis accepted ECN's bid. ¶ 12; Dkt. 55 (ECN's Bid). Bovis and ECN then executed a formal subcontract agreement (the Subcontract).[2] The Subcontract, *inter alia,* required ECN to excavate petroleum contaminated soil from the worksite, construct drill shafts and load bearing elements, set forth as follows:

furnish and install slurry walls, load bearing elements, site utilities, work platforms, guide walls, temporary steel bracing, concrete substructures foundation work and perform site work, demolition, pre-trenching, mass excavation, dewatering, site restoration and other work.

Dkt. 24 (the Subcontract), Ex. B, Scope of Work.

The complaint alleges that after ECN commenced work, it discovered that the field and subsurface conditions at the Project site significantly differed from those described in the Subcontract documents and pre-bid materials that Bovis had provided. ¶ 20. It contends: (1) ECN encountered substantially more petroleum-contaminated soil to be excavated than Bovis identified in the Subcontract (¶¶ 51-53); (2) Bovis' groundwater measurements, stability analyses, and other measurements for ECN's slurry wall installation were inaccurate, causing the wall to collapse (¶¶ 56-58); and (3) Columbia's geotechnical engineer provided inaccurate design parameters for constructing drill shafts and load bearing elements, forcing ECN to drill much deeper than expected (¶¶ 61-67). As a result of these discrepancies, ECN alleges that Bovis breached the Subcontract (*see* Dkt. 92, 9/11/15 Tr. at 4:15-26) and caused ECN to incur additional construction costs. ¶ 21.

ECN further alleges that Bovis breached the Subcontract by not adhering to the construction schedule and causing other delays. In particular, ECN asserts that Bovis failed to timely erect the steel and pour the concrete for the first floor of two buildings, blocking access to the worksite for two months and causing additional construction costs. ¶¶ 44, 46. Moreover, ECN contends that Bovis engendered other delays by failing to timely issue change orders, failing to supervise the work, and failing to administer the Subcontract. ¶ 22. ECN asserts that the parties did not contemplate the aforementioned delays, that Bovis acted in bad faith, and that the delays were so unreasonable that they constituted an intentional abandonment of the Subcontract. ¶ 47. Alternatively, it alleges Bovis breached its fundamental obligations under the Subcontract. *Id.*

The AC seeks the following, numbered here as in the AC: 1) $7,088,574.40 allegedly owed for agreed-to additional work for which change orders (COs) were issued; 2) $4,445,527.58 in extra work, labor and materials for which no COs were issued; 3) $1,196,069.03 in extra work, outside of the contract, ordered or required to be performed, under protest; 4) $1,522,814.00 in damages caused by construction interference, delays, out-of-sequence work, changes in scope of work, lost labor productivity, denial of access to the site, unanticipated site conditions, and misrepresentations, errors and omissions in the subcontract documents; 5) $2,561,380.00 in excess costs for removal of contaminated soil since Bovis' bid package understated the number of underground storage tanks and the quantity of petroleum contaminated soil; 6) $2,166,604.00 in damages caused by the failure of the subcontract documents to provide accurate groundwater levels, adequate stability analysis and other accurate information, which resulted in slurry wall excavation failures; 7) $4,022,667.00 in costs above the subcontract price to drill and install caissons due to misinformation provided by Columbia's geotechnical engineer used as a basis for the planned design and made part of the pre-bid information and also due to Bovis "unreasonable interpretation of the Building Code"; 8) $1,129,128.48 in interest on late payments; and 9) enforcement of a mechanic's lien against the Project in the amount of $14,195,129.77.

Bovis now moves to dismiss the fourth through seventh causes of action, and Columbia seeks dismissal of the ninth cause of action. They argue that several Subcontract provisions, including a no-damage-for-delay clause and a "concealed conditions" clause preclude these claims as a matter of law. Dkt. 24.

A. Subcontract

The Subcontract, dated October 27, 2010, provides that ECN will be paid $121,900,000 for "Slurry Walls and Foundations." *Id.* Ex. B, p. 1. The monthly billing date is the 20th of each month, and 10% of every application for

payment would be kept as retainage until 50% is paid. *Id.* at 1-2. When the work is substantially complete, all but 1% would be released, and the 1% could be retained for up to one year. *Id.* Overhead and profit on COs were 15% on self-performed work and 5% on subcontracted work. *Id.*

Under the definition of "Work", the contract provides that the Subcontractor is obligated to:

familiarize itself with the site, surrounding and *subsurface conditions* and the character of the operation to be carried on at the site, *and make such investigations as Subcontractor may deem fit or as may be prudent for Subcontractor to fully understand the facilities, physical conditions* and restrictions attending the Work. All Work shall be completed strictly in accordance with the requirements of this Subcontract and the Contract Documents.

See Dkt. 24 at 5 (emphasis added). "Substantial Completion" is defined, in part, as requiring the Slurry Walls and base slab to "provide a watertight structure." *Id.*

Article 2 of the Subcontract states that: the Subcontractor "represents and agrees that it has carefully examined and understands the Contract Documents relevant to the Work; *has adequately investigated the nature and conditions of the Project site* and locality; *has familiarized itself with conditions affecting the difficulty of the Work*; and *has entered into this Subcontract based on its own examination, investigation and evaluation and not in reliance upon any opinion or representations of Contractor or others.*" *Id.* (emphasis added). Article 2 further states that the Contract Documents are to be treated as scope documents, but "do not necessarily indicate or describe all items required for the full performance and proper completion of the Work." *Id.*

Article 3 of the Subcontract speaks to ambiguities and provides that the Subcontractor is to examine the Subcontract for ambiguities, inconsistencies and errors and, in writing, request interpretation and correction. *Id.* at 5-6. Nonetheless, interpretation "shall not vary the Drawings and Specifications and/or the Subcontract." *Id.* The onus is placed on the Subcontractor to notify the Contractor of discrepancies and conflicts before performing the Work, and the Subcontractor is responsible for extra costs for failure to so notify. *Id.* Specifically, it provides:

Subcontractor shall promptly and carefully check all Contract Documents and notify Contractor of any discrepancies or conflicts *before* performing any Work, *and Subcontractor shall be responsible for any extra costs resulting from its failure to do so. Subcontractor shall take field measurements and verify field conditions and compare such field measurements and field conditions with the Contract Documents before activities are commenced.* Errors, inconsistences or omissions discovered are to be reported to Contractor at once. *Any work done by Subcontractor with respect to any portion of the Work affected by such error, discrepancy, conflict, misunderstanding or variance will be at Subcontractor's own risk* and Subcontractor shall cooperate with Contractor and other subcontractors in the preparation of coordination drawings where required by Contractor.

See id. at 6.

Article 11 states that time is of the essence in the performance of Subcontractor's work. *See id.* at 8. On the other hand, Article 12 provides that a written CO may revise and extend the work and if the Subcontractor's work is obstructed or delayed through no fault of the Subcontractor, it will be granted an extension of time. *See id.* at 9. In such event, the Subcontractor must give written notice within 72 hours and set forth, in detail, the nature of the delay. *Id.*

Article 12 then provides:

Except only in the case of Owner and Contractor's failure to provide access to the site of the Work, such that Subcontractor is wholly unable to perform the Work, all as set forth in the next succeeding paragraph of this Article 12, *which shall be the sole and exclusive exception to the no-damage for delay provision contained herein,* all extensions of time shall be in lieu of and in liquidation of any claims for compensation of damages against the Contractor or Owner. . . . no claim for damages shall be made by the Subcontractor for any hindrances, obstructions or delays from any cause whatsoever, *including, without limitation, ordering changes, corrections, suspension, or rescheduling of the Work, whether or not the delays or their causes or their length were foreseeable or*

contemplated by the parties when they entered into this Subcontract, and whether the delays are the fault of the Contractor. Owner, Architects, or otherwise. The parties agree that an extension of time to the extent justified pursuant to this Article, *shall be the sole remedy* of the Subcontractor for any (i) delay in the commencement, prosecution or completion of the Work, (ii) hindrance or obstruction in the performance of the Work, (iii) loss of productivity, or (iv) other similar claims. . . .

Notwithstanding . . . should the Subcontractor be wholly prevented from performing the Work, without fault on its part, as a result of Owner and/or Contractor's failure to provide it with access to the site, and as a result Subcontractor is actually and necessarily delayed in the performance of the Work, then Subcontractor shall be entitled, upon completion with the notice periods required hereunder, to payment of its actual, reasonable and verifiable equipment rental costs only, up to a maximum amount of One Million Five Hundred Thousand Dollars ($1,500,000) (the "Cap"), from and after the 30th calendar day of the commencement of the delay,. . . (the "Grace Period"). The thirty day Grace Period shall apply on an occurrence basis . . . failure to provide access shall not be deemed to have occurred until the elapse of the Grace period in each instance. The Cap, on the other hand, shall be an aggregate cap representing Owner and Contractor's maximum liability for the costs of all delays arising out of or attributable to failure to provide access to the site as referenced herein. . . .

See id. (emphasis added).

Article 13 addresses COs and specifically states that Subcontractor shall not proceed with changed work without a CO. *See id.* at 10. It provides that the Contractor will not be liable for costs or delays incurred in the performance of such changed work without a written CO. *Id.* Article 13 continues:

. . . The agreed compensation specified in a Change Order for changed Work includes full payment for the extra Work covered by the Change Order as well as for any impact to other Work covered by the Change Order as well as for any impact to other Work caused by, arising from, or in any way related to the Change Order, and Subcontractor waives all rights to claim further compensation for such impacts, cumulative or otherwise.

See id.

Article 27 obligates the Subcontractor to submit, *inter alia,* shop and erection drawings, laboratory and inspection reports and engineering calculations. *See id.* at 15. By doing so, "Subcontractor represents and warrants that it has determined and verified all materials, field measurements, and field construction criteria pertaining thereto, [and] has checked and coordinated this information with the Work and Contract Documents." *Id.*

Article 41(a) provides that the Subcontract is to be governed by New York law. *See id.* at 19. Article 41(b) states that the Subcontract, Contract and the documents incorporated therein are the "the entire agreement of the parties and supersedes all prior negotiations, agreements and understandings . . .[,] and any claims against Contractor, irrespective of an alleged breach by Contractor of the Contract Documents, shall be based, nonetheless, upon this Subcontract and the Price, and shall in no event be based upon an asserted fair and reasonable value of the Work performed." *See id.* Article 41(c) is a no-waiver clause requiring a writing signed by the Contractor to amend the agreement. *See id.*

Finally, Article 45 provides that Subcontractor "expressly" agrees that it "has assumed full responsibility for all naturally occurring existing conditions at the Project site (including specifically regulated soil), whether subsurface or otherwise concealed conditions (and whether or not they differ in any way from those indicate in the Contract Documents), or unknown physical conditions which differ in any way from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents." *See id.* at 21. However, it excepts manmade obstructions. *See id.* Further, it states that Subcontractor has included these considerations in its price and will not be entitled to adjustments in price if these conditions are encountered. *See id.*

II. Discussion

In determining a CPLR 3211 motion to dismiss, the court's task is to determine whether, within the four corners of the pleading, the plaintiff alleges facts that manifest a legally cognizable claim. *511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 151-152 (2002). The court must accept the facts in the complaint as true, as well as all reasonable inferences that the court may glean from those facts. *Amaro v Gani Realty Corp.,* 60 AD3d 491 (1st Dept 2009). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to favorable consideration." *Skillgames, LLC v Brody,* 1 AD3d 247, 250 (1st Dept 2003), citing *Caniglia v Chicago Tribune-New York News Syndicate,* 204 AD2d 233 (1st Dept 1994). Where, as here, the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of NY,* 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez,* 84 NY2d 83, 88 (1994).

A. ECN's Delay Claim (Count 4) ? Omitted

B. ECN's Petroleum-Contaminated Soil Claim (Count 5)

The crux of the AC is that Bovis provided inaccurate information about existing physical conditions at the Project site that caused ECN to incur additional construction costs. With respect to ECN's soil claim, ECN alleges that Bovis represented in its pre-bid materials that there were about 15,000 cubic yards of petroleum-contaminated soil at the worksite. *See* Dkt. 46 at 24-25. However, ECN claims that it encountered roughly 75,000 cubic yards of petroleum-contaminated soil, in addition to underground storage tanks and benzene-contaminated soil, which Bovis also failed to disclose. *Id.* The AC alleges that the discrepancy between the amount of soil at the worksite and the amount that Bovis estimated in its pre-bid documents purportedly caused ECN to incur an additional $2.5 million in construction costs. Further, ECN asserts that Bovis knowingly, and in bad faith, withheld documents during the pre-bid process that would have disclosed the correct amount of petroleum-contaminated soil. *Id.* at 26; *see* AC ¶ 52. ECN maintains that it could not have discovered (and did not discover) the actual amount of petroleum-contaminated soil through its own reasonable investigation, given the limited amount of time (11 days) it had to conduct subsurface investigations at the Project site before submitting its bid. *See* Dkt. 46 at 27-28.

The Subcontract, however, forecloses these claims.

Where a party agrees to perform construction work for a fixed sum, that party ordinarily "will not be excused or become entitled to additional compensation, because he encounters unforeseen difficulties." *United States v Spearin,* 248 US 132, 136 (1918). In other words, "[o]ne who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil." *Id.* Here, the contract specifically places the onus upon ECN to inspect. ECN relies upon pre-contract representations. Moreover, here, there is a merger clause which would foreclose this argument.

Specifically, Bovis disclaimed liability for any representations related to the amount of petroleum contaminated at the worksite. ECN expressly agreed to perform the Subcontract work for a lump sum payment without additional payments for changed site conditions. In the provision setting forth ECN's warranties, ECN represented and warranted that it "adequately investigated the nature and conditions of the Project Site . . . familiarized itself with conditions affecting the difficulty of the Work [,] and . . . entered into [the] Subcontract based on its own examination, investigation and evaluation and not in reliance [on] any opinions or representations of [Bovis]. . .". *See* Dkt. 24 at 5 (emphasis added). Similarly, the Subcontract's definition of "Work" specifically includes "ECN's obligation to visit the Project site, and to fully acquaint and familiarize itself with the site, surrounding and subsurface conditions . . . and make such investigations as [ECN] may deem fit or as may be prudent for [ECN] to fully understand the facilities, physical conditions and restrictions attending the Work." *See id.* (requiring ECN to verify and compare field conditions); *see also Bovis Lend Lease (LMB) Inc. v Lower Manhattan Dev. Corp.,* 2011 WL 10842023, at *6 (Sup Ct, NY County 2011) (enforcing similar clause on motion to dismiss that assumed risk of differing site conditions at construction site), *mod. on other grounds,* 108 AD3d 135 (1st Dept 2013).

In addition, the Subcontract contains multiple clauses assigning the risk of differing site conditions to ECN. Article 45 states that ECN assumed responsibility for all "naturally occurring existing conditions at the Project site (including specifically regulated soil), whether subsurface or otherwise concealed physical conditions (and whether they differ in any way from those indicated in the Contract Documents), or unknown physical conditions which

differ in any way from those ordinarily found to exist [in similar construction projects]." *See* Dkt. 24 at 21. Article 45 goes on to state that ECN included in its Subcontract price all risk of subsurface, concealed, or unknown natural conditions (*excluding only manmade obstructions*), and agreed that it would not be entitled to a price adjustment for such conditions. *Id.*

At least six other Subcontract provisions reference ECN's assumption of risk of differing site conditions. These include several items that expressly address petroleum-contaminated soil quantities at the Project site. For instance, the Subcontract's Scope of Work addendum states that ECN included *all* petroleum-contaminated soil removal in its Subcontract price; that Columbia intended ECN to assume the risk for differing quantities of petroleum-contaminated soil; and that ECN would not use any pre-bid estimate of petroleum-contaminated soil quantities as the basis of any claim against Bovis. *See* Dkt. 24 at 34, 39 (Ex. B, Scope of Work ¶¶ 4, 50) (requiring ECN to visit the jobsite and familiarize itself with field conditions); *see id.* at 52 (Ex. B. Scope of Work, Specific Work Items, Work Item XI, §§ 11.09 & 11.10) (ECN assumes risk of differing soil quantities in performing Slurry Wall construction; requiring ECN to verify any quantity estimates of subsurface materials that Bovis provided); *see id.* at 55 (Ex. B. Scope of Work, Specific Work Items, Work Item XIII, § 13.15) (Mass Excavation provision containing language identical to Slurry Wall provision).

Finally, at least two project specifications[4] required ECN to accept the excavation site "as-is", and to accept all risks associated with subsurface conditions without relying on any pre-Subcontract documents. *See* Dkt. 38 at 16-19. These specifications stated that Bovis provided the soil quantity estimates for ECN's reference only, and that those estimates might not be completely accurate. *Id.* Taken together, these provisions bar ECN from seeking additional compensation in the form of damages for changed Project conditions.

By its plain terms, the Subcontract states that it "embodies the entire agreement of the parties and supersedes all prior negotiations, agreements and understandings relating to the subject matter [of the Subcontract]."[5] *See* Dkt. 24 at 19. This merger clause precludes ECN's breach of warranty claims based on representations that pre-date the Subcontract. *See Torres v D'Alesso,* 80 AD3d 46, 53 (1st Dept 2010) (holding that merger clause was enforceable, precluded consideration of pre-contract representations, and provided "further protection for the interests of certainty and finality."); *see also Foundation Co. v State,* 233 NY 177, 186 (1922) (holding that data in a pre-bid boring sheet did not amount to an affirmative representation that constituted a warranty) ("[The boring sheet] formed no part of the plans upon which the contract was based. It was not prepared or used for that purpose. It was an independent bit of information or supposed information in the possession of the [owner], to which the bidder resorted in making the investigations which it was required to make. If it relied upon this paper, it did so at its own risk."); *see also All Cty. Paving Corp. v Suffolk Cty. Water Auth.,* 20 AD3d 438, 438 (2nd Dept 2005) (the results of test borings previously performed for the defendant more than one mile from the construction site, furnished by the defendant as part of the contract specifications, did not constitute a representation as to the condition of the soil at the construction site).

In light of the foregoing, Bovis' motion to dismiss the fifth cause of action in the AC is granted.

C. ECN's Slurry Wall & Value Engineering Claims (Counts 6 & 7)

ECN further alleges that Bovis breached the Subcontract by impliedly warranting that the construction methods in the Subcontract documents were adequate for their intended purpose, when in fact they were not. Bovis argues the construction methods in the Subcontract documents only prescribe minimum construction requirements and that ECN had sole responsibility for the specific means and methods of construction.

1. ECN's Slurry Wall Claim (Count 6)

ECN's sixth cause of action is dismissed without prejudice and with leave to replead.

Unlike ECN's soil claim, ECN's slurry wall claim is based on alleged warranties in the Subcontract. These warranties (allegedly) set forth the means and methods by which ECN was to install a slurry wall at the Project worksite. ECN argues that Bovis' Scope of Work addendum and slurry wall specifications impliedly warranted that if ECN complied with Bovis' specifications, the slurry wall would function properly. However, ECN alleges the Scope of Work Addendum (Dkt. 24, Ex. B) and Slurry Wall specifications (Dkt. 58) that Bovis provided "failed to accurately indicate groundwater levels, failed to provide an adequate stability analysis, and contained other

deficiencies, error and omissions that resulted in a series of slurry wall excavation failures." AC ¶ 58. ECN seeks damages for breach of warranty associated with the slurry wall collapse. AC ¶¶ 57-59.

Bovis argues that the Subcontract shifts responsibility for the slurry wall installation to ECN, and that ECN could not reasonably rely only on the construction plans that Bovis provided.[6]

The court finds that Subcontract does not unambiguously shift responsibility for the slurry wall construction to ECN. On one hand, Article 28 of Subcontract purports to disclaim Bovis' responsibility for ECN's construction means and methods. It states, in relevant part:

Neither Architect nor [Bovis] nor [Columbia] shall be responsible to [ECN] or third parties for: construction means, methods, techniques, sequences or procedures of Subcontractor; . . . the acts of omissions of [ECN]; or the failure of [ECN] . . . to carry out the Work in accordance with the Contract Documents.

See Dkt. 24 at 16. Also, the slurry wall specifications (Dkt. 58) give ECN open-ended discretion in how to facilitate specific aspects of the slurry wall installation, including "maintain[ing] the level of the bentonite slurry in the trench . . . at a level not less than five feet above the level of the groundwater level . . . [and] [a]djust[ing] [the] slurry level as required to maintain panel stability at all times." *See* Dkt. 58 (Slurry Wall Specifications §3.3(k)).

Notwithstanding these provisions, the Subcontract and the slurry wall specifications indicate that Bovis retained some responsibility for the construction means and methods. Article 28 itself states that ECN was obligated to perform the work "under [Bovis'] direction and satisfaction . . . as provided herein." *See* Dkt. 24 at 16. Likewise, Article 27 refers to ECN's obligation to "perform the [w]ork in strict accordance with the Contract Documents," which Bovis provided. *See id.* at 15. Bovis admits that the slurry wall specifications that it provided contained "minimum" construction requirements from which ECN was unable to deviate. *See* Dkt. 92 (9/11/15 Tr. at 23). Indeed, the Subcontract's Scope of Work and slurry wall specifications prescribe *extensive* requirements for the slurry wall installation.

It appears, therefore, that Bovis' disclaimer of any responsibility for ECN's construction means and methods may be in conflict with the Subcontract's requirement that ECN not deviate from Bovis' prescribed construction means and methods. This tension between the provisions governing the party responsible for construction means and methods precludes the court from ruling on this issue on a motion to dismiss. While Bovis' position — that it only prescribed general construction requirements, while leaving the precise means and methods to ECN — is not "commercially unreasonable", it is not unambiguously clear from the Subcontract itself. *See* *Greenfield,* 98 NY2d at 569.

Nevertheless, to the extent that ECN's sixth cause of action is based on its differing site conditions claim, the sixth cause of action is dismissed. ECN alleges in the AC that Bovis' slurry wall specifications were defective because unexpected groundwater levels rendered them so. AC ¶ 58; *see also* Dkt. 28 (12/5/13 Letter from ECN to Bovis, arguing that faulty groundwater elevations in the contract specifications caused the slurry wall to collapse). This allegation has less to do with the slurry wall specifications that Bovis provided, and more to do with whether those specifications were appropriate given then-existing site conditions. It is simply a reformulation of ECN's site conditions claim.

Although the complaint alleges that the construction plans contained other, unspecified "errors and inaccuracies" that caused the slurry wall to collapse, ECN does not state what those errors and inaccuracies were. Moreover, ECN's December 5, 2013 letter makes it clear that the presence of unexpected groundwater levels at the worksite rendered other aspects of Bovis' construction plans, such as Bovis' stability analyses, inaccurate. *See* Dkt. 28 at 2 ("Inadequate head differential between the groundwater elevation and the top of the slurry resulted in collapse. . .").

Ultimately, ECN fails to allege how Bovis' slurry wall plans were defective in any respect other than by failing to accurately reflect existing groundwater levels. As set forth above, however, ECN expressly assumed the risk of differing site conditions at the worksite, including the risk of unexpected groundwater levels. Accordingly, ECN's sixth cause of action is dismissed. Nonetheless, in the event that ECN can identify any other defects in Bovis' construction plans and requirements with which it had to comply, ECN may move to replead.

2. ECN's Value Engineering Claim (Count 7)

Finally, ECN alleges that before entering into the Subcontract, Bovis and Columbia provided ECN with design parameters for constructing drill shafts and load-bearing elements. ECN used the design parameters that Bovis provided as a basis for two value engineering proposals, which ECN expected would govern the drill shaft construction. ECN alleges that the design parameters failed to take existing subsurface conditions into account, requiring ECN to drill thousands of feet deeper than planned. As a result, ECN contends that it incurred approximately $2.2 million in additional construction costs. AC ¶¶ 60-67.

Once again, ECN relies on allegedly "inaccurate pre-bid information" as a basis for a breach of warranty claim against Bovis. As set forth above, however, representations or data in pre-bid documents that are not part of a Subcontract do not create enforceable warranties in the Subcontract. This principal applies as much to pre-bid design parameters as it does to pre-bid representations about existing site conditions. ECN fails to allege that the parties incorporated the pre-bid design parameters that form the basis of count seven into the Subcontract, which had a merger clause and repeatedly required ECN to inspect the subsurface conditions, or the Project Specifications.[7] Bovis' motion to dismiss the seventh count of the AC is granted.

D. ECN's Mechanic's Lien (Count 9)

Columbia's motion to dismiss count 9 of the AC essentially argues that if counts 4-7 of the AC are dismissed, ECN should be precluded from enforcing its $14.2 million mechanic's lien against the Project (count 9), to the extent that the lien includes damages alleged in counts 4-7 (approximately $10.27 million in damages). *See* Dkt. 92 (9/11/15 Tr. at 17). The court agrees. *See MCC Dev. Corp. v Perla,* 81 AD3d 474, 474 (1st Dept 2011) (dismissing mechanic's lien arising out of contract where plaintiff failed to satisfy contract's conditions precedent to commencing litigation).

The lien will be reduced by $6,606,861, the amount of ECN's alleged damages surviving this motion to dismiss. This includes the total damages sought in the fifth and seventh causes of action, plus the $22,814 in damages for the fourth cause of action that exceed the Subcontract's $1.5 million cap. Additionally, unless ECN timely repleads, the portion of the lien owing to the sixth cause of action ($2,166,604) and the remaining damages for the fourth cause of action ($1.5 million), will also be extinguished.

To amend the AC, ECN must include, at a minimum, allegations that show how it incurred reasonable equipment rental costs of $1.5 million, after the contractual grace period, as a result of Bovis' alleged delays. Should ECN timely amend the first and sixth causes of action and preserve those claims, the portion of the lien attributable to those counts will remain in place pending a final judgment on the merits. *See* Lien Law § 17 (filing of action to foreclose lien with notice of pendency preserves mechanic's lien beyond one-year statutory period). Accordingly, it is

ORDERED that the motions to dismiss by defendant Lend Lease (US) Construction LMB, Inc. and Trustees of Columbia University in the City of New York are granted in part as follows: (1) the fourth cause of action (delay damages claim) is dismissed except as to reasonable equipment rental costs and limited to $1.5 million in damages; (2) the fifth (petroleum contaminated soil claim), sixth (slurry wall claim) and seventh (value engineering claim) causes of action are dismissed; and (3) the ninth cause of action (mechanic's lien claim) is dismissed without prejudice and with leave to replead in accordance with the decision within 30 days of the entry of this order on the NYSCEF system.

[1] ECN submitted an over-long, 40-page brief opposing both Bovis' and Columbia's motions without leave of the court. However, the court, nunc pro tunc, has permitted the filing. In addition, Bovis failed to include a table of contents or table of authorities in any of its motion papers, in violation of this court's rules.

[2] Both ECN and Bovis fail to submit complete copies of the subcontract documents, which the court understands are quite extensive. However, the parties have submitted hundreds of pages of documents, including project specifications and memoranda, without identifying which of these documents is part of the subcontract or, if incorporated by reference, where the parties (expressly) incorporate the documents by reference.

[3] Although ECN asserts separate claims for "extra work" and "protest work," these claims, at least in part, stem from Bovis' alleged delays in performing under the Subcontract; i.e., that Bovis' failure to adhere to the construction schedule forced ECN to perform extra or protest work. To the extent that ECN's "extra work" and "protest work" claims arise from work caused by Bovis' alleged delays and not memorialized in change orders, those claims also may be subject to dismissal.

[4] Bovis does not state whether the project specifications it cites in its moving papers constitute part of the Subcontract, or produce a complete copy of the Subcontract that includes all Subcontract Documents.
[5] ECN stated during oral argument that its sole claim against Bovis is for breach of contract, and not for fraudulent inducement. *See* Dkt. 92 (9/11/15 Tr. at 4). Thus, any pre-contract representations are precluded by the merger clause. Moreover, there can be no fraud claim here where there is no justifiable reliance. Again, ECN, contractually, undertook to investigate the construction conditions and represented that it actually did.
[6] The parties dispute whether ECN actually complied with Bovis' plans.
[7] ECN also does not explain why Bovis should be held responsible for design parameters that Columbia's geotechnical engineer provided. AC ¶ 63.

56 A.D.2d 95 (1977)
Grow Construction Co., Inc., Respondent,
v.
State of New York, Appellant. (Claim No. 51499.)
Appellate Division of the Supreme Court of the State of New York, Third Department.
February 17, 1977

Louis J. Lefkowitz, Attorney-General (*Richard J. Dorsey* and *Ruth Kessler Toch* of counsel), for appellant.
Berman, Paley, Goldstein & Berman (*David R. Paley* and *Murray Tim Berman* of counsel), for respondent.

SWEENEY, J. P., KANE, MAHONEY and MAIN, JJ., concur.

96*96LARKIN, J.

Claimant Grow Construction Co., Inc., and the appellant State of New York entered into a highway construction contract dated August 29, 1966 for the construction of a portion of Interstate Route 503. The contract was for the construction of a divided four-lane highway slightly under one mile in length, with two bridge structures, connecting Orange County in New York and Pike County in Pennsylvania. By agreement between the respective States the major bridge structure over the Delaware and Neversink Rivers linking the two States, Bridge 1-A, was to be designed and constructed by New York. Claimant began work on this contract in September, 1966, and the State accepted the work as complete on December 6, 1968. Although claimant actually finished its work on October 26, 1968, well before the August 1, 1969 contract completion date, various unanticipated difficulties were encountered in the course of the construction, especially with respect to the construction of Bridge 1-A. These difficulties precipitated the instant claim.

The first cause of action, relating to moneys concededly due to claimant, was severed with the question of interest to abide the trial. Neither party has addressed this cause of action, which we affirm. In the second cause of action claimant alleged that the State interfered with, prevented and made more costly claimant's performance of the contract, *inter alia*, as follows: design which was inadequate and defective, negligently 97*97 prepared and not in accordance with good engineering practice; inadequate and misleading bidding information; unreasonable delay both in preparing and approving new plans and designs and in making decisions; prevention of the proper co-ordination of its work by claimant; various other acts and omissions delaying and impeding claimant's work. These allegations were repeated in subsequent causes of action, as claimant demanded judgment in the sum of $780,323.21 and the return of its bond.

The most significant items of increased cost and delay developed at the trial were the results of difficulty in construction and dewatering of cofferdams for Bridge 1-A, differences between rock elevations upon which the State based its design of Bridge 1-A and actual elevations, and the failure of the State to act promptly in cases where a redesign was necessary in the course of the construction. The Court of Claims found the State liable on all causes of action except the seventh, for which the contract price paid for extra work was found to be sufficient. The court concluded, among other things, that claimant was "misled by the State's boring information and also was required to rely on a design prepared by the State which in some respects was negligently and not competently done" and also found the State guilty of delays in decision making and in failing to timely acquire certain property. Although we do not agree with each and every finding of the Court of Claims, we are of the view that its ultimate conclusions that the State was guilty of supplying misleading bidding information, of negligent design, and of delay "are substantially supported by the record" (*Public Constructors v State of New York*, 55 AD2d 368 [Jan. 20, 1977]). The arguments of the State, essentially premised upon mistakes made by claimant in its performance of the contract, while not sufficient to absolve the State from liability, do provide grounds for an apportionment of liability by this court.

It is undisputed that the claimant experienced unanticipated difficulties in dewatering certain cofferdams, used in the construction of piers or footings, at Bridge 1-A. Claimant contends that these difficulties were unanticipated because the State misrepresented the subsurface soil conditions in the contract. In the special bridge notes in the contract proposal (part of the contract), the bidders were informed: "Bridge 1-A: It is anticipated that the foundation material at the site of this structure will consist of varying layers of silt and sand 98*98 overlying a very compact layer of glacial till which overlies bedrock at varying depths". This description, which would indicate soils of low permeability ideal for constructing and dewatering cofferdams, is conceded by the State to have been incorrect. Although the boring information supplied did indicate the presence of gravel and boulders, which when predominant may cause difficulty in dewatering, their omission from the soil description in the special bridge notes may very well have led claimant to believe that the gravel and boulders which did exist were incidental, not predominant, factors.

As in numerous recent cases, the State relies on various exculpatory clauses to escape liability herein. It is axiomatic, however, that "[i]n a construction contract between the State and an individual, which contains representations as to existing conditions affecting work thereunder as well as an exculpatory clause relieving the State of liability and requiring personal inspection of the contract site, liability, nevertheless, may attach to the State if said conditions are not as represented and (1) inspection would have been unavailing to reveal the incorrectness of the representations (*Foundation Co. v. State of New York*, 233 N.Y. 177, 184-185; *Faber v. City of New York*, 222 N.Y. 255, 260), or (2) the representations were made in bad faith (*Young Fehlhaber Pile Co. v. State of New York*, 265 App. Div. 61; *Jackson v. State of New York*, 210 App. Div. 115, affd. 241 N.Y. 563)" (*Warren Bros Co. v New York State Thruway Auth.*, 34 AD2d 97, 99, affd 34 N.Y.2d 770. See, also, *Public Constructors v State of New York, supra*, p 372). There was testimony on behalf of claimant that it would have taken at least six months to have done an independent subsurface soils investigation. Additionally, it appears that the State had access to further information which, had it been supplied to claimant, may have alerted claimant to the potential problems with the soils at the bridge site and which, in any event, indicates that the State should have known that its soil description was misleading.

The claim of faulty design is based upon the necessity of dewatering the cofferdams to an extent far greater than anticipated, and changing pier elevations because of the aforementioned misrepresentation of soil conditions and faulty rock elevations supplied for certain of the piers for Bridge 1-A. As to the first claim, it is clear from the record that claimant was forced to do considerably more pumping than anticipated because of the coarser, more permeable

soil found. The second 99*99 aspect of claimant's argument regarding improper design also has merit in that it appears that as to at least two of the piers the State's design relied upon clearly erroneous rock elevations.

The record also reveals that the State was responsible for various delays in the construction. Initially, we must address the State's argument that because the work was completed and the job was accepted well before the August 1, 1969 contract completion date, there can be no recovery for increased costs due to delay. This claim is without merit. The proper rule was enunciated in *D'Angelo v State of New York* (46 AD2d 983, 984, affd 39 N.Y.2d 781) in which this court stated: "claimants could rightfully expect to operate free from needless interference by the State, and, therefore, they are entitled to compensation where, as here, they could have completed their work ahead of schedule and thereby saved substantial sums of money, absent the delays caused by the State". In addition to the two causes of delay previously discussed, misrepresentation of soil conditions and defective design, the record contains ample evidence of delays caused by the State's failure to promptly order redesigns and construction changes to meet problems which arose during the construction. In particular, the State appears to have been remiss in approving redesign changes suggested by the claimant to meet the problem of dewatering the cofferdams.

Finally, we must consider the proper apportionment of damages between the State and the claimant. Noting that the State was entitled to a reasonable period of time in which to make the necessary decisions as problems arose, and that certain causes of delay, such as high waters, were beyond the control of the State, the Court of Claims reduced all damages by 10%. In a nonjury case this court's inquiry is not limited to whether the findings were supported by some credible evidence, but rather if it appears on all the credible evidence that a finding different from that of the trial court is not unreasonable, this court must weigh the probative force of the conflicting evidence and inferences (*Shipman v Words of Power Missionary Enterprises*, 54 AD2d 1052). Then it is within the power of this court to grant the judgment which upon the evidence should have been granted by the trial court (*Spano v Perini Corp.*, 25 N.Y.2d 11; *McCarthy v Port of N. Y. Auth.*, 30 AD2d 111). Because we find sufficient evidence in the record to permit us to make new findings, and despite the 100*100 impossibility of establishing a precise formula for computing damages (*Public Constructors v State of New York*, *supra*), we conclude that the interests of justice mandate a 75% to 25% apportionment in this case. Our primary reason for attributing a greater percentage of the liability to claimant than was assessed by the Court of Claims is our conclusion, based upon an extensive examination of this record and the briefs submitted by the parties, that the dewatering problems experienced by claimant were at least in part the result of its own actions. In addition, we conclude that the award of $15,000 for traffic control in the fifth cause of action is without support in the record and should be modified by reducing it to $5,000.

By way of recapitulation, we adjudge, on the law and the facts, with regard to the causes of action and items thereunder as follows:

First cause of action, affirmed.

Second cause of action, modified as follows: Item (a) modified by reducing the award to $105,416.01. Item (b) modified by reducing the award to $99,478.37. Item (c) modified by reducing the award to $13,788.53. Item (d) modified by reducing award to $3,750.

Third cause of action, modified by reducing the award to $1,182.18.

Fourth cause of action, modified by reducing the award to $1,727.08.

Fifth cause of action, modified by reducing the award to $5,000.

Sixth cause of action, modified as follows: Labor is reduced to $73,555.15. Equipment is reduced to $115,465. Material is affirmed and unchanged.

Seventh cause of action, affirmed.

Eighth cause of action, modified by reducing the award to $17,332.

Ninth cause of action, modified by reducing the award to $11,566.96.

Total award for causes of action two through nine is $459,377.18.

The judgment should be modified, on the law and the facts, so as to reduce the award on the second cause of action to $222,432.91; so as to reduce the award on the third cause of action to $1,182.18; so as to reduce the award on the fourth cause of action to $1,727.08; so as to reduce the award on the fifth cause of action to $5,000; so as to reduce the award on 101*101 the sixth cause of action to $220,480.48; so as to reduce the award on the eighth cause of action to $17,332; so as to reduce the award on the ninth cause of action to $11,566.96; for a total award, inclusive of the second, third, fourth, fifth, sixth, eighth and ninth causes of action of $479,722.16, together with appropriate interest, and, as so modified, affirmed, without costs.

Judgment modified, on the law and the facts, so as to reduce the award on the second cause of action to $222,432.91; so as to reduce the award on the third cause of action to $1,182.18; so as to reduce the award on the fourth cause of action to $1,727.08; so as to reduce the award on the fifth cause of action to $5,000; so as to reduce the award on the sixth cause of action to $220,480.48; so as to reduce the award on the eighth cause of action to $17,332; so as to reduce the award on the ninth cause of action to $11,566.96; for a total award, inclusive of the second, third, fourth, fifth, sixth, eighth and ninth causes of action of $479,722.16, together with appropriate interest, and, as so modified, affirmed, without costs.

2019 NY Slip Op 33284(U)
EAST EMPIRE CONSTRUCTION INC., Plaintiff,
v.
BOROUGH CONSTRUCTION GROUP LLC, 952 COLUMBUS LLC, CPR MONEY LLC, JOHN DOE NO.1 THROUGH JOHN DOE NO.5, Defendants.
Docket No. 655963/2016, Motion Seq. No. 001.
Supreme Court, New York County.
November 1, 2019.

DECISION + ORDER ON MOTION

BARBARA JAFFE, J.S.C.

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting partial summary judgment on the issue of liability as to plaintiff's first, fourth, and fifth causes of action, and dismissing defendants' eleventh affirmative defense. Defendants oppose.

I. UNDISPUTED BACKGROUND

On November 20, 2015, defendant Borough Construction Group, LLC retained plaintiff to perform certain work on a construction project taking place at 952 Columbus Avenue in Manhattan, owned by 952 Columbus LLC. As pertinent here, the subcontract provides, as to Borough's remedies, that

[i]f the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within five working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by appropriate Modification, and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

(NYSCEF 29).

Pursuant to section 7.2.1 of the subcontract, Borough may terminate it if plaintiff repeatedly fails or neglects to carry out its work and "fails within a ten-day period after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness ..." If Borough so terminates, and if the unpaid balance of the subcontract sum exceeds the expense of finishing plaintiff's work and other damages incurred by Borough and not expressly waived, the excess is paid to plaintiff. If the expenses and damages exceed the unpaid balance, plaintiff is to pay the difference to Borough. (NYSCEF 29).

The scope of work sheet, annexed to the subcontract, provides that if plaintiff fails to perform, plaintiff will be issued a seventy-two hour notice to cure, and if it fails to rectify and remedy the situation within that timeframe, the project's owner will remove it from the project, and any costs and fees associated with its failure to perform will be back-charged and deducted from any monies owed to plaintiff. (NYSCEF 29).

In a construction bid form dated November 20, 2015, Borough and plaintiff agreed that the proposed completion date would be February 14, 2016. (NYSCEF 30).

By email dated March 29, 2016, plaintiff submitted to Borough a change order, and asked Borough to review and sign it so that plaintiff could proceed with the work. Borough wrote back that plaintiff should proceed with the work. (NYSCEF 41). The change order was signed by Borough on April 5, 2016. (NYSCEF 42).

After reviewing an AIA document prepared by Borough in response to the change order, plaintiff asked that revisions be made to the document as the change of order time would take 6 weeks, that it would not be completed by April 5, 2016, the date on the document, and that the change order would affect the sum, time and maximum price. Borough agreed to make the changes. (NYSCEF 43).

The AIA document provides that the subcontract time will be increased by 42 days, although it also states that the date of substantial completion will therefore be April 23, 2016. The document was signed on April 5, 2016. (NYSCEF 44).

By email dated May 3, 2016, plaintiff informed Borough that its work would be completed by July 16, 2016, which represented the original three-month schedule for the work plus the additional 42 days due to the change order. Borough did not object to it. (NYSCEF 45).

On May 6, 2016, plaintiff informed Borough that the stairs would be installed the following Monday and that it would provide Borough with a detailed timeline also on Monday. Borough replied that "Monday works for both." (NYSCEF 46).

On May 10, 2016, Borough asked plaintiff for the timeline, and upon receipt of it, Borough rejected it as having told plaintiff that the work needed to be done by June 16. Plaintiff replied that it had told Borough that it would be done by July 16, not June 16. (NYSCEF 47).

The same day, and by letter dated May 9, 2016, Borough informed plaintiff that it was giving plaintiff notice of termination and that the subcontract "will be terminated in three business days from the date of this letter ..." Borough alleged that plaintiff was in default of its contractual obligations by failing to provide sufficient manpower, failing to meet the schedule, safety regulations and qualified workmanship for the project, and by failing to respond or delaying a response to an expediter's requests for crane usage, which was a task stipulated to in the subcontract, and which delayed the performance and completion of work. Borough thus directed that plaintiff "cease all work at the site immediately." No mention is made therein of an opportunity for plaintiff to cure the alleged defaults. (NYSCEF 49).

The following day and in response to the letter, plaintiff emailed Borough to ask if it should continue its work, to which Borough replied affirmatively and suggested that they meet to discuss plaintiff's schedule. Borough cancelled the termination notice that day. (NYSCEF 50).

On May 16, 2016, Borough emailed its third-party engineering consultant, Global Consultants LLC that there was a problem with the steel on the project, and that it needed to be addressed as soon as possible or Borough would get a stop work order. Global responded that Borough needed to remove all personnel from the project until the building could be stabilized and inspected, and that Global was putting a stop work order on the site until further notice.

(NYSCEF 68).

On May 16, 2016, Borough sent to plaintiff the identical notice of termination letter as before, and again directed plaintiff to cease all work at the site immediately. (NYSCEF 51).

II. PERTINENT PORTIONS OF COMPLAINT (NYSCEF 1) AND ANSWER (NYSCEF 5)

In plaintiff's first cause of action, it alleges that it performed its obligations under the subcontract but that Borough breached it by wrongfully terminating plaintiff without good cause, failing to give plaintiff the appropriate notice and opportunity to cure any alleged defects, and failing to pay plaintiff. In the fourth cause of action, plaintiff contends that it furnished labor and materials to defendants in good faith and for their benefit and with the expectation that it would be paid, but that defendants failed to pay. And in the fifth cause of action, plaintiff contends that defendants have been unjustly enriched from the work performed by plaintiff.

As their eleventh affirmative defense, defendants maintain that plaintiff's claims are barred by its own material breach of the agreement, entitling defendants to, among others, offsets related to plaintiff's defective work, improper staffing, delays, and retention of materials for the project.

III. CONTENTIONS

A. Plaintiff (NYSCEF 54)

Plaintiff contends that defendants breached their agreement by failing to pay it for its work and terminating the subcontract wrongfully and in contravention of its procedures for termination. Having wrongfully terminated the agreement, defendants may not recover damages based on plaintiff's alleged non-performance of the subcontract. Nor may defendants recover offsets for plaintiff's alleged defective work as they failed to comply with section 3.4 of the subcontract by failing to provide the required written notice. Plaintiff further maintains that defendants waived the right to timely performance, especially as the delays were not plaintiff's fault.

Plaintiff argues that defendant 952 Columbus is liable for quantum meruit and unjust enrichment, despite the existence of a contract between plaintiff and Borough, as 952 Columbus made payments directly to plaintiff, thereby implicitly promising to pay for plaintiff's work.

B. Defendants (NYSCEF 81)

Defendants maintain that there are triable issues as to whether plaintiff performed under the subcontract, especially as its work was defective and created an unsafe and dangerous situation. They deny that they were required to provide an opportunity to cure, as plaintiff's defaults were repeated and could not have been cured in a few days, nor could it be trusted to cure them safely. Defendants also contend that they provided an opportunity to cure by issuing the first termination letter and then cancelling it after discussing the issue with plaintiff, and therefore gave plaintiff seven days to cure between the first and second termination letters.

Defendants deny that they have waived their rights to a setoff, distinguishing the cases cited by plaintiff. They also deny having waived their rights pursuant to section 3.4 of the subcontract, again relying on the May 9th termination notice as providing the required notice and time to cure.

They observe that even if they waived their rights to an offset, they may nonetheless raise plaintiff's defective work as a defense to plaintiff's claim that it performed under the subcontract. Defendants argue that plaintiff may not recover from 952 Columbus absent evidence it performed work for 952 Columbus outside the scope of its subcontract with Borough.

IV. ANALYSIS

A. Breach of termination procedures

If a contract provides that a party must fulfill conditions precedent before it can terminate it, those conditions are enforceable and binding, and a party that fails to follow them may be held liable for breach of contract. (*Black Riv. Plumbing, Heating & A.C., Inc. v Bd. of Educ. Thousand Is. Cent. Sch. Dist.,* 175 AD3d 1051 [4th Dept 2019]). Thus, in *Black Riv. Plumbing,* where the parties' contract required defendants to give plaintiff seven days to cure any deficiencies before terminating the contract, and defendants failed to do so, the Court granted the plaintiff's motion for liability on its breach of contract claim.

Similarly, in *MCK Bldg. Assocs., Inc. v St. Lawrence Univ.,* the Court held that where the defendant's contract termination letter stated that it was based not only on the plaintiff's lack of performance and disregard of contractual obligations, but also on a specific provision of the agreement which required written notice of default, and as the letter provided no written notice but instead indicated that the contract had been terminated as of the letter's date, the defendant wrongfully terminated the contract. (301 AD2d 726 [3d Dept 2003], *lv dismissed* 99 NY2d 651 [2003]).

And in *New Image Constr., Inc. v TDR Enter., Inc.,* the Court found that the defendant's termination of the contract was ineffective absent the required 14-day notice to cure and written notice of termination, both of which were contractual prerequisites to termination. (74 AD3d 680 [1st Dept 2010]).

Here, the parties' subcontract and scope of work sheet require both written notice to plaintiff and an opportunity for it to cure any alleged defaults before the subcontract may be terminated. Even assuming that Borough's 72-hour notice of termination was sufficient rather than the 10-day notice provided in the subcontract, the notice directed plaintiff to cease immediately all of its work on the project, thus failing to give it an opportunity to cure before the subcontract was terminated. Plaintiff thereby establishes, *prima facie,* that defendants breached their agreement by failing to comply with its proper termination provisions.

Given defendants' cancellation of the first notice of termination, they may not rely on it to argue that that notice provided time for plaintiff to cure its defaults until it issued its second termination letter seven days later. Rather, by cancelling the notice, defendants indicated that they did not intend to proceed with the termination. In any event, the first letter similarly fails to provide time to cure but rather directs plaintiff to cease all work immediately. (*See Mike Bldg. & Contr., Inc. v Just Homes, LLC,* 27 Misc3d 833 [Sup Ct, Kings County 2010] [termination letter which provided that contract would be terminated seven days after receipt of letter and that contractor was not to return to premises failed to provide opportunity to cure deficiency in performance, notwithstanding seven-day delay in effecting termination]).

To the extent that defendants argue that an emergency situation existed which negated the need to provide plaintiff time to cure any defaults, defendants issued the first termination letter without evidence that an emergency then existed. In any event, defendants cite no apposite authority for their claim that they did not have to provide time to cure if there was an emergency or if plaintiff's defaults were repeated and/or could not be cured, and submit no evidence that plaintiff either repudiated the agreement or indicated that it could not cure its alleged defaults. (*See Genl. Supply & Constr. Co. v Goelet,* 241 NY 28 [1925] [even if owner justified in belief that contractor would continue to default in performance and would not finish work within reasonable time, owner still had to terminate contract according to its terms, and failure to do so was wrongful]; *cf. Kleinberg Elec., Inc. v E-J Elec. Installation Co.,* 111 AD3d 410 [1st Dept 2013] [plaintiff waived right to notice of termination as it repudiated subcontract by abandoning work]; *J. Petrocelli Constr., Inc. v Realm Elec. Contrs., Inc.,* 15 AD3d 444 [2d Dept 2005] [whether contractor liable for failure to comply with termination procedure depended on whether subcontractor had already repudiated contract]).

Defendants' claim that plaintiff's alleged breaches preclude its recovery for breach of contract is also unavailing. (*See New Image Constr., Inc.,* 74 AD3d at 681 [contractor granted judgment for payment due; termination of contract was ineffective due to failure to comply with termination procedures, regardless of whether termination based on plaintiff's failure to complete work diligently]; *Rebh v Lake George Ventures,* 223 AD2d 986 [3d Dept 1996] [defendants breached contract by failing to follow procedures for terminating plaintiff for substandard job performance before giving opportunity to cure, and argument that plaintiffs' breach precludes recovery rejected as alleged substandard job performance was situation to which cure provision applied]).

B. Defendants' waiver of certain damages

Given defendants' failure to terminate the subcontract properly, they are barred from seeking an offset based on plaintiff's alleged defaults, specifically, any expenses incurred by defendants for finishing plaintiff's work and other damages and costs and fees associated with plaintiff's failure to perform, all of which depended on defendants' adherence to the notice, opportunity to cure, and termination procedures in the subcontract and scope of work sheet. (*See e.g., Paragon Restoration Group, Inc. v Cambridge Sq. Condominiums,* 42 AD3d 905 [4th Dept 2007] [as defendant terminated contract without complying with termination procedures, termination was deemed to be without cause and for convenience, and therefore counterclaim for offset for cost of completing project dismissed]; *Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.,* 180 AD2d 222 [4th Dept 1992] ["defendant's wrongful termination of plaintiff for default (which deprived plaintiff of right to cure) is deemed to be a termination for the convenience of defendant" and thus defendant not entitled to reimbursement for payments made to others to complete plaintiff's work]).

Similarly, defendants failed to comply with section 3.4 of the subcontract, which requires five-days notice and an opportunity to cure before defendants may correct plaintiff's alleged deficiencies and "deduct the reasonable cost thereof" from payments due plaintiff. (*See Northeast Constr. Group, Inc. v Deconstruction, Inc.,* 16 AD3d 357 [1st Dept 2005], *lv denied* 5 NY3d 709 [2005] [dismissing contractor's counterclaims against subcontractor in which it asserted right to deduct amounts spent to remedy alleged defaults by subcontract, as contractor failed to give written notice as required before taking deductions]).

Defendants do not address plaintiff's argument that they waived the right to timely performance by agreeing to plaintiff's revised schedules and as the delays were not plaintiff's fault, other than by observing that there was no time-of-essence completion date in the parties' agreement, without explanation of the its relevance here. Thus, any damages sought by defendants based on plaintiff's alleged delays are dismissed.

C. Plaintiff's claims against 952 Columbus

A quasi-contract claim is precluded when there is a contract in existence covering the same claims at issue. (*See 22 Gramercy Park, LLC v Michael Haverland Architect., P.C.,* 170 AD3d 535 [1st Dept 2019] [unjust enrichment claim should have been dismissed as it arose out of subject matter covered by express contract]). Moreover, a subcontractor may not recover on a quasi-contract claim against an owner where the subcontractor has a contract with a general contractor, unless the owner expressly consents to pay for the subcontractor's work. (*Perma Pave Contr. Corp. v Paerdegat Boat and Racquet Club, Inc.,* 156 AD2d 550 [2d Dept 1989]).

While plaintiff establishes that 952 Columbus issued payments to it, there is no evidence that it thereby expressly consented to pay for plaintiff's work or induced plaintiff to believe that 952 Columbus would or had consented to pay for plaintiff's services, and thus plaintiff fails to establish that 952 Columbus may be held liable to it for unjust enrichment or quantum meruit. (*See J.P. Plumbing Corp. v Born to Build Constr. Corp.,* 137 AD3d 976 [2d Dept 2016] [plaintiff's unjust enrichment claim against owner dismissed as all business transactions were between plaintiff and contractor, and owner did nothing to induce plaintiff to believe it would pay for its services]; *Davis v CEC, Inc.,* 135 AD3d 1049 [3d Dept 2016], *lv denied* 27 NY3d 904 [2016] [unjust enrichment claim should have been dismissed as against owner where plaintiff did no work outside scope of subcontract and owner did not, by words or actions, assume contractor's obligation to pay]; *Sears Ready Mix, Ltd. v Lighthouse Marina, Inc.,* 127 AD3d 845 [2d Dept 2015] [subcontractor's claim against owner dismissed as plaintiff was hired by contractor and performed work for contractor]).

Plaintiff's reliance on *Vertical Progression, Inc. v Canyon-Johnson Urban Funds* is misplaced as there, the general contractor signed the subcontract as agent for the owner, a circumstance not present here, and the owner directly paid the subcontractor. (126 AD3d 784 [2d Dept 2015]). Similarly, in *CPN Mech., Inc. v Madison Park Owner LLC,* the owner paid the plaintiffs directly with a two-party check showing the contractor as a co-payee. (94 AD3d 626 [1st Dept 2012]). Plaintiff submits no authority to support its claim that an owner's direct payment to a subcontractor, by itself, is sufficient.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion is granted to the extent of: (1) granting it partial summary judgment on liability on its breach of contract claim against defendant Borough Construction Group, LLC, and (2) dismissing defendants' eleventh affirmative defense, and is denied as to its fourth and fifth causes of action as against defendant 952 Columbus LLC; it is further
ORDERED, that upon searching the record (CPLR 3212[c]) and for the reasons set forth above, plaintiff's fourth and fifth causes of action as against defendant 952 Columbus LLC are hereby severed and dismissed; and it is further
ORDERED, that the action is hereby referred to the Commercial Division Mediation Program, pursuant to the annexed order.

Fyfe *v.* . Sound Development Co., 139 N.E. 263 (NY 1923)

This is an action brought to foreclose a mechanic's lien wherein the Fidelity and Deposit Company of Maryland has been made a party by reason of its having given an undertaking to discharge the lien. Upon a motion made by the company for judgment on the pleadings, the mechanic's lien as filed has been held to be bad.

The complaint alleges that one James M. Townsend was the owner of the premises in question and that the Sound Development Company, Inc., was in possession of the same through the acts and consent of the owner. Paragraph seven of the complaint reads as follows:

"That on or about the month of November, 1920, plaintiff entered into an oral agreement with the defendant, Sound Development Company, to perform such work, labor and services and to furnish such goods, wares and materials for the building and rebuilding of certain hoppers, elevators, tracks and the doing of other work on the screening plant, structures and buildings on said premises as should thereafter from time to time be ordered and directed by said defendant, and said defendant agreed monthly to pay plaintiff therefor the cost thereof, plus ten percent." *Page 268

The complaint then goes on to allege the completion of the contract by the doing of work and furnishing materials during the months of February, March and April of 1921, the amount which became due and the balance payable. It further alleges that on or about the 16th day of May, 1921, and within four months after the last items of said work were performed, and the last items of said materials were furnished, the plaintiff duly filed a notice of lien in the office of the clerk of Nassau county, a copy of which is annexed to the complaint. Continuing, the complaint also alleges that on the second day of June, 1921, the Sound Development Company filed with the clerk of the county of Nassau an undertaking duly executed by the defendants in the sum of $6,500 conditioned for the payment of any judgment which might be rendered against said property in any action brought by the plaintiff for the enforcement of the lien.

To this complaint the defendant, the Fidelity and Deposit Company of Maryland, answered, denying any knowledge or information as to the allegations of the complaint, and setting up as a partial defense that any indebtedness had been partially paid, discharged and satisfied.

A motion was thereupon made by this defendant for judgment on the pleadings on the ground that the mechanic's lien did not comply with the provisions of the Lien Law (Cons. Laws, ch. 33) and was, therefore, null and void. A copy of the lien annexed to the complaint stated as follows:

"(4) The labor performed was building and rebuilding hoppers, elevators, tracks, and doing other additional work on the sand screening plant on said land."

"The labor to be performed is None."

"The materials furnished was lumber, iron work, machine parts, piping, fittings, hardware, etc."

"The material to be furnished is None." *Page 269

"The agreed price and value of said labor is cost plus ten per cent (10%)."

"The agreed price and value of said material is cost plus ten per cent (10%)."

"(5) The amount unpaid to the lienor for such labor and material is $5,467.03."

The Special Term was of the opinion that this notice of lien was defective in that it did not state in figures the contract price or the value of said labor and material; that stating the agreed price as contained in the contract was

insufficient. Judgment was thereupon given for this defendant, which has been affirmed by the Appellate Division, one justice dissenting.

We cannot agree with the courts below and think this notice of lien sufficiently complied with the provisions and purposes of the Lien Law.

Section 9 of the Mechanics' Lien Law (Laws of 1909, chapter 38, as amended) specifies what the notice of lien shall contain. Subdivision 4 of this section reads as follows:

"The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof."

This subdivision does not require that both the agreed price and the value of the labor and materials furnished shall be stated. The law is complied with if the agreed price is given *or* the value stated of the work done or materials furnished.

The agreed price means the price agreed upon by the contract of employment or of purchase. As alleged in the complaint the contract in this case called for cost plus ten per cent payable monthly. This was the contract or agreed price. The claimant, therefore, in attempting to comply with this section, subdivision 4, of the Lien Law, stated exactly and accurately what the agreed price was — cost plus ten per cent. He could not state, *Page 270 truthfully, that the cost, as *he* figured it, subsequent to the making of the contract, or as it developed during the progress of and up to the completion of the work, was the agreed price. The contractor, the Sound Development Company, Inc., agreed to pay cost plus ten per cent (10%), but, speaking strictly, did not agree in the alleged contract to pay a specific or definite amount; that is, a given figure. The cost as ascertained by the plaintiff might be and could be disputed by the development company, and yet the contract not be violated. This is what has happened. The complaint states the cost price and alleges that the parties have agreed to the amount. This the answer denies. The plaintiff might have alleged in figures the cost price under that provision of the Lien Law which permitted him to state the value of the work done instead of the contract price. But as he had the alternative and chose to state the agreed price, he stated it in the very words of the contract.

When we remember that the Mechanics' Lien Law contemplates that the claimant may prepare his own papers (*Hurley* v. *Tucker,*128 A.D. 580), and that section 23 of the law requires that the terms and provisions shall be construed liberally, and that a substantial compliance shall be sufficient for the validity of the lien, it seems to us that the notice of lien in this instance came within the law.
The following cases relied upon are not in point:

Bradley Currier Co. v. *Pacheteau* (71 A.D. 148;175 N.Y. 492) was clearly not a compliance with the Lien Law, as it existed, prior to the amendment of 1916, chapter 507, section 4. The law then required the notice of lien to state the labor performed, or to be performed, or materials furnished, or to be furnished, and the agreed price or value thereof. A lien which did not separate and value the labor performed from the labor unperformed, but gave a lump sum as the valuation *Page 271 of both was not a compliance with the law. This has nothing to do with the case here.
In *Toop* v. *Smith* (181 N.Y. 283, 287) the notice of lien recited that "the labor performed and materials furnished, and the agreed price or value thereof is as follows: Under and by virtue of a contract partly written and partly oral made with the said Smith, Coope and Shuttleworth above mentioned, according to specifications in writing and drawings of the improvements herein mentioned, on or about February 24th, 1898, April 25th, 1899, and September 25th, 1899." This was held not to be a compliance with the Lien Law as it then stood, although it was stated in the opinion as follows:
"It may be that if the specifications and drawings mentioned in the notice had been attached to the latter, there would have been a substantial compliance with the statute, but it seems to us there can be no doubt that a mere general reference to specifications and drawings that may not even be in existence at the time of filing the notice of lien cannot be a sufficient compliance with the subdivision of the statute under discussion."

Finn v. *Smith* (186 N.Y. 465) involves similar facts and the same kind of notice as found in the *Bradley Currier Case* (*supra*) and is distinguished for the same reason.
In *Flaum* v. *Piccaretto* (226 N.Y. 468, 471) the notice of lien stated that "the labor performed is all carpenter work upon said houses, as per said contract; two of said houses ready for plastering and third house completed for plastering except five partitions. That the labor to be performed is completion of said houses as per contract." The notice failed to state the contract or agreed price or even the value of the work performed.

The other objections made to this lien, in our opinion, are without merit. The one which we have here discussed is the only one referred to and sustained by the courts below. Differing from them as to the sufficiency *Page 272 of this notice of lien the judgments appealed from should be reversed, with costs in all courts, and the defendant's motion for judgment on the pleadings denied, with costs.

HISCOCK, Ch. J., HOGAN, CARDOZO, POUND and ANDREWS, JJ., concur: McLAUGHLIN, J., absent.

Judgments reversed, etc.

Supreme Court, Appellate Division, Second Department, New York.
CALLOS, INC., Appellant, v. Jane JULIANELLI, et al., Respondents, et al., Defendants.

Decided: December 30, 2002

ANITA R. FLORIO, J.P., WILLIAM D. FRIEDMANN, LEO F. McGINITY and SANDRA L. TOWNES, JJ.
Esseks Hefter & Angel, Riverhead, N.Y., (William Power Maloney of counsel), for appellant. Lazer, Aptheker, Rosella, Melville, N.Y., (David Lazer of counsel), for respondents.

In an action, inter alia, to foreclose mechanic's liens, the plaintiff appeals from a judgment of the Supreme Court, Suffolk County (Kitson, J.), entered February 27, 2002, which, upon an order of the same court entered November 14, 2001, granting the motion of the defendants Jane Julianelli and South Woods, Inc., for summary judgment dismissing the complaint insofar as asserted against them, dismissed the complaint insofar as asserted against them and discharged the mechanic's liens.

ORDERED that the judgment is affirmed, with costs.

It is well settled that licensing statutes are to be strictly construed, and that an unlicensed contractor forfeits the right to recover damages based either on breach of contract or on quantum meruit, as well as the right to foreclose on a mechanic's lien (see B & F Bldg. Corp. v. Liebig, 76 N.Y.2d 689, 563 N.Y.S.2d 40, 564 N.E.2d 650; Ellis v. Gold, 204 A.D.2d 261, 611 N.Y.S.2d 587; Todisco v. Econopouly, 155 A.D.2d 441, 547 N.Y.S.2d 103; George Piersa, Inc. v. Rosenthal, 72 A.D.2d 593, 421 N.Y.S.2d 91).

The defendants Jane Julianelli and South Woods, Inc., established their prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against them by establishing that the plaintiff was not licensed to perform home improvements in the Town of East Hampton when the contract was signed or when the work was performed, and the plaintiff failed to raise a triable issue of fact in opposition (see Ellis v. Gold, supra; George Piersa, Inc. v. Rosenthal, supra). Accordingly, the Supreme Court properly granted the motion for summary judgment.

The plaintiff's remaining contention is without merit.

168 A.D.2d 877 (1990)
Murphy Construction Corporation, Respondent,
v.
John Morrissey et al., Appellants
Appellate Division of the Supreme Court of the State of New York, Third Department.

December 27, 1990

Mahoney, P. J., Kane, Casey, Weiss and Mercure, JJ., concur. Mercure, J.

Following joinder of issue and discovery in this action to foreclose a mechanic's lien, defendants moved for an order canceling the notice of lien, alleging that plaintiff served a copy of its notice of lien upon defendants by certified mail more than 30 days after filing and that plaintiff never filed 878*878 proof of such service with the County Clerk. Supreme Court granted the motion only to the extent of ordering cancellation and discharge of the notice of mechanic's lien upon condition that defendants post a $5,000 bond "insuring payment of any judgment subsequently obtained by [p]laintiff". Defendants appeal, asserting that the notice of lien should have been unconditionally canceled and discharged.

We agree. Lien Law § 11 provides in pertinent part that "[w]ithin thirty days after filing the notice of lien, the lienor *shall* serve a copy of such notice upon the owner, if a natural person, by delivering the same to him personally" and

that "[f]ailure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed *shall* terminate the notice as a lien" (emphasis supplied). It is uncontroverted that plaintiff failed to comply with the statutory requirements both with respect to service of a copy of the notice of lien and the filing of proof of such service, and a literal application of the statutory language would clearly require the unconditional grant of defendants' motion.

The next consideration is whether the Legislature intended the peremptory word "shall", emphasized above, to be applied permissively, thereby leaving Supreme Court with discretion to excuse plaintiff's noncompliance (*see*, McKinney's Cons Laws of NY, Book 1, Statutes § 177, at 350-352). We note at the outset that, while the Legislature's use of the term is not conclusive, such a word of command is ordinarily construed as peremptory in the absence of circumstances suggesting a contrary legislative intent (*see*, § 177, at 350; *see also*, *People v Schonfeld*, 74 N.Y.2d 324, 328). Moreover, the legislative history of the section supports a finding of peremptory intent. Prior to the 1988 amendment to Lien Law § 11 (L 1988, ch 105, § 1), the section provided for discretionary service of a copy of the notice of lien "[a]t any time" following filing and that "failure to serve the notice does not otherwise affect the validity of such lien". The Legislature's amendment of the statute so as to substitute a peremptory provision for a permissive one is very strong evidence of its intent that the amended statute be mandatory in its application (*see*, McKinney's Cons Laws of NY, Book 1, Statutes §§ 177, 193, at 345, 357-358; *see also*, *People v Schonfeld*, *supra*, at 328-329; *Paolangeli v Sopp*, 145 Misc 2d 259). We conclude, therefore, that Supreme Court had no discretion to excuse plaintiff's noncompliance with Lien Law § 11 or to place any conditions upon the vacatur of plaintiff's lien.

Order modified, on the law, with costs to defendants, by deleting the second decretal paragraph thereof, and, as so modified, affirmed.

Outrigger Construction Company, Inc., Appellant,
v.
Nostrand Avenue Development Corporation et al., Defendants, and Bank Leumi Trust Company of New York, Respondent. (And a Third-Party Action.)
Appellate Division of the Supreme Court of the State of New York, Second Department.

July 31, 1995

Rosenblatt, J. P., Copertino, Hart and Friedmann, JJ., concur.

Ordered that the order is affirmed, with costs.

The plaintiff, Outrigger Construction Company, Inc., commenced this action to foreclose a mechanic's lien on real property owned by Nostrand Avenue Development Corporation (hereinafter Nostrand) and on which the defendant Bank Leumi Trust Company of New York (hereinafter Bank Leumi) held a mortgage. The plaintiff had performed construction work on the property for Nostrand. However, Nostrand failed to fully pay the plaintiff for its labor and materials.

On October 26, 1990, the plaintiff filed a notice of a mechanic's lien in the amount of $68,480.46 on the real property in question. On November 21, 1990, the plaintiff served a notice of the lien on Nostrand in compliance with Lien Law § 11. On November 26, 1990, the plaintiff and Nostrand entered into a stipulation in which they agreed that the mechanic's lien would be discharged by the filing of a bond in the amount of $68,480.46. The plaintiff, however, did not file proof of service of the notice of the lien with the Kings County Clerk within 35 days after the filing of the notice of the lien as required by Lien Law § 11. The plaintiff contends that the stipulation between 690*690 it and Nostrand, which was made within the 35-day period, obviates the need for filing proof of service of the notice of the mechanic's lien pursuant to Lien Law § 11.

The Supreme Court properly declared the mechanic's lien null and void and properly dismissed the complaint insofar as it is asserted against Bank Leumi. The plaintiff failed to file proof of service of the notice of the lien as required by the clear and unambiguous language of Lien Law § 11 (*see*, *Matter of Podolsky v Narnoc Corp.*, 196 AD2d 593, 594-595). The "invalidation of the lien where proof of service is not filed is mandatory leaving no discretion in the court" (*Matter of Northport Marina*, 146 Bankr 60, 62 [ED NY]; *Matter of Connecticut St. Dev. Corp. v Garber Bldg. Supplies*, 216 AD2d 561).

Further, the plaintiff cannot avoid the requirement of filing proof of service of the notice of the lien merely because the lien was discharged by the filing of a surety bond. The posting of a surety bond merely shifts the lien from its original adherence and attaches it to the substituted bond (*see*, *Tri-City Elec. Co. v People*, 96 AD2d 146, 150, *affd* 63 N.Y.2d 969). To justify payment of the lien out of the bond, a valid lien must first be perfected. The filing of the bond, by itself, does not establish the validity or timely filing of the lien (*see*, *Tri-City Elec. Co. v People*, *supra*, at 150).

We find the plaintiff's remaining contentions to be without merit.

2008 NY Slip Op 28366

COOPER SQUARE HOTEL, LLC, Petitioner,

v.

ASSURED SOURCE NATIONAL, LLC, Respondent.

107057/2008

Supreme Court of the State of New York, New York County.

Decided September 23, 2008.

Frank P. Ribaudo, Esq., Tunstead & Schechter, Esqs., Jericho, New York, for Petitioner. Lawrence W. Rosenblatt, Esq., Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York, New York, for Respondent.

MICHAEL D. STALLMAN, J.

Petitioner entered into a contract with non-party F.J. Sciame Construction Co., Inc. (Sciame) to perform construction management services in connection with petitioner's construction of a hotel on its property, known as 25-33 Cooper Square, New York, New York. Sciame allegedly entered into a contract with Angel Construction Group, LLC (Angel), to perform superstructure concrete work at the construction project. Angel entered into a professional employer organization (PEO)[1] agreement with respondent Assured Source National.

On April 30, 2008, respondent filed with the County Clerk of New York County a mechanic's lien against the property at issue in the amount of $316,561.13, for unpaid labor and materials performed and furnished through September 1, 2007.

Pursuant to Lien Law § 19 (6), petitioner Cooper Square Hotel, LLC seeks an order discharging a mechanic's lien that respondent Assured Source National, LLC filed on April 30, 2008, against the real property at issue.

DISCUSSION

Petitioner argues that the lien should be discharged because respondent and Angel executed waivers of mechanic's liens and partial releases. Respondent executed the waiver and partial release is dated August 7, 2007; Angel executed the waiver and partial release is dated September 27, 2007, executed by Angel. Mizzi Aff., Exs H, I. Both waivers identically state, in relevant part,

"The undersigned further acknowledges that, except for monies retained for subsequent payment pursuant to the terms of the agreement, the payment aforesaid constitutes payment of all sums presently due and owing to the undersigned for the said labor performed and/or material and/or equipment furnished and/or services provided and the undersigned does hereby release and waive any claims against . . . Cooper Square Hotel LLC, . . ."

Ibid. According to Sciame's President, the last day that Angel performed any labor on the project was August 6, 2007, because Angel did not provide Sciame with proof of proper insurance required under their contract. Mizzi Aff. ¶¶ 7-8. Petitioner therefore concludes that respondent has waived any liens against the property.

In support of the petition, Sciame also claims that it paid Angel and respondent in full, commencing in February 2007 up to and including August 7, 2007. Mizzi Aff. ¶¶ 14. In February 2007, Sciame purportedly started issuing two-party checks to respondent and Angel to fund Angel's payroll, but Sciame claims that it did not authorize respondent to pay Angel's employees after Angel stopped work on the project. *Id.* ¶¶ 12, 21. Sciame maintains that invoices supporting the lien are for payroll after Angel's last day of work on the project, for the invoices are dated August 16, 23, and 30, 2007. Mizzi Aff., Ex J.

Finally, petitioner argues that respondent, as a PEO, is not among the class of persons or entities that may assert a mechanics lien under Lien Law § 3, because a PEO presumptively does not provide labor, citing *Tri-State Employment Serv. v Mountbatten Sur. Co., Inc.,* 99 NY2d 476, *supra.*

In opposition, respondent contends that the waivers are not valid because the amounts noted in the waivers have not been paid in full, which was a condition of the waivers. Brown Aff. ¶¶ 5, 16. Respondent claims that neither Sciame

nor Angel notified it that Angel's last day on the project was August 6, 2007. *Id.* ¶ 10. Respondent maintains that Sciame continued to instruct respondent to release payroll subsequent to August 6, 2007, and that Sciame's project manager review payroll for the week ending August 23, 2007. *Id.* ¶ 11.

Assured's, Angel's and Sciame's affidavits raise factual issues which would warrant discovery as to whether the waivers are effective, and whether the August 2007 invoices are for labor provided by Angel. In reply, petitioner did not submit any proof of the payment in full of the amounts set forth in the waivers, which was the consideration of the waivers. Petitioner did not submit any affidavit from Sciame refuting respondent's Sciame's alleged communications regarding Angel's payroll after Angel's last day of work. The invoices themselves post-date Angel's last day of work. However, it is not clear from the invoices themselves whether the "payroll" entries could reflect labor performed prior to Angel's last day, or whether the entries merely reflect the respondent's ongoing cost of keeping Angel's employees on respondent's payroll, under the PEO agreement, even though Angel had already ceased work. These issues would warrant discovery.

Notwithstanding the above, petitioner has demonstrated that respondent is not entitled to assert a mechanic's lien against the property. "An entity that merely advances money for the completion of a contract, as opposed to furnishing labor or material, is not protected by the state mechanics' lien statute which—similar to payment bonds—protects labor and material suppliers." *Tri-State Employment Serv,* 99 NY2d at 483, citing *Uvalde Asphalt Paving Co. v City of New York,* 191 NY 244 (1908).

In *Tri-State Employment Services, Inc.,* the Court of Appeals addressed the issue of whether a PEO is a proper claimant under a labor and materials surety bond. Although *Tri-State Employment Services, Inc.* concerned a payment bond, this Court agrees with the parties that the reasoning in *Tri-State Employment Services, Inc.* equally applies here. The Court of Appeals itself drew the parallel between payment bonds and mechanics liens, which are both meant to protect labor and material suppliers. This Court sees no reason to fashion a different standard for determining whether a PEO has provided labor for the purposes of a mechanics lien.

In reviewing the PEO relationship, the Court of Appeals held that "a PEO's sole or primary role as a provider of administrative and human resources services, and as a payroll financier, gives rise to a presumption that the PEO does not provide labor to a contractor for purposes of a payment bond claim." *Id.* At 486. However, the Court of Appeals further held that the inquiry is essentially factual, and that the presumption could be overcome.

"In determining whether a PEO is a provider of labor, a court should consider factors similar to those identified in *Contractors Labor Pool* [*v Westway Contrs., Inc.,* 53 Cal App 4th 152], including: the PEO's involvement in selecting and screening the workers for hire, and whether it used its own criteria in doing so; the PEO's affirmative representations to the workers that it is their employer; the nature of the documentation exchanged between the workers and the PEO at the start of the working relationship (such as handbooks, manuals and employment forms); the PEO's involvement in training, supervising and disciplining the workers and in otherwise retaining control over the workers or directing their behavior; whether the PEO, rather than the contractor, determined which workers could be terminated; and whether the PEO withheld workers, rather than its services, upon nonpayment by the contractor." *Id.* at 486-87.

Here, respondent has not overcome the presumption that, as a PEO, respondent did not provide labor. Angel's former Director of Operations claims that respondent assisted in recruiting, hiring, and terminating workers, and respondent had employees fill out employment documents, and provided employees handbooks. Atamanoff. Aff. ¶ 4. Such actions fall squarely within human resource services.

Respondent argues that it acted as a "co-employer" pursuant to its agreement with Angel, but the Court of Appeals rejected this very argument in *Tri-State Employment Services.* "PEOs' claimant status should not rest on whether they are categorized as employers or joint employers. . . . . We decline to adopt a legal employer' or joint-employer' standard in determining whether a PEO is a proper bond claimant." *Tri-State Employment Serv.,* 99 NY2d at 484, 486. Under the New York professional employer act, a PEO is, by definition, a co-employer.[2] Thus, if the Court were to adopt respondent's co-employer argument, then all PEOs would presumptively be considered as providing labor.

CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition to discharge a mechanic's lien is granted, the mechanic's lien filed by respondent Assured Source National, LLC, on April 30, 2008 in the amount of $316,561.13 against the property known as 25-33 Cooper Square, New York, New York, Block 461, Lots 1-6 is discharged, and the Clerk is directed to make the appropriate entries for cancellation of the lien.

168 A.D.3d 664 (2019)
91 N.Y.S.3d 506
2019 NY Slip Op 00089
C.C.C. Renovations, Inc., Respondent,
v.
Victoria Towers Development Corp. et al., Appellants, et al., Defendants.
2016-04718. Index No. 700169/13.
Appellate Division of the Supreme Court of New York, Second Department.
Decided January 9, 2019.

In an action to foreclose mechanic's liens, the defendants Victoria Towers Development Corp. and Westchester Fire Insurance Company appeal from an order and judgment (one paper) of the Supreme Court, Queens County (Marguerite A. Grays, J.), entered April 1, 2016. The order and judgment, insofar as appealed from, granted that branch of the plaintiff's motion which was for summary judgment on the fifth, sixth, and seventh causes of action in the amended supplemental complaint and directed the defendant Westchester Fire Insurance Company to pay the plaintiff the full amount due under Bonds Discharging Mechanic's Liens numbers K0864570A and K08645711, as amended.

Mastro, J.P., Rivera, Duffy and Brathwaite Nelson, JJ., concur.

Ordered that the order and judgment is affirmed insofar as appealed from, with costs.

The defendant Victoria Towers Development Corp. (hereinafter *665 Victoria Towers) is the owner, along with the defendant Wu Towers, LLC (hereinafter Wu Towers), of a building located in Queens (hereinafter the property). Victoria Towers contracted with the defendant Blue Diamond Group, LLC (hereinafter Blue Diamond), to act as general contractor to make repairs to the property necessitated by damage sustained in September 2010. The plaintiff entered into four separate subcontract agreements with Blue Diamond to perform roofing, pipe scaffolding, electrical scaffolding, and sidewalk scaffolding work at the property. After the work was performed, some or all of the amounts owed under the four subcontracts went unpaid. On or about November 7, 2011, the plaintiff filed two mechanic's liens against the property, naming Victoria Towers as the owner, and seeking $59,500 for unpaid roofing work and $698,185 for unpaid sidewalk bridging, pipe, and electric scaffolding work. On or about January 18, 2012, Blue Diamond also filed a mechanic's lien against the property, naming both Victoria Towers and Wu Towers as owners, and seeking $5,325,557 for unpaid services, labor, and materials provided at the property. The plaintiff then filed a third mechanic's lien, on or about January 23, 2012, naming both Victoria Towers and Wu Towers as owners. In August 2012, Victoria Towers secured bonds from the defendant Westchester Fire Insurance Company (hereinafter Westchester Fire), as surety, to discharge the plaintiff's roofing mechanic's lien and the plaintiff's piping, electrical, and sidewalk scaffolding mechanic's liens.

Following the commencement of this action, the plaintiff moved, inter alia, for summary judgment on the fifth, sixth, and seventh causes of action in the amended supplemental complaint, which sought foreclosure of the mechanic's liens filed against the property, and a directive that Westchester Fire pay the full amount due under the bonds to the plaintiff. The Supreme Court granted those branches of the motion, determined that the plaintiff had met its prima facie burden of proving its entitlement to recover on the filed discharge bonds, and found that the defendants' submissions in opposition to the motion failed to raise a triable issue of fact as to whether, inter alia, an adequate lien fund existed at the time the plaintiff's liens were filed. An order and judgment was subsequently issued, which foreclosed the mechanic's liens and directed Westchester Fire to pay the plaintiff the full amount due under the bonds. Victoria Towers and Westchester Fire appeal. We affirm the order and judgment insofar as appealed from.

Lien Law § 3 provides that a contractor who performs labor *666 or furnishes materials for the improvement of real property with the consent, or at the request of, the owner "shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien." "The lienor must establish the amount of the outstanding debt by submitting proof of either the price of its contract or the value of the labor and materials supplied" (*DHE Homes, Ltd. v Jamnik,* 121 AD3d 744, 745 [2014]; *see Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.,* 112 AD3d 171, 175 [2013]). The amount of the lien is limited by the contract under which it is claimed, and ordinarily a lienor is bound by the price term contained in the contract to which it is a party (*see Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.,* 112 AD3d at 175).

The lienor's right to recover is further limited by principles of subrogation (*see id.* at 176; 8-92 Warren's Weed, New York Real Property § 92.11 [1], [4]). Thus, no individual mechanic's lien can exceed the total amount owed by the owner to the general contractor at the time of the filing of the notice of lien (*see* Lien Law § 4 [1]; *Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.,* 112 AD3d at 176). The subcontractor's right to recover is derivative of the right of the general contractor to recover, and if the general contractor is not owed any amount under its contract with the owner at the time the subcontractor's notice of lien is filed, then the subcontractor may not recover (*see Timothy Coffey Nursery/Landscape v Gatz,* 304 AD2d 652, 653-654 [2003]).

Here, the plaintiff established its prima facie entitlement to judgment as a matter of law on its causes of action to foreclose the mechanic's liens it filed through evidence establishing, inter alia, the amounts owed for the services it provided at the property under the relevant subcontracts, and that those amounts did not exceed the amount owed by the owners to the general contractor, Blue Diamond. In opposition, Victoria Towers and Westchester Fire failed to raise a triable issue of fact.

The remaining contention of Victoria Towers and Westchester Fire is without merit (*see Matter of Union Indem. Ins. Co. of N.Y.,* 89 NY2d 94, 103-104 [1996]).