

**Bonland Indus., Inc. v KSW Mech. Servs., Inc.**

2015 NY Slip Op 32210(U)

November 16, 2015

Supreme Court, New York County

Docket Number: 653982/2013

Judge: Lawrence K. Marks

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

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BONLAND INDUSTRIES, INC., :

Plaintiff, :

-against-

Index No. 653982/2013

KSW MECHANICAL SERVICES, INC., :  
MOUNT SINAI SCHOOL OF MEDICINE OF :  
NEW YORK UNIVERSITY, FIDELITY AND :  
DEPOSIT COMPANY OF MARYLAND, :  
and JOHN DOES "1" through "10", :  
those persons being unknown and :  
having a claim against the project :  
known as "Mount Sinai Center for :  
Science and Medicine", :

Defendants. :

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LAWRENCE K. MARKS, J.

Motions sequence numbers 006 and 007 are consolidated for disposition.

This is an action for breach of contract, quantum meruit and unjust enrichment by plaintiff Bonland Industries, Inc. ("Bonland") arising from plaintiff's installation of air conditioning units at a building construction project.

In motion sequence number 006, defendant KSW Mechanical Services, Inc. ("KSW") moves, pursuant to CPLR 3212, for an order granting partial summary judgment dismissing six of plaintiff's claims for breach of contract as well as its causes of action for quantum meruit and unjust enrichment. In the alternative, KSW moves for an

order prohibiting Bonland from offering evidence at trial that it was damaged by actions of third parties over whom KSW had no control.

In motion sequence number 007, Bonland moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing KSW's ninth affirmative defense and its first and second counterclaims. KSW cross-moves, pursuant to CPLR 3212, for an order granting partial summary judgment on its second counterclaim.

For the reasons stated below, defendant's motion for partial summary judgment (006) is granted. Plaintiff's motion for summary judgment (007) is granted to the extent that defendant's claim for punitive damages is dismissed and the motion is otherwise denied. Finally, defendant's cross-motion for summary judgment (007) is denied.

## BACKGROUND

This action arises from a construction project known as the Mount Sinai Center for Science and Medicine (the "Project"), which was owned by defendant Mount Sinai School of Medicine of New York University. KSW was hired to be the Mechanical Trade Manager pursuant to an agreement (the "Trade Management Agreement") dated May 20, 2010, between KSW and the construction manager, Bovis Lend Lease LMB, Inc.

KSW states that it is one of the largest heating, ventilation and air conditioning contractors in the New York City area. According to KSW, it was hired to manage the work of the various mechanical trade contractors, on a cost plus fee basis. KSW hired

Bonland as a sheet metal subcontractor for a portion of the Project.

Among other things, Bonland's subcontract ("Subcontract") required it to assemble large air handling units ("AHUs"), which were supplied by Johnson Controls, Inc. ("Johnson"). The AHUs were supposed to be delivered in pre-assembled sections. However, Johnson shipped some sections of the AHUs in pieces, which, it is undisputed, increased the amount of Bonland's labor in order to assemble them.<sup>1</sup>

In addition to the delays arising from the AHUs, Bonland alleges that numerous other events occurred that caused delays and additional costs in performing its obligations under the Subcontract. Specifically, it alleges:

KSW failed to provide proper access for moving material and tools into the work area, as well as performing contract work on the 6th Floor Tower Mechanical Room, the Duct Risers, the Generator Room and the 7th Floor Tower; KSW improperly scheduled Bonland's work, due to the piecemeal issuances of multiple construction permits, among other things; KSW improperly dictated the manner in which Bonland released its sheet metal for installation; KSW failed to provide adequate access to either of the two hoists on the project [and] KSW directed Bonland to perform work out of sequence.

Compl, ¶ 13.

During the course of the Project, Bonland submitted several requests to KSW for change orders ("Change Orders"), one-page agreements between KSW and Bonland that provided Bonland with additional time and/or compensation for additional work it had to

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<sup>1</sup> KSW's third-party claims against Johnson have been settled.

perform due to events that were outside of Bonland's control or beyond the original contractual scope of its work. Among these were requests for Change Orders due to the improperly delivered AHUs.

It is undisputed that KSW issued a series of Change Orders to Bonland, including Change Orders 3 and 13, which were issued to reimburse Bonland for the difference between the actual costs it incurred to assemble the AHU's and the amount of labor it should have estimated to do this work. Each of the Change Orders set forth an additional amount of compensation and specifically stated:

The amount of this change order is based on your proposal for providing the additional cost for putting together the York air handling units as opposed to your estimate of costs associated with assembling sections. You may be required to document the actual costs incurred and the validity of your original estimate in support of this change order. Your failure to do so may result in a credit change order for any unsupported dollar difference.

Dorfman 5/21/15 Aff, Exh G (the Change Orders). Each Change Order further stated: "The amount of this change order represents full compensation for all costs, including delays and impacts resulting therefrom." *Id.* It is further undisputed that Bonland received an advance of \$200,000 in connection with Change Order 13.

Change Order 18 is dated June 18, 2012 and is, apparently, the last Change Order that was issued. Thereafter, Bonland sent letters to KSW dated August 24, 2012 and September 21, 2012, each of which set forth delays that had occurred on the Project. The September 21, 2012 letter specifically addressed delays resulting from the improperly

delivered AHUs. That letter also requested a Change Order in the amount of \$1,285,392. However, no Change Order was issued.

Bonland commenced this action in November 2013, asserting causes of action for, among other things, breach of contract, quantum meruit and unjust enrichment.<sup>2</sup>

Paragraph 15 of the complaint lists six specific claims, referred to by the parties as claim items ("Claim Items"), for which Bonland seeks a total of \$2,700,398.09 in damages.

The largest is Claim Item number 3, in which plaintiff seeks \$1,285,392 for additional work performed as the result of the improperly delivered AHUs.

The gravamen of the complaint is that numerous delays and inefficiencies occurred during the Project which impacted Bonland by causing it to perform significant amounts of extra work to complete certain tasks, and which cost Bonland money in terms of lost productivity. Bonland contends that the delays and inefficiencies at issue resulted from, among other things, KSW's failure to properly coordinate the various subcontractors on the Project, as it was required to do under the Trade Management Agreement. The largest delay resulted from the delivery of the unassembled AHUs.

In its answer, KSW asserts two counterclaims. The first counterclaim seeks a refund of the \$200,000 paid under Change Order 13, claiming Bonland's alleged failure

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<sup>2</sup> The complaint also sets forth causes of action for account stated, mechanic's lien foreclosure, discharge of mechanic's lien bond and a cause of action under General Business Law § 756. These causes of action are not addressed by the parties on either of the motions or the cross-motion and are not at issue in this decision.

to document both the actual costs it incurred in assembling the AHUs and the validity of its original estimate, as required by the terms of Change Order 13. The second counterclaim is for fraud. KSW alleges that Bonland submitted fraudulent payrolls that resulted in apprentice workers being paid at the higher rate applicable to journeymen workers.

## DISCUSSION

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). To defeat the motion, the party opposing it must then demonstrate the existence of a specific factual issue. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

### Motion Sequence 006

In motion sequence 006, KSW moves for partial summary judgment dismissing the six Claim Items set forth in paragraph 15 of the complaint, as well as the causes of action for quantum meruit and unjust enrichment.

#### Claim Items 1, 3, 5 and 6

The damages sought in Claim Items 1, 3, 5 and 6 arise from delays and

inefficiencies on the Project, which caused Bonland to perform extra work and also resulted in lost productivity on Bonland's part. Specifically, these Claim Items relate to work performed by Bonland on the 6<sup>th</sup>, 7<sup>th</sup> and 11<sup>th</sup> floors of the Project, as well as the installation of a generator. Compl, ¶ 15. The largest Claim Item is number 3, which seeks \$1,285,392 for extra work as well as damages for lost productivity resulting from the improperly delivered AHUs. *Id.*

In connection with each Claim Item, Bonland sent a letter to KSW describing how delays and inefficiencies on the part of either KSW or other subcontractors impacted Bonland by either causing Bonland to perform extra work or delaying Bonland in performing its work, resulting in lost productivity. It is undisputed that each of these Claim Items seeks additional compensation in connection with work already being done by Bonland pursuant to a corresponding Change Order.

KSW now seeks dismissal of each Claim Item on the grounds that Bonland either failed to give proper notice of the claim, or that the Claim Item is barred by certain clauses in the Subcontract and the Change Orders, which limit Bonland's ability to seek additional compensation.<sup>3</sup>

#### Notice

Initially, KSW argues that Bonland failed to give timely notice with respect to

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<sup>3</sup> The parties refer to these clauses either as "no damages for delay" clauses, *see, e.g.*, Def Mov Br at 11, or exculpatory clauses. *See, e.g.*, Pl Opp Br at 8.



Claim Item number 3, as required by the Subcontract between the parties. Specifically, KSW asserts that Bonland did not give notice of this claim until August, 2012, which, it argues, would be untimely under the terms of the Subcontract. However, Bonland avers that it gave notice in a letter dated June 9, 2011, and KSW does not dispute or address this assertion in its reply. Therefore, the Court finds that summary judgment on this ground has not been established.

No Damages for Delay Clause - in Subcontract

KSW also argues that items 1, 3, 5 and 6 are precluded by clauses in the Trade Management Agreement between KSW and the Construction Manager, which were incorporated by reference into the Subcontract between KSW and Bonland. Specifically, KSW relies on paragraphs 19.6, 19.8 and 19.9 of the Trade Management Agreement, which prohibited KSW from seeking damages from the Construction Manager for extra labor or costs arising from delays, including delays resulting from improper scheduling and coordination of work. Dorfman Aff, Exh I. These sections restricted KSW to seeking an extension of time under such circumstances, rather than money damages.

KSW asserts that, pursuant to paragraph 3(b) of the Subcontract, the Trade Management Agreement was incorporated into the Subcontract. Warkol 4/14/15 Aff, Exh C. KSW argues that these sections prohibit Bonland from seeking damages for extra labor or costs arising from delays, and restrict Bonland to seeking an extension of time.

KSW's argument is unpersuasive. Bonland does not dispute that the no damages

for delay clause in the Trade Management Agreement was incorporated into the Subcontract. However, it is also undisputed here that Claim Items 1, 3, 5 and 6 seek damages for the impact on Bonland's work and productivity as the result of delays and inefficiencies that arose in connection with work being done pursuant to Change Orders, which were issued by KSW to Bonland, and which modified the parties' Subcontract with respect to the work covered by the Change Orders.

The Change Orders not only provided Bonland with additional compensation and time beyond that set forth in the Subcontract, they contain specific language governing Bonland's rights to seek compensation under them. Moreover, the Change Orders were indisputably issued as the result of delays, most notably, the delays resulting from the improperly delivered AHUs. Therefore, the parties clearly agreed that Bonland would be entitled to additional compensation for work performed as the result of delays in the Project. As such, KSW cannot now argue that the restrictive clauses in the Trade Management Agreement prevent Bonland from seeking compensation for extra work performed as the result of certain delays, when such work was provided for in Change Orders executed by the parties themselves.

No Damages for Delay Clause - in Change Orders

KSW argues that, in any event, Claim Items 1, 3, 5 and 6 should be dismissed. KSW argues that each one arises in connection with work done pursuant to a Change Order, and the Change Orders preclude Bonland from seeking additional compensation,

including compensation related to delays on the Project.

The Change Orders, which were signed by KSW and Bonland, stated that the “amount of this change order represents full compensation for all costs, including delays and impacts resulting therefrom.” Dorfman Aff, Exh G. KSW argues that this language precludes Bonland from seeking further compensation beyond that set forth in the Change Orders.

Bonland does not dispute that Claim Items 1, 3, 5 and 6 arose in connection with work being performed pursuant to the various Change Orders. In fact, it makes such an assertion itself. Pl Opp Br, at 8, 13 and 14. Bonland also does not dispute that it signed the Change Orders or that they contained language limiting its compensation. Instead, Bonland argues that the parties did not intend its compensation to be limited. Bonland asserts that the issuance of multiple Change Orders demonstrates that the parties understood, on an ongoing basis, that extra work might be required of Bonland, as the result of delays or for other reasons, for which Bonland would be entitled to compensation.

As discussed below, the Court finds that, based on the restrictive language contained in the Change Orders, KSW has made a prima facie demonstration that Bonland is precluded from seeking the additional compensation set forth in Claim Items 1, 3, 5 and 6. The Court also finds that Bonland has failed to demonstrate that issues of fact exist that would preclude summary judgment. Although Bonland describes KSW’s

argument as “absurd” (Pl Opp Br, at 14), that is all it does. Bonland puts forth no documentary evidence, case law or affidavit from a person with knowledge, to demonstrate that it is not bound by the restrictive language in the Change Orders.

It is well-settled that while “clauses in construction contracts which exculpate parties from damages resulting from delays in performance are generally valid and enforceable, such clauses may not be invoked to bar damages for: (1) delays caused by the protected party’s bad faith or its willful, malicious or grossly negligent conduct; (2) unanticipated delays; (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee; and (4) delays resulting from the contractee’s breach of a fundamental obligation of the contract.” *Abax Inc. v. New York City Housing Auth.*, 282 A.D.2d 372 (1st Dep’t 2001) (citing *Corinno Civetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297, 309–12 (1986)).

“Plaintiffs seeking to invoke one of the exceptions to the enforceability of a ‘no damages for delay’ clause face a ‘heavy burden.’” *LoDuca Assoc., Inc. v. PMS Const. Mgt. Corp.*, 91 A.D.3d 485, 485 (1st Dep’t 2012) (quoting *Dart Mech. Corp. v. City of New York*, 68 A.D.3d 664, 664 (1st Dep’t 2009)). *See also North Star Contr. Corp. v. City of New York*, 203 A.D.2d 214, 215 (1st Dep’t 1994). Moreover, allegations that amount to “nothing more than inept administration or poor planning” are insufficient to avoid compliance with such a clause. *Commercial Elec. Contr., Inc. v. Pavarini Const. Co., Inc.*, 50 A.D.3d 316, 317 (1st Dep’t 2008). *See also Bat-Jac Contr., Inc. v. New*

*York City Hous. Auth.*, 1 A.D.3d 128 (1st Dep't 2003); *Tougher Indus., Inc. v. Dormitory Auth. of the State of NY*, 130 A.D.3d 1393, 1395 (3d Dep't 2015).

Here, Bonland has not set forth any facts to raise a triable issue of fact as to whether the no damages for delay clauses in the Change Orders are enforceable.

Bonland has not identified any conduct on KSW's part that would demonstrate that any of the delays at issue were caused by KSW's bad faith or by its willful, malicious or grossly negligent conduct.<sup>4</sup> Nor has it demonstrated that the alleged delays were so unreasonable that they constituted an intentional abandonment of the contract by KSW or that the delays resulted from KSW's breach of a fundamental obligation of the contract. Indeed, the issuance of multiple Change Orders in response to Bonland's complaints might demonstrate that KSW was attempting to fulfill its obligations under the Subcontract in good faith.

Further, to the extent that Bonland asserts that KSW failed to properly schedule the work on the Project and failed to properly coordinate the other subcontractors, those allegations do not amount to any more than allegations of "inept administration or poor planning" and are insufficient to warrant a denial of summary judgment here.

*Commercial Elec. Contr., Inc.*, 50 A.D.3d at 317.

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<sup>4</sup> Gross negligence is conduct "that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Serv., Ltd.*, 81 N.Y.2d 821, 823-24 (1993) (internal citations omitted); *Ambac Assur. UK Ltd. v. J.P. Morgan Inv. Mgt, Inc.*, 88 A.D.3d 1, 8 (1st Dep't 2011).

Bonland further argues that it is not bound by the restrictive language of the Change Orders because the delays that gave rise to the Claim Items were not contemplated by the parties. It argues that the issuance of the Change Orders demonstrates that delays occurred that the parties had not contemplated. This argument is unpersuasive. It is undisputed that certain delays occurred that the parties did not contemplate. The most notable is the delivery of the unassembled AHUs. However, the parties responded to those unexpected delays by agreeing to the Change Orders, which compensated Bonland for its extra work, most notably Change Orders 3 and 13, which provided Bonland with more than \$400,000 for its extra work due to the unassembled AHUs. Dorfman Aff, Exh G.

However, although the parties specifically contemplated that further delays might occur, they agreed, in the Change Orders which Bonland signed, that Bonland would not be entitled to further compensation from the delays. *Id.* Bonland has not demonstrated that it should not be bound by the Change Orders it signed based on the existence of unanticipated delays.

The Court also finds that Bonland has not demonstrated that the issuance of each successive Change Order constituted a waiver by KSW with respect to previous Change Orders. It is well-established that parties to a contract may alter or waive portions of an agreement through their course of conduct. *Echevarria v. 158th St. Riverside Dr. Hous. Co., Inc.*, 113 A.D.3d 500, 501 (1st Dep't 2014). Here, the issuance of multiple Change

Orders demonstrates that the parties were attempting to address certain unexpected delays by providing Bonland with additional compensation. However, each Change Order continued to set forth the restrictive language with respect to compensation for future delays, and nothing in any given Change Order demonstrates that it was intended to constitute a modification or waiver of any previous Change Order.

Therefore, that portion of the motion that seeks summary judgment dismissal of Claim Items 1, 3, 5 and 6 is granted.

#### Claim Item 2

Claim Item 2 arises in connection with impacts to Bonland's riser installation, as set forth in a letter dated October 24, 2012. The letter states, *inter alia*, that Bonland had to wait while other trades completed their work and for other trades to cut the decks through which the risers would be installed, and that there was limited delivery time and limited space for Bonland to store ductwork. Bonland also alleges that the Construction Manager only cut one or two holes at a time, which prevented Bonland from finishing one floor at a time and caused it to remobilize from floor to floor. It also claims that the holes were not always cut when promised, causing the reassignment of employees to different work areas.

KSW argues that this claim should be dismissed for several reasons. As set forth above, under both the Subcontract and the Trade Management Agreement, Bonland was prohibited from seeking damages for extra labor or costs arising from delays and was

restricted to seeking an extension of time. Additionally, KSW argues that the Subcontract between itself and Bonland specifically contemplated out-of-sequence work. Further, KSW asserts that Claim Item 2 ignores the Fall Protection Safety provision in the Subcontract, which provides:

All openings are to be left decked over. All penetrations in the deck shall not be cut until just prior to the work that is intended to pass through is installed. In this fashion no unprotected openings shall exist in a deck prior to the installation of work that passes through these openings. For purposes of planning the construction of these openings, deck layout shop drawings are to be provided to the Contractor and the Concrete Subcontractor for coordination. Cutting of deck for these openings is by others.

Warkol 4/14/15 Aff, Exh C. Based on this provision, KSW argues that Bonland had no right to expect that the Construction Manager would cut holes simultaneously in all 11 floors of the shaft where Bonland was working, because Bonland knew that leaving all 11 floors in the shaft open would be a Fall Safety Hazard. KSW has demonstrated that many of the delays alleged in Claim Item 2 were contemplated by the parties and that, in any event, Bonland was precluded from seeking further compensation for delays. Based on the foregoing, the Court finds that KSW has made a prima facie demonstration that it is entitled to summary judgment.

As such, the burden shifts to Bonland to demonstrate that material questions of fact exist, warranting a denial of summary judgment. However, Bonland fails to



specifically address KSW's arguments with respect to Claim Item 2. Bonland argues generally that KSW waived the no damage for delay provisions of the Subcontract and Trade Management Agreement when it issued the various Change Orders. Bonland does not, however, identify any specific Change Order covering the work and damages set forth in Claim Item 2, in either its brief or via an affidavit from anyone with personal knowledge to dispute KSW's assertions. Therefore, Bonland has failed to put forth any specific and material issues of fact that exist in connection with Claim Item 2. As such, that portion of the motion for summary judgment that seeks dismissal of this claim is granted.

#### Claim Item 4

Bonland's fourth Claim Item is for an American Express charge deducted from payments made to contractors on the Project. In Claim Item 4, Bonland seeks to be compensated in the amount of \$20,422 for this charge, which was deducted from payments for work done pursuant to the various Change Orders.

According to KSW, trade payments for the Project were made through Mount Sinai's American Express account in order to expedite the payment of monthly requisitions, and such payments included a 1.65% processing fee. KSW asserts that Bonland has already been reimbursed for American Express charges on Change Order work. Specifically, KSW avers that, during the course of the Project, Bonland added 4% to its proposals for extra work, sometimes attributing this markup to "Bond & Amex" and

sometimes only to “Bond.” KSW argues that, since Bonland’s Bond cost was approximately 1% of its contract amount, the 4% markup in Bonland’s Change Order proposals also included the American Express charge for which Bonland now seeks compensation. KSW has made a prima facie demonstration that it is entitled to summary judgment dismissing this claim.

Bonland, to which the burden shifts, fails to forth any facts in opposition to this portion of KSW’s motion. As such, Bonland has not demonstrated the existence of material issues of fact that preclude summary judgment. Therefore, that portion of the motion that seeks summary judgment dismissal of Claim Item 4 is granted.

#### Quantum Meruit/Unjust Enrichment

Bonland’s second and third causes of action are for quantum meruit and unjust enrichment respectively. KSW moves for summary judgment dismissing both causes of action as duplicative of plaintiff’s cause of action for breach of contract.

In general, “the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter.” *Curtis Prop. Corp. v. Greif Co.*, 236 A.D.2d 237, 239 (1st Dep’t 1997). *See also Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987).

Here, it is undisputed that the second and third causes of action seek to recover damages for work performed pursuant to the subcontract between KSW and Bonland. In fact, the complaint specifically states that the damages sought derive from work

performed pursuant to that agreement. Moreover, the damages sought are the same as those set forth in the claim for breach of contract. Since the work at issue is governed by an express contract, the claims for quantum meruit and unjust enrichment cannot be sustained. Accordingly, that portion of the motion that seeks summary judgment dismissal of these claims is granted.

#### Motion Sequence 007

In motion sequence 007, Bonland moves for summary judgment dismissing KSW's ninth affirmative defense and KSW's first and second counterclaims. KSW cross-moves for partial summary judgment on its second counterclaim.

#### Ninth Affirmative Defense/First Counterclaim

KSW's ninth affirmative defense and its first counterclaim are the same. KSW asserts that, among the sums sued, for by Bonland in this action, Bonland contends that it is owed \$247,243 pursuant to Change Order 13, which covered the additional work and costs associated with assembling the air conditioning units. Am Ans, ¶ 32. KSW asserts, in its ninth affirmative defense and its first counterclaim, that despite its repeated requests, Bonland refused to document both the actual costs it allegedly incurred in assembling the units and the validity of its original estimate, as required by the terms of Change Order 13. As such, KSW claims that Bonland is obligated to refund \$200,000 to KSW, which represents the sum that has already been paid to Bonland under Change

Order 13. It is undisputed that KSW advanced \$200,000 to Bonland based on Bonland's estimate of the costs associated with assembling the air conditioning units pursuant to Change Order 13. It is also undisputed that, under Change Order 13, Bonland could be required to document the actual costs incurred and the validity of its original estimate and that a failure to do so could result in a credit change order for any unsupported differences.

Bonland, in support of its motion, asserts that in deposition testimony, representatives of KSW admitted that it owes somewhere between \$400,000 and \$447,243, and this includes the \$200,000 already paid for the work done pursuant to Change Order 13. Bonland therefore contends that there are no issues of fact as to whether it provided the required documentation, and that there are no questions as to whether KSW owes Bonland the \$200,000 that KSW seeks to recoup. In opposition, KSW disputes Bonland's interpretation of the deposition testimony and denies admitting that it owed the money to Bonland. KSW states that any admission was only as to the amount of Bonland's estimate, and was not an admission as to the validity of that estimate.

The summary judgment standard has not been met on this issue. Bonland has not submitted sufficient proof that it documented both the actual costs it incurred in assembling the units and the validity of its original estimate, as required by the language in Change Order 13. Moreover, the parties sharply dispute whether KSW conceded in its

testimony that it owed Bonland the \$200,000 that it initially paid under Change Order 13. As such, that portion of the motion for that seeks summary judgment dismissal of KSW's ninth affirmative defense and first counterclaim is denied.

### Second Counterclaim

KSW's second counterclaim is for fraud. As set forth above, pursuant to the various Change Orders, KSW agreed to pay Bonland extra money to perform work outside the original scope of the Agreement. KSW states that certain of the Change Orders required Bonland to submit written tickets documenting workers' names, hours worked, union status and payments received. KSW further states that Bonland submitted written proposals to KSW in support of the Change Orders which listed the workers' names, union status and hours worked. According to KSW, each of the tickets and proposals submitted by Bonland listed all the workers performing the extra work as journeymen. However, KSW now alleges that payrolls produced by Bonland show that a number of the workers were apprentices rather than journeymen. KSW states that journeymen receive higher wages than apprentices and greater benefits. KSW asserts that it reasonably relied on Bonland's tickets and proposals when paying for the extra work under the Change Orders, and that Bonland knew that the tickets and proposals it submitted fraudulently represented the apprentices' union status, and the amounts they would be paid. KSW claims that it has been damaged in the amount of \$59,565.40 as a result of the alleged fraud. Am Ans, ¶ 47. KSW also contends that Bonland's conduct

was of such a willful and egregious nature that KSW is entitled to punitive damages.

In opposition, Bonland asserts that there was, in fact, no classification or separate category for apprentices on the construction project. As such, Bonland asserts that it is entitled to summary judgment dismissing the second counterclaim.

It is undisputed that KSW's second counterclaim arises from the parties' contractual relationship. In order to recover punitive damages, KSW must demonstrate, *inter alia*, conduct aimed at the public. *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 315-16 (1995); *2470 Cadillac Resources, Inc. v. DHL Express (USA), Inc.*, 84 A.D.3d 697, 699 (1st Dep't 2011). No such allegations exist here. Nor has KSW demonstrated any morally culpable or reprehensible conduct on the part of any of the defendants to support a claim for punitive damages. *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d at 315-316; *CDR Creances S.A.S. v. Cohen*, 62 A.D.3d 576, 577 (1st Dep't 2009). Therefore, that portion of Bonland's motion that seeks summary judgment is granted to the extent that the claim for punitive damages is dismissed.

The remainder of Bonland's motion, seeking summary judgment dismissing KSW's second counterclaim, as well as KSW's cross-motion for summary judgment as to this counterclaim, are denied. The parties sharply dispute whether Bonland improperly billed KSW for work done by apprentices under the rate applicable to journeymen. Neither side has demonstrated an entitlement to summary judgment, given the questions of fact that remain as to this issue.

The Court has considered the parties other contentions and finds them unavailing.

Accordingly, it is

ORDERED that the motion for partial summary judgment by defendant KSW Mechanical Services, Inc. (sequence 006) is granted in full and the six claims set forth in paragraph 15 of the complaint are dismissed and the second and third causes of action in the complaint are dismissed; and it is further

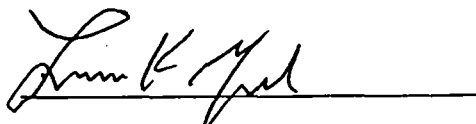
ORDERED that the motion for summary judgment by plaintiff Bonland Industries, Inc. (sequence 007) is granted to the extent that the portion of defendant's second counterclaim that seeks punitive damages is dismissed and the remainder of the motion is denied; and it is further

ORDERED that the cross-motion for summary judgment (sequence 007) by defendant KSW Mechanical Services, Inc. is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: November 16, 2015

ENTER:



J.S.C.

HON. LAWRENCE K. MARKS