American Indus. Corp. of N.Y. v Pioneer Window Mfg. Corp.
2017 NY Slip Op 33254(U)
May 8, 2017
Supreme Court, Nassau County
Docket Number: 610100-16
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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AMERICAN INDUSTRIES CORP. OF NEW YORK,

Plaintiff,

-against-

PIONEER WINDOW MFG. CORP.,

Defendant.

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TRIAL/IAS PART: 12
NASSAU COUNTY

Index No: 610100-16
Motion Seq. No. 1
Submission Date: 3/22/17

Papers Read on this Motion:

Notice of Motion, Affidavit in Support and Exhibits..................................x
Memorandum of Law in Support..x
Affidavit in Opposition and Exhibits...x
Memorandum of Law in Opposition..x
Reply Affidavits and Exhibits...x
Reply Memorandum of Law..x
Correspondence dated March 23, 2017...x [1]

This matter is before the court on the motion filed by Plaintiff American Industries Corp. ("AIC" or "Plaintiff") on March 2, 2017 and submitted on March 22, 2017. For the reasons set forth below, the Court denies the motion but directs that Defendant will only be permitted to pursue its Counterclaims as they relate to work, if any, performed by Defendant after February 6, 2014, the date of the release at issue.

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[1] By letter to the Court dated March 23, 2017, Defendant objected to the Court's consideration of Plaintiff's reply papers on the grounds that they were untimely, and further requested that, if the Court decided to consider Plaintiff's reply, the Court consider Defendant's letter as a sur-reply. By responsive letter to the Court dated March 23, 2017, Plaintiff asserted that its one-day delay in serving its reply papers did not prejudice Defendant, and objected to the Court's consideration of Defendant's sur-reply. The Court issued a directive on March 27, 2017 stating that it would consider the reply papers as well as the March 23, 2017 letters, but that no further submissions would be permitted.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order dismissing the four counterclaims asserted by Defendant Pioneer Window Mfg. Corp. ("Pioneer" or "Defendant").

Defendant opposes the motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. 1 to Plutzer Aff. in Supp.) alleges as follows:

AIC is a company that is engaged in the business of furnishing and installing windows and related products with respect to the improvement of commercial and residential premises. Pioneer is a company that is engaged in the business of manufacturing, fabricating, supplying, furnishing and selling custom architectural windows, curtain walls, window walls and related accessories with respect to the improvement of commercial and residential premises. Pioneer held itself out as having extensive knowledge and expertise regarding the manufacturing of window wall systems in commercial and residential premises.

29 Flatbush Associates, LLC ("Owner") is the owner of premises ("Premises") located at 29 Flatbush Avenue, Brooklyn, New York, on which the Owner sought to construct a forty two (42) story building consisting of residential units, retail space, a parking garage and amenity spaces, known as "29 Flatbush" and now known as "66 Rockwell Place" ("Project"). On or about December 20, 2010, Lend Lease (US) Construction f/k/a Bovis Lend Lease LMB, Inc. ("Lend Lease") entered into an agreement with the Owner pursuant to which Lend Lease agreed to provide construction management services as the agent for the Owner for the Project.

In or about July 2010, AIC received a bid package from Lend Lease, for whom AIC had previously performed work, with respect to furnishing and installing the exterior facade, a window wall system, for the Project. The documents in the bid package ("Bid Package") included the proposed contract to be entered into by Lend Lease with the contractor who had the successful bid, drawings and specifications. AIC contacted Pioneer about furnishing the materials for the exterior facade for the Project, with the intention that AIC would install the materials for the exterior facade, a window wall system, for the Project ("Project System").

Pioneer advised AIC that Pioneer would not only furnish the materials for the Project System, but was also willing to enter into a subcontract with a third party, other than AIC, to install the materials for the Project System and, in exchange for AIC bringing the business opportunity to Pioneer to furnish and install the Project System, Pioneer would compensate AIC as follows: after paying costs for labor and materials, Pioneer would divide the profit equally with AIC. AIC thereafter provided the bid package to Pioneer.

In or about April 2011, AIC, accompanied by Pioneer, went to a "close the job" meeting with Lend Lease (Comp. at ¶ 12) ("Meeting") to discuss the construction of the Project System. At the Meeting, Lend Lease agreed to award the contract for the furnishing and installing of the Project System to AIC for the sum of $7,750,000.00, with Pioneer having advised AIC that the cost for materials and labor would be $6,644,083.00. At the Meeting, Lend Lease also stated that the construction schedule was being delayed for ten (10) months due to issues relating to the foundation, and asked whether the Project System could be changed ("Initial Change") from a window wall system to a fusion wall system, with the price to be not more than the price for a window wall system. After confirming with Pioneer that the Initial Change was acceptable and could be implemented without a change in the cost of materials and labor, AIC agreed to the Initial Change.

On or about April 29, 2011, Lend Lease and AIC, with the knowledge and consent of Pioneer, entered into an agreement ("AIC/Lend Lease Agreement") pursuant to which AIC agreed to perform the work and furnish the materials for the fusion wall Project System for the agreed price of $7,750,000.00, as discussed as the Meeting. Shortly thereafter, Pioneer advised AIC that the third party with whom Pioneer intended to subcontract was unable to obtain the requisite bonding and, therefore, Pioneer did not have a third party to install the System. Pioneer and AIC then discussed entering into a joint venture pursuant to which Pioneer would manufacture the materials for the Project System and AIC would install the materials provided by Pioneer for the Project System. In or about May 2011, Pioneer and AIC entered into an oral joint venture agreement ("Joint Venture Agreement") pursuant to which AIC and Pioneer agreed that: 1) Pioneer would manufacture the materials for the Project System in accordance with the terms of the AIC/Lend Lease Agreement, including but not limited to the schedule and costs for the fabrication of the materials as set forth in the AIC/Lend Lease Agreement, specifically

$4,922,365.00; 2) AIC would install the materials provided by Pioneer for the Project System in accordance with the terms of the AIC/Lend Lease Agreement, including but not limited to the schedule and costs for the installation of the materials as set forth in the AIC/Lend Lease Agreement, specifically $1,721,718.00; 3) each party would contribute its expertise to the Joint Venture, with Pioneer bringing its expertise in manufacturing and fabricating wall systems to the Joint Venture and AIC bringing its expertise in installing wall systems to the Joint Venture; and 4) after payment of costs for materials and installation, anticipated profits of approximately $1.1 million would be divided equally between AIC and Pioneer, provided that any losses would also be equally divided between the parties.

On or about January 25, 2011, Pioneer provided proposed drawings for the Project System ("Proposed System Drawings") to AIC which, with Pioneer's knowledge, sent the Proposed System Drawings to Lend Lease. The Proposed System Drawings reflected that the exterior facade would be a fusion wall system that featured machined curtain wall components that were notched at the slab level to bypass the slab edge while sitting directly on and below the floor slabs to which they were mechanically fastened and set from within the building.

Pursuant to the Joint Venture Agreement, AIC discussed with Pioneer a fabrication schedule for the Project System as depicted in the Proposed System Drawings. Pioneer advised AIC that the fabrication schedule ("Initial Fabrication Schedule") for the Project System as depicted by the Proposed System Drawings would be as follows: delivery of the first set of panels by mid-December 2011; thereafter, panels for a minimum of two (2) floors per week would be delivered in accordance with the AIC/Lend Lease Agreement; and, as required by the AIC/Lend Lease Agreement, completion of the Project System would be achieved within 355 calendar days of the first delivery of panels in mid-December 2011. AIC, with Pioneer's knowledge, conveyed to Lend Lease the Initial Fabrication Schedule.

Pursuant to the Joint Venture Agreement, Pioneer thereafter manufactured a built-in mock-up ("Mock-Up") of the panels for the Project System as depicted by the Proposed System Drawings. During Lend Lease and AIC's review of the Mock-Up at Pioneer's plant, it became apparent that the Proposed System could not be manufactured as depicted by the Proposed System Drawings, and Pioneer advised AIC that modifications were needed. In or about late September 2011, Pioneer advised AIC, which advised Lend Lease, that the Project System as

depicted by the Proposed System Drawings failed to account for mating the in-corners and the out-corners which, by design, required panels to be installed sequentially and, therefore, the Project System as depicted by the Proposed System Drawings could not be properly assembled. Pioneer proposed to AIC, which proposed to Lend Lease and other parties, that the Proposed System should be modified ("Second Change") from a fusion wall system to a standard curtain wall system, with notched mullions connecting to top slabs which, Pioneer represented, Pioneer had successfully installed at other projects. In accordance with the Joint Venture Agreement, Pioneer advised AIC that there would be no cost change associated with making the Second Change. On or about November 1, 2011, Pioneer provided AIC with proposed drawings for the Second Change ("Second Proposed System Drawings") and AIC, with Pioneer's knowledge and consent, provided the Second Proposed System Drawings to Lend Lease.

On or about December 31, 2011, pursuant to the Joint Venture Agreement, Pioneer advised AIC that the fabrication schedule ("Revised Fabrication Schedule") for the curtain wall System under the Second Change would be as follows: delivery of the first set of panels by mid-June 2012; thereafter, panels for a minimum of two (2) floors per week would be delivered in accordance with the AIC/Lend Lease Agreement; and, as required by the AIC/Lend Lease Agreement, completion of the Project System would be achieved within 355 calendar days of the first delivery of panels in mid-June 2012. AIC, with Pioneer's knowledge, conveyed to Lend Lease the Revised Fabrication Schedule for the Project System under the Second Change.

Shortly thereafter, Pioneer advised AIC that the first set of panels under the Revised Fabrication Schedule under the Second Change could not be delivered until mid-July 2012 rather than mid-June 2012. AIC, with Pioneer's knowledge, conveyed to Lend Lease the change in the delivery date for the first set of panels under the Revised Fabrication Schedule under the Second Change. Pioneer then manufactured a set of panels as proposed by the Second Change to be tested at Architectural Testing, Inc., an independent performance testing company located in Pennsylvania ("Performance Mock-Up"). At the Performance Mock-Up, the set of panels passed the specific performance requirements of the Project to the satisfaction of the consultants of the Owner for the Project.

Unbeknownst to AIC, the "fully tested" (Comp. at ¶ 39) System in the Second Change was similar to a "Sotawall" system (Comp. at ¶ 39), for which a patent was held by Sotawall, Inc., which was then being used on exterior facades on other buildings. On May 15, 2012, Sota Glazing, Inc. ("Sota") advised Lend Lease that the notched mullions in the fully tested System proposed in the Second Change, and accepted by Lend Lease, AIC and other parties, violated the

patent owned by Sota. To avoid the delay that would result if there were litigation with Sota, in accordance with the Joint Venture Agreement, Pioneer proposed to AIC, which proposed to Lend Lease and other third parties, that the Project System be changed again ("Third Change") from a fully tested standard System to a "true" curtain wall system (Comp. at ¶ 41) where the mullions are not notched but the faces of the slabs are pulled back to allow the mullions to "fly past" (*id.*). To accommodate the Third Change, the Owner of the Project had to have the architect and structural engineer for the Project revise the drawings for the Project because the Third Change required the face of the slabs to be pulled back to accommodate the true curtain wall, thereby reducing the interior sizes of the apartments for the Project.

Pursuant to the Joint Venture Agreement, on or about June 12, 2012, Pioneer advised AIC that the fabrication schedule ("Further Revised Fabrication Schedule") for the true certain wall system for the Project System under the Third Change would be as follows: panel deliveries would commence on or about July 26, 2012 and end on or about December 6, 2012, which would have allowed AIC to install the panels commencing on or about August 8, 2012 and ending on or about January 6, 2013. AIC, with the knowledge of Pioneer, conveyed to Lend Lease the Further Revised Fabrication Schedule for the true Project System under the Third Change.

The Complaint contains three (3) causes of action:

1) Pioneer breached the Joint Venture Agreement by a) failing to provide panels for the true Project System under the Third Change pursuant to the Further Revised Fabrication Schedule as follows: i) the first panels were not provided until October 2012, rather than the end of July 2012; ii) panel deliveries were sporadic through the remainder of 2012 and 2013; and iii) the last panels were delivered in 2014; b) improperly fabricating panels and related accessories for the Project System resulting in numerous leaks throughout the true Project System and otherwise providing defective, nonconforming and unusable materials for the Project System; and c) increasing the costs for the fabrication of the materials above the costs set forth in the AIC/Lend Lease Agreement. AIC alleges that, as a result of that breach, 1) AIC was delayed in the installation of the Project System; 2) AIC was caused to pay Pioneer amounts of monies exceeding the costs for materials set forth in the AIC/Lend Lease Agreement; 3) AIC was caused to incur other costs and expenses for materials and labor in excess of what was contemplated under the AIC/Lend Lease Agreement; and 4) AIC was caused to breach the AIC/Lend Lease Agreement. Although AIC sought an adjustment to the contract sum under the AIC/Lend Lease Agreement, Lend Lease refused any adjustment to the contract sum and threatened to sue AIC for breach of the AIC/Lend Lease Agreement by delaying the Project. AIC alleges that it performed

all of the terms, conditions and work under the Joint Venture Agreement that it was required to perform.

2) Alternatively, if the Court does not find that there was a Joint Venture Agreement as alleged, AIC originally engaged Pioneer to manufacture, fabricate, furnish and install the Project System pursuant to the following agreement ("AIC/Pioneer Subcontract"): Pioneer would manufacture, fabricate, furnish and install the Project System in accordance with, including the cost set forth in, the AIC/Lend Lease Agreement, for which AIC would pay $6,644,083.00 for materials and labor, and the resulting profit, then estimated to be approximately $1.1 million, would be divided equally between AIC and Pioneer. Thereafter, Pioneer advised AIC that Pioneer was able to manufacture, fabricate and furnish the materials for the Project System but was unable to install the Project System, which resulted in a modification of the AIC/Pioneer Subcontract to an agreed price of $4,922,365.00. Plaintiff alleges that Pioneer breached the AIC/Pioneer Subcontract by 1) failing to provide panels for the true Project System under the Third Change under the Further Revised Fabrication Schedule as follows: a) the first panels were not provided until in or about October 2012, rather than at the end of July 2012; b) panel deliveries were sporadic throughout the remainder of 2012 and 2013; and c) the last panels were delivered in 2014; 2) improperly fabricating panels and related accessories for the Project System resulting in numerous leaks, and otherwise providing defective, nonconforming and unusable materials for the Project System; and 3) increasing the costs for the fabrication of the materials above the costs set forth in the AIC/Lend Lease Agreement. AIC alleges that, as a result of that breach, 1) AIC was delayed in the installation of the Project System; 2) AIC was caused to pay Pioneer amounts of monies exceeding the costs for materials set forth in the AIC/Lend Lease Agreement; 3) AIC was caused to incur other costs and expenses for materials and labor in excess of what was contemplated under the AIC/Lend Lease Agreement; and 4) AIC was caused to breach the AIC/Lend Lease Agreement. Although AIC sought an adjustment to the contract sum under the AIC/Lend Lease Agreement, Lend Lease refused any adjustment to the contract sum and threatened to sue AIC for breach of the AIC/Lend Lease Agreement by delaying the Project. AIC alleges that it performed all of the terms, conditions and work under the AIC/Pioneer Subcontract that it was required to perform.

3) Pioneer failed to provide a warranty and perform warranty work based on the allegation that Pioneer, whether as a joint venturer or subcontractor, agreed, and was required, upon the completion of the true Project System, to provide a five (5) year warranty ("Warranty") for the materials to AIC, which in turn was required to provide the Warranty to Lend Lease for

delivery to the Owner pursuant to the AIC/Lend Lease Agreement. Pioneer provided "the form of warranty" to AIC (Comp. at ¶ 64) but refused to provide a signed Warranty to AIC. As a result of AIC's inability to deliver to Lend Lease a signed Warranty from Pioneer, AIC had to execute and deliver a Warranty to Lend Lease for delivery to the Owner pursuant to the AIC/Lend Lease Agreement. Thereafter, AIC received written notices from the Owner stating that water was leaking into the building through the System. AIC has provided written notices to Pioneer requesting that Pioneer repair the System to prevent the leaks, but Pioneer has ignored those requests. As a result, AIC has incurred costs for which Pioneer is responsible, in whole or in part, in the sum of $188,267.00, which amount will continue to increase because there are approximately 2 and ½ years remaining under the Warranty that AIC provided to Lend Lease which was delivered to the Owner.

In its Verified Answer with Counterclaims ("Answer") (Ex. 2 to Plutzer Aff. in Supp.), Pioneer asserts the following four (4) Counterclaims:

1) breach of contract based on the allegations that a) AIC enlisted Pioneer's assistance for the Project and, in doing so, requested that a specific product by manufactured by Pioneer for use at the Project; b) all pricing negotiations were based on the presumption that this specific product would be used at the Project; c) AIC repeatedly altered its requests, from basic windows to a substantially more involved curtain wall, and went from asking Pioneer to initially take care of the installation to AIC wanting to perform the installation itself; d) AIC and/or nonparties over whom Pioneer lacks privity or control "fell victim to what was essentially an extortion letter" (Answer at ¶ 85) which falsely asserted that the curtain wall used violated a patent and, as a result, needlessly required Pioneer to redo its work by making new units to comply with the demands set forth in the letter; e) Pioneer was not compensated for this additional labor or the supplies necessitated by it; f) in light of the foregoing, AIC breached its obligations, contractual or otherwise, to Pioneer; g) these breaches have caused, and continue to cause, damage to Pioneer; and h) Pioneer performed all of its obligations to AIC, contractual or otherwise.

2) unjust enrichment based on the allegation that a) Pioneer worked with AIC with the understanding that AIC would abide by the terms and spirt of their agreement, contractual or otherwise; b) Plaintiff failed to uphold its obligations, whereas Pioneer upheld its own; c) as a result of AIC's conduct, Pioneer has been unjustly enriched by the amount of time, labor and expenses that it incurred; and d) as a result of the foregoing, Pioneer has been damaged, and continues to be damaged..

3) *quantum meruit* based on the allegation that a) AIC is liable to Pioneer in *quantum meruit* for the reasonable value of the goods delivered and services performed by Pioneer to AIC; and b) by reason of the foregoing, Pioneer has been damaged, and continues to be damaged.

4) breach of the duty of good faith and fair dealing based on the allegation that a) New York State law imposes a duty of good faith and fair dealing on all parties to a contract; b) this duty requires each contracting party to refrain from doing anything that may have the effect of destroying or injuring the other party's rights to receive benefits under the contract, and includes an affirmative promise to abide by any promises that a reasonable party would be justified in expecting under the contract; c) the parties entered into an agreement, written or otherwise, in New York State, where AIC filed this action, and accordingly the agreement incorporates the covenant of good faith and fair dealing in the course of the performance of their respective obligations; and d) AIC breached this covenant, resulting in damages to Pioneer.

In support of the motion, Gary Plutzer ("Plutzer"), the President of AIC, affirms that throughout the course of the Project, Pioneer submitted invoices to AIC and, upon payment of the invoices to AIC, Pioneer provided Partial Waivers of Lien that ran to, among other parties, AIC. On February 6, 2014, Pioneer received a final payment ("Final Payment") in the sum of $13,035.42 from AIC which, when added to other prior payments made by AIC, reflected that AIC had paid the sum of $6,132,000.00 to Pioneer in connection with the Project. In conjunction with the Final Payment, Pioneer executed and delivered to AIC a Final Waiver of Lien and Release (the "Release") (Ex. C to Plutzer Aff. in Supp.). Plutzer sets forth relevant provisions of the Release (Plutzer Aff. in Supp. at ¶ 8) which is dated February 6, 2014.

Plutzer affirms that more than three (3) years after providing the Release, and allegedly in retaliation for AIC's commencement of this action, Pioneer asserted its Counterclaims which, AIC submits, are barred by the Release. Plutzer affirms that Pioneer did not supply any materials and/or perform any work relating to the Project after executing and delivering the Release to AIC, as Pioneer has refused AIC's request to perform warranty work at the Project. Thus, Plutzer submits, the Counterclaims do not relate to work or materials outside the scope of the Release. Moreover, Plutzer contends, the Release states that Pioneer acknowledges receiving the Final Payment which, when added to payments previously received from AIC, represents the full and final amount due for all work performed and materials furnished by Pioneer for the Project. Plutzer contends, further, that there is no language in the Release reflecting a reservation or exclusion that would permit the Counterclaims.

In opposition, Vincent J. Amato, Jr. ("Amato"), the Chief Executive Officer of Pioneer, submits that Plaintiff's motion is without merit because the Release's use of the past tense makes it clear that the Release does not apply to compensation owed for work performed after February 6, 2014, the date on which the Release was executed. The Release (Ex. A to Amato Aff. in Opp.) includes the following headings at the top of page 1 (bold in original): 1) Amount to be paid as **FINAL PAYMENT**: **$13,035.42**, and 2) Total amount paid including **FINAL PAYMENT**: **$6,132,000.00 - Includes all New York State Sales Taxes**. Paragraph 1 of the Release provides as follows (bold in original):

> Provided and on condition that the **FINAL PAYMENT** set forth above is received by **[Pioneer]**, **[Pioneer]** hereby agrees to accept the **FINAL PAYMENT** in full and final payment for any and all amounts that are due to **[Pioneer]** for work performed and/or materials furnished at **29 Flatbush Avenue, Brooklyn, NY 11217**. **[Pioneer]** warrants that the work performed and/or the materials supplied to **29 Flatbush Avenue, Brooklyn, NY 11217** were complete and without defect when completed and that **[Pioneer]** affirms that the warranties issued, if still in existence, remain in full force and effect.

Amato disputes Plutzer's affirmation that Pioneer did not supply any materials and/or perform any work relating to the Project after executing and delivering the Release to AIC (*see* Plutzer Aff. in Supp. at ¶ 10), and affirms that Pioneer continued to provide materials and perform work beyond that date. In support, Amato provides emails between Pioneer and AIC that were sent in August and September 2014 (Ex. B to Amato Aff. in Opp.), several of which were addressed *inter alia* to Plutzer. Amato affirms that one example of Pioneer's work after execution of the Release, which Amato submits is not a release but rather just a waiver of Pioneer's right to file a lien against the property (Amato Aff. in Opp. at n. 1), referred to in the email chain is a September 24, 2014 email from AIC's project manager to Pioneer employees Bob Mott and Eric Miller readings as follows: "The mockup was approved. How can I order parts? I want to order 20 lefts and 20 rights." Amato affirms that, in response to this email, Pioneer provided the requested materials.

Amato affirms that the emails provide additional examples of post-Release work performed by Pioneer, including 1) AIC's September 8, 2014 email to Pioneer stating that "My foreman indicated that Mikey was able to get the sash to operate, but we still need a lock that can be installed to properly close and lock the sash form free swinging. Do you know when we can get this onsite and installed?" and 2) Pioneer's responsive September 9, 2014 email stating that "We received the locking handle this morning..Mikey will have it tomorrow and swap it out ASAP." Amato outlines additional emails which, he affirms, were evidence of Pioneer's post-

Release work (Amato Aff. in Opp. at ¶¶ 8-11). Amato submits that, because these emails clearly reflect work performed by Pioneer after February 6, 2014 when the Release was signed, the Release is inapplicable to the compensation to which Pioneer contends it is entitled for performing this extra work.

Amato contends, further, that other provisions in the Release demonstrate that Pioneer was only waiving claims against the property, as opposed to against AIC itself, with respect to work performed prior to February 6, 2014. He cites *inter alia* 1) language in the second paragraph of the Release stating that, upon receipt of the final payment, Pioneer waives its rights "which it may now or hereafter have upon the land and improvements in **29 Flatbush Avenue, Brooklyn, NY 11217**..., and 2) language in the third paragraph of the Release stating that "[**Pioneer**] further warrants that (1) all workmen employed by [Pioneer] or its subcontractors for **29 Flatbush Avenue, Brooklyn, NY 11217** have been fully paid to the date hereof...(2) all materialmen...have been paid to the date hereof; [and] (3) none such workmen and materialmen has any claim or demand or right of lien upon the land and improvements in **29 Flatbush Avenue, Brooklyn, NY 11217**." Amato submits that the Release precludes Pioneer from filing a mechanic's lien against the property and/or against AIC's bonding company with respect to work performed prior to February 6, 2014, and precludes Pioneer from thereafter proceeding to commence a lawsuit to foreclose that lien. Amato submits that, because Pioneer's Counterclaims assert no such cause of action, they are not precluded by the Release.

In reply, Kenneth Saldibar ("Saldibar"), who was employed as a Project Manager by AIC, submits that the Amato affidavit in opposition is "designed to create the illusion that Pioneer provided materials or performed work at the request of AIC" that is not within the purview of the Release (Saldibar Reply Aff. at ¶ 2), and disputes Amato's affirmations. Saldibar affirms that the Final Payment of $13,035.42, when added to prior payments made by AIC to Pioneer, resulted in AIC having paid $6,132,000.00 to Pioneer in connection with the Project. Saldibar affirms that after receiving the Final Payment and executing and delivering the Release, Pioneer did not provide any further work or furnish any additional materials for the Project which could be considered "extra work" (Saldibar Reply Aff. at ¶ 4), meaning further work or additional materials outside the scope of the Release.

Saldibar notes that the emails provided by Amato do not contain invoices for the alleged extra work performed, or demands provided by Pioneer to AIC for payment of extra work after the date of the Release. Saldibar affirms that Pioneer never submitted invoices or made claims to AIC after executing and delivering the Release. Rather, Pioneer's only involvement with the

Project after the date of the Release related to emails from AIC about either defective materials that Pioneer had supplied prior to the date of the Release or missing materials that Pioneer had failed to provide, but for which AIC had paid prior to the date of the Release. Saldibar affirms that AIC made numerous demands on Pioneer to provide warranties and correct defective materials, which should have been covered by the warranties, all of which were ignored by Pioneer. Saldibar notes, further, that the Release makes no reference to "extra work" provided by Pioneer at the request of AIC after the date of the Release, and submits that the Counterclaims are based on the allegations, set forth at paragraphs 82-86 of the Answer, which refer to design changes made during the Project, not after the date of the Release. Saldibar affirms that he oversaw the relevant daily operations of installing the materials provided by Pioneer during the Project. Saldibar affirms that the emails provided by Amato do not relate to extra work performed after the date of the Release, and provides details regarding the specific issues raised in those emails (Saldibar Reply Aff. at ¶ 8(a) to (c)). Saldibar submits, further, that Amato's contention that the Release is a waiver, not a release, is belied by the language in the Release, including the use of the word "release." In further reply, Plutzer adopts the affirmations of Saldibar as set forth in his reply affidavit.

C. The Parties' Positions

Plaintiff submits that the Court should dismiss the Counterclaims because Pioneer executed and delivered the Release to AIC in exchange for the Final Payment which, when added to other payments previously made by AIC totaled $6,132,000.00, for work performed and materials furnished in connection with the Project. Plaintiff contends that the Plutzer affidavit in support establishes that Pioneer did not perform any work or supply any materials relating to the Project after executing and delivering the Release to AIC on February 6, 2014. Thus, Plaintiff contends, by executing and delivering the Release, Pioneer "unequivocally" (P's Memo. of Law in Supp. at p. 3) released all claims against, *inter alia*, AIC as of the signing of the Release, or which arose thereafter.

Defendant opposes the motion submitting that the Release, which Defendant contends is in effect a waiver rather than a release, only precludes Pioneer from filing, and foreclosing on, a mechanic's lien against the owner of the Project, and/or AIC's bonding company, regarding work performed by Pioneer prior to February 6, 2014. Defendant contends, further, that AIC's

assertion that Pioneer did not perform any work on the Project after February 6, 2014 is belied by the emails produced by Amato. Under these circumstances, Pioneer submits, the Counterclaims are not barred by the Release.

In reply, Plaintiff submits that Defendant's argument ignores the plain language of the Release and, therefore, is without merit. Plaintiff contends, further, that the Counterclaims do not allege extra work after the date of the Release but, rather, are based on the allegations in paragraphs 82-86 of the Answer which specifically refer to design changes made during the Project, and not after the date of the Release. Plaintiff notes that paragraph 85 of the Counterclaims makes reference to a letter which, Plaintiff submits, is the letter referred to in paragraph 40 of the Complaint, specifically a letter dated May 15, 2012. Plaintiff submits that Defendant has "concocted" ("P's Reply Aff. at p. 6) its claim about post-Release work in an attempt to avoid the consequences of the Release.

RULING OF THE COURT

A. Dismissal Standards

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

B. Release

Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release. *Matter of Boatwright*, 114 A.D.3d 856, 858 (2d Dept. 2014), citing *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276 (2011), quoting *Global Mins. & Mteals Corp. v. Holme*, 35 A.D.3d 93, 98 (1st Dept. 2006), *lv. den.*, 8 N.Y.3d 804 (2007). A release is governed by principles of contract law, *Sicuranza v. Philip Howard Apts. Tenants Corp.*, 121 A.D.3d 966, 967 (2d Dept. 2014), quoting *Mangini v. McClurg*, 24 N.Y.2d 556, 562 (1969), and one that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms, *Sicuranza v. Philip Howard Apts. Tenants Corp.*, 121 A.D.3d at 967, quoting *Alvarez v. Amicucci*, 82 A.D.3d 687, 688 (2d

Dept. 20122).

The plain language of a release is controlling, regardless of one party's claim that he intended something else. *Sicuranza v. Philip Howard Apts. Tenants Corp.*, 121 A.D.3d at 967, quoting *Matter of Brooklyn Resources Recovery, Inc.*, 309 A.D.2d 931, 932 (2d Dept. 2003). Where the scope of the release is unambiguous, the court may not look to extrinsic evidence to determine the parties' intent. *Sicuranza v. Philip Howard Apts. Tenants Corp.*, 121 A.D.3d at 967, quoting *Koufakis v. Siglag*, 85 A.D.3d 872, 873 (2d Dept. 2011). Whether or not a writing is ambiguous is a question of law to be resolved by the courts. *Sicuranza v. Philip Howard Apts. Tenants Corp.*, 121 A.D.3d at 967, quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

C. Application of these Principles to the Instant Action

The Court denies the motion but directs that Defendant will only be permitted to pursue its Counterclaims as they relate to work, if any, performed by Defendant after February 6, 2014. While Plaintiff has raised meritorious arguments regarding the viability of the Counterclaims in light of the Release, the Court cannot say, as a matter of law, that the Release conclusively establishes a defense as a matter of law. The Release does not explicitly state the dates of work covered by the Release, and contains language that is arguably consistent with Defendant's position that the Release did not apply to work performed by Defendant after the date of the Release. In consideration, however, of the fact that 1) the Counterclaims do not specify the dates of work for which Defendant seeks compensation; 2) Defendant has argued that the Release does not apply to work performed after February 6, 2014; and 3) Defendant has provided an affidavit of Defendant's representative stating that Defendant provided work after February 6, 2014 for which it is entitled to compensation, the Court directs that Defendant will only be permitted to pursue its Counterclaims as they relate to work, if any, performed by Defendant after February 6, 2014, the date of the Release.

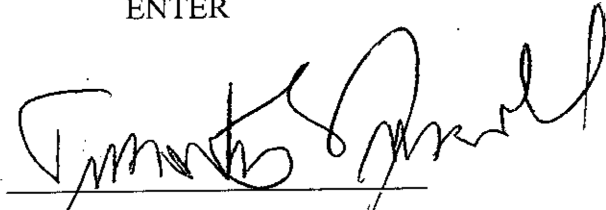
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on June 27, 2017 at 9:30 a.m.

ENTER

DATED: Mineola, NY
May 8, 2017



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
MAY 10 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE