SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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PRIMIANO ELECTRIC CO.,

Plaintiff,

-against-

DECISION/ORDER

HTS-NY, LLC, HE NEWPORT, LLC, RC DOLNER, LLC, HYATT HOTELS CORPORATION, SI WOOD FURNITURE CORP., PREMIUM SYSTEMS, INC., CORD CONTRACTING CO., TAAS CONSTRUCTION CORP. and ENERGY CONSERVATION ASSOCIATES,

Index No. 651724/2011

Defendants.

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This action is brought by plaintiff Primiano Electric Co. (PEC), a subcontractor of defendant RC Dolner LLC (Dolner), to foreclose on a mechanic's lien and recover damages for extra work performed in connection with a hotel construction project, called the Hyatt Andaz Hotel, located at 485 Fifth Avenue, New York, New York (the Project). Dolner and defendants HTS-NY, L.L.C., HE Newport, L.L.C., and Hyatt Hotels Corporation (collectively, the Hyatt/Dolner defendants or defendants) move for summary judgment, pursuant to CPLR 3212, dismissing the first through seventh causes of action asserted in the Amended Verified Complaint (Amended Complaint). PEC also moves for partial summary judgment, pursuant to CPLR 3212, on the first through fifth causes of action.[1]

[1] Plaintiff's notice of motion does not specify the particular items of damage or amounts for which plaintiff seeks judgment. As noted below, there is inconsistency in plaintiff's submissions regarding the relief sought.

BACKGROUND

The following facts are undisputed. On or about November 17, 2008, the owner of the Project, Hyatt Corporation, as successor-in-interest to Hyatt Development Corporation and as agent for HTS-NY, L.L.C. and H.E. Newport, L.L.C. (collectively, Hyatt), executed a written letter agreement with PEC and Dolner. (Joint Statement of Undisputed Material Facts, ¶ 2 [Jt. St.]; Letter Agreement [Aff. of Gary Rubin (Hyatt/Dolner Defs.' Atty.) In Supp. (Rubin Aff. In Supp.), Ex. P].) On or about February 12, 2009, PEC executed a written Subcontract Agreement with Dolner, effective as of November 17, 2008 (Subcontract), under which PEC agreed to perform electrical work for the Project, in consideration for the sum of $8,750,000. (Jt. St., ¶ 3; Subcontract [Rubin Aff. In Supp., Ex. Q].) At all relevant times, Alex Primiano was the president and sole shareholder of PEC. (Jt. St., ¶ 4.) He oversaw the preparation of PEC's project estimate and negotiated the $8,750,000 subcontract price. (Id.)

Under the Subcontract, time is of the essence. (Jt. St., ¶ 5; Subcontract, § 2.1.) PEC was to be reasonably compensated for schedule and sequence changes to the extent that such costs were approved by the Owner and received by Dolner. (Subcontract, § 3.2; see Jt. St., ¶ 5.) The Guestroom and "Fractional" units were scheduled for completion by August 15, 2009, and the Public Area was scheduled for completion by October 1, 2009. (Subcontract, "Hyatt on 5th Schedules," Ex. I; Jt. St., ¶ 5.) The Subcontract also contains the following no-damages-for-delay provisions (collectively, the no-damage-for-delay clause):

> 3.1 . . . Subcontractor acknowledges and agrees that delays, disruptions, errors in the Drawings and Specifications, and interferences commonly arise in the construction process and has included compensation for the cost of these problems in its price and in agreeing to comply with the scheduling requirements or any

> adjustments thereto issued by RCDolner LLC, including reasonable extensions beyond the projected completion date.
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> * * *
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> 5.1 Should the Subcontractor be delayed, disrupted, obstructed, hindered or interfered with in the commencement, prosecution or completion of the Subcontractor's Work for any reason (including without limitation, the acts, omissions, negligence or default of RCDolner LLC, another contractor or subcontractor, the Architect, the Owner or Owner's representatives under the Owner's Contract) . . . , then the Subcontractor shall be entitled to such extension of time as is obtained by RCDolner LLC from the Owner pursuant to the Owner's Contract, and an extension of time only, and in no event shall Subcontractor be entitled to damages; provided, however, that the Subcontractor shall not be entitled to any such extension unless the Subcontractor: (1) notifies RCDolner LLC in writing of the cause or causes of such delay, obstruction, disruption, hindrance or interference within forty-eight (48) hours of the commencement thereof and provides sufficient information to enable RCDolner LLC to request a time extension from Owner pursuant to the Contract Documents; (2) demonstrates that it could not have anticipated or avoided such delay, obstruction, hindrance or interference; and (3) has used all available means to minimize the consequences thereof.
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> * * *
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> 5.3 No Change Orders or claims shall be recognized in this Subcontract for any damages occasioned by delays, obstructions, disruptions[,] interferences or hindrances in completion of the Project, including but not limited to requests for equitable adjustment, loss of productivity, Eichleay formula costs, extended overhead, loss of profit, direct, indirect or consequential damages or any other equitable adjustment theories.

The Subcontract also contains the following merger clause:

> 25.1 This Agreement constitutes the entire agreement between the parties. No oral representations or other agreements have been made by RCDolner LLC except as stated in this Agreement. This Agreement may not be changed in any way except as herein provided, and no term or provision hereof may be waived by RCDolner LLC except in writing.

Work continued on the Project beyond October 1, 2009. (Jt. St., ¶ 7.) In December 2009 and January 2010, PEC wrote to Dolner, stating that PEC's work was being delayed through no

fault of its own, and that it was incurring substantial extra costs and financial pressure due to the delay. (Id., ¶ 8.) As a result, PEC requested a reasonable extension of time to perform its work under the Subcontract. (Id.) On or about February 17, 2010, by mutual agreement of the parties, Hyatt began advancing funds to Dolner to cover PEC's weekly payroll expenses. (Id., ¶ 9.)

Effective on or about March 26, 2010, PEC and Dolner entered into a written agreement (the Change Order Agreement), negotiated by Hyatt, Dolner, and PEC, acting through their attorneys. (Change Order Agreement [Rubin Aff. In Supp., Ex. R]; Jt. St., ¶¶ 10-11.) The Change Order Agreement includes the following provisions:

> 1. This Change Order authorizes Subcontractor [PEC] to enter into a sub-subcontract with A TECH ELECTRIC ENTERPRISES, INC., a New York corporation ('ATECH') to provide electricians to work under the supervision and coordination of Subcontractor, as necessary, and as approved and directed by Contractor [Dolner] in connection with the completion of Subcontractor's Work, as defined in the Subcontract, as a measure of mitigation of the effects of late completion of the Subcontractor's Work . . . .
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> 2. Subcontractor shall provide Contractor with a certified payroll for electricians employed by Subcontractor and by ATECH for each week that ATECH electricians are working on the Project, by Thursday of such week, which shall be accompanied by waivers of lien for all payments to be made to ATECH and Subcontractor for such week. ATECH shall be paid an amount equal to 110% of the certified payroll amount as set forth on 'A' attached hereto and by this reference incorporated herein, by the following Tuesday and Subcontractor shall be paid the amount of such payroll on the following Tuesday, without fee, markup or general conditions. Subcontractor shall not be paid any compensation in connection with the work of ATECH, including, but not limited to fee, general conditions cost, or any other item. The amounts payable to ATECH pursuant to this Paragraph 2 constitute entire compensation payable with respect to any work of ATECH. Subcontractor acknowledges that no further payments shall be made to Subcontractor for fee, profit, markup or general conditions.

3. Attached hereto as Exhibit 'B', and by this reference incorporated herein, is a complete listing of all amounts payable by the Subcontractor for: (i) all materials and supplies obtained by Subcontractor through the date hereof with respect to the Project; and (ii) payments to the Electricians Union due by Subcontractor with respect to the Project as of the date hereof (the items in clauses (i) and (ii) and hereinafter collectively referred to as the 'Payables'.) Except for the Payables and sums payable pursuant to Paragraph 2 hereof, Subcontractor warrants and represents to Contractor and Owner that no amounts are payable by Subcontractor with respect to the Project that could, if not paid, result in a lien on the Project or create liability for the payment thereof upon Contractor or Owner. Upon presentation to Contractor of lien waivers and other documentation satisfactory to Contractor which provides for the full and complete waiver of lien rights with respect to the Payables and all labor performed and materials supplied prior to the date hereof and provides Owner and Contractor with a complete release of liability for the payment of the Payables, Contractor shall disburse an amount not to exceed $1,000,000.00 to payees of the Payables and the Contract Sum shall be increased by said amount.

4. Subcontractor acknowledges and agrees that the time for completion of the Subcontractor's Work is: (i) April 20, 2010 with respect to all portions of the Subcontractor's Work relating to the fire alarm system; and (ii) May 8, 2010 relating to the substantial completion of all Subcontractor's Work, time being of the essence thereof, provided however that the date of May 8, 2010 shall be extended by the additional time necessary to complete portions of Subcontractor's Work other than the fire alarm system (it being understood and agreed that no extension shall be granted with respect to the portions of the Work relating to the fire alarm system), necessitated by the failure of other parties to complete work as required prior to installation of Subcontractor's Work, provided that no such extension shall be granted unless Subcontractor provides Contractor written notice of such failure of other parties not later than the next business day after the day such failure occurs, and no such extension shall be granted if the delay is not of a nature so as to entail the necessity of additional time.

5. Payments of the Price made to Subcontractor, [sic] may include portions of the amounts previously retained, provided however in no event shall the retainage level be less than One Percent (1%) of the adjusted Price.

6. Contractor and Subcontractor acknowledge that an insurance claim has been made relating to water damage to the Subcontractor's Work in the amount of One Hundred Eighty Two Thousand Two Hundred Sixty Eight Dollars and No Cents ($182,268.00), and upon receipt of such claimed sums, such amount shall be paid to Subcontractor.

7. As a material inducement to Contractor to enter into this Change Order, Subcontractor hereby waives and releases Owner and Contractor from any and all past or present claims, causes of action, damages, personal or economic injuries, rights or liabilities of any nature whatsoever, known and unknown, developed or undeveloped, including, but not limited to attorneys' fees, expert witness fees, costs and litigation expenses, whether grounded in contract, tort, equity or regulatory violation, based upon or arising out of the Project and the Subcontract, provided that the foregoing shall not release the Subcontractor from the covenants of this Change Order and shall not release the Subcontractor from any future obligations arising under the Subcontract, provided further that the foregoing shall not be or be deemed to be a release of any liability for bodily injury or property damage arising due to the acts or omissions of the Contractor, the Subcontractor or any party acting on behalf of Subcontractor.

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9. This Change Order modifies the specific terms and conditions of the Subcontract between Contractor [Dolner] and Subcontractor [PEC] only to the extent specifically set forth herein. All other terms and conditions of the Subcontract remain in full force and effect.

10. The Subcontract Summary set forth below sets forth the Price. All capitalized terms not defined herein shall carry the meanings set forth in the Contract Documents.

CONTRACT SUMMARY:

The Current Price:	$9,818,488.00
Net change of Change Orders in progress, subject to final approval:	$468,274.00
The Price prior to this Change Order:	$10,286,762.00

The Price shall be increased by the sum

of up to $1,000,000.00 pursuant to Paragraph 3 above:	$1,000,000.00
The new Price upon maximum application of Paragraph 3 above:	$11,286,762.00

(See also Jt. St., ¶ 12, extensively quoting the Change Order Agreement.)

Payments totaling $3,878,742.18, representing payroll payments and joint-check payments, were made on the Project for PEC's account during the period between February 26, 2010 and December 30, 2010. (Jt. St., ¶¶ 14-15.) Those payments included the $1,000,000 sum described in paragraph 3 of the Change Order Agreement.[2] (Id., ¶ 15.) "[A]s authorized and requested by PEC," the $1,000,000 sum was paid by the Hyatt/Dolner defendants as follows: $818,675.43 was paid by the Hyatt/Dolner defendants to satisfy obligations owed by PEC to certain of PEC's material vendors, and $181,324.57 was paid to satisfy obligations owed by PEC to union benefit funds. (Id.)

Of the $468,274 in "Change Orders in progress," described in paragraph 10 of the Change Order Agreement, change order requests totaling $376,136 had been processed to PEC's subcontract as of November 15, 2010, and change order requests totaling $92,138 remained unpaid. (Jt. St., ¶ 16.) Subsequent to the Change Order Agreement, PEC received payment of $50,740 on account of the water damage claim described in paragraph 6 of the Change Order Agreement. (Id., ¶ 17.) Between October 20, 2008 and December 15, 2010, PEC submitted 29 applications for payment (requisitions) in connection with the Project. (Id., ¶ 18.) Each of the requisitions contains a "Release and Partial Waiver of Liens." (Jt. St., ¶ 20.) The total amount

[2] As the Change Order Agreement refers to its provisions by paragraph, rather than by section number, the court will also do so.

that has been paid for PEC's account by Hyatt and/or Dolner, for work performed on the Project, is $12,268,942. (Id., ¶ 13.)

DISCUSSION

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd [b])." (Zuckerman, 49 N.Y.2d at 562.)

The Amended Complaint pleads a first cause of action for foreclosure of a mechanic's lien (Am. Compl., ¶¶ 13-49); a second "to set aside" the Change Order Agreement (id., ¶¶ 50-59); a third for breach of the Change Order Agreement based on failure to process change orders for "extra work and materials" (id., ¶¶ 60-62); a fourth for "extended performance costs" (id., ¶¶ 63-64); a fifth for breach of contract for outstanding sums incurred for work due to water damage (id., ¶¶ 65-67); a sixth for quantum meruit (id., ¶¶ 68- 72); and a seventh for unjust enrichment (id., ¶¶ 73-77).

In moving for summary judgment and in opposing plaintiff's motion, defendants argue that plaintiff's claims for damages based on delay (as asserted in the first through fourth, sixth, and seventh causes of action) are barred by the express terms of the Subcontract. (Defs.' Memo.

In Supp., at 9-15; Defs.' Reply Memo., at 8-10; Defs.' Memo. In Opp., at 16-20.)[3] Defendants further contend that all of plaintiff's claims predating the Change Order Agreement are waived and released under that agreement (Defs.' Memo. In Supp., at 15-16; Defs.' Reply Memo., at 3), and that no later claims, including plaintiff's lien foreclosure claim, are viable because defendants fully performed by making all of the payments required by the agreement. (Defs.' Memo. In Supp., at 16-17.) Defendants also argue that plaintiff's entitlement to payment for the water damage claim (except for possibly $214) is limited to the $50,740 actually received from the insurer. (Defs.' Memo. In Supp., at 22-23; Defs.' Reply Memo., at 7.) Any sums potentially owed to plaintiff, defendants argue, are offset by over $500,000 in supervisory costs erroneously included in plaintiff's payroll requisitions. (Defs.' Memo. In Supp., at 19-20; Defs.' Memo. In Opp., at 24-25.) Defendants seek dismissal of the quasi-contractual claims on the ground that they are precluded by the existence of the written agreements. (Defs.' Memo. In Supp., at 20-22.) As asserted by defendants, no claims can be interposed against Hyatt Hotels Corporation because it was not a party to those agreements. (Defs.' Memo. In Supp., at 24-25; Defs.' Reply Memo., at 10-12.)

In its motion and opposition papers, plaintiff does not contest that the no-damages-for-delay clause applies to both the Subcontract and the Change Order Agreement. (See Pl.'s Memo. In Supp., at 20-21.) Rather, plaintiff argues that this clause is unenforceable. In particular, plaintiff contends that at the time the Change Order Agreement extended the completion date for PEC's work from October 1, 2009 to May 8, 2010, it was not and could not have been

[3] The memoranda of law filed on defendants' motion are referred to as Defs.' Memo. In Supp., Pl.'s Memo. In Opp., and Defs.' Reply Memo. The memoranda of law filed on plaintiff's motion are referred to as Pl.'s Memo. In Supp., Defs.' Memo. In Opp., and Pl.'s Reply Memo.

contemplated that PEC's work would not be completed until November 29, 2010. (Id.) Plaintiff asserts that "[t]his is especially true in light of the express time of the essence language in the Change Order." (Pl.'s Reply Memo., at 7-9 [emphasis plaintiff's]; Pl.'s Memo. In Opp., at 18-19.) Plaintiff also argues that the clause is unenforceable due to defendants' alleged bad faith conduct in "accepting but not processing PEC's valid change orders and [in] unilaterally using and misappropriating PEC's earned retainage totaling $710,019.93 by using it for PEC's future certified payroll financing." (Pl.'s Memo. In Supp., at 21-22; Pl.'s Reply Memo., at 9-10; Pl.'s Memo. In Opp., at 19-20.) Citing the same alleged examples of bad faith, as well as defendants' allegedly wrongful payment of ATECH's labor charges from funds allocated to plaintiff, and defendants' failure to pay plaintiff's water damage claim, plaintiff maintains that defendants materially breached and "constructively abandoned" the Change Order Agreement and that the Agreement should therefore be set aside. (Pl.'s Memo. In Supp., at 14-18; Pl.'s Reply Memo., at 3-7; Pl.'s Memo. In Opp., at 20-23.) Finally, plaintiff argues that Hyatt Hotels Corporation is liable by virtue of the representations of one of its representatives. (Aff. of Alex Primiano In Opp., sworn to on June 20, 2016 [Primiano Aff. In Opp.], ¶¶ 4-7.)

Enforceability of the No-Damages-for-Delay Clause

As held by the Court of Appeals, a no-damages-for-delay clause excusing a contractee from liability to a contractor for damages resulting from delays in the performance of the work is generally valid and enforceable. (Corinno Civetta Constr. Corp. v City of New York, 67 NY2d 297, 309 [1986], rearg denied 68 NY2d 753, citing Kalisch-Jarcho, Inc. v City of New York, 58 NY2d 377, 384 [1983].) Exceptions to the enforceability of such provisions include "(1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2)

uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract." (Corinno Civetta, 67 NY2d at 309.) "[A] party seeking to invoke any of the exceptions to the general rule that no damages for delay clauses are enforceable bears a heavy burden." (Bovis Lend Lease (LMB), Inc. v Lower Manhattan Dev. Corp., 108 AD3d 135, 147 [1st Dept 2013] [Bovis], citing LoDuca Assocs., Inc. v PMS Constr. Mgt. Corp., 91 AD3d 485, 485 [1st Dept 2012] [LoDuca].)

Plaintiff has not met that burden here. Plaintiff's principal complaint is that "the project was badly mismanaged by Dolner who, with Hyatt's full knowledge, intentionally failed and refused to provide PEC, or any of Dolner's other subcontractors on the project, with construction schedules. Dolner's documented failure to properly coordinate the scheduling and sequencing of the work among its 20 plus subcontractors resulted in severe delays that greatly extended the duration of the project." (Pl.'s Memo. In Opp., at 6 [internal citation omitted]; Pl.'s Memo. In Supp., at 2 [same]; see Aff. of Alex Primiano In Supp., sworn to on May 16, 2016 [Primiano Aff. In Supp.], ¶¶ 4, 18-21.) As asserted in Mr. Primiano's affidavit in support of plaintiff's motion, Dolner's mismanagement included a failure to schedule anything "other than periodic meetings at the site where 'two week look-aheads' were discussed; helter-skelter construction management practices; poor and limited coordination of the subcontractors; 'out-of-sequence work' and delay of activities preceding PEC's work; scope increases approximating almost 50% of the base Subcontract; late delivery of, and problems with, the owner-furnished materials; poor engineering design; slow responses to PEC's Requests for Information . . . and differing site conditions." (Primiano Aff. In Supp., ¶¶ 21-22 [internal citation omitted]; see also Aff. of Awad

Hanna [Pl.'s Expert], sworn to on May 12, 2016 [Hanna Aff.], ¶¶ 10, 16-17, 22, 31 [identifying causes of delay in the Project including lack of scheduling, change of design and scope, "out-of-sequence work," and lack of coordination among the trades on the project].) Dolner also allegedly "directly interfered with PEC's work" by "installing drywall out of sequence and 'burying' installed wiring without . . . leaving PEC access to connect its fixtures and devices." (Primiano Aff. In Supp., ¶ 24; see Hanna Expert Report, at 18-20 [summarizing the communication between Primiano and Dolner concerning the sheet rock installation].)

These allegations, however, describe "nothing more than inept administration or poor planning, which falls within the contract's exculpatory clause" (i.e., the no-damages-for-delay clause), and which does not rise to the level of bad faith or gross negligence. (Commercial Elec. Contrs., Inc. v Pavarini Constr. Co., Inc., 50 AD3d 316, 318 [1st Dept 2008] [rejecting plaintiff's allegation that an 8 to 20-month delay arising from, among other things, failure to provide temporary heat during the winter months, scheduling "sugarblasting" of concrete walls when plaintiff was supposed to perform electrical work, and failing to schedule work of different trades in an organized manner, rendered the no-damages-for-delay clauses unenforceable]; see Advanced Automatic Sprinkler Co. v Seaboard Sur. Co., 139 AD3d 424, 425 [1st Dept 2016] ["[T]he delays that plaintiff seeks to impute to the prime contractor constitute, at most, 'inept administration' and 'poor planning,' and do not, as plaintiff contends, evince bad faith on the prime contractor's part"]; Polo Elec. Corp. v New York Law Sch., 114 AD3d 419, 419 [1st Dept 2014].)

Moreover, the parties specifically contemplated that delays might arise from "the acts, omissions, negligence or default of [defendants]" (Subcontract, § 5.1), or from "errors in the

Drawings and Specifications[] and interferences [that] commonly arise in the construction process. . . ." (Id., § 3.1.) Further, the parties agreed that "[n]o Change Orders or claims shall be recognized . . . for any damages occasioned by delays, obstructions, disruptions[,] interferences or hindrances in completion of the Project, including but not limited to requests for equitable adjustment, loss of productivity, Eichleay formula costs, extended overhead, loss of profit, direct, indirect or consequential damages or any other equitable adjustment theories." (Id., § 5.3.) Plaintiff's assertion that defendants were aware of the various problems during the course of the construction does not take the claims outside of the no-damage-for-delay clause. (LoDuca, 91 AD3d at 486.) The Subcontract expressly "included compensation for the cost of these problems in its price. . . ." (Subcontract § 3.1.) Plaintiff also received bargained-for compensation in the form of "reasonable extensions beyond the projected completion date." (Id.; see Superb Gen. Contr. Co. v City of New York, 70 AD3d 517, 518 [1st Dept 2010], lv dismissed 14 NY3d 906, lv denied 15 NY3d 714.) In addition, the Change Order Agreement authorized plaintiff to retain a sub-subcontractor as a "measure of mitigation of the effects of late completion of [plaintiff's] Work. . . ." (Change Order Agreement, ¶ 1.)

Plaintiff does not meaningfully dispute the force of the governing legal authorities, but attempts to distinguish them on the ground that the Subcontract, as well as the Change Order Agreement, recite that "time[ ]is of the essence. . . ." (Subcontract, § 3.1 [capital letters omitted]; Change Order Agreement, ¶ 4; Pl.'s Memo. In Supp., at 20-21; Pl.'s Reply Memo., at 8-9; Pl.'s Memo. In Opp., at 18.) This argument also fails. Provisions barring delay damages have been upheld despite the existence of a time of the essence clause.[4] (See e.g. Bovis, 108 AD3d at 140,

[4] Contrary to plaintiff's contention (Pl.'s Reply Memo., at 8-9), a time of the essence clause was also present in the subcontracts in both of the cases from which plaintiff speculates it might have been absent. (See E.E.

147.) Read in context, the time of the essence clause in the Subcontract protects defendants from possible delays, and does not nullify the express clause precluding an award of damages to plaintiff as a consequence of delays.

The court is also unpersuaded by plaintiff's argument that the nearly seven-month delay in completing the Subcontract work (i.e., the delay between the May 8, 2010 Subcontract completion date in the Change Order Agreement and the actual November 29, 2010 completion) "was not, and could not reasonably be, contemplated by PEC at the time the Change Order was negotiated." (Pl.'s Memo. In Supp., at 20-21; Pl.'s Reply Memo., at 8-9; Pl.'s Memo. In Opp., at 18.) "It is true that . . . the length of [a] delay is relevant to the issue of whether an exception to the general rule enforcing 'no damages for delay' clauses applies. However, the length of the delay does not transform a delay caused by an event specifically contemplated by the 'no damages for delay' clause into something uncontemplated." (LoDuca, 91 AD3d at 486 [internal citations omitted]; see Bovis, 108 AD3d at 147.) Accordingly, damages attributed to delays significantly longer than the seven months complained of here have been found not to be barred by a no-damages-for-delay provision where the cause of the delay was anticipated by the parties. (Dart Mech. Corp. v City of New York, 68 AD3d 664, 664 [1st Dept 2009] [32-month delay caused by other delinquent contractor did not fall within an exception to the enforcement of the no-damages-for-delay clause for the reason, among others, that the delay was contemplated]; Blau Mech. Corp. v City of New York, 158 AD2d 373, 374 [1st Dept 1990] [holding that a 709-day delay due to subsurface conditions was contemplated].) As discussed above (supra, at 11-

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Cruz/Nicholson Joint Venture, LLC v Lend Lease (US) Constr. LMB, Inc., 2016 NY Slip Op 30207 [U], 2016 WL 427619, * 4 [Sup Ct, NY County 2016] ["Article 11 states that time is of the essence in the performance of Subcontractor's work"]; Advanced Automatic Sprinkler Co., Sup Ct, NY County, Index No. 650321/2011, Subcontract Agreement, § 12.1 [NYSCEF Doc. No. 64] ["Time is of the essence in this subcontract"].)

12), all of the causes of delay raised by plaintiff and its expert fall squarely within the scope of the no-damage-for delay clause.

The court further rejects plaintiff's argument that defendants' refusal to pay $1,190,032.38 in change orders, submitted after March 2010, constituted bad faith and intentional misconduct. (See Pl.'s Memo. In Supp., at 21-22.) Plaintiff claims that these changes orders were due for labor and services and for overhead and extended supervision costs for work in the additional period between the substantial completion date under the Change Order Agreement (May 2010) and the final completion of the work (November 2010). (See id.) This claim appears to correspond to the third cause of action for extra work and materials in the period subsequent to the Change Order Agreement and up to November 2010, although the amount sought on this cause of action is $614,375 (representing the balance assertedly due on an alleged total sum of $1,488,383). (Am. Compl., ¶¶ 60-63.) The claim also overlaps with the fourth cause of action for extended performance costs, although this cause of action seeks such costs not only for the period from May 2010 to November 2010, but also for the period from November 2009 to May 2010. (Id., ¶ 63.) The fourth cause of action seeks these costs in the total amount of $978,228 (representing $735,149 from November 2009 to May 2010 plus $243,079 from May 2010 to November 2010). The sums sought on the third and fourth causes of action do not add up to the $1,190,032.38 change order total alleged on these motions.

In any event, as discussed above (supra, at 13), the parties agreed that no change orders would be recognized for damages due to delays, including damages for extended overhead. (Subcontract, § 5.3.) Payment for such change orders was not required by the Change Order Agreement, as defendants' liability under that Agreement was expressly limited to payment of

the certified payrolls for PEC and ATECH, plus payment of up to $1,000,000 toward certain obligations of PEC to material vendors and the electricians union.[5] (Change Order Agreement, ¶¶ 2-3.) The Change Order Agreement also provided that "no further payments shall be made to [PEC] for fee, profit, markup or general conditions." (Id., ¶ 2.)

Plaintiff's assertion that defendants misappropriated its retainage of $710,019.93 also does not support its claim that Dolner acted in bad faith. Paragraph 5 of the Change Order Agreement specifically stated that the payments made to plaintiff "may include portions of the amounts previously retained, provided however in no event shall the retainage level be less than One Percent (1%) of the adjusted Price." Defendants effectively concede that the retainage fell below the threshold by $112,867.62. (Report of Thomas Sinacore [Defs.' Expert], dated Oct. 30, 2015, at 22-24, 35 [Rubin Aff. In Supp., Ex. I].) This overuse of the retainage amounts, however, to less than three percent of the $3,878,742.18 payments made under the Change Order Agreement. Although defendants acknowledge that plaintiff may be entitled to recover the $112,867.62 sum (id.; Aff. of Gary Rubin In Opp., dated June 20, 2016, ¶ 16; see infra, at 21), the overuse of this sum does not rise to the level of a fundamental breach or intentional abandonment of the parties' agreements. Nor does it provide justification for exposing defendants to millions of dollars in unrelated delay damages.

Enforceability of the Change Order Agreement

Plaintiff seeks to set aside the Change Order Agreement for alleged "lack of

[5] Paragraph 3 of the Change Order Agreement expressly limited payment of certain obligations, including "payments to the Electricians Union," to the amount of $1,000,000. In its second cause of action to set aside the Change Order Agreement, plaintiff alleges that defendants failed to pay $164,843 for union benefits. (Am. Compl., ¶ 56.) Plaintiff, however, does not separately allege a breach of contract claim against defendants for union benefits, and does not, on this motion, seek judgment in that or any other amount for union benefits. In any event, the parties agreed in their Joint Statement that $181,324.57 was paid to satisfy obligations owed by PEC to union benefit funds and that the $1,000,000 sum in paragraph 3 of the Change Order Agreement was paid in full. (Jt. St., ¶ 15.)

consideration." (Pl.'s Memo. In Supp., at 14; Pl.'s Memo. In Opp., at 20.) As on the branch of its motion challenging the enforceability of the no-damage-for-delay clause in the Subcontract, plaintiff invokes the seven-month extension of the Project's completion date, the failure to process change orders, and the overuse of retainage. (Pl.'s Memo. In Supp., at 14-18; Pl.'s Memo. In Opp., at 20-22.) For the reasons stated above (supra, at 10-16), these acts do not support the relief sought.

Plaintiff's remaining arguments regarding payments to ATECH in the amount of $250,275.27, allegedly from funds allocated to plaintiff (Pl.'s Memo. In Supp. at 15, 17), and the outstanding dispute over the water damage claim (id., at 17), do not change this result. The Amended Complaint does not plead a claim for sums allegedly paid to ATECH from funds allocated to plaintiff. Nor is there support for this claim, as the Change Order Agreement specifically provided that defendants would pay ATECH's payroll. (Change Order Agreement, ¶¶ 1-2.)

As to the water damage claim, the court agrees with plaintiff that paragraph 6 of the Change Order Agreement does not limit its recovery solely to whatever amount the insurer might approve. Although the parties agreed that plaintiff would be paid "upon receipt" of the insurance proceeds, the parties acknowledged that the "claimed sum[]" was $182,268, not the $50,740 ultimately paid. (Change Order Agreement, ¶ 6.) Paragraph 6 thus merely fixed the time for, and did not limit the amount of, payment. As these sophisticated parties did not specifically provide that payment would include that limitation, the court will not do so under the guise of contract interpretation. (See generally Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004]; accord ACE Sec. Corp. v DB Structured Prods., Inc., 25 NY3d 581, 597

[2015].)

Even if the agreement did expressly predicate plaintiff's right to payment upon recovery from the insurer, it would be ineffective. (See West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co., 87 NY2d 148, 155-158 [1995] [holding that a subcontract provision which made payment from the owner to a general contractor a "condition precedent" to any payment to plaintiff, and did not merely fix a time for payment, was a pay-when-paid provision that was "void and unenforceable as contrary to public policy. . . ."]; accord Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., Inc., 139 AD3d 515, 516 [1st Dept 2016].)

The court, however, rejects plaintiff's contention that defendants' decision to contest plaintiff's right to the alleged balance owed on the water damage claim was a material breach of the Change Order Agreement or an exercise of bad faith. As discussed in defendants' expert's report, citing the insurer's findings, there is a bona fide dispute over the actual amount due. (See Sinacore Expert Report, at 25-29.) On this record, the court cannot determine whether plaintiff supplied the insurer with sufficient information to evaluate the claim. (See id.) The court also notes that plaintiff's claimed entitlement to approximately $196,000 for the work (i.e. the $50,740 amount paid by insurer plus the $145,287 that plaintiff claims remains unpaid)[6] deviates from the $182,268 amount reflected in the Change Order Agreement. (Change Order Agreement, ¶ 6; Jt. St., ¶ 17; Pl.'s Memo. In Supp., at 15.)

[6] Plaintiff's papers also contain inconsistences—albeit, minor—as to the actual amount claimed to be outstanding. (Compare Memo. In Supp., at 9, 15, 17 [alleging that a total of $196,028.19 was incurred for work performed as a result of water damage and that $145,287 remains outstanding], and Primiano Aff. In Supp., ¶¶ 50, 68 [same], with Am. Compl., ¶¶ 56, 65-67 [alleging that the total amount for work performed was $196,241 and the amount outstanding is $145,501], and Primiano Aff. In Supp., ¶ 69 [same].)

Plaintiff's Additional Claims

Plaintiff asserts entitlement to payment for other expenses in connection with the Project.[7] Specifically, plaintiff claims it is owed $260,835.34 for the first two weeks of PEC's February 2010 payroll (Pl.'s Memo. In Supp., at 6, 23); $168,435 for a January 2010 requisition (Primiano Aff. In Supp., ¶ 30, Conclusion ¶ 1); payment of its payroll taxes (Pl.'s Memo. In Supp., at 22-24); and $92,138 as the unpaid balance of the $468,274 of "Change Orders in Progress" referenced in the Contract Summary of paragraph 10 of the Change Order Agreement. As discussed above (supra, at 10, 16-18), plaintiff also asserts a claim for misappropriated retainage and water damage. Plaintiff is not entitled to judgment as to any of these claims.

First, plaintiff has not identified any contractual predicate for payment for the February 2010 payroll, which appears to be raised for the first time in its motion for summary judgment. It is not mentioned in the Change Order Agreement, which waived all prior claims. (Change Order Agreement, ¶ 7.) Plaintiff has not pointed to any other agreement between the parties covering this sum. To the contrary, the Amended Complaint alleges only that defendants agreed to finance plaintiff's payrolls commencing on February 17, 2010 (Am. Compl. ¶¶ 31-32), and does not particularize a claim for the $260,835.34. Nor does plaintiff pursue a legal argument in favor of the claim in any of its briefs.

Similarly, plaintiff has not identified any contractual predicate for payment for the January 2010 requisition claim, which is also not mentioned in the Change Order Agreement

[7] Plaintiff apparently does not rely on its entitlement to these other expenses in connection with its arguments, discussed above, as to the enforceability of the Subcontract and the Change Order Agreement. As also discussed above, some of these claims are not alleged in the Amended Complaint and are raised only in some of plaintiff's affidavits.

and is subject to the waiver provision of that agreement. (Change Order Agreement, ¶ 7.) While the first cause of action to foreclose on a mechanics lien alleges that prior to executing the Change Order Agreement, "Dolner, as a stopgap measure, advanced Primiano $200,000 from the $368,435 it owed Primiano on its [January] requisition," leaving $168,435 outstanding (Am. Compl., ¶ 30), plaintiff does not appear to seek relief for that amount in its Amended Complaint. Plaintiff also does not pursue a legal argument in favor of the claim in any of its briefs.

Plaintiff also does not assert that payment by defendants of the payroll taxes is required by any contractual provision. Rather, plaintiff relies on section 3505 (b) of the Internal Revenue Code (Pl.'s Memo. In Supp., at 22-24), which provides for liability only to the United States. Further, although the Amended Complaint pleads a claim for $379,318 in unspecified "taxes" (Am. Compl., ¶ 56), Mr. Primiano stated during his deposition that the $379,318 sum "derived from unpaid taxes for the months of January and February 2010." (June 16, 2015 Deposition Transcript of Alex Primiano, at 138-139 [Rubin Aff. In Supp., Ex. D] [June 16, 2015 Primiano Deposition Tr.].) Pursuant to paragraph 7 of the Change Order Agreement, plaintiff waived and released any claims predating that Agreement.

The second cause of action to set aside the Change Order Agreement alleges that defendants are "indebted to Primiano" for, among other things, the $92,138 change order balance. (Am. Compl., ¶¶ 56, 59.) Plaintiff does not separately plead this claim in connection with its breach of contract causes of action, and does not seek judgment on its motion for this sum. The $92,138 change order balance was identified as an item of damage by plaintiff's counsel at oral argument (Transcript of Oral Argument, at 27), and it is undisputed that this sum

remains unpaid. (Jt. St., ¶ 16.) This claim cannot, however, be resolved on this motion as issues of fact exist as to defendants' claim for an offset. (See infra, at 21-23.)

As discussed above (supra, at 16), plaintiff's motion for summary judgment also asserts a claim for misappropriated retainage. Notwithstanding the fact that plaintiff did not plead a claim for misappropriated retainage, defendants admit that the retainage was reduced below the 1% minimum permitted under the Change Order Agreement and that plaintiff may be entitled to $112,867.62. This claim also will not be resolved on this motion, given the issues of fact on defendants' claim for an offset.

Finally, plaintiff asserts a fifth cause of action for breach of contract for work performed as a result of water damage. As discussed above (supra, at 17-18), while plaintiff is entitled to payment under the Change Order Agreement for such work, a question of fact remains as to whether plaintiff supplied the insurer with sufficient information to evaluate the claim, and there is a bona fide dispute over the actual amount due.

The claims for water damage, misappropriated retainage, and unpaid change orders will therefore survive this motion for summary judgment. Plaintiff is granted leave to serve a Second Amended Complaint amending the fifth cause of action for breach of contract to assert not only the claim for water damage but also claims for misappropriated retainage in the amount of $112,867.62 and for an unpaid change order balance of $92,138.

Defendants' Offset Claim

Although defendants have not raised any claim or affirmative defense alleging an overpayment or offset in their answer, they now assert that any lien or indebtedness to plaintiff would be extinguished by plaintiff's erroneous submission of payroll requisitions which include

"general conditions costs," and which are barred by paragraph 2 of the Change Order Agreement. (Defs.' Memo. In Supp., at 19-20.)

In claiming an offset, defendants cite Mr. Primiano's deposition testimony that general conditions costs include administrative costs such as supervisory costs, and his identification of a number of supervisory employees on PEC's staff who serviced the Project. (Defs.' Memo. In Supp., 19-20; June 16, 2015 Primiano Deposition Tr., at 69; June 17, 2015 Deposition Transcript of Alex Primiano, at 204-205, 248-250 [Rubin Aff. In Supp., Ex. E].) Defendants assert that plaintiff's payroll requisitions include $511,862.24 in billings for those employees. (Defs.' Memo. In Supp., at 20; Sinacore Expert Report, at 42.)

In opposition, plaintiff asserts that the construction industry standard is that the costs for supervisory personnel who are assigned to a particular project are not part of general conditions costs. In particular, Plaintiff contends that general conditions costs include staff such as himself, secretarial employees, and estimators who are not so assigned, and expenses such as rent, utilities, and insurance. (Pl.'s Memo. In Opp., at 23-24; Primiano Aff. In Opp., ¶ 22.) Plaintiff also repeats its claim that the Change Order Agreement is unenforceable. (Pl.'s Reply Memo., at 10.)

In reply, defendants do not discuss Mr. Primiano's interpretation of industry custom or otherwise address plaintiff's arguments regarding the offset issue. The parties have cited no legal authority on the term "general conditions costs" and have not proffered expert testimony regarding the term.

As the parties have addressed the offset defense on the merits, the court will entertain the defense. (See generally Bautista v Archdiocese of New York, 161 AD3d 453, 454 [1st Dept

2018].) In view the parties dispute of fact, however, this defense cannot be resolved on this motion.

Lien Foreclosure

Plaintiff's first cause of action to foreclose on a mechanics lien will be dismissed. In opposing a summary judgment motion to cancel a lien, "the contractor, as plaintiff, bears the burden of establishing its entitlement to payment and must furnish proof to support its case, whether judgment is predicated on the Lien Law or the contract." (Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp., 25 AD3d 392, 393 [1st Dept 2006].) Plaintiff has not done so here. The amount of the lien as alleged in the Amended Complaint is $1,010,399, representing $3,889,141 inclusive of overhead and profit, less $2,878,742 paid. (Am. Compl., ¶¶ 35, 37.) In its interrogatory responses, plaintiff confirms that the $2,878,742 consists of the payment of the payrolls under the Change Order Agreement, admits that it received an additional $1,000,000 under that Agreement, and indicates that those two combined amounts ($3,878,742) are the basis for the calculation of the lien amount set forth in the Amended Complaint. (Pl.'s Response To Interrogatories, ¶ 15 [Rubin Aff. In Supp., Ex. Y].) Plaintiff also stipulated to receipt of those amounts in the Joint Statement. (Jt. St., ¶¶ 14-15.) Accordingly, plaintiff has failed to establish that there was any amount owing to support a lien.

Plaintiff now seemingly argues that the $3,889,141 is a sum completely separate from the $3,878,742 received pursuant to the Change Order Agreement, and represents the value of its extra work in and after March 2010. (Pl.'s Memo. In Opp., at 24-25.) The actual Notice of Lien (Mason Aff. In Supp., Ex. A) supplies yet different figures, alleging unpaid labor of $954,444 and unpaid materials of $143,760, for a total lien of $1,098,204. (Id., ¶ 5.) It also specifies that

the time period covered was October 27, 2008 to November 10, 2010. (Id., ¶ 6.) Given the conflict between its prior admissions and current position, and the conflict between the allegations of the Amended Complaint and the Notice of Lien, plaintiff has not met its evidentiary burden. Further, as discussed above, plaintiff has not substantiated any outstanding amount that could establish the basis for a lien other than the potential $145,000 claim relating to the water damage, the alleged overuse of retainage in the amount of $112,867.62, and the allegedly unpaid change order balance of $92,138 identified in paragraph 16 of the Joint Statement. And even if those amounts could be credited toward a lien, the lien would be voidable as exaggerated. (See Strongback, 25 AD3d at 393.)

Quantum Meruit

The claims based upon quantum meruit and unjust enrichment are barred by the existence of the contracts covering the subject matter of the dispute. (See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987].)

Liability of Hyatt Hotels Corporation

The claims as against Hyatt Hotels Corporation are dismissed. Mr. Primiano states in his affidavit that "the only 'Hyatt' representative" with whom he dealt on the Project was Jeffrey Hansen, and that Mr. Hansen "held himself as having authority to make decisions for, and act on behalf of, Hyatt. . . ." (Primiano Aff. In Opp., ¶ 5.) As Mr. Primiano acknowledges, Mr. Hansen has identified himself as an officer of "Hyatt Corporation." (Id., ¶ 4; Hansen Aff. In Supp., sworn to on May 13, 2016, ¶ 1.) Plaintiff fails to show that Mr. Hansen acted for Hyatt Hotels Corporation. That entity did not sign any of the operative agreements. Moreover, plaintiff does

not allege any theory of alter ego liability in the Amended Complaint, and, in its briefs, does not articulate any basis on which the entity Hyatt Hotels Corporation is liable.

ORDER

It is hereby ORDERED that defendants' motion for summary judgment is granted to the following extent:

1. The Amended Complaint as against defendant Hyatt Hotels Corporation is dismissed in its entirety;
2. The first cause of action for foreclosure of a mechanic's lien, the second cause of action to set aside the Change Order Agreement, the third cause of action for breach of the Change Order Agreement, the fourth cause of action for extended performance costs, the sixth cause of action for quantum meruit, and the seventh cause of action for unjust enrichment are dismissed in their entirety;
3. The fifth cause of action for breach of contract for work due to water damage is severed and shall continue; and it is further

ORDERED that defendants are granted leave to serve an Amended Answer pleading a defense of entitlement to an offset to any indebtedness to plaintiff for overpayment of supervisory costs in the amount of $511,862.24; and it is further

ORDERED that plaintiff's motion for summary judgment is denied, and it is further

ORDERED that plaintiff is granted leave to serve a Second Amended Complaint amending the fifth cause of action of the Amended Complaint for breach of contract to add a claim for misappropriated retainage in the amount of $112,867.62 and for unpaid sums due from

change orders pursuant to paragraph 10 of the Change Order Agreement in the amount of $92,138; and it is further

ORDERED that the parties shall appear for a pretrial conference on October 11, 2018 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
August 2, 2018

MARCY FRIEDMAN, J.S.C.