SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER J.S.C. Justice

PART 54

Index Number : 654407/2015
TRITON STRUCTURAL CONCRETE,
vs.
CITY OF NEW YORK, BY AND
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/2/18
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 68-106, 107

Answering Affidavits — Exhibits _____ | No(s). 109-316, 318, 320-322

Replying Affidavits _____ | No(s). 319, 327-334

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/17/18

HON. JENNIFER G. SCHECTER J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

TRITON STRUCTURAL CONCRETE, INC., Index No.: 654407/2015

Plaintiff, **DECISION & ORDER**

-against-

THE CITY OF NEW YORK, by and through the NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION,

Defendant.

----------X

JENNIFER G. SCHECTER, J.:

Defendant the City of New York (the City) moves, pursuant to CPLR 3212, for summary judgment dismissing the first cause of action for breach of contract by plaintiff Triton Structural Concrete, Inc. (Triton) as to (1) $3,128,584.11 for extra work claims and (2) the delay and acceleration claims in their entirety or, at the very least, $12,540,798 of the delay and acceleration claims. Triton opposes. The City's motion is granted in part.

I. Procedural History & Factual Background

This case arises from a hard-bid contract between the City and Triton to construct facilities at New York City beaches devastated by Superstorm Sandy in 2012 (the Contract) (Dkt. 106 [Joint Statement of Material Facts (JS)] ¶¶ 1-2; Dkt. 70 [Contract]).[1] The City awarded the Contract to Triton based on Triton's $105,003,443 bid (JS ¶ 3). The Contract required Triton to fabricate, deliver and install thirty-five modular buildings (Mods) to serve as lifeguard stations, restrooms, comfort stations and changing facilities at fifteen locations across Brooklyn, Queens and Staten

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

Island (the Project) (JS ¶¶ 2, 5-7). Prior to the bidding of the Project, an addendum to the Contract set the substantial completion date at 87 consecutive calendar days following the notice to proceed (Dkt. 297 at 2 [Feb. 14, 2013 addendum]; Dkt. 113 [Penick Aff.] ¶ 5). On March 6, 2013, the New York City Department of Design and Construction (DDC) issued a notice to proceed directing Triton to begin work on March 1, 2013 and to complete all work by May 24, 2013, which was fewer than 87 calendar days from either March 1 or March 6 (JS ¶ 4; Dkt. 71 [Notice to Proceed]).

A. The Contract

Article 11 of the Contract is titled "Notice of Conditions Causing Delay and Documentation of Damages Caused by Delay." Articles 11.1 and 11.2 provide:

> 11.1 After the commencement of any condition which is causing or may cause a ***delay in completion of the Work***, including conditions for which the Contractor may be entitled to an extension of time, ***the following notifications and submittals are required***:
>
> 11.1.1 ***Within seven (7) Days after the commencement of such conditions***, the Contractor must ***notify the Engineer in writing*** of ***the existence, nature and effect*** of such condition upon the approved progress schedule and the Work, and must state ***why and in what respects, if any, the condition is causing or may cause delay***.
>
> 11.1.2 If the Contractor shall claim to be sustaining ***damages for delay*** as provided for in this Article, ***within forty-five (45) Days from the time such damages are first incurred, and every thirty (30) Days thereafter*** for as long as such damages are being incurred, the Contractor shall submit to the Commissioner ***verified written statements of the details and the amounts of such damages***, together with ***documentary evidence*** of such damages ("***statement of delay damages***") as further detailed in section 11.6. The Contractor may submit any of the above statements within such additional time as may be granted by the Commissioner in writing upon written request therefor. On failure of the Contractor to fully comply with all of the foregoing provisions, such claims shall be deemed waived and no right to recover on such claims shall exist. ***Damages that the Contractor may claim in any action arising under or by reason of this Contract shall not be different from or in excess of the statements made and documentation provided pursuant to this article.***

> 11.1.3 Within 60 days of submission of the final verified statement of claims pursuant to Article 44, the Commissioner shall make a determination as to whether a compensable delay has occurred and, if so, the amount of compensation due the Contractor. Notwithstanding the above, ***the Commissioner may make a determination*** as to whether a compensable delay has occurred ***at any time after the Contractor's first submission of a statement of delay damages***.
>
> 11.2 Failure of the Contractor to strictly comply with the requirements of Article 11.1.1 may, in the discretion of the Commissioner, be deemed sufficient cause to deny any extension of time on account of delay arising out of such condition. ***Failure of the Contractor to strictly comply with the requirements of Article 11.1.1 and 11.1.2 shall be deemed a conclusive waiver by the Contractor of any and all claims for damages for delay arising from such condition and no right to recover on such claims shall exist*** (Contract at 20-21 [emphasis added]).

Pursuant to § 11.6, the "statement of delay damages" must provide

> For each delay; ***the dates of the claimed periods of delay*** and, in addition, a description of the ***operations*** that were delayed, the ***reasons*** for the delay and an ***explanation*** of how they were delayed.
>
> A ***detailed factual statement*** of the claim providing all necessary ***dates, locations and items of work*** affected by the claim.
>
> The ***amount of additional compensation*** sought and a breakdown of that amount into ***categories*** as described in Article 26.2, subject to the limitations set forth in 11.7 (Contract at 22 [emphasis added]).[2]

Section 11.4 of the Contract ("Compensable Delays") states as follows:

> 11.4.1 ***The Contractor agrees to make claim only for additional costs attributable to delay*** in the performance of this Contract

---

[2] Article 30.1 requires a detailed statement of damages caused by ***any*** act or omission of the City:

> If the Contractor shall claim to be sustaining damages ***by reason of any act or omission of the City*** or its agents, it shall submit to the Commissioner ***within forty-five (45) Days*** from the time such damages are first incurred … ***verified statements of the details and the amounts of such damages***, together with ***documentary evidence*** of such damages. … On failure of the Contractor to fully comply with the foregoing provisions, ***such claims shall be deemed waived*** … (Contract at 47 [emphasis added]).

> ***necessarily extending the time for completion*** of the Work ***or resulting from acceleration directed by the City and required to maintain the project schedule***, occasioned ***solely*** by any ***act or omission to act of the City listed below***. The Contractor also agrees that delay from any other cause shall be compensated, if at all, solely by an extension of time to complete the performance of the Work. (Contract at 21 [emphasis added]).

Sections 11.4.1.1-11.4.1.9 enumerate the City's acts and omissions that can cause compensable delays (*see id.*).[3] Section 11.4.2 further provides:

> The provisions of this Article apply only to ***claims for additional costs attributable to delay*** and do ***not preclude determinations by the Commissioner allowing reimbursements for additional costs for Extra Work*** pursuant to Articles 25 and 26 of this Contract. To the extent that ***any cost attributable to delay is reimbursed as part of a change order, no additional claim*** for compensation under this section ***shall be allowed*** (*id.* [emphasis added]).

"Work," "Contract Work" and "Extra Work" are defined as follows:

> 2.1.10 "Contract Work" shall mean ***everything required to be furnished and done by the Contractor by any one or more of the parts of the Contract*** referred to in Article 1, ***except Extra Work*** as hereinafter defined. ...
>
> 2.1.13 "Extra Work" shall mean ***Work other than that required by the Contract at the time of award*** which is authorized by the Commissioner pursuant to Chapter VI of this Contract. ...
>
> 2.1.33 "Work" shall mean all services required to complete the Project in accordance with the Contract Documents, including without limitation, labor, material, superintendence, management,

[3] These acts and omissions are: (1) "***failure*** of the City to take reasonable measures to coordinate and ***progress the Work***" (2) "***Extended delays*** attributable to the City in the review or issuance of change orders, in shop drawing reviews and approvals or as a result of the cumulative impact of multiple change orders, which have a verifiable impact on project costs" (3) "***unavailability of the site*** for an extended period of time" (4) "issuance by the Engineer of a ***stop work order***" (5) "Differing ***site conditions***" (6) "***Delays*** caused by the City's bad faith or its willful, malicious, or grossly negligent conduct" (7) "***Delays*** not contemplated by the parties" (8) "***Delays*** so unreasonable that they constitute an intentional abandonment of the Contract by the City" and (9) "***Delays*** resulting from the City's breach of a fundamental obligation of the Contract" (Contract at 21 [emphasis added]).

> administration, equipment, and incidentals, and shall include both Contract Work and Extra Work (*id.* at 10, 12 [emphasis added]).

Section 11.5 ("Non-Compensable Delays") describes that excess costs attributable to certain causes of delay—such as acts or omissions of third parties; situations within the contemplation of the parties at the time of entering into the Contract; "Extra Work" that does not significantly affect overall completion; and reasonable delays in the review, issuance or approval of change orders, field orders and shop drawings—are non-compensable (Contract at 21-22).

Section 11.7 ("Recoverable Costs") states that "[d]elay damages may be recoverable for the following costs actually and necessarily incurred in the performance of the Work: Labor; Materials; Equipment; Extended Field Office Costs; Extended Contract Site Overhead; Extended Home Office Overhead; and Insurance and Bond Costs" (Contract at 22-23).

Section 11.9 permits the parties to use written change orders to compensate Triton for delay damages, as follows: "If the parties ***agree*** that a ***compensable delay has occurred and*** agree on the ***amount of compensation***, payment may be made pursuant to a ***written change order***, ***subject to pre-audit*** by the ***Engineering Audit Officer***, and ***may be post-audited*** by the ***Comptroller*** and/or the ***Department***" (Contract at 23 [emphasis added]).

Article 25 ("Changes") provides:

> 25.1 Changes may be made to this Contract only as ***duly authorized in writing by the Commissioner in accordance with the Laws and this Contract***. All such changes, modifications and amendments will become a part of the Contract. Work so ordered shall be performed by the Contractor.
>
> 25.2 Contract changes will be made only for ***Work necessary to complete the Work included in the original scope of the Contract*** and/or for ***non-material changes to the scope of the Contract***. Changes are not permitted for any material alteration in the scope of Work in the Contract.
>
> 25.3 The Contractor shall be entitled to a ***price adjustment for Extra Work performed pursuant to a written change order***. ...

> 25.4 All payments for change orders are ***subject to pre-audit by the Engineering Audit Officer*** and ***may be post-audited by the Comptroller and/or the Department*** (Contract at 40 [emphasis added]).[4]

"Commissioner" is defined as "the head of the Agency that has entered into this Contract, or his/her duly authorized representative" (*id.* at 10).

Article 27 mandates alternative dispute resolution proceedings (ADR) for disputes about the scope of work, Contract interpretation, amounts to be paid for "Extra Work" or disputed Contract work as well as contractual conformity, acceptability and the quality of the performed work (Contract at 42-43 [§ 27.1.2]).[5] Pursuant to § 11.8, Article 11 determinations are not subject to Article 27 (*id.* at 23).

Article 33.1 authorizes the Commissioner to "review and make determinations on any and all questions in relation to this Contract and its performance" (Contract at 49).

A "No Estoppel" clause is set forth in Article 34 as follows:

> 34.1 ***Neither the City*** nor any Agency, officer, agent or employee thereof, ***shall be bound, precluded or estopped by any determination***, decision, ***approval***, order, letter, payment or certificate ***made or given under or in connection with this Contract by the City, the Commissioner, the Resident Engineer, or any other officer, agent or employee of the City*** ... :
>
> > 34.1.1 From showing the true and correct classification, amount, quality or character of the Work actually done; or ***that any such determination,*** decision, order, letter,

[4] The Contract defines "Laws" as "the Constitution of the State of New York, the New York City Charter, the New York City Administrative Code, a Statute of the United States or of the State of New York, a local law of the City of New York, any ordinance, rule or regulation having the force of law, or common law" (Contract at 10-11).

[5] Article 27 disputes "arise when the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Commissioner makes a determination with which the Contractor disagrees" (Contract at 43 [§ 27.1.2]). Such disputes are presented to the DDC Commissioner, are subject to review by the City Comptroller and are adjudicated by a "Contract Dispute Resolution Board," whose decision is final and binding on all parties and may be challenged only in a CPLR article 78 special proceeding (Contract at 43-46).

> payment or certificate ***was untrue, incorrect or improperly made in any particular***, or that the Work, or any part thereof, does not in fact conform to the requirements of this Contract (Contract at 50 [emphasis added]).

Article 56.1 of the Contract provides as follows:

> Any claim, that is not subject to dispute resolution under the PPB Rules or this Contract, against the City for ***damages for breach of Contract*** shall not be made or asserted in any lawsuit, unless the Contractor shall have ***strictly complied with all requirements relating to the giving of notice and information*** with respect to such claims, as herein before provided (Contract at 65 [emphasis added]).

A "Merger Clause" is set forth in Article 73, as follows:

> The Written Contract herein, contains all the terms and conditions agreed upon by the parties hereto, and ***no other agreement, oral or otherwise, regarding the subject matter of this Contract shall be deemed to exist or to bind any of the parties hereto, or to vary any of the terms contained herein*** (Contract at 76 [emphasis added]).

B. Performance of the Contract

The City retained Jacobs Engineer Group, Inc. (Jacobs) as construction manager and Garrison Architects (Garrison) as architect of record (JS ¶ 8; Dkt. 69 [O'Leary Aff.] ¶ 4). Triton retained Deluxe Building Systems (Deluxe) to fabricate the Mods at Deluxe's Pennsylvania factory under a subcontract originally valued at $14,684,388, which was subsequently modified to reduce the price to $7,065,491 and to shift procurement of materials to Triton (JS ¶¶ 9-10; Dkt. 296 [Subcontract]; O'Leary Aff. ¶ 6; Dkt. 72 [Mar. 5, 2013 change order]).[6]

Instead of the three months originally contemplated by the Contract, the Project took ***over three years*** to complete.[7] Neither party to this litigation is satisfied with the other's performance.

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[6] Once all the Mods shipped from the factory, Triton declared Deluxe in default and terminated the subcontract (O'Leary Aff. ¶ 28; Dkt. 87 [Aug. 8, 2013 Triton letter to Deluxe]). Triton filed a cross-claim against Deluxe in a presently-stayed, Project-related action in the U.S. District Court for the Middle District of Pennsylvania (Order Continuing Stay, *Int'l Metal Fusion Corp. v Triton Structural Concrete, Inc.*, Case No. 4:14-cv-00506 (MWB) [MD Pa June 7, 2018]).

[7] DDC finally accepted Triton's work in June 2016 (Def.'s Opening Br. at 18).

Triton believes that the City failed to live up to its obligation to provide complete and buildable plans and specifications at bid time. The resulting "design on the fly" process for the Mods allegedly caused performance inefficiencies and required Triton and Deluxe to perform duplicate work. Triton also believes that the City unreasonably insisted on a May 24, 2013 shipment date when the contract specified 87 days from the Notice to Proceed, or June 1, 2013, purportedly forcing Triton to perform costly and inefficient field work that it had originally planned to complete in the factory. Triton further alleges that the City agreed to compensate it through change orders for its claimed losses but that the City now belatedly insists on strict compliance with the Contract's notice provisions.

The City, in turn, blames Triton for the delays and increased costs as Triton was allegedly obligated to procure shop drawings needed to fabricate the Mods based on Project plans initially supplied by the City and designated "not for construction." The City bases its motion, however, on Triton's noncompliance with the Contract's procedural requirements for recovery of delay damages and extra work claims.

In support of its motion, the City submits an affidavit by John O'Leary, a DDC project manager assigned to the Project in June 2013 (Dkt. 69). In opposition, Triton submits affidavits by Steve Levan, a Triton executive (Dkt. 110); Stacey Coughlan, chief estimator for Triton who managed fabrication of the Mods at Deluxe's factory (Dkt. 112); Timothy Penick, CEO of Triton (Dkt. 113); and Anthony Lee, Triton's senior project manager for the Project (Dkt. 314). Triton also submits an affidavit and report from its litigation expert, Thomas Sinacore (Dkt. 111 [Sinacore Aff.]; Dkt. 316 [Sinacore Rpt.]).[8]

[8] Triton corrected technical defects related to the Coughlan, Penick and Lee Affidavits by filing certificates of conformity on March 27 and 28, 2018 (Dkts. 320-322) (*see Midfirst Bank v Agho*, 121 AD3d 343, 351-352 [2d Dept 2014]).

From the Project's inception, Triton communicated about progress with the City and Jacobs verbally and in writing. Triton identifies written notices regarding delays that were sent between March 7 and May 21, 2013 (*see* Pl.'s Opp. Br. at 18-19 [identifying exhibits]; Coughlan Aff. ¶ 15). For example, a March 26, 2013 Triton communication states:

> As previously requested both verbally and in writing, we need to have the entire design team available and working with us at the Deluxe Factory. The ***failure of the Mechanical, Electrical, Plumbing and Structural designers to be physically present at the Deluxe facility*** has, and is continuing to be, an ***impact to the project.*** Conference calls are not sufficient in order to expedite and ***move the project forward***.
>
> As promised to all bidders at the Pre-Bid meeting as well as throughout the bid process, the designers were to have been working with the contractor on an as-needed basis, 24/7. This has not been happening. ***The review and approval process for submittals and RFIs is running at an approximate turn around time frame of three days***. This is unacceptable and ***can not continue if we are to deliver the project on schedule***.
>
> This memorandum serves as our formal demand notice for the Design Team, including all disciplines, to mobilize onsite to the Deluxe Factory no later than tomorrow, Wednesday, March 27th (Dkt. 117 [Triton email to Jacobs and DDC] [emphasis added]; *see also, e.g.*, Dkt. 115 [Mar. 7, 2013 Triton email to Jacobs] at 2 [requesting 24/7 access to "Design Team" and identifying "delays relating to the design"]).

As another example, Triton sent a May 6, 2013 notice to Jacobs stating:

> Triton has been ***directed by DDC and Jacobs to ship the units regardless of the state of finish***. … Our concerns include …:
>
> The units will be installed on piles elevated 8'0" to 10'0" above the ground, ***making access an issue***.
>
> The units will be spread out along a wide area of public beach, further ***inhibiting access*** and creating a supervision problem.
>
> The units will be out in the elements which ***may impact work***.
>
> The units will be worked on by crafts people unfamiliar with the routine which will ***delay progress***.

> The units will be surrounded by numerous other site construction activities which may cause conflicts and ***impact progress*** to both the site and modular construction (Dkt. 116 [email] [emphasis added]).

Triton employees attest to verbal assurances by City representatives regarding Project specifications, the Contract's notice requirements and Triton's added costs (Penick Aff. ¶ 17; Coughlan Aff. ¶ 16; Levan Aff. ¶ 6). Moreover, DDC and Jacobs employees testified that Commissioner Resnick and other DDC employees told Triton not to worry about Project specifications, that Triton would not be hurt and that specific costs would be paid (Dkt. 327 at 153 [Simmler Dep. 152:3-19]; Dkt. 333 at 164-65, 169 [Romeo Dep. 163:4-164:11, 168:14-18]; Dkt. 334 at 94-95 [Hernandez Dep. 93:15 - 94:14]).

In early May 2013, Triton and Jacobs discussed ongoing difficulties with the Project and DDC's verbal commitment to pay certain extra costs (Dkt. 311 [May 5, 2013 Triton email to Jacobs]; Penick Aff. ¶ 10). With DDC input, Triton and Jacobs drafted proposed change order language and a spreadsheet summary of estimated costs (Dkt. 302 [May 7 and May 8, 2013 emails between Jacobs and Triton] at 1-3; Dkt. 313 [May 9, 2013 email from Jacobs to Triton]; Dkt. 189 [May 11, 2013 email from Jacobs to Deluxe and Triton] at 1-3).

On May 16, 2013, DDC sent Triton a letter (the May Letter) signed by Deputy DDC Commissioner Burney on behalf of DDC Commissioner Resnick (O'Leary Aff. ¶ 19; Dkt. 81 [May Letter]). The May Letter states:

> This is to acknowledge that due to the unique and highly time sensitive nature of this project, Triton and its subcontractors, and in particular Deluxe Building Systems, ***has performed and continues to perform*** certain items of work that ***may be beyond the scope of the contract*** between DDC and Triton.
>
> Owing to the City's extremely aggressive delivery schedule, the ***design documentation*** issued for the 35 modular units ***was not fully complete at time of bid***, and a number of ***design changes had to be made during construction***, which ***may have added to*** Triton's (and Deluxe's) ***cost and other changed conditions. These changes***

> ***include***, but are not limited to, the addition of a reinforced concrete floor system, and the addition of seismic bracing and reinforcements to the steel frames and ***the items addressed in the draft change order language attached as Exhibit A***.
>
> It is our understanding that ***the change order proposal for these items is currently being drafted***, and forwarded to the City ***for review*** (with associated backup documentation).
>
> As discussed this afternoon, ***Triton's change order will be expeditiously reviewed and negotiated*** and ***we are committed to a fair and reasonable settlement*** on the value of the change (May Letter at 3 [emphasis added]).

Exhibit A, which was attached to the May Letter and contained the draft change order language prepared by Triton and Jacobs, began as follows:

> This Change Order is necessary because ***constructible plans and specifications*** for the modular units prepared by Garrison Architects ***were not complete at bid time***. In addition, the ***aggressive delivery schedule*** required to meet the City's completion date created a situation in which the contractor incurred ***additional cost to expedite*** the work (*id.* at 2).

Exhibit A states that "additive items" to the Contract include "any and all costs over the [Triton-Deluxe] subcontract price … to supplement the labor, materials and equipment originally contemplated in the subcontract" for various items, including "[e]xtra time, labor, equipment and overhead costs (i.e. General Conditions) for the completion of the work, to make up for and to accelerate to compensate for late deliveries, and to timely finish miscellaneous scope and punch list work" (*id.*). After sending the May Letter, Burney asked Triton to continue working while any change orders were reviewed (Dkt. 97 at 59-60 [Burney Dep. 58:24-59:13]).

On May 21, 2013, representatives from Triton and the City met at Deluxe's Pennsylvania facility (Penick Aff. ¶ 12). At that meeting, a City representative supplied Penick with a proposed change order (the May 21 PCO) to "provide all labor, material, and equipment to perform … acceleration of schedule to meet required mayoral commitment date" at a proposed cost of $12,540,798, attaching a summary of increased costs similar to estimated cost spreadsheets

previously prepared by Triton and Jacobs (*id.*; Dkt. 264 [May 21 PCO]). Penick immediately signed and returned the May 21 PCO to the City (Penick Aff. ¶ 12).[9] The May 21 PCO includes several form notices, including the following statements:

> 1. Contractor shall not proceed with this work until issued a Contract Change or otherwise directed by the Commissioner. ***All work begun before Contract Change is registered by the Comptroller's Office is done at the Contractor's own risk***.
>
> 2. All work is ***subject to audit*** by the Department's ***Engineering Audit Officer*** and to ***post-audit*** by the ***Comptroller's Chief Engineer***.

(May 21 PCO at 1 [emphasis added]). Commissioner Resnick told Penick that Triton could bill off the May 21 PCO in "about two weeks" (Dkt. 96 at 30-31 [Penick Dep. 156:19-25]). Nonetheless, DDC never countersigned the May 21 PCO (O'Leary Aff. ¶ 22).

By May 24, 2013, 23 of the 35 Mods were delivered from Deluxe's factory to the beach sites in "various states of completion" and rendered usable for the summer with temporary finishes (Coughlan Aff. ¶ 12). In a June 7, 2013 meeting, Resnick and Jacobs told Triton that the parties would collaborate to ensure that added costs were reimbursed; Jacobs and DDC reinforced this conciliatory message in follow-up emails to Triton (Levan Aff. ¶ 7; Dkt. 269 [June 11, 2013 Jacobs email to Triton]; Dkt. 270 [June 11, 2013 DDC email to Triton]; Dkt. 275 [June 15, 2013 Jacobs email to Triton]). Contemporaneous emails exchanged between Jacobs and DDC employees, however, indicate their intent to ***aggressively*** negotiate outstanding change orders with Triton (Dkts. 271-274 [emails dated between June 13 and June 16, 2013]). A Jacobs employee testified, moreover, that continued delays in change order approvals were due to a lack of funding—of which Triton was not informed (*see* Dkt. 327 at 222-23 [Simmler Dep. 221:6-222:14]).

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[9] The City does not dispute Penick's account of the May 21 meeting or the provenance of the May 21 PCO (*see Costello Assocs., Inc. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984] ("Failure to contradict facts is an admission"), *appeal dismissed*, 62 NY2d 942 [1984]).

On July 10, 2013, Triton submitted a notice of delay damages to DDC (O'Leary Aff. ¶ 27; Dkt. 305 [Notice of Delays]). O'Leary attests that this was Triton's "first notice of delay damages" (O'Leary Aff. ¶ 27). On the same day, Triton requested additional time to submit a verified statement of claim (Dkt. 86 [Request for Additional Time]).[10]

On August 2, 2013, Tim Penick emailed Commissioner Resnick, requesting as follows:

> ***Instead of moving forward in submitting a verified claim at this time***, and because of the unique schedule to complete this Project's work, ***we are requesting that, by your acknowledgement below***, the DDC agrees to allow Triton to hold off on submitting a verified statement of claim for all delays and associated requests for damages and time until November 15, 2013. ...
>
> ***Should the DDC agree to this request via acknowledgement below***, it is understood that DDC is waiving only defenses to the time and procedural requirements of Articles 11 and 30 but is reserving all its rights to dispute, in substance, the basis of Triton's delay claim (Dkt. 265 [email] at 1 [emphasis added]).

Above the acknowledgement signature line, the email stated:

> ***We hereby acknowledge and agree to extend Triton's requirement for submitting a verified statement of claim for all delay related time and costs incurred on the referenced Project*** until and including November 15, 2013, as set forth in more detail and per the conditions above (*id.* at 2 [emphasis added]).

Penick sent a follow-up email on August 7, 2013 (Dkt. 266 [email]; *see* Penick Aff. ¶¶ 18-19).

On August 7, 2013, Resnick responded to Penick as follows:

> Give me until tomorrow on this, thanks. I don't foresee any problem with this approach, but need some input from others here. ***Typically we just get a one or two page letter every 30 days indicating that impacts are continuing, but cannot be quantified as yet, and that suffices***, but I will let you know more precisely what would be acceptable as soon as I hear back from our folks, which as I say, should be tomorrow (Dkt. 267 [email] at 1 [emphasis added]).

[10] Around July 24, 2013, Triton submitted another proposed change order, PCO 119 (O'Leary Aff. ¶ 22). PCO 119 claims Triton's factory costs—$15,357,006.19—above Deluxe's original contract price (Dkt. 84 [PCO 119]). DDC never signed it (O'Leary Aff. ¶ 22).

In a same-day, follow-up email to Penick, Resnick stated as follows:

> ***Your July 10 letter is fine, just keep sending us that letter every 30 days***, noting that the itemized areas of impact are still affecting you and that once costs can be fully assessed you will send us the final verified notice of claim with the dollar amounts claimed (Dkt. 268 [email] at 1).

There is no evidence that Resnick or anyone at DDC actually signed the acknowledgement.

Around August 8, 2013, Triton submitted a proposed change order (PCO 162) seeking $3,128,584.11 in alleged additional costs, consisting of over $2.1 million in labor costs and over $800,000 in materials costs relating to 15 items[11] (O'Leary Aff. ¶ 29; Dkt. 88 [PCO 162] at 1, 13-14). PCO 162 stated that "[t]he scope of this change order ***does not include any costs or claims recoverable under Article 11*** of the Contract (caused by delays, ***acceleration*** and/or disruption on the Project)" (PCO 162 at 1-2 [emphasis added]). The accompanying letter described its purpose as providing "narrative and cost impact of (15) discrete ***changes*** directed in the factory" (*id.* at 2 [emphasis added]). It also stated that labor hours shown did "***not include*** potential downtime and ***acceleration***" (*id.* at 3 [emphasis added]). PCO 162 included a reservation of rights: "Execution of this change order does not imply or expressly waive Triton's rights to recover any delay damage costs or claims recoverable under Article 11 of the contract (caused by delays, acceleration and/or disruption on the project)" (*id.* at 1-2). DDC rejected PCO 162 (O'Leary Aff. ¶ 30).

Triton's July 31, 2015 final verified statement of claims sought $41,918,180 over the contract price (Dkt. 89 [Final Verified Statement of Claims] at 9). Around August 25, 2016, Triton amended it to claim $45,181,683 (Dkt. 90 [Amended Verified Statement of Claims] at 9).

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[11] These items are: ADA restrooms, light troughs, structural steel penetrations, surface mounted soap dishes, windows, tile, stainless steel details, continuous welding and stiffeners, condenser room waterproofing and paint, condenser gate, lighting, wall layout, installing plywood at openings, MEP and skylights - flashing elements (Coughlan Aff. ¶ 13).

C. Procedural History and Causes of Action

Triton commenced this action on December 28, 2015 (Dkt. 1). Its original complaint asserted a single cause of action for breach of contract (First Cause of Action), claiming damages of $35 million (Complaint at 5-6).[12] Triton filed an amended complaint (Dkt. 44, AC) on June 13, 2017. In its amended complaint, Triton claimed damages of $38.7 million for the First Cause of Action and added a cause of action for breach of contract (Second Cause of Action) for the City's alleged withholding of $2,188,000 of the Contract price (AC at 4-5). On June 14, 2017, the City moved to dismiss the Second Cause of Action (Dkt. 48 [Notice of Motion Seq. No. 004]). On March 15, 2018, the City's motion to dismiss was denied due to questions of fact as to whether the Second Cause of Action is subject to ADR in accordance with Article 27 of the Contract (Dkt. 317 [Decision and Order on Motion Seq. No. 004]).

Following fact and expert discovery, Triton filed a note of issue (Dkt. 66) with jury demand on November 22, 2017. On February 6, 2018, the City made this motion for summary judgment (Dkt. 68 [Notice of Motion Seq. No. 005]).

D. Triton's Damages Claims

Triton characterizes its damages for its First Cause of Action, totaling $46,579,166.65, as follows: (a) acceleration damages of $34,172,185.24 for factory and field damages and (b) delay damages of $12,406,981.41 for extended Project duration and an April stop work order (Pl.'s Opp. Br. at 13; Dkt. 316 [Sinacore Rpt.] at 56-60). Factory damages of $13,127,249.14 purport to reflect Triton's cost to fabricate the Mods above Deluxe's original contract price (Dkt. 316 [Sinacore

[12] In 2016, Triton filed a second action against the City, which was assigned index number 656321/2016 (the 2016 Action). Following the City's motion to consolidate the 2016 Action with this one, the parties stipulated to permit Triton to file an amended complaint in this action to include the claim from the 2016 Action (i.e., for withholding a portion of the Contract price) (*see* Dkt. 46 [June 13, 2017 so-ordered stipulation]).

Rpt.] at 54-56). Field damages of $21,044,936.10, submitted by Triton as CO (Change Order) 93, purport to reflect Triton's added costs from the City's directive to ship incomplete Mods and to complete them in the field instead of at the factory as Triton had planned to do (*id.* at 57-58). Extended Project duration damages of $12,291,004 purport to reflect costs relating to Triton's extended allocation of resources to the Project past the original Contract period (*id.* at 60-66). Finally, stop work order damages of $115,977.23 reflect costs (plus contractual markups) incurred by Triton's contractor for an April 7, 2013 work stoppage ordered by DDC, the costs of which were previously submitted as CO 139/RCO 104 and rejected with the direction that "[w]ork delays and stoppages should be entered as delay claims not change orders" (*id.* at 59).

II. Discussion

A. Legal Standard – Summary Judgment

Summary judgment may be granted only in the absence of any triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant bears the burden of making a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The motion must be "supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions" (CPLR 3212[b]). Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

Once the movant has laid bare its proof, the opposing party is compelled to do the same (Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 38 [1st Dept 2011]). One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the claim rests or must demonstrate an acceptable excuse for failure to offer admissible evidence (*Zuckerman*, 49 NY2d at 562). Failure to contradict facts is an admission (*Costello Assocs., Inc. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984],

appeal dismissed 62 NY2d 942 [1984]). The evidence on the motion must be examined in the light most favorable to the opponent of summary judgment (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact following the court's examination of the documents submitted in connection with the motion (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Mere conclusions, unsubstantiated allegations or expressions of hope, however, are insufficient to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). Indeed, summary judgment cannot be defeated by the "shadowy semblance of an issue" (*Jeffcoat v Andrade*, 205 AD2d 374, 375 [1st Dept 1994]).

B. Extra Work Claims

The City moves for dismissal of $3,128,584.11 of Triton's claim for damages under its first cause of action as outside this court's subject matter jurisdiction pursuant to Article 27 of the Contract, which mandates ADR for disputed work. This dollar amount reflects Triton's claim in PCO 162, which listed 15 discrete items as "Extra Work." Triton argues that PCO 162 does not "conclusively establish" that these costs are ***not*** the result of acceleration.[13] Triton propounds testimony from its own employees (Coughlan and Penick) and expert (Sinacore) that—in conclusory fashion—categorizes them as acceleration costs (Coughlan Aff. ¶ 14; Penick Aff. ¶ 15; Dkt. 98 at 92 [Sinacore Dep. 92:7-24]).[14] Triton fails to demonstrate a triable issue of material fact.

[13] Triton does not argue that the language in PCO 162 purporting to reserve its rights under Article 11 negates the statements regarding the specific cost items claimed in the change order.

[14] Coughlan characterizes these costs as resulting from "the acceleration experienced by Triton" (Coughlan Aff. ¶ 14). Penick explains that PCO 162 reflected an attempt "to get some money for the acceleration paid to Triton by identifying what they could describe as 'extra work' … that flowed from the acceleration" (Penick Aff. ¶ 15). Similarly, Triton's expert characterized PCO 162 as "inaccurate" and a "completely transactional" attempt to recoup some of the acceleration costs claimed in prior change orders (Dkt. 98 at 92 [Sinacore Dep. 92:7-24]).

Under Article 27 of the Contract, claims for "Extra Work" or any disputed work performed under the Contract are subject to ADR. New York courts readily enforce agreements to resolve disputes through ADR (*see Laquila Constr., Inc. v New York City Tr. Auth.*, 282 AD2d 331, 332 [1st Dept 2001]). Failure to comply with contractual ADR provisions warrants dismissal (*see Acme Supply Co. v City of New York*, 39 AD3d 331, 332 [1st Dept 2007]). According to the Contract, only Article 11, which governs delay and acceleration claims, can exempt disputed work from Article 27's ADR requirements.

The City established that the items claimed in PCO 162 are subject to Article 27's ADR requirement. The City's failure to approve PCO 162 places the claimed items—costs incurred for "scope changes," materials and labor (*see* PCO 162 at 1-2)—squarely in Article 27's ambit as "disputed work," unless demonstrated to be within Article 11's scope. PCO 162 itself is prima facie evidence that the 15 items are not only "disputed work" within the ambit of Article 27 of the Contract, but in Triton's ***own words***, are "***not*** .... costs or claims recoverable under Article 11 (***caused by delays, acceleration*** and/or disruption on the Project)" (PCO 162 at 2 [emphasis added]). Finally, nothing in PCO 162 suggests that the costs resulted "from acceleration directed by the City and [were] required to maintain the project schedule" and thereby rendered subject to Article 11's carveout (Contract at 21).

The testimony of Coughlan, Penick and Triton's expert that PCO 162's costs resulted from acceleration is unavailing, as it is unsupported, conclusory and nonprobative (*see Castro v New York Univ.*, 5 AD3d 135, 136 [1st Dept 2004] ("affidavits devoid of evidentiary facts and consisting of mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary relief"); *see also Zuckerman*, 49 NY2d at 562 [unsubstantiated allegations and conclusions insufficient to bar summary judgment]). While testimony that PCO 162 reflected

efforts to recoup acceleration costs suggests that Triton should, perhaps, not be ***precluded*** from refuting its express statements that the items were ***not*** recoverable under Article 11, the testimony does not constitute probative evidence that the 15 ***specific items***, in fact, ***were*** acceleration costs. Indeed, Triton fails to propound ***any affirmative evidence***—except conclusory testimony—regarding the items' nature. Triton's hope that evidence not presently before the court as to the "true nature of the damages" will prove its point is not a basis for denying the motion (*see Zuckerman*, 49 NY2d at 562 [expressions of hope insufficient to bar summary judgment]).

Partial summary judgment is therefore granted to the City on the itemized costs claimed by Triton in PCO 162. Pursuant to Article 27 of the Contract, Triton is precluded from recovering damages for any of the items listed in PCO 162 in this plenary action for breach of contract (*see JCH Delta Contracting, Inc. v City of New York*, 44 AD3d 403, 404 [1st Dept 2007] [affirming dismissal of cause of action for extra and disputed work for failure to comply with contract's ADR procedures]). [15]

C. Delay and Acceleration Claims

The City seeks dismissal of Triton's delay and acceleration claims, or portions thereof, alleging that Triton failed to strictly comply with the Contract's Article 11.1.1 and 11.1.2 notice requirements. Triton argues (1) the notice requirements apply only to delay damages and not acceleration damages, (2) it complied with the notice requirements, (3) the May Letter modified the Contract and (4) other written and verbal assurances by and on behalf of the City exempted it from the notice requirements.

[15] Rather than ***automatically*** deducting the amount claimed in PCO 162 from any future damages award, the court will require the parties to conform their trial presentations to exclude the 15 items listed in PCO 162 consistent with this decision.

Notice and reporting requirements, common in public works contracts, are "important both to the public fisc and to the integrity of the bidding process" because they "provide public agencies with timely notice of deviations from budgeted expenditures or of any supposed malfeasance, and allow them to take early steps to avoid extra or unnecessary expense, make any necessary adjustments, mitigate damages and avoid the waste of public funds" (*A.H.A. Gen. Const., Inc. v New York City Hous. Auth.*, 92 NY2d 20, 33-34 [1998]). "Where a construction contract contains 'a condition precedent-type notice provision setting forth the consequences of a failure to strictly comply,' strict compliance will be required" (*Peter Scalamandre & Sons, Inc. v FC 80 Dekalb Assoc., LLC*, 129 AD3d 807, 808 [3d Dept 2015], quoting *Northgate Elec. Corp. v Barr & Barr, Inc.*, 61 AD3d 467, 468-69 [1st Dept 2009]; *see Schiavone Constr. Co. v City of New York*, 106 AD3d 427, 428 [1st Dept 2013]; *Schindler El. Corp. v. Tully Constr. Co.*, 139 AD3d 930, 931 [2d Dept 2016]). Defendant's actual knowledge is not sufficient to relieve plaintiff of contractual notice requirements (*see S.J. Fuel Co. v New York City Hous. Auth.*, 73 AD3d 413, 413-14 [1st Dept 2010]; *Schindler*, 139 AD3d at 931-32; *Ridley Elec. Co. v Dormitory Auth. of the State of N.Y.*, 152 AD3d 1129, 1132 [3d Dept 2017]). A plaintiff may be nevertheless excused from strict compliance where "it would suffer a disproportionate forfeiture, and the occurrence of the condition was not a material part of the agreed exchange" (*Danco Elec. Contractors, Inc., v Dormitory Auth. of the State of N.Y.*, 162 AD3d 412, 413 [1st Dept 2018], citing *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995]).

i. Applicability of Articles 11.1.1 and 11.1.2 to the Claimed Damages

As an initial matter, Triton wrongfully asserts that ***no*** notice of its asserted acceleration damages of over $34 million is necessary because Articles 11.1.1 and 11.1.2 mention "delay" and not "acceleration." But Article 11.1.2 states that Triton cannot claim damages "in ***any action***

arising under or by reason of this Contract" differing from or exceeding the statements and documentation of delay damages made pursuant to Article 11.1.2 (Contract at 20 [emphasis added]). Additionally, the Contract's sole reference to acceleration costs is in Article 11.4, which is titled "Compensable ***Delays***," and provides:

> The Contractor agrees to make claim only for ***additional costs*** attributable to delay in the performance of this Contract necessarily extending the time for completion of the Work or ***resulting from acceleration directed by the City and required to maintain the project schedule, occasioned solely by any act or omission to act of the City listed below*** (Contract at 21 [emphasis added]).

The Contract then proceeds to list acts and omissions by the City that relate to ***delay*** rather than ***acceleration*** (*id.*). The ***only*** compensable amounts under Article 11 are for (City-caused) ***delay***, such amounts falling in two categories: (a) costs incurred due to necessary ***extensions*** to a contemplated schedule; and (b) costs to ***catch-up*** to a contemplated schedule. As the Court of Appeals recognized: "All ***delay damage*** claims seek compensation for increased costs, … whether the costs result because it takes longer to complete the project or because overtime or ***additional costs are expended in an effort to complete the work on time***" (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 313–14 [1986] [emphasis added] [holding that "conduct of the city during the contract period which made completion more expensive because it made performance of the contract inefficient and disorganized" fell within contract's exculpatory clause for ***delay damages***]). All amounts compensable under Article 11 (including 11.4) thus reflect ***delay damages*** for "compensable delays" and therefore require adherence to the Article 11.1.1 and 11.1.2 notice requirements.[16] In any event, were Triton's "acceleration damages" to fall outside Article 11's purview, such damages would be subject to Article 27 ADR as "disputed work."

[16] Even if this were not the case, Article 30.1—which, like Article 11.1.2, also requires 45 days notice—is ***not limited to delay damages*** (*see* Contract at 47).

ii. Compliance with Article 11.1.1 (Notice of Conditions Causing Delay)

The City argues that Triton failed to submit ***any*** delay or acceleration notices until ***after*** the seven-day initial notice period set forth in Article 11.1.1 of the Contract passed. It asserts that because Triton did not submit a "Notice of Delay" under Article 11 until July 10, 2013, Triton's ***entire claim*** for delay and acceleration damages must be dismissed pursuant to Article 11.1.2 (and Article 11.2). As the City rests its argument on Triton's alleged failure to submit ***any*** Article 11.1.1 notices until July 10, 2013 and fails to address the substance of the specific communications identified by Triton in opposition,[17] Triton successfully identifies a disputed issue of material fact as to its compliance with Article 11.1.1.

Triton argues that it notified the City on numerous occasions, prior to July 10, 2013, of conditions causing or that may cause delay. For example, the March 26, 2013 notice to Jacobs discusses the "failure of the Mechanical, Electrical, Plumbing and Structural designers to be physically present at the Deluxe facility" and the "approximate turn around time frame of three days" for review and approval of "submittals and RFIs," further stating that "[t]his is unacceptable and can not continue if we are to deliver the project on schedule" (Dkt. 117 [Communication to Jacobs]). In another example, a May 6, 2013 notice to Jacobs expresses concerns that the City's instructions to ship the units prior to their factory completion will delay or impact progress (Dkt. 116 [Communication to Jacobs]). Triton identifies additional communications dated between March 7 and May 21, 2013 (*see, e.g.*, Dkt. 115 [Mar. 7, 2013 Triton email to Jacobs] at 2

[17] The City, which has the heavy burden on this motion, also does not identify any specific "commencement of any condition which is causing or may cause a delay" for which Triton failed to give Article 11.1.1 notice within 7 days (*see 1199 Hous. Corp. v International Fid. Ins. Co.*, 14 AD3d 383, 384 [1st Dept 2005] [holding that "proponent of the agreement is required to demonstrate fulfillment of the condition (precedent) only to the extent specified by the party asserting noncompliance"]).

[requesting 24/7 access to "Design Team" and identifying "delays relating to the design"]; *see also generally* Pl.'s Opp. Br. at 18-19 [identifying additional exhibits]).

The City maintains that these emails and other communications did not "strictly comply with the Contract" because they did not provide "a single notice specifically pursuant to Article 11.1.1" that would be distinguishable from the "myriad of Project-related communications" and that would "properly alert DDC" (Def.'s Reply Br. at 14). The court disagrees.

Article 11.1.1 states:

> 11.1 After the ***commencement of any condition which is causing or may cause a delay in completion of the Work***, ... the following notifications and submittals are required:
>
> 11.1.1 ***Within seven (7) Days*** after the commencement of such conditions, the Contractor must ***notify the Engineer in writing*** of ***the existence, nature and effect*** of such condition upon the approved progress schedule and the Work, and must state ***why and in what respects, if any, the condition is causing or may cause delay*** (Contract at 20 [emphasis added]).

There is no contractual requirement that Article 11.1.1 notices refer to Article 11 of the Contract or to "delay damages." Nor is there a requirement that such notices have a sole purpose (i.e., that they ***not*** serve any other Project-related purpose) or that the City must have been "properly alert[ed]" by them. The notices must only "notify the Engineer in writing of the existence, nature and effect" of the conditions and state "why and in what respects ... the condition is causing or may cause delay." There is an issue of material fact as to whether written communications to Jacobs and other City representatives[18] on the Project submitted between March 7 and May 21, 2013 fulfilled Triton's notice obligations under Article 11.1.1 of the Contract.

[18] The City does not argue that Jacobs or other recipients of the alleged Article 11.1.1 notices were not the "Engineer" specified by the Contract (*see* Contract at 10 [defining "'Engineer' or 'Architect' or Project Manager'" as "the person so designated in writing by the Commissioner to act as such in relation to this Contract, including a private Architect or Engineer or Project Manager, as the case may be"]).

iii. Compliance with Article 11.1.2 (Statement of Delay Damages)

The City argues that Triton did not submit the statement of delay damages required by Article 11.1.2 of the Contract until July 10, 2013, thereby waiving damages incurred more than 45 days before that date (prior to May 26, 2013). Consequently, the City asserts, the amount claimed to "provide all labor, material, and equipment to perform … acceleration of schedule to meet required mayoral commitment date" in the May 21 PCO—$12,540,798—was waived by failure to comply with Article 11.1.2 and cannot be recovered. Triton argues that (1) the July 10, 2013 Notice of Delays complied with Article 11.1.2 because no delay damages were incurred until June 1, 2013 and because no acceleration damages were incurred until the City failed to process the May 21 PCO pursuant to the May Letter; (2) the May 21 PCO and related summaries of estimated costs (Dkt. 189 and 313) dated earlier in May 2013 complied with Article 11.1.2; (3) the May Letter modified the notice requirement; and (4) Triton's compliance was excused.

Triton first asserts that no delay or acceleration damages were incurred until June 1, 2013. Triton's expert describes delay damages of $115,977.23 for CO 139/RCO 104 and $12,291,004 for the extended duration of the project past June 1, 2013. As the City's reply brief does not address the date these damages were incurred, the court will not grant summary judgment as to them.[19]

Triton argues that the remaining $34,172,185.24 in damages, which it characterizes as acceleration damages, were not incurred until the City failed to process the May 21 PCO. Triton's proposition that damages are not incurred when associated costs are incurred is flatly contradicted by the Contract. Article 11.7.1 describes that "[d]elay ***damages*** may be recoverable for the following ***costs*** actually and necessarily ***incurred***" (emphasis added) and Article 11.1.2 states that

[19] To the extent that Triton incurred the costs claimed in CO 139/RCO 104 before May 26, 2013 and failed to comply with Article 11.1.2 within 45 days, Triton may not recover them.

the statements of delay damages must be submitted "within forty-five (45) Days from the time such ***damages are first incurred***" (*see State v R.J. Reynolds Tobacco Co.*, 304 AD2d 379, 379-80 [1st Dept 2003] [identical phrases in different contract subsections should "presumptively be given the same meaning"]; *Finest Inv. v Sec. Trust Co. of Rochester*, 96 AD2d 227, 229-230 [4th Dept 1983] ["We may presume that the same words used in different parts of a writing have the same meaning"], *affd* 61 NY2d 897 [1984]). Moreover, Triton agreed to "make claim only for additional ***costs*** attributable to delay … or resulting from acceleration …" (Contract at 21 [§ 11.4.1]). Thus, delay and acceleration ***damages*** are first incurred when such ***costs*** are first incurred, ***not*** when the City refuses to reimburse them or reneges on a purported agreement to do so.[20]

Triton's second argument—that its pre-July 10, 2013 notices included all the requisite elements—fails due to the Contract's requirements for the statement of delay damages. Section 11.6 of the Contract requires the "statement of delay damages" to include "the dates of the claimed periods of delay …, a description of the operations that were delayed, the reasons for the delay and an explanation of how they were delayed," a "***detailed factual statement*** of the claim providing all necessary ***dates, locations and items of work*** affected by the claim" and "the amount of additional compensation sought and a breakdown of that amount into categories as described in Article 26.2" (Contract at 22 [emphasis added]). Further, under Article 11.1.2, the statement must also be accompanied by documentary evidence (*id.* at 20). The cost summaries propounded by Triton are not detailed factual statements and fail to include documentary evidence of the damages (Dkt. 264 [May 21 PCO]; Dkt. 313 [May 9, 2013 Jacobs email to Triton attaching draft of Exhibit A to May 16 Letter and estimated cost spreadsheet]; Dkt. 189 [May 11, 2013 Jacobs email to

[20] Triton does not argue that the City's ***delay*** in approving change orders caused Triton to incur costs (*cf.* Contract § 11.4.1.2), but instead that Triton was harmed when the City ***reneged*** on an alleged agreement to reimburse Triton through change orders (e.g., the May Letter).

Triton attaching draft of Exhibit A and spreadsheet]; Dkt. 293 [May 16, 2013 Jacobs email to DDC forwarding Dkt. 189]; Dkt. 318 [May 16, 2013 Jacobs email to DDC summarizing spreadsheet]). Triton's failure to strictly comply with the contractual notice provision waives its claim (*see Schiavone*, 106 AD3d at 428 ["Plaintiffs' original notice of claim failed to comply with the strict notice provisions of the parties' contract; thus, plaintiffs waived their claim under the contract"]; *Schindler*, 139 AD3d at 931-32 [rejecting letters and emails that failed to include verified statements of damages amounts and documentary evidence as noncompliant with contract]).

Triton's third argument is, likewise, to no avail. The May Letter could not have modified the Contract (e.g., pursuant to Article 25.1) because it reflects a mere agreement to agree (*see* May Letter at 3 ["Triton's change order will be expeditiously reviewed and negotiated and we are committed to a fair and reasonable settlement on the value of the change"]; *Goodstein Constr. Corp. v City of New York*, 67 NY2d 990, 993 [1986]; *Prospect St. Ventures I, LLC v Eclipsys Sols. Corp.*, 23 AD3d 213, 213 [1st Dept 2005]). Nor, due to its indefinite language, could the May Letter reflect a Commissioner determination under Article 33.1.1 of the Contract, as Triton argues. While Section 11.9 permits reimbursement for a compensable delay through ***change*** orders—subject to an approval process—where the parties "agree that a compensable delay has occurred ***and*** agree on the ***amount*** of compensation" [emphasis added], the May Letter does not reflect a "meeting of the minds" on either of these items (*see* May Letter at 3 [acknowledging that "design changes … ***may have*** added to Triton's (and Deluxe's) cost and other changed conditions"]). Moreover, while the May Letter acknowledges items addressed in Exhibit A as "design changes," it does not purport to waive the Contract's method for computing compensable costs, much less Article 11.1.2's requirements or any other applicable provision (*see Ring v Printmaking Workshop, Inc.*, 70 AD3d 480, 480 [1st Dept 2010] [waiver must be "clear and unambiguous"]; *Silverstein*

Properties, Inc. v. Paine, Webber, Jackson & Curtis, Inc., 104 AD2d 769, 771 [1st Dept 1984] [waiver must convey intent to relinquish a known right], *affd*, 65 NY2d 785 [1985]).[21]

Finally, Triton argues that compliance with the notice and documentation provisions was excused based on four distinct legal theories, each phrased in the alternative: (1) equitable estoppel; (2) frustration or prevention doctrine; (3) material breach; (4) bad faith or gross negligence.

The City is not equitably estopped from enforcing the Contract's notice and documentation provisions based on the the Contract's "No Estoppel" clause (Contract at 50; *see Centennial El. Indus., Inc. v New York City Hous. Auth.*, 129 AD3d 449, 450 [1st Dept 2015] [holding that contract's "no estoppel" clause barred waiver of notice provision]). Even if that were not the case, "the doctrine of equitable estoppel applies only 'where a governmental subdivision acts or comports itself wrongfully or negligently, ***inducing reliance*** by a party who is entitled to rely and who changes his position to his detriment or prejudice'" and is a doctrine "to be invoked sparingly and only under ***exceptional circumstances***" (*Luka v New York City Tr. Auth.*, 100 AD2d 323, 325 [1st Dept 1984] [emphasis added] [addressing statutory notice of claim], *affd* 63 NY2d 667 [1984], quoting *Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 668 [1976]).

The City's assurances that change orders would be timely processed, statements that Triton would be made whole for certain costs and requests that Triton continue working during change order processing are irrelevant to and could not have been reasonably relied upon for waiver of contractual ***notice requirements***; thus, they do not estop the enforceability of such requirements. Nor can statements made by the City ***after*** July 10, 2013—such as Resnick's August 7th responses to Triton's Request for Additional Time (Dkts. 267-268)—estop the City from holding Triton to

[21] The May 21 PCO, which was never signed by DDC, likewise did not amend the Contract—as counsel for Triton asserted at oral argument (*see* Dkt. 325 [Oral Arg. Tr.] at 28)—because it states, on its face, that it is a "Contractor Proposal" subject to audit (*see* May 21 PCO at 1).

task for its failure to comply with Article 11.1.2 ***prior to*** July 10th (*see Centennial*, 129 AD3d at 450 [holding that communications ***after*** relevant notice period cannot trigger estoppel]).[22]

Penick avers generally that on several occasions, City representatives told him not to worry about the notice requirements and that he relied on these statements in his understanding that the the City was instructing him that he need not worry about the notice requirements (Penick Aff. ¶ 17). Triton cannot have reasonably relied on oral statements contradicting Article 11.1.2 and 11.2 of the Contract where Article 25.1 requires that modifications be made in writing (*see New York State Urban Dev. Corp. v Garvey Brownstone Houses, Inc.*, 98 AD2d 767, 771 [2d Dept 1983] ["In the face of the outstanding conflict between the alleged oral representations and ... the written terms of the [contracts], appellant cannot claim justifiable reliance and, thus, has failed to establish the elements of ... estoppel"]).[23] In any event, Penick's vague testimony is insufficient to create a genuine issue of material fact that the requisite "exceptional circumstances" exist here to warrant the application of equitable estoppel.

Triton's "material breach" theory hinges on the argument that the City so substantially breached the Contract that it defeated the parties' object in making the Contract and excused Triton's performance (*see Accadia Site Contracting, Inc. v Erie Cty. Water Auth.*, 115 AD3d 1351, 1353 [4th Dept 2014]). Triton argues that the City breached the Contract by failing to provide Triton with complete and constructible plans and specifications at bid-time and by insisting on early delivery of the Mods. Triton has not demonstrated an issue of fact that these alleged breaches

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[22] Even if the City had informed Triton on July 10 or August 7 that its claims for delay damages incurred prior to May 26 had been waived, only the DDC Commissioner could have retroactively extended the deadline (*see* Contract at 20 ["The Contractor may submit any of the above statements (described in Article 11.1.1 and 11.1.2) within such additional time as may be granted by the Commissioner in writing upon written request therefor"]).

[23] Moreover, Article 11.1.2 provides that extensions of time may only be "granted by the Commissioner ***in writing upon written request*** therefor" (Contract at 20).

defeated the object of the Contract—fabrication, delivery and installation of the Mods in exchange for payment—much less that the City ***prevented*** Triton's compliance with the notice provisions (*see S.J. Fuel*, 73 AD3d at 414 ["defendant's alleged breach of the contract [did not] estop it from relying on plaintiff's failure to comply with the notice of claim provisions, since the breach, even if it occurred, did not prevent plaintiff from complying ..."]).

Triton's remaining theories are that the City frustrated or prevented compliance with the notice provisions, or otherwise engaged in bad faith or grossly negligent conduct, by falsely stating that Triton's losses would be timely compensated via change order. Since notice and reporting provisions reflect a condition precedent to recovery, whether misconduct excused Triton's obligation to give formal notice hinges on whether the City "prevented or hindered ... compliance with the notice and reporting requirements" (*A.H.A. Gen. Const.*, 92 NY2d at 31). No evidence suggests that the City prevented or hindered any submittals regarding delay damages.

Triton does not argue that its failure to comply with the notice provisions should be excused because it would otherwise "suffer a disproportionate forfeiture"—a disproportionate loss of right to an agreed exchange after its substantial reliance on the expectation of that exchange (*Oppenheimer*, 86 NY2d at 692 & n 2, citing Restatement [Second] of Contracts § 229). Recently, the Appellate Division, First Department excused the nonoccurrence of a condition precedent—plaintiff's strict compliance with a notice requirement for extra work claims—where noncompliance was "de minimis" and defendant had shown "no prejudice whatsoever" (*Danco*, 162 AD3d at 413). In *Danco*, defendant had not argued that plaintiff failed to document the costs of the claimed extra work, to provide timely notice of claims for extra work or to provide timely notice of its objections to defendant's rejection of claims for extra work, but that plaintiff had merely failed to ***verify*** (i.e., notarize) its written statements supporting its extra work claims (*id.*).

Here, in contrast, Triton diverged considerably from Article 11.1.2's requirements by failing to timely submit detailed statements and documentary proof of its asserted damages.[24]

In sum, Triton has failed to demonstrate a genuine issue of material fact as to Article 11.1.2's enforceability or Triton's failure to comply therewith before July 10, 2013. Under Article 11.1.2 and 11.2 of the Contract, Triton is therefore precluded from recovering costs incurred prior to May 26, 2013, except RCO 104's claimed costs (*see Schiavone*, 106 AD3d at 428; *Schindler*, 139 AD3d at 931-32).[25] Accordingly, it is

ORDERED that defendant City of New York's motion for summary judgment is granted in part, as to items claimed in PCO 162 and costs incurred prior to May 26, 2013 (except costs claimed in RCO 104), and is otherwise denied; and it is further

ORDERED that the parties shall call Chambers (646-386-4048) on October 17, 2018 at 3:00pm to discuss scheduling of the pre-trial conference and revision of expert reports to exclude costs deemed nonrecoverable by this decision.

Dated: September 17, 2018

ENTER:

JENNIFER G. SCHECTER, J.S.C.

[24] Though the City makes no direct claim of prejudice, Triton's failure to timely submit detailed statements and proof under Article 11 inherently prejudiced the City. For example, Triton failed to timely alert the City of Triton's intention to claim specific cost items as delay damages, prejudicing the City's ability to collect useful evidence to defend this plenary action (*cf. Promo-Pro Ltd. v Lehrer McGovern Bovis, Inc.*, 306 AD2d 221, 222 [1st Dept 2003] [recognizing notice provision's "additional underlying purpose of avoiding the credibility contests that arise in cases of alleged oral modification and waiver"]; *Phoenix Signal & Elec. Corp. v New York State Thruway Auth.*, 90 AD3d 1394, 1397 [3d Dept 2011] ["failure to provide defendant with the required notice prevented defendant from taking steps to mitigate the cost of the extra work while it was being performed and therefore caused ***inherent*** prejudice" (emphasis added)]).

[25] The court will require the parties to conform their trial presentations to exclude costs incurred prior to May 26, 2013 (except costs claimed in RCO 104), rather than automatically deducting the amount claimed in the May 21 PCO from any future damages award.