At a Submitted Motion Term of the Supreme Court of the State of New York, County of Broome, held in Binghamton, New York on the 1st day of March, 2018.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

MCPHERSON BUILDERS, INC.,

Plaintiff,

vs.

PERFORMANCE PREMISES, LLC and TOMPKINS TRUST COMPANY,

Defendants.

DECISION AND ORDER

Index No.: 2017-0480
RJI No.: 2018-0064-M

On October 7, 2016 Performance Premises, LLC (the owner) and McPherson Builders, Inc. (the contractor), entered into an AIA Standard Form of Agreement Between Owner and Contractor for a Residential or Small Commercial Project related to improvements at the Cherry Street Artspace, located at 102 Cherry Street, Ithaca, NY. It was agreed that Performance Premises, LLC (hereinafter referred to as Performance) would pay McPherson Builders, Inc. (hereinafter referred to as McPherson) $254,403.00 for the improvements. The work was to be substantially completed within eighty five (85) days of the date of the contract. The project was not substantially completed in 85 days. The last item of material provided and labor performed was May 11, 2017.

McPherson was paid $159,593.00, leaving an outstanding balance of $94, 810.00. McPherson served notice of mechanic's lien on or about July 10, 2017. Plaintiff

commenced this action to foreclose the mechanic's lien on August 9, 2017. Defendant, Tompkins Trust Company, served an answer on August 25, 2017. Defendant Performance filed an answer and counterclaim on August 29, 2017. The parties stipulated to discontinue the action against Tompkins Trust Company on February 20, 2018.

Plaintiff has moved for summary judgment, pursuant to CPLR 3212, to dismiss the counterclaim and for summary judgment in favor of plaintiff on the grounds that there is no merit to the counterclaim or defense to the complaint. In support of the motion, the plaintiff submitted the affidavit of Jerry Stevenson, sworn to on the 25th day of January, 2018, with attached exhibits and the affidavit of Dirk A. Galbraith, sworn to on the 2nd day of February, 2018.

The defendant opposed the motion by submitting the following affidavits: Sam Buggeln, sworn to on February 23, 2018, with attached exhibits; Barbara Behrmann, sworn to on February 21, 2018; Claudia Brenner, sworn to on February 20, 2018; Darcy Martin Rose, sworn to on February 23, 2018; Sarah Chalmers, sworn to on February 21, 2018; Chris Hauser, sworn to on February 21, 2018; and Michael Barakiva, sworn to on February 22, 2018.

First, plaintiff argues that the contract mandates that the certificate of payment issued by the architect is conclusive that plaintiff is entitled to payment. The Court disagrees. Paragraph 12.4.4 states "a certificate for payment, a progress payment, or partial or entire use or occupancy of the project by the owner shall not constitute acceptance of work not in accordance with the requirements of the contract documents". The agreement required substantial completion within 85 days (December

31, 2016). It is undisputed that the project was not substantially completed in 85 days. Therefore, the requirements of the agreement were not met. The receipt of the certificate of payment does not foreclose the defendant from asserting claims against the plaintiff, *Environmental Safety & Control Corp. v Board of Educ. of Camden Cent. School Dist.*, 179 AD2d 10121 (1992); *Board of Educ., Union Free School Dist. No 5 v Barbaresi & Son*, 25 AD2d 855, 856 (1966).

Secondly, plaintiff contends that defendant's sole remedy when plaintiff did not substantially complete the project on December 30, 2016, was to terminate the contract. Now defendant is estopped from interposing delay as a defense.

Paragraph 11.1 of the agreement states that "time limits stated in the contract documents are of the essence of the contract". Paragraph 7.4.3 states "costs caused by delays or by improperly timed activities or defective construction shall be borne by the party responsible therefor". The terms of the agreement allow the defendant to interpose a defense and counterclaim. The Court of Appeals has held that a failure to enforce the right to terminate the contract promptly constitutes to an extent a waiver of default, but does not constitute a waiver of the claim for damages. The defendant has a right to set-off, an independent action or by counterclaim, *Deeves & Son v Manhattan Life Ins Co.*, 195 NY 324, 330 (1909); *General Supply & Constr. Co. v Goelet*, 241 NY 28, 36 (1925).

Lastly, plaintiff opines that the counterclaim for lost rent, income and profit is speculative, uncertain and should be dismissed. When it is clear that some injury has occurred, recovery will not be denied simply because the quantum of damage is

unavoidably uncertain, beset by complexity or difficult to ascertain, *Berley Indus. v City of New York*, 45 NY2d 683, 687 (1978); *Novak & Co. v Facilities Dev. Corp.*, 116 AD2d 891, 892 (1986). Performance has alleged and shown that it was unable to rent the Cherry Artspace for a period of time, or was forced to rent at a reduced rate. While Performance may have difficulties quantifying its damages, it is entitled to seek recovery.

The motion is denied, in its entirety. This constitutes the Decision and Order of the Court.

Dated: April 18, 2018

Hon. Molly Reynolds Fitzgerald
Supreme Court Justice

cc: Dirk A. Galbraith, Esq.
Edward Y. Crossmore , Esq.
Mary Hodges, Tompkins County Chief Court Clerk