SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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SUMMIT DEVELOPMENT CORP., d/b/a SUMMIT WATERPROOFING & RESTORATION CO.,

Plaintiff,

- against –

HUDSON MERIDIAN CONSTRUCTION GROUP LLC, FEDERAL INSURANCE COMPANY, and "JOHN DOE 1" through "JOHN DOE 10"
Said parties being lienors who have yet to perfect their liens And being fictitious and unknown to Plaintiff,

Defendants.

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DECISION AND ORDER

Index # 650755/2009

SUMMIT DEVELOPMENT CORP., d/b/a SUMMIT WATERPROOFING & RESTORATION CO.,

Plaintiff,

-against-

HUDSON MERIDIAN CONSTRUCTION GROUP LLC, and FEDERAL INSURANCE COMPANY,

Defendants.

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Index No. 650172/2009

In the Matter of

SUMMIT DEVELOPMENT CORP., d/b/a SUMMIT WATERPROOFING & RESTORATION CO.,
On behalf of themselves and as a representative for all others who may be deemed beneficiaries of a certain trust created pursuant to Lien Law Article 3-A,

Plaintiff,

-against-

HUDSON MERIDIAN CONSTRUCTION GROUP LLC, and FEDERAL INSURANCE COMPANY,

Defendants.

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Index No. 650239/2009

DAVID B. COHEN, J.:

In this action, Summit Development Corp. ("Summit") sought to recover amounts due for work performed on a construction project under two subcontracts it had with defendant Hudson Meridian Construction Group LLC ("Hudson"), the general contractor. Work was performed on two buildings, 444 Second Avenue and 330 East 26th Street on a project referred to by the litigants as the Phipps Project.

At trial, Summit sought $1,024,832.74 for breach of the base masonry subcontract, $587,263.57 for breach of the base roofing subcontract, and additional amounts for claimed change order work under the masonry subcontract. Summit also sought to collect pursuant to the labor and materials payment bond, issued by Federal Insurance Company ("Federal").

For its part, Hudson seeks to back-charge Summit for costs of completion of Summit's unfinished work, costs associated with bonding the mechanic's liens filed by Summit, costs incurred for general conditions associated with delays claimed to be cause by Summit, a claim by Interstate Masonry Corp. ("Interstate") against Summit which has been assigned to Hudson, and a payment made by Hudson to cover unpaid union benefits that were not paid by Interstate.

At trial, plaintiff called Kostas Fakiris, Summit's Vice President, Donna Neubauer, Summit's Controller, Jan J. Kalas, an expert architect, and Josh Keller, an expert construction consultant. Defendant called Russel Imbrenda, Hudson's project executive, John Richard Coogan, the architect of record on the Phipps project ("Architect"), William Cote, the president and managing member of Hudson, Frank Boccia, a professional engineer and partner in the firm Engineered Building Inspections, P.C. ("EBI"), Joseph Livoti, the managing member of Construction Staffing Solutions ("CSS"), and Douglas Shaeffer, Hudson's Controller. The parties also read excerpts from the examinations before trial of William Cote, Kostos Fakiris, Miriam Rubinton, Henry Phipps Plaza South Limited Partnership's (the "Owner" or "Phipps")

representative on the project, and Nick Dandolos, Hudson's senior project manager. I make the following findings of fact and conclusions of law.

Credibility Findings

This Court first considers the credibility of the witnesses who testified at trial. Mr. Fakiris and Mr. Cote, the principals of Summit and Hudson respectively, gave extensive testimony and this Court had ample opportunity to evaluate their demeanor under direct and cross-examination. This Court finds that their testimony was biased and tainted by their significant financial stake in the outcome, and unworthy of belief. Both demonstrated that they were willing to testify as necessary to deflect all blame or responsibility for the substantial problems encountered during the project from themselves, and place that blame squarely upon the other. Their testimony was impaired and tainted by their greed, which both informed their conduct during the course of the construction and colored their testimony at trial. Their testimony demonstrated that when it was financially beneficial to both Summit and Hudson, they happily took the same position, for example in trying to convince the Owner and its Architect that much of the work they were performing was extra work worthy of substantial extra compensation. Mr. Cote even testified that it was Hudson's obligation to support these change requests for both additional time (because he knew the project was delayed) and money. When delays to the project exposed both entities to financial risk, they both resorted to finger pointing and blame shifting. These positions were staked out early on, guided this litigation for years, and colored these witnesses' testimony at trial. Their behavior, directed against one another, manifested at trial in incomplete truths and falsehoods. In the end, their testimony proved useful

primarily as a means of identifying and explaining documents which were generated during the course of the project and to explain some of the project nomenclature.

As is often the case, this testimonial bias also permeated the testimony of most of their respective corporate employees, Donna Neubauer, Russel Imbrenda and Douglas Shaeffer, who also skewed their testimony to favor their employers' litigation positions. This bias also permeated the testimony of the experts called to lend support to the positions of the parties that retained them to testify at trial. To the extent that any of these employees or experts' testimony was credited by this Court on a particular point, it is specifically noted.

The only live witnesses that this Court found to be generally credible witnesses were Mr. Coogan, Mr. Boccia, Mr. Livoti and Mr. Shaeffer.

The Project Scope, Contracts and Subcontracts

Phipps hired defendant Hudson to be the general contractor and perform renovations to the premises known as 444 Second Avenue (the "444 building" or the "building") and 330 East 26th Street (the "330 building"). The trial focused primarily on project issues that arose at the 444 building, so reference in this decision to "the building" or "the project" is specific to the 444 building; where the discussion involves the 330 building, it is specifically identified as such. This work needed to be performed because the buildings were suffering from water infiltration issues throughout. The contract was dated June 29, 2006 and had an original completion date of October 29, 2008. The entire construction project was to last 24 months. The exterior work required under the contract on the 444 building included the removal and replacement of the exterior brick, repair and parging of the existing back-up block as necessary including filling of open joints and voids, furnishing and installing steel shelf angles at each floor above the third-

floor plaza, the placement of thermal insulation between the back-up block and the exterior brick, the installation of new windows, new through-the-wall air conditioning sleeves, and new roofing on both buildings. The contract has a provision making Hudson responsible for liquidated damages of $7,825.66 per day, from the stated completion date (or any extended completion date), until final completion of the project. This was a prevailing wage contract which required that each employee needed to appear on a certified payroll report submitted to Hudson on a bi-weekly basis, who then submitted it to the Owner.

Hudson subcontracted with Summit to perform work under two separate subcontract agreements, façade work (the "masonry subcontract") and roofing work (the "roofing subcontract"). The roofing subcontract included three roofs, the main roof and 3rd floor plaza roof at the 444 building, and the main roof of the 330 building. The value of the base roofing subcontract was $1,408,200.00. Article 7.8 and 7.8.1 of the roofing subcontract provided for a 10% retention, two-thirds of which was to be paid upon substantial completion.

Summit's scope of the masonry subcontract included the removal of the existing face brick, furnishing and replacement of exterior face brick, parging all existing back-up block as necessary, waterproofing, insulating and thoroughly protecting all openings where work is exposed to the weather, furnishing and installing the steel shelf angle at each floor above the plaza roof deck, installation of flashing, installation of coping stones, and installation of 800 replacement air conditioning sleeves. Summit was to provide all masonry material and all necessary steel installations and other waterproofing components. Summit was also to provide the Mastclimbers and a sidewalk shed. On the 330 building, Summit was responsible for the installation of coping stones at the parapet wall and pointing of the building.

Also, Summit was responsible for all the hoisting, rigging, cranes, and elevating and transporting of materials related to their work. Summit's scope of work made it responsible for providing thorough protection against the weather at all openings and areas where its removal work exposed the building to the weather.

The value of the base masonry subcontract was $6,201,400.00. Pursuant to Articles 6.3, 6.11 and 8.5, Summit was responsible for the means, methods, and technique, which were to be performed within industry accepted standards. Article 7.8 and 7.8.1 of the masonry subcontract provided for a 15% retention, two-thirds of which was to be paid upon substantial completion.

Summit was also responsible for coordinating with other subcontractors, performing its work in a way that would not interfere, affect, or delay the project's completion or any of the other work being performed on the project. The subcontracts provide that upon execution, Summit was to provide a detailed schedule including milestones, commencement and completion dates, scope of work and delivery dates for materials.

Summit entered into subcontracts with Interstate Masonry Corp. ("Interstate") to perform the masonry scope of work including removal of the face brick, installation of the flashing on the shelf angle, new face brick, air conditioning sleeves and caulking, Perfect City Gates to install the steel shelf angle, and Dunlop Mastclimbers Ltd. ("Dunlop") to provide the Mastclimbers, equipment used to hoist laborers and materials on the exterior façade of the building, which were necessary because the building was occupied and masonry materials could not be brought to work areas from inside the building. The Mastclimbers consisted of eight masts (or rails) installed vertically on the building, two on each side (or elevation), and a platform which goes up and down on the mast, supplying men and materials to reach all work locations on the exterior of the building.

Summit was not responsible for the window installation. Hudson hired a small firm named Oriel to perform the window installation. The windows needed to rest on a sill that was to be placed on top of the newly installed masonry.

Summit's work was originally supposed to take place from March 2007 to November 2007. Hudson's field team included Frank Giovinco, the field superintendent and site safety manager, Nick Dandolos, and Larry Moskowitz, the site project manager. Russel Imbrenda was Hudson's project executive. Mr. Fakiris visited the site a few days per week and Summit had project managers Kevin Kato and Michael Dean on site every day.

The Progress of the Project

The chronology of the salient details of the project are as follows:

By February 2, 2007, the installation of the sidewalk bridge was nearly complete. By March 6, 2007 the sidewalk bridge was completed, and the Mastclimber installation was about one-third complete.

In March 2007, Phipps hired Frank Boccia and his firm Engineered Building Inspections ("EBI") to be an Owner's representative on the project, specifically with the respect to the brick work, and prepare field reports for the Owner. EBI generated 47 field reports over the course of the project.

On March 26, 2007, Summit submitted its original work schedule prepared in conformance with subcontract provisions, providing for the use of what is known as the spiraling method to perform the exterior brick replacement, from the 33rd floor down to the third-floor, over 127 days. Starting at the 33rd floor -- the top floor -- workers would remove the exterior brick on one facing of the building per day on each floor, progressing down to successive floors.

On each facing where the exterior brick was removed, over the next two days workers would install the steel angles, prepare the back-up brick, seal openings, apply insulation and, on the fourth day, the new exterior masonry brick would be installed. Using this method, they would spiral around and down the building to successive floors. This method would protect that building from water infiltration, as very limited portions of the building would be exposed at any given time. According to the schedule, after the brick was replaced down to the fifth floor, it would be followed by two weeks for removal and replacement at the bulkhead, three weeks to wash down the building, and one week for demobilization. The masonry subcontract did not specifically provide for the use of the spiraling method and Article 6.3 provided that Summit was solely responsible for and had control over the construction means, methods, techniques, sequences and procedures for coordination of their work.

By May 3, 2007, the Mastclimbers were 90% installed. Once fully installed, the Mastclimbers would need New York State Department of Buildings ("DOB"), Elevator Division approval. In a letter dated May 23, 2007, Summit complained to Dunlop about the adequacy of the load capacities of the Mastclimbers and their "uselessness" for the project at the provided capacity. Summit claimed that they had been given assurance of a load capacity of 8,000 lbs., but the engineer had only certified capacity at levels of 4,750 lbs. and 4,500 lbs. on March 1, 2007, and 3,000 lbs. on May 22, 2007. The next day, Summit complained to Dunlop of certified capacity of only 3,500 lbs. Complaints were again made on June 15, 2007. By the end of June 2007, Summit was preparing to have Interstate commence removal and replacement of the brickwork.

Interstate complained to Summit about function and capacity of the Mastclimbers on July 20, 2007, stating that the project was proceeding at half the scheduled pace. Five days later,

Interstate sent a letter to Summit suggesting a revised schedule, that involved the building be stripped instead of spiraled.

In the summer of 2007, in the early stages of the masonry work, asbestos was discovered in the mastic that glued the waterproofing membrane onto the shelf angles. Work stopped in order to determine what was required for the asbestos removal and to determine the additional cost and time needed to incorporate the removal. At this time, the Architect's minutes reflect that there were discussions about stripping the brick, repairing the back-up block, and waterproofing the building with insulation before the winter, then beginning the installation of the new exterior brick in the spring, but it was ultimately agreed that the project would adhere to the spiraling method. In late September 2007, the Owner issued a construction change directive to Hudson and Hudson issued one to Summit to address the change in scope as a result of the asbestos. This resulted in the Owner and Hudson negotiating and approving a change order, and Hudson and Summit doing the same. The Owner sought and obtained a variance to permit the asbestos removal without full containment. At Summit's request, it was agreed that the masonry work on the 444 building would recommence after the winter, on March 3, 2008. As a result, on May 7, 2008, Change Order 10 was executed by Summit and Hudson and set forth a new substantial completion date for Summit of October 31, 2008, plus an extension of 11 additional working days for bad weather through May 2, 2008. The masonry subcontract price was also increased by $1,630,000.00 for Summit's equipment and other costs associated with the delay resulting from the asbestos. This agreement included a 6% markup for Summit's insurance cost, which Hudson agreed to moving forward.

As of September 24, 2007, 40% of the pointing work had been completed on the 330 building.

As per the warranty information from Johns Mansville, the roofing manufacturer, the 330-building roof was completed on January 14, 2008 and passed inspection.

The project plan as set forth in a Hudson document entitled Exterior Schedule for 444 2nd Avenue Building, dated January 1, 2008 (which was prepared after the asbestos was discovered and included asbestos removal) and as testified to by Mr. Coogan and other witnesses, provided for the performance of the exterior work also using the spiraling down method, and incorporating the abatement of the asbestos after the removing the brick from each facing. The asbestos abatement was to be performed by another crew at the end of the day, after the masons completed their work, and would not delay the brick removal and replacement. This Hudson schedule also incorporated the windows installation, which was to begin above the brick work once the top five floors of brick were replaced. Based upon the schedule, window installation was to continue from the top floor of the building moving downward, five weeks for each group of five floors, taking 31 weeks in total and finishing on October 24, 2008. Mr. Fakiris testified that there was never an agreement for window installation to take place above the masonry work. It was anticipated that the Mastclimbers would be removed between August 14, 2008 and September 3, 2008. The concrete deck on the third-floor plaza would then be removed from September 4, 2008 through September 18, 2008, pipe scaffold would be built up from the third-floor roof deck from September 19 to 25, 2008, to allow access to perform the masonry work on the third and fourth floors. Once that masonry work was performed, the pipe scaffold would be removed from the third-floor roof deck from October 13 to 17, 2008. The work was then to begin on the replacement of the third-floor plaza roof from October 20, 2008 to November 7, 2008.

The masonry work recommenced in March 2008. On March 19, 2008, Summit sent a letter to Interstate complaining of insufficient manpower and materials on site. On March 20, 2008, Interstate sent a response letter to Summit stating that although they had agreed to start the masonry work on the first quadrant on March 18, 2008, Dunlop did not have the required connection plates in place, for the workers to move safely on the scaffold. By March 27, 2008, 5.7% of the brick had been removed, and 4% of the shelf angles, 1.65% of the flashing, and 1.65% of the new brick had been installed.

On April 9, 2008, Mr. Imbrenda sent a letter to Mr. Fakiris memorializing a meeting that took place on April 3, 2008, attended by representatives of Summit, Hudson, Interstate, and Dunlop, where it was agreed that Dunlop would make modifications to the Mastclimbers requested by Summit and Interstate by the end of the week, Interstate would increase manpower, and the project would proceed using the spiraling method.

On April 10, 2008, exterior brick had been removed from three floors at the top of the building and new exterior brick had been installed at the top floor. At that time Summit encountered voids in the back-up masonry and the spandrels were out of plumb. Summit raised these issues with Hudson staff on site.

At a weekly site meeting held on April 17, 2008, Hudson stated that the Mastclimbers lacked sufficient electrical power to operate properly, were unable to perform at the capacity the project required, Hudson stated that Summit was concerned that the building was out of plumb by ¾ of an inch. Hudson suggested that they strip the brick from the entire building and then rebrick upward, but without a plan to protect the back-up block. Mr. Coogan and the Owner's representative found this unacceptable as the building would have no protection from rain, wind

and cold, and directed Hudson not to continue the brick removal and continue with replacement. By this date, 600 windows had been delivered to the site.

As per the warranty information issued by Johns Mansville, the roofing manufacturer, the 444 buildings top roof was completed on April 18, 2008.

On April 18, 2008, Summit proposed a project work schedule that would involve first demolition of the entire building's exterior brick and removal of asbestos, and then the rebuilding the new brick. This methodology was detailed in a letter to Hudson dated April 22, 2008, which contained a project schedule providing for the completion of the exterior brickwork by September 29, 2008, exclusive of weather delays. Mr. Imbrenda, Hudson's Project Executive, testified that Hudson did not object to change of method to the stripping method and that Hudson took the proposal to the Owner who necessarily approved the abandonment of the spiraling method for the stripping method.

On April 22, 2008, Mr. Coogan sent a letter to Mr. Imbrenda, reminding him of his obligation to protect this building from the weather during construction and indicating that brick had been removed down to the 27th floor while rebricking had only occurred on the 33rd floor, leaving six floors exposed and demanding immediate correction. Mr. Coogan testified that, at that time, neither he, nor the owner, had approved a change in the masonry means and method. On April 29, 2008, the Architect's field report indicated that brick demolition was mostly complete for ten floors down. That report also stated that it was raining and reported wet moisture readings in apartments 30-G, 30-F, 28-B, and 26-F. That day, Mr. Coogan sent an email to Mr. Imbrenda with a directive to immediately waterproof the building, a task that would not have been required under the original spiraling means and method.

As per the original project schedule using the spiraling method, by April 30, 2008, about 15% of the masonry removal and replacement work should have been completed down to the 24th floor; however, Summit had removed 35.75% of the brick, but had only installed 7% of the shelf angles, and 3% of the flashing and new brick. The brick removal was exceeding its replacement. Hudson had completed 99% of the window repair on the 330 building and had 48% of the windows on site for the 444 building.

The Architect's field report from May 1, 2008 indicated that work was complete on the Mastclimbers and they should be functional.

On May 7, 2008, Mr. Fakiris signed off on the asbestos removal change order, Change Order Number 10 (discussed above). At that time, he was aware of the condition of the back-up block which had been exposed by exterior brick removal on at least ten stories.

The Architect's field report from May 9, 2008 indicated that brick had been removed from 16 floors that were now exposed to the elements, that it was raining that day, and that moisture was detected at the baseboards of apartments 26-G and 26-F. That day, the Owner issued a stop work order, requiring Hudson to stop the removal of exterior brick until the Architect's direction to install an approved protective waterproof coating and the parging of voids in the back-up block was completed to Owner's satisfaction.

On May 13, 2008, Mr. Fakiris sent a letter to Hudson expressing shock that Hudson was claiming that Summit changed methodology without their knowledge as there had been several meetings where Summit notified Hudson that the Mastclimbers were incapable of feeding the masons adequately in order to perform the scope of work, requiring the switch to the stripping method. In another letter dated May 13, 2008, Mr. Coogan reiterated his directive to use a waterproof coating and directed the use of either of two possible products. Photographs taken on

May 13, 2008 show the exposed back-up block on 16 floors below the top floor. The exterior brick had been removed from about half of the building.

On May 16, 2008, Hudson made a Request for Information from the Owner's Architect requesting direction on how to proceed regarding the protruding back-up block and the installation of insulation. On May 28, 2008, Hudson was advised by the Architect that if the protrusion was two inches or less, cut the insulation boards to fit, and that if it was greater, to remove the block and fill with pancake block or mortar parging. Mr. Fakiris testified that Summit did not cut the insulation as directed, but instead removed and replaced all protruding back-up block.

In responsive letters and emails on May 19, 2008, Mr. Fakiris and Mr. Cote squabbled about the revised plan and the obligation to protect the exposed back-up block. Ultimately, it was determined that Summit would apply Thoroseal to any back-up block exposed during the project.

On May 22, 2008, Hudson made a Request For Information from the Owner's Architect on how to proceed regarding installation of the chair angles with respect to the spandrels protruding. On May 28, 2008 they were advised to shim out using steel spacers up to one-half inch and make up any further variation by coursing the brick from floor to floor.

Photographs taken June 13, 2008 show that the entire building has been stripped of exterior masonry and the Thoroseal coating of the building was complete on that day.

On June 19, 2008, the Architect's minutes reflect that Hudson was going to install a single window mockup once the new sills were available, in six weeks.

The Architect's minutes reflect that brick replacement began on June 23, 2008, and it was anticipated that they would install two floors of brick per day. On June 30, 2008, Interstate

complained to Summit in an email of delays caused to the work they planned to perform on the sixth-floor masonry, since all Dunlop systems were initially not working in the morning and needed to be restarted. On July 2, 2008, Interstate complained of not being able to work after 11:00 a.m. due to failure of proper protections on the Mastclimbers.

The Architect's minutes of July 3, 2008 reflect that the sills had not yet been ordered.

Photographs taken July 11, 2008 show exterior brick replacement already covering about five floors above the plaza level. On July 14, 2008, Interstate again complained of two Mastclimbers being out of service due to making contact with the brick on the ninth floor and needing to be adjusted, reiterating this complaint the next day. On July 16, 2008, Interstate complained of three Mastclimbers being out of service and of a morning loss of power to the system.

The Architect's minutes from July 31, 2008 reflect that the sills had now been ordered and were due to be delivered six weeks later, and that this delay would affect the completion of the façade work.

On August 7, 2008, Summit sent a letter to Interstate complaining about the lack of any bricklayers on site that day.

Photographs taken August 14, 2008 show exterior brickwork progressing, with new exterior brick covering about 16 or 17 of the lower floors of the building.

On August 19, 2008, Mr. Imbrenda sent an email to Mr. Fakiris indicating that the Architect decided not to proceed with the previous flashing detail on the third-floor plaza curb and had replaced it with a revised detail. He advised Summit to provide its cost proposal as soon as possible. The detail provided for a number of new items including new concrete masonry blocks, stainless steel flashing, a waterproof membrane, wood blocking and water stops.

On August 27, 2008, Interstate complained of a loss of function on two of the Mastclimbers, and on September 2, 2008, one Mastclimber was not functioning.

The Architect's meeting minutes from August 22, 2008 reflect that window installation was to take place the second week of September, and Hudson had not received a schedule from its window installer, Oriel.

In an email from August 27, 2008 Interstate indicated that due to problems with the Dunlop Mastclimbers, Interstate was deploying its bricklayers to other projects.

According to Mr. Coogan, the window sills did not arrive on site until September 2008, and when they arrived they realized that they could not install them above the masons because if something fell it would hurt the masons below, so the masonry work needed to be substantially completed before the installation of the windows could begin. Mr. Cote testified that Hudson abandoned the idea of putting in windows below the masons because of safety concerns, and also blamed the inability to get a work schedule from Summit.

Photographs taken on October 9, 2008 show five or six floors of exterior brick remain to be completed.

As per the masonry subcontract, Hudson was to provide the air conditioning sleeves to the project and Summit was responsible for the installation, which Interstate was going to perform. By letters dated October 13, 2008 and October 15, 2008, Summit complained to Hudson that Hudson's air conditioning sleeve installation was delaying their work, and sought a time extension and reimbursement. Hudson was supposed to provide access for Interstate to install the air conditioning sleeves from the interior and Interstate had to complete the exterior brick around the sleeves. Since the sleeves were not installed with the brickwork, crews now needed to double back and finish the sleeve installation. Further, there were no sleeves to install

on site. On October 15, 2008, Hudson posted a notice to the tenants of the building that the sleeve installation was cancelled until further notice.

The Architect's meeting minutes from October 16, 2008 reflect that the masonry work was completed on all but the third and fourth floors and that 40% of the sills had arrived on site.

On October 17, 2008, Interstate complained of another day lost to problems with the Mastclimbers. In an October 22, 2008 email, Summit advised Interstate that due to the continuous lack of manpower, Summit would furnish the necessary crews and back-charge Interstate. In a letter dated October 22, 2008, Summit memorialized its agreement with Interstate that Interstate would complete all brick work on the upper floors by October 21, 2008, or Interstate would be back-charged for cost incurred starting November 1, 2008.

Air conditioning sleeves were delivered to the project on October 19, 2008, but they were the wrong color. On October 27, 2008, Summit was unable to install the sleeves because of a lack of access to tenant apartments and an insufficient number of sleeves on site. Hudson cancelled sleeve installation in the B-line of the 444 building that was planned for November 3rd and November 4th, 2008. Also on October 27, 2008, Mr. Imbreda sent Mr. Fakiris letters from the Architect detailing the Architects reasons for rejecting Summit's Change Order requests 24, 25, 26, 27, 30, and 32 (these change order requests are discussed below in greater detail).

On November 4, 2008, Hudson complained to Summit of the lack of a work schedule, stating that they had 800 windows on site, with 600 of them ready to install.

On November 7, 2008 there was once again an inadequate number of air conditioning sleeves on site for the installation. On November 11, 2008, Summit once again complained of delays in the air conditioning sleeve installation due to Hudson scheduling, and then cancelling, sleeve installations. In a letter dated November 12, 2008, Summit once again complained as to

the lack of sleeves on site and the that next delivery of sleeves was only expected on November 18, 2008. Another letter dated November 20, 2008 addresses how Hudson disregarded a sleeve installation schedule made at Hudson's request, and how this issue continued to delay Summit's work.

According to an EBI survey report from a site visit on November 11, 2008, mortar joints on the building were unevenly tooled and missing cement in many locations and mortar joints were cracked and missing weep tubes in some locations. There was incomplete or irregular through-wall flashing, incomplete sealant at a shelf angle, and damaged or improperly sloped air conditioning sleeves in some locations. According to Mr. Boccia, this report was not a punch list, as it was too soon for a punch list.

Photographs taken on November 12, 2008 show the entire exterior of the building covered with the new exterior brick. Mr. Fakiris testified that the new exterior brick was not installed on the third and fourth floor since that could not be done until the Mastclimbers were removed, because they had bracing that ran across the third-floor plaza roof. As per Mr. Coogan, these photos show that the masonry work was substantially completed at that time.

Architect's minutes from November 13, 2008 show that Hudson was looking into adding another window installer to provide adequate manpower. Mr. Cote testified that around this time, they were planning to accelerate the window installation from 31 weeks to two months. He stated that Oriel, its original window installation subcontractor, was not adequately staffed to handle the accelerated window installation schedule, and asked to be taken off the job. Oriel left the job around this time and was thereafter replaced by Metal & Glass Solutions.[1]

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[1] The Court notes with skepticism that, in spite of the fact that Hudson used three window installers, each of whom performed substantial work on the project, Hudson was not able to demonstrate the existence of a written subcontract with any of the installers, and Mr. Cote could

In a Friday, November 14, 2008 email, Summit complained to Mr. Imbrenda that they had been asking for water for several weeks to wash down the masonry, which had been scheduled to start that Monday, but water was unavailable and they had been unable to start the washdown. Summit attributed this delay to Hudson. Mr. Moskowitz responded that day, stating that the washdown had already begun, and that the plumber was working on a supply system to provide additional water.

The site meeting minutes from November 20, 2008, indicate that there was no start date scheduled for window installation, and that the Architect and the Owner were concerned about the lack of a coherent plan in coordinating access to apartments during the holiday season. Mr. Coogan testified that this was due to a delay in starting the masonry, acquiring the sills, and there were some issues regarding the proper manner of installing the windows. Mr. Cote testified that Hudson was "still trying to pass a mockup" and claimed that Hudson didn't have access to the façade.

On November 19, 2008, Summit advised Interstate by email that they must complete the insulation work as much as possible on the third and fourth floors and install brick on the North elevation of the fourth floor.

The site meeting minutes from November 25, 2008 indicate that the window manufacturer was to be on site that day to determine a solution to a problem with the "closing head" of the window and to review other deficiencies such as sharp edges on the aluminum, inadequate fastening of sill screen installation, and lack of squareness. Also, Hudson advised that the window installation would begin when the masonry punch list was completed. The

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not recall is any written subcontracts were entered into with the window installers. Mr. Cote even testified that he would be surprised if there was no written subcontract or at least a short form purchase order.

Owner and Architect believed that installation could begin on one side of the building while the masonry punch list work was performed on the other three sides, and that Hudson had not provided a workable plan.

An EBI survey report from a site visit on December 2, 2008, reflects that at a number of locations on the façade, the cement above the membrane was protruding beyond the shelf angle toe, the membrane was not cut evenly above the shelf angle, caulk under the membrane had pushed the membrane up, and caulk under the membrane was unevenly applied and tooled. According to Mr. Boccia, this reflected unacceptable workmanship on the masonry. According to Mr. Boccia, mortar joints on the building were unevenly tooled and missing cement in many locations and mortar joints were cracked and missing weep tubes in some locations. There was incomplete or irregular through-wall flashing, incomplete sealant at a shelf angle, and damaged or improperly sloped air conditioning sleeves in some locations. Summit's daily job report from that date reflects that "wash down" was performed on two remaining elevations and was then complete on all elevations.

On December 4, 2008, Interstate, indicating that they were near completion of their work, complained of one Mastclimber that had not been working for a week-and-a-half. That day, Hudson was to provide a revised detail for the window head closure.

Also on December 4, 2008, Summit submitted its revised change order proposal on the new flashing detail on the third-floor plaza curb. This work began in December 2008 and was completed in March 2009.

On December 9, 2008, Mr. Imbrenda, responding to an email from Mr. Kanaras from Summit, stated that, as they had discussed many times before, Hudson could not have the

window trade working above or below the masonry workers because of safety and DOB requirements.

A window installation schedule dated December 10, 2008 shows installation on windows from the bottom up, commencing on December 15, 2008 and continuing through March 20, 2009. Mr. Cote testified that installing windows through the holiday season was challenging due to reduced manpower and losing working days to the holidays.

On December 10, 2008, Hudson informed Summit that a Change Order for the installation of 154 additional coping stones on the parapet wall was approved by the Architect. Also, on December 10, 2009, Federal Insurance Company approved the reduction of the retainage on Hudson's contract with Phipps from 10% to 5%.

The Architect's minutes reflect that as of December 11, 2008, Hudson submitted a revised window installation schedule and had hired a new window subcontractor who was going to two sample windows in two apartments. Hudson also submitted a shop drawing of a 4-inch clip that was needed to attach the window to the existing frame that was going to take three weeks to produce and submitted a revised schedule. The entry from January 8, 2009 indicates that the clip was still on order and another entry on January 15, 2009 stated that the clips were expected on that date.

Summit did not pay Dunlop its monthly Mastclimbers rental fee of $65,025.00 for the months of October and November 2008. Dunlop refused to remove their Mastclimbers from the building, so in December 2008, Summit hired another company to dismantle the Mastclimbers. Photographs taken December 11, 2008 show that the Mastclimbers had been partially removed from the South Elevation of the building. Once the Mastclimbers were removed, brick needed to

be installed into the holes where the Mastclimbers had been tied into the building, then those area of the exterior needed to be power washed.

On December 12, 2008, the New York City Department of Buildings issued Stop Work Orders with respect to each of the eight Dunlop Mastclimbers. Some time elapsed before these Stop Work Orders were lifted.

On December 17, 2008, Summit commenced an action against Dunlop complaining of the delays and damage caused by Dunlop's failure to remove the Mastclimbers and seeking to back-charge Dunlop for various expenses. These claims between Dunlop and Hudson were later settled and Dunlop ultimately removed the remaining Mastclimbers.

On December 18, 2008, Summit billed Hudson for $649,858.26 for exterior masonry work performed on the 444 building through November 3, 2008. Hudson paid $435,383.50 to Summit, retained $214,474.76 and paid $214,383.50 into court to discharge the Dunlop mechanics lien. Also, as to work completed through December 18, 2008, Hudson's requisition to the Owner lists the masonry work as 96.19% complete, the metal work as 96.82%, the waterproofing as 95.06% complete, the sheet metal at 94.55% complete, and the windows at 1.6% complete.

By email dated December 29, 2008, Summit complained to Interstate of having only two masons and two laborers to perform the brick installation on the South elevation of the third-floor plaza.

An EBI survey report from a site visit on January 2, 2009, states that EBI had identified several issues with the moisture barrier system which could render the building vulnerable to water intrusion, these included previously identified items as well as the additional suspect

condition of open window frame seams, through which water could enter the building. Shortly after this report, Mr. Boccia removed himself from the Phipps project due to his concerns.

On January 7, 2009, Summit submitted two proposed Change Orders, one for the removal of six existing doors from the 3rd floor plaza of 444 Second Avenue, and a second for the removal of two additional doors on the 3rd Floor plaza, and the installation of block and brick to cover the openings. This work was performed in January and February 2009.

On January 7, 2009, Summit billed $112,826.16 for exterior masonry work through November 28, 2008 and was paid by Hudson on February 24, 2009. On January 12, 2009 Summit billed $106,895.37 for masonry and air conditioning sleeve work performed through December 29, 2009. This requisition was not paid by Hudson, without explanation, for over two months, in spite of the fact that had Summit submitted a waiver of lien to Hudson at Mr. Imbrenda's request on March 9, 2009.

In an email from Mr. Coogan to Hudson dated January 9, 2009, he stated that once Hudson began work "it became apparent that the plan of spiraling down the building in a sequence combining brick and window installation was ill conceived and impractical, leading to further delays." He also stated that window installation was delayed while sill parts were being re-manufactured because of an error in their dimensions. Further, only in September 2008, did Hudson realize that the windows could not be installed before the masonry work was complete for safety reasons, reflecting Hudson's lack of understanding of the project and poor planning.

The coping stones ordered pursuant to the Change Order arrived at the project in early January 2009. They were taken up to the roof using the Mastclimbers and installed in late January and early February 2009.

Photographs from January 12, 2009 show the Mastclimbers had been fully removed from the South elevation and a hanging scaffold was present. The hanging scaffold was being used by Summit for punch list work, installation of the air conditioning sleeves, and repair of the bricks damaged during window installation.

On January 30, 2009, the Owner notified Hudson that the December 15, 2009 project completion date has passed without substantial completion and Owner was reserving its right to seek liquidated damages.

As of January 31, 2009, Hudson's window installation was 30% complete. The remaining Mastclimbers were removed in early February 2009.

On February 12, 2009, the Owner made payment to Hudson to reduce its retainage on the contract from 10% to 5%.

In a letter from Mr. Coogan to Hudson of February 13, 2009, he complained of windows being installed by two or three unrelated crews of workers who were being supervised by a foreman who was not always on site, poor communication between the foreman and the workers, the use of an insufficient number of the 4-inch hold down clips being installed at the windows, installers expressing frustration with the lack of certain clips and trim materials interrupting their work, and window units that did not properly fit the openings.

On February 17, 2009, Summit billed $608,324.06 to reduce the retainage from 15% to 7.5%. Although Summit was contractually entitled to have its retainage on the masonry subcontract reduced to 5%, at this time, Hudson prevailed upon Summit to seek a lesser percentage. This requisition and the January 7, 2009 requisition were paid by Hudson on February 24, 2009. According to Mr. Cote, Hudson made an assessment at that time that they

wanted Summit to complete the job and that the balance of the subcontract plus the retainage were adequate for them to continue cash flow to Summit.

Interstate's requisition reflects that, as of February 25, 2009, their project work was 96.81% complete, the outstanding work was primarily the installation of new brick on the third and fourth floors which was only 40% installed, and caulking yet to be done on the fifth through tenth floors.

As of February 28, 2009, Hudson's window installation was 90% complete, but they could not install windows on the third and fourth floors until the masonry was completed. Mr. Cote testified that Hudson had the windows installed by February 2009, and certainly had them mostly installed by March 6, 2009. Mr. Cote also testified that there were issues with the window fabrication and installation, and that after the installation, Hudson went through a lengthy and time-consuming process to determine and repair the problem, including onsite remediation using caulking, and additional clips. In spite of their remediation efforts, the windows continued to fail the air and water infiltration tests.

On March 5, 2009, Summit billed Hudson $70,787.70 for exterior masonry work performed on the 444 building, air conditioning sleeve work, and the blocking up of doors through February 27, 2009. Hudson did not pay Summit for this requisition. That same date, Summit billed Hudson for $207,549.07 to reduce the retainage on the masonry subcontract from 7.5% to 5%. Hudson did not pay Summit for this requisition.

On March 9, 2009, Mr. Cote sent Mr. Fakiris a Notice of Intent To Terminate Subcontract in three days, citing Summit's dismantling of the sidewalk bridge, the Stop Work Order issued by the New York City Department of Buildings on December 12, 2008 relating to Dunlop Mastclimbers, Summit's failure to sufficiently staff and timely perform work, Summit's

failure to submit a work schedule, Summit's failure to pay its subcontractors and keep the project free and clear from liens (referencing the Dunlop lien), and Summit's failure to discharge or resolve the lien. On March 10, 2009 Summit responded, refuting each item in turn, including that the sidewalk bridge needed to be removed for Summit to complete other work, that the stop work orders for the Mastclimbers had been long since lifted, lack of compensation and time extensions for additional work, substantial delays caused by the air conditioning sleeve installation problems, and that Dunlop's lien was discharged by Hudson using Summit's money that was withheld from Summit.

By letter dated March 11, 2009, Hudson conditionally withdrew its Notice of Intent to Terminate Subcontract, provided that Hudson would withhold payment to Summit to offset potential liquidated damages from the Owner, costs incurred in Hudson taking over the sidewalk bridge; that Summit provide an expedited roofing completion schedule as the May 8, 2009 completion date was unacceptable, and that Summit provide lien waivers from all its subcontractors and vendors. On March 12, 2009, Summit responded to Hudson that they did not have a liquidated damages clause in their subcontract, that the sidewalk bridge was no longer required for their scope of work and that the completion date for the masonry scope of work was now March 13, 2009.

In a letter from Mr. Coogan to Mr. Imbrenda, dated March 11, 2009, he indicated that Hudson's choice of the Mastclimber scaffold proved unsuitable for the planned spiraling method due to its weight bearing capacity and lack of travel speed. This letter also indicated that Hudson did not have the proper materials (sills) on site to begin window installation until September 2008, and that Hudson had tardily realized that the windows could not be installed while the

masonry work was in progress, which further delayed the window installation until December 2008.

On March 12, 2009, Summit filed its first Mechanic's Lien in the sum of $1,531.333.60 for the work performed on the masonry subcontract, covering its payments due of $106,895.35 for requisitions numbers 21, $70,787.70 for requisition 23, $207,549.07 for project retainage, and the remainder for amounts claimed on Change Order requests 23, 24, 25, 26, 27, 29, 30, 32, 33, 34, 36, and 39.

On March 18, 2009, Mr. Fakiris sent a letter to Mr. Cote indicating that Hudson had been paid for Summit's work in December 2008 and January 2009, indicating that Hudson's payment to Summit on the January 7, 2009 requisition for $112,826.16 was past due.

By email dated March 18, 2009, from Larry Moskowitz from Hudson to Ms. Kanaras and Mr. Fakiris of Summit, he requested that Summit repair the brick under the window sills. The email indicated that "according to Geiger's report, this is brick under the window sills that was blown out during the installation of the sill clips. We realize that this was not caused by Summit. Please price up by unit cost, the cost to fix this problem as it must be corrected from the outside and your scaffold is installed in those areas." This email resulted in Change Order number 42 (see discussion below), which Hudson refused to pay. This work was performed by Summit from April 1, 2009 through April 24, 2009.

On March 19, 2009 the Architect's meeting minutes show that Architect and Owner were to provide a more detailed façade punch list of defective work and, on March 26 and April 16, 2009 this work was underway and ongoing. Also, on March 19, 2009, Hudson finally sent Summit a letter, justifying its withholding payment of the January 12, 2009 requisition. Its reasons included, offsetting liquidated damages, take over of the sidewalk bridge, Summit's lack

of a schedule, lack of lien waivers from subcontractors and vendors, unremedied defects in the façade, and Summit's lien.

On March 25, 2009, Summit billed Hudson for $1,007,053.70 for the balance of the masonry subcontract, for the exterior masonry work performed on the 444 building, coping work, and all of the claimed change orders, for work performed through March 25, 2009. Hudson did not pay Summit for this requisition. Also, on March 25, 2009, Summit billed Hudson for $470,598.34 for the balance of the retainage on the masonry subcontract. Hudson did not pay Summit for this requisition. Pursuant to the section 7.11 of the masonry subcontract, the final installment of the subcontract, including all remaining retainage, was due to be paid within 90 business days after final completion of the work.

In a March 25, 2009 letter from Mr. Coogan, he indicated that there were many issues with the windows including the clips, the trim and the outer plumbness.

As of March 27, 2009, the base roofing subcontract work was listed as 68% complete, with the 32% outstanding ($467,738) reflecting the work still to be performed on the 3rd floor plaza roof.

On March 29, 2009, Summit billed $89,796.40 for work performed on the third-floor plaza roof deck through March 27, 2009. This requisition was not paid by Hudson.

By letter dated March 28, 2009, Summit complained to Hudson about only getting access to four of nine apartments that needed air conditioning sleeve adjustments.

The base masonry subcontract work was essentially completed by the end of March 2008, and Summit performed some additional punch list work in March 2008. On March 31, 2009, only $50,000.00 for the work from the base masonry subcontract remained outstanding and $670,000.00 of the $850,000.00 roofing subcontract work was complete, the roof of the 330

building was 100% complete, the roof of 444 building was 100% complete, and roof of 3rd floor plaza was 10% complete, the plaza doors and drains work had not been done, and the air conditioning sleeve installation was now 98% complete. Hudson's interior work was also 98% complete.

From April 1, 2009 to April 24, 2009, Summit performed sill repair brick work and related mortar pointing work due to the damage caused by the window installers. This work was performed on the West and South elevations of the building, was performed at Hudson request, and Hudson acknowledged that this was remediation of issues not caused by Summit. Hudson's site safety manager, Frank Giovinco, signed off on Summit's Time and Materials tickets, and Mr. Cote testified that Hudson agreed to pay Summit for this work.

On April 28, 2009, Summit billed $237,788.43 for work performed on the third-floor plaza roof through that date. This requisition was not paid by Hudson.

Summit's daily job reports reflect that on April 29, 2009 and April 30, 2009, they were power washing and painting the inside of the third-floor parapet.

By letter dated May 4, 2009, Summit advised Hudson that they had been notifying Hudson for two weeks to set up an inspection of the completed punch list and sills brick replacement work. The punch list items needed to be inspected by the Architect.

By letter dated May 8, 2009, Summit advised Hudson that they had not received the signed Change Order for the under-sill brick repair work that they had performed, and would not continue with the brick repair work until they received the appropriate documentation.

On May 15, 2009, Summit filed a Mechanic's Lien in the sum of $89,796.47 for the roofing scope of work for work performed through May 14, 2009.

On May 19, 2009, Summit sent an email to their Johns Mansville representative to perform a roofing inspection of the plaza roof. After Johns Mansville inspected and approved the warranty, Summit communicated to Johns Mansville that it had completed work on the 444 building's plaza roof on June 1, 2009. Apparently, although Johns Manville approved the roofing work for the warranties, it refused to issue the warranties for any of the roofs, because Summit had not been paid. Although in deposition testimony, Ms. Rubinton testified that there were some outstanding problems with the roof that required repairs (some of which may have occurred during lighting installation), which were performed by the Owner, Hudson has presented no evidence and has made no claim at trial as to any back-charge costs incurred by Hudson to make any of these claimed roofing repairs.

On June 5, 2009, the roofing work on the third-floor plaza was completed, Summit had performed the wash down of the exterior, and Summit billed $187,562.67 for work performed on the third-floor plaza roof through that date. At that time, the work on the third-floor plaza roof was 100% completed. This requisition was not paid by Hudson. Also, on June 5, 2009, Summit billed $36,941.27 for the masonry change order work to repair the damage under the windows caused by the window installers. This requisition was not paid by Hudson.

On June 10, 2009, Summit billed $72,116.00 for the 5% retainage on the roofing subcontract. This requisition was not paid by Hudson.

On June 11, 2009, Summit filed a Mechanic's Lien in the sum of $237,788.43 for work performed on the roofing scope of work through May 26, 2009.

Summit's daily job reports reflect that from June 15, 2009 through June 25, 2009, they were power washing, patching, and coating the inside of the third-floor parapet.

In another letter from Mr. Coogan dated June 17, 2009, he indicated that there was an ongoing problem with the exterior trim still being installed. In an email on the same date, Mr. Coogan indicated that the windows had been installed in a shoddy, unprofessional manner, that Hudson had been made to go back and reinstall and the reinstallation was still unsatisfactory as a result of poor workmanship and lack of supervision. Also, the exterior clips, which provided more stability and water and air tightness, had only been installed at three of the 600 windows.

On July 17, 2009, Summit filed a Mechanic's Lien in the sum of $187,562.67 on the roofing scope of work for work performed through June 3, 2009.

In Hudson's June 30, 2009 requisition, it certified to the project Owner that Summit scope of work under the masonry and roofing subcontracts were 100% complete.

In an email dated August 6, 2009, Mr. Coogan indicated that the window problems were still an issue holding up completion of the project and asking when window work was going to resume.

As of August 17, 2009, Summit had paid Interstate $3,316,142.00 on their subcontract (after downward adjustments were made for materials that were actually purchased by Summit and upward adjustments made for additional work performed by Interstate), leaving a balance due of $100,756.43. Ms. Neubauer testified that Summit would be entitled to an additional reduction in the subcontract value of $150,000.00 to 160,000.00 in back-charges for the air conditioning sleeve work and another $30,000.00 in back-charges for the punch list work that Interstate was supposed to perform that Summit actually performed on the 444 building. This Court credited Ms. Neubauer's testimony on this point. Thus, Interstate has no claim for damages against Summit.

On August 25, 2009, Interstate filed a Notice under Mechanic's Lien in that amount of $186,833.44. This Lien was not bonded by Summit.

On September 1, 2009, Summit filed a Mechanic's Lien in the sum of $368,425.14 on the masonry scope of work for work performed through March 11, 2009. The lien specified that it represents brick and concrete work, unpaid retainage, less money held in court. Also that date, Summit filed a Mechanic's Lien in the sum of $72,116.00 on the roofing scope of work for work performed through June 2, 2009.

The construction minutes from September 17, 2009, indicate that the interior punch list work was on hold pending window tests.

On October 1, 2009, Dunlop filed a mechanic's lien in the amount of $192,317.00.

The construction minutes from October 29, 2009 indicate that the windows failed a water infiltration test and Hudson proposed a liquid sealant to close defective joints in the window frames. The interior punch list work continued to be put on hold pending the window passing the infiltration test. Mr. Cote testified that at some point they realized that their window installation subcontractor, Metal & Glass Solutions was likely the cause of the problems, and that the Owner was never impressed by this subcontractor. They were removed from the job, and replaced with another company, ASK Construction Inc., who suggested the use of a snap trim kit as a solution. Mr. Cote acknowledged that this process took a long time, but it worked.

On November 5, 2009, Mr. Coogan emailed Hudson expressing concern that the outside trim work should have already started, and the need for a schedule of when the window installers would start and finish.

By letter dated November 11, 2009, Hudson's counsel demanded that Summit discharge or otherwise resolve the liens and claims of that of Glenwood, Interstate, Dunlop, and

Bricklayers Local 1 and its Fringe Benefit Fund ("Local 1'), or face being back-charged for all costs associated with the liens, including payments to lienors to satisfy the liens. Upon Summit's failure to bond the liens, Hudson bonded the liens, incurring fees.

On November 19, 2009, Summit filed a Mechanic's Lien in the sum of $214,385.50 on the masonry scope of work for work performed through March 11, 2009. Hudson bonded all of Summit's liens.

On December 15, 2009, Owner sent Hudson a notice of default, specifying its failure to retest the windows, remediate the deficient windows and damaged exterior masonry work. The notice also specified the window and damaged masonry remediation work required. Hudson's counsel's response, dated December 18, 2009, blamed the delay largely on change order work including the extensive repairs that had to be made to the back-up block. The response claimed that further delay resulted from the failure to approve and pay for change order work such as the back-up block wall, which then led to the liens placed by Summit and its subcontractors, further slowing the work.

On December 21, 2009, Local 1 sent a claim letter advising Hudson, Summit, Owner, and Interstate of its claims against Interstate, specifically that Interstate failed to pay $341,000.00 in fringe benefit funds and dues contributions for work at the project, exclusive of interest, cost and attorney's fees. The letter demanded that Federal immediately pay the claimants the amount claimed under the terms of the payment bond. When Summit learned that Interstate was not paying at least part of its fringe benefits as required under this prevailing wage contract, Summit sued Interstate for fraud, claiming it had been told that the fringe benefits had been paid to Local 1.

On February 25, 2011, Local 1 commenced a Federal Court action against, inter alia, Interstate, M.A. Angeliades ("MAA"), Hudson, and Federal. Local 1's claims arise from Interstate's failure to pay union contributions on the Phipps project and another separate project. Local 1 sought $329,000.00 against MAA, Hudson, and Federal, pursuant to the labor and materials payment bond, plus interest, cost, and disbursements. The Complaint also stated direct Federal claims against Hudson under the Federal Employee Retirement Income Security Act ("ERISA") and the Federal Labor Management Relations Act ("LMRA"), based upon allegations that MMA was a signatory to the relevant collective bargaining agreement and Hudson was legally responsible for payments due under the collective bargaining agreement as an alter ego of MAA. In an unrelated case, an arbitrator had previously found Hudson legally responsible for union claims under a collective bargaining agreement between MAA and the Mason Tenders District Council, upon a finding that MAA and Hudson were alter egos of one another.

As of March 24, 2010, the Owner was still withholding $2,000,336.63 from Hudson on the project.

On April 5, 2010, Summit filed its Amended Verified Complaint in this action alleging that Interstate failed to perform work in a timely and workmanlike manner, provide sufficient, manpower, adhere to the project progress schedule, complete its work, follow directions from Summit, and failed to pay suppliers and fringe benefits and dues contributions for its workers, and willfully exaggerated its mechanic's lien.

By letter dated April 14, 2010, Summit reminded Hudson that their subcontract included a duty for Summit to defend, indemnify and hold Hudson harmless in connection with the Federal claims filed by Local 1.

On May 12, 2011, Hudson, MAA, and Federal resolved Local 1's claims against them by agreeing to pay $300,000.00 in full satisfaction of all claims. Hudson paid this amount to Local 1. In the same stipulation, Interstate also settled all its claims against Hudson, acknowledged owing Local 1 at least $300,000, and assigned its claims against Summit in this action, to Hudson.

As some point in 2011, Mr. Boccia was asked to return to the project because the windows were leaking and to see if he could help get a resolution to the windows issue. When he returned to address the windows, he also performed an examination of the façade. An EBI site visit was performed on June 16, 2011, on the North elevation of the building to identify any deficiencies in the exterior masonry façade in order to establish a punch list so that any remaining deficiencies could be corrected. EBI identified areas where brick was cracked and mortar was damaged below the window sills and some areas where caulk needed to be reapplied around windows. He also identified some places where brick was broken and mortar was protruding, cracked, or missing in areas away from the window sills, and membrane protruding from the sealant at shelf angles. Mr. Cote testified that Bay Restoration had performed the remediation of the damaged window sill brick on the East and North elevations back in July 2009, however, the photos in the EBI report prove this his account was not credible.

On July 13, 2011, Bay Restoration submitted an estimate to perform work on two elevations of the building. Hudson then retained Bay Restoration to perform the outstanding punch list work on the North and East elevations of the building as directed by Mr. Boccia, and Mr. Boccia then inspected their work. Bay Restoration performed this work during the months of August 2011 through October 2011 at a total cost to Hudson of $112,000. Once this work was

completed, Mr. Boccia was later able to certify the building as safe in a Local Law 11 report submitted to the City of New York.

On October 26, 2011, the balance due to Hudson from the Owner was $1,628,007.00 on the project. On October 28, 2011, the Owner released to Hudson $656,131.00 as payment of four outstanding requisitions, citing Hudson's apparent improvement in its progress toward completion of the project work, based upon its submission of an acceptable completion schedule and increased manning of the work site.

On October 31, 2011, upon a final inspection report, Hudson received certification from the United States Department of Housing and Urban Development that they had satisfactorily completed all their contract work, signaling completion of project. At that time, the Owner released Hudson from any claims for liquidated damages.

In February 2012, the Owner and Hudson resolved their claims in this action, except that Hudson reserved its claims under nine Change Orders 24, 25, 26, 27, 30, 32, 36, 38 and 39, for which it had not been paid and it had not paid Summit, which all stemmed from Summit's masonry subcontract work. As agreed, these claims were to be submitted to mediation.

On March 23, 2012, Hudson received a final payment from the Owner of $1,382,167.45

In March 2013, Hudson invited Summit to the mediation to make a presentation of the facts, information, documents and arguments in support of these Change Order claims. The mediation resulted in a settlement agreement between the Owner and Hudson.

Discussion and Findings

Summit seeks $1,024,832.74 for amounts not paid on the masonry subcontract, $587,263.57 for amounts not paid on the roofing subcontracts, and a total of $1,199.599.83 representing various claims for additional work under the masonry subcontract.

Summit's Breach of Contract Claims

Summit seeks $1,024,832.74 for breach of the base masonry subcontract. The parties stipulated that $7,707,269.69 was paid on the masonry subcontract.

Failure to make periodic, installment, or progress payments is a material breach of contract (*Fifty States Mgmt. Corp. v. Pioneer Auto Parks, Inc.*, 46 NY2d 573 [1979]; *Awards.com LLC v. Kinko's Inc.*, 42 AD3d 178, 187 [1st Dept 2007]). Plaintiff is entitled to recover upon a showing that they substantially performed under those subcontracts and that Hudson breached those subcontracts in failing to pay Summit. The burden is on the withholding party to show that the withholding was proper (*Sturdy Concrete Corp. v. Nab Const. Corp.*, 65 AD2d 262, 272-73 [2d Dept 1978]). A party cannot withhold payment for strictly theoretical reasons or possible future contingent liabilities (*NRS Const. Corp. v. City of New York,* 134 AD2d 219, 221 [1st Dept 1987]; *see Fehlhaber Corp. v. O'Hara*, 53 AD2d 746, 747 [3d Dept 1976]). Summit substantially performed, and Hudson has not met its burden of establishing that its withholding of payment was justified.

The masonry subcontract permits Hudson to withhold payment in the event a subcontractor files a mechanic's lien. Hudson actually withheld $214,474.76 from Summit's December 18, 2008 requisition, depositing those funds into court to discharge the Dunlop mechanics lien. Thus, no further withholding on this basis was appropriate. Hudson breached the masonry subcontract when it withheld the periodic payment to Summit on its January 12, 2009 requisition, for $106,895.37, for masonry and air conditioning sleeve work performed through December 29, 2009. This breach was made even more egregious, when Hudson prevailed upon Summit to submit a lien waiver prior to receiving payment, and then withheld payment to Summit. Pursuant to Article 7.8 of the the masonry subcontract, Hudson was

required to pay Summit within five business days after Hudson's receipt of funds from the Owner.

On March 18, 2009, Summit wrote to Hudson demanding payment and advising that the Owner had paid Hudson for this work two weeks prior. Only at that point, on March 18, 2009, did Hudson send Summit its first notice of withholding detailing their claimed justification for such action. These claimed reasons for withholding will be addressed in turn.

As such, Hudson's failure to pay Summit's two March 5, 2009 requisitions of $70,787.70 for exterior masonry work performed on the 444 building, air conditioning sleeve work, and the blocking up of doors through February 27, 2009 and $207,549.07 to reduce the retainage on the masonry subcontract from 7.5% to 5% as required by pursuant to Article 7.8.1 of their subcontract upon substantial completion (even though the Owner paid Hudson to reduce its retainage on February 12, 2009), were also breaches of the masonry subcontract. Hudson never terminated its subcontract with Summit (although in March 2009 it served a Notice of Intent To Terminate), and Summit remained on the project seeing the masonry and roofing work through to their completion in June 2009.

First Hudson claims that it withheld to offset liquidated damages that the Owner may assess, however, at the time of Hudson's breach, the Owner had merely advised Hudson that it was reserving its right to seek liquidated damages, a right that the Owner had under its contract with Hudson. A contracting party may only withhold payment if it has an existing claim against another party, not because at some future date a claim may arise (*NRS Constr. Corp. v. City of New York*, 134 AD2d at 221). A potential claim for liquidated damages against the general contractor does not constitute a claim against the subcontractor which the general contractor may offset in its payments to the subcontractor (*ACS Systems Associates , Inc. v. Safeco Ins. Co. of*

America, 134 AD3d 413, 414 [1st Dept 2015][an unrealized, admittedly "potential" claim for liquidated damages that the SCA may or may not assert against the general contractor does not constitute a claim for liquidated damages against plaintiff by which defendant or the general contractor may offset its payment to plaintiff]). At bar, the Owner never assessed Hudson for liquidated damages (and ultimately waived any such claim in February 2012), so this was not an appropriate basis for withholding.

Hudson next claims that Summit failed to provide a schedule showing an expedited completion date, and Summit failed to provide lien waivers executed by all of its subcontractors and vendors despite repeated requests. However, neither are a basis to withhold payment under the masonry subcontract. "[Lien] waivers cannot be required as a precondition to payment and may only be required either at the time payment is made or thereafter and withholding payment based upon failure to provide lien waivers is prohibited (*U.W. Marx, Inc. v. Koko Contracting, Inc.*, 97 AD23d 893, 895 [3d Dept 2012] *citing* New York Lien Law 34).

Further belying all of Hudson's claims to withhold, is the fact that Mr. Cote and Mr. Coogan certified to the Owner and the Federal government on December 18, 2008 that the masonry subcontract scope of work, including masonry, metal work, and waterproofing were over 95% complete. Higher percentages were reported in Hudson's February 28, 2009 and March 31, 2009 certifications. Thus, Hudson also breached the masonry subcontract by failing to tender a portion of the retainage when required. The masonry subcontract provided that 15% of the amounts due to Summit were to be retained by Hudson, and that upon substantial completion, Article 7.8.1 required two-thirds of the retainage to be released to Summit. Hudson only released half of the retainage to Summit, leaving $207,549.07 unpaid. When Summit billed for the improperly withheld retainage in their invoice for work up until February 27, 2009, and

again in their invoice of March 25, 2009, Hudson failed to pay. In any contract action, claimant bears the burden of establishing its damages (*Crane-Hogan Structural Systems, Inc. v. State*, 88 AD2d 1258 [4th Dept 2011]). Summit has met its burden of proof as to the breach, and the measure of its damages, and is entitled to an award of $1,024,832.74 for breach of the base masonry subcontract.

This Court finds that Hudson has also materially breached the roofing subcontract. The parties stipulated that $587,263.57 was the balance on the roofing subcontract. Summit has established the breach through its proof of its own performance and the failure of Hudson to pay. Mr. Coogan testified that Summit completed 100% of the roofing work including all punch-list items, Hudson certified completion, billed the Owner, and ultimately received payment for 100% of Summit's work on the roofing subcontract. Manufacturers warranties were prepared to be issued, but for the fact of Hudson's refusal to pay Summit for the work. Hudson has presented no evidence at trial to the contrary, has withheld $587,263.57 in due payments, and has made no back-charge claims with respect to the roofing subcontract work at trial. Summit has met its burden of proof as to the breach, and the measure of its damages, and is entitled to an award of $587,263.57 for breach of the roofing subcontract.

Summit's Change Order Claims

Summit seeks additional money and delay time as a result of various Change Order requests made during the construction. As an initial matter, Summit moved *in limine* to preclude Hudson from using Summit's lack of certified payroll document to establish Summit did not perform certain work or that Summit cannot establish the value of such work. Early in this litigation, Perfect Imaging, a document reproduction firm was retained to reproduce records that were exchanged in discovery. The documents of record are ambiguous as to whether Perfect

Imaging was retained by Hudson or Summit. Summit contends that, in October 2010, a binder containing Summit's certified payroll for this project, for the period from November 2008 to June 2009, was removed from Summit's offices along with other documents for reproduction, and when the documents were returned in December 2010, that this particular binder was never returned. Contemporaneous emails to and from counsel address the claimed missing binder, but therein Summit's counsel states that he is not insinuating that Hudson or its counsel did anything improper, and is merely seeking information to obtain the return of the binder. As discovery progressed, Hudson continued to seek the certified payroll from Summit.

Summit's motion *in limine* is denied. Other than by self-serving statements, Summit has failed to demonstrate to this Court's satisfaction that these documents in fact existed, that they were removed from Summit's offices, and that they were not returned. Even if they did exist, other than by inuendo, Summit has failed to demonstrate that they were lost due to some misconduct by Hudson or its counsel. Nor has Summit demonstrated that these claimed lost documents could not have been obtained or re-created, either by regenerating the certified payroll records from their computer system or obtaining them from the Owner (who would have received the documents during the project).

Change Order request 24 sought $216,004.53 for repairs to the back-up block for floors 5 through 32 and an extension of 19 working days to perform this work. This was based upon the position that the back-up block was in a far worse state of repair than could have been reasonably anticipated. Hudson advocated in support of this Change Order request with the Owner, contending that was additional work, and Larry Moskowitz verified Summit's time and materials tickets. Mr. Coogan rejected this Change Order request finding that patching and filling all damaged concrete back-up block on the inner side of the exterior walls was within the scope of

the subcontract drawings and specifications which required the repair of all existing back-up block and filling of open joints and voids.

Change Order request 25 sought $72,788.72 for the application of a Thoroseal waterproof coating to the back-up block on floors 5 through 32 and an extension of 10 working days. Mr. Coogan rejected this Change Order request because this work was that he proposed as a reasonably priced stop-gap measure, necessitated by Summit's change of the means and methods, for their own expedience, from the spiraling to the stripping method, and leaving the building vulnerable to the elements. The cost associated with waterproofing the exterior back-up block to prevent water penetration into the building's apartments, was work clearly within Summit's scope of work under the masonry subcontract, and was not additional work.

Change Order request 26 sought $109,019.77 for removal of protruding block and brick required to properly install the insulation assembly, as well as an extension of 14 working days. Upon inquiry, Mr. Coogan advised Summit to carve out the insulation to fit over protrusions of two inches or less and to remove the brick and replace it with pancake block or fill with mortar parging for protrusions of two inches or more. In spite of this response, Summit, as directed by Hudson, removed the protruding block, repairing the back-up wall. Hudson wrote to the Architect to detail how this extra work was necessitated by encountering unknown conditions. Mr. Coogan rejected this as additional work, finding that this was within the original scope of work, including in notes on the project drawings, which required repair to all damaged back-up block, and filling of all joins and voids to create a smooth surface on the block wall. Mr. Coogan also questioned the cost, as being four times the industry standard. Summit failed to submit any backup documentation for the cost of this work.

Change Order request 27 sought $107,122.38 for the installation of bituthene membrane on floors 3 - 4 and 13 - 32 at the concrete spandrel panels, plus seven additional working days. Hudson advocated to the Architect that the bituthene was additional work beyond the scope of the original project plans. Mr. Coogan rejected any additional compensation for this change because this was a substitute waterproofing method, as a result of field conditions, where the original method had monies in the contract for repair of the concrete spandrels and the installation of a half-inch of insulation board. Although the contractors requisition from July 31, 2006 had a line item which provided for asphalt coated copper flashing with the new window spandrels, Mr. Coogan testified that this copper was a more expensive product than the bituthene that was actually installed.

Change Order request 30 sought $157,474.82 for additional shims and associated labor that were necessary to complete the masonry subcontract. Summit claims that it was required to use substantial additional shims to deal with field conditions and Mr. Kalis testified that minor adjustments for this job would have required the use of about 1,500 shims, but this project required the use of five or six times as many, or 12,000 shims. Mr. Coogan rejected this Change Order request as the specifications indicate that Summit was to provide all necessary shims and Hudson never agreed that the project originally required a certain number of shims. Nor was there any documentation from Summit as to the actual number of shims used on the project or time and materials tickets documenting the costs incurred.

Change Order request 32 sought $52,540.34 for the installation of a shelf angle on the 33rd floor (according to a new detail drafted by the Architect during the project) and a 10 work day extension of time to perform the work. Mr. Coogan rejected payment under this Change Order request since the scope of work did not change and the number of floors which required

shelf angles under the specifications and drawings remained the same as this was a shelf angle at the window head of the 33rd floor as required by the specifications. This Court finds that Mr. Fakiris's claim during the project, and at trial, that this was additional work because it did not appear on the parapet coping detail drawing was frankly absurd. Mr. Coogan explained that this shelf angle did not again need to be shown on the parapet coping detail drawing, which had nothing to do with the shelf angles below, and the scope of work clearly provides for shelf angles on floor 3 to 33. Further, Summit never provided time and material tickets for this work. The Court notes that for some reason, in January 2010, Mr. Dandolos sent an email to Mr Fakiris indicating that he could offer Mr. Fakiris $44,141.35 for the work associated with this Change Order request, however, there is no indication that this offer was ever accepted by Summit.

Summit's request for payment on Change Orders 24, 25, 26, 27, 30 and 32 must be denied. The masonry subcontract provides at paragraphs 2.7 that:

> In the event of any conflict or ambiguity between or among any of the Subcontract Documents (i) Architect and/or Engineer shall interpret the design intent of the Plans and Specifications, and (ii) Contractor shall interpret all other Subcontract Documents.

Additionally, paragraph 13.2 provides that:

> Subcontractor shall be bound by the decision of: (i) the Architect of the Engineer as to the interpretation of the design intent of the Plans and Specifications; (ii) Architect, the Engineer or Contractor as to the quality of Work; (iii) Contractor as to the performance of Work.

Where the parties to a contract agree that a third party's determination shall resolve disputes arising under the contract, that third party's determination is binding absent fraud or bad faith (*Charles S. Wood & Company, Inc. v. Alvord & Swift*, 258 NY2d 611 [1932][contract provided that Architect's decision as to the true intent and meaning of the specifications and the quality, quantity and sufficiency of the materials and workmanship furnished thereunder shall be

accepted as final and conclusive]; *Sturdy Concrete Corp. v. NAB Construction Corp.*, 65 AD2d 262, 268 [2d Dept 1978] [agreement provided that engineer was to decide all questions of any nature arising out of the contract]). A "contractor cannot recover for additional work required by the architect or engineer in charge of construction where the contract gives the architect or engineer authority to determine the manner of performing the contract." (*Savin Bros. Inc. v. State*, 62 Ad2d 511, 516 [4th Dept 1978] *citing Snare & Triest Co. v. City of New York*, 191 AD 184, 199 [1st Dept 1920]). With respect to each of these six Change Orders requests, Hudson wrote to Mr. Coogan, the Architect, and advocated that the work required in these six Change Order requests be determined to be additional work, however, in each instance, Mr. Coogan determined that the work was within the original scope of work required by the contract, detailed his reasoning and cited to the specific plans and specifications. Based upon these determinations, and in the clear absence of any evidence of fraud or bad faith by the Architect, Summit's claims for additional monies as a result of these Change Order requests are denied.

However, although the Architect's reasoning was sound, in light of the positions taken by Hudson, on Change Order request 24 (back-up block repair), Change Order request 26 (removal of protruding block and brick), and Change Order request 27 (bitithene mebraine), this Court finds that Summit was permitted 19, 14, and 7 additional working days respectively to complete this work.

Summit is entitled to no time extension, however, for Change Order request 25, (Thoroseal waterproof coating) as this work was necessitated by Summit's switch from the original spiraling method, which Summit abandoned in order to speed up their masonry work on the project. Summit is also entitled to no additional time for Change Order request 32 (shelf

angle) as this work was set forth in the original specifications and required no additional time to complete.

Change Order request 33 sought $87,629.94 for cost associated with rental equipment for the 23 days of weather delays in connection with equipment set forth in Change Order 10. Frank Giovinco, Hudson's site safety manager approved the 23 days of weather delay in an email of October 30, 2008. Section 8.8 of the masonry subcontract specifically provides that:

> Subcontractor expressly agrees for itself, its Sub-subcontractors and suppliers not to make and hereby waives, any claim for damages on account of any delay, obstruction or hinderance. Subcontractor's sole remedy for any delay, obstruction or hinderance shall be an extension of time in which to complete the work.

Accordingly, any damages sought for delays are expressly barred by the subcontract (*see LoDuca Assocs., Inc. v. PMS Const. Mgmt. Comp.*, 91 Ad3d 485 [1st Dept 2012]; *Universal/MEC, Ltd. V. Dormitory Auth. Of State of N.Y.*, 50 AD3d 352, 353 [1st Dept 2008]). However, Summit was already provided an extension for 11 of these days in the asbestos Change Order, so Summit was entitled to an extension of 12 additional working days to complete the project.

Change Order request 23R sought $21,900.00 for use of Lehigh 11A custom color mortar used on the 330 building in lieu of standard mortar, to coincide with a prior approved change order. This change request was not approved by Hudson, as Hudson requested backup information to justify the 2000 additional bags and the cost difference between the colored mortar and the standard mortar; there is no evidence that this information was ever provided. Further, Summit only provided evidence of receipts for 123 bags of Lehigh 11A custom color mortar and has submitted no evidence of any difference in price. Accordingly, Summit has not met its burden of proof on this change request.

Change Order request number 29 sought $186,455.46 for the use of "spec mix" custom mortar in lieu of standard mortar. Hudson rejected and never signed this Change Order request since the "spec mix" was approved as an "as equal" submission, the subcontract provides for the use of standard mortar, and the Summit installed 15 floors of brick on the building using the "spec mix" prior to requesting a change order. Hudson's basis for rejection has not been credibly refuted by Summit. Also, the invoices submitted by Summit were billed to Interstate and Summit has failed to establish that Summit incurred any additional costs as a result of Interstates purchase of the "spec mix" instead of other mortar. Accordingly, Summit has not met its burden of proof on Change Order request number 29.

Change Order 36R sought $115,710.28 for costs associated with work on the 3rd floor plaza/curb and 13 working days of additional time. Mr. Imbrenda's email from August 2008 indicates that the Architect decided not to proceed with the previous flashing detail, replaced it with a revised detail and advised Summit to provide its cost proposal as soon as possible. The detail provided for a number of new items including new concrete masonry blocks, stainless steel flashing, a waterproof membrane, wood blocking and water stops. Thus, as per Hudson, this was additional work to be performed pursuant to a construction change directive as provided for in Article 9.3 of the masonry subcontract. Summit submitted its revised Change Order proposal on December 4, 2008. At trial, Summit submitted evidence of their receipts for the additional materials, and Mr. Fakiris pointed out the differences between the original drawing and the revised detail and pointed out photographic evidence of the location where work was performed. Accordingly, Summit has met its burden of proof and is entitled to payment of $115,710.28 plus 13 days of additional work time.

Change Order 37 sought $5,031.07 for the removal of six existing doors from the 3rd floor plaza of 444 Second Avenue, as well as six additional working days. Change Order 38R sought $8,526.01 for the removal of two additional doors on the 3rd Floor plaza, the installation of block and brick to cover the openings, and another six working days. These Change Orders were submitted by Summit on January 5, 2009 and January 6, 2009. Hudson prepared a subcontractor/vendor agreement on their form for the amounts requested, leaving off the 12 additional working days. Mr. Fakiris added back the 12 additional working days and submitted the form back to Hudson, who refused to countersign because of the addition of the 12 working days. There is no dispute that this work was performed, was additional work that Hudson induced Summit to perform, and Hudson agreed to the cost. In addition, Hudson billed the Owner for this additional work and was paid for at least a portion of this work. Thus, Summit has met its burden and is entitled to recover $13,557.08, and this Court finds that they were also entitled to the 12 additional work days to perform this additional work.

Change Order request 39, dated January 21, 2009 sought $13,823.46 for installation of permanent wiring and ground-fault protection. As per Mr. Fakiris and the invoice from Rockledge Scaffold Corp., the company that performed the work, this was an upgrade to the sidewalk shed lighting to bring it into compliance with a change to the New York City electrical code, which was amended during the project. Summit submitted the invoices and calculations to Hudson for payment. Summit has met its burden and it entitled to receive its actual cost for this work of $10,241.44.

Change Order 34R sought $5,631.78 and 11 additional working days for the installation of 154 additional coping stones because the parapet was actually 10 inches wide, not 8 inches wide. On December 10, 2008, Hudson informed Summit that this Change Order was approved

by the Architect. Hudson billed the Owner for this additional work and received payment. Hudson never paid Summit and accordingly, Summit has met its burden and is entitled to $5,631.78 for this Change Order plus 11 additional working days.

Change Order 42 dated April 28, 2009, sought $39,941.27 for the sill repair brick work and pointing due to damage caused by the window installers. Hudson directed the work, acknowledged that it realized that this work was not caused by Summit, Hudson's site safety manager, Frank Giovinco, signed off on Summit's time and material tickets, and Mr. Cote testified that Hudson agreed to pay Summit for this work. Accordingly, Summit has met its burden and is entitled to payment of $39,941.27 for this Change Order, plus the 13 additional working days during which Summit performed this work.

In total, on the above Change Orders where Summit has met its burden of proof, it is entitled to recover a total of $185,081.85. Adding the base masonry $1,024,832.74 and base roofing $587,263.57 amounts, Summit is entitled to $1,797,178.16 on its claims.

Hudson's Claims

Delays Claims

Hudson has asserted counterclaims seeking costs associated with its project expenses which it claims are attributable to Summit's project delays. They seek to back-charge Summit 100% of their project costs for the three months from December 6, 2008 to March 5, 2009, and 50% of their project costs for the period from March 6, 2009 to June 28, 2009.

With respect to vendor Construction Staffing Solutions they have presented evidence that the costs for both periods totaled $328,775.34. With respect to vendor Construction Safety Agency of New York Inc. they have presented evidence that the costs for both periods totaled

$30,488.60. With respect to Hudson's "general conditions" (internal employee labor costs for staff dedicated to the project) they have presented evidence that this cost totaled $305,541.80.

Hudson contends that they are entitled to damages associated with these overhead costs, which they claim they would not have incurred but for Summit's delays on the project. Ultimately, this claim hinges on whether Hudson has demonstrated that project delays were attributable to Summit. Thus, the reason for project delays was a central issue at the trial.

As a preliminary matter, Summit made a motion *in limine*, on which this Court reserved decision at trial. This motion sought to strike Hudson's counterclaims and affirmative defenses pertaining to delays and offsets for delay damages, resolve all delay issues in Summit's favor, or granting an adverse inference against Hudson's on issues of delay. This motion is based on a claimed failure by Hudson to turn over emails from Frank Giovinco, Hudson's Superintendent and Site Safety Manager during the project, sent to other's at Hudson, complaining of Metal & Glass Solutions incompetent window installation work. At Mr. Giovinco's deposition, he testified that he sent at least two emails per week complaining of Metal & Glass's poor performance, during the entire time that he was working on the job and Metal & Glass was installing windows. In an order dated December 16, 2014, issued in spite of a prior good faith search affidavit on this very issue, Justice Cynthia S. Kern ordered defendant Hudson to provide all correspondence from any date that relate to the delays allegedly caused by Metal & Glass, for up to July 2009, within 45 days. No emails were ever turned over in response, and the only documents provided establish that Metal & Glass was performing work on site in the early months of 2009. This Court finds that Summit has established that such emails did in fact exist, that they were not preserved and provided by Hudson in spite of a Court order. This Court also finds that the striking of Hudson's counterclaims and affirmative defenses pertaining to delays

and offsets for delay damages would be excessive, and that the appropriate sanction is an adverse inference against Hudson; that these emails would have shown that Mr. Giovinco made numerous complaints to others at Hudson that Metal & Glass's defective window installation was the cause of delays at the project (*Maiorano v. JP Morgan*, 124 AD3d 536 [1st Dept 2015]; *Pegasus Aviation v. Varig*, 118 AD3d 428 [1st Dept 2014]; *Strong v. City of New York*, 112 AD2d 15 [1st Dept 2013]). Even were this sanction not imposed, the Court would nevertheless find that the credible evidence at trial strongly supports a determination that the delays at the project were not attributable to Summit.

The party seeking delay damages has the burden of proving its damages (*Berley Industries, Inc. v. City of New York*, 45 NY2d 683, 686 [1978]; *Manshul Const. Corp. v. Dormitory Authority of New York*, 79 AD2d 383, 387 [1st Dept 1981]). When claims are made for damages from delay, the party with the burden "must show that the [other party] was responsible for the delay; that these delays caused delay in the completion of the contract (eliminating overlapping delays); that [they] suffered damages as a result of the delays, and [] must furnish some rational basis for the court to estimate those damages, although a precise measure is neither possible nor required" (*Manshul*, 79 AD2d at 387 [1st Dept 1981]; *Plato General Const. Corp./EMCO Tech Const. Corp. v. Dormitory Authority of State*, 89 AD3d 819, 825 [2d Dept 2011]).

Initially, Change Order 10 resets Summit's masonry completion date to October 31, 2008, plus 11 working days for weather on the masonry subcontract. Additional weather-related extensions of 12 working days, extended Summit substantial completion date for the masonry subcontract work into early December 2008. Summit substantially completed this work, within this time frame, and completed its work and left the project by June 2009. As discussed above,

as a result of various change order requests, this Court finds that Summit is reasonably entitled to a 112 working-day extension of its time to complete the masonry scope inclusive of the above weather delays, which pushed their masonry completion date out to mid-April 2009.

After the asbestos was discovered and addressed, and the construction work continued anew, Summit did indeed experience delays in its progress on the project, resulting primarily from deficiencies in the load capacity of the Mastclimbers and their occasional breakdowns. Mr. Coogan described the Mastclimbers as fine pieces of equipment that just couldn't move quickly enough for the operation. These problems forced Summit to change its means and methods of performing the masonry work from the spiraling method to the stripping and rebricking method. Even during the course of the stripping and rebricking of the exterior masonry, the Mastclimbers suffered from sporadic problems with their full function, which in turn led to Interstate occasionally understaffing the masonry work. Mr. Fakiris conceded that there were failures by the Mastclimbers throughout the project, including load failures which slowed down Summit's work, and that there were also days when Interstate did not provide sufficient manpower to the job.

Nevertheless, these problems did not significantly impede Summit's progress. As the photos taken November 12, 2008 show, all the exterior brick, except on the third and fourth floors was installed, and as per Mr. Coogan, these photos reflect Summit's substantial completion of the masonry subcontract. Some work remained, such as the third and fourth floors still needed to be covered with brick, which required removal of the Mastclimbers, imperfections in the façade needed to be remediated, washdown needed to be performed and the third-floor plaza decking, coping and roof work still needed to be performed. Summit's dispute with Dunlop, Summit's failure to pay Dunlop, and Dunlop's refusal to remove the Mastclimbers, did

impact Summit's completion of these last components of the project. Also, Summit needed to step in and perform work itself when Interstate failed to install the air conditioning sleeves or perform punch list work.

Contrary to Hudson's contentions, however, this Court finds that none of the delay, or Hudson's costs associated with completing the project can be appropriately shifted to Summit. The true cause of the entirety of the project delay, was Hudson's disastrous failures in its management of the window installation. First, although Hudson's project schedule had them, in theory, putting in windows above the masonry work as it proceeded down the building, as Mr. Coogan credibly testified, there was never a legitimate safety plan in place that would have allowed the window installation to take place above where the masons were working; any testimony, particularly by Mr. Cote, to the contrary is simply unworthy of belief. Thus, contrary to Hudson's project plan, the window installation was never going to take place while the masonry work was being performed and was always going to wait for the masonry's substantial completion.

Then Hudson had repeated failures to order and obtain the window sills, upon which the windows were to rest. Even if Hudson could have theoretically installed windows while the masonry work was ongoing, failures to order and obtain the sills persisted for about three months from mid-June 2008 until September 2008. Only by mid-October, were 40% of the sills finally on site.

These Hudson caused delays were further exacerbated by Hudson's inability to get air conditioning sleeves on site, ordering sleeves in the wrong color, not having an adequate number of sleeves, and failure to schedule access to the apartment units for installation to occur. This began in mid-October 2008 and continued through mid-November 2008.

By mid-November 2008, Hudson sought to correct its miscalculation on the timing of the window installation by accelerating the window installation schedule. This caused its first window installation subcontractor, Oriel, to beg off the project. But Oriel's replacement by Metal & Glass could not solve Hudson's ongoing problems with the windows. By November 20, 2008, due to various deficiencies, Hudson still did not have a successful window installation mock-up of the proper manner for installing the windows, and the window manufacturer was called in to address several problems. By mid-December, Hudson realized that the window installation was going to require an additional clip to attach the window to the frame. Hudson then lost two months of installation time as these clips did not arrive until mid-January 2009.

Once installation began, problems persisted. Mr. Cogan complained of unrelated crews, foremen not on site, poor communication, and the use of an insufficient amount of clips, while the installers complained or windows that did not fit, and lack of clips and trim material. Although the windows installation was initially "completed" by early-March 2009, the installation was so badly botched, the improper installation methods and poor window fit resulted in repeated failures to satisfy air and water penetration testing, as well as damage to the brick below the window sills. By June 17, 2009, Mr. Coogan noted ongoing window problems with the exterior trim, shoddy and unprofessional installation, unsatisfactory reinstallation, and the use of virtually none of the needed exterior clips; he again noted problems with the windows in August 2009. In September 2009, window failures were delaying Hudson's interior punch list work, and the windows failed another water infiltration test in October 2009. At this point, the

ineffective Metal and Glass was replaced by ASK Construction Inc.[2] Over time ASK ultimately resolved the issues with the windows, which were completed at some point in the year 2011.

As such, the problems with the project that caused the delays were the result of Hudson's extremely poor planning and defective work involving the window installation. These delays overlapped and extended far beyond any delays that could have been attributed to Summit. Any notion that Summit delayed the project and should be responsible to pay Hudson for its overhead costs during the from December 2008 to June 2009, during which Summit was completing the third and fourth floor masonry, masonry punch list items, performing coping and roofing work on the third-floor deck, and remedying damage to the masonry caused by a Hudson retained window installer, is without merit.

Accordingly, Hudson has not met its burden of proof that the overall project was delayed in any way by Summit. Further, to the extent Summit could be found responsible for any portion of the delay, that delay overlapped the extensive and pervasive delays that were caused by Hudson. In addition, Summit was entitled to additional time to complete the project through and including mid-April 2009 (see change order discussion above), and Hudson's window delay extended the project completion for years, into 2011. Accordingly, none of the delay is attributable to Summit and Hudson's delay counterclaims are dismissed.

Remediation Costs

Hudson seeks the cost associated with Bay Restoration's completion of punch list items performed on the North and East elevations of the façade at a cost of $112,000.00. Hudson has

[2] The exact timing of which window subcontractors were on the job during which periods is difficult to precisely ascertain as Hudson lacked any documentation of any subcontracts with the window installation subcontractors.

established that it paid Bay Restoration $112,000.00 for work performed from August 2011 through October 2011 as identified in the June 16, 2011 EBI report. Although Mr. Cote insisted in his testimony that Bay Restoration was also on site in June 2009 to repair the below windowsill brick damage caused by the Metal & Glass, Hudson did not identify any contract, invoices, payments, or other project document to support Bay Restorations presence in June 2009, and this claim it controverted by the findings and photos in the EBI report showing brick damage still present below the sills. As such, as a factual matter, a portion of the work performed by Bay Restoration in 2011, was remediation of the damage caused by Metal & Glass. Upon my finding that the sill brick remediation work was necessitated by damage done by Metal & Glass, Summit is not responsible for the cost associated with this portion of the work. However, the 2011 EBI report also demonstrated that, when Summit left the project, it left the North elevation, and likely the East elevation, with many other deficiencies in the masonry work that needed repair. Accordingly, with the exception of the portion of this cost associated with the sill brick repair, Hudson has met its burden of proof and has demonstrated its entitlement to this $112,000.00 cost. In determining the portion of the cost associated with the sill brick repair on the North and East elevation, this Court can look to the comparable cost of $39,941.27 that Summit sought from Hudson under Change Order 42, for the cost of the same sill brick repairs on the other two elevations. Reducing this amount from the $112,000.00, Hudson has met its burden of proof and is entitled to an award of $82,058.73 on this counterclaim.

Hudson seeks costs paid by Hudson to Rockledge Scaffold Corp. associated with the rental of the sidewalk bridge for the three-month period from August 2011 through October 2011, during which Bay Restoration was performing the remediation work on the façade, at $4,355.00 per month including sales tax. Hudson also seeks a one-time $45,000.00

demobilization fee, a cost assumed from Summit, for a total claim of $58,065.00. Hudson has presented evidence that it took over the sidewalk bridge contract from Summit effective March 1, 2009, paid Rockledge a $22,500.00 deposit toward the demobilization fee in March 2009, and paid Rockledge three checks in late 2011 totaling $35,565,00, representing three months rent and the second half of the deposit. As the sidewalk bridge was a Summit obligation as per the masonry subcontract's scope of work, Hudson is entitled to the cost of demobilization. As the monthly rental from August 2011 to October 2011 was primarily in place for the remediation of deficiencies in the Summit's masonry work, Hudson has met its burden of proof that this cost is a remediation cost that should properly be borne by Summit. Hudson is awarded $58,065.00 on this counterclaim.

Mechanic's Liens

Hudson seeks an order discharging Summit's mechanic liens and damages of $247,942.00 associated with the cost of bonding all of the liens on the project through the date of the conclusion of trial. Hudson contends that Summit's Liens were willfully exaggerated in several respects. If a court finds that a lienor had willfully exaggerated a mechanics lien, the lien shall be declared void and he cannot recover on the lien (Lien Law section 39). Damages for a willful exaggeration include the amount of any premium paid for a bond given to discharge the lien (Lien Law section 39-a). The burden of proof is on the party claiming the willful exaggeration (*Goodman v. Del-Sa-Co Foods*, 15 NY2d 191, 194 [1965]). "The provision with respect to excessive lien claims was intended to punish willful exaggeration and not honest differences [*citations omitted*] and to protect an owner or contractor 'against fictitious, groundless and fraudulent liens by unscrupulous lienors.'" (*E-J Elec. Installation Co. v. Miller &*

Raved, 51 AD2d 264, 265 [1st Dept. 1976], *citing*, 37 NY Jur, Mechanics' Liens, § 69). "A notice of lien may include amounts due from both written contracts and from change orders for extras depending on whether the owner of the property sought to be liened has given his consent for the extra work." (*Matter of Forman v. Pala Constr. Co.*, 124 AD2d 453 [3d Dept 1986]; Lien Law section 3; see *Delany & Co. v. Duvoli*, 278 NY 328, 329 [1938]). The consent required is not mere acquiescence, but some affirmative act or course of conduct on the part of the owner establishing confirmation (*Valsen Constr, Corp. v. Long Is. Racquet & Health Club*, 228 AD2d 668, 669 [2d Dept 1996]; *Tri-North Bldrs. V. Di Donna*, 217 Ad2d 886, 887 [3d Dept 1995]).

Article 9.2 of Summit's masonry subcontract provides that a Change Order must be in writing signed by Hudson, and Article 9.14 provides that "[p]ending final determination of costs, amounts which have been approved may be included in Applications for Payment." Summit billed for, and then filed a lien against the property which included its change order requests numbered 24, 25, 26, 27, 29, 30, and 32 totaling $901,406.02. Summit was fully aware that each of these change orders was either explicitly rejected by the Architect or by Hudson, and that Summit was not entitled to seek payment for these rejected change orders. Thus, Summit significantly exaggerated its liens by including these amounts. In terms of establishing the element of willfulness, during a portion of his deposition which was read into the trial record, Mr. Fakiris acknowledged that he knew that Summit could only submit a requisition for Change Orders that were approved. Based upon this testimony, Hudson has conclusively demonstrated that Summit willfully and intentionally exaggerated its lien (*see LMF-RS Constr., Inc. v. Kaljic*, 126 AD3d 436 [1st Dept 2015]; *Inter Metal Fabricators, Inc. v. HRH Constr. LLC*, 94 AD3d 529 [1st Dept 2012]; *Abra Constr. Corp. v. Duane Assoc., LLC*, 59 AD3d 263 [1st Dept 2009]). Thus, the filing of a lien based upon rejected claims of additional work, for which Summit was not

entitled to bill, was willful and that this was "not a case involving a mere inaccuracy or honest mistake in setting the amount of the lien" (*Strongback Corp. v. N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392, 393, 394 [1st Dept 2006]). This determination rests upon my credibility assessment of Mr. Fakiris (*see New Day Bldrs. V. SJC Realty*, 219 AD2d 623 [2d Dept 1995]), and specifically this Court's determination that that he was fully aware this was not additional work -- but work required of Summit under the base masonry subcontract -- and he willfully inflated his lien by including these illegitimate claims to obtain leverage over Hudson and the Owner in what was clearly shaping up to be a protracted litigation.

Further, the equipment costs contained in Change Order requests 24 through 27, plus the additional equipment charge contained in Change Order request number 33 which sought $87,629.94 for cost associated with rental equipment for 23 days of weather delays were also willfully exaggerated. Under section 8.8 of the masonry subcontract, Summit waived any claim for damages on account of any delay, and Summit's sole remedy for any delay was an extension of time in which to complete the work. In light of this unequivocal subcontract provision barring these charges, this Court finds that their inclusion in the lien amount by Summit was unquestionably a willful exaggeration of the lien. Hudson's remaining claims of willful exaggeration relate to labor or overhead charges on these same change order requests that have already been found to be willfully exaggerated and need not be addressed.

All of the lien amounts that Hudson claims were exaggerated arise out of Summit's Change Order requests, which were all subsumed within Summit's First Mechanics Lien, filed on March 12, 2009, in the amount of $1,531.333.60. This lien was exaggerated by $989,035.96. Hudson's costs associated with bonding this lien was $133,711.00. Accordingly, this lien is discharged and Hudson is awarded $133,711.00 on this claim.

Hudson's Payment to Settle Claims with Local 1

Hudson seeks an offset of $300,000.00 for funds that it paid to Local 1 in settlement of the claims stemming from Interstate's failure to pay fringe benefits and dues contributions.

Members of Local 1 were hired by Interstate to perform the masonry work. On December 21, 2009, the attorneys for Local 1 and its Fringe Benefits Funds sent Federal a letter formally requesting payment of $341,000 on the payment bond due to an alleged underpayment by Interstate in fringe benefits and dues contributions. Hudson's and Summit's attorneys communicated several times regarding this demand, with Summit insisting that the claim was improper and untimely, and that Hudson should not pay. Indeed, in one communication, Summit reminded Hudson that Summit would have a duty to defend and indemnify Hudson and informed Hudson that it would deem any payment by Hudson a voluntary payment. In a January 7, 2010 letter, Federal denied the claim stating that Local 1 was not a beneficiary to the bond and that Local 1 did not give Federal notice within the proper time limits to make a claim on the bond.

After further communications between the various parties, on February 25, 2011, Local 1 commenced an action in the United States District Court, Eastern District of New York. The defendants in that matter included Interstate, MAA, Hudson, Federal and others (Summit was not a defendant). With respect to the Phipps projects, Local 1 alleged joint and separate claims against Interstate, Federal and MAA and Hudson.[3] In addition to a cause of action seeking payment from Federal under the payment bond, Local 1 also alleged separate and direct ERISA and LMRA causes of action against Hudson and MAA. Local 1 claimed that MAA was a signatory to the collective bargaining agreement, and that Hudson and MAA held themselves out

[3] The Federal complaint made allegations with respect to more than one project, but only claims made with respect to the Phipps project are germane.

as related entities and were in fact alter-egos of one another. The Federal Complaint quoted Hudson as stating that Hudson served "as the Construction Management arm" of MAA[4] and made specific reference to a prior arbitration award against MAA and Hudson, that had made findings and ruled that they were in fact alter-egos of one another. Eventually, the Federal action settled with Hudson making a $300,000 payment to Local 1 and, in exchange, Local 1 released all its claims against Interstate, Federal and MAA and Hudson.

The common law voluntary payment doctrine bars "recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525, 526 [2003]). Similarly, a payment made without the payor having made any effort to learn what its legal obligations were, may be deemed voluntary (*Gimbel Bros., Inc. v Brook Shopping Centers, Inc.*, 118 AD2d 532, 535 [2d Dept 1986]). However, the voluntary payment doctrine does not apply if the payor "was in some way lawfully answerable for the claim paid" (*Merchants Mut. Ins. Group v Travelers Ins. Co.*, 24 AD3d 1179, 1180 [4th Dept 2005]). Summit argues that the $300,000 settlement was a voluntary payment, that Local 1's payment bond claims were specious as set forth in Federal's January 7, 2010 letter, and that any payment was not obligatory. Although Summit is likely correct as to Federal's lack of a legal exposure on the bond claim, Hudson was still lawfully answerable to Local 1 on the separate, direct ERISA and LMRA claims as the alter-ego of MAA. Hudson further faced potential exposure to third-party claims that could have been pursued under New York State law (*see Cox v. Nap Construction*

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[4] Although Mr. Cote testified that he bought back 25% of Hudson from MAA as of December 31, 2007, there was not supporting evidence or documents consistent with that assertion, and in any event, there was no evidence that the companies have in any way changed how they held themselves out to the public.

Co., 10 NY3d 592 [2008]). Since Hudson was lawfully answerable to Local 1 on these ERISA and LMRA claims, the voluntary payment doctrine is inapplicable.

Summit claims that Hudson settled these claims to protect MAA's principals, who were guarantors of the payment bond. However, Summit, Hudson and Federal were all of the opinion that Local 1's payment bond claim, had no merit, was untimely, and would be easily defeated. As such, Summit has effectively conceded that MAA's principals were highly unlikely to face personal financial exposure on their guarantee of the payment bond. It is thus evident that Hudson had no need to settle Local 1's claims to protect MAA's principals. By contrast, Summit argued that Hudson and MAA were alter-egos of one another, which would support Hudson's position that Hudson (and MAA, but not MAA's principals) faced significant exposure on the ERISA and LMRA claims. Thus, Hudson had a sound basis to determine that despite the weakness of Local 1's bond claims, it was lawfully answerable on the ERISA and LMRA claims. In light of this obligation and Article 7.13 of the Masonry Subcontract, Hudson's settlement of these claims was not a voluntary payment. Accordingly, Hudson is entitled to an offset of $300,000.00 for its payment to Local 1, as the payment does not fall under the common law voluntary payment doctrine.

October 2008 Mastclimber Rental Cost

Hudson seeks an offset of $84,664.70 for the cost associated with the Mastclimber rental for October 2008, based upon Ms. Neubauer's undisputed testimony that these amounts were not paid to Dunlop by Summit. Hudson has met its burden of proof on this claim by demonstrating that Summit has never actually incurred this cost, and had not incurred this cost at the time that is

billed Hudson for the October 2008 Mastclimbers rental on December 18, 2018. Accordingly, Hudson is entitled to an offset of $84,664.70.

Claims Assigned from Interstate

Hudson seeks $109,899.28 for claims assigned from Interstate, representing the outstanding unpaid balance on the subcontract between Summit and Interstate. Justice Cynthia S. Kern, in an order enter on October 8, 2015, in denying Summit's motion for leave to amend, explicitly held that this assignment was not void and null as a matter of law. However, this claim has no value and Hudson is entitled to no recovery. This Court credited Ms. Neubauer's testimony that Summit would be entitled to back-charge Interstate $150,000.00 to 160,000.00 for the air conditioning sleeve work and $30,000.00 for the punch list work that Interstate was responsible for, but Summit ultimately performed. Accordingly, Hudson's has not met its burden of proof on this claim and it is dismissed.

Hudson is awarded $82,058.73 for remediation costs paid to Bay Restoration, $58,065.00 for sidewalk bridge costs paid to Rockledge Scaffold Corp., $133,711.00 for the cost of bonding Summit's willfully exaggerated mechanic's lien, $300,000 for Hudson's payment to Local 1, and $84,664.70 for one month's rental costs of Dunlop's Mastclimbers, for a total of $658,499.43.

Accordingly, Summit's award of $1,797,178.16 shall be reduced by Hudson's counterclaims totaling $658,499.43 for a total award to Summit of $1,138,678.73.

Summit's Claim Against Federal

Summit seeks judgment against Federal for breach of the labor and materials payment bond. "Under New York law a surety's duty generally is coextensive with that of the principal

on the bond" (*West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.*, 49 F3d 48, 50 (2d Cir 1995). Thus, Federal, as surety on the payment bond, is liable to Summit to the same extent as Hudson.

It is hereby

ORDERED that Summit shall be awarded a final judgment against Hudson in the amount of $1,138,678.73 with interest at the rate of 9% per annum, from June 28, 2009 to the date of this order, and thereafter at the statutory rate as calculated by the clerk; and it is further

ORDERED that Summit's Mechanic's lien filed March 12, 2009 is discharged; and it is further

ORDERED that Summit shall be awarded a final judgment against Federal in the amount of $1,138,678.73 with interest at the rate of 9% per annum, from June 28, 2009 to the date of this order, and thereafter at the statutory rate as calculated by the clerk; and it is further

ORDERED that Summit shall submit judgment on notice consistent with this decision and order.

Dated: June 28, 2019

David B. Cohen, A.J.S.C.

HON. DAVID B. COHEN
J.S.C.