SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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METRO WOODWORKING INC.,

Plaintiff,

- v -

HUNTER ROBERTS CONSTRUCTION GROUP, LLC, GS SITE 25 HOTEL, LLC, GS SITE 25 RETAIL, LLC, LASALLE BANK, NATIONAL ASSOCIATION, JOHN DOES 1-10

Defendant.

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INDEX NO. 653760/2012

MOTION DATE 01/08/2019

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER .

Upon the foregoing documents and for the reasons set forth on the record (1/23/2020), Hunter Roberts Construction Group, LLC's (**HRCG**) motion for summary judgment pursuant to CPLR 3212 seeking dismissal of that portion of Metro Woodworking, Inc.'s (**Metro**) first cause of action which seeks delay damages and/or inefficiency costs in the amount of $626,780 is granted, and Metro's cross-motion for summary judgment dismissal of the counterclaims against it is denied as untimely.

RELEVANT FACTUAL BACKGROUND

HRCG was hired as the general contractor on a construction project to renovate and upgrade a 14-story hotel and retail complex located at 102 North End Avenue in Battery Park City, New York (the **Project**). Pursuant to Amendment No. 1 to Construction Contract for General

Contractor (the **Construction Contract**), dated July 1, 2011, by and between HRCG and GS Site Hotel LLC (**GS**), the Project had a 12-month schedule starting January 18, 2011, with a substantial completion date of November 10, 2011 (NYSCEF Doc. No. 114). Metro was retained as a subcontractor pursuant to a Subcontract (the **Subcontract**), dated March 2, 2011, by and between HRCG and Metro (NYSCEF Doc. No. 115). Per the Subcontract, Metro agreed to fabricate and install custom millwork wall panels, doors, cabinets, fabric wall panels, wood rails and restaurant islands for the public spaces, restaurants, conference areas and hotel lobbies located on the first three floors of the Project in exchange for a "lump sum" of $2,450,000 for all the work included in its scope of work (*id.*). Specifically, Article 1.3 of the Subcontract states:

> The Subcontractor shall perform all work and furnish all supervision, labor, materials, plant, equipment. loading, hoisting, scaffolding, tools, supplies, transportation and other things necessary for the construction and completion of the Millwork – Suite, Conference Centers & Restaurant work for the Project, as further defined in the Scope of Work attached hereto as Exhibit A all in strict accordance and in full compliance with all Contract Documents and to the satisfaction of Hunter Roberts and the Owner (the "Work")

(*id.*, Art. 1.3)

The Subcontract also provides:

> The Subcontractor is responsible to mobilize as many times as necessary to conform to job site conditions and the project schedule. ***Any fees associated with these mobilizations are to be covered by this Subcontractor. The GC and client will not incur any costs associated as a result of these mobilizations***.

(*id.*, Ex. A, Paragraph 3[c, "Scope of Work" [emphasis added]).

And,

> … The Subcontractor shall include all costs to work overtime during weekdays, weekend and holidays in order to maintain the project schedule and shall also include all the costs for their equipment, supplies, manpower, stand by trades, as well as all escalation costs, etc. as would be required in order to complete their work as outlined in the project schedule ….

(*id.*, Ex. A, Paragraph 2[a], "Schedule").

Metro's sole remaining cause of action in this action is for breach of contract, seeking (1) $626,340 in delay damages for Change Order Requests (**COR**) 45 and 46 (the **Delay Claim**) and (2) an alleged unpaid balance on the Subcontract. COR 45, dated February 6, 2012, sets forth a "shop labor increase" of $314,000 for the period of November 20, 2011 to February 20, 2012:

> Materials and Shop Labor Increase due to job schedule being extended by 3 months from a late date of 11/20/11 to 02/20/12 in accordance with Section 2.a.i of Exhibit 'A' dated 2/28/11."

(NYSCEF Doc. No. 116).

COR 46 claims a "field labor increase" of $312,340 during the period starting January 27, 2012, through March 8, 2012:

> Provide labor in the field to complete installation of woodwork and fabric panels in a 9 week install schedule in lieu of 14 week install schedule as per Section 2.a.i. of Exhibit 'A' dated 02/28/11. Change Order includes lost productivity for added manpower and extended working hours caused by other trades not being completed in accordance with approved schedule and not having responses to questions from Hunter Roberts CG.

(NYSCEF Doc. No. 117).

It is not disputed that neither COR 45 nor COR 46 were ever countersigned by HRCG (Robertson EBT, 154:3-6; NYSCEF Doc. Nos. 116-17). In fact, prior to the submission of both documents, on or about February 2, 2012, HRCG had issued a notice of termination to Metro for, among other things, failing to progress the work as required under the Subcontract (NYSCEF Doc. No. 119). Metro disputed its default by email

dated February 6, 2012 – the same day that it submitted COR 45 and COR 46 (NYSCEF Doc. No. 120).

Subsequently, Metro submitted Payment Requisition #15 for $253,693.96 for labor and materials furnished on the Project as of February 29, 2012. By Waiver and Release of Lien (each Waiver and Release of Lien, the **Release**) dated March 8, 2012, Metro affirmed that upon receipt of the payment of $253,693.96 requested in Pay Requisition #15, it will have received ***full payment*** (except retainage) for "all services and work performed and all materials and equipment furnished or stored in connection with the construction of the Project" as February 29, 2012 (NYSCEF Doc No. 121). Metro also executed multiple identical releases (the **Releases)** for the prior periods which covered COR 45 and 46. For example, by Release, dated February 22, 2012, Metro waived and released all claims related to work performed from the beginning of the Project through February 22, 2012 (NYSCEF Doc. No. 122). By Release, dated February 8, 2012, Metro waived and released all claims related to work performed from the beginning of the Project through January 31. 2012 (NYSCEF Doc. No. 123). And by Releases, dated January 24, 2012 and December 12, 2011, Metro waived and released all claims related to work performed from the beginning of the Project through January 16, 2012 and December 15, 2011, respectively (NYSCEF Doc. Nos. 124 and 125). In each of these written Releases, Metro certified that, "the percentage amounts set forth above are true and correct and acknowledge[d] that ***there are no additional costs or claims for any extras or additional for work, services, material and/or equipment on the Project other***

than as set forth above" (NYSCEF Doc. Nos. 121-125 [emphasis added]). It is undisputed that delay costs were not carved out of these lien wavers.

Metro was ultimately terminated in April of 2012 (NYSCEF Doc. No. 128). In total, HRCG paid Metro $2,645,546 for its work (NYSCEF Doc. No. 127). HRCG claims that, except for retainage, Metro has been fully paid. HRCG also claims that it was forced to spend in excess of $710,000 over and above Metro's retainage in overtime other acceleration costs in order to complete Metro's work. HRCG has asserted counterclaims against Metro for (1) breach of contract, (2) contractual indemnity for the claims of subcontractors American Wood Installers and Absolute Woodwork, and (3) indemnity for the judgment entered in favor of American Wood Installers and Absolute Woodwork.

DISCUSSION

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opposing party must then "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" that its claim rests upon (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

Here, as an initial matter, Metro's delay claim is barred by multiple releases, each of which provides as follows:

2. Upon receipt of the portion of the Subcontract Price constituting the Percentage of Subcontract Price Requested in this Application [$253,693.96], as set forth herein, the undersigned acknowledges and agrees that ***it will have received payment in full, less retainage withheld, for all services and work performed and all materials and equipment furnished or stored in connection with the construction of the Project through the Period Ending Date, and hereby now and forever waives, releases and quitclaims, with respect to the Project, all claims and rights to claim against the Contractor, the Owner***, the Lessor, the Lender or the land upon which, or the improvements within which, the Project is situated, except for retainage withheld. …

3. Contingent upon [receipt of] the portion of the Subcontract Price constituting the Percentage of Subcontract Price Requested in this Application, and except for any unpaid retainage, ***the undersigned does hereby as of the date hereof, forever waive, release and quitclaim in favor of the Contractor, the Owner, the Lessor, the Lender*** ... all rights that presently exist to any and all types and forms of construction, contractor's mechanic's and/or materialmen's lien and other liens.

(NYSCEF Doc. Nos. 121-125 [emphasis added]).

In each of the written releases, Metro certified that, "there are no additional costs or claims for any extras or additional for work, services, material and/or equipment on the Project" (*id.*).

The law is well settled that "absent fraudulent inducement or concealment, misrepresentation, mutual mistake or duress, a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim that is the subject of the release" (*Diontech Consulting, Inc. v NYC Hous. Auth.*, 78 AD3d 527, 528 [1st Dept 2010]). There is no ambiguity in the releases here, nor any credible allegations of fraud, misrepresentation, mutual mistake or duress (*id.*). Accordingly, Metro's claim is barred on this basis.

Additionally, Metro's claim is also barred by the plain terms of the parties' contracts. The Subcontract incorporates by reference all the terms and conditions of the General Contract (NYSCEF Doc. No. 115, Art. 1.1). Article 3.9 of the Subcontract similarly provides that "if the General Contract is at variance with granting such time extension, then the provisions of the General Contract shall control" (*id.*). Among the provisions incorporated by reference is the "no-damage-for-delay" provision of the General Contract which provides that absent a prior authorization by the Owner to expend funds to avoid or mitigate delay, the contractor's "sole and exclusive remedy" shall be an extension of time, and that "Contractor shall in no event be entitled to any claim for damages whatsoever by reason of any such Unavoidable Delay Event, including so-called 'Eichleay Damages'" (NYSCEF Doc. No. 114, §5.5.1[b]). New York courts strictly enforce contractual provisions such as this except for in limited circumstances not relevant here (e.g., delays caused by bad faith or willful or grossly negligent conduct, uncontemplated delays, delays so unreasonable as to constitute an intentional abandonment of the contract, or breach of fundamental obligations of the contract) (*Corinno Civetta Const. Corp. v NYC,* 67 NY2d 297 [1986]). A contractor seeking to avoid a no-damage-for-delay clause has a "'"heavy burden of proving that the delays were wholly unanticipated and were solely due to gross negligence" of the contractee (*North Star Contr. v NYC*, 203 AD2d 214 [1st Dept 1994]). Here, Metro has clearly not met its burden, particularly in light of Section 3.7 of the Subcontract which states:

> ***The Subcontactor expressly agrees not to make, and hereby waives, any claim for delay costs, loss of productivity or efficiency, lost profits or extended home office overhead, on account of any delay, obstruction or hindrance from any cause whatsoever, whether or not foreseeable, and whether or not anticipated***, except to the extent that Hunter Roberts has actually recovered corresponding cost reimbursement, compensation or damages from the Owner under the Contract Documents for such delay, obstruction, hindrance or interference, and then only to the extent of the amount, if any, that Hunter Roberts on behalf of the Subcontractor actually received from the Owner on account of such delay, obstruction, hindrance or interference.

(NYSCEF Doc. No. 115, §3.7 [emphasis added]).

The Delay Claim asserted by Metro plainly fall within the scope of Section 3.7 of the Subcontract and Section 5.5 of the General Contract, and there is no issue of bad faith or willful, malicious or grossly negligent conduct by HRCG in connection with the Releases. Similarly, there can be no claim of abandonment or any breach of fundamental obligation of the Subcontract since the Project progressed continuously and was completed by HRCG. Nor can the delay be deemed to "uncontemplated" as under New York law contemplated" by the parties if it is the result of circumstances which is simply "mentioned" in the contract, or arises from the contractor's work during performance, and in any event Section 3.7 of the Subcontract expressly bars delay damages, "whether or not foreseeable, whether or not anticipated" (*Corinno Civetta, supra*, 67 NY2d at 310, NYSCEF Doc. No. 115, §3.7). Metro's Delay Claim was clearly contemplated by the parties as the Subcontract expressly provides that Metro will "mobilize as many times as necessary to conform to job site conditions and the project schedule" at no extra cost, and that the lump sum Subcontract price includes, "all costs to work overtime during weekdays, weekend and holidays in order to maintain the project schedule … as well as

all escalation costs, etc. as would be required in order to complete their work as outlined in the project schedule" (NYSCEF Doc. No. 115, Ex. A).

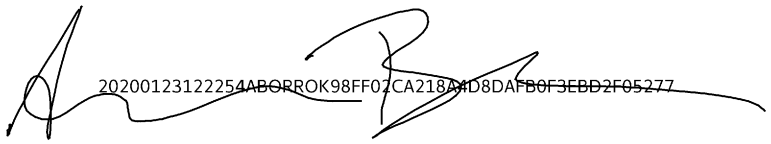
Turning to the cross motion, it is denied as untimely. CPLR 3212 makes clear that the latest a motion for summary judgment may be made is 120 days from the filing of the note of issue, "except with leave of court on good cause shown." The note of issue in this action was filed on September 5, 2018. The cross motion was not filed until March 04, 2019 – ***more than 180 days after the note of issue*** and well in excess of the 120-day maximum provided for such motions under the CPLR. Counsel conceded that on the record at oral argument that there was no good cause for the delay in making the motion.

Accordingly, it is

ORDERED that the Hunter Roberts Construction Group's motion for summary judgment is granted, and the clerk is directed judgment accordingly, and it is further

ORDERED that Metro's cross motion is denied; and it is further

ORDERED that a trial on the counterclaims shall be had on October 12, 2020, with the parties to pick a jury on October 6, 2020, and a pre-trial conference set for September 30, 2020 at 11:30 AM. The parties are directed to familiarize themselves with the Part 53 Trial Rules and prepare all required documents as set forth therein.



1/23/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE