SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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MCCORMACK CONTRACTING, INC., ON BEHALF OF ITSELF AND ALL OTHER PERSONS ENTITLED TO SHARE IN FUNDS RECEIVED BY TRITON CONSTRUCTION COMPANY, LLC IN CONNECTION WITH AN IMPROVEMENT OF REAL PROPERTY LOCATED AT 215 CHRYSTIE STREET, NEW YORK, NEW YORK

Plaintiffs,

- v -

TRITON CONSTRUCTION COMPANY LLC, LIBERTY MUTUAL INSURANCE COMPANY, CADEPLOY, INC., FRANK REICH, LANCE FRANKLIN, CHRIS PEARSON, AND JOHN DOE ONE THROUGH JOHN DOE TEN,

Defendants.

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INDEX NO. 656376/2017

MOTION DATE 07/19/2019, 07/19/2019

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 106, 107, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 137, 138, 140, 141, 142, 143, 144, 145, 146, 147

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 136, 139

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, defendants' motion for summary judgment (motion sequence no. 002) is granted in part, and denied in part, and plaintiff's motion for summary judgment (motion sequence no. 003) is denied.

Plaintiff McCormack Contracting, Inc. (McCormack), a drywall and carpentry trade contractor, brings this action for breach of its trade contract with defendant Triton Construction Company, LLC (Triton), a construction manager, arising out its termination on a construction

project in New York City (the Project). The Project, located at 215 Chrystie Street, consists of high-end condominiums and a luxury hotel.

Motion sequence nos. 002 and 003 are consolidated for disposition. In motion sequence no. 002, defendants Triton, Liberty Mutual Insurance Company, Frank Reich, Lance Franklin and Chris Pearson move for an order granting them partial summary judgment dismissing the complaint, and finding McCormack liable on Triton's counterclaims, in an amount to be determined.

In motion sequence no. 003, McCormack moves for partial summary judgment on the complaint's first, fourth and sixth causes against Triton, and the individual defendants. McCormack also moves for summary judgment dismissing Triton's counterclaims based on its allegations that McCormack breached the subcontract, to be followed by a hearing on McCormack's damages.

BACKGROUND

The following factual background is taken from the complaint (NYSCEF Doc. No. 2); the answer and counterclaims (NYSCEF Doc. No. 76); the affirmation of Brian G. Lustbader, Esq., McCormack's attorney (NYSCEF Doc. No. 90); the affidavit of Enda McCormack, McCormack's co-owner (NYSCEF Doc. No. 131); the affidavit of Chris Petersen (Petersen), Triton's project manager for the hotel portion of the Project, and the person in charge for change orders and billings to the owner (NYSCEF Doc. No. 58); the affidavit of Frank Reich (Reich), Triton's co-chief executive (NYSCEF Doc. No. 56); the affidavit of Gloria Hartnett (Hartnett), Triton's controller (NYSCEF Doc. No. 73); and the affirmation of Michael McDermott, defendants' attorney (NYSCEF Doc. No. 74).

The Parties

McCormack is a drywall and carpentry subcontractor that provides construction materials and labor. Triton is a construction company that provides general construction, construction management, and construction consulting services.

The Project and the CM Agreement

Triton signed a construction management agreement, dated June 17, 2015 (the CM Agreement) with 215 Chrystie LLC (the Owner), requiring Triton to construct the Project (Petersen aff ¶ 2; Reich aff, ¶ 3; *see also* complaint, ¶ 3). The CM Agreement (Reich aff, exhibit A [NYSCEF Doc. No. 57]) made timely completion by May 2017 an essential term, and it provided, by later amendment, that Triton would construct the Project for an amount not to exceed $135,330,566 (the GMP) (*see id.*).

The GMP is comprised of five elements: (1) Cost of the Work, including trade contractor costs; (2) a Contingency Fund; (3) Insurance Costs; (4) Subcontractor Default Insurance Costs; and (5) Fee (*see* CM Agreement, § 9.2). Triton invoiced the Owner each month, including amounts earned by each trade contractor in the preceding month, as part of the Cost of the Work (Petersen aff, ¶ 4; Reich aff, ¶ 4). The Owner reviewed Triton's certified requisitions, supported by trade contractor applications for payment, and then paid Triton amounts for release to each trade contractor, who then acknowledged payment in certified waivers (*id.*; *see* last Lien Waiver [Petersen aff, exhibit B, NYSCEF Doc. No. 60]).

The Trade Contract

McCormack and Triton entered into a Trade Contract Agreement (the Trade Contract) dated October 30, 2014 (*see* Lustbader affirmation, exhibit C [NYSCEF No. 93]), pursuant to which McCormack agreed to furnish materials and perform labor for the installation of drywall

and carpentry work and related materials required for the hotel portion of the Project, in consideration for the price of $4,344,919.00 (the Trade Contract Amount), subject to adjustment in accordance with the terms of the Trade Contract (complaint, ¶ 4). The Trade Contract is comprised of Terms and Conditions (Trade Contract Terms), Trade Contract General Conditions (General Conditions), and exhibits.

Trade Contract Provisions

1. Timely Performance

Trade Contract Terms, section 4, provides that "[t]ime is of the essence" and that "[McCormack] . . . shall diligently prosecute and complete the Trade Work":

> "Time is of the essence to this Trade Contract. [McCormack] shall commence the Trade Work within forty-eight hours after receiving Triton's written Notice to Proceed, and shall diligently prosecute and complete the Trade Work in accordance with the Project Schedule established by Triton and the Owner under the [CM Agreement], subject to adjustments made under the [CM Agreement]. In order to ensure compliance with the Project Schedule, [McCormack] shall seek all required clarifications of the Contract Documents on a prompt and timely basis, place all orders and plan all fabrication for long-lead times in time for delivery to accommodate the Project Schedule and take all other steps required to ensure its timely performance of the Trade Work"

(Trade Contract Terms, § 4).

General Conditions, section 4.1, details McCormack's broad liability for delay damages, including counsel fees and costs:

> "If [McCormack] fails to complete the Trade Work in accordance with the Project Schedule, and/or Triton's directions intended to ensure compliance with the Project Schedule, [McCormack] shall be liable for Triton's damages of every description caused by [McCormack's] delay or non-compliance, including but not limited to, the additional costs, expenses and damages to Triton resulting from such delay . . . costs to Triton for other contractors to recapture such delay, and all costs, damages and other claim incurred with, or owed to, others by Triton, including the Owner for liquidated and/or actual damages to the full extent such are recoverable by the Owner from Triton under the Contract Documents, together with reasonable counsel fees and costs, and all other direct and indirect damages"

(General Conditions, § 4.1).

General Conditions, article 9, allows Triton to terminate McCormack immediately (without cure notice) if the delay is material, or if there are other material breaches. Article 9 also confirms Triton's right to proceed with the defaulted work post-termination, and provides for Triton's damages (*see* General Conditions, §§ 9.1, 9.2, 9.3 and 9.4). In addition, § 9.6 provides:

> "Upon written notice to [McCormack], Triton shall have the right to terminate the Trade Contract for convenience without the obligations to give any reason or justification. Further, in the event that Triton declares [McCormack] to be in default and terminates the Trade Contract upon such basis, and such assertion of default and/or termination is later determined to be improper and/or without lawful justification, such termination for default shall be immediately converted to a termination for convenience under this Article. In the event of a termination for convenience, [McCormack] shall be entitled to payment under the Trade Contract for the Trade Work properly performed prior to termination, plus all other reasonable and unavoidable direct costs to [McCormack] for demobilizing its field forces, plant and equipment, quitting the Project site and terminating any subcontracts and purchase orders . . . [McCormack] expressly waives any claim for compensation and damages beyond the amounts provided above. Further, [McCormack] shall, at its own expense, defend (if requested by Triton), indemnify and hold harmless Triton from any claims by subcontractors or suppliers based upon a termination under this Article"

(General Conditions, § 9.6).

2. Contemplated Disruption and Delay

Section 2.1 of the General Conditions provides that:

> "[McCormack] shall plan, schedule and prosecute all aspects of the Trade work diligently and in accordance with the Project Schedule . . . coordinate the Trade Work with all other work . . . [so that all] work proceeds expeditiously and without delay"

(General Conditions, § 2.1).

Section 1.10 of the General Conditions acknowledges that McCormack might experience delay and disruption, but nevertheless bars such claims:

> "[McCormack] recognizes that the Trade Work may be delayed or disrupted, or accelerated, directly or indirectly, in order to keep pace with . . . other trade

> contractors or Triton . . . [McCormack] considered these risks and factors in agreeing to the Trade Contract Amount . . . [and] shall not make any claim for an increase in the Trade Contract Amount based on . . . [such] delays or disruptions, regardless of extent, duration or frequency"

(General Conditions, § 1.10).

Section 16.1 of the General Conditions also provides that:

> "[McCormack] agrees not to assert any claims against Triton for damages or additional compensation, and only to seek an extension . . . [under] Article 2.2, based on such delays or disruptions, regardless of extent, duration or frequency"

(General Conditions, § 16.1).

While General Conditions section 2.2 allows an extension of time for excusable delay as an "exclusive" remedy, provided written notice is timely given, section 2.3 provides that if the delay or disruption is caused by Triton or the Owner "intentionally and willfully, and without good cause," McCormack is allowed certain costs, again provided written notice is timely given.

3. Termination

Article 9 of the General Conditions to the Trade Contract relates to Termination. Article 9, section 9.2 provides that:

> "Triton may immediately terminate the Trade Contract . . . if (a) the Trade Contractor commits a material breach of the Trade Contract, (b) the Trade Contractor fails to obey a directive from Triton under the Trade Contract, (c) the Trade Contractor breaches any other contract or agreement with Triton; (d) a petition under the Bankruptcy Act is filed by or against the Trade Contractor; (e) the Trade Contractor makes an assignment for the benefit of creditors, (f) the Trade Contractor becomes insolvent; (g) the Trade Contractor fails to comply fully with all applicable federal, state and local laws, rules, regulations and ordinances, and (h) a receiver is appointed for the Trade Contractor's property"

(General Conditions, § 9.2).

McCormack's Alleged Breach and Termination

Triton contends that McCormack's performance was slow from the outset because of inadequate manpower and supervision, and that this situation persisted, despite sporadic

improvement, from late 2015 into early 2017 (Petersen aff, ¶ 21). During his deposition, Enda McCormack testified that "[t]owards the end," i.e., "November, December [of 2016], January and February [of 2017], "there was a reduced level of staffing," because McCormack didn't have the funds to pay its subcontractors or to pay workers. "Basically we were doing change order work and working and not getting paid for it . . . . "We were struggling for money because they weren't paying the change orders" (McCormack tr at 128-129 [McDermott affirmation, exhibit 7, NYSCF Doc. No. 81]).

Triton further contends that McCormack's de-manning was confirmed by its subcontractors and by Triton's Project Manager, who testified that McCormack ignored directives to increase manning, including at weekly meetings, and that McCormack had essentially abandoned the Project (*see* Gary Donoghue tr at 19; Conor Lynam tr at 32; Petersen tr at 259-260 [McDermott affirmation, exhibits 8, 9 and 10, NYSCEF Doc. Nos. 82, 83, 84]).

By letter dated March 6, 2017 (Lustbader affirmation, exhibit D [NYSCEF Doc. No. 94]), Triton notified McCormack that it was terminating the Trade Contract for alleged default by McCormack, effective immediately:

> "McCormack has been and remains in default and material breach under the Trade Contract for a variety of reasons, chief among them improper work and unexcused delays . . . it presently appears [to have] abandon[ed] the Project, having no workers or a skeletal crew . . . [it has no] lawful right . . . that would justify or excuse its defaults under the Trade Contract and to essentially abandon work on the Project."

Triton asserts that its termination of McCormack relieves it of any further obligation to make payment under the Trade Contract. Triton contends that it paid McCormack's monthly Applications for Payment in a timely manner and that, in total, McCormack was paid $4,248,916.05, with retainage of $237,513.42 held, out of the adjusted Trade Contract Amount of $4,587,517.44 (Petersen aff, ¶ 34).

Contrary to Triton's allegations, McCormack alleges it did not breach the Trade Contract. McCormack alleges that it timely commenced performance of the Trade Contract, and substantially performed and completed each of its obligations thereunder, except to the extent that it was impeded or prevented from so performing by acts or omissions of Triton (complaint, ¶ 5).

McCormack contends that, according to Triton's requisition dated February 28, 2017 (Lustbader affirmation, exhibit E [NYSCEF Doc. No. 95]), as of that date, McCormack had completed 95.1% of its work, and that Triton's termination of the Trade Contract post-substantial completion was itself a breach of the Trade Contract.

McCormack alleges that it was not fully paid, and that it suffered damages for unpaid work, the unpaid contract balance and retainage for work performed, the costs of labor, materials and insurance premiums and equipment, obligations to subcontractors and suppliers, supervision and field overhead, and lost anticipated fees and profits on the unperformed remaining work in an amount not less than $2,026,791.52 directly flowing from Triton's breach (complaint, ¶ 10).

McCormack also contends that, as of May 18, 2016, Triton had approved McCormack's change orders in the amount of $720,017.40, but that from May 28, 2016 through February 28, 2017, Triton did not pay for these approved change orders (*see* 3/24/17 letter to Triton [Lustbader affirmation, exhibit K, NYSCEF Doc. No. 101]). In addition, McCormack seeks delay damages in excess of $900,000.

Procedural History

On April 20, 2017, McCormack filed a Notice of Mechanic's Lien against the Owner for the amount allegedly unpaid to McCormack for labor performed and materials furnished to the Project in the amount of $1,066,127.53, which, according to McCormack, includes a contract balance due (retainage) in the amount of $237,513.42, and approved but unpaid change orders in

the amount of $828,614.11 (complaint, ¶ 31). On May 19, 2017, McCormack's lien was discharged, upon the filing of an undertaking in the amount of $1,172,740.28, executed by Triton, as principal, and defendant Liberty Mutual Insurance Company (Liberty Mutual), as surety (*id.*, ¶ 33).

McCormack filed its complaint on October 13, 2017 with six causes of action: (1) wrongful termination under the Trade Contract, seeking $2 million; (2) delay and disruption under the Trade Contract, seeking $960,644; (3) wrongful termination on the ground that Triton had a financial incentive to terminate McCormack because it had subcontractor default insurance (SDI), seeking $2 million; (4) quantum meruit, seeking $1,167,215; (5) against the Liberty Mutual's bond (the Bond), seeking $1,172,740; and (6) alleged violations of New York Lien Law Article 3-A (Article 3-A) against Triton and the individual defendants, seeking $2 million, along with punitive damages and counsel fees.

On December 20, 2017, Triton filed its answer with counterclaims. Triton denied the operative allegations of the complaint, and alleged a number of affirmative defenses, including (1) breach of the Trade Contract; (2) failure to state a claim; (3) failure to satisfy conditions precedent (contractual notice); and (4) estoppel, waiver and release.

Triton also alleged two counterclaims for breach, based on McCormack's alleged delay, failure to man the work, abandonment, refusal to obey Triton's directives, and defective work, both seeking damages exceeding $4.1 million for costs allegedly incurred for completing McCormack's work, plus counsel fees and costs. Triton also alleged a third counterclaim, based on implied contract, seeking the same damages.

DISCUSSION

"'[T]he proponent of a summary judgment motion 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'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment should not be granted if there are genuine material issues of disputed fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

McCormack seeks partial summary judgment on the first cause of action for breach of the Trade Contract for wrongful termination, the fourth cause of action in quantum meruit for the unpaid contract balance, and the sixth cause of action for improper diversion of trust fund assets under Article 3-A. McCormack also seeks dismissal of Triton's counterclaims for breach of the Trade Contract.

Triton seeks summary judgment dismissing the entire complaint, and finding McCormack liable on the counterclaims, in an amount to be determined.

Both parties concede that the threshold legal issue in this contract action is whether Triton's termination of McCormack was proper (*see* defendants' memorandum at 14 [NYSCEF Doc. No. 88] ["(w)hile McCormack alleges various causes of action, each turns on whether McCormack has entitlement under the Trade Contract"]; *see also* plaintiff's memorandum at 5-6 [NYSCEF Doc. No. 103]). If termination was proper, then Triton is entitled to breach damages, allowed by the Trade Contract and applicable law, subject to offset by the adjusted Trade Contract Amount (*see* General Conditions, § 9.3; *Kleinberg Elec., Inc. v E-J Elec. Installation Co.*, 111 AD3d 410, 411 [1st Dept 2013] [general contractor entitled to "cost-to-complete" damages against defaulting subcontractor]; *Lyon v Belosky Constr., Inc.*, 247 AD2d 730, 731 [3d Dept 1998] [damages in construction cases based on difference between contract balance and cost of completing or correcting the defaulted work]).

On the other hand, Triton concedes that if its termination of McCormack is found to be improper, McCormack would be entitled to the amount due, but unpaid, out of the adjusted Trade Contract Amount (*see* defendants' memorandum at 15).

However, the issue of whether Triton's termination of McCormack was wrongful is sharply disputed by the parties. Triton contends that it terminated McCormack for default when it abandoned its Trade Work as the Project neared completion. McCormack contends that it was immune from a default-based termination because it had substantially completed its construction work at the time of termination.

Accordingly, as more fully set forth below, given that there are sharply disputed issues of fact on the key issue of whether McCormack was properly terminated, McCormack's motion for partial summary judgment on the first cause of action for breach of the Trade Contract, and for summary judgment dismissing Triton's counterclaims, is denied.

Likewise Triton's motion for partial summary judgment dismissing the first, second, third and fifth causes of action, which all turn on whether McCormack was properly terminated, as well as judgment on its counterclaims seeking to find McCormack liable for breach of the Trade Contract, is also denied. Triton's motion is granted to the limited extent that the fourth cause of action for quantum meruit and the sixth cause of action for diversion of trust assets are both dismissed.

Breach of the Trade Contract (First Cause of Action; Counterclaims)

Where a party to a contract fails to perform a contract duty, a breach results and an action may be maintained seeking damages. The proponent must provide requisite proof of four elements: (1) the existence of the contract; (2) non-performance; (3) performance by the proponent; and (4) damage caused to the proponent (*see Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 446 [1st Dept 2016]). Here, both parties contend that the other party breached the Trade Contract.

1. *McCormack's Motion for Partial Summary Judgment*

In support of its motion for summary judgment on the first cause of action, McCormack argues that Triton breached the Trade Contract by terminating it after it had reached substantial completion.

McCormack argues that Triton's February 28, 2017 requisition shows that McCormack's drywall and carpentry scope of work was 95.19% complete as of that date, constituting substantial completion at the time Triton terminated its trade contract. McCormack further argues that it did not materially breach the Trade Contract (as required by § 9.2) because McCormack had reached 95.19% completion, which, as a matter of law, constitutes substantial completion.

McCormack contends that "[t]erminating a party who has substantially completed its work constitutes wrongful termination" (plaintiff's memorandum at 7, citing *Nature's Plus Nordic A/S v Natural Organics, Inc.*, 980 F Supp 2d 400, 411-413 [ED NY 2013] and *845 UN Ltd. Partnership v Flour City Architectural Metals, Inc.*, 28 AD3d 271, 272 [1st Dept 2006]). McCormack further contends that "New York courts have universally held that 95% or more completion constitutes substantial completion as a matter of law" (plaintiff's memorandum at 7, citing *Norberto & Sons, Inc. v County of Nassau Dept. of Pub. Works*, 16 AD3d 642, 643 [2d Dept 2005] and *Michael G. Buck & Son Constr. Corp. v Poncell Constr. Co.*, 217 AD2d 925, 926 [4th Dept 1995]).

According to McCormack, given these authorities, Triton's termination of McCormack's contract was wrongful, and McCormack is entitled to summary judgment on its first cause of action alleging breach, and a hearing on damages.

In opposition to McCormack's motion, Triton argues that McCormack conflates the notion of "Substantial Completion" of physical work under the Trade Contract with the substantial performance doctrine. The court agrees with Triton, given that all of the cases cited by plaintiff in support of its argument all refer to the doctrine of substantial performance (*see Nature's Plus Nordic A/S*, 980 F Supp 2d at 411-413 [court held that the plaintiff "substantially performed" in accordance with the minimum sales requirement under the contract]; *845 UN Ltd. Partnership*, 28 AD3d at 272 [finding "undisputed record evidence of substantial performance by defendant of its contractual obligations"]; *Norberto & Sons, Inc.*, 16 AD3d at 643 ["(w)e agree with the trial court's finding that Norberto substantially performed its obligations under the subcontract"]; *Michael G. Buck & Son Constr. Corp.*, 217 AD2d at 926 ["(t)he court properly awarded plaintiff the contract price for the three items substantially completed"]).

Under the doctrine of substantial performance, a party who has failed to comply fully with the terms of a contract but has nevertheless substantially performed the contract, is immune from termination, and is entitled to recovery of the contract price, less specified contract damages. However, in order to recover under this doctrine, the claimant must demonstrate that any alleged failure to comply fully with the terms of the agreement was inadvertent or unintentional, or that the defects in performance were insubstantial, slight, trivial or minor (*Jacob & Youngs, Inc. v Kent*, 230 NY 239, 241-243 [1921]; *Novair Mech. Corp. v Universal Mgt. & Contr. Corp.*, 81 AD3d 909, 910 [2d Dept 2011]; *Botco Devs. v Mikealice Mgt. Corp.*, 291 AD2d 871, 871 [4th Dept 2002]; *A–1 Gen. Contr. v River Mkt. Commodities*, 212 AD2d 897, 900 [3d Dept 1995]; *Sear-Brown Assocs., P.C. v Blackwatch Dev. Corp.*, 112 AD2d 765, 765 [4th Dept 1985]).

Further, there must be substantial performance of all material contractual obligations – not just "substantial completion" of the physical work (*see Steel Storage & Elevator Constr. Co. v Stock*, 225 NY 173, 178 [1919] [substantial performance rejected where a complete grain elevator did not operate at the pace required by the contract, as "rapid performance was a material element"]).

However, "[t]here is no simple test for determining whether substantial performance has been rendered, and several factors must be considered, including the ratio of the performance already rendered to that unperformed, the quantitative character of the default, the degree to which the purpose behind the contract has been frustrated, the willfulness of the default, and the extent to which the aggrieved party has already received the substantial benefit of the promised performance" (*Hadden v Consolidated Edison Co. of N.Y.*, 34 NY2d 88, 96 [1974]). "The question of whether there has been substantial performance . . . is to be determined, whenever there is any doubt, by the trier of fact" (*F. Garafalo Elec. Co., Inc. v New York Univ.*, 300 AD2d 186, 189 [1st

Dept 2002]; *see also Merritt Meridian Constr. Corp. v Old Country Iron Works*, 229 AD2d 661, 663 [3d Dept 1996] ["(q)uestions of substantial performance turn on the facts of each case"]; *Anderson Clayton & Co. v Alanthus Corp.*, 91 AD2d 985, 985 [2d Dept 1983] ["the issue of substantial performance is usually one of fact"]).

Here, McCormack contends that Triton's termination was wrongful because it had substantially completed 95% of its construction work. However, McCormack fails to address the other elements of a substantial completion claim – *i.e.*, that its failure to complete the work was unintentional and that its defects in performance were trivial. Indeed, in all of the cases cited by McCormack in support of its argument that 95% substantial completion of a contract is, by itself, sufficient to bar termination, the court found that that either the failure to fully perform was unintentional or that the deficits were trivial (*see Nature's Plus Nordic A/S*, 980 F Supp 2d at 411-413 [court found that any failure to perform was inadvertent and defects were minor]; *845 UN Ltd. Partnership*, 28 AD3d at 272 [finding no intentional failure to fully perform]; *Norberto & Sons, Inc.*, 16 AD3d at 643 [same]; *Michael G. Buck & Son Constr. Corp.*, 217 AD2d at 926] [same]).

In opposition to the motion, Triton contends that the evidence shows that McCormack had not substantially performed all material aspects of the Trade Contract prior to its termination, including "Substantial Completion" of the physical Trade Work, or "timely performance," and has not demonstrated that its failure to perform was inadvertent.

Where, as here, in Trade Contract Terms, ¶ 4, the contract specifies "time is of the essence," the parties are obligated to comply strictly with its terms (*see Milad v Marcisak*, 307 AD2d 281, 282 [2d Dept 2003]). Performance by the specified date is a material element of the contract, and the failure to perform by that date constitutes a material breach of the contract (*see e.g. Kleinberg Elec., Inc.*, 111 AD3d at 410 [subcontractor that abandoned project despite "time is of the essence"

provision was in material breach of the contract]; *see also Triple M. Roofing Corp. v Greater Jericho Corp.*, 43 AD2d 594, 594 [2d Dept 1973]).

With respect to timely performance, Triton contends that it terminated McCormack because it de-manned the Project, and thus abandoned it prior to completion. If true, McCormack's abandonment would be material, and it would not be entitled to recover under the doctrine of substantial performance. Triton also contends that the abandonment was intentional, because Enda McCormack testified that he had to de-man the Project due to lack of financing. These contentions, as well as McCormack's testimony, are sufficient to raise factual issues as to whether McCormack abandoned the Project prior to completion.

With respect to "Substantial Completion" of the physical work, Triton contends that the 95.19% reflected in the requisition does not reflect the level of acceptable Trade Work, but rather, only the total interim payments made to McCormack out of the Trade Contract Amount.

In support of this argument, Triton submits evidence that, after McCormack's termination, the architect for the Project, Beyer Blinder & Belle (BBB), issued punch lists that identified 3,455 deficiencies in the Trade Work, including 51 of the 367 hotel rooms (Petersen opposing aff, ¶ 10 [NYSCEF Doc. No. 109]; *see id.* exhibit C [excel spreadsheet of punch lists issued by BBB from July 2016 to May 2017 [NYSCEF No. 112]). Petersen contends that 1,392 items on BBB's post-termination punch lists were not mere housekeeping or clean-up items, but rather items of the Trade Work that remained to be "repair[ed]," "replace[d]," "adjust[ed]," "patch[ed]," correct[ed]," "fix[ed]" or "install[ed]" (Petersen opposition aff, ¶ 10). Triton argues that, as such, at least 10% of McCormack's work remained at termination.

Triton also submits the affidavit of Carlos J. Cardoso, an architect employed BBB, who provides his professional opinion that a contractor who has billed 95% in interim payments against

its trade contract value and who also has significant punch list work to accomplish with respect to that 95% of the billed work, has not "substantially completed" its scope of the work (aff of Carlos J. Cardoso, aff, ¶¶ 1-2 [NYSCEF Doc. No. 116]).

These submissions are sufficient to raise issues of fact as to whether McCormack substantially performed the Trade Contract, i.e., whether McCormack's failure to fully complete the contract was intentional, or whether its deficient performance was material, requiring denial of the motion (*see Adam Leitman Bailey, P.C. v Pollack*, 63 Misc 2d 1229[A], 2019 NY Slip Op 50793[U], * 8 [Sup Ct, NY County 2019] [denying motion for summary judgment on cause of action for breach of contract on ground that "defendant has raised a triable issue of fact" as to "whether plaintiff substantially performed"]; *Megrant Corp. v John P. Picone, Inc.*, 43 Misc 3d 1213[A], 2013 NY Slip Op 52311[U], *2 [Sup Ct, Nassau County 2013] [denying motion for summary judgment on breach of contract claim as court could not "definitively conclude[] that Megrant's contract performance was sufficient to satisfy, as a matter of law, the fact-intensive requirements associated with the substantial performance . . . doctrine[]").

Accordingly, McCormack's motion for summary judgment on its first cause of action for breach of contract, and to dismiss Triton's counterclaims, is denied.

2. *Triton's Motion for Summary Judgment*

In support of its motion for summary judgment dismissing the first cause of action, and finding McCormack liable on the counterclaims, Triton argues that McCormack's abandonment of the Project breached its material obligations under the Trade Contract, including to fully man the Project, and make the required progress, and forbidding McCormack from suspending performance based on unresolved claims. Triton argues that thus, McCormack was properly

terminated. In support of this argument, Triton submits the affidavit of Enda McCormack, and the testimony of Triton's project manager and other subcontractors.

However, "[i]n New York, whether a contract has been abandoned is a question of fact" (*Mikada Group, LLC v T.G. Nickel & Assocs., LLC*, 2014 WL 7323420, *17 [SD NY 2014]; *see also Matter of Rothko*, 43 NY2d 305, 324 [1977]; *Wolff & Munier, Inc. v Whiting-Turner Contr. Co.*, 946 F2d 1003, 1008 [2d Cir 1999]).

Indeed, in opposition to the motion, McCormack vigorously disputes this assertion, and contends that its alleged abandonment is refuted by Triton's manpower records, which demonstrate that McCormack's work force averaged 20 workers per day from September 2016 through February 2017 (*see* manpower logs [Lustbader opposition affirmation, exhibit F, NYSCEF Doc. No. 125]; *see also* McCormack aff, ¶¶ 27-28 [NYSCEF Doc. No. 131).

Thus, McCormack has raised a material issue of disputed fact with respect to its alleged abandonment of the Project, and Triton's motion for summary judgment dismissing the first cause of action for breach of contract, and for judgment on its counterclaims, is denied (*see e.g. Spectrum Painting Contrs., Inc. v Kreisler Borg Florman General Constr. Co., Inc.*, 64 AD3d 565, 575-576 [2d Dept 2009] [genuine issue of material fact as to whether construction manager abandoned contract precluded summary judgment in owner's breach of contract action against manager]; *Belrose Fire Suppression, Inc. v Stack McWilliams, LLC*, 51 AD3d 485, 485 [1st Dept 2008] [genuine issues of material fact as to whether plaintiff abandoned project precluded summary judgment on issue of liability in breach of contract action]; *Bovis Lend Lease LMB Inc. v GCT Venture, Inc.*, 6 AD3d 228, 229 [1st Dept 2004] [material issues of fact as to whether contract was abandoned precluded summary judgment]; *see also Megrant Corp.*, 43 Misc 3d 1213[A], 2013

NY Slip Op 52311[U] at *3 ["factual issues preclude summary disposition of the parties' opposing claims with respect to the propriety of Picone's August, 2008 termination notice"]).

In light of this determination, it is unnecessary to consider Triton's arguments with respect the adjusted Trade Contract Amount balance, or the proper amount to be paid to McCormack for its unpaid, but approved, change orders (*see* defendants' memorandum at 19-23).

Quantum Meruit (Fourth Cause of Action)

In its fourth cause of action for quantum meruit, McCormack seeks the unpaid contract balance in the amount of $1,167,215. However, this cause of action is subject to summary dismissal, given the existence of the Trade Contract.

Under New York law, the existence of a written contract covering the particular subject matter of the claims asserted precludes recovery in quasi contract (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] ["The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]; *see also Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1st Dept 2004] ["A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter"]).

The Trade Contract is such a contract, and thus bars McCormack's quantum meruit claim (*see e.g. Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295, 295 [1st Dept 2002] ["the existence of a valid and enforceable written contract governing the disputed subject matter precludes plaintiffs from recovering in quantum meruit"]; *Scavenger, Inc. v GT Interactive Software Corp.*, 289 AD2d 58, 59 [1st Dept 2001] ["since the matters here in dispute are governed by an express contract, defendant's counterclaim for unjust enrichment was properly found untenable"]).

Accordingly, Triton's motion for summary judgment dismissing the fourth cause of action is granted.

Second, Third and Fifth Causes of Action

Triton also seeks summary judgment dismissing the second, third and fifth causes of action. McCormack's second cause of action for breach of contract is based on delay and disruption under the Trade Contract, and seeks $960,644. The third cause of action is for wrongful termination on the ground that Triton had a financial incentive to terminate McCormack because it had SDI, and seeks $2 million. The fifth cause of action is against the Bond, and seeks $1,172,740.

However, defendants admit that each of McCormack's causes of action "turns on whether McCormack has entitlement under the Trade Contract" (defendants' memorandum at 14). Given that there are issues of fact as to whether the Trade Contract was properly terminated by Triton, and thus, whether McCormack has any rights under the Trade Contract, defendants' motion for summary judgment dismissing these causes of action is denied.

Diversion of Lien Law Trust Funds (Sixth Cause of Action)

Article 3-A of the Lien Law creates a series of trusts insuring that money entering the hands of an owner or contractor on a construction project is paid to contractors, subcontractors, and other laborers on the job who performed services or provided materials for the job, i.e. McCormack and other subcontractors. Lien Law section 70 provides that "all funds received by an owner or contractor [i.e. Triton] for a public or private improvement in New York constitutes assets of a statutory trust for which the owner or contractor is designated as statutory trustee." "The assets of an article 3-A trust 'shall be held and applied' to payment of article 3-A trust beneficiaries and costs of the improvement to real property" (*Matter of RLI Ins. Co., Sur. Div. v New York State Dept. of Labor*, 97 NY2d 256, 261 [2002], quoting Lien Law § 71). The trust assets, of which a

contractor is a trustee, shall be held and applied for the payment of claims of subcontractors, among others (Lien Law § 71 [a]). The trust assets, of which an owner is a trustee, shall be held and applied for the payment of the cost of improvements (Lien Law § 71 [a]).

The primary purpose of Article 3-A is "to ensure that 'those who have directly expended labor and materials to improve real property . . . at the direction of the owner or general contractor' receive payment for the work actually performed" (*RLI Ins. Co.*, 97 NY2d at 264 [citation omitted]; *accord Atlas Bldg. Sys. v Rende*, 236 AD2d 494, 495 [2d Dept 1997]). Article 3-A mandates that, once a trust comes into existence, its funds may not be diverted for non-trust purposes. "Use of trust assets for any purpose other than the expenditures authorized in Lien Law § 71 before all trust claims have been paid or discharged constitutes an improper diversion of trust assets, regardless of the propriety of the trustee's intentions (*RLI Ins. Co.*, 97 NY2d at 263 [citations omitted]).

In its motion for partial summary judgment, McCormack claims trust diversion by Triton and the individual defendants under Article 3-A. Defendants seek dismissal of this claim in their motion for summary judgment.

McCormack contends that a statutory trustee's payment of its overhead costs with trust fund money constitutes a diversion of trust fund assets. McCormack also contends that, because change orders are considered a "cost of improvement," they qualify as trust claims, and therefore must be satisfied before a general contractor can pay its own overhead and administrative expenses. McCormack argues that here, Triton paid its own overhead expenses before paying McCormack's approved change orders, in violation of Article 3-A (*see* plaintiff's memorandum at 12-13).

In opposition to McCormack's motion and in support of its own motion for summary judgment, Triton argues that McCormack fails to submit any evidence of diversion. Indeed, during

discovery, McCormack never questioned Triton's witnesses regarding diversion, or the actual application of contract funds received by Triton.

Triton also submits the affidavit of Gloria Hartnett, its controller, with respect to Triton's practice for handling payments received by Triton from project owners. Ms. Harnett avers that Triton maintains complete and accurate records, consistent with accepted accounting standards, reflecting the billing, receipt, deposit and then the payment out of funds received by Triton with respect to each project (Hartnett aff, ¶ 2).

New York Lien Law, § 75 (1), states that:

> "The trustee shall not be required to keep in separate bank accounts or deposits the funds of the separate trusts of which he may be trustee under this article, provided his book of account shall clearly show the allocation to each trust of the funds deposited in his general or special bank account or accounts."

The Court of Appeals has ruled that a contractor may commingle trust funds, and treat such as running bookkeeper balances rather than as segregated accounts (*see e.g. Aquilino v United States of Am.*, 10 NY2d 271, 280 [1961]; *Caristo Constr. Corp. v Diners Fin. Corp.*, 21 NY2d 507, 512 [1968]). Hartnett alleges that, here, all trust fund receipts, including the Fee received from the Owner, were deposited in Triton's main operating account. That account held, and still holds, a balance far in excess of the fee received on the Project, as such accumulated over time, from later summer 2014 to the present (*see* Hartnett aff, ¶ 3). There can be no diversion where, as here, the funds are being held and are available to pay trust claims (*see Pavarini McGovern, LLC v Waterscape Resort LLC*, 483 BR 601, 614-615 [Bankr SD NY 2012]).

Moreover, mere assertion of a diversion claim does not establish that claim, or shift the burden to disprove the claim (*Matter of IDI Constr. Co.*, 345 BR 60, 66 [Bankr SDNY 2006 [speculation insufficient to satisfy burden of proof]; *People v Rallo*, 46 AD2d 518, 528 [4th Dept 1975], *affd* 39 NY2d 217 [1976] [diversion must be proved by a preponderance]; *Environmental*

Appraisers & Bldrs., LLC v Imhof, 143 AD3d 756, 759 [2d Dept 2016] [summary judgment granted for proof failure]).

Accordingly, because McCormack has failed to provide any evidence of Triton's actual application of trust funds for improper purposes, its diversion claim must be dismissed (*see Environmental Appraisers & Bldrs., LLC,* 143 AD3d at 759 ["defendants also failed to establish their prima facie entitlement to judgment as a matter of law on their third counterclaim alleging a diversion of trust fund assets under article 3-A of the Lien Law, since they presented no evidence that EAB used any article 3-A trust funds for a purpose other than that authorized by the Lien Law"]; *H. Verby Co., Inc. v Plainview Assoc.*, 6 Misc 3 1011[A], 2005 NY Slip Op 50026[U]. *3 [Sup Ct, Nassau County 2005] [denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment dismissing Article 3-A claim on ground that "[t]here is no evidence to establish the crucial element of the diversion claim; to wit: that trust funds were diverted to a non-trust purpose"]).

The court has considered the remaining arguments and finds them to be without merit.

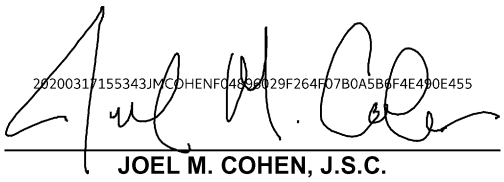
Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment (motion sequence no. 002) is granted to the limited extent that the fourth and sixth causes of action of the complaint are dismissed and severed, and the Clerk is directed to enter judgment accordingly in favor of defendants on those claims; and is it is further

ORDERED that plaintiff's motion for partial summary judgment (motion sequence no. 003) is denied; and it is further

ORDERED that the action shall continue as to the first, second, third and fifth causes of action.

This constitutes the decision and order of the Court.



3/17/2020
DATE

JOEL M. COHEN, 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