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Framan Mech., Inc. v Dormitory Auth. of the State of N.Y.
2019 NY Slip Op 50583(U)
Decided on March 7, 2019
Supreme Court, Albany County
Platkin, J.
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Decided on March 7, 2019

Supreme Court, Albany County

Framan Mechanical, Inc., Plaintiff,

against

Dormitory Authority Of the State of New York, Defendant/Third-Party Plaintiff. ARCH INSURANCE COMPANY, Third-Party Defendant.

A1114-14

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Richard M. Platkin, J.

This construction dispute arises out of renovation and abatement work performed by plaintiff Framan Mechanical, Inc. ("Framan") for defendant/third-party plaintiff Dormitory Authority of the State of New York ("DASNY"). Discovery is complete, and a trial-term note of issue has been filed. DASNY now moves for summary judgment, seeking an order dismissing (1) the Amended Verified Complaint filed by Framan in its entirety, and (2) the first through fourth counterclaims alleged by third-party defendant Arch Insurance Company ("Arch"). Arch cross-moves for partial summary judgment, seeking: (1) dismissal of the second, third and fifth causes of action alleged in DASNY's Amended Third-Party Complaint; and (2) an order capping the liquidated damages recoverable by DASNY on its first cause of action at a maximum of $528,000.

BACKGROUND

On or about May 14, 2013, Framan and DASNY entered into a contract ("Contract") for Framan to perform a bathroom renovation project, with associated asbestos abatement, at the New York City College of Technology ("Project") for a total price of $4,255,000. Arch, as surety, issued a performance bond ("Bond") on behalf of Framan, as principal, and in favor of DASNY, as obligee, in connection with Framan's performance of the Contract.

The Project involved the renovation of 35 bathrooms and six janitor's closets at Namm Hall, an 11-story academic building. To minimize disruption, the Project was divided into six sequential phases. Under the Contract, Framan was to achieve substantial completion no later than December 31, 2014. In the event that the Project was not timely completed, Framan agreed to pay liquidated damages of $2,000 per day for loss of beneficial use of the facility, together with any other types of damages actually sustained by DASNY.

By letter dated May 15, 2014, DASNY terminated the Contract for cause and made a demand under the Bond for Arch to complete the contracted work ("Work"). On or about July 31, 2014, Arch and DASNY entered into a Completion/Takeover Agreement ("Takeover Agreement"), whereby Arch agreed to complete the Work. The Project was substantially completed on October 3, 2016.

By summons and complaint filed October 31, 2014, Framan commenced this action against DASNY, alleging causes of action for breach of contract, unjust enrichment, quantum meruit and declaratory judgment. All of these causes of action arise out of DASNY's alleged wrongful termination of the Contract. Framan subsequently filed an Amended Verified Complaint ("Complaint") that added claims for delay damages and for DASNY's alleged negligence in determining that Framan was not a responsible contractor and rejecting its bids on two other construction projects.

DASNY answered the Complaint and interposed counterclaims for breach of contract. DASNY also commenced a third-party action against Arch, seeking recovery of the damages allegedly incurred as a result of Arch's breaches of the Bond and Takeover Agreement. For its part, Arch counterclaimed against DASNY for: (1) improper demand under the Bond, a claim premised on the allegation that Framan was wrongfully terminated; (2) breach of the Takeover Agreement; (3) unjust enrichment; and (4) quantum meruit.

LEGAL STANDARD

"[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," and the "[f]ailure to make such . . . showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant meets this initial burden, the burden shifts to

the nonmoving party to demonstrate the existence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On such a motion, all evidence must be viewed in the light most favorable to the opponent of the motion (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]).

DASNY'S MOTION AGAINST FRAMAN

DASNY moves for dismissal of Framan's Complaint in its entirety "on the ground that Framan lacks standing to assert any of the causes of action alleged therein, having assigned to its surety, [Arch], all claims and causes of action arising out of Framan's contract with [DASNY]" (NY St Cts Electronic Filing [NYSCEF] Doc No. 83 ["DASNY Notice of Motion"]).

A. DASNY's Contentions

In support of the motion, DASNY submits proof that Framan was terminated for cause based upon its default under the Contract (*see* NYSCEF Doc No. 104). DASNY also submits the General Indemnity Agreement executed by Framan in favor of Arch, which provides that upon a default, "[Framan and its indemnitors] do hereby assign, transfer and set over to [Arch], all of their rights under [the Contract], including . . . all claims and causes of action against any parties to the [Contract] . . . , [and] any and all sums due, or to become due under the [Contract] at or after the time of such Default" (NYSCEF Doc No. 93 ["GIA"], § 7).[FN1]

Thus, DASNY contends that, because Framan "'assign[ed] its rights under [the Contract] to [its surety Arch], [Framan] is no longer the real party in interest with respect to claims against [DASNY]'" (*Xavier Constr. Co., Inc. v Bronxville Union Free School Dist.*, 143 AD3d 976, 977 [2d Dept 2016], quoting *International Fid. Ins. Co. v Quenzer Elec. Sys., Inc.*, 132 AD3d 811, [*2]812 [2d Dept 2015]; *see James McKinney & Son v Lake Placid 1980 Olympic Games*, 61 NY2d 836, 838 [1984]; *Nagan Constr., Inc. v Monsignor McClancy Mem. High Sch.*, 137 AD3d 986, 987 [2d Dept 2016]).

B. Waiver

As a threshold matter, Arch and Framan argue that DASNY waived the defense of lack of standing by failing to include it in a pre-answer motion to dismiss under CPLR 3211 or in its answer.

As held by the Court of Appeals and all four Departments of the Appellate Division, "[a]n argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211 (e)" (*US Bank N.A. v Nelson*, 2019 NY Slip Op 00494, *3, ___ AD3d ___, ___, [2d Dept Jan. 23, 2019] [internal quotation marks and citation omitted] [collecting authorities]). DASNY concedes that it failed to preserve the defense of lack of standing, but it contends that Framan and Arch's argument "ignores settled case law establishing that the applicable defense in this case is 'failure to state a cause of action' (CPLR [3211] (a)(7)" (NYSCEF Doc. 152, p. 4).

The Court does not find DASNY's argument to be persuasive. In fact, DASNY's own notice of motion frames the defense as one of lack of standing, not failure to state a cause of action (*see* DASNY Notice of Motion), and this characterization is echoed in DASNY's opening brief (*see* NYSCEF Doc. 110, p. 1). Moreover, several of the cases relied upon by DASNY, both in its moving papers and in reply, describe the applicable defense as lack of standing (*see id*., p. 7, citing *Nagan*, 137 AD3d at 987 ["plaintiffs lacked standing to commence this action"]; NYSCEF Doc. 152, p. 5, citing *CRAFT EM CLO 2006-1, Ltd. v Deutsche Bank AG*, 139 AD3d 638, 638 [1st Dept 2016] [plaintiff "lacked standing to sue"]).

Moreover, even if DASNY were free to re-characterize the grounds for the relief that it is seeking in response to Framan and Arch's claim of waiver under CPLR 3211 (e), the overwhelming weight of authority supports the conclusion that DASNY's defense sounds in lack of standing (*see e.g. SIBA Contr. Corp. v Stantec Inc.*, 158 AD3d 473, 474 [1st Dept 2018] ["court correctly determined that plaintiff assigned its claims to (surety) under the parties' indemnification agreement, and accordingly has no standing to bring this action"]; *CRAFT*, 139 AD3d at 638 [where plaintiff "granted (trustee) all of (its) rights under the . . . agreements, . . . the motion court . . . properly found that (plaintiff) lacked standing to sue"]; *Barranco v Cabrini Med. Ctr.*, 50 AD3d 281, 281-282 [1st Dept 2008] ["failure to schedule a legal claim as an asset in a bankruptcy proceeding deprives the debtor of standing to raise it in a subsequent legal action"]; *Williams v Stein*, 6 AD3d 197, 198 [1st Dept 2004] [plaintiff's claim properly dismissed under CPLR 3211 (a) (3) where claim became the property of bankruptcy estate]; *National Fin. Co. v Uh*, 279 AD2d 374, 375 [1st Dept 2001] [upon

assignment of the subject note, plaintiff "was no longer the real party in interest . . . and retained no right to pursue a claim (thereupon). Dismissal of the complaint is therefore required for lack of standing."]; *see also Kruger v State Farm Mut. Auto. Ins. Co.*, 79 AD3d 1519, 1520 [3d Dept 2010] [describing the "standing issue" as "whether plaintiff is a proper person to pursue (the) claim"]).

In the face of this abundance of authority supporting Framan and Arch's claim of waiver, DASNY responds with three cases, all of which plainly are distinguishable. In *Rainbow Hospitality Mgt. v Mesch Eng'g* (270 AD2d 906, 906 [4th Dept 2000]), the Fourth Department [*3]held that a corporate plaintiff that "did not exist when the conduct complained of occurred and sustained no injury as the result of that conduct" failed to state a legally sufficient claim for relief (*id.*). Here, of course, Framan did exist and sustained injury by reason of DASNY's alleged breaches of the Contract, but subsequently assigned its rights under the Contract to its surety (*see SIBA*, 158 AD3d at 474; *CRAFT*, 139 AD3d at 638; *Williams*, 6 AD3d at 198).

The other Fourth Department case cited by DASNY concerns individual plaintiffs who were not parties to the contract sued upon by a corporation. In that situation, the Appellate Division recognized that these non-contracting parties had failed to state a claim for breach of the subject contract (*see Truty v Federal Bakers Supply Corp.*, 217 AD2d 951, 952 [4th Dept 1995]).

The final case cited by DASNY is *Wells v Merrill* (204 App Div 696 [3d Dept 1923]), which was decided under the "real party in interest" provisions of the former Code of Civil Procedure.

For all of the foregoing reasons, the Court concludes that DASNY waived the affirmative defense of lack of standing.

C. Framan's Standing to Sue

Even if DASNY were permitted to interpose its unpreserved defense of lack of standing at this juncture, the Court is satisfied that papers submitted in opposition to the motion suffice to raise a triable issue of fact as to whether Framan may prosecute its wrongful termination claims.

Specifically, Arch submits affidavit testimony from its senior claims examiner that the surety "has authorized Framan to pursue its wrongful termination claim against DASNY for the beneficial interest of Arch" (NYSCEF Doc No. 141 ["Apostolidis Opp. Aff."], ¶ 21; *cf. Xavier*, 143 AD3d at 977 ["In opposition, Xavier failed to raise a triable issue of fact as to whether (the assignee) transferred or assigned its rights back to Xavier"]; *Nagan*, 137 AD3d at 987). In this regard, Arch observes that there is nothing in the GIA that prohibited the surety from granting such an authorization.

To similar effect is the affidavit testimony of Frank Manginelli, who is the president of Framan (*see* NYSCEF Doc No. 124 ["Manginelli Aff."], ¶¶ 99-101). Specifically, Manginelli echoes Apostolidis's testimony that Arch granted Framan permission to prosecute the wrongful termination claim "because it was Framan that was wrongfully terminated and Framan was in the best position to argue the merits of the claim for the benefit of Framan and Arch" (*id*., ¶ 100).[FN2]

Further, Arch, as the owner of the wrongful termination claim, observes that DASNY will not be prejudiced in any way by Framan's prosecution of the claim for the benefit of Arch. Indeed, more than two years ago, Arch assured DASNY that it will not be "obligated to pay twice for the same successful claims(s)" (NYSCEF Doc No. 147), and both Framan and Arch reiterate that representation to the Court in opposing DASNY's motion.[FN3]

Finally, the remaining case authorities relied upon by DASNY are distinguishable, inasmuch as they did not involve a situation where the principal submitted evidence that it was authorized to pursue affirmative claims against the owner for the surety's beneficial interest. In *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.* (151 AD3d 1750 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]), the surety challenged the principal's right to prosecute affirmative claims (*see id*. at1751-1752); and there was no evidence in *Quenzer* that the surety had authorized the principal to commence a third-party suit against DASNY (*see* 132 AD3d at 812-813). Finally, in *James McKinney & Son*, the surety had previously released the owner from all claims arising out of the contract (*see* 61 NY2d at 838).

Based on the foregoing, the branch of DASNY's motion seeking dismissal of Framan's Complaint based on lack of standing is denied.

DASNY's MOTION AGAINST ARCH

DASNY moves for dismissal of Arch's four counterclaims. In response, Arch concedes that its third and fourth counterclaims, which sound in quasi-contract, are barred by the parties' written agreements (*see* NYSCEF Doc No. 140, Arch's Opp. Mem., at 1 n 2). As such, Arch's unjust enrichment and quantum meruit counterclaims are dismissed on consent.

A. Wrongful Termination/Improper Demand (1st Counterclaim)

Arch's first counterclaim alleges that Framan was wrongfully terminated and, therefore, DASNY's demand under the Bond was improper. DASNY moves for dismissal of the claim on two grounds, contending that: (1) Arch is estopped from raising this challenge; and (2) Arch cannot prove wrongful termination without expert testimony, but is precluded from introducing such testimony based on its failure to disclose an expert.

1. Estoppel

a. Equitable Estoppel

DASNY first argues that Arch is estopped from challenging Framan's termination on the ground that the surety's conduct in taking over the Project represents a "stipulation" that DASNY was not in default of its obligations under the Contract. Arch counters that DASNY failed to plead the affirmative defense of estoppel, and, in any event, the defense has no merit, since Arch entered into the Takeover Agreement with a full reservation of rights.

"Equitable estoppel is 'imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought'" (*Readco, Inc. v Marine Midland Bank*, 81 F3d 295, 301 [2d Cir 1996], quoting *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]).

As a threshold matter, estoppel is an affirmative defense that generally is deemed to be waived unless pleaded in the answer or moved upon at the pre-answer stage (*see* CPLR 3018 [b]; *Morgan v Morgan*, 21 AD3d 1068, 1068-1069 [2d Dept 2005]; *Braunsdorf v Haywood*, 295 AD2d 731, 732 [3d Dept 2002]). Here, DASNY improperly seeks to raise the affirmative defense for the first time on summary judgment.[FN4]

In any event, DASNY's unpleaded affirmative defense of estoppel fails on the merits. As DASNY observes, Arch's liability under the Bond expressly is conditioned on there being no default by DASNY (*see* NYSCEF Doc No. 92, Bond, ¶ B). However, the Takeover Agreement includes language that clearly and unambiguously reserves all of Arch and Framan's rights, defenses and liabilities: "Nothing contained in this agreement shall waive, limit, alter or amend any of [Arch's] rights, defenses or liabilities under its Bonds nor the rights, defenses or liability of [Framan]" (NYSCEF Doc No. 94 ["Takeover Agreement"], art VII). "All rights of [Arch] are hereby reserved" (*id*., art XI). The foregoing language explicitly preserves Arch's rights as a matter of contract law and conclusively defeats any claim of equitable estoppel by DASNY.

Given the lack of any ambiguity in the Takeover Agreement, the Court need not rely upon parol evidence. Nonetheless, the Court observes that Arch has submitted proof that DASNY's initial draft of the Takeover Agreement contained an express waiver by Arch of all rights "to assert that the default and termination of Contractor was wrongful, improper, or otherwise not in accordance with the terms and provisions of the Contract and Bonds" (Apostolidis Opp. Aff., ¶ 8 & Ex. B, art VII). Arch refused to forfeit those rights, deleted all such references from the draft, and inserted the above-quoted reservation language in place of the waiver clause. Thus, the Court shares Arch's view that DASNY's argument in this regard is disingenuous.[FN5]

For all of the foregoing reasons, the Court concludes that DASNY's equitable estoppel defense is without merit.

b. Collateral Estoppel

DASNY further argues that Arch's first counterclaim is barred by the unpleaded defense of collateral estoppel. DASNY's invocation of collateral estoppel is based on an indemnity

action brought by Arch against Framan in the New Jersey courts. Framan defended the action on the ground that DASNY had breached the Contract by wrongfully terminating Framan and, as a result, Arch's takeover of the work was improper under the Bond.

In an August 2015 ruling on Arch's motion to dismiss Framan's counterclaim, the New Jersey trial court held, in pertinent part:

> [U]nder paragraph (b) of the Bond, it appears that Arch is obligated to first determine if [DASNY] defaulted on its obligations. If DASNY was not in default, and had met each of the conditions set forth under paragraph (b), it was only then that Arch was required to take action, including performing and completing the Contract itself (NYSCEF Doc No. [*4]97, p. 8).

According to DASNY, this ruling collaterally estops Arch from now contending that DASNY was in default when it took over the Work.

The doctrine of collateral estoppel precludes a party from relitigating "an issue which has previously been decided against [it] in a proceeding in which [the party] had a fair opportunity to fully litigate the point" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985] [internal quotation marks and citation omitted]). "The party seeking to invoke collateral estoppel has the burden to show the identity of the issues, while the party trying to avoid application of the doctrine must establish the lack of a full and fair opportunity to litigate" (*Matter of Dunn*, 24 NY3d 699, 704 [2015]).

Even assuming that DASNY is entitled to pursue its unpleaded affirmative defense of collateral estoppel at this late date, there has been no showing that the issues decided in the New Jersey action were identical to the issues implicated here. The New Jersey decision merely holds that Framan stated a claim for relief against Arch under the Bond if the surety improperly took over the Project. The New Jersey court did not consider the issue of Arch's express reservation of rights and defenses relative to DASNY in the Takeover Agreement. Accordingly, DASNY's collateral estoppel argument is without merit.

2. Expert Proof

DASNY has submitted expert proof to support its contention that the termination of Framan was proper. The expert affidavit of Rocco R. Vespe, P.E. submitted in support of the motion incorporates by reference two expert reports outlining Framan's delays in progressing the Work, which is the stated basis of the termination (*see* NYSCEF Doc No. 106, Vespe Aff., ¶ 3; Doc No. 108 [Initial Vespe Report], pp. 6-45; Doc No. 109 [Second Vespe Report], pp. 30-43).

There is no dispute that the foregoing proof is sufficient for DASNY to meet its initial burden of demonstrating, *prima facie*, that it permissibly terminated Framan for cause and, therefore, DASNY's demand under the Bond was proper. According to DASNY, Arch is unable to raise a triable issue of fact in response to the motion without expert proof, but Arch is precluded from introducing such testimony pursuant to Rule 13 (c) of the Commercial Division due to its failure to identify any expert witnesses. Thus, DASNY argues that the first counterclaim must be dismissed.

In opposition to DASNY's motion, Framan submitted expert reports prepared by Kenneth Wasserman and Christopher G. Molloy that previously had been disclosed to DASNY (*see* NYSCEF Doc Nos. 127-128, Manginelli Aff., Exs. C ["Wasserman Report"] & D ["Molloy Report"]). These reports were the subject of a purported cross motion by which DASNY sought to preclude Framan and Arch from "introducing expert testimony at trial" by Wasserman and Molloy "or relying in any way upon the purported expert reports prepared by [them]" (NYSCEF Doc No. 149). In a Letter Decision & Order dated November 8, 2018, the Court denied the cross motion as both untimely and procedurally improper, but deemed the papers filed by DASNY in support of the cross motion to be part of DASNY's reply in further support of [*5]summary judgment (*see* NYSCEF Doc No. 174).[FN6]

DASNY proffers three bases for precluding Framan and Arch from offering or otherwise relying on the Wasserman and Molloy reports: (1) Framan is not the real party in interest with respect to the claims asserted against DASNY;[FN7] (2) Arch failed to timely identify an expert to be called at trial; and (3) the Molloy Report unfairly exceeds the scope of the Wasserman Report.

With respect to Arch's failure to timely identify an expert witness, DASNY relies on Commercial Division Rule 13 (c) (*see* 22 NYCRR 202.70), which governs expert disclosure and provides that a party who fails to timely provide the required disclosure shall be

precluded from using the expert's testimony at trial absent a showing of good cause. As properly observed by Arch, CPLR 3212 (b) was amended in 2015 to add the following language: "Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court *shall not* decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101 (d) (1) (i)] was not furnished prior to the submission of the affidavit" (emphasis added) (*see also* CPLR 3101 [d] [1] [i]).

Consistent with the foregoing statutory language, courts routinely have considered expert evidence submitted in opposition to a motion for summary judgment where the expert had not been timely disclosed (*see e.g. Washington v Trustees of the M.E. Church of Livingston Manor*, 162 AD3d 1368, 1369 [3d Dept 2018]; *Moreland v Huck*, 156 AD3d 1396, 1396 [4th Dept 2017]; *Johnson v New York Tr. Auth.*, 60 Misc 3d 1202[A], 2018 NY Slip Op 50909[U], *4 [Sup Ct, Bronx County 2018]; *Trotman v Boston Props., Inc.*, 59 Misc 3d 1230[A], 2018 NY Slip Op 50803[U], *3 [Sup Ct, Bronx County 2018]; *Matter of Strauss*, 61 Misc 3d 1218[A], 2017 NY Slip Op 52014[U], *8 n 7 [Sur Ct, Albany County 2017]). While none of these cases address the interplay with Commercial Division Rule 13 (c), the court rule should be read in harmony with the statutory law enacted by the State Legislature (*see Travis v New York State Dept. of Envtl. Conservation*, 185 AD2d 714, 715 [4th Dept 1992]).

Thus, although Arch did not timely identify an expert prior to DASNY's motion for summary judgment, CPLR 3212 (b) obliges the Court to consider any expert proof submitted in opposition to the motion. Thus, even if DASNY is correct that the Wasserman and Molloy reports were not disclosed in strict compliance with Commercial Division Rule 13 (c), the Court still cannot decline to consider the reports on summary judgment solely on that basis. Moreover, DASNY has failed to offer a persuasive basis for disallowing Arch, as surety, to rely on the expert reports submitted by Framan, as principal, in opposition to DASNY's motion.

Accordingly, the Court declines to preclude Arch from relying on the Wasserman and Molloy Reports in opposition to DASNY's motion for summary judgment.[FN8] And upon [*6]consideration of those expert reports, the Court is satisfied that Arch has raised sufficient factual questions requiring a trial of the cause of action.

Based on the foregoing, the branch of DASNY's motion seeking the summary dismissal of Arch's first counterclaim must be denied.

B. Breach of Takeover Agreement (2nd Cause of Action)

For its second counterclaim, Arch alleges that "DASNY breached the Takeover Agreement by, among other things, (a) failing to grant Arch extensions of time to complete the Work, as required by the Contract and Takeover Agreement; (b) delaying the critical path of the Project; (c) failing to pay Arch for extra-contractual work; and (d) failing to process and pay change orders due and owing to Arch" (NYSCEF Doc No. 89 ["Arch Answer"], ¶ 18). The counterclaim arises from, among other things, work that was undertaken by Arch pursuant to Non-Compliance Notice No. 01 ("NCN-01"), which involved the tearing down and rebuilding of a chase wall constructed by Framan.

DASNY argues that Arch failed to properly assert and/or preserve its claims under the Takeover Agreement. In this connection, DASNY submits the affidavit of John P. Kelly, who served as the authority's Project manager. According to Kelly, DASNY duly processed all written change order requests that were properly submitted and granted Arch a total of 77 days of time extensions as a result of approved requests (*see* NYSCEF Doc No. 98 ["Kelly Aff."], ¶ 17). Kelly further avers that at no point during the "Takeover Work" did Arch provide DASNY with written notice of a "Claim" under Article 10.01 (A) of the Contract's General Conditions, which must be submitted "within fifteen (15) days after occurrence of the event giving rise to such Claim or within fifteen (15) working days after the Contractor first recognizes the condition giving rise to the Claim, whichever is earlier" (*id*., ¶ 18). Nor, according to Kelly, did Arch submit the necessary supporting documentation called for by the Contract (*see id*.). The foregoing proof is sufficient for DASNY to meet its *prima facie* burden.

The Court is satisfied, however, that Arch's opposition raises a triable issue of fact. Specifically, Arch's senior claims examiner, Peter Apostolidis, attests that Arch properly submitted a request for a time extension in connection with NCN-01 pursuant to Section 9.01 of the General Conditions of the Contract (*see* NYSCEF Doc No. 72 ["Apostolidis Supp. Aff."]), which permits DASNY to extend the time for substantial completion in one of two ways: "by a Change Order or approval of the updated critical path method schedule" (NYSCEF Doc No. 73 ["General Conditions"], § 9.01 [E]).

Apostolidis explains that on August 1, 2014 — after Framan's termination but prior to Arch's commencement of work under the Takeover Agreement — DASNY issued NCN-01 (*see* Apostolidis Supp. Aff., ¶ 8 & Ex. E). This "came as a complete surprise . . . , since this directive was never given to Framan," and DASNY "had previously inspected, and substantially paid Framan for, the construction of the subject wall" (Apostolidis Supp. Aff., ¶ 9).

Arch, through its representative Thomas Acchione, sent an email to DASNY's project manager, Kelly, on August 25, 2014 requesting "an extension of time when the required action [on NCN-01] is due" (Apostolidis Supp. Aff., ¶ 10 & Ex. F). Kelly responded on September 2, [*7]2014 by directing Arch to submit a proposed schedule (*see id.*). "Once DASNY has received and reviewed the proposed schedule," Kelly advised, "DASNY will evaluate the surety's request for an extension of time" (*id.*). Acchione emailed a schedule to Kelly that proposed an extended substantial completion date of January 13, 2016 (*see* Apostolidis Supp. Aff., ¶ 11 & Ex. G). Kelly admitted in his deposition testimony that DASNY received, reviewed, accepted and approved the updated schedule (*see* NYSCEF Doc No. 70, pp. 151-156).

Following Kelly's deposition, he sought to change his testimony via an errata sheet stating that "DASNY did not agree to a change order to provide the surety with an extension of the contractually mandated completion date in Framan's contract with DASNY, as the contract provides how that would be effectuated. Rather, DASNY understood that the schedule provided by the surety was merely a projection of the date by which the surety planned to complete the takeover work" (NYSCEF Doc No. 71, Errata Sheet; *see also* NYSCEF Doc No. 112 ["Kelly Opp. Aff."], ¶¶ 9-16).

Kelly's revised testimony presumes that the only way to grant a time extension is via a change order, which is contrary to the terms of Section 9.01 (E) of the General Conditions. As stated above, time extensions may be granted through an approved change order *or* through DASNY's approval of an updated schedule. Thus, under the Contract, Arch would be entitled to the additional time set forth on an approved "updated critical path method schedule" (General Conditions, § 9.01 [E]), regardless of Kelly's understanding of the legal significance of his approval of such a schedule.

Moreover, and in any event, the conflicts between Kelly's testimony that DASNY had approved Arch's proposed revised schedule and his "corrected" testimony that DASNY did

not approve the requested extension of time "raise credibility issues for the jury to decide" (*Clindinin v New York City Hous. Auth.*, 117 AD3d 628, 629 [1st Dept 2014]; *see Natale v Woodcock*, 35 AD3d 1128, 1129 [3d Dept 2006]; *Williams v O & Y Concord 60 Broad St. Co.*, 304 AD2d 570, 571 [2d Dept 2003]; *Binh v Bagland USA*, 286 AD2d 613, 614 [1st Dept 2001]).[FN9]

Finally, Apostolidis avers that there are "$240,311.92 in open change orders which were *timely* submitted by Arch *with backup* that DASNY has still failed to pay or address" (Apostolidis Opp. Aff., ¶ 15 [emphasis added]). This unrebutted testimony is supported by a spreadsheet prepared by Arch's representative reflecting the status of change order requests (*see id.*, Ex. C).[FN10]

Accordingly, the issues of fact raised by Arch preclude the award of summary judgment to DASNY on Arch's second counterclaim.

ARCH's CROSS MOTION

Arch cross-moves for partial summary judgment against DASNY's Amended Third Party [*8]Complaint (*see* NYSCEF Doc No. 88 ["Third-Party Complaint"]), by which DASNY seeks to hold Arch responsible under the Bond and Takeover Agreement for the delays in the completion of the Work, including the delays allegedly caused by Framan. Specifically, Arch moves for an order: (1) dismissing DASNY's second, third and fifth causes of action; and (2) limiting the liquidated damages recoverable under the first cause of action to no more than $528,000.

A. Liquidated/Actual Damages (2nd Cause of Action)

DASNY's first cause of action seeks to recover liquidated damages of $2,000 per day for delays under Section 9.01 (F) and (G) of the General Conditions, and its second cause of action seeks to recover "additional costs" associated with the delays under Section 9.01 (H) of the General Conditions. Arch contends that DASNY cannot recover both liquidated damages and actual damages for the same alleged breaches of contract, and, therefore, the second cause of action must be dismissed.

Ordinarily, a party is awarded "either actual damages or liquidated damages, but not both when the predicate for the awards is the same" (*Wechsler v Hunt Health Sys., Ltd.*, 330 F Supp 2d 383, 426 [SD NY 2004]; *see U.S. Fidelity and Guar. Co. v Braspetro Oil Services Co.*, 369 F3d 34, 71 [2d Cir 2004]; *International Fid. Ins. Co. v County of Chautauqua*, 245 AD2d 1056, 1057 [4th Dept 1997]; *Mars Assoc. v Facilities Dev. Corp.*, 124 AD2d 291, 292 [3d Dept 1986]). The rationale for this rule is that liquidated damages, by their nature, are "in lieu of, not in addition to, other compensatory damages" (*Levitt Corp. v Levitt*, 1978 WL 21377, *8, 1978 US Dist LEXIS 15820, *22 [ED NY Aug. 29, 1978, No. 78 C 1531 (GCP)], *affd* 593 F2d 463 [2d Cir 1979]).

As a corollary, "both actual and liquidated damages are recoverable damages when the predicate for the awards 'differ in kind'" (*Northwestern Mut. Life Ins. Co. v Uniondale Realty Assoc.*, 11 Misc 3d 980, 986 [Sup Ct, Nassau County 2006], quoting *Wechsler v Hunt Health Sys., Ltd.*, 330 F Supp 2d 383, 426 [SD NY 2004] [brackets omitted]; *see Creative Waste Mgt., Inc. v Capitol Envtl. Servs., Inc.*, 495 F Supp 2d 353, 359 [SD NY 2007] ["the award of liquidated damages will not preclude the recovery of actual damages when the former does not subsume the latter"]; *see also Town of N. Hempstead v Sea Crest Const. Corp.*, 119 AD2d 744, 746 [2d Dept 1986]). As the United States Supreme Court has observed:

> There is no reason why parties competent to contract may not agree that certain elements of damage difficult to estimate shall be covered by a provision for liquidated damages and that other elements shall be ascertained in the usual manner. Provisions of a contract clearly expressed do not cease to be binding upon the parties, because they relate to the measure of damages (*see J.E. Hathaway & Co. v United States*, 249 US 460, 464 [1919, Brandeis, J.]).

Here, Section 9.01 (F) of the General Conditions provides for the payment of liquidated damages to compensate DASNY "for loss of beneficial use of the Work" due to delay in substantial completion of the Work. In contrast, Section 9.01 (H) encompasses "actual damages" sustained by DASNY due to delay, "other than actual loss of beneficial use."

It is readily apparent from the foregoing language that DASNY may recover liquidated [*9]damages for loss of beneficial use, together with any other types of damages actually sustained.[FN11] There is no duplication of damages, and Arch offers no other basis to disregard the parties' clear and unambiguous agreement (*see J.E. Hathaway & Co.*, 249 US at 464).[FN12] Accordingly, the branch of Arch's motion seeking dismissal of DASNY's claim for actual damages is denied.

B. Limitation of Liquidated Damages (1st Cause of Action)

DASNY seeks to recover liquidated damages in the sum of $1.13 million, based on the contention that substantial completion of the Work was delayed by 565 days (*see* Kelly Opp. Aff., ¶ 7 & Ex. A, p. 65). Arch does not dispute the appropriateness or reasonableness of the damages prescribed by Section 9.01 (F) of the General Conditions or the enforceability of the liquidated damages clause (*see* NYSCEF Doc No. 61, p. 9). Arch does contend, however, that DASNY cannot recover liquidated damages for the period in which it granted Arch an extension of the substantial completion date with respect to NCN-01. Specifically, Arch maintains that in light of DASNY's extension of the substantial completion date to January 13, 2016 and the actual substantial completion date of October 3, 2016, DASNY's liquidated damages are limited to $528,000.

For the reasons previously stated, the Court concludes that triable issues of fact preclude granting judgment as a matter of law to any party on the issue of whether DASNY extended the substantial completion date of the Work on account of NCN-01. In light of this factual dispute, the branch of Arch's motion seeking to cap DASNY's liquidated damages must be denied.

C. Attorneys' Fees

By its third and fifth causes of action, DASNY seeks recovery of its attorneys' fees and costs under Article 14 of the General Conditions and Paragraph E of the Bond, respectively. Arch seeks dismissal of both claims, arguing that neither the Contract nor the Bond entitle DASNY to an award of the legal fees and costs incurred in this case.

Under the American Rule, counsel fees and disbursements "'are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule'" (*Baker v Health Mgt. Sys.*, 98 NY2d 80, 88 [2002], quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

Here, DASNY alleges an entitlement to legal fees based on provisions of the Contract and the Bond. In this regard, New York courts will "not infer a party's intention to provide counsel fees as damages for a breach of contract unless the intention to do so is *unmistakably*

clear from the language of the contract" (*Bank of New York Tr. Co., N.A. v Franklin Advisers, Inc.*, 726 F3d 269, 283 [2d Cir 2013] [internal quotation marks and citations omitted] [emphasis added]; *see Flores v Las Americas Communications*, 218 AD2d 595, 595 [1st Dept 1995], *lv dismissed and denied* 87 NY2d 1051 [1996]). Thus, a written agreement that is claimed to provide for an award of such fees "must be strictly construed to avoid inferring duties that the parties did not intend to create" (*Oscar Gruss & Son, Inc. v Hollander*, 337 F3d 186, 199 [2d Cir 2003]; *see Schuyler [*10]Meadows Country Club, Inc. v Holbritter*, 95 AD3d 1408, 1409 [3d Dept 2012], *lv denied* 19 NY3d 813 [2012]).

1. Article 14 of the General Conditions

Article 14 of the General Conditions provides, in relevant part, that Framan shall pay "the defense of any action at law or equity" brought against DASNY, including "any legal fees associated with defending, all costs of investigation, expert evaluation, and any other costs including any judgment or interest or penalty that may be entered against [DASNY]" (General Conditions, § 14.04 [A] [4]). The Takeover Agreement incorporates by reference the terms of the Contract, including Section 14.04 (A) (4).

It is by now settled law that a contractual indemnity provision of the type set forth in Section 14.04 (A) (4) "does not demonstrate unmistakably that the parties intended for the loser in litigation between them to indemnify the winner for legal fees" (*Julien Entertainment.Com, Inc. v Live Auctioneers, LLC*, 145 AD3d 623, 623 [1st Dept 2016]). Accordingly, DASNY's claim for attorneys' fees asserted in the third cause of action of its Third-Party Complaint must be dismissed (*see id.*; *Episcopal Health Servs., Inc. v POM Recoveries, Inc.*, 138 AD3d 917, 919 [2d Dept 2015]; *Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 208-209 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]; *see also Hooper Assoc.*, 74 NY2d at 491-492).

2. The Bond

DASNY's fifth cause of action seeks recovery of its attorneys' fees and costs under Paragraph E.2 of the Bond, which provides, in pertinent part:

> To the limit of the amount of this Bond, but subject to commitment by the Owner of the Balance of the Contract Price to mitigation of costs and damages on the contract, the Surety is obligated without duplication for: . . . Additional legal, design professional and delay costs resulting from the Contractor Default, and resulting from the actions or failure to act of the Surety . . . .

As correctly observed by Arch, virtually identical bond language consistently has been interpreted by the New York courts, including the Court of Appeals, as applying only to legal assistance provided in connection with the re-procurement of the project and not to the legal fees incurred in litigating the underlying claims against the surety's bond (*see U.S. Fidelity and Guar. Co. v Braspetro Oil Services Co.*, 369 F3d 34, 75-77 [2d Cir 2004]; *accord Mount Vernon City School Dist. v Nova Cas. Co.*, 78 AD3d 1028, 1030 [2d Dept 2010], *affd* 19 NY3d 28, 39-40 [2012]; *Comprehensive Care Mgt. Corp. v Utica Mut. Ins. Co.*, 33 Misc 3d 1236[A], 2011 NY Slip Op 52252[U], *5 [Sup Ct, Suffolk County 2011]). DASNY's submissions do not address these case authorities or identify any cases holding to the contrary (*see* NYSCEF Doc No. 111, pp. 16-17). Accordingly, the Court dismisses DASNY's claim for attorneys' fees under the fifth cause of action.

CONCLUSION

Accordingly,[FN13] it is

ORDERED that DASNY's motion for summary judgment is granted to the extent of [*11]dismissing the third and fourth counterclaims alleged by Arch in its Answer to DASNY's Amended Third-Party Complaint and Counterclaim, and the motion is otherwise denied; and it is further

ORDERED that Arch's cross motion for partial summary judgment is granted to the extent of dismissing the third and fifth causes of action alleged in DASNY's Amended Third-Party Complaint, and the motion is otherwise denied; and it is further

ORDERED that all counsel shall personally appear in the Chambers of the undersigned on **April 9, 2019** at **1:00 p.m.** for a conference to, among other things, select a day certain for trial; and finally it is

ORDERED that counsel shall confer in advance of the conference regarding potential trial dates that are mutually agreeable for counsel, their clients and necessary fact and expert witnesses.

This constitutes the Decision & Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, counsel for Arch Insurance Company shall promptly serve notice of entry on all other parties to this action (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: March 7, 2019

Albany, New York

RICHARD M. PLATKIN

A.J.S.C.

Papers Considered:

NYSCEF Doc Nos. 60-148, 152-155, 170-172, 178-185.

Footnotes

Footnote 1: The definition of "Default" set forth in the GIA includes any declaration of default under the Contract (*see id*., p. 1).

Footnote 2: While DASNY observes that neither Arch nor Framan has adduced any documentary evidence confirming the authorization testified to by Apostolidis and Manginelli, the absence of corroborating documentation does not deprive the witnesses' averments of probative value. Moreover, DASNY has not cited any authority requiring any particular level of formality for an authorization of the type alleged by Framan and Arch.

Footnote 3: The Court will, of course, hold Framan and Arch to this representation.

Footnote 4: To be sure, the Court recognizes that "[e]ven an unpleaded defense may be raised on a summary judgment motion, as long as it would not be likely to surprise the adverse party or raise issues of fact not previously apparent" (*Brodeur v Hayes*, 305 AD2d 754, 755 [3d Dept 2003]). Here, however, DASNY's belated invocation of estoppel deprived Arch of the opportunity to take discovery on the facts and circumstances regarding the Takeover Agreement and the parties' negotiations regarding the reservation-of-rights language that was included in the final version of the agreement.

Footnote 5: Indeed, accepting DASNY's argument and denying effect to the parties' negotiated reservation-of-rights provision would dissuade sureties from taking over the work of their principals in the many cases in which the defaults were subject to legal challenge. Moreover, given the liabilities that sureties may be exposed to for wrongfully failing to perform under their bonds, DASNY's position, if adopted, would discourage sureties from writing bonds in New York State.

Footnote 6: The Court subsequently denied DASNY's motion for reargument and/or renewal of the cross motion by letter dated November 14, 2018 (*see* NYSCEF Doc No. 186).

Footnote 7: For the reasons previously stated, the Court rejects this contention.

Footnote 8: In view of this conclusion, the Court need not decide whether Arch could meet its burden without the use of expert proof. Further, given the Court's denial of DASNY's cross motion as untimely and procedurally improper in the context of the current motion practice, the Court has no occasion to decide whether Arch should be precluded from introducing the expert testimony of Wasserman and Molloy at trial.

Footnote 9: To the extent that DASNY contends, based upon Acchione's testimony, that Kelly's contemporaneous response to the proposed schedule did not constitute an approval within the meaning of Contract (*see* NYSCEF Doc. 120, pp. 215-216), the proof merely serves to give rise to additional questions of fact.

Footnote 10:DASNY does not controvert this proof in its reply (*see* NYSCEF Doc No. 153, Bartlett Reply Aff., ¶ 10).

Footnote 11:DASNY seeks actual damages for extended design and construction management fees totaling $613,000 (*see* Kelly Opp. Aff., Ex. A, p. 65).

Footnote 12: Contrary to Arch's contention, the liquidated and actual damages are not duplicative of one another merely because both are forms of delay damages.

Footnote 13: To the extent not expressly addressed, the parties' remaining arguments have been considered and found to be lacking in merit and/or unnecessary to reach given the

disposition ordered herein.

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