At an IAS Term, Commercial Part I of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of April, 2007

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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FRANCO BELLI PLUMBING & HEATING & SONS, INC.,
Plaintiff,

Index No. 26334/02

- against -

VOLMAR CONSTRUCTION, INC., AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,
Defendants.

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The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-6
Opposing Affidavits (Affirmations)	7-8
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Franco Belli Plumbing & Heating (plaintiff) moves, pursuant to CPLR 3211 (b), for an order dismissing defendants Volmar Construction, Inc. (Volmar) and Travelers Casualty and Surety Company of America's (Travelers) (collectively, defendants) first and second affirmative defenses. Plaintiff

further moves, pursuant to CPLR 3212, for summary judgment determining Volmar and Travelers' liability to plaintiff to be $58,671.80 plus interest in connection with the construction project on Public School 115, and $48,698.14 plus interest in connection with the construction project on Junior High School 13. In the alternative, plaintiff moves for an order awarding it partial summary judgment against defendants on the question of liability and scheduling an immediate inquest on the issue of damages. Defendants cross-move for summary judgment dismissing plaintiff's second, third, and fourth causes of action.

Background Facts and Procedural History

In or about 1997, Volmar was hired by the New York City School Construction Authority (SCA) to serve as the general contractor on a renovation project involving exterior modernization, boiler conversions, and the construction of additional space at Public School 115 (PS 115) in Brooklyn and Junior High School 13 (JHS 13) in Manhattan. Under the terms of the contract, Volmar was required to obtain labor and material payment bonds for the benefit of its subcontractors on the projects. Accordingly, separate payment bonds were furnished for the two projects with Volmar as principal and Reliance Insurance Company (Reliance) as surety.[1] Under the terms of the bonds, Volmar and Reliance became jointly and severally liable for the payment of all claimants (including subcontractors) who furnished materials or performed work on the PS 115 and

[1] Defendant Travelers is the successor to Reliance.

JHS 13 projects.[2]

After entering into the contract with the SCA, Volmar retained plaintiff to perform plumbing work at both schools. Specifically, by written subcontract agreement, Volmar hired plaintiff to install cold and hot water circulating systems, a gas distribution system, and a sanitary drainage system at PS 115 for the agreed upon price of $1,058,645. The subcontract also allowed for the performance of additional work provided that Volmar pre-approved such work in writing. In particular, paragraph 5.4 of the agreement provided:

> " EXTRA OR ADDITIONAL WORK.
>
> Any of the terms and conditions in the Subcontract Documents to the contrary notwithstanding, [plaintiff] shall notify [Volmar] or its authorized representative, personally and in writing, and receive a specific written and signed Approval to Proceed from [Volmar] or its authorized representative endorsed upon a copy of such Notice, prior to commencing any extra or additional Work. Failure to give such Notice and receive such Approval to Proceed shall act as a waiver and release by [plaintiff] of any and all claims to recover, either by means of compensation or extension of time or otherwise, on account of such extra or additional work. The requirement by [plaintiff] to give such Notice and to receive such Approval to Proceed can in no way be waived by [Volmar's] acts or prior omissions."

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[2] In its motion papers, plaintiff failed to attach the correct payment bond for the JHS 13 project. However, plaintiff's reply papers contained the bond for this project.

With respect to the renovation of JHS 13, Volmar hired plaintiff to install a new kitchen sewer system for the agreed upon sum of $95,000. Unlike the PS 115 project, plaintiff's work at JHS 13 was not covered by a formal subcontract agreement. Instead, the parties merely executed a purchase order agreement and attached rider (the purchase order agreement) which set forth the scope of plaintiff's work. The purchase order agreement also differed from the aforementioned subcontract inasmuch as Volmar did not specifically require that extra work preformed by plaintiff be pre-approved in writing. In fact, the purchase order agreement was silent on the question of extra work performed by plaintiff on the JHS 13 project.

During the performance of plaintiff's work at PS 115, Volmar issued several written "change orders" in the total amount of $64,716 for extra work that was not covered under the subcontract agreement. Volmar does not dispute that these change orders increased the subcontract price to $1,123,361.[3] However, according to plaintiff, the total value of the extra work it performed on the PS 115 project at Volmar's request was $112,154.23 (thereby increasing the total value of the subcontract to $1,170,799.23) and $58,671.80 of this amount remains outstanding.[4] In any event, notwithstanding the

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[3]According to Volmar, it has already paid plaintiff $1,112,127.39 and it will pay the remaining amount due under the subcontract (i.e., $11,233.61) when plaintiff co-signs the change orders which correspond to this outstanding amount.

[4] In its motion for summary judgment, plaintiff alleges that it is owed $76,920.23 for extra work performed on the PS 115 project. However, in a reply affidavit, plaintiff reduced its

fact that paragraph 5.4 of the subcontract required that plaintiff receive Volmar's prior written approval before performing any extra work, and that plaintiff would waive any claim to receive compensation for extra work performed without such prior written approval, the change orders approved by Volmar were not executed and issued until months after plaintiff performed the work called for in the change orders.

During the course of its work on the JHS 13 project, plaintiff alleges that it performed work valued at $39,198.14, which was outside the scope of the purchase order agreement. In this regard, in a letter dated October 21, 1998, plaintiff provided Volmar with an itemized list of this extra work and requested that Volmar submit the list to the SCA "and request a change order for the total amount indicated." According to an affidavit submitted by John P. Volandes, an officer and principal of Volmar, Volmar submitted the list to the SCA as requested but the SCA rejected the request for additional compensation. Mr. Volandes further avers that Volmar paid plaintiff the full $95,000 due under the purchase order agreement. However, plaintiff's vice president, Paul Belli, alleges in an affidavit that $9,500 of the amount due under the purchase order agreement remains outstanding inasmuch as Volmar conditioned payment of a check in this amount upon plaintiff's waiver of its claim for extra work, and plaintiff refused to waive this claim.

By summons and complaint dated July 2, 2000, and amended summons and

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demand to $58,671.80 based upon monies paid by Volmar which plaintiff failed to factor into its original calculations.

complaint dated October 16, 2002, plaintiff brought the instant breach of contract action against Volmar and Travelers seeking to recover for the extra work it allegedly performed on the PS 115 and JHS 13 projects for which it was not compensated.[5] Specifically, plaintiff's third cause of action seeks $78,298.94 (now reduced to $58,671.80) in damages, plus interest, for uncompensated work it performed on the PS 115 project while the fourth cause of action seeks $48,698.14 for the balance on the contract and the uncompensated work it performed on the JHS 13 project. In their answer to the complaint, defendants' first and second affirmative defenses asserted that plaintiff's claims against Travelers were barred by the bonds' stated period of limitations and by plaintiff's failure to comply with the conditions precedent set forth in the payment bonds. Plaintiff now moves for summary judgment against Volmar under its claims relating to the PS 115 and JHS 13 projects while defendants cross-move for summary judgment dismissing these claims.[6] Plaintiff also moves to dismiss defendants' first and second affirmative defenses.

Motions for Summary Judgment

In support of its motion for summary judgment under its third cause of action (i.e.,

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[5] The complaint also seeks to recover monies that plaintiff is allegedly owed under a subcontract involving the renovation of Prospect Heights High School. However, these claims are unrelated to the instant motions before the court.

[6] In its notice of cross motion, defendants purportedly seek summary judgment dismissing plaintiff's second, third, and forth causes of action. However, plaintiff's second cause of action, which involves the Prospect Park High School project, is not discussed in any of the papers before the court.

for the extra work it performed on the PS 115 project), plaintiff relies upon two affidavits by Mr. Belli, in which he avers that Volmar requested, and plaintiff performed, extra work on the PS 115 project with a fair and reasonable value of $112,154.23, and that $58,671.80 of this amount remains unpaid. Plaintiff has also submitted various documents including change orders and proposals for extra work which purportedly support these claims. In addition, plaintiff argues that Volmar waived the requirement under the subcontract that extra work be pre-approved in writing. In this regard, plaintiff notes that the conduct of the parties during the course of the project demonstrates that pre-written authorization was not required for extra work. Instead, Volmar orally directed plaintiff to perform extra work and would only issue written change orders for such work months after the work was performed.

In support of its motion for summary judgment under its fourth cause of action (i.e. for the extra work performed on the JHS 13 project), plaintiff points to Mr. Belli's affidavits, in which he alleges that Volmar directed plaintiff to perform $39,198.14 in extra work for which plaintiff was never compensated and that $9,500 of the original contract amount set forth in the purchase order agreement remains outstanding. Plaintiff has also submitted certain documentation which itemizes this extra work.

In opposition to plaintiff's motion for summary judgment, and in support of its own cross-motion for summary judgment dismissing plaintiff's third and fourth causes of action, defendants submit an affidavit by Mr. Volandes in which he maintains that

Volmar never approved or authorized the extra work on the PS 115 and JHS 13 projects which form the basis of plaintiff's third and fourth causes of action. Mr. Volandes also states that Volmar has paid plaintiff the full $95,000 due under the purchase order agreement for the JHS 13 project. Defendants further maintain that plaintiffs' claims for compensation under the PS 115 project are barred because plaintiff failed to obtain Volmar's prior written consent for this extra work as required under paragraph 5.4 of the subcontract. Finally, defendants argue that the documentation submitted by plaintiff simply does not support plaintiff's claim that Volmar directed plaintiff to perform the extra work that is at issue in these motions.

Initially, the court must determine whether or not plaintiff's claims for compensation on the PS 115 project are barred by the prior written consent clause set forth in the subcontract. It is well-settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). However, even where the written contract contains an express provision to the contrary, a party may waive its right to enforce an unambiguous contract term either through "words or conduct, including partial performance" (*Madison Ave. Leasehold, LLC v Madison Bently Assocs LLC*, 30 AD3d 1, 5 [2006], *affd* 8 NY3d 59 [2006]). See also, *Bank Leumi Trust Co. Of NY v. Block 3102 Corp.*, 180 AD2d 588, 590 (1992), *lv denied* 80 NY2d 754 (1992). Thus, "[u]nder New York law, oral directions to perform extra work may modify or eliminate

contract provisions requiring written authorization" (*Tridee Assocs., Inc. v New York City School Constr. Auth.*, 292 AD2d 444, 445 [2002], *citing Barsotti's Inc., v Consolidated Edison Co. Of N.Y.*, 254 AD2d 211, 212 [1998]; *Austin v Barber*, 227 AD2d 826, 828 [1996]).

Here, paragraph 5.4 of the subcontract unambiguously required that plaintiff receive Volmar's prior written authorization for any extra work it carried out on the PS 115 project. It is undisputed that plaintiff did not receive Volmar's written consent for the extra work for which it seeks compensation under its third cause of action. However, plaintiff's evidence, including Mr. Belli's affidavit, as well as change orders signed by Volmar, demonstrates that the parties adopted a course of conduct whereby Volmar only issued written approval for extra work after the work had been performed. Indeed, Volmar does not deny that the extra work for which it admittedly owes plaintiff was only approved in writing after the work was performed. Thus, Volmar waived the prior written consent requirement set forth in paragraph 5.4 of the subcontract inasmuch as "the conduct of the parties demonstrates an indisputable mutual departure from the written agreement" (*Austin*, 227 AD2d at 828). Under the circumstances, defendants' cross motion for summary judgment dismissing plaintiff's third cause of action is denied.

Although plaintiff's evidence demonstrates that Volmar waived the prior written notice requirement in the subcontract, plaintiff has failed to demonstrate, as a matter of law, that the uncompensated extra work it performed on the PS 115 project was "clearly

requested by [Volmar] and executed by [plaintiff']" (*Austin*, 227 AD2d at 828). In this regard, none of the documentation submitted by plaintiff demonstrates that Volmar agreed, either orally, or in writing, to $112,154.23 in extra work on the PS 115 project. In fact, the final change order, which was signed by Volmar on November 24, 2000, indicates that the final contract amount was $1,123,361 and that the total value of the agreed upon extra work performed by plaintiff was $64,716. Moreover, all of the documentation submitted by plaintiff regarding the extra work it performed on the PS 115 project pre-dates the final change order. However, defendants concede that plaintiff did perform $11,233.61 worth of agreed upon extra work on the PS 115 project for which it has yet to be compensated. Accordingly, plaintiff's motion for summary judgment under its third cause of action is granted, but only in the amount of $11,233.51.[7] As an issue of fact has been raised regarding the remaining balance alleged to be due plaintiff, plaintiff's claim therefor is severed and summary judgment is denied thereon. See *Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 (1st Dep't, (2002).

Turning to plaintiff's claims for extra work on the JHS 13 project (i.e., plaintiff's fourth cause of action), neither party has met their prima facie burden of proof demonstrating that they are entitled to summary judgment with respect to this claim. In this regard, the only proof offered in support of this branch of defendants' cross motion is

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[7] Defendants' papers indicate that this payment was withheld because plaintiff failed to execute the change order corresponding to this payment. Accordingly, plaintiff has failed to demonstrate, as a matter of law, that it is entitled to interest on this $11,233.51 amount.

Mr. Volandes conclusory statement in his affidavit that Volmar never approved plaintiff's request for change orders totaling $39,198.14 and an attached self-generated computer print-out indicating that Volmar issued a $9,500 check payable to plaintiff that had been "reconciled." Similarly, plaintiff's evidence consists of a conclusory claim in Mr. Belli's affidavit that Volmar directed plaintiff to perform extra work on the JHS 13 project for the agreed upon sum of $39,198.14. Furthermore, the documentation attached to plaintiff's motion merely consists of an itemized list of the purported extra work. Nothing in this documentation demonstrates that Volmar ordered or agreed to pay for this extra work. In fact, inasmuch as plaintiff asked Volmar to forward the list to SCA so that the SCA could issue a change order for the work, there is an issue of fact as to whether the SCA (as opposed to Volmar) was the entity that ordered and was otherwise responsible for approving this extra work.

Defendants' First and Second Affirmative Defenses

Plaintiff also moves, pursuant to CPLR 3211 (b), for an order dismissing defendants' first and second affirmative defenses. Specifically, plaintiff argues that there is no basis for defendants' first affirmative defense, which alleges that plaintiff's claims against the payment bonds issued for the PS 115 and JHS 13 projects are time-barred. In support of this argument, plaintiff notes that the payment bonds required that any suit seeking payment under the bonds be commenced within two years after Volmar ceased

work on the PS 115 and JHS 13 projects. Thus, plaintiff's claims against the payment bonds would only be time barred if Volmar ceased work on the project prior to July 2, 2000 (*i.e.*, two years before plaintiff commenced this action on July 2, 2002). However, according to Mr. Belli's affidavit, Volmar was performing "punch list" items on the PS 115 and JHS 13 projects for many months after July 2000 and he had "many conversations with John Volandes, the owner of Volmar . . . after July 2000 regarding the status of Volmar's completion of PS 115 and JHS 13." Plaintiff also argues that there is no merit to defendants' second affirmative defense, which alleges that plaintiff failed to comply with the conditions precedent set forth in the payment bonds. Plaintiff maintains that it complied with all applicable conditions set forth in the payment bonds. Specifically, plaintiff argues that because it is a claimant "having a direct contract with the Principal", Volmar, under the terms of the bond, paragraph 3 (a), it is not required to give written notice of its claim in advance of commencing this action.

In opposition to this branch of plaintiff's motion, defendants argue that their second affirmative defense is viable inasmuch as plaintiff has failed to demonstrate that it complied with the express notice provisions set forth in the payment bonds.

With respect to the first affirmative defense, defendants' papers do not deny that Volmar was still performing work on both projects after July 2, 2000. The payment bonds for the PS 115 and JHS 13 projects required that actions seeking payment against the bonds be commenced no more than two years after Volmar completed work on the

projects. Here, plaintiff has submitted admissible evidence in the form of Mr. Belli's affidavit that Volmar was still working on both projects less than two years before the commencement of this action. Defendants have failed to submit evidence contradicting Mr. Belli's affidavit in this regard. Accordingly, the first affirmative defense is dismissed.

As to defendants' second affirmative defense based upon plaintiff's failure to give written notice of its claims within 120 days of completion of work pursuant to paragraph 3 (a) of the bond, this Court finds the language therein to be supportive of plaintiff's claim that the provision does not apply to it. The documents in evidence clearly establish that claimant Franco Belli had a direct contract with Volmar. Accordingly, the motion to dismiss the first and second affirmative defenses is granted.

Summary

In summary, the court rules as follows: (1) that branch of plaintiff's motion which seeks summary judgment under the third cause of action is granted only to the extent that plaintiff is awarded $11,233.61 for uncompensated extra work on the PS 115 project and the claim is otherwise severed for trial; (2) that branch of plaintiff's motion which seeks summary judgment under the fourth cause of action is denied; (3) that branch of plaintiff's motion which seeks to dismiss the first and second affirmative defenses is granted; and (4) defendants' cross motion for summary judgment dismissing plaintiff's

second, third, and fourth causes of action is denied.

Counsel are directed to appear for conference at 9:45 am on May 10, 2007 in room 756 of the courthouse at 360 Adams Street, Brooklyn.

This constitutes the decision and order of the court.

E N T E R

J. S. C.

HON. CAROLYN E. DEMAREST