SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
--X
DGI-MENARD, INC.,

Index No.: 27435/08

Plaintiff,

-against-

YONKERS CONTRACTING COMPANY, INC.,

Defendant.
--X

**REPLY MEMORANDUM OF LAW
IN SUPPORT OF YONKERS CONTRACTING COMPANY'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

In its futile effort to defeat Defendant, Yonkers Contracting Company's ("Yonkers), motion for partial summary judgment, Plaintiff, DGI-Menard, Inc. ("DGI"), makes a series of unfounded assertions of law that are not supported by the authorities cited for those propositions; distorts and misstates basic principles of New York contract law; and utterly fails to raise any material issue of fact with respect to Yonkers' motion that would even arguably provide a valid justification for the denial of Yonkers' partial summary judgment motion. In fact, the Affidavit of DGI's Seth Perlman does more to support Yonkers' motion than it does to oppose it.

To this end, Mr. Perlman makes numerous relevant and significant admissions, including, but not limited to acknowledging that: (1) DGI was aware that progress payments were conditioned upon payment by the owner (Perlman Affid., ¶ 12); (2) DGI relied upon EnCap's financing and creditworthiness in entering into the Subcontract (Perlman Affid., ¶ 13); (3) the delays that DGI experienced were due to EnCap, Mactec (EnCap's remediation contractor), and other circumstances over which Yonkers had no control (Perlman Affid., ¶ 15-

16); and (4) Yonkers presented to EnCap DGI's Request for an Equitable Adjustment, as the Subcontract specified Yonkers was required to do. Accordingly, the essential facts are not in dispute, and there being no material conflict between Mr. Perlman's affidavit and the affidavits provided by Mr. Kolaya and Mr. Capolino, this case is ripe for disposition under CPLR 3212.

I. Pay-If-Paid Provisions Are Not Per Se Unenforceable As A Matter Of New York Contract Law, And May Be Enforced Where They Do Not Conflict With New York's Public Policy As Embodied In The Mechanic's Lien Law.

Citing to the Court of Appeals' decisions in West-Fair Elect. Contractors v. Aetna Casualty & Surety Co., 87 N.Y.2d 148 (1995) and Welsbach Elect. Corp. v. MasTec North America, Inc., 7 N.Y.3d 624, 626, 631-32 (2006), DGI disingenuously and mistakenly argues that these decisions supposedly create a "blanket rule" that New York courts will not enforce pay-if-paid provisions in subcontracts, as a fundamental "principle of New York Contract law." (See DGI Br. at 9-10). However, the plain language of these Court of Appeals rulings clearly belie this contention. In Welsbach, the Court of Appeals recounted the history of pay-if-paid clauses in New York, noting that prior to its decision in West-Fair, pay-if-paid clauses enjoyed a long history of enforceability in this state. Welsbach, 7 N.Y.3d at 626, 631-32. That historical discussion further reflected that the enforceability of such clauses were only called into doubt as a result of the interplay of such provisions with the anti-lien waiver provisions of § 34 of the New York Lien Law. Welsbach, 7N.Y.3d at 626, 628-29, 631-32; West-Fair, 87 N.Y.2d at 158-59. Thus, there is nothing fundamentally improper about pay-if-paid clauses as a matter of general contract law.

Likewise, there is nothing that would render all such clauses void in all circumstances. This also is self-evident from the Court of Appeals' decision in Welsbach, where the Court, despite the applicability of the New York Lien Law to the subject construction project, clearly

held that the general prohibition against the enforceability of pay-if-paid clauses is not so repugnant to New York's public policy that the Lien Law would bar the contractor's enforcement of the clause, where the parties agreed to apply Florida law which does not prohibit the enforcement of pay-if-paid clauses. Welsbach, 7N.Y.3d at 626, 632. Thus, contrary to DGI's assertion, Welsbach does not cast any doubt whatsoever on Yonkers' statement that the pay-if-paid provision of the Subcontract is enforceable where New York's Lien Law is not implicated, but rather bolsters it.

It is evident from these Court of Appeals holdings that pay-if-paid clauses are only unenforceable in New York due to their conflict with the New York Lien Law, not because they are contrary to New York common law or general New York public policy. Since this is a New Jersey construction project, § 34 of the Lien Law is no more applicable to the parties' agreement than the trust fund provisions of Article 3-A or any other provisions of the lien law. See Allied Thermal Cop. v. James Talcott, Inc., 3 N.Y.2d 302, 303-04 (1957) (Holding that the Article 3-A trust fund provisions of the New York Lien Law do not apply to construction projects in Pennsylvania); see also, Carrier Corp. v. J.E. Schecter Corp., 347 F.2d 153,154 (2d Cir.1965) (Holding that New York's Lien Law did not apply to a construction project in New Jersey, even though the contract stated that New York law applied). Therefore, the policies and effect of the Lien Law cannot serve as a basis for denying enforcement of the valid, agreed upon pay-if-paid provision of the parties' contract.

DGI also attempts to challenge Yonkers' arguments by its passing reference to two string cited, unreported New York decisions from trial courts of coequal jurisdiction which apparently, for reasons unknown, failed to enforce pay-if-paid clauses where New York's Lien Law did not apply to the project. (See DGI Br. at 11). It appears that the Oneida County Supreme Court in

Otis Elevator Co. v. Hunt Constr. Grp., Inc., 20 Misc.3d 1102A, 867 N.Y.S.2d 18 (Sup. Ct. 2008), and the New York County Supreme Court in Unicco Service Co. v. Jet Project Mgmt, Inc., 2008 WL 2481828 (N.Y. Sup. Ct. 2008)[1] did not enforce the alleged pay-if-paid clauses before them[2], notwithstanding the fact that the New York Lien Law did not apply to either project in question. However, it is unclear whether the controlling decisional law was called to the attention of these courts or what the rationale was for their decisions. The decisions were quite terse and thus it is impossible to discern whether the authorities and arguments presented here by Yonkers in support of this motion were ever actually raised or argued by the parties to those cases, or whether the court contemplated and considered Yonkers' argument, or whether those courts ever considered the Welsbach decision in connection with their rulings.

In any event, the courts' failure to provide the rationale for their decisions or to provide any insight into the basis for their legal analyses in Otis Elevator and Unicco, coupled with the absence of any citation to Welsbach, would suggest that those courts never considered or analyzed the precise issue before this Court. Moreover, these factors also suggest that no consideration was given to the applicability of the Court of Appeals' decision in Welsbach to the enforceability of pay-if-paid provision involving an out of state construction project on which the New York Lien Law indisputably does not apply. Therefore, neither case should be viewed as either dispositive or even persuasive authority in connection with the legal issue before this Court. Moreover, to the extent that DGI may impliedly suggest that Otis Elevator and Unicco are applicable or even dispositive of this issue, as unpublished decisions, neither case is

[1] Since DGI has failed to provide the Court with copies of these unpublished opinions, as it is required to do by the court rules, Yonkers has appended these decisions as Exhibits "1" and "2" respectively to the Zicherman Reply Affirmation for the Court's convenience.
[2] The court in Otis Elevator did not quote the operative provisions from the parties' contract, and thus it is not even possible to say with certainty that the contract clause before the court involved a true pay-if-paid clause.

precedential, and as decisions from coequal courts outside of Westchester County, they certainly are not binding on this Court.

II. The Use Of The Words "Condition Precedent" Is Sufficient, In And Of Itself, To Shift The Risk Of Nonpayment By EnCap To DGI, And The Clear And Unambiguous Terms Of The Subcontract Reflect The Parties' Intent That Payments To DGI Are Subject To The Condition Precedent That The Owner First Make Payment To Yonkers.

Despite DGI's arguments to the contrary, under New York law no specific words in a contract are required to manifest the parties' intent to shift the risk of nonpayment to the subcontractor. Nevertheless, to support its argument that the Subcontract supposedly does not contain a valid pay-if-paid clause, and to avoid the terms of the agreement that it willingly entered into, DGI deliberately misstates New York caselaw by asserting that:

> Under New York law, only "a provision specifying that the subcontractor will be paid after the general contractor receives payment from the owner *together with* a provision specifying that the subcontractor assumes the credit risk incurred by the contractor with respect to payment by the owner creates a condition precedent to the subcontractor's right to payment." Hatzel & Buehler, Inc. v. Lovisa Cosntr. Co., Inc., 1993 WL 276971 (E.D.N.Y. 1993).

(DGI Br. at 12). This is a completely incorrect statement of New York law in that there is no mandatory two-part test. Indeed, the court in Hatzel, never held that this was the "only" way in which a court could find the existence of a valid pay-if-paid provision.

Rather, reading the actual quotation in context, the Hatzel, court actually held that where the parties use the words "condition precedent" with respect to payment, the provision will be found to be an enforceable pay-if-paid clause, and that a valid pay-if-paid clause may also be found in the absence of those words, as long as the language used reflects that the subcontractor is to be paid after the contractor's receipt of payment from the owner and the subcontractor has

relied upon the owner's credit. See Hatzel, 1993 WL 276971, *4.[3] Such a holding is consistent with the holding of the Court of Appeals' in West-Fair, where it found that the provision before it – making payment by the owner a "condition precedent" to the contractor's allegation to remit payment to the subcontractor – constituted a valid pay-if-paid provision that shifted the risk of the owner's nonpayment to the subcontractor. West-Fair, 87 N.Y.2d at 154-55. see also, David Fanarof, Inc. v. Dember Constr. Corp., 195 A.D.2d 346, 347-48 (1st Dept. 1993) (Holding that the contractual clause "Payment of purchaser [defendant] by Owner shall be a condition precedent to Vendor's [plaintiff's] right to receive payment hereunder," "could hardly express more clearly that payment by the owner to defendant *was* a condition precedent to plaintiff's right to receive payment under the subcontracts.") (emphasis in original).

Even assuming, arguendo, that the Hatzel case could be read as DGI suggests, the case still lends no support whatsoever to DGI's argument because Yonkers still satisfies those requirements. First, Section 4.2, and even Section 4.3 (related to final payment) of the Subcontract, indisputably state that DGI will not be paid until after Yonkers receives payment from the owner. (See Capolino Reply Affid., Ex. "2"). Secondly, Mr. Pearlman admitted in his Affidavit that when DGI entered into the Subcontract with Yonkers, it was concerned about cash flow and "the financial ramifications to DGI of the potential for slow payment" (See Pearlman Affid., ¶ 13), but that such concerns were allayed when he learned that EnCap had funding and security for DGI's work "through an environmental closure policy from AIG and through the New Jersey Environmental infrastructure Trust." (See Pearlman Affid., ¶ 13). Thus, the undisputed evidence before this Court reflects that DGI relied on the creditworthiness of EnCap

[3] Again, DGI has hidden from this Court the actual holdings of the unpublished decisions that it has relied upon by failing to attach a copy of the Hatzel decision to its opposition papers. Notwithstanding, Yonkers has appended a copy of this decision as Exhibit "3" to the Zicherman Reply Affirmation, so that the Court can see the true holding of this case.

and not that of Yonkers.[4] Therefore, having satisfied both parts of DGI's purported two-part test, the Subcontract must be found to contain a valid and enforceable pay-if-paid provision.

It is a fundamental precept of contract law in this state that courts are to construe the parties' intent from reading the contract as a whole. "Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish", but rather "[t]he court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance, and a sensible meaning of words should be sought." William C. Atwater & Co., Inc. v. Panama R.R. Co., 246 N.Y. 519, 524 (1927); see also, Lawyers' Fund for Client Protection v. Bank Leumi Trust Co., 94 N.Y.2d 398, 404 (2000) (Rejecting the defendant's argument which focused exclusively on one of two relevant paragraphs, and holding that "the agreement must be read in its entirety"). DGI acknowledges, as it must, that this, in fact, is the law. (DGI Br. at 13). Notwithstanding, DGI tries to artificially dissect and distort the Subcontract language, arguing that the one sentence in Section 4.2 of the Subcontract that makes the owner's payment to Yonkers a condition precedent to Yonkers' obligation to pay DGI cannot be used shift to DGI the entire risk of the owner's nonpayment for extra work, delays damages, and costs attributable to "the ultimate failure of the project." (See DGI Br. at 13-14). However, a fair and plain reading of the Subcontract as a whole, leads to the unavoidable conclusion that this is precisely what DGI had agreed to.

[4] A subcontractor's intent to rely upon or assume the credit risk of the owner may be established by extrinsic evidence. See Hatzel, 1993 WL 276971, *3, quoting Schuler-Haas Electric Corp. v. Aetna Casualty & Surety Co., 389 N.Y.S.2d 348, 348-49 (1976), which held that when payment is stipulated to occur on an event, the occurrence of the event fixes only the time for payment, unless there is express language in the written document or extrinsic evidence to the contrary.

As explained in the Capolino Reply Affidavit, the Subcontract establishes a simple, straightforward procedure for the payment of moneys to DGI, regardless of the nature or reason for the payment, and the parties followed those procedures throughout the course of the Project. (See Capolino Reply Affid., ¶¶ 3-22). In the interest of brevity, Yonkers refers the Court to Mr. Capolino's Affidavit and incorporates herein his explanation of the operation of the Subcontract as it relates to payments and claims sought by DGI. In short, though, pursuant to the Subcontract's terms, all payment requisitions and invoices prepared and submitted by DGI during the Project for work that it performed, were subject to the provisions of Section 4.2, which contained the condition precedent requirement of payment first by EnCap. If there were changes to the Subcontract that increased the contract price, such as for extra work or additional compensation for standby time due to delays by the owner, et cetera, Yonkers and DGI would execute an amendment to the Subcontract, and the amounts agreed to under that amendment were invoiced by DGI to Yonkers as part of its monthly requisitions pursuant to Section 4.2. (See Capolino Reply Affid., ¶¶17-18). There is no separate payment procedure in the Subcontract for extra work or delay costs.

While DGI argues that Section 4.2 only relates to interim progress payments and cannot be applied or extended to the cost of extra work performed or damages due to delays to its work (DGI Br. at 14, 16), it conveniently ignores the express language of Section 3.3 of the Subcontract which explicitly states that "All payments under this Subcontract shall be made in accordance with Subcontract Article 4." (See Caploino Reply Affid., ¶ 18, Ex. "2"). Article 4, entitled "Payments," clearly deals with how, when, and under what conditions DGI will be entitled to receive money. There is no exception to the applicability of this Article for delays or for extra work. Any increases in the Subcontract price as a result of such costs were to be

reflected in DGI's schedule of values and were to be paid pursuant to Section 4.2. (See, e.g., Pearlman Affid., Ex. "H").

DGI further transparently argues that the money claimed in this action is not a progress payment under Section 4.2, but instead a final payment governed by Section 4.5, and that since the words "condition precedent" are not contained in Section 4.5, its claims in this action are not subject to a pay-if-paid provision. This contention, lacks merit for several reasons. First, as the Hatzel case, upon which DGI misplaces its reliance, holds, the words "condition precedent" do not need to appear in the Subcontract, as long as the requisite intent is evident (1993 WL 276971, *4). As previously mentioned, Section 4.5 clearly states that final payment to DGI will only occur after Yonkers receives payment from EnCap (See Capolino Reply Affid., Ex. "2"), and Mr. Pearlman admits that DGI had relied upon the financial security that EnCap had in place to ensure payment of work performed by DGI (Pearlman Affid., ¶ 13). Thus, Section 4.5 constitutes a valid pay-if-paid clause under Hatzel.

Moreover, the money sought by DGI in this action does not constitute "final payment", as that term is used in the Subcontract. Pursuant to the Subcontract, "final payment" is the payment made to DGI after DGI completes the entire scope of work contemplated under the Subcontract and that work is accepted by the owner, and DGI submits to Yonkers various releases, waivers, and other contract closeout documentation (which it has never done). Thus, while any payment to DGI may be the last payment, it is not the "final payment", as that term is used in the Subcontract. Accordingly, the terms of Section 4.5 are not applicable and even if applicable, they would still support the relief sought by Yonkers.

Finally, while Mr. Perlman admits that he knew the Subcontract had a pay-when paid provision, he now self-servingly proclaims that he did not understand that the "condition

precedent" language shifted the risk of owner nonpayment to DGI, and that he would not have entered into a subcontract where he was asked to undertake that risk. (See Perlman Affid., ¶¶ 12, 14). However, these gratuitous statements are unfounded and they should have no bearing on the outcome of this motion and must be disregarded. See First Montauk Securities Corp. v. Menter, 26 F.Supp.2d 688, 689 (S.D.N.Y. 1998) (Holding that "the uncommunicated subjective intent of a party is irrelevant in interpreting a contract" and if the party had something in mind other than the unqualified language of the agreement, it is of no consequence). Moreover, under New York law, a party that signs an agreement is presumed to have read the agreement, and is presumed to know its contents, understood their meaning, and assented to them. See Saxony Ice Co. v Little Mary's Am. Bistro, 243 A.D.2d 700, 701 (2d Dept. 1997) (Holding that the defendant's claims that she neither read nor understood the terms of the agreement was "patently inadequate" and failed to constitute an affirmative defense to the enforceability of the contract as a matter of law). Thus, this final fleeting argument also fails to stand as an obstacle to this Court's enforcement of the pay-if-paid provisions of the Subcontract.

III. No Provision In The Subcontract Makes Yonkers Liable To DGI For Owner-Caused Delay Damages For Which Yonkers Has Not Received Compensation from EnCap.

DGI makes a superficial, nonsensical argument to try to justify its more than $1.2 million claim against Yonkers for what admittedly amounts to alleged EnCap-caused delay damages. Its argument is predicated entirely on the dictionary definition of the word "compensable", which DGI relies on to reach the spurious conclusion that the addition of the four words, "or compensable by owner", to Section 5.3(b) of the Subcontract, supposedly manifested Yonkers' agreement to be liable to DGI for any claimed damages resulting from owner-caused delays. DGI seems to be contending that as long as it asserts a claim that "warrants compensation" under

the terms of Yonkers' General Contract with EnCap, irrespective of whether EnCap determined the claim had merit or Yonkers was ever paid by EnCap for that claim, it is entitled to payment on its claims from Yonkers. (See DGI Br. at 17-18). On its face, this proposition is entirely inconsistent with the plain language of the Subcontract and defies logic and reason.

DGI has fabricated an argument, devoid of any factual or legal support lending any credence whatsoever to this contention. Nowhere in Mr. Pearlman's seven-page affidavit does he offer any sworn testimony which, either expressly or even by implication, supports the argument. Nowhere in his affidavit does he say under oath that he specifically negotiated this language for the purpose of imposing liability on Yonkers for owner-caused delay damages or to render Yonkers the effective insurer of its profitability on the Project. In fact, Mr. Perlman's Affidavit is bereft of any discussion regarding the meaning or intent of the "or compensable by owner" language or how those words came to be included in the Subcontract. Conversely, Mr. Capolino clearly explains how the use of these words came about, and precisely what their meaning and intent was.

As Mr. Capolino explained, Section 6.5 in the original form of subcontract did not allow DGI to claim any additional compensation for either owner-caused delays or Yonkers-caused delays to the Project, and provided that DGI's sole remedy for delay was an extension of time. (See Capolino Reply Affid., ¶ 8). DGI took exception to this language, particularly since the General Contract afforded Yonkers the right to seek compensation from EnCap for owner-caused delays. DGI wanted to have that same right against EnCap, and it therefore proposed revising Section 6.5 to reflect that DGI would agree to an extension of time as its sole relief for owner-caused delays, "unless there exists the ability to collect damages for any such claim in the General Contract." (See Capolino Reply Affid., ¶ 10, Ex. "1"). Yonkers agreed with this

proposed change and the Subcontract was revised to incorporate DGI's proposed language. (See Capolino Reply Affid., Ex. "2", § 6.5).

Section 6.5 was subsequently deleted in the final negotiations because it exculpated Yonkers from liability to DGI for delays caused solely by Yonkers, and, therefore, conflicted with the revised Section 5.3, which made Yonkers responsible for Yonkers-caused delays. (See Capolino Reply Affid., ¶ 11). However, DGI insisted that its right to seek damages against EnCap for owner caused delays compensable under the General Contract be preserved. Mr. Capolino chose and added the words "or compensable by owner" to reincorporate the same rights he had previously agreed to under the revised Section 6.5. (See Capolino Reply Affid., ¶¶ 11-12). As stated in Mr. Capolino's sworn affidavit, no greater rights were intended by his choice of those words and DGI never asked that it be afforded greater expanded rights than it had already negotiated for itself with respect to claiming and collecting damages against EnCap as allowed under the General Contract. (See Capolino Reply Affid., ¶ 12). Nothing in Mr. Perlman's Affidavit conflicts with these sworn statements, contradicts them, or ascribes any different meaning or intent to the words.

Further, to adopt the strained interpretation employed by DGI, this Court would have to disregard the host of other provisions of the Subcontract which conflict with its construction. In particular, this Court would have to disregard Section 6.3, pertaining to claims for additional compensation resulting from owner-caused acts or omissions (e.g., owner-caused delays), which unambiguously provides that Yonkers is not "answerable or liable in anyway for any acts or omissions of [EnCap] or others which cause damage to [DGI]" and that Yonkers' sole obligation to DGI for such claims is to submit them to EnCap for consideration, after which DGI agrees to "accept and be conclusively bound by the determination of the Owner with respect thereto,

relieving Contractor of all liability in connection with any such claims". (Capolino Reply Affid., Ex. "2", § 6.3).[5] Since Yonkers passed through to EnCap DGI's claims, a fact readily admitted by DGI, (Perlman Affid., ¶¶ 22-23), Yonkers is absolved from any and all further liability to DGI, particularly since EnCap never paid the delay claims and costs that DGI improperly seeks from Yonkers in this litigation.

In addition, this Court also would have to disregard Article 12, which provides that DGI is not entitled to any compensation or damages on account of EnCap's suspension of the work, "unless, and only to the extent that," Yonkers receives such payment from EnCap on behalf of DGI. (See Capolino Reply Affid., Ex. "2"). DGI would have this Court ignore this provision to find that the parties contradictorily intended that Yonkers be absolutely liable to DGI for additional costs due to EnCap-caused delays, but that Yonkers would not be liable to DGI for additional costs due to EnCap's suspension of the Project unless Yonkers first received such compensation from EnCap. Such a construction makes absolutely no sense and is irreconcilable with the plain language of the Subcontract. Therefore, the parties clearly could not have intended a different result for EnCap-caused delays. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63, 115 S.Ct. 1212, 1219 (1995) (Citing to New York law, the Supreme Court held that it is a cardinal principle of contract construction that a contract "should be read to give effect to all its provisions and to render them consistent with each other").

DGI fails to appreciate how the Subcontract operates as a whole, and in doing so misconstrues Section 5.3(b) as being an "express provision entitling DGI to additional compensation for schedule changes for which the Owner was responsible". (DGI Br. at 21).

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[5] In an effort to rebut the pass-through nature of Sections 6.3 and 6.4, DGI frivolously argues that these provisions do not constitute a pass-through or liquidating-type agreement, since "there is no provision limiting DGI's rights to recovery against Yonkers to amounts actually recovered as a result of the claims process, nor is there a provision obligating Yonkers to remit any such recovery." (DGI Br. at 23). However, this spurious contention is sufficiently refuted by the plain language of Section 6.3 and the payment provisions of Section 4.2.

However, such a construction contradicts the express words used by the parties. Section 5.3(b) states only that schedule changes that are compensable by the owner are a "ground" for "justifiable" compensation to DGI. As such, the express words of this section clearly do not provide DGI with an absolute entitlement to compensation, but merely makes owner-caused delays a basis for DGI to seek, as against EnCap, additional, provable costs due to such delays. By contrast, under the original contract, there was no right to even seek such compensation, since DGI's exclusive remedy was an extension of time. (Compare Capolino Reply Affid., Ex. "1", § 6.5 with Ex. "2", § 5.3(b)). Under the plain reading of the Subcontract, DGI would only be entitled to such additional compensation if, and to the extent that, EnCap agreed to compensate DGI for those owner-caused acts pursuant to the procedures established by Section 6.3 and then actually paid Yonkers therefore on DGI's behalf; which conditions have not occurred. (See Capolino Reply Affid., Ex. "2", § 6.3).

Accordingly, since there is no provision in the Subcontract which provides that Yonkers is liable for owner-caused delays that are beyond its control, the Court of Appeals' decision in Triangle Sheet Metal Works, Inc. v. James H. Merritt and Co., 79 N.Y.2d 801 (1991) is applicable and serves to bar DGI's claims against Yonkers for damages solely resulting from owner-caused delays in this action.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Yonkers' moving papers, it is respectfully submitted that Yonkers is entitled to partial summary judgment against DGI, dismissing with prejudice the portion of its First Cause of Action that seeks retainage, and its entire Second and Third Causes of Action, together with such other and further relief as is deemed by the Court to be just and proper, and appropriate costs and disbursement.

Dated: New York, New York
September 16, 2010

Respectfully submitted,

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