NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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THOROBIRD G RAND LLC and GRAND APTS HOUSING DEVELOPMENT FUND CORPORATION,

Plaintiff,

- against -

M. MELNICK & CO., INC. and FEDERAL INSURANCE COMPANY,

Defendants/Counterclaim Plaintiffs,

-against-

BAYPORT CONSTRUCTION CORP., ET AL.

Additional Counterclaim Defendants.

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Index No. **816972/2022E**

Hon. **FIDEL E. GOMEZ**
Justice

The following papers numbered 1 to 5, Read on this Motion noticed of 7/25/23, and duly submitted as no. 3 on the Motion Calendar of 7/25/23.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause – Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	4	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers- Order Extending Duration of Notice of Pendency		
Memorandum of Law	3, 5	

Plaintiff's motion is decided in accordance with the Decision and Order annexed hereto.

Dated:
8/30/23

Hon.
FIDEL E. GOMEZ, JSC

1.CHECK ONE	☐ CASE DISPOSED	X NON-FINAL DISPOSITION
2. MOTION/CROSS-MOTION IS	☐ GRANTED (MOTION) X GRANTED IN PART	☐ DENIED (MOTION) ☐ OTHER
3. CHECK IF APPROPRIATE.	☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST	☐ FIDUCIARYAPPOINTMENT ☐ REFEREE APPOINTMENT ☐ NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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THOROBIRD G RAND LLC and GRAND APTS HOUSING DEVELOPMENT FUND CORPORATION,

Plaintiffs,

-against-

DECISION AND ORDER

M. MELNICK & CO., INC. and FEDERAL INSURANCE COMPANY,

Index No. 816972/2022E

Defendants/Counterclaim Plaintiffs,

-against-

BAYPORT CONSTRUCTION CORP., BAYSHORE SAFETY LLC, CORE & MAIN LP, EXTECH BUILDING MATERIALS INC., FXR CONSTRUCTION, INC., NAF PAK PLUMBING & HEATING CORP., NY PLUMBING WHOLESALE & SUPPLY INC., SOLCO PLUMBING SUPPLY, INC., SPEC PERSONNEL, LLC TIGER CABINETS INC., USA INTERIORS LLC, NEW YORK STATE HOUSING FINANCE AGENCY, THE CITY OF NEW YORK, ACTING BY AND THROUGH ITS DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, MARK REED, T.D. BANK, N.A., ODYSSEY RENOVATION CORPORATION, COLONY HARDWARE CORPORATION, ROCKLEDGE SCAFFOLD CORP., ADKINS CLEANING & LANDSCAPING, LLC D/B/A ADKINS LANDSCAPE CONTRACTING AND JOHN DOES 1-10,

Additional Counterclaim Defendants.

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Plaintiffs Grand Apts Housing Development Fund Corp. ("HDFC") and Thorobird Grand LLC ("Thorobird" and together with HDFC, "Plaintiffs") move for an Order pursuant to CPLR §

3212, granting partial summary judgment in favor of Plaintiffs and against Defendant Federal Insurance Company ("Federal") on Plaintiffs' twelfth cause of action for willful exaggeration of mechanic's liens.

For the reasons which follow, Plaintiffs' motion is granted, in part.

BACKGROUND

The amended complaint filed in this action alleges causes of action for breach of contract, willful exaggeration of mechanic's liens, and slander of title. Specifically, the amended complaint alleges, *inter alia*, as follows: By written agreement dated September 28, 2017 (the "Contract"), between Plaintiffs and Defendant M. Melnick & Co., Inc. ("Melnick"), Melnick agreed to perform labor and furnish equipment/material in connection with the construction of three separate mixed-use, mixed-income, affordable housing building projects in Bronx County. One project is located at 220 East 178th Street (the "Grand I Project"), another project is located at 225 East 179th Street (the "Grand II Project"), and a third project is located at 2195 Morris Avenue (the "Grand III Project" and together with the Grand I Project and Grand II Project, the "Projects"). Melnick, as principal, and Federal, as surety, provided payment ("Payment Bond") and performance ("Performance Bond") bonds. Pursuant to the Performance Bond dated September 2017, Melnick and Federal ("Defendants") agreed to be jointly and severally liable to Plaintiffs to the extent required by the Contract. Plaintiffs performed all material terms and conditions under the Contract, Payment Bond and Performance Bond. On or about June 14, 2019, Plaintiffs declared Melnick to be in default of the Contract, terminated the Contract for cause, and demanded that Federal perform its obligations under the Performance Bond.

By written agreement dated October 29, 2019, Plaintiffs entered into a contract with Federal, pursuant to which Federal, as surety, agreed to arrange for the performance and completion of Melnick's obligations under the Contract (the "Takeover Agreement"). Federal arranged for the performance of the Contract by hiring J.S. Held, LLC ("Held") to act as Federal's agent, and executed a completion agreement with Melnick pursuant to which Melnick agreed to perform all of the labor and furnish the equipment/material required to complete the

construction of the Projects. Plaintiffs performed all material terms and conditions of the Takeover Agreement. On December 6, 2022, Melnick filed a mechanic's lien against the Grand I Project in the amount of $1,143,333.63 and a mechanic's lien against the Grand III Project in the amount of $821,675.95 (the "Melnick Liens"). On December 22, 2022, Federal filed mechanic's liens against the Projects in the respective amounts of $1,827,297.37 (the "Federal Grand I Lien"), $295,440.78 (the "Federal Grand II Lien"), and $1,329,032.046 (the "Federal Grand III Lien"). On January 5, 2023, Federal and Melnick each filed notices of pendency with respect to their lien foreclosure counterclaims in the instant action. Numerous subcontractors have also filed liens against the Projects due to nonpayment by Melnick. Neither Melnick nor Federal have paid those subcontractors.

Plaintiffs allege that Melnick breached the Contract by: (1) failing to complete each of the three Projects in the time required by the Contract; (2) failing to perform the required labor and furnish the required equipment/material for the completion of certain scopes of work; and (3) performing negligent, defective or incomplete work. Federal breached the Takeover Agreement by: (1) failing to arrange for the performance of the work on the Projects so that they were completed on time; (2) failing to arrange for the performance of labor and furnishing of equipment/material for the completion of certain scopes of work; and (3) providing work on Federal's behalf which was negligent, defective or incomplete. Federal breached the Payment Bond by refusing and failing to defend and indemnify Thorobird from claims for payment and liens filed by Melnick subcontractors. The liens filed by Melnick and Federal are willfully exaggerated and therefore, void and unenforceable. Indeed, Federal is not entitled to file any liens against the Projects under the New York Lien Law. Federal knew or should have known it had no lien rights and that the liens were invalid. Federal disparaged Plaintiffs' exclusive, valid title by recording invalid liens and notices of pendency. Federal filed the liens and notices of pendency to pressure Plaintiffs to make payments to Federal that were not due. As a direct and proximate result of Federal's conduct, there is a cloud on Plaintiffs' title.

Plaintiffs allege, *inter alia,* that Melnick and Federal are liable for statutory damages pursuant to Lien Law § 39-a for willfully exaggerating their mechanic's liens.

In their respective answers, Federal and Melnick interpose counterclaims against Plaintiffs and the Additional Counterclaim Defendants[1] for, *inter alia,* the foreclosure of their mechanic's liens.

Performance Bond

The Performance Bond in the amount of $32,852,241 lists Melnick as the contractor, Federal as the surety, and Plaintiffs as the owners. In pertinent part, the Performance Bond states:

> **1** The Contractor and the Surety, jointly and severally, bind themselves . . . to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.
>
> . . .
>
> **4** When the Owner has satisfied the conditions of Paragraph 3 [owner declares a contractor default], the Surety shall promptly and at the Surety's expense take one of the following actions:
>
> . . .
>
> **4.2** Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors; . . .

Takeover Agreement

The Takeover Agreement is between Melnick, Thorobird, HDFC and Federal. It provides, in pertinent part:

> **WHEREAS**, Federal, as a take-over pursuant to Section 4.2 of the Performance Bond, has arranged for the completion of the work remaining under the Contract . . . and the Owner agrees to such completion, subject to a reservation by the Owner, Federal and Melnick of all of their respective rights, claims and defenses under this Agreement, the Bonds, the Contract and applicable law; and

[1]In its Answer, Federal alleges that "the Additional Counterclaim-Defendants are named as parties herein solely due to their status as lien or mortgage holders with an alleged interest in [the Projects]."

WHEREAS, subject to Paragraph 3 below, Federal is assuming all of Melnick's obligations under the Contract for the performance and completion of the work . . .; and

WHEREAS, without admitting liability under the Performance Bond, Federal is entering into this Agreement and agreeing to assume Melnick's obligations . . . in order to discharge its obligations to the Owner and the Additional Obligees under the Performance Bond . . .

1. As completing surety and not as a contractor to the Owner, Federal agrees to arrange for the performance and completion of the Work required by Melnick under the Contract in accordance with the terms and conditions of the Contract and Performance Bond. Federal shall be bound to the Owner as Melnick was formerly bound to the Owner under the Contract . . .. Federal's maximum liability under this Agreement and the Performance Bond is limited to and shall not exceed the penal sum of the Performance Bond as provided in Paragraph 16 below.

. . .

4. Federal has contracted with or will contract with Melnick as a completion subcontractor in connection with the completion of the Work . . . Federal will provide lien releases for Melnick as required under the Contract, to the extent that lien releases were previously required from Melnick thereunder.

. . .

7. Federal shall be represented at the Project by J.S. Held LLC . . . No contractual relationship shall exist between the Owner and JS Held. . .

16. The Parties acknowledge that the Performance Bond Penal Sum is $36,852,241. Notwithstanding any other provision in this Agreement, Federal's total liability under this Agreement and the Performance Bond is limited to and shall not exceed the Performance Bond Penal Sum . . . Federal has entered into this Agreement in order to discharge obligations to the Owner under the Performance Bond; any Work performed by Federal on the Project is, therefore, being performed by Federal as a completing surety and not as a contractor of the Owner. . . To the extent any provision(s) of this Agreement may be construed by any Party to the contrary, such provision(s) shall subordinate to this Paragraph with respect to construing the Parties' intent.

In support of summary judgment, Plaintiffs contend that as a surety, Federal does not have the right to file statutory mechanic's liens and, therefore, the entire amount of its liens are willfully exaggerated and Federal is liable to Plaintiffs for all damages available under Lien Law § 39-a.

In opposition to summary judgment, Defendants contend that: (1) Plaintiffs have not satisfied their *prima facie* burden of establishing that Federal willfully exaggerated the amounts of its mechanic's liens; (2) Federal has standing under the Lien Law to file its liens; (3) Federal did not waive its right to file the liens in the Takeover Agreement; and (4) public policy does not favor and would be harmed by the Court granting Plaintiffs' motion.

In support of their contentions, Plaintiffs submitted, *inter alia,* the affidavit of Thorobird's principal, Thomas Campbell (Campbell), with attached exhibits. In his affidavit, Campbell reiterates the allegations in the amended complaint and, in addition, states as follows: HDFC is the record owner and Thorobird is the beneficial owner of the three properties. In connection with the Projects, Melnick, as principal, and Federal, as surety, duly provided payment and performance bonds. Federal is identified as a surety throughout the Payment Bond and Performance Bond. Campbell attached copies of the Contract, Payment Bond, Performance Bond, Notice of Termination,[2] and Takeover Agreement to his affidavit. Campbell points to the Takeover Agreement and avers that because Federal is a surety and not a contractor, it was agreed upon that Federal's liability under the Contract would not exceed the maximum liability under the Performance Bond. Campbell avers that the parties confirmed Federal's "agreed upon status as surety" in paragraph 16 of the Takeover Agreement.

Campbell states that Melnick performed and supplied all of the material, labor and equipment with respect to the Projects by itself and/or through various subcontractor, supplier and rental agreements. Federal did not provide any labor or furnish any materials or equipment in connection with the Projects. Pursuant to the Payment Bond, Federal is required to pay the

[2]The Notice of Termination, dated June 14, 2019, from Plaintiffs' attorneys to Melnick, indicates that due to Melnick's continued default of its contractual obligations under the Contract, Plaintiffs are exercising their right under the Contract to terminate Melnick's employment effective immediately.

undisputed amounts of claims asserted by Melnick's subcontractors and trade professionals. Federal, however, is refusing to pay off the claims made against the Payment Bond and has filed three mechanic's liens instead. Further, and as a result of Federal's failure to comply with the obligations of the Payment Bond by remitting payment to Melnick and its subcontractors, Melnick has filed mechanic's liens against the Projects. At least twenty subcontractor liens were also filed against the Projects.

Campbell states that "[i]n connection with the [Projects'] various funding sources, as well as new funding required for completion of the Project[s], Plaintiffs were forced to discharge the Federal Liens, the Melnick Liens, and the Subcontractor Liens to ensure the titles for the [Projects] remained clear and clean." Because the Projects "must remain free and clear of any encumbrances in order to avoid foreclosure," on April 13, 2023, Plaintiffs obtained 24 bonds in order to discharge the 24 mechanic's liens filed against the Projects at that time. Plaintiffs were forced to discharge the 24 mechanic's liens due to a mandatory May 1, 2023 bond redemption date. Had Plaintiffs defaulted on their financial obligations to bondholders, the Projects "could have been immediately foreclosed upon by the letter of credit bank and sold to the highest bidder." Plaintiffs are required to pay premiums in connection with the 24 bonds secured in order to discharge the liens. The total cost of those premiums is $94,923.69.

In opposition, Defendants submitted the affirmation with attached exhibits of Derek A. Popeil (Popeil) and the affidavit with attached exhibits of Christopher Herron (Herron).

In his affidavit, Popeil states as follows: He is a vice president and surety claims manager for Federal and has personal knowledge of the facts set forth in his affidavit. On September 28, 2017, Melnick entered into a general construction contract (the Contract) with Plaintiffs for the construction of the Projects. On the same date, Federal issued, together with the Payment Bond, the Performance Bond in the penal sum of $36,852,241 on behalf of Melnick, as principal, in connection with the Contract, which bond named Plaintiffs as obligees. On June 14, 2019, Plaintiffs issued a notice to Federal, in which Plaintiffs: (1) declared Melnick, the Projects' original generator contractor, to be in default under the Contract; (2) terminated the Contract; and (3) demanded that Federal take action under Paragraph 4 of the

Performance Bond. On October 29, 2019, Federal and Plaintiffs, with Melnick's consent, entered into the Takeover Agreement pursuant to which Federal agreed to complete Melnick's remaining general contractor work under the Contract, subject to a full reservation of its rights, claims, and defenses. Under the Takeover Agreement, Plaintiffs became obligated to pay Federal directly for its work to perform and complete the Projects. On November 5, 2019, Federal executed a separate agreement with Melnick, pursuant to which Melnick continued to perform certain work on the Projects "strictly as a subcontractor to Federal, which was expressly permitted under the Takeover Agreement." Over the next three years, Federal, through its agent, Held, duly performed and completed Melnick's general contractor work under the Contract and pursuant to the Takeover Agreement. By October 2022, Plaintiffs materially breached the Contract and Takeover Agreement, including by failing to pay several payment applications submitted by Federal for its completion work. Federal has sustained at least $3,350,166.42 in damages as a result of those breaches. Accordingly, on December 22, 2022, Federal file three mechanic's liens against the properties. On February 28, 2023, Federal filed counterclaims in this action against Plaintiffs for breach of contract, quantum meruit, unjust enrichment, and mechanic's lien foreclosure as to all three of its liens. On that same date, Federal served responses to Plaintiffs' demands under Lien Law § 38 to itemize the liens.

With respect to paragraph 16 of the Takeover Agreement, the language which states that Federal entered into the agreement "as a completing surety and not as a contractor of the Owner" was included solely to protect Federal from the Owners later claiming that Federal waived its rights under the Performance Bond by having agreed to assume Melnick's obligations under the Contract. This is because, under the Performance Bond, Federal's maximum potential liability to the Owners was limited to the penal sum of the bond.[3] The "completing surety" language in paragraphs 2 and 16 of the Takeover Agreement exists solely to preserve Federal's rights under the Performance Bond. This language "did not affect the nature of the construction completion work that Federal performed pursuant to the Takeover Agreement, nor did Federal intend for this

[3]Popeil avers that Federal was not required to assume Melnick's obligations to perform and complete the Contract under the Performance Bond.

language to waive, and it does not waive, Federal's right to pursue all remedies available to it under New York law to address non-payment by the Owners, including its right to file mechanic's liens." To the contrary, paragraphs 14 and 17 of the Takeover Agreement, among others, expressly reserve Federal's rights to pursue such remedies. Paragraph 14 provides that Federal may assert any rights which Melnick could have asserted against the Owners for nonpayment. Similarly, paragraph 17 provides that Federal does not waive any rights, claims or defenses against the Owners unless they are expressly waived in the Takeover Agreement. Federal did not waive any of its lien rights in the Takeover Agreement. If the statutory right to file liens did not exist, or if such right were waived, it would "provide a strong disincentive to sureties against undertaking the work and assuming the risk necessary to complete construction projects . . . because the surety's rights to remedy its non-payment by the project owner would be limited and far narrower than those of the contractor which the surety replaced."

In his affidavit, Herron states as follows: He is Held's Senior Vice President and has worked predominantly in the construction business for 23 years. His responsibilities at Held have included the management of Held's work to complete the Projects. As such, he is fully familiar with the facts set forth in his affidavit, which are based upon his personal knowledge. The purpose of his affidavit is to explain Held's role and responsibilities on the Projects, which Held performed as an agent of Federal from 2019 through 2022. Pursuant to the Takeover Agreement, Federal agreed to complete Melnick's remaining general contractor work under the Contract with Melnick, continuing to perform certain work on the Projects "strictly as a subcontractor to Federal." Federal retained Held to perform Melnick's general contractor duties as Federal's agent due to Held's construction experience. Held's work on the Projects was performed solely as an agent of Federal. Held did not enter into a contract with Plaintiffs, and was paid by Federal, not Plaintiffs. Herron was designated by Plaintiffs and Federal as the lead representative for Held for the Projects and it was agreed that Held was authorized to act on Federal's behalf regarding all issues relating to the completion of the Contract. Acting on Federal's behalf, as its agent, Held managed and supervised the construction of the Projects for approximately three years and performed the construction management duties previously

performed by Melnick. Accordingly, in November 2019, Held began providing site superintendents to oversee the construction on a regular basis. Throughout Held's involvement with the Projects, Plaintiffs treated Federal as the Projects' general contractor, frequently referring to Federal as the general contractor in correspondence with Herron. Payment applications approved and paid by Plaintiffs listed the "Contractor" as "JS HELD LLC on Behalf of Federal Insurance Company." Further, Plaintiffs "recognized that the work performed by Federal was lienable work" by requiring Federal to sign lien waivers - construction payment agreements under which a contractor waives its right to file a mechanic's lien for the amount of a certain invoice once that invoice is later paid. Herron attached copies of numerous lien waivers to his affidavit.[4] Each lien waiver is entitled "CONDITIONAL WAIVER AND RELEASE OF LIEN UPON PROGRESS PAYMENT," and is signed by Joseph Coffman, Senior Consultant, J.S. Held LLC on Behalf of Federal Insurance Company. Melnick is listed as the "CONTRACTOR/SUBCONTRACTOR" and Thorobird LLC is listed as the "OWNER" on the first page of each lien waiver.

* * * * * * * * * * *

Standard of Review

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 2828 AD2d 387, 388 [1st

[4]In addition to the lien waivers, Herron attached copies of the Contract, Takeover Agreement, payment applications and various email correspondence to his affidavit.

Dept 2001], *revd on other grounds; Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2001]). Notably, the court can consider otherwise inadmissible evidence, when the opponent fails to object to its admissibility and instead relies on the same (*Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1028 [4th Dept 1995]).

Once a movant meets its initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact [*Zuckerman* at 562]). It is worth noting, however, that while movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals, [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally, if the opponent is to succeed in defeating a summary judgment motion, it too, must make its showing by producing evidentiary proof in admissible form. The rule with respect to defeating a summary judgment motion, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate an acceptable excuse for its failure to meet the strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case (*Friends of Animals v Associated Fur Manufacturers, Inc.,* 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, it must proffer an excuse for failing to submit evidence in admissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

When deciding a summary judgment motion the role of the court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811[4th Dept 2000]), "[s]upreme court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition

testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues of fact for trial" (*Id.* at 811; *see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the court's function when determining a motion for summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Discussion

Plaintiffs assert that because Federal is a surety, which is not expressly listed as the type of entity which can file a mechanic's lien under New York's Lien Law, Federal is not entitled to file a statutory mechanic's lien. Since Federal has no lien rights, Plaintiffs assert, its liens are willfully exaggerated in their entirety.

New York Lien Law § 3 provides, in pertinent part, as follows:

> A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, and any trust fund to which benefits and wage supplements are due or payable for the benefit of such laborers, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer, or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed by this chapter.

Plaintiffs contend that they are entitled to summary judgment on their twelfth cause of action against Federal for willful exaggeration of lien, and judgment against Federal in the amount of $3,546,694.30 plus reasonable attorney's fees for services provided in connection

with securing the discharge of Federal's liens pursuant to Lien Law § 39-a. Lien Law § 39-a provides:

> Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon.

Lien Law § 39 provides:

> In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is at issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice.

Lien Law § 39-a is penal in nature, and therefore it must be strictly construed in favor of the person upon whom the penalty is sought to be imposed (*Goodman v Del-Sa-Co Foods,* 15 NY2d 191, 195 [1965]; *Guzman v Estate of Fluker,* 226 AD2d 676, 678 [2d Dept 1996]; *Joe Smith, Inc. v Otis-Charles Corp.,* 279 AD 1, 4 [4th Dept 1951]). Lien Law §§ 39 and 39-a must be read in tandem, and damages may not be awarded under § 39-a unless the lien has been discharged for willful exaggeration (*Guzman* at 678; *Joe Smith, Inc.* at 4-5). Where the lien has been discharged for reasons unrelated to its supposed exaggeration, there remains no lien to be declared void by the court and, thus, § 39-a damages are unavailable (*Wellbilt Equipment Corp. v Fireman,* 719 NYS2d 213, 216 [1st Dept 2000]; *Guzman* at 678; *Joe Smith, Inc.* at 4). "It is

well established that [i]naccuracy in amount of lien, if no exaggeration was intended, does not void a mechanic's lien; willfulness also must be shown" (*Goodman* at 194). "The provision with respect to excessive lien claims was intended to punish wilful exaggeration and not honest differences, and to protect an owner or contractor against fictitious, groundless and fraudulent liens by unscrupulous lenders" (*E-J Elec. Installation Co. v Miller & Raved, Inc.,* 51 AD2d 264, 265 [1st Dept 1976][internal citations and quotation marks omitted]).

To succeed on a claim of willful exaggeration of a lien, the property owner must establish that: (1) a lien was filed; (2) the amount of the lien was exaggerated relative to the underlying claim; and (3) the exaggeration was willful and not due to honest mistake (*Goodman* at 200; *GPK 31-19 LLC v L&L Const. Development Inc.,* 2020 WL 1972234, *16 [Sup Ct, NY County Apr. 23, 2020]). A claim under Lien Law § 39-a is subject to summary disposition where the evidence concerning whether or not the lienor willfully exaggerated the lien is conclusive (*Northe Group, Inc. v Spread NYC, LLC,* 88 AD3d 557, 557 [1st Dept 2011]). The burden is on the opponent of the lien to show that the amounts set forth were intentionally and deliberately exaggerated (*Garrison v All Phase Construction Corp.,* 33 AD3d 661, 662 [2d Dept 2006]). Such a burden necessarily involves proof as to the credibility of the lienor (*Rosenbaum v Atlas & Design Contrs, Inc.,* 66 AD3d 576, 576 [1st Dept 2009]). Accordingly, the issue of willful or fraudulent exaggeration is one that is ordinarily determined at the trial of the foreclosure action, and not on summary disposition (*On the Level Enterprises*, *Inc. v 49 East Houston LLC,* 104 AD3d 500, 500 [1st Dept 2013]).

Federal contends that, for purposes of the Lien Law, it is a contractor and, therefore, Federal is entitled to file mechanic's liens against the Projects for amounts it is owed by Plaintiffs for its work. In support of this contention, Federal points to Lien Law § 2(9) which defines a contractor as "a person who enters into a contract with the owner of real property for the improvement thereof, or with the state or a public corporation for a public improvement." Federal asserts that because it entered into the Takeover Agreement with the property owners Thorobird and HDFC to improve their real property, its status is that of a contractor for purposes of the Lien Law. As such, Federal argues, Federal was entitled to file its mechanic's liens for the

nearly $3.4 million it claims Plaintiffs owe Federal. Federal avers that its right to file its liens is further evidenced by the fact that, pursuant to the Takeover Agreement, Federal assumed the obligations of the Projects' original general contractor, Melnick, under Melnick's construction contract with Plaintiffs. Federal avers that it performed Melnick's general contractor duties through its agent, Held.

In addition, Federal argues that Plaintiffs attack on Federal's lien rights is entirely meritless as evidenced by the fact that Plaintiffs: (1) consistently referred to Federal as the "general contractor" throughout the years following the Takeover Agreement and (2) required Federal, as a condition of payment, to execute lien waivers "in clear recognition of Federal's right to file liens for its work." Federal also notes that while Plaintiffs admit to only spending $95,000 to discharge the liens, they urge the Court to void Federal's liens and award them $3.5 million in damages – over 35 times the amount of their lien bond premiums.

In reply, Plaintiffs assert that Federal's attempt to prove that Federal is no longer a surety but is now a contractor impermissibly relies upon inadmissible parol and extrinsic evidence, e.g., the affidavits of Popeil and Herron, and ignores the intent of the parties as clearly expressed in the Payment Bond and Takeover Agreement.

* * * * * * * * *

Contract Law

It has long been held that absent a violation of law or some transgression of public policy, people are free to enter into contracts, making whatever agreement they wish, no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms (*Vermont Teddy Bear v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004]

[internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing (*Vermont Teddy Bear, Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.,* 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous (*Greenfield v Philles Records,* 98 NY2d 562, 569 [2002]). Further, extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous on its face (*South Road Associates, LLC v Intern. Business Machines Corp.,* 4 NY3d 272, 278 [2005]; *W.W.W. Assoc. v Giancontieri,* 77 NY2d 157, 163 [1990]).

With respect to whether the parties intended that Federal's status under the Takeover Agreement be that of a surety, the Court finds that the Takeover Agreement is clear and unambiguous. Significantly, paragraph 16 expressly states that any work that Federal performed on the Projects would be performed by Federal "as a completing surety and not as a contractor of the Owner." Moreover, this paragraph also states that to the extent that any provisions of the Takeover Agreement may be construed otherwise, "such provision(s) shall subordinate to this Paragraph with respect to construing the intent of the parties." This language can only be interpreted as a clear intention by the parties that Federal would maintain its status as a surety while undertaking its obligations under the Performance Bond to complete the contractor's work. As the Takeover Agreement is not ambiguous, parol or extrinsic evidence may not be used to create an ambiguity. Therefore, neither the affidavits of Popeil and Herron nor the exhibits attached thereto are admissible to establish that, under the Takeover Agreement, the parties intended that Federal act as a general contractor in completing Melnick's duties. However, even

if Herron's affidavit were admissible on this issue, it actually lends support for the Court's interpretation of the Takeover Agreement. Notably, in his affidavit, Herron explains that the completing surety language in paragraph 16 was included to limit Federal's liability to the penal sum of the Performance Bond. Unquestionably, Federal is the surety on the Performance Bond. Significantly, the Performance Bond explicitly provides that when the "Owner" has declared a contractor default the "Surety shall promptly and at the Surety's expense . . .[u]ndertake to perform and complete the [Contract] itself, through its agents, or through independent contractors." That is exactly what the surety has done here – Federal undertook to perform and complete the Contract through its agent, Held. It is also noteworthy that Federal retained the same contractor originally retained by Plaintiffs as the general contractor, Melnick, to complete the work under the Contract.

However, whether the parties intended that Federal maintain its status as a surety when completing the work under the Contract is not, in and of itself, dispositive of whether, under the Lien Law, Federal may assert lien rights as a contractor. Indeed, Defendants' assert that, irrespective of how it is characterized in the Takeover Agreement, Federal is a contractor under the Lien Law because it entered into the Takeover Agreement with the property owners, Thorobird and HDFC, to improve their real property. This, Defendants assert, satisfies the statutory definition of a contractor set forth in Lien Law §2(9), which provides that a contractor is "a person who enters into a contract with the owner of real property for the improvement thereof." In support of their assertion, Defendants cite *Burns Elec. Co. v Walton Street Assoc.,* 136 AD2d 291 [4th Dept 1988], in which the court found that the labels or terms employed in a contract are not always controlling, which, in the court's view was especially true for the term contractor because "we must look not to the terms by which the parties refer to themselves, but rather to all of the facts constituting the relationship." Notably, in *Burns Elec. Co.,* the party seeking contractor status was designated as an owner and the opposing party as a contractor in the parties' agreement. In its decision, the court noted that there was nothing contradictory about an owner also being a contractor since it is common for an owner to enter into a series of contracts for improvement of real property thereby acting as a general contractor. However,

unlike in *Burns Elec. Co.,* here, the parties specifically stated in their agreement that Federal was *not* performing as a contractor but as a surety. This makes sense since Federal is an insurance company, not a construction company.

To be sure, Lien Law § 23 states that Article 2 "is to be construed liberally to secure the beneficial interests and purposes thereof." And, the courts have recognized that "[t]he Mechanics Lien statute is a remedial one and is to be liberally construed to carry out the purpose of its enactment" (*Tri-City Elec. Co.,* 96 AD2d 146, 149 [4th Dept 1983]). "This rule of liberal construction is not without limit, however, and does not authorize judicial legislation to enlarge the clearly defined scope of purpose of the Lien Law" (*Raymond Concrete Pile Co. v Federation Bank & Trust Co.,* 288 NY 452, 463 [1942]). The Court of Appeals has held that the primary purpose of the Lien Law is to ensure that those who have directly expended labor and materials to improve real property or a public improvement at the direction of the owner or a general contractor receive payment for the work actually performed (*Canron Corp. v City of New York,* 89 NY2d 147, 155 [1996]; *West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.,* 87 NY2d 148, 157 [1995]; *Acquilino v United States,* 10 NY2d 271, 278-279 [1961]).

As Defendants point out, the Lien Law provides that a contractor is "a person who enters into a contract with the owner of real property for the improvement thereof" (Lien Law § 2[9]). While read broadly, that definition would include anyone who makes a contract with the owner, "[t]he contractor whom the Lien Law has in view is one who would be so characterized in the common speech of men"(*McNulty Brothers v Offerman,* 221 NY 98, 105 [1917]). "He is one who, in the usual course of trade, has undertaken to improve the property of another" (*id.*) "The question is in its essence a question of intention: did the parties intend to assume the relation of owner and contractor as those terms are usually understood, or did they intend to assume the relation of owner and [surety] ?" (*id.* at 106).

By their own admission, Defendants undertook to complete the Contract solely to discharge their obligations under the Performance Bond. In doing so, Defendants were performing their obligations under section 4.2 of the Performance Bond which states that the "Surety" shall "[u]ndertake to perform and complete the Construction Contract itself, through its

agent or through independent contractors. Defendants aver that Federal performed their obligations under section 4.2 through their agent, Held, as expressly provided for in the Performance Bond. As such, Federal's liability was limited to the penal sum of the Bond – a critical component of both the Performance Bond and the Takeover Agreement. In the Court's view, this evinces that the parties understood that Federal was a surety for all purposes. Any mention of Federal as a general contractor or contractor in email communications evinces only that, in the broadest sense, Plaintiffs viewed Federal as a contractor. Also, the fact that Plaintiffs demanded that Federal execute lien waivers, on behalf of Melnick as the "Contractor/Subcontractor," does not mean that Plaintiffs believed that Federal could or would file liens as the lienor itself. Indeed, since Melnick filed its own liens against the properties, it stands to reason that, at least to some extent, the Federal Liens and Melnick Liens are duplicative and concern the same work.

Significantly, the parties have not cited, and the Court has not found, any legal authority which supports Defendants' assertion that a surety is entitled to file a mechanic's lien. On the other hand, however, in *JDS Const. Group LLC v Copper Services, LLC,* 2022 WL 1620425, *3 [Sup Ct, NY County, May 23, 2022], cited by Plaintiffs, the Supreme Court found that a surety could not invoke Lien Law § 15 (Assignment of contracts and orders to be filed) as a defense to nonpayment under a payment bond on the ground that, by its plain language, § 15 is applicable to "subcontractors, laborers, and materialmen, which the Surety is not." In that case, the court determined that the surety could not avail itself of a statute "that affords it no protection" (*id*.) Similarly, here, Lien Law § 3 lists numerous entities that are entitled to file a mechanic's lien, and, although sureties are commonly used in large construction projects, the legislature chose not to include sureties in this section. With regard to Defendants' argument that precluding sureties from filing mechanic's liens will provide a disincentive for sureties to complete construction projects, other than the conclusory allegation of Popeil, Defendants submitted no evidence to suggest that this is an extant problem.

Based upon the foregoing, the Court finds that Federal has no rights to file mechanic's liens under Lien Law §3 and, therefore, the Federal Liens are invalid and must be discharged.

However, to find Federal liable for damages pursuant to Lien Law § 39-a, Plaintiffs must demonstrate that Federal willfully exaggerated the amount of its liens under Lien Law § 39. In support of Plaintiffs contention that the liens were willfully exaggerated because Federal had no lien rights, and that they either knew or should have known that they had no such rights, Plaintiffs cite *Baring Industries, Inc. v 3 BP Property Owner LLC,* 580 F.Supp3d 41, 54-55 (SD NY 2022), in which the federal district court found that the entire amount of a lien was overstated and the exaggeration was willful because the individuals involved with the preparation and filing of the lien knew or should have known that the work performed/materials provided were not permanent improvements, as required under Lien Law § 3. The court arrived at this conclusion based on the deposition testimony of two witnesses involved with the preparation and filing of the lien. Of note, one witness testified that he lacked knowledge of the project or equipment provided, and that he did not personally do anything to verify the amounts claimed to have been due, yet authorized the lien to be filed (*id.*). Another witness testified that she lacked personal knowledge regarding the labor, equipment, and services provided and knew that a mechanic's lien can only be filed in connection with a permanent improvement to property, yet she caused the lien to be filed *(id*. at 55). Had either witness "attempted to verify whether the lien was well founded before they caused it to be filed," the court opined, "they would have discovered the equipment . . . delivered and installed could not reasonably have been considered permanent improvements to the property" (*id.*). "On this record," the court stated, "such a dramatic overstatement cannot reasonably have been the result of a genuine mistake or misunderstanding" (*id*). As such, the court found the entire lien amount had been willfully exaggerated. However, unlike *Baring Industries,* which involved factual issues as to the type of equipment/services provided, here, Plaintiffs argue that as a surety, Federal may not avail itself of Lien Law § 3 as a matter of law.

In opposition, Defendants cite *Saratoga Assoc. Landscape Architects, Engrs & Planners, P.C. v The Lauter Dev. Group,* 77 AD3d 1219, 1223 (3rd Dept 2010), in which the Third Department rejected the defendants' argument that the entire amount of the lien was willfully exaggerated because plaintiff knew or should have known that the lien was invalid. Noting that

this argument was inconsistent with its prior interpretations of Lien Law §§ 39 and 39-a, the Court stated that "[t]he remedy in Lien Law § 39-a requires a finding that the lienor deliberately and intentionally exaggerated the *lien amount,* and is available only where the lien is otherwise valid (*id.*) (emphasis in original). The court pointed out that "[a]s a penal provision, this statute must be strictly construed in favor of the person upon whom the penalty is sought" (*id.*). In the instant case, the essence of Plaintiffs' argument is that sections §§ 39 and 39-a apply because Federal has no legal right to file a mechanic's lien.

Moreover, Plaintiffs do not argue that the *amount*s of the Federal Liens are incorrect. Indeed, Plaintiffs do not even address the merits of the claimed lien amounts. Nor does it appear that Plaintiffs disputed, or even responded to, the itemization of liens provided to them by Defendants upon Plaintiffs' demand for same. Rather, they proffer the same legal argument rejected by the Third Department (*id*). Further, given the dearth of legal authority on the issue of whether a surety has lien rights, the Court finds that it was not unreasonable for Defendants to take the position that their liens were valid when filed.[5]

Based upon the foregoing, it is hereby

ORDERED that the Bronx County Clerk is directed to discharge the Federal Liens in the respective amounts of $1,827,297.37, $295,440.78, and $1,329,032.46. It is further

ORDERED that Plaintiffs serve a copy of this Decision and Order upon Defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: August 30, 2023
Bronx, NY

Hon.
FIDEL E. GOMEZ, JSC

[5]In a footnote, Plaintiffs note that, in *JDS Constr. Group,* the surety was represented by the same law firm that represents Federal in this action, which is also listed as the attorney for Federal in each of the Federal Liens, which were executed six months after the decision was rendered. To the extent that Plaintiffs infer that this evinces that Defendants' knew they had no lien rights when they filed the liens, this Court disagrees. First, the Lien Law section in that case is not the same section at issue here. Second, this Court is not bound by decisions rendered by courts of coordinate jurisdiction. Therefore, it was not unreasonable for Federal and/or its attorneys to take the position that Federal had the right to file mechanic's liens.