Gamma USA, Inc. v Pavarini McGovern, LLC

2026 NY Slip Op 05237

September 10, 2026

Appellate Division, First Department

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Gamma USA, Inc., Plaintiff-Respondent,

v

Pavarini McGovern, LLC, Defendant-Appellant. [And a Third-Party Action].

Decided and Entered: September 10, 2026
Index No. 655472/23|Appeal No. 6099|Case No. 2025-01311|

Before: Manzanet-Daniels, J.P., Kapnick, Shulman, Chan, Hagler, JJ.

Peckar & Abramson, P.C., New York (Skyler Santomartino of counsel), for appellant.

Catania, Mahon & Rider, PLLC, New Windsor (Michael Catania of counsel), for respondent.

[*1]

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered January 21, 2025, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to dismiss defendant's counterclaim to the extent of restricting recoverable damages to $3.6 million under the liquidated damages cap found in section 22.1 of the relevant subcontract, unanimously modified, on the law, to dismiss only those portions of the counterclaim seeking delay damages in excess of the $3.6 million liquidated damages cap and consequential damages, and otherwise affirmed, without costs.

This case involves a major hotel, retail, and theater renovation project at a 47-story tower in Times Square. We are called upon to determine the scope of permissible damages allowed to defendant Pavarini McGovern, LLC, the construction manager/general contractor (General Contractor) on its counterclaim against plaintiff subcontractor Gamma USA, Inc. (the Subcontractor), which was asserted by the General Contractor as a "pass-through" claim on behalf of the nonparty owner of the project, Times Square Hotel Owner, LLC (the Owner). As the relevant contractual provisions do not, as Supreme Court's order found, limit recovery of Owner's direct damages (apart from consequential damages and delay damages in excess of the $3.6 million liquidated damages cap), the order must be modified accordingly.

I. The Relevant Agreements

The Owner engaged the General Contractor on the project pursuant to a Construction Management Agreement (the CMA) in August 2018. Section 3.1.2 of the CMA provides that, if the General Contractor did not meet certain milestones by a specified date, it would pay the Owner liquidated damages in the amount of $10,000 per day, not to exceed $3.6 million (the Delay Provision). The Delay provision clarifies that such liquidated damages would constitute the Owner's "sole remedy" for delay damages from the General Contractor.

Separately, section 25.19 of the CMA provides that the General Contractor and the Owner would waive claims for consequential damages against each other arising under the contract (the Waiver Provision). The Waiver Provision clarifies that it was not meant to preclude an award of liquidated damages in accordance with the Delay Provision. Notably, the parties did *not* waive other damages (such as direct damages) under the Waiver Provision.

It is also undisputed that the General Contractor is liable to the Owner for the performance of its subcontractors under the CMA.

[*2]

In August 2018, the General Contractor retained the Subcontractor to perform curtainwall and faÇade work pursuant to a trade contract (the Subcontract).The Subcontract required the Subcontractor to complete the work in accordance with the CMA and other contract documents, with time being of the essence. Unlike the Waiver Provision found in the CMA described above (which waived consequential damages), section 6.1 of the Subcontract specified that the Subcontractor would be liable to the General Contractor "for *all direct and consequential* damages arising out of . . . this [Subcontract] including any defects in [Subcontractor's] Work" (emphasis added).

In section 22.1 (entitled "Timely Completion"), as modified by exhibit H, section V(7) of the Subcontract, the Subcontractor acknowledged that failure to complete the work in a timely manner would "result in extreme hardship to [the] Owner" and that if Subcontractor failed to do so "[the] Owner's damages for such delays shall be liquidated" in the same manner as specified in the Delay Provision of the CMA, and "[n]otwithstanding the foregoing, [Subcontractor's] liability for liquidated damages" would be capped at $3.6 million (the Liquidated Damages Cap). Section 22.2 sets forth that the Liquidated Damages Cap would not "in any way limit [the General Contractor's] right . . . to collect damages for, inter alia, increased cost of construction . . . and any other damages, including direct or consequential damages, to which [the General Contractor] may be entitled to collect by law for breach of this contract."

II. *This Litigation*

The Subcontractor commenced this action against the General Contractor, seeking more than $16 million for nonpayment and breach of the Subcontract. The General Contractor answered the complaint. The Subcontractor's primary claims have since been dismissed, and are not at issue on appeal.

III. *The "Pass-Through" Liquidating Agreement*

Several months after the commencement of the action, the General Contractor and the Owner entered a "pass-through" liquidating agreement so that the General Contractor could assert a counterclaim in the lawsuit on the Owner's behalf (as amended, the Amended Liquidating Agreement). The Amended Liquidating Agreement was necessary because the Owner lacked privity to assert its own claim against the Subcontractor, and the Owner wished to avoid the time and expense of suing the General Contractor (which would then in turn sue the Subcontractor for indemnification).

[*3]

In the Amended Liquidating Agreement, the Owner and the General Contractor acknowledged that the Owner had incurred damages (including consequential damages) on account of the Subcontractor's failure to perform work in accordance with the Subcontract (the Owner Claim), and that the General Contractor was liable to the Owner for that claim under the CMA. The Owner and the General Contractor also agreed that they had entered the Amended Liquidated Agreement to "liquidate the Owner Claim such that [the General Contractor's] liability to [the] Owner in connection with the Owner Claim is liquidated and limited to the amount, if any, that is actually recovered from [the] Subcontractor on account of the Owner Claim, including, without limitation the consequential damages incurred by [the] Owner as a result of [the] Subcontractor's breach. . . ."

IV. *The Amended Counterclaim and Motion to Dismiss*

The General Contractor filed a second amended answer, the operative pleading in this action, asserting an amended counterclaim brought by the General Contractor solely on the Owner's behalf in accordance with the Amended Liquidating Agreement.

The Subcontractor moved to dismiss the amended counterclaim shortly after it was filed, arguing that the Amended Liquidating Agreement was unenforceable. In the alternative, the Subcontractor argued that its "liability for liquidated damages" was capped at $3.6 million under the Liquidated Damages Cap of the Subcontract.

V. *The Order Appealed From*

Supreme Court granted the motion to dismiss the amended counterclaim to the extent it sought damages exceeding the $3.6 million Liquidated Damages Cap. The court found that the amended counterclaim sought damages solely for the *Owner's* injuries, not the General Contractor's injuries. The court also noted that, under the CMA, the Owner had expressly waived its right to recover "any damages" other than liquidated damages from defendant, which included consequential delay damages.

Thus, the Court held that while the General Contractor would have retained the right to recover consequential damages from the Subcontractor for its *own* injuries under the Subcontract (*see e.g.* section 6.1 of the Subcontract, discussed above), the liability for the *Owner's* injuries was governed by the Liquidated Damages Cap found in 2.21 of the Subcontract, which capped recoverable damages at $3.6 million. The General Contractor's recovery on its amended counterclaim asserted on behalf of the Owner was thus limited to a maximum of $3.6 million with respect to all forms of damages.

VI. *Discussion*

[*4]

At the outset, Supreme Court correctly read the amended counterclaim— styled entirely as a pass-through claim by the General Contractor on behalf of the Owner — in determining that there was no independent claim asserted by the General Contractor (apart from the liability for its subcontractors to the Owner under the CMA). For example, paragraph 194 of the second amended answer alleges that the "Owner incurred substantial additional costs as a result of [the Subcontractor's] breaches, in the form of overhead and supervision, direct work costs charged by separate contractors, additional storage, and labor expenditures." Paragraph 196 asserted that "[u]nder the [CMA], [the General Contractor] is responsible for all the acts and omissions of its subcontractors and is liable to [the] Owner for damages incurred due to" the Subcontractor's breaches of the Subcontract. Thus, the General Contractor did not allege that it incurred additional damages apart from those owing to the Owner on account of the Subcontractor's breaches.

Supreme Court also properly found that it was necessary to interpret both the CMA (between the Owner and the General Contractor) and theSubcontract (between the General Contractor and the Subcontractor) in determining the scope of recoverable damages on the pass-through counterclaim. First, the court correctly found that to the extent the General Contractor sought to recover damages from the Subcontractor that the Owner incurred based on the Subcontractor's delays, that recovery was subject to the Liquidated Damages Cap in the Subcontract. That section explicitly provides that the Owner's damages for such delays would be be liquidated in the same daily amount specified by the owner in the CMA (i.e., $10,000 per day for each day of the delay) in the proportion that the Subcontractor was the cause of such delay, and that notwithstanding the foregoing, the Subcontractor's liability for liquidated damages would be capped at $3.6 million.

However, the above limitation is applicable only to the Owner's damages caused by the Subcontractor's delays. The relevant agreements do not, as the court found, restrict the other damages that the General Contractor may recover on behalf of the Owner. Notably, the first amended counterclaim claim asserts several forms of damages attributable to Owner, not just delay damages. To the extent the damages sought were not delay damages, they should not have been subject to the $3.6 million cap.

[*5]

Second, with respect to other forms of damages recoverable by the Owner, it was necessary to look to the CMA. While Supreme Court addressed the CMA only in passing, the recognition that the terms of the CMA apply to the pass-through counterclaim is important. As touched upon above, the Owner had the ability to assert claims for damages directly against the General Contractor for liquidated delay damages and other (nonconsequential) damages under the CMA. However, the Owner instead chose to rely on the Amended Liquidating Agreement to pursue claims against the Subcontractor by way of a pass-through counterclaim asserted by the General Contractor against the Subcontractor. This strategic decision did not (and should not) alter or expand the scope of the Subcontractor's liability for the Owner's damages under the Subcontract, which expressly incorporated the terms of the CMA.

While Supreme Court properly acknowledged that the CMA applied, the court's interpretation exceeded the intended scope of the prescribed damages waived in the CMA. Specifically, Supreme Court concluded that the "Owner expressly waived its rights to recover *any damages* other than liquidated damages from defendant [General Contractor], including consequential delay damages" in the CMA (emphasis added). However, the CMA did *not* waive all damages as between the Owner and the General Contractor, but only claims for "consequential damages arising of and relating to the Contract." Consequential damages are meant to compensate for indirect losses, and are but a small subset of permissible damages under a contract (*see e.g. Bi-Economy Market, Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192-193 [2008]*; see also American List Corp. v U.S. News & World Report*, 75 NY2d 38, 43 [1989]).

Thus, nothing in either the Subcontract or the CMA limits the Owner's ability (vis-Á -vis the General Contractor) to pursue direct damages from the Subcontractor, so long as they are not consequential damages or delay damages in excess of the $3.6 million cap.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: September 10, 2026