NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2893-21

JPC MERGER SUB LLC, d/b/a JERSEY PRECAST,

Plaintiff-Appellant,

v.

TRICON ENTERPRISES, INC., COUNTY OF UNION, and QBE INSURANCE CORPORATION, d/b/a QBE SURETY,

Defendants-Respondents,

and

QBE INSURANCE, d/b/a QBE SURETY,

Third-Party Plaintiff/
Respondent,

v.

TRICON ENTERPRISES, INC., TRICON MANAGEMENT, LLC, NEW VENTURES, LLC, and DENISE PETRIZZO,

Third-Party Defendants/
Respondents.

APPROVED FOR PUBLICATION

December 7, 2022

APPELLATE DIVISION

Argued September 29, 2022 – Decided December 7, 2022

Before Judges Haas,[1] Gooden Brown and Mitterhoff.

On appeal from interlocutory orders of the Superior Court of New Jersey, Law Division, Union County, Docket No. L-2885-21.

Greg Trif argued the cause for appellant (Trif & Modugno LLC, attorneys; Greg Trif and Brendan W. Carroll, of counsel and on the briefs).

Gary Strong argued the cause for respondent QBE Insurance Corporation, d/b/a QBE Surety (Gfeller Laurie LLP, attorneys; Gary Strong, of counsel; Madison E. Calkins, on the brief).

Emilie T. Ngo, Second Deputy County Counsel, argued the cause for respondent County of Union (Bruce H. Bergen, Union County Counsel, attorney; Emilie T. Ngo, on the statement in lieu of brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

The crux of this dispute is the enforceability of a "pay-if-paid" provision in a construction contract and the applicability of the "knock-out" rule when unilateral modifications are made to the contract. "In construction contract parlance," a pay-if-paid provision "means that a subcontractor gets paid by the general contractor only if the owner pays the general contractor for that

[1] Judge Haas did not participate in oral argument. He joins the opinion with counsel's consent. R. 2:13-2(b).

subcontractor's work." Sloan & Co. v. Liberty Mut. Ins. Co., 653 F.3d 175, 179 (3d Cir. 2011). Thus, "'receipt of payment by the contractor from the owner is an express condition precedent to the contractor's obligation to pay the subcontractor. A 'pay-if-paid' provision in a construction subcontract is meant to shift the risk of the owner's nonpayment under the subcontract from the contractor to the subcontractor.'" MidAmerica Constr. Mgmt., Inc. v. MasTec N. Am., Inc., 436 F.3d 1257, 1262 (10th Cir. 2006) (quoting Robert F. Carney & Adam Cizek, Payment Provisions in Construction Contracts and Construction Trust Fund Statutes: A Fifty-State Survey, 24 Constr. Law., Fall 2004, at 5, 5-6 (footnote omitted)).

"[T]he 'knock[-]out' rule applies in New Jersey when there are conflicting terms in a contract governed by the Uniform Commercial Code ('UCC'), codified at N.J.S.A. 12A:1-101 to 11-108." Richardson v. Union Carbide Indus. Gases, Inc., 347 N.J. Super. 524, 525 (App. Div. 2002). "The effect of applying the 'knock-out' rule is that the conflicting terms do not become part of the parties' contract and the contract 'consist[s] of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of [the UCC].'" Id. at 525-26 (quoting N.J.S.A. 12A:2-207(3)).

In this case, plaintiff subcontractor, JPC Merger Sub LLC, d/b/a Jersey Precast, entered into a purchase order contract with defendant general contractor, Tricon Enterprises, Inc. (Tricon), for materials to fulfill a public improvement contract with defendant project owner, County of Union (the County). Defendant QBE Insurance d/b/a QBE Surety (QBE) was Tricon's surety. The purchase order (PO) contained a pay-if-paid provision specifying that plaintiff would be paid only if the County paid Tricon. Upon receipt of the PO, plaintiff's president made unilateral handwritten changes that conflicted with certain preprinted terms, including the contract price and the payment schedule.

Notwithstanding the modifications, performance of the contract commenced and Tricon paid plaintiff the amount billed in its initial invoices. Ultimately, when the County stopped paying Tricon, Tricon, in turn, stopped paying plaintiff. Plaintiff sued Tricon, the County, and QBE, alleging breach of contract and other claims. Relying on the pay-if-paid provision, Tricon filed a counterclaim against plaintiff, alleging that plaintiff breached the contract by attempting to enforce payment prior to Tricon having a duty to pay.

Plaintiff moved to dismiss Tricon's counterclaim pursuant to Rule 4:6-2(e) for failure to state a claim. QBE cross-moved for summary judgment,

arguing that under the pay-if-paid provision, neither Tricon nor QBE as its surety had a duty to pay plaintiff when the County had not yet paid Tricon. The trial judge denied plaintiff's motion and granted QBE's cross-motion.

By leave granted, plaintiff now appeals from the judge's interlocutory orders. Specifically, plaintiff appeals the January 27, 2022 order denying plaintiff's motion to dismiss Tricon's counterclaim; the January 27, 2022 order granting QBE's cross-motion for summary judgment; and the April 1, 2022 order denying plaintiff's motion for reconsideration of both January 27, 2022 orders.

For the reasons that follow, we conclude that N.J.S.A. 12A:2-207(3) was inapplicable to "knock-out" the "pay-if-paid" provision from the contract at issue. Accordingly, we affirm the denial of plaintiff's dismissal motion. However, because there are disputed issues of material fact regarding the triggering of the condition precedent to Tricon's obligation to pay plaintiff, we reverse the order granting summary judgment to QBE as Tricon's surety.

I.

We glean these facts from the motion record. On October 31, 2019, the New Jersey Department of Transportation approved the County's award of a $2.115 million construction contract to Tricon for a project known as the "Bi-County Bridge Replacement Passaic Street Bridge Over the Passaic River

Superstructure Replacement" (the project). In accordance with the contract and the bid specifications, on December 12, 2019, QBE, as surety, issued both a performance bond and a separate payment bond to the County on behalf of Tricon, the principal.

On February 21, 2020, plaintiff received from Tricon a two-sided pre-typed PO for materials needed for the project. In the PO, Tricon offered to buy from plaintiff thirty-eight fabricated prestressed box beams for $12,000 each, totaling a fixed sum of $456,000. Although the front of the PO stated it was "[n]ot [v]alid [u]ntil [s]igned and [r]eturned in its [e]ntirety [w]ithout [m]odification," plaintiff's president, Amir Ulislam, crossed out the pre-typed prices and handwrote higher prices in blue pen. The new, handwritten prices were $12,149 for each beam, totaling $461,662.

Ulislam made a number of other changes in the same fashion. First, on the front of the PO under "NOTES", Ulislam wrote and initialed:

> – 10% ADVANCE; REMAINING AS PER SCHEDULE OF VALUES (ATTACHED)
>
> – NO RETAINAGE
>
> – ALL PAYMENTS WITHIN 45 DAYS OF [PLAINTIFF'S] INVOICES.

Additionally, at the bottom, Ulislam inserted and initialed the following:

> SCHEDULE: –

– SUBMISSION OF SHOP DRAWINGS — [FOUR] WEEKS FROM THE DATE OF PO.

– START OF FABRICATION — [THREE] WEEKS FROM SHOP DRAWINGS APPROVAL.

– DELIVERY STARTS — A WEEK AFTER [SIX] WEEKS OF FABRICATION (AROUND JULY 17, 2020).

The reverse side of the PO set forth additional pre-typed terms and conditions. Paragraph 1 stated in part: "This [PO] . . . shall constitute the complete and entire agreement of the parties" and "may not be amended or modified except in writing signed by the [p]arties." Paragraph 3 stated:

> 3. UCC. Notice is hereby given pursuant to Section 2-207 of the [UCC] ("Code") of Tricon's objection to all terms and conditions in addition to and different from these [t]erms and [c]onditions, which are contained in any written acceptance or order confirmation issued by Vendor. Any [t]erms and [c]onditions herein that conflict with the Code shall constitute a variation by agreement and shall take precedence.

Critically, Paragraph 5 provided:

> 5. PAYMENT. Tricon shall pay Vendor for the [w]ork furnished within fourteen (14) days after Tricon's receipt of payment from the Owner . . . for such [w]ork, less retainage (if any) in the corresponding amount withheld from Tricon. Vendor understands and agrees that Tricon's obligation to make any payment to Vendor is subject to, and shall not exist unless and until, Tricon's receipt of payment on account of Vendor's [w]ork from the Owner . . . , the occurrence and satisfaction of which shall be a

> condition precedent to Tricon's duty to remit payment. Payment by Tricon shall not constitute acceptance of any [w]ork or [g]oods, nor shall tender of payment be a condition to Vendor's duty to furnish the [w]ork required hereunder.

The underlined sentence in Paragraph 5 constitutes the "pay-if-paid" provision now in dispute.

Still using blue pen, Ulislam modified Paragraph 5 by crossing out "14" and replacing it with "7," and crossing out the phrase, "less retainage (if any) in the corresponding amount withheld from Tricon." Ulislam made no other changes to Paragraph 5 but made minor revisions to Paragraphs 2 and 4, none of which are germane to this appeal. Finally, Paragraph 9 stated that the PO was "governed by the laws of the state in which the [p]roject [was] located," i.e., New Jersey.

The PO was signed by plaintiff's vice-president, Khwaja Abbas, and returned to Tricon on February 28, 2020. In certifications submitted in support of the ensuing motions, Ulislam averred that Wamiq Maqsood, Tricon's executive vice-president, ultimately accepted the PO on behalf of Tricon as the contract between the parties. However, Maqsood certified that "Tricon, did not in writing or verbally agree to any of the other handwritten notations that were made on the contract." According to Maqsood, "Tricon neither accepted [plaintiff's] changes nor . . . add[ed] its initial to the PO.

Instead, Tricon applied the terms in their original printed form to the sale of goods from [plaintiff]."

Ultimately, in accordance with the PO, plaintiff submitted the initial shop drawings to Tricon and, after several months of revisions, Tricon and the County approved plaintiff's final shop drawings. After the drawings were approved, plaintiff began fabricating the beams. As specified in the PO, plaintiff submitted ten invoices to Tricon over several months beginning March 3, 2020, eventually billing Tricon a total of $423,661.82. In July 2020, Tricon billed the County $115,956.54, and received full payment on September 14, 2020. On October 12, 2020, Tricon paid plaintiff in full for its first two invoices, totaling $67,166.20. On December 1, 2020, plaintiff completed the beams. However, Tricon refused to accept delivery of the beams or pay the remaining invoices plus the cost of storage for the beams.

According to Maqsood, Tricon could not use the beams because the County "failed to obtain the approval of Jersey Central Power & Light ('JCP&L') to move high voltage power lines that r[a]n precariously close to the [p]roject." Maqsood certified that Tricon had "anticipated using a crane to both remove the old bridge structure and install the [b]eams for the new bridge [p]roject." However, "when JCP&L refused to move the power lines, the construction of the [p]roject became an impossibility" and the beams

"remain[ed] unused." Maqsood certified that "although Tricon . . . invoiced [the County] for the cost of the [b]eams," the County "failed and refused to make payment for the [b]eams" and "refused to accept delivery of the [b]eams." Therefore, Tricon never paid plaintiff.[2]

On March 24, 2021, plaintiff submitted a claim to QBE under the payment bond. On June 28, 2021, the County submitted a notice of claim under the performance bond, notifying QBE that Tricon had defaulted on the contract by "fail[ing] to complete the project on time." In a subsequent certification prepared by David Atkinson, a certified municipal engineer, the County repudiated Tricon's claims that the County was at fault in rendering the completion of the project impossible.

Specifically, Atkinson averred that the County was not "responsible for obtaining approval from JCP&L to move high voltage power lines." On the contrary, the bid "specifications provide[d] that prospective bidders were responsible for making all inquiries and arrangements with utility companies and to inspect the [p]roject site prior to bidding." According to Atkinson, "[t]he specifications further provide[d] that once a bid [was] submitted, the

[2] Tricon's counsel certified that "[i]n an effort to verify Tricon's assertion of impossibility," QBE "conducted an investigation with an outside construction consultant" who "found that because JCP&L refused to de-energize the wires, the work could not be safely performed."

bidder [was] assumed to have all requisite knowledge of the [p]roject site and accepted all of the [p]roject site's current conditions." Further, "[t]he contractor [was] responsible for the construction schedule and the fabrication of materials [was] dictated by the contractor's construction schedule on any given project."

On July 16, 2021, plaintiff made a final demand to Tricon for payment. Plaintiff also demanded that QBE pay the remaining balance due from Tricon plus storage charges for the beams of $1,067.30 per week since January 1, 2021. On July 20, 2021, Tricon's attorney responded by referencing Paragraph 5 of the PO and declaring: "To date, Tricon has not been paid for [plaintiff's] work by the Owner of the project. As such, no monies are due and owing to [plaintiff] at this time."

On August 20, 2021, plaintiff filed a complaint against Tricon, the County and QBE, seeking full payment under the PO of no less than $356,495.62, plus other damages and costs. In the complaint, plaintiff alleged breach of contract (count one); breach of the implied covenant of good faith and fair dealing (count two); violation of the Prompt Payment Act, N.J.S.A. 2A:30A-1 to -2 (count three); lien foreclosure (count four); breach of the payment bond (count five); and book account and account stated (counts six and seven).

Tricon filed a contesting answer with affirmative defenses, a crossclaim against the County, and a counterclaim against plaintiff. In its counterclaim, Tricon alleged that plaintiff materially breached the PO by attempting to enforce payment prior to Tricon having a duty to pay, as the condition precedent set by the pay-if-paid clause had not yet occurred. Thus, Tricon asserted it was "relieved of its obligations under the [PO]."

QBE also filed a contesting answer with affirmative defenses, crossclaims for contribution and indemnification, and a third-party complaint against Tricon and others. In its third-party complaint, QBE demanded specific enforcement of the collateral demand provision in its general agreement of indemnity (count one), and complete indemnification of all losses, damages, fees and costs as a result of issuing bonds on behalf of Tricon (count two). In addition, the County filed an answer with affirmative defenses and crossclaims against Tricon and QBE.

Plaintiff moved to dismiss Tricon's counterclaim pursuant to Rule 4:6-2(e) for failure to state a claim. QBE cross-moved for summary judgment, relying on the PO's pay-if-paid clause and arguing that neither Tricon nor QBE had a duty to pay plaintiff since the County had not yet paid Tricon. In that regard, QBE, as the payment bond surety, was standing in the shoes of Tricon

since QBE ultimately would be responsible for any payment to plaintiff under the suretyship agreement. Tricon joined in QBE's cross-motion.

On January 27, 2022, following oral argument, the judge denied plaintiff's motion to dismiss and granted QBE's cross-motion for summary judgment, which the judge construed as QBE's request for dismissal of all plaintiff's claims. As a threshold matter, in a written opinion, the judge posited that the dispositive questions were as follows: first, whether the handwritten modifications were valid and conflicted with other provisions in the PO; second, whether the pay-if-paid provision was applicable; and, third, if applicable, whether the pay-if-paid provision was enforceable as a matter of public policy. The judge concluded that plaintiff's "handwritten modifications" were "unenforceable as a matter of law" and that the pay-if-paid provision was applicable and enforceable. Plaintiff moved for reconsideration, which was denied on the papers on April 1, 2022. We granted plaintiff's motion for leave to appeal the memorializing January 27 and April 1, 2022 orders, and this appeal followed.

II.

Our analysis begins with some basic rules regarding our standard of review. Our standard of review for a Rule 4:6-2(e) motion to dismiss for "failure to state a claim upon which relief can be granted" is de novo, and we

"owe[] no deference to the trial court's legal conclusions." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). "The standard traditionally utilized by courts to determine whether to dismiss a pleading . . . is a generous one." Green v. Morgan Props., 215 N.J. 431, 451 (2013). As such, "[a] plaintiff is entitled to a liberal interpretation and given the benefit of all favorable inferences that reasonably may be drawn." State, Dep't of Treasury ex rel. McCormac v. Qwest Commc'ns Int'l, Inc., 387 N.J. Super. 469, 478 (App. Div. 2006). As a result, motions to dismiss "should be granted in only the rarest of instances." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989); see also Smith v. SBC Commc'ns Inc., 178 N.J. 265, 282 (2004).

In evaluating a Rule 4:6-2(e) motion, "'our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint.'" Green, 215 N.J. at 451 (quoting Printing Mart, 116 N.J. at 746). "At this preliminary stage of the litigation the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." Printing Mart, 116 N.J. at 746. Rather, "the test for determining the adequacy of a pleading . . . [is] whether a cause of action is 'suggested' by the facts." Ibid. (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). To that end, courts must "'search[] the complaint in depth and with liberality to

ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim'" and grant the "'opportunity . . . to amend if necessary.'" Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Notwithstanding this liberality, "the essential facts supporting [the] cause of action must be presented in order for the claim to survive," and "conclusory allegations are insufficient in that regard." Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012) (citing Printing Mart, 116 N.J. at 768).

Similarly, "we review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). That standard is well-settled.

> [I]f the evidence of record — the pleadings, depositions, answers to interrogatories, and affidavits — "together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact," then the trial court must deny the motion. On the other hand, when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted.
>
> [Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016) (citations omitted) (quoting R. 4:46-2(c)).]

See also Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995) (holding that whether a genuine issue of material fact exists depends on "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party").

"We review issues of law de novo and accord no deference to the trial judge's [legal] conclusions." MTK Food Servs., Inc. v. Sirius Am. Ins. Co., 455 N.J. Super. 307, 312 (App. Div. 2018). "The interpretation or construction of a contract is generally a legal question, which is 'suitable for a decision on a motion for summary judgment.'" Petersen v. Township of Raritan, 418 N.J. Super. 125, 133 (App. Div. 2011) (quoting Driscoll Constr. Co. v. State, Dep't of Transp., 371 N.J. Super. 304, 313 (App. Div. 2004)). "Accordingly, we pay no special deference to the trial court's interpretation and look at the contract with fresh eyes." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011).

On the other hand, "a trial court's reconsideration decision will be left undisturbed unless it represents a clear abuse of discretion." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). Where the order sought to be reconsidered is interlocutory, as in this case, Rule 4:42-2 governs the motion. Reconsideration under this rule offers a

"far more liberal approach" than Rule 4:49-2, governing reconsideration of a final order. Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). "Rule 4:42-2 declares that interlocutory orders 'shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice.'" Ibid. (quoting R. 4:42-2(b)); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 4:42-2 (2023) ("[A]n order adjudicating less than all the claims is subject to revision in the interests of justice at any time before entry of final judgment.").

Turning to the substantive principles pertinent to this appeal, "our inquiry is governed by 'familiar rules of contract interpretation.'" Barila v. Bd. of Educ., 241 N.J. 595, 615 (2020) (quoting Serico v. Rothberg, 234 N.J. 168, 178 (2018)). "It is well-settled that '[c]ourts enforce contracts "based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract."'" In re County of Atlantic, 230 N.J. 237, 254 (2017) (alteration in original) (quoting Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014)). Contract terms are generally "given their plain and ordinary meaning." M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). Because "[t]he plain language of the contract is the cornerstone of the interpretive inquiry[,] 'when the intent of the parties is plain and the language is clear and unambiguous, a

court must enforce the agreement as written, unless doing so would lead to an absurd result.'" Barila, 241 N.J. at 616 (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)). "If we conclude that a contractual term is ambiguous, we 'consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining a contract's interpretation.'" Ibid. (quoting County of Atlantic, 230 N.J. at 255).

In New Jersey, there is no statute or published caselaw governing the enforceability of a pay-if-paid contract provision. Courts in some states require clear and unambiguous language before enforcing a pay-if-paid clause to block payment to a subcontractor. See, e.g., Main Elec., Ltd. v. Printz Servs. Corp., 980 P.2d 522, 528 (Colo. 1999) (stating "[t]o create a pay-if-paid clause in a construction contract, the relevant contract terms must unequivocally state that the subcontractor will be paid only if the general contractor is first paid by the owner and set forth the fact that the subcontractor bears the risk of the owner's nonpayment"); DEC Elec., Inc. v. Raphael Constr. Corp., 558 So. 2d 427, 429 (Fla. 1990) (stating risk-shifting provisions of a pay-if-paid term must be clear and unambiguous or, if ambiguous, interpreted as setting a reasonable time for payment).

The rationale underlying this stringent requirement for enforcing pay-if-paid provisions was best expressed in Thos. J. Dyer Co. v. Bishop

International Engineering Co., 303 F.2d 655 (6th Cir. 1962), where the court explained:

> It is, of course, basic in the construction business for the general contractor on a construction project of any magnitude to expect to be paid in full by the owner for the labor and material he puts into the project. He would not remain long in business unless such was his intention and such intention was accomplished. That is a fundamental concept of doing business with another. The solvency of the owner is a credit risk necessarily incurred by the general contractor, but various legal and contractual provisions, such as mechanics' liens and installment payments, are used to reduce this to a minimum. These evidence the intention of the parties that the contractor be paid even though the owner may ultimately become insolvent. This expectation and intention of being paid is even more pronounced in the case of a subcontractor whose contract is with the general contractor, not with the owner. In addition to his mechanic's lien, he is primarily interested in the solvency of the general contractor with whom he has contracted. He looks to him for payment. Normally and legally, the insolvency of the owner will not defeat the claim of the subcontractor against the general contractor. Accordingly, in order to transfer this normal credit risk incurred by the general contractor from the general contractor to the subcontractor, the contract between the general contractor and subcontractor should contain an express condition clearly showing that to be the intention of the parties.
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> [Id. at 660-61.]

In other states, pay-if-paid provisions are enforceable merely as written. See Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC, 540 S.W.3d 770,

786 (Ky. 2017) (declining "to hold that 'pay-if-paid' terms are unenforceable as a matter of public policy" in light of the state's long tradition of freedom of contract); Lemoine Co. of Ala., L.L.C. v. HLH Constructors, Inc., 62 So. 3d 1020, 1025-26 (Ala. 2010) (holding that "[a]lthough conditions precedent are not favored in contract law," a pay-if-paid clause creates an enforceable condition precedent in light of the Supreme Court of Alabama's "consistently held" position that "the freedom to contract is an inviolate liberty interest.").

In some states, legislatures have passed statutes declaring pay-if-paid provisions unenforceable, often as against public policy due, in part, to their impact on mechanic's lien rights.[3] See., e.g., Cal. Civ. Code § 8122 (declaring provision void absent statutory waiver); Del. Code Ann. tit. 6, § 3507(e), but see § 3507(f) (exempting public works contracts); D.C. Code § 27-134(c) (declaring provisions that limit the right to obtain mechanics' liens or

[3] In New Jersey, under the Construction Lien Law, N.J.S.A. 2A:44A-1 to -38, which replaced the Mechanic's Lien Law, "any contractor or subcontractor or supplier who provides work, services, material or equipment pursuant to a contract shall be entitled to a lien for the value of the work or services performed, or materials or equipment furnished in accordance with the contract and based on the contract price." Thomas Grp. v. Wharton Senior Citizen Hous., 163 N.J. 507, 512-13 (2000) (citing N.J.S.A. 2A:44A-3). "The lien attaches to the interest of the owner in the real property" as long as the claimant "file[s] a lien claim within [ninety] days from the last date of work, services, material or equipment provided for which payment is claimed." Id. at 513 (first citing N.J.S.A. 2A:44A-3; and then citing N.J.S.A. 2A:44A-6). On July 29, 2021, plaintiff filed a notice of mechanic's lien with the County in the amount of $356,495.62.

contractors' bonds void as against public policy); Ind. Code § 32-28-3-18(c), but see § 32-28-3-18(b) (exempting certain construction contracts); Minn. Stat. § 337.10(3) (requiring all payments to subcontractors be made within ten days of receipt of services); Mo. Rev. Stat. § 429.005(1) (declaring contract provisions that waive a subcontractor's right to obtain any lien absent payment unenforceable and against public policy); Mont. Code Ann. § 28-2-723 (prohibiting contract provisions that waive the right to a construction lien or a claim against a payment bond); Nev. Rev. Stat. §§ 624.624 to 624.628 (allowing subcontractor to stop work upon nonpayment, even if contract contains pay-if-paid provision, and generally prohibiting contract terms limiting lien rights); N.Y. Gen. Oblig. §5-322.1 (declaring contract provisions requiring exhaustion of another legal remedy before enforcing bond unenforceable as against public policy); N.C. Gen. Stat. § 22C-2 (declaring pay-if-paid provisions unenforceable); S.C. Code Ann. § 29-6-230 (same); Wis. Stat. § 779.135 (declaring pay-if-paid provisions void).

"A leading construction law treatise suggests that there is nothing inherently unfair about a pay-if-paid clause that operates to shift risk of non-payment by the owner to the subcontractor." Sloan & Co., 653 F.3d at 181 n.9 (citing 2 Construction Law ¶ 7.04 (Matthew Bender ed., 2011)). Although industry custom generally places the risk of an owner's nonpayment on the

general contractor rather than the subcontractor, we believe that as long as the contract on its face contains clear and unequivocal language that unambiguously sets forth the parties' intention and agreement that owner payment is a condition precedent to the general contractor's obligation to pay the subcontractor, such a provision is neither unfair, unconscionable, nor against public policy.

Like other states, in New Jersey, freedom of contract "'is a factor of importance'" within "the framework of modern commercial life." Whalen v. Schoor, DePalma & Canger Grp., Inc., 305 N.J. Super. 501, 505-06 (App. Div. 1997) (quoting Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 386 (1960)). It is a "settled principle that parties bargaining at arm's-length may generally contract as they wish." Id. at 505 (citing Marchak v. Claridge Commons, Inc., 134 N.J. 275, 281-82 (1993)). To that end, "parties may make contractual liability dependent upon the performance of a condition precedent." Duff v. Trenton Beverage Co., 4 N.J. 595, 604 (1950).

As a general rule, there must be strict compliance with conditions precedent to the obligations created by a contract. See 13 Richard A. Lord, Williston on Contracts § 38:6 (4th ed. 2022). Therefore, we believe that a prohibition against the use of pay-if-paid provisions as conditions precedent in construction contracts should come from the legislature rather than the courts.

Thus, we hold that as long as the contract specifies a clear and unambiguous intent and agreement by the parties to shift the risk of nonpayment, a pay-if-paid provision is enforceable subject to the parties' implied duty to not frustrate conditions precedent to their performance. See Quinn Constr., Inc. v. Skanska USA Bldg., Inc., 730 F. Supp. 2d 401, 421 (E.D. Pa. 2010) ("In general, courts are reluctant to enforce a conditional payment provision against an unpaid subcontractor that is not responsible for the condition giving rise to the payment defense.").

A bedrock principle of contract law is that absent fraud, duress, mutual mistake or unconscionability — none of which are alleged here — a signed contract will bind both parties. 2 Richard A. Lord, Williston on Contracts § 6:44 (4th ed. 2022). However, N.J.S.A. 12A:2-204(1), codifying the UCC, states that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." N.J.S.A. 12A:2-208(2) further states in part that "[t]he express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other."

Pertinent to this appeal, N.J.S.A. 12A:2-207 governs acceptance or confirmation of a UCC sales contract when the parties to a transaction

exchange unsigned documents containing additional contract provisions. N.J.S.A. 12A:2-207 provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> > (a) the offer expressly limits acceptance to the terms of the offer;
> >
> > (b) they materially alter it; or
> >
> > (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

In Richardson, we "adopted" the "'knock-out' rule" of N.J.S.A. 12A:2-207(3) as "preferable" in cases with conflicting contract terms. 347 N.J.

Super. at 533. We held that if an expression of acceptance contains terms that are additional to or different from those in the offer, "the conflicting terms" in both are knocked out of the contract "and, if necessary, are replaced by suitable UCC gap-filler provisions." Id. at 532.

III.

Here, the judge found that plaintiff's handwritten modifications conflicted with the other provisions in the contract and that the modifications were "initialed by [only] one party" to the contract. The judge determined that N.J.S.A. 12A:2-207(3) was inapplicable because "the offer expressly limit[ed] acceptance to the terms of the offer." Consequently, the judge applied N.J.S.A. 12A:2-207(2)(a) and ruled that "any handwritten modifications by [p]laintiff [were] considered proposals for addition to the contract that were not accepted" by Tricon. As a result, the judge held that "the handwritten modifications [were] unenforceable as a matter of law" and that the pay-if-paid provision "agreed to before modification" was applicable and enforceable.

Specifically addressing the applicability and enforceability of the pay-if-paid provision, the judge stated the provision "operates as an absolute condition precedent to Tricon's obligation to pay [plaintiff]," which is "only triggered once payment to Tricon is made." The judge explained that "[c]ourts will ordinarily enforce contracts as written," and found the pay-if-paid

provision to be "clear and unambiguous on its face, . . . shift[ing] the risk of loss resulting from nonpayment by . . . the County . . . from Tricon to [p]laintiff." The judge concluded that "because the absolute condition precedent of Tricon's receipt of payment for the beams from the County was no[t] satisfied," the pay-if-paid provision, "which was agreed to by all parties notwithstanding any proposed modifications," was "triggered and Tricon [was] contractually excused from [remitting] payment to [p]laintiff."

Plaintiff argues the judge erred because the plain language of its handwritten insertions, which included a clause requiring payment by Tricon within forty-five days of invoice receipt without condition or exception, clearly conflicted with the condition precedent to Tricon's payment obligation set by the pre-typed pay-if-paid clause. Thus, according to plaintiff, both clauses were knocked-out and the agreement saved under N.J.S.A. 12A:2-207(3), which replaced the conflicting payment terms with terms from N.J.S.A. 12A:2-310, requiring payment from Tricon at the time and place at which Tricon received the goods. Plaintiff further argues the judge erred by finding that the pay-if-paid provision was clear and unambiguous. In support, plaintiff asserts the judge disregarded evidence of its clear intent not to be bound by Tricon's pre-typed pay-if-paid provision evidenced by plaintiff's

handwritten insertion requiring payment forty-five days after receipt of invoice without exception or condition.

Based on our de novo review, we question the judge's determination that plaintiff's handwritten insertions were conflicting and unenforceable as a matter of law. As the judge stated, plaintiff's added terms were "only triggered once payment to Tricon [was] made" by the County. Thus, plaintiff's handwritten insertion directing payment within forty-five days after invoice receipt merely created a timetable for Tricon's payment schedule, whereas the pre-typed pay-if-paid clause established, as the judge found, "an absolute precondition" to Tricon's payment. We therefore discern no conflict between the parties' respective payment provisions because one clause established a payment schedule while the other created an absolute precondition to payment.

For the same reason, we are satisfied that the pay-if-paid provision is clear and unambiguous. "Ordinarily, we are content to let experienced commercial parties fend for themselves," Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 230 (2005), and have accordingly found that certain payment "provisions in a commercial contract between sophisticated parties are presumptively reasonable," MetLife Cap. Fin. Corp. v. Washington Ave. Assocs. L.P., 159 N.J. 484, 496 (1999). "The court will not write better or more favorable contracts for parties than they

have themselves seen fit to make." Mancuso v. Rothenberg, 67 N.J. Super. 248, 254 (App. Div. 1961) (quoting Marone v. Hartford Fire Ins. Co., 114 N.J.L. 295, 297 (E. & A. 1935)). Moreover, "[a] modification of a pay-if-paid condition is a not uncommon practice in the construction industry." Sloan & Co., 653 F.3d at 181.

Here, instead of objecting to the pay-if-paid clause or clearly expressing its intention to not be bound by its terms, as it did when it modified other provisions in the PO such as the contract price, plaintiff assumed the risk of never receiving payment from Tricon if the County did not pay. We cannot create a better contract for plaintiff than the contract plaintiff created for itself.

N.J.S.A. 12A:2-209 provides that "an attempt at modification" of a sales contract "can operate as a waiver" of any applicable restrictions on modification if the parties' subsequent conduct is consistent with the modified terms, even if the "signed agreement . . . excludes modification . . . except by a signed writing." N.J.S.A. 12A:2-209(2) to (4); U.C.C. § 2-209 cmt. 4 (Am. L. Inst. & Unif. L. Comm'n 2022). Thus, contrary to the judge's finding, it is unclear at this stage of the proceedings whether plaintiff's handwritten insertions would be unenforceable as a matter of law due to the possibility that the parties' later conduct modified the PO as to the timing of payment after invoice receipt.

Nonetheless, because plaintiff's handwritten insertions did not conflict with the pay-if-paid provision, we conclude, albeit for different reasons, that the judge correctly determined that N.J.S.A. 12A:2-207(3) was inapplicable to knock out the pay-if-paid clause from the PO. See Isko v. Planning Bd., 51 N.J. 162, 175 (1968) ("[I]f the order of [a trial court] is valid, the fact that it was predicated upon an incorrect basis will not stand in the way of its affirmance."). Because Tricon's counterclaim sought a declaration that the pay-if-paid provision was enforceable and relieved it of its obligation to pay plaintiff until after it received payment from the County, Tricon's counterclaim adequately suggested a cause of action to withstand dismissal for failure to state a claim.

Plaintiff also contends the judge erred by expanding the enforceability of pay-if-paid contract provisions to situations where the failure to bring about the condition precedent was attributable to the general contractor's conduct. Plaintiff argues that a pay-if-paid provision can be enforced only when the project owner's nonpayment to the general contractor was the result of default or insolvency and not when nonpayment is due to the fault of the general contractor. Otherwise, permitting Tricon and QBE, as surety, to hide behind Tricon's own contract default disregards the law prohibiting hindrance of a

condition precedent and eviscerates New Jersey's public policy of providing greater protection to subcontractors.

In rejecting plaintiff's challenge to the enforceability of the pay-if-paid provision, the judge determined that the pay-if-paid clause "[was] silent on the allocation of fault as it pertains to why the payment was not made by the County in the first place; it simply relieve[d] Tricon of their duty to pay unless and until they are paid themselves for [p]laintiff's work." Further, the judge found

> no malicious factual circumstances present that would give rise to a breach of the implied covenant of good faith and fair dealing. Instead, while the exact sequence of events that caused . . . [p]laintiff's beams to no longer be needed is in dispute, no party alleges that Tricon negotiated with, or otherwise conspired with, the County to thwart [p]laintiff of payment for the materials.

Thus, finding "no material facts in dispute regarding the enforceability or applicability" of the pay-if-paid provision, the judge granted QBE's cross-motion for summary judgment.

Although the judge correctly found that the pay-if-paid provision was silent on the allocation of fault, there is a factual dispute as to whether the County's nonpayment was precipitated by Tricon's inadvertent actions, deliberate conduct, or poor project management. Where a promisor "prevents or hinders" fulfillment of a condition which otherwise would have been

fulfilled, "performance of the condition is excused" and the promisor's liability is "fixed" regardless of the condition's non-fulfillment. Coastal Oil Co. v. E. Tankers Seaways Corp., 29 N.J. Super. 565, 577 (App. Div. 1954). See Ward v. Merrimack Mut. Fire Ins. Co., 332 N.J. Super. 515, 522 (App. Div. 2000) (stating that a condition precedent may be excused where the conduct of the party seeking to avail itself of the condition precedent "has rendered compliance therewith impossible"); Allstate Redevelopment Corp. v. Summit Assocs., Inc., 206 N.J. Super. 318, 324-25 (App. Div. 1985) (finding non-performance of condition precedent may be excused by promisor's wrongful behavior).

We are satisfied plaintiff proffered sufficient evidence demonstrating a genuine issue of material fact regarding the County's dispute with Tricon, resulting in its nonpayment, to withstand QBE's cross-motion for summary judgment. According to plaintiff, Tricon mismanaged the project, failed to coordinate with utility companies, failed to conduct its own due diligence, and directed plaintiff to fabricate the beams before considering power lines and other obstructions. In contrast, QBE claims that the County's nonpayment to Tricon was not the inadvertent or deliberate fault of Tricon, nor has Tricon acted in bad faith.

"[A] party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact." Judson v. Peoples Bank & Tr. Co., 17 N.J. 67, 74 (1954). "Our role in reviewing a motion for summary judgment is merely to determine whether there is a genuine issue of material fact, but not to decide it." Fielder v. Stonack, 141 N.J. 101, 127 (1995). Given the disputed material facts regarding the circumstances surrounding the County's nonpayment to Tricon, summary judgment should not have been granted. We therefore reverse the judge's order granting QBE's cross-motion for summary judgment.

Finally, plaintiff contends the judge erred by applying an incorrect standard in adjudicating its motion for reconsideration. For the first time on appeal, plaintiff also asserts the judge erred by denying oral argument on the reconsideration motion. As to the latter, plaintiff never requested oral argument when afforded the opportunity to do so. Thus, plaintiff waived its right to oral argument on its reconsideration motion. See R. 1:6-2(d) (providing that "no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs"). As to the former, plaintiff is correct that the judge applied Rule 4:49-2 instead of Rule 4:42-2 when denying its

reconsideration motion. However, given our de novo review of the judge's decisions, the error was of no moment.

In sum, we affirm the denial of plaintiff's motion to dismiss Tricon's counterclaim, but reverse the grant of QBE's cross-motion for summary judgment.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.