STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED – JULY 13, 2012)

PROCESS ENGINEERS & CONSTRUCTION, INC.	:	
V.	:	**C.A. No.: NO. PC 08-0657**
DIGREGORIO, INC.	:	

DECISION

CARNES , J. This matter is before this Court for decision following a non-jury trial on a complaint by Progress Engineers & Construction, Inc. ("Plaintiff" or "Process") against DiGregorio, Inc. ("Defendant" or "DiGregorio"). Plaintiff seeks recovery under a construction subcontract claiming breach of contract and quantum meruit. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

The facts giving rise to the instant matter emerge from a project initiated by Brown University ("Project") involving replacement of the underground piping system that delivers high temperature, high pressure water from Brown University Heating Plant to various buildings on the Brown campus. To design, engineer, and draw the plans for the Project, Brown University hired WM Group. For the Project, Brown pre-selected a ready-made, pre-insulated piping system manufactured by Perma Pipe, Inc. ("Perma Pipe").

On or about November 28, 2005, Brown University hired Bond Brothers as a general contractor on the project. Subsequently, Bond Brothers solicited bids for the performance of various parts of the work. On or about April 21, 2006, Bond Brothers accepted DiGregorio's bid. DiGregorio was selected to excavate and remove the existing system, prepare the trenches for the new pipe, place the new pipe in the trenches, and backfill the trenches when the new pipe is installed, tested, and approved.

Thereafter, DiGregorio entered into a contract with Process to install, weld, flush, and inspect the new pipe. Additionally, the parties agreed that Process would assume and manage the preexisting purchase order with Perma Pipe in order to assure timely payment and delivery of the new pipe as needed for the Project. Later, Bond Brothers entered into a subcontract with DiGregorio for the entire project. Thereafter, DiGregorio entered into a subcontract with Process, whereby Process was DiGregorio's installation subcontractor.

The Project was to be completed in two phases. Phase one of the Project required part of the system to be installed and hooked into the existing old piping, so the heating plant would be ready for use for the 2006-2007 heating season. Phase two was to be completed in the spring of 2007, when the rest of the piping would be replaced and the entire project completed. In November 2006, the first phase of the Project was completed.

During the Project, sand infiltration was discovered in Brown University's heating plant, which could cause serious damage to its boilers. As a result, Brown University had to shut down the heating plant and obtain a temporary heating system for the 2006-2007 heating period. Thus, because of the uncertainty of the scope of damage the sand infiltration caused to Brown University and because of the uncertainty of which party or parties were responsible for the

infiltration, Bond Brothers established a damage contingency fund and diverted to the fund payments that were payable and due to various subcontractors.

On or about October 30, 2006, it was discovered that the insulation surrounding the interior 14-inch pipe, running from Thayer Street to Hope Street, had been flooded at both ends. As a result, the insulation at the Hope Street side of the pipe deteriorated to a point requiring that some of the pipe be removed and replaced, at a substantial cost for DiGregorio and Process. Both parties disagreed as to who was to blame for the wet pipe. DiGregorio alleged that Process caused the insulation to become wet while performing a pressure test of the outside of the pipe. Process denied being responsible for the wet insulation and maintained that DiGregorio failed to keep the trenches dry, as required under the contract, thus causing the insulation to become wet. Although disputing its fault with regard to the wet pipe, Process replaced the damaged pipe and finished the Project, allowing Brown University to start using the new system.

In 2008, Process filed the instant lawsuit alleging Breach of Contract (Count I), maintaining Defendant's failure to pay Process under the contract, and in the alternative Quantum Meruit (Count II) for the work performed by Process, which was necessary to complete the Project but not timely approved before the end of the Project.

This Court, sitting without a jury, heard the matter over two days, and thereafter received post-trial memoranda which included suggested findings of fact and conclusions of law. The parties presented the testimony of Robert S. Silvia ("Mr. Silvia"), the president and owner of Process; Mr. Enrico DiGregorio ("Mr. DiGregorio"); and Charles Barbanti ("Mr. Barbanti"), the project manager from Bond Brothers, who was assigned to Brown. Decision is herein rendered.

II

Standard of Review

In a non-jury trial, the standard of review is governed by Super. R. Civ. P. 52(a). The Rule provides that "in all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon . . . ." Accordingly, "the trial justice sits as a trier of fact as well as of law." Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984). In a non-jury trial, "determining the credibility of [the] witnesses is peculiarly the function of the trial justice." McEntee v. Davis, 861 A.2d 459, 464 (R.I. 2004) (quoting Bogosian v. Bederman, 823 A.2d 1117, 1120 (R.I. 2003)). This is so because it is "the judicial officer who [actually observes] the human drama that is part and parcel of every trial and who has had the opportunity to appraise witness demeanor and to take into account other realities that cannot be grasped from a reading of a cold record." In the Matter of the Dissolution of Anderson, Zangari & Bossian, 888 A.2d 973, 975 (R.I. 2006).

Although the trial justice is required to make specific findings of fact and conclusions of law, "brief findings will suffice as long as they address and resolve the controlling factual and legal issues." White v. Le Clerc, 468 A.2d 289, 290 (R.I. 1983); Super. R. Civ. P. 52(a). Accordingly, a trial justice is not required to provide an extensive analysis and discussion of all evidence presented in a bench trial. Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998); see also Anderson v. Town of East Greenwich, 460 A.2d 420, 423 (R.I. 1983). Competent evidence is needed to support the trial justice's findings. See Nisenzon v. Sadowski, 689 A.2d 1037, 1042 (R.I. 1997). Moreover, the trial justice should address the issues raised by the pleadings and testified to during the trial. Nardone v. Ritacco, 936 A.2d 200, 206 (R.I. 2007). However, a trial judge sitting as a finder of fact need not categorically accept or reject each piece of evidence or

resolve every disputed factual contention. Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008) (quoting Narragansett Electric Co. v. Carbone, 898 A.2d 87, 102 (R.I. 2006)).

III

Analysis

A

Breach of Contract

Plaintiff maintains that Defendant has breached the contract by not paying the full amount under the contract. Defendant counters that Plaintiff did not prove that the balance in dispute was actually owed. Furthermore, Defendant alleges that Plaintiff failed to satisfy an express conditions precedent in the contract. Specifically, Defendant avers that Plaintiff is unable to present any written approvals for the change orders presented, as required by the subcontract. Defendant also maintains that Plaintiff was unable to show that final payment to DiGregorio from Bond Brothers was made in order for Process to recover any payments due.

"In order to prevail in a breach of contract claim, the plaintiff has the burden to prove, by a preponderance of the evidence, that it has complied with the contract's provisions and that the defendant has failed to perform its own obligations." ADP Marshall, Inc. v. Noresco, LLC, 710 F. Supp. 2d 197, 212 (D.R.I. 2010) (citing DelFarno v. Aetna Cas. & Sur. Co., 673 A.2d 71, 72 (R.I. 1996)). Thus, this Court must determine whether the parties have performed their respective obligations under the terms of the subcontract or whether the conduct of either party constitutes a breach of their subcontract. Additionally, "[c]ontract interpretation is a question of law; it is only when the contract terms are ambiguous that construction of terms becomes a question of fact." Dubis v. E. Greenwich Fire Dist., 754 A.2d 98, 100 (R.I. 2000) (quoting Clark-Fitzpatrick, Inc./Franki Foundation Co. v. Gill, 652 A.2d 440, 443 (R.I. 1994)).

"In determining whether or not a particular contract is ambiguous, the court should read the contract 'in its entirety, giving words their plain, ordinary, and usual meaning.'" Young v. Warwick Rollermagic Skating Center, Inc., 973 A.2d 553, 558 (R.I. 2009) (quoting Mallane v. Holyoke Mutual Insurance Company in Salem, 658 A.2d 18, 20 (R.I. 1995)). "A contract is ambiguous when it is 'reasonably susceptible of different constructions.'" Id. at 558 n.6 (quoting Westinghouse Broadcasting Co. v. Dial Media, Inc., 122 R.I. 571, 579, 410 A.2d 986, 991 (1980)). Furthermore, "[c]lear and unambiguous language set out in a contract is controlling in regard to the intent of the parties to such contract and governs the legal consequences of its provisions." Dudzik v. Leesona Corp., 473 A.2d 762, 765 (R.I. 1984) (citing Chapman v. Vendresca, 426 A.2d 262, 264 (R.I. 1981); Fireman's Fund Insurance Co. v. E.W. Burman, Inc., 120 R.I. 841, 391 A.2d 99, 102 (1978)). It is a well established rule of contract interpretation that "[i]n determining whether a contract is clear and unambiguous, the document must be viewed in its entirety and its language be given its plain, ordinary and usual meaning." Rubery v. Downing Corp., 760 A.2d 945, 947 (R.I. 2000) (quoting Rotelli v. Catanzaro, 686 A.2d 91, 94 (R.I. 1996)).

After reviewing the subcontract in its entirety, this Court finds that its language is clear and unambiguous. Article 11.9 of the Contract, titled CHANGES IN THE WORK, incorporates by reference the standard form of Article 7 of American Institute of Architects ("AIA") document A201. As a general rule, our Supreme Court has established that "a reference in a subcontract to the main or primary contract or to any other extraneous writing, made for a particular purpose, makes it part of the subcontract only for the purpose specified." A.F. Lusi Constr., Inc. v. Peerless Ins. Co., 847 A.2d 254, 261 (R.I. 2004) (citing Guerini Stone Co. v. P.J. Carlin Constr. Co., 240 U.S. 264, 277 (1916)); see also Stanley-Bostitch, Inc. v. Regenerative

Environmental Equipment Co., Inc., 786 A.2d 1063, 1065 (R.I. 2001) ("instruments referred to in a written contract may be regarded as incorporated by reference and thus may be considered in the construction of the contract.").

Article 7 of AIA A201 governs CHANGES IN THE WORK and specifies that "[c]hanges in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and else where in the Contract Documents." AIA A201-2007, § 7.1.1 at 17. Under section 7.1.2 of the AIA 201A document, "[a] Change Order shall be based upon agreement among the Owner, Contractor and Architect[.]" Furthermore, section 7.2.1 specifies that

> "[a] Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:
> .1 The change in the Work;
> .2 The amount of the adjustment, if any, in the Contract Sum; and
> .3 The extent of the adjustment, if any, in the Contract Time."

The Court finds, moreover, the Subcontract expressly specifies that "[t]he Subcontractor agrees that all work shall be done subject to the final approval of the Architect." Sec. 11.2.5 In addition, the Court also finds that "[r]eceipt of a final payment by DiGregorio from Bond Bros. for the Subcontractor's line item(s) is an express and strict condition precedent to DiGregorio's obligation to make final payment to the Subcontractor." Sec. 6.2. The Court further finds that the Subcontract also indicates that "the Contactor shall pay the Subcontractor each progress payment and the final payment under this Subcontract within five working days after he receives payment from the Owner." Sec. 12.4.1.

The Court also finds that the subcontract lays out number of conditions precedent, which need to be satisfied before Defendant's performance is due. Specifically, the Subcontract requires all change orders to be made in writing and signed by the Architect, the Owner, and the Contractor. Additionally, all the work is subject to a final approval by the Architect and payments expressly conditioned on payments received by DiGregorio from the Owner.

Where a contractual duty is subject to a condition precedent, there is no duty of performance and there can be no breach by nonperformance until the condition precedent is either performed or excused. Laurel Race Course, Inc., v. Regal Const. Co., Inc., 333 A.2d 319, (Md. 1975). However, the burden is on the plaintiff to show the performance or occurrence of a condition precedent. See R.I. Super. R. Civ. P. 9(c); see also Robert B. Kent et al., Rhode Island Civil and Appellate Procedure § 9:2 (West 2005).

Here, the evidence presented during trial failed to establish the occurrence of the conditions precedent. Both parties agreed that normally all the change orders would be approved in writing. The Plaintiff, however, presented conflicting testimony with regard to the written approval of the change order. Initially, Plaintiff represented that "typically there would be some type of written authorization to proceed with the additional work." (Tr. at 32; 59.) However, Mr. Silvia explained that he does not have the written authorization with him and he would "have to research the file." (Tr. at 32.)[1] However, in direct contradiction, Mr. Sylvia testified

[1] The actual testimony contained in the transcript of the trial on April 30, 2012 goes much further than the simple statement above. From the answers given, the witness implies, "I don't have it [written authorization] with me today. (Tr. at 32: 23-24.) A review of pages 32-35 reveals that the witness, when asked if he had approvals with him, he answered, "not with me, no." Furthermore, when the witness was asked, "You have no documentation that was approved by Bond Brothers, correct?" (Tr. at 46: 17.) The witness answers, "not with me, no." (Tr. at 46: 19.) He further testifies, "I'm sure they agreed to it but I don't have anything in writing with me." (Tr. at 46: 23-24.) He uses those precise words to answer further questions about whether he has documentation about whether Bond Brothers approved a change order by testifying, "not with me, no" on two occasions. See Tr. at 47: 17-22. In light of these answers, the Court is inclined to believe that the witness meant to imply that he had the evidence but simply did not have it in his possession on the day he testified. Said documentation never came before the Court.

that he "never received any formal contract change orders[.]" (Tr. at 18.) In fact, Plaintiff failed to present any evidence that the change orders were made in writing and signed by the necessary parties. The Plaintiff also failed to present any approval of the work by the Architect, and no evidence was presented that DiGregorio ever received payments for the additional work claimed.

Necessarily, a party to a contract to should have the ability to make small modifications in order to stay on schedule and accommodate the unexpected, however, "no party should be allowed to unilaterally and materially alter the agreement reached between the parties." See Steven G.M. Stein, Construction Law § 4.02 [2] (2010). "Mutual assent or a bilateral agreement must be obtained before any party's obligations under a construction contract are altered." Id. Here, Plaintiff's request for payment on invoices for extra cost without first obtaining a written change order materially alters the subcontract and goes beyond the scope of the provision providing for written change orders. See Fondedile, S.A. v. C.E. Maguire, Inc., 610 A.2d 87, 92 (R.I. 1992). (holding contractor not entitled to extra costs where strict compliance with express clause providing for modification is necessary). Accordingly, this Court finds that Plaintiff has failed to satisfy its burden to show that the conditions precedent have occurred and thus the Defendant has not breached its subcontract by nonperformance. See Laurel Race Course, Inc., 333 A.2d at 319 (Md. 1975).

Notwithstanding the above findings, Plaintiff was also required to prove, "by a preponderance of the evidence, that it has complied with the contract's provisions and that the defendant has failed to perform its own obligations." ADP Marshall, Inc., supra. The trial testimony of Robert Silvia demonstrate that his methodology, in computing the amount owed to him under the contract, was to take the contract price, add all the change orders, and subtract

from the total, the amount he knows he has gotten paid. An exchange during his testimony is illustrative:

> "Q. Sir, this is where I don't understand. You have 123,000 [$] in invoices, where is the rest of the documentation that takes us from 123,000 to 317 [$317,000]?
> A. You'd have to ask your client [DiGregorio] he didn't pay us.
> Q. He didn't pay you for what, sir?
> A. $317,000." (Tr. at 44: 20-25.)
>
> "Q. What didn't he pay you for?
> A. I have no idea because we'd get checks and joint checks that weren't even made out to us. There was never any documentation to show what was paid and what was not paid." (Tr. at 45: 3-6.)
>
> "Q. Right? Okay, so that brings us to some quick math here, $94,000, you're asking for 317 [$317,000], where's the difference between 317 and 94?
> A. In the amount of money we were paid and what our contract value was." (Tr. at 48: 20-24.)
>
> " . . . .
>
> "Q. What did you not get paid for?
> A. I have no idea, cause, again, as I explained before, there was never a breakdown of what was being paid, there were joint checks that went to DiGregorio or Perma Pipe. I have no idea what was paid and what was not paid." (Tr. at 49: 6-10.)

In light of the above testimony, the Court finds that the Plaintiff has failed to satisfy its burden to show, with the requisite specificity, exactly what amounts have not been paid and what work the payment would have been for.

B
Quantum Meruit

Plaintiff also seeks recovery under quantum meruit, claiming Defendant will be unjustly enriched if Plaintiff is precluded from recovery. Under Rhode Island law, a plaintiff is entitled to recover under a quantum meruit theory (a) if he or she conferred a benefit on the defendant, (b)

the defendant accepted the benefit, and (c) under the circumstances, it would be inequitable for the defendant to retain such benefit without payment of the value thereof. Fondedile, 610 A.2d at 97. Thus, "[t]o recover on an action in quantum meruit, it must be shown that the owner derived some benefit from the services and would be unjustly enriched without making compensation thereof." National Chain Co. v. Campbell, 487 A.2d 132, 135 (R.I. 1985) (citing Montes v. Naismith & Trevino Construction Co., 459 S.W.2d 691, 694 (Tex. Civ. App. 1970)).

1

As to Change Orders

Here, Plaintiff has failed to meet its burden that that it is entitled to recovery under such theory for the additional expenses incurred in change orders. "It is incumbent upon the trier of fact to assess the credibility of witnesses and to determine the weight to be afforded such testimony." Vargas Mfg. Co. v. Friedman, 661 A.2d 48, 53 (R.I. 1995). Here, although both parties presented testimony that normally all the change orders would be approved in writing, Mr. Silvia presented conflicting testimony in this regard. Initially, Mr. Silvia represented that "typically there would be some type of written authorization to proceed with the additional work." (Tr. at 32; 59.) However, Mr. Silvia explained that he does not have the written authorization with him and he would "have to research the file." (Tr. at 32.) Yet in direct self-contradiction, Mr. Sylvia represented that he "never received any formal contract change orders[.]" (Tr. at 18.) Furthermore, when presented with a monthly progress billing for the period of September 30, 2007 to October 31, 2007, Mr. Silvia testified that it represented the last billing under the contract and the retainage was the last balance due necessary to finish the balance. (Tr. at 20.) ("Q: Was this the last billing under the contract? A: I believe so, yes.") However, Mr. Silvia billed DiGregorio for services performed after the final billing period under

the subcontract. (Tr. at 21.) ("Q: In fact . . . the first several are dated November 1st, 2007; is that correct? A: Yes"). Thus, sitting as a trier of fact, this Court finds Mr. Silvia's testimony lacking credibility as it was inconsistent throughout the hearing.

Accordingly, this Court finds that Plaintiff failed to meet its burden necessary to recovery under a quantum meruit theory. Plaintiff was unable to show that it actually conferred a benefit on the Defendant. Mr. DiGregorio testified that Process would bill the Defendant throughout the Project; however, the checks issued by Bond Brothers did not always mach the invoices presented by Plaintiff because of a discrepancy between the work actually performed by Plaintiff and the invoiced presented by it. (Tr. at 61, 96.) Thus, this Court finds that Plaintiff was not able to sustain its burden and show that he actually conferred a benefit on the Defendant and that Defendant actually accepted this benefit.

2

As to the Additional Bond Premium

At the same time, Plaintiff may recover all costs of performance incurred, including such direct costs as bonds. See Steven G.M. Stein, Construction Law § 11.3[2][e][ii] (2011) ("The contractor may recover all costs of performance which he incurred unless the owner proves those costs to be unreasonable or unless the owner can prove that the costs incurred provided no benefit. These costs may include such direct costs as labor, material, bonds, insurance…."). (emphasis added). Here, section 4.1 of the Subcontract itself expressly states that "Contract Sum includes a 100% Performance and Payment Bond for the value of $996,860.00" based on the initial subcontract price. Thus, this Court finds that Plaintiff could recover the additional bond premium in the amount of $12,929.40, required by the Bond company, based on an increase of the initial subcontract amount and not originally covered under the subcontract.

3

As to the Wet Insulation Pipe Replacement

Furthermore, Plaintiff under quantum meruit requests recovery of back charges for the wet insulation pipe replacement, which was damaged by water intrusion at Meehan Loop and its demolition costs in the amount of $72,857.96. In order "to recover[,] [P]laintiff must attribute its loss to something other than its own actions." Fondedile, 610 A.2d at 97. Process and DiGregorio disagree as to who was at fault with regard to the wet insulation of Perma Pipe. DiGregorio suggests that Progress caused the insulation to get wet when Process was performing an air-pressure test. (Tr. at 8.) Furthermore, Mr. Barbanti testified that although the manufacturer shipped the pipes in a saran wrap, id. at 126., Process should have been using a heavy duty poly, and he felt that Process should have duck taped the end of the pipe. Id. at 113. Mr. Silvia testified that Process was not required to cap the ends of the pipe in order to keep the insulation dry. Process also alleges that the insulation became wet as a result of a heavy rain the weekend before the pressure test, and as a result of an inadequate dewatering by DiGregorio. Id. at 8; 50. However, there was no evidence presented that Process was required to protect the pipes in levels higher than the levels specified by the manufacturer.

Additionally, Mr. Barbanti testified that the dewatering of the trenches where the pipes were located was the responsibility of someone else rather than Process. Id. at 131. Mr. Barbanti later specified that Brown expected that the dewatering of the trenches was within the scope of DiGregorio's work. Id. at 133. His testimony was further supported by Exhibit C "Brown University-HTHW Scope Review." Under "Brown University-HTHW Scope Review," item number twenty requested ,"What are you dewatering plans?" and under DiGregorio's name, it was indicated, "Yes," whereas the space under Process is left empty. Thus, the evidence

shows that Process was clearly not required to dewater the trenches in order to keep the pipes dry. Accordingly, the Court is satisfied that Process has satisfied its burden to show that its loss was due to something else than its own actions. Fondedile, 610 A.2d at 97. After a thorough review of the evidence presented at trial, this Court finds that Plaintiff was able to show that the additional costs in replacing the damaged pipe were not attributed to Plaintiff's own inefficiencies or job preparation.

CONCLUSION

After considering the evidence before it, this Court finds that Plaintiff has failed to carry out its burden in showing by a clear preponderance of the evidence that it was entitled to recover for breach of contract and for quantum meruit with regard to the change orders. However, this Court finds that Plaintiff has satisfied its burden of showing that it was entitled to recover for quantum meruit in regard to the increased amount of the bond premium ($12,929.40), and the amount paid for replacement of the damaged wet insulation piping, ($72,857.96). Counsel shall submit appropriate judgment for entry.