Filed 4/25/11

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FEI ENTERPRISES, INC., Plaintiff and Appellant, v. KEE MAN YOON, etc., Defendant and Appellant.	B209862 (Los Angeles County Super. Ct. No. BC358443)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Mary H. Strobel, Judge. The judgment and the order are affirmed.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup and Caroline E. Chan for Defendant and Appellant.

Law Office of Robert G. Klein and Robert G. Klein for Plaintiff and Appellant.

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* This opinion is certified for publication except for sections 1, 2 and 3 of the Factual and Procedural Background and Part A of the Discussion.

Owner Kee Man Yoon (Yoon) and general contractor Pacific Construction Co., a general partnership et al. (Pacific Construction), refused to pay the low-voltage electrical subcontractor FEI Enterprises, Inc. (FEI) for work performed under two subcontracts. FEI brought this action against Pacific Construction[1] seeking, among other things, breach of contract damages and prompt payment penalties. Pacific Construction responded with a cross complaint alleging that FEI had breached the subcontracts. The trial court entered judgment for FEI on both its complaint and on Pacific Construction's cross-complaint. Pacific Construction appeals, contending the trial court erred in construing the subcontracts' language. In the unpublished portion of this opinion, we conclude that the trial court did not err in its interpretation of the contractual provisions. We will therefore affirm the judgment.

FEI cross-appeals, contending that the trial court erred in declining to order Pacific Construction to pay prompt payment penalties. In the published portion of this opinion, we hold that the record contained evidence sufficient to support the trial court's finding under Business and Professions Code section 7108.5, subdivision (c), that there was a "good faith dispute" between Pacific Construction and FEI as to the money owed. Determined by an objective standard, this justified Pacific Construction's withholding of progress payments and the denial of the statutory prompt payment penalties. We will therefore also affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Pacific Construction was the general contractor for two separate construction projects, a 19-unit residential building on Gramercy Drive and a 7-unit residential

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[1] FEI also named as defendants: Jong Woon Kim; American Continental Bank; International Bank of California; SC USA Corporation, doing business as So CA USA Corp.; and American Contractors Indemnity Company. None of these additional defendants is a party to this appeal.

[2] We recite the facts as reflected by the record on appeal and construed in the light most favorable to the judgment. (*City of Hope National Medical Center v. Genentech, Inc*. (2008) 43 Cal.4th 375, 394.)

structure on Manhattan Place in Los Angeles (respectively, the Gramercy Project and Manhattan Place Project). Defendant Jong Woon Kim was the owner of the Gramercy Project and Yoon was the owner of the Manhattan Place Project.

1. *The Relevant Subcontract Provisions*

On April 12, 2006, Pacific Construction and FEI entered into two construction subcontracts (the subcontracts) under which FEI would install low-voltage (25 volts) electrical systems, such as fire alarms, telephones, and cable television systems. FEI's scope of work did not include the high-voltage (110 volts) system that supplies power to the projects. The two subcontracts are identical in their terms except for the price, property, owner, and architect.

Yoon drafted the portion of the subcontracts' terms and conditions that was added to the boilerplate forms. These additions stated in part that FEI would "Furnish all labor, materials, hardware, equipment, required insurance and installations to perform the work necessary or incidental to complete low voltage systems for new 19 units multi dwelling . . . as per the approved plans provided by M & S Engineering and per local codes, but not limited to the following: Fire alarm systems for entire building as per code ($14,800.00), 4-telephone (1 for wall hung jack at kitchen) and 2-dedicated data line pre-wiring, wall plates, jacks and punch blocks with CAT 6 per unit, 1-fire alarm monitoring, 1-telephonic entry and 1-internet line with CAT 6 for the building ($64.00/line), 3-CATV and 2-satellite TV RG-6 pre-wiring (cable to be supplied by other) wall plates and jacks per unit ($34.00/line), 1-weatherproof roof mounted box ($430.00), necessary permits, *testing all line installed*, required necessary inspections, tax and license. *All work performed to be in one continuous operation rough-in and finish with well trained crews and warrant labor & materials for one (1) full year from the date of project completion*." (Italics added.) Yoon also included a provision that FEI "agreed to start the work immediately without any other conditions upon contract executed . . . . "

The boilerplate portion of the subcontracts further provided that "*No work shall be performed under this agreement until notified to proceed. . . .*" The subcontracts required

FEI to "keep [itself] fully informed as to the progress of the work under the prime contract and as soon as the project requires the performance of the work to be performed under this agreement for its continued progress[. . . s]ubcontractor will *promptly commence work*. Subcontractor will *prosecute the work diligently to completion and will conform to any progress schedule established by the contractor*. *Subcontractor will coordinate his work with contractor and other subcontractors so that there will be no delay or interference with other work on the project*." (Italics added.) The subcontract price for work and materials was $25,948 for the Gramercy Project and $10,186 for the Manhattan Place Project.

2. *Low-Voltage Electrical Construction*

There are two phases to installation of low-voltage electrical devices, the rough installation stage, and the finish stage. Yoon testified, although he is not an electrician, that rough installation included pulling the wire, installing the junction box and protection plate and testing the system to see whether the wiring was correctly done. Rough installation for the fire alarm constituted only 20 percent of the work necessary for the entire installation.

However, FEI's president, Gabriel Fedida, testified that rough installation consists of drilling to mount all the backs of the boxes where the wires will be terminated, drilling holes in the framing to create a braceway through which to run wires, and pulling wires through the drilled holes. The final installation phase commences after the drywall is installed and the walls are painted, Fedida explained. At that point the finish devices (such as the horns, strobes, and telephone jacks) are installed.

At the conclusion of the rough-stage installation, FEI was to check that everything was wired properly and completely. To check the wires after the rough stage, FEI "walk[s] the project[, looks] at all the devices," and compares them to the plans to ensure everything is installed. Gilbert Garnica testified on behalf of FEI that there is usually no point in testing the wires before all the other trades have done their work because another trade can damage or short the wires. He explained, "The point of testing of the wiring comes after all the rest of the trades are completed with their rough-in work." That way,

if there is a problem with the system after the drywall is installed, they know the drywaller or another trade caused the damage. Testing with an ohmmeter, or volt meter, cannot be done at the rough stage, Fedida explained, because that meter works only on "hot wires." The only sort of test that can be done at the rough stage is with a "toner," which will beep if a wire is installed. However, Fedida explained, a toner cannot be used to test a fire alarm.

The entire system is normally tested by FEI after installation of the finish devices at the end of the final phase. FEI waits until the final stage to test the system for proper function because that is when there is continuity of electrical connection from one point to another. Also, once everything is installed, FEI can bring in temporary power to the panel for the devices. Fire alarm subcontractors usually test the *system* after the final installation is completed. "Testing the system" occurs when the fire alarm system is completely installed, i.e., the wiring is complete, the devices are installed and hooked up to the fire alarm power, and the panel has power in it. FEI "activat[es]" the smoke detectors by blowing smoke into them to see whether the horns and strobe lights work.

3. *FEI's Rough-Phase of Installation*

FEI began working on the Manhattan Place Project by April 19, 2006, and the Gramercy Project two days later.

Neither subcontract contained a schedule for completion of FEI's work. The trial court did not find Yoon's testimony to be credible that FEI estimated two to three days to perform the work on the Manhattan Place Project and one week to complete the Gramercy Project work. Fedida testified that it would take FEI a couple of weeks to finish the rough portion of the Gramercy Project and a week to perform the rough installation on the Manhattan Place Project.

Yoon testified that FEI employees did not come to the job site every day. He believed FEI provided insufficient manpower. Fedida opined otherwise. The trial court did not find Yoon's testimony credible based on "the expertise of the FEI witnesses regarding the requirements for the jobs, and Yoon's failure to provide a timetable for completion either before or after execution of the contracts." Garnica testified he did not

know what the contracts' phrase, "one continuous operation" meant, but opined that FEI performed its work in one continuous operation and did not delay any other trades.

All of the other trades, such as the sprinklers, plumbing, electrical, grading, and framing, were still working on the sites when FEI completed its rough installation. Believing FEI had not completed its rough installation, Yoon called Fedida many times during the spring of 2006 complaining about unfinished work. Fedida responded that FEI had finished the rough installation. The two met three times to walk through the properties.

FEI faxed a bill to Yoon on June 5, 2006, according to the subcontracts' terms. Although Garnica spoke to Yoon after June 5th, he does not recall Yoon ever responding to the faxed bill. On June 6, 2006, Yoon, Fedida, and Garnica walked the Gramercy Project site together. Fedida explained that the work had been done and, there remaining nothing more to complete on both projects, requested payment. Yoon refused to pay FEI, believing that the work was incomplete. The discussion digressed into a shouting match and eventually Fedida left the site. The following day, FEI was denied access to the job sites. FEI never received payment for either project.

On June 9, 2006, Yoon's attorney wrote FEI demanding its crews return to the sites and complete the remaining work within five days, or Yoon would terminate FEI's subcontracts. FEI did not return to the work sites in response to the letter because, as Fedida testified, there was no more work to be done. FEI never had an opportunity to do the finish-stage testing because Pacific Construction fired FEI after the rough work was done.

On June 20, 2006, Gary Eskay, the District Inspector at the Los Angeles Department of Building and Safety, inspected and approved the rough electrical work on the Manhattan Place Project. On July 7, 2006, the Department of Building and Safety inspected and approved the rough electrical work on the Gramercy Project. Eskay explained that once he has signed his inspection report for the rough electrical work, most, if not all, of the rough work has been done and approved. Eskay described the process for approval, which includes verification of the plans and visual inspection.

Although the normal, i.e., high-voltage, subcontractor had not finished its work on the Manhattan Place and Gramercy Projects, Eskay found that FEI's work was "installed well. Good enough for their inspection." *Eskay testified that all of FEI's rough electrical work was approved before the work of the remaining subcontractors, such as mechanical and plumbing trades, received approval*.

After its dispute with FEI arose, Pacific Construction hired Earl Security to replace FEI. At trial, Lynn Chen, owner and manager of Earl Security, estimated that the rough work would have taken approximately 15 days to complete. She also testified that testing at the completion of the rough stage involves a visual inspection to assure that all the wires are installed. Chen testified that testing of installed wires with a "volt meter" was part of the rough installation.

At trial, Fedida discussed the list of work that Pacific Construction claimed FEI had failed to complete and for which Earl Security sought payment. With respect to each item, Fedida explained why the work was complete, not within the scope of FEI's subcontract, or was not required to be done at the rough-installation stage. Fedida testified that Yoon's claim that FEI did not properly test at the end of the rough installation stage was "false," and that Yoon never called FEI to do the finish installation.

4. *The Trial Court's Ruling*

As is relevant here, the trial court ruled, with respect to both parties' breach of contract claims, that FEI did not breach the subcontracts because FEI had completed 90 to 100 percent of the rough installation that fell within its scope of work. Further, FEI was excused from performing the remainder of the subcontracts' work because Yoon terminated FEI's contract. The court also ruled that FEI did not delay the projects because other trades were still performing their rough work after FEI finished. In addition, the court found that, although FEI had properly submitted its requests for payment to Pacific Construction, the latter had breached the subcontracts by failing to process FEI's properly submitted payment requests. The trial court, however, denied FEI's request for prompt payment penalties based upon its finding that a good faith

dispute existed as to the sums owed. Pacific Construction appealed and FEI cross-appealed.

DISCUSSION

A. *Pacific Construction's Appeal*

1. *Standard of Review*

"The rules governing the role of the court in interpreting a written instrument are well established. The interpretation of a contract is a judicial function. [Citation.] In engaging in this function, the trial court 'give[s] effect to the mutual intention of the parties as it existed' at the time the contract was executed. [Citation.] Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms. [Citations.]

"The court generally may not consider extrinsic evidence of any prior agreement or contemporaneous oral agreement to vary or contradict the clear and unambiguous terms of a written, integrated contract. [Citations.] Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous. [Citations.]

"When the meaning of the words used in a contract is disputed, the trial court . . . provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [Citations.] If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract. [Citations.] When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citations.] This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence [citations] or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. [Citations.] If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the [factfinder]. [Citations.]" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125-1127, fn. omitted.)

2. *The Trial Court Properly Ruled that FEI Did Not Breach the Subcontracts*

a. *The Subcontracts Are Ambiguous and the Receipt of Extrinsic Evidence Was Proper*

Pacific Construction contends the trial court's findings that FEI did not breach the subcontracts, did not cause a delay, and was otherwise excused from performance, are erroneous.

The language at issue in the subcontracts is: "[a]ll work performed to be in *one continuous operation* rough-in and finish with well trained crews" and "FEI Enterprises has . . . agreed to start *immediately* without any other conditions upon contract executed . . . ." (Italics added.)

Citing this language, Pacific Construction argues that the subcontracts "clearly" required FEI to start its work *immediately* and perform the work continuously. Pacific Construction asserts that the evidence is undisputed that FEI provided insufficient manpower, commenced work approximately a week after the subcontracts were signed, showed up at the sites intermittently, and then ceased work at the rough installation stage, with the result that FEI delayed performance and breached the subcontracts.

There was no agreement that a particular number of workers be present on the sites at all times, just that the crews be comprised of well-trained workers. Therefore, there is no evidence to support Pacific Construction's contention that FEI breached the subcontracts by understaffing.

Nor do the subcontracts contain a timetable or schedule for completion of FEI's work. The trial court disbelieved Yoon's testimony, noting that Pacific Construction had adduced no documentary evidence about a work schedule. We may not reweigh the trial court's credibility determination (*People ex rel. Reisig v. Acuna* (2010) 182 Cal.App.4th 866, 878). As a result, there is no evidence that the parties had agreed on a timetable or schedule.

"If no time is specified for the performance of an act required to be performed, a reasonable time is allowed." (Civ. Code, § 1657.)[3] What is reasonable "must be determined by 'the situation of the parties, the nature of the transaction and the circumstances of the particular case. . . . ' [Citation.]" (*D. A. Parrish & Sons v. County Sanitation Dist.* (1959) 174 Cal.App.2d 406, 410 [construction contract].) The trial court properly inferred a reasonable time for performance.

Pacific Construction suggests that the timeframe is inferred from the subcontracts' language that FEI commence work "immediately" and "perform in one continuous operation." However, the subcontracts also specified that "[n]o work shall be performed under this agreement until notified to proceed. . . ." creating an ambiguity about what was meant by commencing "immediately." Furthermore, Pacific Construction provided no evidence that, in the context of construction, a matter of days does not constitute "immediate," while there is evidence to suggest that such a timeframe was reasonable. More important, however, FEI completed its rough installation of the low voltage wires and received approval from the City's inspector before any other trades finished their respective work. Thus, even if a week was not "immediate," the record is clear that FEI's conduct did not delay the projects and hence caused no damages to Pacific Construction.

As for Pacific Construction's contention that FEI breached the "one continuous operation" language of the subcontracts, we agree with the trial court that the phrase "one continuous operation" is ambiguous. Garnica's testimony that he did not understand the meaning of "one continuous operation" supports this conclusion. The evidence of the parties' situation, the transaction's nature, and the circumstances (*D. A. Parrish & Sons v. County Sanitation Dist., supra*, 174 Cal.App.2d at p. 410), indicates that FEI did perform the rough work in one "continuous operation." That is, FEI performed all the work it could do under the rough installation portion of the subcontracts by the time FEI submitted its progress payment requests, and it was otherwise excused from performing

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[3] Pacific Construction argues unpersuasively that Civil Code section 1657 is inapplicable where the subcontracts provided a time for performance. As noted, the subcontracts did not provide for a schedule for performance.

any remaining work because the other trades, such as the drywall and painting, had yet to complete their jobs. As the trial court explained, "the 'continuous operation' language in the contract is inconsistent with Fedida, Garnica and Yoon's testimony that after the low voltage rough work was done, other trades would have to complete additional work (e.g., dry-walling) before the finish work could be completed by FEI." Fedida testified that FEI had finished its rough installation work and the court believed that testimony, finding that FEI had completed 90 to 100 percent of the work.

Pacific Construction argues that, even if the language of the subcontracts was not clear, settled rules of contract construction support its position. Pacific Construction relies on Civil Code section 1645 [technical words are to be interpreted as usually understood by persons in the profession or business to which they relate] and *Ermolieff v. R.K.O. Radio Pictures* (1942) 19 Cal.2d 543, 550 [if particular expressions have acquired a specific meaning through trade usage, the parties engaged in that trade are deemed to have used the words according to their peculiar sense]). These authorities, however, do not result in a different outcome. The trial court believed Fedida's and Garnica's testimony that other trades' work was ongoing at the time FEI finished installing the low voltage wiring. As noted, even if FEI did not commence work "immediately," and did not complete all of its work in "one continuous operation," its failure to do so had no deleterious effect on the projects as FEI was the first trade to complete its work and obtain an inspector's approval.

In sum, the trial court did not err in concluding that FEI did not breach the subcontracts or cause any delay.

b. *The Trial Court Properly Found that FEI Was Not Required to Test the Wires at the Rough-Installation Stage*

Pacific Construction contends that the trial court erroneously found that the subcontracts did not require FEI to test the wires it installed during the rough installation phase of construction.

The trial court found "credible" Fedida's testimony that "the testing of the wires was to be performed after the systems were installed, including after drywall had been

complete[d] and all devices had been installed," i.e., at the finish stage. The court found that the contract term " 'testing all wires installed' does not support a finding that FEI was to test twice; once after the wires had been installed but prior to the completion of the rough work; and a second time after installation of the systems was complete as Yoon testified. The Court does not find credible Yoon's testimony that the requirement to test after rough installation had been thoroughly discussed prior to contract negotiation. Had that been the case the contract could have and should have been more explicit about the type of testing and timing of the testing required." This ruling was not error.

The subcontracts only mention testing once; they do not specify testing two times. Fedida testified that FEI did test the wires at the conclusion of the rough stage by visually checking to assure that the wiring was proper and complete and by comparing the wires installed against the plans. Yoon claimed FEI should have tested with an ohmmeter. But Fedida explained why FEI did not conduct such a test, and why a "toner" cannot be used to test a fire alarm. Garnica explained that, at the Gramercy and Manhattan Place Projects, there was no point in testing the wires at the rough stage because the other trades had not completed their rough work and could have damaged FEI's wires. While there was testimony in contradiction, the trial court specified it believed Fedida, and we cannot reweigh this credibility determination. (*People ex rel. Reisig v. Acuna*, *supra*, 182 Cal.App.4th at p. 878.) Although the evidence on this point was conflicting, the record contained sufficient evidence to support the trial court's conclusion, where FEI was the first trade to complete its rough work, that it could not test the wires in the manner Yoon might have expected, although it did conduct a visual inspection.

Thus, the trial court properly awarded judgment in favor of FEI on Pacific Construction's complaint.

B. *FEI'S Cross Appeal*

1. *The Prompt Payment Statutes*

"California has a series of so-called 'prompt payment' statutes that require general contractors to pay their subcontractors within specified, short time periods, and that impose monetary penalties for violations." (*Tesco Controls, Inc. v. Monterey Mechanical*

Co. (2004) 124 Cal.App.4th 780, 800 (*Tesco Controls*) [involving Bus. & Prof. Code, § 7108.5 and Pub. Contract Code, § 7107; see also Civ. Code, § 3260].) These prompt payment statutes serve a " 'remedial purpose: to encourage general contractors to pay timely their subcontractors and to provide the subcontractor with a remedy in the event that the contractor violates the statute.' [Citation.]" (*S&S Cummins Corp. v. West Bay Builders, Inc*. (2008) 159 Cal.App.4th 765, 777.)

One such statute is Business and Professions Code section 7108.5,[4] which requires a general contractor to pay its subcontractors their respective shares of a progress payment within 10 days of receiving that payment from the project's owner, unless the parties agree otherwise in writing. If the general contractor fails to timely pay, the

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[4] Unless otherwise indicated, all statutory references are to the Business and Professions Code.

Business and Professions Code section 7108.5 reads:

"(a) This section applies to all private works of improvement and to all public works of improvement, except where Section 10262 of the Public Contract Code applies.

"(b) Except as provided in subdivision (c), a prime contractor or subcontractor shall pay to any subcontractor, not later than 10 days of receipt of each progress payment, unless otherwise agreed to in writing, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest therein. A prime contractor or subcontractor that fails to comply with this subdivision shall be subject to a penalty, payable to the subcontractor, of 2 percent of the amount due per month for every month that payment is not made as required under this subdivision.

"(c) *If there is a good faith dispute over all or any portion of the amount due on a progress payment from the prime contractor or subcontractor to a subcontractor, the prime contractor or subcontractor may withhold no more than 150 percent of the disputed amount.*

"(d) A violation of this section shall constitute a cause for disciplinary action.

"(e) In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs.

"(f) The sanctions authorized under this section shall be separate from, and in addition to, all other remedies, either civil, administrative, or criminal." (Italics added.)

In 2009, the Legislature "[r]ecast[]" Business and Professions Code section 7108.5 "for clarity and readability" (Assem. Com. on Business and Professions, Analysis of Sen. Bill No. 821 (2009-2010 Reg. Sess.) as amended June 15, 2009, p. 7), but it did not alter the "good faith dispute" language. (Compare Stats. 1996, ch. 712, § 2 with Stats. 2009, ch. 307, § 72.)

subcontractor may recover a penalty fixed at two percent of the amount due per month for every month the payment is not made. (*Id*., subd. (b); see also Civ. Code, § 3260[5] & Pub. Contract Code, § 7107.)[6]

However, a contractor may withhold progress payments from a subcontractor without exposure to the two percent penalty if there is a good faith dispute between the general contractor and the subcontractor over the amount owed. Specifically, subdivision (c) of section 7108.5 provides that "[i]f there is a *good faith dispute* over all or any portion of the amount due on a progress payment from the prime contractor or subcontractor to a subcontractor, the prime contractor or subcontractor may withhold no more than 150 percent of the disputed amount." (Italics added.) Thus, to deny penalties under this prompt payment statute, the trial court must conclude that the parties had a "good faith dispute" over amounts due on a progress payment. (*Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1339 (*Alpha Mechanical*).)

2. *Proper Interpretation of the Term "Good Faith Dispute"*

The problem is that the statute does not define the term "good faith dispute" and the parties disagree as to how it is to be interpreted. FEI contends that an objective standard should be applied while Pacific Construction argues that the standard should be subjective; that is, it would be sufficient if Pacific Construction had a good faith *belief* in the merits of its position with respect to its claimed right to withhold payments due to FEI.

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[5] This statute will be repealed effective July 1, 2012 for reasons that appear to be unrelated to the issues presented in this case. (Stats. 2010, ch. 697, §16.)

[6] Similar language is found in Public Contract Code sections 7107, subdivision (e) ("bona fide dispute") and 10262.5, subdivision (a) ("good faith dispute") as well as in Civil Code section 3260, subdivision (e) ("bona fide dispute"). There appears to be no significant or meaningful difference between the terms "good faith" dispute and "bona fide" dispute as utilized in these statutes.

Alpha Mechanical, supra, 133 Cal.App.4th 1319, was the first court to interpret the good faith standard with respect to section 7108.5 and Civil Code section 3260. It stated that "good faith 'suggests a moral quality; its absence is equated with dishonesty, deceit or unfaithfulness to duty.' ([*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 211)] . . . In *People v. Nunn* [(1956) 46 Cal.2d 460], the California Supreme Court stated that '[t]he phrase "good faith" in common usage has a well-defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation.' [Citation.]" (*Alpha Mechanical, supra,* 133 Cal.App.4th at p. 1339; see also *Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.* (2009) 179 Cal.App.4th 1401, 1411, fn. 5 [involving Pub. Contract Code, § 7107].)

The *Alpha Mechanical* court went on to discuss the very practical problem created by its perceived need to look into a "subjective state of mind." It stated that " '[g]ood faith, or its absence, involves a factual inquiry into the plaintiff's subjective state of mind. [Citations]: Did he or she believe the action was valid? What was his or her intent or purpose in pursuing it? A subjective state of mind will rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence.' [Citation.]" (*Alpha Mechanical, supra,* 133 Cal.App.4th at p. 1339.) Thus, if good faith is to be measured by a subjective standard, as the *Alpha Mechanical* court concluded, determining its existence is a factual question requiring the examination of *objective* circumstantial evidence that would permit an inference as to a subjective state of mind. In *Alpha Mechanical,* the court concluded, however, that the *absence* of such objective evidence of bad faith was sufficient to sustain the conclusion that a "good faith dispute" existed. (*Id*. at p. 1340.)

Similarly, the appellate court in *Denver D. Darling, Inc. v. Controlled Environments Construction, Inc*. (2001) 89 Cal.App.4th 1221, held that the trial court had *necessarily* concluded a bona fide dispute existed under Civil Code section 3260 where it did not find the winning side's interpretation of the contract to be the only reasonable

one. (*Denver D. Darling, Inc. v. Controlled Environments Construction, Inc*., at pp. 1240-1241.) In *Alpha Mechanical*, the evidence of the builder's good faith belief in the existence of a dispute had come from the builder's witness who had testified that he *believed* the builder had overpaid the subcontractor under a specific provision in the subcontract, but "[t]here was *no* testimony that [the builder had] subjectively believed its claim had no merit, but [had] proceeded in any event." (*Alpha Mechanical, supra,* 133 Cal.App.4th at p. 1340, italics added.) Finally, in *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, the city was found to have had a good faith *belief* under Public Contract Code section 7107 that the contractor did not complete the work, or had completed it improperly. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale,* at pp. 533, 556.) In each of these cases, however, it was the externally observable facts in the record that was relied upon to support the trial court's conclusion that the party withholding payment "genuinely believed" a meritorious dispute with the subcontractor existed.

In our view, Pacific Construction's reliance on *Alpha Mechanical* is misplaced. That decision did not make a proper analysis of the meaning of the term "good faith dispute" as it is used in section 7108.5. While the *Alpha Mechanical* court recognized that it was presented with an issue of first impression with respect to the meaning of the term "good faith *dispute*," it limited its analysis to the abstract term "good faith." It apparently adopted this limitation as it had found no authority "expressly interpreting the good faith dispute standard in section 7108.5 or Civil Code section 3260." (*Alpha Mechanical, supra,* 133 Cal.App.4th at p. 1339.)

Alpha Mechanical therefore turned to three cases applying the term "good faith" in factual contexts totally unrelated to the one presented by this case. For example, it cited *Guntert v. City of Stockton, supra,* 43 Cal.App.3d 203, where the court discussed "good faith" in contrast to a reasonableness standard for the defendant city's application of a "sole discretion" provision in the termination clause of a lease previously issued to the plaintiff lessee. The *Guntert* court simply assumed that "good faith" was to be determined by a subjective standard and contrasted it with the objective standard of

reasonableness, which latter standard it then concluded should be applied in the interpretation and enforcement of the lease provision.[7] In *Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, (disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7) the court construed a statute (Code of Civil Proc., § 1038) that imposed a conjunctive burden to prove the absence of both "good faith" and "reasonable cause" as a basis for the imposition of defense costs against a party whose complaint under the Tort Claims Act (or for express or implied indemnity) had been subjected to summary disposition. Finally, *Alpha Mechanical* cited *People v. Nunn*, *supra*, 46 Cal.2d 460, where a doctor had been criminally charged with improperly prescribing a narcotic. One of the statutes construed by the court limited such prescriptions to cases where the doctor *believed in good faith* that the patient's condition required such medication. Obviously, in such a case, the doctor's subjective state of mind was an essential part of the case.

Relying *solely* on these three cases, the *Alpha Mechanical* court apparently concluded that the plaintiff subcontractor was required to show that the prime contractor (whose surety was the defendant insurer) did not have a good faith *belief* that the dispute over the amount claimed by the plaintiff was justified. Since the evidence was not sufficient to demonstrate such lack of belief, the award of penalty interest under section 7108.5, subdivision (b) was reversed. Thus, what the *Alpha Mechanical* court did was convert the Legislature's "good faith dispute" language into a "good faith belief" in the dispute. And it did so without making any attempt to discern the Legislature's purpose in creating an exception to penalty interest exposure for a "good faith dispute." Pacific Construction argues that the *Alpha Mechanical* analysis supports its argument that a subjective standard should be applied in a case such as the one before us. In our view, however, such a conclusion would be both unwarranted and unwise.

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[7] The *Guntert* court concluded that the parties' intent as to the defendant city's exercise of its "sole discretion," with respect to termination of a lease, should be evaluated under a *reasonable* or *objective* standard.

3. *Good Faith Can Be Subjective or Objective*

We do not disagree with *Alpha Mechanical* to the extent it recognized that some cases apply a subjective standard to a determination of good faith. In addition to the cases relied upon by the *Alpha Mechanical* court (e.g., *People v. Nunn, supra,* 46 Cal.2d 460), the "personal satisfaction" or "sole discretion" cases, clearly require application of a subjective standard to determine whether a party has demonstrated the satisfaction of a condition precedent to contractual liability. In *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, for example, this court applied a subjective test for determining a movie studio's satisfaction with the performance and production proposals of the plaintiff. The defendant movie studio was only required to exercise its subjective judgment "honestly and in good faith." (*Id.* at pp. 363, 367.) When a promissor has the power under a contract to make a purely subjective decision, that decision must be made in "good faith," but the courts will not examine its "reasonableness." (*Hall v. Webb* (1924) 66 Cal.App. 416, 422-424; see also *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 808-809.) The *Locke* case is illustrative of the line of satisfaction cases where a subjective "good faith" test has been applied. These involve such matters as fancy, taste or judgment. (See *Mattei v. Hopper* (1958) 51 Cal.2d 119, 123-124.) In such cases, a party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. (*Kadner v. Shields* (1971) 20 Cal.App.3d 251, 258.)

However, not all such satisfaction cases apply a subjective standard. Indeed, the objective standard is preferred unless the circumstances dictate otherwise. "Which test applies in a given transaction is a matter of actual or judicially inferred intent. [Citation.] Absent an explicit contractual direction or one implied from the subject matter, the law prefers the *objective*, i.e., reasonable person, test. [Citation.]" (*Guntert v. City of Stockton, supra,* 43 Cal.App.3d at p. 209.) Another court, more recently, endorsed this point. "The choice of objective or subjective test to evaluate a promisor's satisfaction depends upon the intent of the parties, as expressed in the language of the contract. In the absence of a specific expression in the contract or one implied from the subject matter,

the preference of the law is for the less arbitrary reasonable person standard. [Citations.] The reasonableness test is especially preferable when factors of commercial value or financial concern are involved, as distinct from matters of personal taste. [Citations.]" (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 59-60; see also *Denver D. Darling, Inc. v. Controlled Environments Construction, Inc., supra,* 89 Cal.App.4th at pp. 1240-1241 [where the court recognized that a "reasonable" (i.e., objective) standard was properly applied in determining the existence of a "bona fide" dispute under Civil Code section 3260, subdivision (e)].)

Moreover, in other factual contexts, where the bona fides of a legal dispute is at issue, courts routinely apply an objective standard in evaluating the merits of the dispute. Four examples readily come to mind.

a. *Malicious Prosecution Cases*

In malicious prosecution cases, the element of probable cause will be negated by evidence of the legal tenability of the claim asserted by the defendant in the prior action. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 868.) Whether there was probable cause to institute the prior action is "to be determined by the trial court on the basis of whether, as an *objective* matter, the prior action was legally tenable or not." (*Id*. at p. 868; italics added; see also *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 495-498.)

"Whereas the malice element is directly concerned with the *subjective* mental state of the defendant in instituting the prior action, the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted. [Citation.] Because the malicious prosecution tort is intended to protect an individual's interest 'in freedom from unjustifiable and unreasonable litigation' [citation.], if the trial court determines that the prior action was objectively reasonable, the plaintiff has failed to meet the threshold requirement of demonstrating an absence of

probable cause and the defendant is entitled to prevail." (*Sheldon Appel Co. v. Albert & Oliker, supra,* 47 Cal.3d at p. 878, italics in original.)

b. *Labor Code Wage Payment Violations*

Labor Code section 203 provides for "waiting time" penalties to be imposed against an employer willfully failing to timely pay wages due an employee. The meaning of the term willful, as used in Labor Code section 203, is that an employer has intentionally failed or refused to perform an act which was required to be done. (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7-8.) In *Barnhill*, the court considered the impact on section 203 penalty provisions of a *dispute* as to the amount of wages actually due the plaintiff employee. Apparently, at the time of the termination of the employee's employment, she still owed her employer a balance on a promissory note which was intended to be paid in installments by payroll deductions. (*Barnhill v. Robert Saunders & Co., supra,* at p. 4.) Because the law was not clear at the time as to whether the employer was entitled to "set off" the unpaid balance of the employee's debt, the *Barnhill* court reversed the trial court's penalty award. (*Id*. at pp. 8-9.)[8]

"*Barnhill's* holding was memorialized in California Code of Regulations, title 8, section 13520. This regulation states: 'A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203. [¶] (a) Good Faith Dispute. A "good faith dispute" that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses

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[8] Although the *Barnhill* court noted that there "was no contention that appellant did not entertain a good faith belief that it was entitled to [] a setoff," (*Barnhill v. Robert Saunders & Co., supra,* 125 Cal.App.3d at pp. 8-9), the rationale for the court's conclusion that the penalty should not be imposed was its legal determination that the law was uncertain and the appellant should not be penalized for arriving at a *reasonable* conclusion as to how it should be interpreted and applied.

presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a "good faith dispute." ' (Cal. Code Regs., tit. 8, § 13520.)" (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.) This regulation imposes an objective standard.[9] In *Amaral*, it was claimed that the employer had failed to comply with a living wage ordinance. The employer raised in defense constitutional challenges to the ordinance. Although those defenses were rejected, there were neither unreasonable nor frivolous (*id*. at p. 1202) and therefore the employer was not liable for the penalty. "So long as no other evidence suggests the employer acted in bad faith, presentation of a good faith defense, based in law or fact, will negate a finding of willfulness." (*Id*. at p. 1204.)

c. *Accord and Satisfaction Cases*

The affirmative defense of accord and satisfaction is applicable to the disposition of a dispute over an unliquidated claim. To succeed on such a defense, it must be established (1) that there was a "bona fide dispute" between the parties, (2) that the debtor made it clear that acceptance of what he tendered was subject to the condition that it was to be in full satisfaction of the creditor's unliquidated claim, and (3) that the creditor clearly understood when accepting what was tendered that the debtor intended such remittance to constitute payment in full of the particular claim in issue. (*Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d 592, 597.) "It matters not that there was no solid foundation for the dispute as the test is whether the dispute was honest or fraudulent." (*Ibid.; Thompson v. Williams* (1989) 211 Cal.App.3d 566, 573.) This, in context, also amounts to an objective standard as the word "honest" when juxtaposed to the word "fraudulent" conveys the meaning that the dispute must be actual, real or "bona fide."

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[9] The appearance of the language "or are presented in bad faith" in the list of circumstances precluding a finding of a good faith dispute does not render the test a subjective one, but indicates that subjective bad faith may be of evidentiary value in the objective bad faith analysis.

d. *Insurance "Genuine Dispute" Cases*

Finally, in the context of the "genuine dispute" doctrine as applied to claims of insurance bad faith, the cases hold that the issue of an insurer's bad faith depends on a showing that the insurer acted *unreasonably*. Put another way, an insurer breaches the implied covenant of good faith and fair dealing when it unreasonably delays or denies policy benefits due the insured. While two cases have suggested that this issue is determined by the application of *both* an objective and a subjective standard (see *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1238 and *Bernstein v. Travelers Ins. Co.* (N.D. Cal. 2006) 447 F.Supp.2d 1100, 1114), the weight of California authority is to the contrary. The majority view is that in determining whether the dispute is "reasonable," the proper test to apply is an objective one. An insurer's subjective state of mind is immaterial. (See *Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1239 [while some bad faith cases speak in terms of a duty to act reasonably and in good faith, "good faith" is not a separate requirement. Rather, the insurer's subjective mental state is a "circumstance to be considered in the evaluation of the *objective* reasonableness of the insurer's actions"]; *CalFarm Ins. Co. v. Krusiewicz* (2005) 131 Cal.App.4th 273, 287; *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973; *Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205.)

The Supreme Court in *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713 appears to have reached a similar conclusion. "In the insurance bad faith context, a dispute is not 'legitimate' *unless it is founded on a basis that is reasonable under all the circumstances."* (*Id.* at p. 724, fn. 7; italics added; see also *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 792 [the genuine dispute doctrine is "subsumed within the concept of what is reasonable and unreasonable"].

As the prompt payment statutes involve the bona fides of a legal dispute, the law would appear to require an objective standard. A review of the relevant legislative history supports this conclusion.

4. *Legislative Purpose For Use of Term "Good Faith Dispute"*

Alpha Mechanical summarily concluded that good faith was a subjective issue about state of mind (*Alpha Mechanical, supra,* 133 Cal.App.4th at p. 1339), and that the trial court must find evidence in the record that circumstantially shows the contractor *honestly believed* that a valid dispute with the subcontractor existed over the amount owed. (*Ibid.*) Yet, as indicated, *Alpha Mechanical* provided no persuasive analysis of the legislative intent behind section 7108.5, nor any justification for its conclusions other than the three unrelated older cases briefly summarized above. It is true that a subsequent case noted, without comment or analysis, that *Alpha Mechanical* had reached such a decision. (*Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc., supra,* 179 Cal.App.4th at p. 1411, fn. 5.). That case, however, dealt with a different issue[10] and quoted from *Alpha Mechanical* in a footnote in order to illustrate the point that courts had equated the term "bona fide dispute" with "good faith dispute."

In our view, *Alpha Mechanical's* discussion and conclusion are inconsistent with the Legislature's apparent purpose in enacting the several prompt payment statutes (see fns. 4 and 5, *ante.*), including section 7108.5. The prompt payment statutes were intended to serve a "remedial purpose: to encourage general contractors to pay timely their subcontractors and to provide the subcontractor with a remedy in the event that the contractor violates the statute." (*Morton Engineering & Construction, Inc. v. Patscheck* (2001) 87 Cal.App.4th 712, 720.) In its analysis of AB 2620 (the Assembly bill that amended in section 7108.5), the Senate Committee on the Judiciary noted that the provisions of section 7108.5, subdivision (c), would provide "some leeway" for a general contractor when there was a dispute as to the amount due. "The language would establish a *clear standard* for amounts that a prime contractor could retain in cases of disputes,

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[10] The *Martin Brothers* court was concerned with whether the provisions of Public Contract Code section 7107, subdivision (e) was applicable to a dispute over the amount due as a result of "change orders." The meaning of the term "bona fide dispute" used in Public Contract Code section 7107, subdivision (e) was not in issue or considered. (*Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc., supra,* 179 Cal.App.4th at pp. 1401, fn. 1, 1411-1412, fn. 5.)

while also ensuring that litigation does not ensue over de minimis amounts." (Sen. Com. on Judiciary, com. on Assem. Bill No. 2620 (1989-1990 Reg. Sess.) May 22, 1990, italics added). Given these legislative goals, the recognition of a subjective standard for determining the existence of a "good faith dispute" is not only inappropriate, but also places an unnecessary additional burden on the plaintiff subcontractor to prove the state of mind of the nonpaying general contractor. As the trial court clearly recognized here, establishing a party's state of mind will, in most cases, require the introduction of evidence demonstrating that the dispute does not have objective merit.

5. *An Objective Standard Applies Here*

While there are some cases where a subjective standard may properly be applied to evaluate the legal consequences of a party's actions, such application is appropriate only in a limited number of circumstances and only then when it is consistent with the intention of the parties. To do as the *Alpha Mechanical* court did and lift general abstract language from prior cases, free of their foundational factual context, is misleading and contributes to considerable confusion. It seems clear that what the statutory language here at issue was intended to describe was the bona fide existence of an actual legal dispute over the amount due under a construction contract. If such a dispute did exist then the non-paying party would have a defense to the imposition of penalty interest liability on the amount at issue in such dispute.

There is no practical justification for construing the undefined statutory use of terms adjectively characterizing a legal dispute as one raised in "good faith" or with "bona fides" so as to require a *subjective* analysis of the non-paying party's state of mind or motives. As we have indicated, the apparent legislative purpose was to make sure that when a prime contractor withheld some portion of a promised payment, such retention was based on a real or actual dispute as to the amount owed. Whether the non-paying party might ultimately be vindicated is not the issue. The critical question should be the legal tenability of the justification for non-payment that was asserted. There simply is no reason to apply here the standards common to the state of mind, personal satisfaction or sole discretion cases. A *legal dispute* between two parties exists, is "legitimate,"

"genuine," "bona fide," or in "good faith" where the arguments asserted or positions taken have *objective* legal tenability. Nothing more should be required.[11]

Thus, the proper standard to be applied to the question of whether there was a "good faith dispute" is, in our view, objective, not subjective. To do otherwise leads not only to potential mischief but also ignores the reality that the evaluation of the dispute will, in actuality, be based on the examination of objective facts and circumstances which will or will not demonstrate that an objectively reasonable basis existed for the non-paying party's action. Certainly, a party who has no reasonable, objective justification for withholding payment under a construction contract, but "believes," by reason of delusion, ignorance, negligence of legal counsel or otherwise, that the money is not owed should not be able to avoid penalty interest on such ground.

As is illustrated by many of the "good faith" cases discussed earlier, there is a significant lack of coherence or consistency among the decisions that have attempted to address this issue. There are some cases where it is appropriate, or even critical, to consider a party's state of mind (e.g., *People v. Nunn, supra,* 46 Cal.2d 460). That is not the case here, where we are concerned with determining the legitimacy of a legal dispute. The Legislature certainly intended to allow a contractor to retain payments otherwise payable to a subcontractor only if there was an actual "bona fide" dispute over the amount due. The subjective "belief" of the non-paying party may be of evidentiary interest, but should not be the standard for evaluating the merits of the dispute.

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11 It should not matter whether the dispute is characterized as "honest," "legitimate," "bona fide" or as one asserted in "good faith." These terms all reflect the need for *objective* evidence demonstrating that there is a *reasonable basis* for the non-paying party's actions. If there is an objectively reasonable basis for the delay or denial of a promised progress payment, the statutory requirement of "a good faith dispute" will have been satisfied and the actual subjective state of mind of the non-paying party will not be relevant except as a circumstance to be considered in the evaluation of the objective reasonableness of the non-paying party's actions.

6. *Application of These Principles*

In this case, the subcontracts directed that "Payment[s] are to be made in monthly installments for work performed the preceding month on or before five (5) days after payment is received by Contractor from Owner. . . ." FEI's complaint alleged Pacific Construction owed it $18,400 and $7,300 for the Gramercy and Manhattan Place Projects, respectively. FEI alleged it was entitled to statutory penalties for late progress payments under section 7108.5, subdivision (c) and retention payments under Civil Code section 3260, subdivision (e).[12]

In its statement of decision, the trial court found that Pacific Construction disputed that it owed FEI money based on Yoon's interpretation of the subcontracts, and on his contention that FEI had failed to complete the rough work in a timely manner, forcing him to pay for the completion of FEI's work. Based on the record, the court could not find that "Yoon subjectively believed [his] claim had no merit, but proceeded in any event." Accordingly, the court found there was a good faith dispute as to the moneys owed and declined to award prompt payment penalties.

The evidence supports the trial court's conclusion if not its rationale: First, the parties litigated their divergent understanding of the meaning of two phrases in the subcontracts. The court found the subcontracts' clauses at issue to be ambiguous and inferentially that FEI's interpretation was not the only reasonable one. (*Denver D. Darling, Inc. v. Controlled Environments Construction, Inc*., *supra*, 89 Cal.App.4th at pp. 1240-1241.) Second, Pacific Construction maintained that FEI did not complete the work required under the subcontracts and went so far as to retain and pay another company to complete the work it believed FEI did not finish. While the trial court purported to apply a subjective standard and weighed the evidence to determine the subjective existence of good faith, it did so based on objective and extrinsically

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[12] Pacific Construction contends that the current version of Civil Code section 3260 is inapplicable to this case. We need not address this contention because the trial court found a good faith dispute, so penalties would not have been awardable under Civil Code section 3260, subdivision (e) in any event.

observable evidence. Such evidence supports the trial court's conclusion that there was a good faith dispute between Pacific Construction and FEI as to what the subcontracts required of FEI and whether FEI fully performed its rough-work obligations. Determined according to an objective standard, there was thus a good faith dispute over amounts owed and the court properly denied FEI's request for penalties.[13]

C. *FEI's Request for Sanctions*

FEI seeks to impose sanctions against Yoon and Pacific Construction's counsel for prosecuting a frivolous appeal. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) The sanctions request was presented in FEI's brief, not by motion with supporting declaration, and thus did not comply with California Rules of Court, rule 8.276(b)(1). We do not consider it further.

DISPOSITION

The trial court's judgment and order are affirmed. Each party shall bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

WE CONCUR:

CROSKEY, Acting P. J.

KITCHING, J.

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[13] Although we hold that FEI was correct in its contention that an objective standard should be applied, it makes no difference in the outcome of this case as the trial court correctly, and necessarily, relied on substantial *objective* evidence in reaching its conclusion.