IN THE SUPERIOR COURT OF THE STATE OF

DELAWARE IN AND FOR NEW CASTLE COUNTY

RODMAN CONSTRUCTION CO., Inc., a Delaware Corporation, and NORTHEAST CONSTRUCTION,	)	
	)	CIVIL ACTION NUMBER
Plaintiffs	)	
	)	07L-08-084 JOH
v.	)	
BPG RESIDENTIAL PARTNERS, V, LLC, a Delaware Corporation, and GBC CHRISTINA LANDING, LLC, a foreign corporation,	)	
Defendants	)	

Submitted: July 10, 2012
Decided: January 8, 2013

MEMORANDUM OPINION

Bench Trial Decision

Appearances:

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HERLIHY, Judge

Introduction

This matter involves a dispute between the two plaintiff sub-contractors, Rodman Construction Co. ("Rodman") and Northeast Construction ("Northeast") and defendants BPG Residential Partners V, LLC ("BPG"), GBC Christina Landing, LLC ("GBC") surrounding the construction of Christina Landing Tower II ("Tower II"). Tower II is a twenty-seven story condominium building located at the intersection of South Market and A Streets in Wilmington, on the Christina River. BPG is the owner and GBC was the construction manager/general contractor. To a large extent, it appears that the underlying issue which set this dispute in motion were the cost-saving choices the owner made in the construction of Tower II. Christina Landing Tower I used more steel in its internal construction and a brick wall exterior. However, the costs of both had gone up significantly, making it economically less desirable, if not potentially money losing, to construct Tower II using the same method of construction.

Particularly, instead of an exterior brick wall, the owner, with the assistance of its architect and others selected a "Trespa" wall system, which was less expensive than brick. It seems aesthetically less pleasing to the eye and it is unclear how much experience, if any, the key players on the owner's side had in using it. Some of the issues which led to many of the disputes resolved in this opinion seem to have been due to various factors. One such issue was the rush to get started and commencing work before finalization of key contract documents which is more fully discussed later. Another was some unfortunate ill-will between one of the persons working for one or both of the

defendants and representatives of plaintiffs which carried over from Tower I disagreements and became very magnified between the same individuals on Tower II. Still another is the faint aroma which came out during the bench trial that a non-party "defendant" was responsible for the issues which arose between these parties and which appears to have been unduly taken out on the plaintiffs.

The numerous claims and counterclaims arise from attempts to address issues emerging during construction through "change orders" and "change order requests" purporting to modify the underlying contract or separate "time and materials" bills pursuant to purported collateral agreements. The suit began when plaintiffs filed a mechanics' lien for $518,535 plus interest and costs against the property. To discharge the lien, GBC deposited a bond with the Court in the amount of $700,022.25 in accordance with 25 *Del. C.* § 2729. The Court must thus determine the proper distribution of the sums secured by this bond and assess any damages to the extent those sums cannot provide a sufficient remedy.

The parties undertook their work according to standard commercial construction financing practice, in which time is literally money until construction is complete due to high construction loan interest rates and utilization opportunity cost. Under this practice, subcontractors pay their own labor and material expenses relating to the job with "draws" from the general contractor against the contract price, minus "retainage" held by the owner as security for completion of final "punch list" items at the end of the job. While theoretically a subcontractor has the right to negotiate or refuse to agree to a change order, its financial obligations arising from the job (including payroll, suppliers and its

own subcontractors) make that right largely illusory.[1] Further, if progress halted for negotiations every time the general contractor issued a change order to one of its many subcontractors, the resulting delay would increase everyone's costs as described above.

To accelerate completion, the owner and construction manager planned and tracked progress using "critical path" scheduling, whereby the sequential series of tasks with the longest total duration (the "critical path") defines the fastest route to overall completion. Tasks not on the critical path can thus be done in parallel without delaying the end date; but moving them onto the critical path will have exactly that impact. Adherence to the critical path schedule is measured by completion of defined "milestone" events according to their prescribed dates.

Further, as is frequently done in the industry, the owner and construction manager attempted to "fast track" the project through a "design-build" process by starting work on its early portions while design details and their associated contractual arrangements were still being planned for later phases. And they conducted "value engineering," modifying designs to save costs when initial cost estimates exceeded project budgets. Haste can, and did, make waste, however; and when the risks inherent in such an approach materialized, the parties came into conflict about their respective rights and duties, generating plaintiffs' eight claims and defendants' three counterclaims at issue here.

[1] *See, e.g., Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. No. 07L-08-084, at 42-43 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

Contractual Arrangements Among the Parties.

As a preliminary matter, the Court must determine whether the parties' rights and duties were defined by contract, and if so, what the relevant terms were, or by other related theories of obligation as pled, including *quantum meruit* and *quantum valebant*. As summarized well in a Chancery opinion:

> [i]n Delaware, . . . the meaning of an unambiguous contract is a question of law for the court to determine. In determining meaning, a contract is to be read as a whole, with a court giving effect to every term therein. Individual terms should not be read to frustrate the parties' clear purpose. And, where a contract is unambiguous, a court will apply that clear meaning and not use parol evidence to create ambiguity in an otherwise unambiguous contract. Extrinsic evidence can only be used to the extent the contract itself is susceptible to multiple reasonable interpretations. Finally, if the agreement is ambiguous and extrinsic evidence does not clarify the vague terms, then the ambiguity is to be resolved against the [drafter] per the *contra proferentum* rule.[2]

The blizzard of paper among the parties here leaves no doubt that they intended to contract, and the Court is satisfied that a sufficient meeting of the minds occurred about the material terms to constitute a valid agreement supported by consideration. Thus, to the extent possible, the Court will rely upon the agreements between the parties and the documents incorporated therein by reference to define their obligations.

As they moved through the design-build and value engineering processes, however, the parties shifted the contemplated scope of work substantially; and to say they were less than scrupulous in adjusting the language in their contract documents to the changed commercial reality of the project plan would be a gross understatement.

[2] *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 90 (Del. Ch. 2009) (citations omitted).

Numerous artifacts from the initial bid package (such as references to precast architectural façade panels which were moot after the Trespa design was substituted) were incorporated by reference into the final agreement. Other provisions expressly conflicted by their own terms, such as the bid package's prescription of "Cost Allowances"[3] and the final agreement's assertion that "[t]he lump sum amount of this Contract Agreement include NO Cost Allowances."[4] This scrivening sloppiness, combined with the agreement's assertions that plaintiffs were assuming all of GBC's obligations toward BPG and that the "Short Form Contracts" were being issued "solely for accounting purposes" created inherent, pervasive ambiguity.

Delaware law requires a court to look to extrinsic evidence to resolve ambiguous contractual terms,[5] including "prior agreements and communications of the parties as well as trade usage or course of dealing."[6] Therefore, the parol evidence rule and integration clauses notwithstanding, the Court must consider this information.

In early 2005, the construction manager, defendant GBC, solicited bids from various trade contractors on behalf of defendant property owner BPG for construction of Tower II ("the project"). Healy, Long and Jevin, Inc. ("HLJ," not a party to this action, but a corporate sibling of plaintiff Rodman, had worked with both defendants on Christina Landing Tower I (the project's companion structure which was then being

[3] Joint Exhibit 1 (herinafter "JX1") tab 122, ¶ K.

[4] JX1 tab 6, p. 3, ¶ 1.1.5.

[5] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

[6] *Id.* at 1233.

completed). HLJ submitted bid of $11,940,000 for the structural concrete work.[7] This was higher than defendants' budget for this work. As a result, they therefore, worked with HLJ in a process of "value engineering" to reduce the bid to $10,089,400[8] by shifting the concrete frame design from poured-in-place, post-tensioned to filigree, rejecting a pre-cast building façade in favor of a less-expensive panel system and changing the garage from cast-in-place to steel, among other changes.

During this process, the parties realized that defendants' financiers required greater independent bonding from the concrete contractor than these bidders could provide. Defendants therefore divided the scope of work in their revised bid solicitation, and HLJ and Rodman arranged for plaintiff Northeast to serve as an intervening contractor for only those components requiring a bond, which consisted of $3,764,360[9] of the budgeted cost. The other portions of the scope of work were shifted to separate "Short Form Contracts" directly from GBC to other entities,[10] including ones for a tower crane and the foundation of the building's garage which were awarded to HLJ.[11] Despite specifying that these "Short Form Contracts" were between GBC and other entities, the GBC-Northeast agreement asserted that this was being done "for accounting purposes

[7] JX1 tab 26, p. 3.

[8] JX1 tab 26, p. 12.

[9] JX1 tab 6, p. 5.

[10] JX1 tab 6, p. 2, ¶ 1.1.2.

[11] JX1 tab 11. HLJ was also in the subcontracting chain for Rodman's work, which ran from GBC to Northeast (JX1 tab 6), Northeast to HLJ (JX1 tab 7), and HLJ to Rodman (JX1 tab 8).

only" and that Northeast still maintained full responsibility for the entire scope of work detailed in the original bid package.[12] This appears to have been done in an attempt to address the bonding issue while still administering the agreement as a guaranteed maximum price cost-plus contract.[13] Indeed, Article 4 of the GBC-Northeast agreement purported to impose upon both plaintiffs all of the obligations GBC as the general contractor had toward BPG as the owner,[14] despite the obvious inconsistency of that assertion with the limited scope even of the original concrete bid.

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[12] JX1 tab 6, p. 2, ¶ 1.1.2.

[13] Evidence from parties on both sides of the dispute indicates that they understood the contract's financial terms to be "cost-plus guaranteed maximum price," and administered them accordingly. *See* Trial Transcript, Vol. IV, pp. 175, 188-189 and 231-232, and Vol. VI, pp. 94-99; and JX1, tab 35, p. 1. This would mean that plaintiffs would be paid their costs (including those of their subordinate subcontractors) in performing the scope of work, plus a fixed profit (the "plus" portion); but as an incentive to assist defendants in cost control, their total fee would not exceed a "guaranteed maximum price." In practice, therefore, plaintiffs would net their own cost overruns against their cost savings, and return any net savings to defendants, but suffer uncompensated losses to the extent that any net cost overruns exceeded the contract's guaranteed maximum price.

It is worth noting first that despite the parties' apparent understanding and behavior, the Court has been unable to find language in the contract documents supporting this interpretation of the financial terms; rather, the agreement itself purports to be a fixed firm price contract. *See, e.g.,* JX1 tab 6, p. 5, ¶ 3.1. Beyond this, however, defendants' introduction of the "Short Form Contract" mechanism is fundamentally inconsistent with a guaranteed maximum price cost-plus financial structure. The latter only works to the extent a subcontractor contracts directly with its subordinate subcontractors, and is therefore personally financially liable for their work. The ham-handed "have it both ways" language that defendants included alleging that the "Short Form Contracts" were "for accounting purposes only" and that plaintiffs were still liable for the entire scope of work under the original concrete bid package is ambiguous at best, and meaningless at worst. *See* JX1 tab 6, p. 2, ¶1.1.2 and *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 122-26 (Del. Super. Feb. 28, 2012 – part 1) (TRANSCRIPT). If defendants had tried to use the construction bond issued for the Northeast contract in connection with one of the "Short Form Contracts," the bond issuer would most certainly have a right to object. What it might mean for a contract to be issued "for accounting purposes only" is opaque – and therefore meaningless – from both legal and accounting perspectives.

[14] JX1 tab 6, pp. 6-7.

In this contractual chain, the date of last signatures indicates that GBC and Northeast did not come to a meeting of the minds until April 17, 2006,[15] four days after Northeast contracted with HLJ and HLJ with Rodman on April 13, 2006.[16] In fact, GBC's contract with Northeast prescribed completion of "Slab Level 6"[17] on April 18, 2006,[18] one day after the final signature on the contract, and "Slab Level 2" on March 10, 2006, over a month prior to contract signature. Further, the parties acknowledge that Rodman had in fact started work on February 20, 2006, almost two months before the contract documents were signed. GBC logs of alleged safety violations indicate that "Healy/Long/Jevin/Rodman" were working on the project as early as October 21, 2005. In parallel, GBC contracted separately with HLJ for the tower crane, with the last signature being affixed on March 31, 2006. The parties did not introduce into evidence the contract for construction of the garage foundation.

The GBC and Northeast contract incorporated by reference other documents, including the original tower concrete bid package[19] (which specified numerous design details that had subsequently been changed in the value engineering process) and design specifications and drawings both specific to the concrete work covered by the Northeast

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[15] JX1 tab 7, p. 20.

[16] JX1 tab 7, p. 1, and tab 8, p. 1.

[17] "Slab Levels" in the contract documents refer to completion of each floor of the concrete superstructure for which defendants contracted plaintiffs' services.

[18] JX1 tab 6, p. 4, ¶ 2.1.

[19] JX1 tab 6, p. 2, ¶ 1.1.

contract and in the "Short Form" contracts awarded directly to others. In the description of the scope of work, it expressly enumerated portions of the scope of work in the original bid package which were being awarded directly to other entities by GBC.

During the course of performance, plaintiffs would periodically submit an "Application for Payment," which defendants would pay upon verification that the associated work had been completed satisfactorily. Plaintiffs would use the sums disbursed to pay their operating expenses, including labor and materials expended on the job. As work progressed, however, defendants issued a series of "change orders" in which they "backcharged" plaintiffs for costs they claimed plaintiffs owed, the net effect of which was be to reduce plaintiffs' overall compensation under the contract. Plaintiffs signed these change orders under protest, and simultaneously submitted "change order requests" demanding that the deducted sums be put back into the contract. Near the end of the job, plaintiffs submitted Applications for Payment Numbers 16 and 17, which sought disbursement of the remaining retainage defendants held under the contract totaling $197,380.

Interpreted either as a guaranteed maximum price cost-plus contract or a fixed-firm price contract, the parties' proper settled expectations would have been that plaintiffs would receive no more than the price stated in the contract, except to the extent that defendants asked for work exceeding the explicit or implicit time, scope, quality or cost constraints defined in the contract documents. Therefore, if the Court finds in plaintiffs' favor regarding some or all of defendants' "backcharges," plaintiffs' recovery will be limited to the outstanding balance under the contract, represented by unpaid

applications for payment. If plaintiffs' claims reflect additional work exceeding the scope of the original agreement or costs incurred due to defendants' frustration of plaintiffs' purposes or other noncooperation with performance, that recovery would not be limited by the contract price.

Since the chronology of the claims and counterclaims are intertwined, the Court will address each in turn.

Plaintiffs' Back Charge Claims; Claims Arising Under Contract.

Back Charge: Change Order Requests 14 & 18 – Safety Fines and Clean-Up Labor ($10,850 and $8,809).

The contract between plaintiffs and defendants incorporated by reference provisions from the owner's general terms and conditions requiring contractors to adhere to the owner's safety program on pain of a series of fines[20] and provide general clean-up labor as part of a common pool for the jobsite.[21] In September and October of 2006, defendants issued a change order to plaintiffs back-charging them for $10,850 in safety fines and $8,809 for failing to provide clean-up labor,[22] to which plaintiffs objected.[23]

Plaintiffs dispute the validity of the safety fines, alleging failure of defendants to provide an opportunity to cure after notice as required under the contract, insufficiency of

[20] JX1 tab 140, pp. 62-63, ¶ 37.11.

[21] JX1 tab 140, pp. 55, ¶¶ 35.11.3-4.

[22] JX1 tab 57.

[23] JX1 tab 57; *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 45-47 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

supporting detail provided,[24] and the timeframe of the violations asserted.[25] Defendants' uncontradicted testimony and the contract documents indicate that there were weekly safety meetings[26] at which safety issues (including violations and prospective fines) were discussed, frequently involving multiple warnings before a fine was ultimately imposed. On balance, the Court is persuaded that defendants provided plaintiffs adequate notice and opportunity to cure as required by the contract documents. The timeframe during which the fines were imposed is more problematic. As noted above, the parties did not come to a meeting of the minds for the contract in controversy until April 17, 2006; but the "Safety Violation Fine Log" submitted by defendants alleges infractions as early as October 2005,[27] during which time HLJ (not a party to this suit) was under contract directly with owner BPG for foundation work,[28] and later separately for rental of the tower crane.[29] This sloppiness in contract administration is further reflected in the log's assessment of the fines against "Healy/Long/Jevin/Rodman" and in one case just against

[24] JX1 tab 6, p. 11, ¶ 9.6; *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 45-46 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

[25] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 46-47 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

[26] JX1 tab 140, pp. 63, ¶ 37.11.7; *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 229 (Del. Super. Feb. 28, 2012 – part 1) (TRANSCRIPT).

[27] JX1 tab 57, p. 7.

[28] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 234-239 (Del. Super. Feb. 29, 2012) (TRANSCRIPT).

[29] JX1 tab 11.

"Healy/Long."[30] Excluding fines assessed before the contract between GBC and Northeast was signed[31] leaves only $4,950 in dispute;[32] and the ambiguity in GBC's safety violation log about which subcontractor committed infractions while both were on the jobsite persuades the Court that none of them are properly chargeable against plaintiffs. The Court finds in favor of plaintiffs on their claim for $10,850.

Plaintiffs also dispute the clean-up labor back charge of $8,809 on the grounds that the general contractor failed to provide sufficient supporting detail or notice or opportunity to cure.[33] They contend that they did perform common cleanup duties, although not necessarily at the same time as other subcontractors on the job.[34] Defendants' submitted the back charge to plaintiffs between September 28 and October 4 of 2006,[35] supported by a single page weekly log running from April 10 through August 28 of 2006 and asserting that "Healy Long Jevin" was subject to "[b]ack charge for not suppling [sic] laborer once a week per contract" from May 8 through August 28.[36]

The owner's general terms and conditions required that:

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[30] JX1 tab 57, p. 18.

[31] JX1 tab 57, pp. 7-12.

[32] JX1 tab 57, pp. 13-19.

[33] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 47, 137 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

[34] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 136-37 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

[35] JX1 tab 57, p. 2.

[36] JX1 tab 57, p. 5.

> [e]ach Trade Contractor [be] responsible to share the task of litter cleanup (e.g., coffee cups, lunch wrappers, etc.). . . . However, to insure proper cleanup, notwithstanding the Trade Contractor's obligations to cleanup any debris resulting from his own operations, and following proper notices the Construction Manager will undertake the cleanup and disposal of litter and other debris whose source is unidentifiable. The cost of this special cleanup detail will be assessed weekly against all Trade Contractors on a per capita basis and invoiced monthly. If any cleanup invoice is not paid within thirty (30) days, it will be back-charged against the respective Trade Contractor's monthly payment application.[37]

There is no documentary evidence in the record that defendants provided "proper notices" or assessed "[t]he cost of this special cleanup detail . . . weekly . . . on a per capita basis" against plaintiffs. Even assuming that the labor pool process defendants adopted (apparently administered entirely verbally) met these requirements, defendants never invoiced plaintiffs monthly or waited thirty days after non-payment before backcharging as required under the contract. Indeed, the four months of accumulated costs asserted were (once again) not even unambiguously properly chargeable to plaintiffs, since defendants' documentation names "Healy Long Jevin" as the offending party, and starts before the contract between GBC and Rodman had been signed. Defendants' failure to administer the contract in accordance with terms they themselves wrote is more than sufficient grounds for the Court to find against them on this back charge of $8,809.

Back Charge: Change Order Request 15 – Installation of Electrical Boxes ($9,908).

Change of the project's concrete frame to a filigree design meant that sections of each floor of the project would be manufactured off-site by a separate contractor ("Mid-

[37] JX1 tab 140, p. 55, ¶¶ 35.11.3 & 35.11.4.

State Filigree Systems" or "Mid-State") and delivered to the project jobsite. One implication of this was that anything requiring recessing in the underside of a floor (which would form the ceiling of the floor below it) had to be sent to the filigree contractor early enough to be incorporated into its design and construction. This issue arose with some electrical boxes that were to be embedded in the panels which were to be installed between the building's ninth and tenth floors. After Rodman finished its work in that area, GBC and its other subcontractors remedied the situation by surface-mounting some of the boxes and adding a drywall ceiling, among other measures. GBC then back charged Rodman $9,908 for this additional work.

Rodman representatives testified about the lead-time requirements for submitting shop drawings and materials to Mid-State, and defendants never rebutted this testimony in any but in the most cursory manner.[38] That alone would provide the Court sufficient grounds to find that GBC should bear these costs; but, in addition, the contract between GBC and Northeast reflects that GBC intended to (and presumably did) issue a separate agreement directly with Mid-State for the panels.[39] As a result, any back charge would properly be against Mid-State, GBC's co-party in that contract, not plaintiffs. Therefore, the Court finds for plaintiffs as to the $9,908 back charge relating to the "missed installation" of electrical boxes in the tenth-floor filigree panels.

[38] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 14-15 (Del. Super. Feb. 29, 2012) (TRANSCRIPT).

[39] JX1 tab 6, p. 2

Back Charge: Change Order Requests 16 & 18 – Material Hoist Operator Time ($1,773 and $1,973).

Defendants hired a material hoist (including operator) for the project to enable the other construction trades (including plaintiffs) to accomplish their work more efficiently. In January and March of 2007, defendants presented plaintiffs with two change orders asserting backcharges for overtime hours for use of the hoist for $1,773 and $1,973 respectively.[40] Plaintiffs objected (both upon receipt and at trial) that these charges were unfair given the number of gratuitous lifts other trade contractors had received (for defendants' ultimate benefit) using the tower crane brought on site primarily for plaintiffs' use in erecting the concrete superstructure.

The contract documents, including the bid solicitation, do not expressly discuss arrangements or payment for a material hoist, specifying neither that defendants are obliged to provide one nor that plaintiffs must pay for any use of one if it is provided. The only relevant provision states that plaintiffs:

> shall be held accountable for the following Project related responsibilities: furnish all labor and supervision; furnish, supply and install all equipment, material, supplies, tools, scaffolding, *hoisting*, transportation, unloading and handling; [and] do all things required to complete the work described . . . on the Project . . . .[41]

The documents submitted by defendants in support of these back charges reflect that only overtime labor was being passed through to plaintiffs; and by all appearances, other trades were paying the same charges. As discussed below, other trade contractors were

[40] JX1 tabs 59 & 61.

[41] JX1 tab 6, p. 4, ¶ 1.2 (emphasis added).

eventually charged for lifts using the tower crane, to which plaintiffs had no objection. It would be inconsistent to deny one and permit the other, and therefore, the Court finds for the defendants on these claims of $1,773 and $1,973.

Back Charge: Change Order Request 17 – Second shift labor costs for Mason, working below Rodman ($70,353).

High-rise construction is a dangerous business, not least because of the heights at which people are working; it is almost as hazardous to those below due to risks of falling objects. During bidding of the project, GBC hired Mason Building Group ("Mason") as a subcontractor to perform various facets of the work, including installing the Trespa façade panels which formed the building's exterior surface; and GBC's overall project plan contemplated Mason working underneath Rodman as the latter continued to add floors to the concrete superstructure.

As the tower went up, there were a number of incidents of tools and materials falling from Rodman's operations.[42] Mason expressed safety concerns about this to GBC, which eventually determined that Mason should work on a second shift each day after Rodman was done,[43] and it urged Rodman to install "debris nets" that would hang off the building just below the floor under construction to catch falling items.[44] GBC

[42] JX tab 126; JX tab 143; *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 103-106 (Del. Super. Feb. 27, 2012) (TRANSCRIPT); *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 45-47 (Del. Super. Feb. 28, 2012 – part 1) (TRANSCRIPT).

[43] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 150-152 (Del. Super. Feb. 28, 2012 – part 1) (TRANSCRIPT).

[44] JX1 tab 126.

informed Rodman that it would be backcharged for the additional costs associated with these safety measures.[45]

Rodman was aware of and concerned about these hazards early in the project,[46] and the original bid package which was incorporated by reference into the final contract required Rodman to:

> [i]nclude furnishing, installing and maintaining all perimeter protection until such point that the permanent exterior wall system is in place. Perimeter protection shall include, but not be limited to a perimeter cable system, toe boards and orange debris netting. Perimeter cable system to be minimum 1/2" cable with at least 3 cable clamps at all terminations and splices.[47]

Rodman's witnesses testified that while this provision obligated it to provide this level of perimeter protection, its experience of industry practice was for the general contractor to provide external debris nets, which Rodman, as the concrete contractor, would "jump" up the building as the tower skeleton rose.[48] Defendants disputed Rodman's assertions about this industry practice, and both sides acknowledged that as a general principle, a subcontractor is responsible for the hazards that it creates.[49] Neither side introduced expert testimony regarding this alleged industry practice.

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[45] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 152-54 (Del. Super. Feb. 28, 2012 – part 1) (TRANSCRIPT).

[46] JX1 tab 30, p. 1.

[47] JX1 tab 122, p.11

[48] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 58-63, 219-20 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

[49] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 104 (Del. Super. Feb. 27, 2012) (TRANSCRIPT); *Rodman Constr. Co., Inc. v. BPG Residential*

The parties' contractual responsibilities specify their respective rights and duties; and the language quoted above obliged plaintiffs to provide "all perimeter protection . . . not . . . limited to" the minimums expressly prescribed. Further, the principle that an actor bears primary responsibility for the hazards it creates is consonant with Delaware law. Accordingly, the Court finds Rodman responsible for costs associated with addressing safety concerns arising from items falling from its work.

Plaintiffs offer several arguments in mitigation. First, they claim that defendants always intended for Mason to operate on a second shift,[50] and therefore, risks created by items falling from plaintiffs' work were not the proximate cause of Mason's overtime charges. Apart from plaintiffs' self-serving testimony regarding defendants' alleged intentions, however, the Court has been unable to find evidence in the record to support their assertion. Plaintiffs' other arguments are more persuasive, however. First, they point out that despite defendants' attempted back charge of $70,353, only $44,489 is supported by any documentation.[51] Beyond this, plaintiffs note that after they procured safety nets at a cost of over $60,000,[52] defendants, however, continued to have Mason operate on a second shift. The timeline reflected in the evidence indicates that the safety incidents and commencement of Mason's second shift work both occurred on August 22,

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Partners, V, LLC., C.A. 07L-08-084, at 147-49 (Del. Super. Feb. 28, 2012 – part 1) (TRANSCRIPT).

[50] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 59 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

[51] *Id.* at 61; JX1 tab 60, pp. 2-4.

[52] *Id.* at 60.

2006, the nets were ordered and installed around September 26, but Mason's second shift work ended on November 30.[53] Counting days in the calendar, this means that plaintiffs had put nets in place after approximately 36% of this second-shift time had passed, meaning that only 36% of the $44,489 overtime costs are properly chargeable against plaintiffs, namely $16,016.04. Deducting that from the $70,353 wrongfully back charged against plaintiffs means that they are owed $54,336.96 on this claim.

Plaintiffs' Change Order Requests Not Responding to Back Charges by Defendants.

Change Order Request 11 – Costs Associated with Assembling Shoring Tables In Situ Rather Than Off the Critical Path ($203,956).

To construct each story of the project, Rodman intended to use "shoring tables," as had been done on Tower I, to support each floor above the second while the concrete comprising it hardened. Shoring tables are 18- by 45-foot long tables made primarily of aluminum, and each floor of the project required between 14 and 20 of them to construct. Given the amount of time the concrete requires to cure, the speed at which each floor could be poured and the need to keep on schedule, Rodman needed four floors worth of tables. This would enable it to remove the tables supporting the lowest floor and leapfrog them up to support construction of the next highest floor. Given their size, however, the tables needed to be delivered to the jobsite in pieces and assembled and stored in a sufficiently flat and level area (a "laydown area") within reach of the tower crane that would move them up during construction.

[53] *Id.* at 66; JX1 tabs 60, 126, 143.

The contract between GBC and Northeast was silent on the question of laydown area, although the bid package which the contract incorporated by reference included a clarification that the subcontractor "will require adequate control in order to layout our own work."[54] In January 2006, GBC indicated to Rodman that a lane of traffic it was taking over could be used for material delivery and storage, and that "[t]he intent is to let you use the garage area to build your forms."[55] Rodman responded that they "were always expecting to use the garage for laydown. One lane in the street is not adequate to build this building."[56] This was the technique that the parties had used in constructing Tower I, and would have allowed them to deliver, assemble and stockpile the tables while the first two floors of the building were being poured, thus off the critical path. However, since the garage design was still being revised and site work was still going on in that area, they were unable to do so. When GBC refused to delay Rodman's completion milestones, Rodman's only recourse to stay on schedule was to assemble the tables in place on the second through fifth floors as overtime work. The additional costs from the shift differential were compounded by the need to provide fall protection for the workers assembling the tables at height, among other factors.

The contract documents, communications between the parties regarding form assembly and laydown area and prior course of dealing between them on Tower I lead the

[54] JX1 tab 122, p. 3.

[55] JX1 tab 30, p. 2.

[56] JX1 tab 30, p. 1.

Court to conclude that "a reasonable person in the position of either party"[57] at the time of contract signature would have expected plaintiffs to have the garage area available to construct their shoring tables. This is reinforced by the ongoing flux in the design of the garage, which was under the control of defendants and which they either failed to resolve or communicate in time for plaintiffs to explore alternate courses of action.

Rodman's original claim for additional costs associated with assembling the shoring tables as they did was $203,956.[58] However, an expert retained by Rodman testified that, based on a "measured mile" approach (which removed costs that Rodman would have incurred anyway), the total cost of additional work for assembling the tables on the structure including labor burden was $99,366.89.[59] Although plaintiffs' expert then increased this by 15% to include overhead and profit, the agreement between GBC and Northeast provides that if GBC "requires and directs [plaintiffs] to work overtime," plaintiffs will be reimbursed for overtime pay plus taxes and benefits, but no overhead or profit.[60] Accordingly, the Court finds in plaintiffs' favor on this claim, but only in the sum of $99,366.89.

Change Order Request 13 – Housekeeping Pads ($7,700).

At various locations in modern commercial buildings, design constraints require that mechanical rooms be included to provide HVAC, electrical, plumbing and similar

[57] *Eagle Indus.*, 702 A.2d at 1232.

[58] JX1 tab 29, p. 2.

[59] JX1 tab 50, p. 4.

[60] JX1 tab 6, p. 11, ¶ 9.13.

services throughout the structure. To accommodate these, the project design called for "housekeeping pads," which are slightly-raised concrete platforms upon which the equipment in question can be placed which elevates it off the common floor.

Defendants purchased these housekeeping pads as an "allowance," reflecting the fact that, like so much of the rest of the project, the design, number and location of these pads was still incomplete at the time of contract signature. The original allowance assumed ten cubic yards of concrete, but when the design was eventually finalized and plaintiffs poured them, it turned out to be 23 cubic yards in total.[61] Plaintiffs issued a change order request[62] for the additional 13 cubic yards of concrete priced at $593 per yard[63] for a total of $7,700, and defendants countered with an offer of $4,400.[64]

Defendants' counteroffer and trial testimony indicate acquiescence that plaintiffs' housekeeping pad work exceeded the budgeted allowance.[65] The contract documents and other evidence submitted do not provide the Court sufficient basis for determining an agreed-upon unit price for the additional 13 cubic yards, however.[66] Accordingly, the

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[61] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 39 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

[62] JX1 tab 56.

[63] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 41 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

[64] JX1 tab 56, pp. 9-10.

[65] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 10-13, 84-85 (Del. Super. Feb. 29, 2012) (TRANSCRIPT).

[66] The GBC-Northeast contract provides a material unit-price for concrete of from $135 - $175 per cubic yard, depending upon quantity. JX1 tab 6, p. 5, ¶ 3.1.1(B)(4)-(6) This reflects

Court finds in plaintiffs' favor regarding this claim, but only to the extent of defendants' offer of $4,400.

T&M Invoice 531 – Labor for Waterproofing Elevator Pits ($4,059).

In late September 2006, plaintiffs applied waterproofing compounds to the elevator pits in the project building, and in November, submitted a time-and-materials invoice for the work for $4,059.[67] Defendants refused to pay, claiming that this was included in the scope of work in the bid package incorporated by reference into the GBC-Northeast contract, and that plaintiffs were therefore already being compensated.[68]

The original bid solicitation issued by defendants included specification "07170 – Underground Waterproofing Systems" as part of the scope of work,[69] and the original bid plaintiffs submitted in March of 2005 included pricing for such work in excess of $200,000.[70] Plaintiffs' final bid (submitted after conducting value engineering), however, responded to a requested "alternate to value engineer the existing waterproofing specification" with "N/A"[71] and included no sums for waterproofing.[72]

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only the material cost, however, and does not include installation labor, administrative and general burden, profit and other significant cost factors.

[67] JX1 tab 62; *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 64-65 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

[68] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 165-66 & 228-230 (Del. Super. Feb. 29, 2012) (TRANSCRIPT).

[69] JX1 tab 26, p. PF-9, and tab 122, pp. PF-9 & PF-14.

[70] JX1 tab 26, "Standard Estimate Report," p. 7; *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 35-36 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

[71] JX1 tab 122, p. PF-6.

Plaintiffs' evidence showed the original waterproofing specification was removed during value engineering and project redesign, and the documentary evidence supports that analysis better than defendants' position. Since this work was outside the scope of the contract, recovery is appropriate under a theory of unjust enrichment such as *quantum meruit* or *quantum valebant*. The valuation assigned by plaintiffs seems reasonable, and the Court adopts it in finding in plaintiffs' favor on this claim in the full amount of $4,059.

T&M Invoice 546 – Charges from Corrado American for Backfilling Bulkhead ($2,336).

Plaintiffs testified that Corrado American, a subcontractor retained under a contract directly with BPG for foundation work, was asked to perform additional work backfilling the bulkhead area adjacent to the Christina River although the contract with BPG had been closed out.[73] Plaintiffs testified that they submitted an invoice for this work which was never paid,[74] and introduced the invoice and supporting invoice from Corrado American into evidence.[75] Defendants did not contradict this in testimony or introduce evidence to the contrary; but plaintiffs' invoice reflects that the foundation contract in question was between defendant BPG and HLJ, which has not been joined as

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[72] JX1 tab 122, p. PF-8.

[73] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 65 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

[74] *Id.*

[75] JX1 tab 63.

a party.[76] Since HLJ has not been joined as a party, the only claims involving it which may be raised are those to which it is subrogated from either plaintiffs or defendants. As no evidence was introduced establishing that this foundation contract was ever part of the scope of work covered by the GBC-Northeast contract or the tower concrete bid solicitation, plaintiffs have no standing to assert HLJ's claim. Therefore, it must be denied.

Defendants' Counterclaims.

The defendants have asserted three counterclaims against plaintiffs. One, they allege that the contract with plaintiffs included two months' worth of use of the tower crane on the jobsite beyond the requirements of the concrete contractor. The crane was to be used at the direction of the general contractor primarily for other trades to move material and equipment onto the newly-erected building's concrete superstructure to complete construction. They assert that plaintiffs refused such use of the crane and required the other trades to pay for their own lifts, and that the other trades then passed these charges through to defendants, causing them essentially to pay for the same services twice. Defendants therefore seek return of two months' worth of tower crane rental at the contract price, totaling $136,000.[77]

Two, the defendants claim that plaintiffs' construction of the shear wall on the south face of the building did not comply with the relevant specifications in the contract,

[76] *Id.*

[77] Defendants' First Am. Answ. and Countercl., ¶ 47.

and that the façade contractor therefore incurred substantial additional cost which was passed through to defendants in installing the surface panel system. They therefore seek $190,000 as reimbursement for these costs.[78]

Three, defendants claim that plaintiffs failed to fulfill their contractual obligation to pour four concrete footers near the building's entrance, and that as a result defendants were required to hire another subcontractor to complete the work at an additional cost of $4,330, for which they seek reimbursement.[79]

Tower Crane ($136,000).

The original tower concrete solicitation required bidders to "[i]nclude an additional two months of the Tower Crane for use by others after the completion of the Tower Concrete"[80] and "[i]nclude in the bid 80 hours of the Tower Crane to be used at the direction of the Construction Manager."[81] After defendants completed their value engineering and divided the scope of work in the original bid package into individual "Short Form Contracts," GBC awarded one of these contracts directly to HLJ to provide the crane, executing the agreement approximately two weeks before the concrete contracts with plaintiffs were signed.[82]

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[78] *Id.* at ¶ 53.

[79] *Id.* at ¶ 56.

[80] JX1 tab 122, p. PF-9.

[81] JX1 tab 122, p. PF-7.

[82] JX1 tab 11.

Apart from referring to the tower concrete bid solicitation, the contract between GBC and Northeast nowhere expressly obliged plaintiffs to provide a tower crane, either for themselves, the general contractor or other subcontractors on the project. The contract between GBC and HLJ, by contrast, while also referencing the bid solicitation, described the scope of work as providing "Tower Crane Rental Services"[83] for a sum not to exceed $729,000.[84] In detailing the basis for this amount, "Tower Crane Rental" was priced "for 10 months," and crane operator time was estimated at 1,480 hours, or 37 weeks, assuming a 40-hour work week.[85] It also stated that "[r]ental is based upon a minimum of six (6) months."[86]

In the early phases of project execution, plaintiffs were apparently the primary users of the tower crane as they erected the building's concrete superstructure. The crane operators apparently did allow other trades to use it gratuitously to the extent doing so did not delay plaintiffs' timely completion of their milestones, however.[87] As the superstructure neared completion, however, discussions began about the timing of crane removal. On the one hand, many of the other trade contractors could use the crane as a very efficient means of moving their equipment, material and tools onto the superstructure. On the other hand, HLJ was paying monthly labor and rental costs in

[83] JX1 tab 11, p. 2, ¶ 1.1.

[84] JX1 tab 11, p. 3, ¶ 2.1.

[85] JX1 tab 11, p. 3, ¶ 2.1.

[86] JX1 tab 11, p. 3, ¶ 2.1.1.

[87] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 54 (Del. Super. Feb. 27, 2012) (TRANSCRIPT).

excess of $50,000 per month for it,[88] and its presence and location interfered with completing certain final portions of the job.

In mid-August of 2006, defendants began inquiring about tower crane usage, and HLJ responded that the "additional two months" and "80 hours" in the bid solicitation had been taken out during the value engineering process to help defendants meet their budget.[89] Contemporaneous emails among the defendants were consistent with this understanding,[90] and indicate that other trades had been informed that they would need to make their own deals directly with HLJ if they needed hoisting.[91] However, the defendants believed that the contract language was at best ambiguous on this, and decided to "use it to [their] advantage,"[92] and, anticipating disputes at the end of the project, "throw bullshit against bullshit"[93] in the closeout process.

At the end of October and early November, defendants were trying to steer a course between getting the other trades' materials up on the building and removing the crane as quickly as possible.[94] Plaintiffs indicated that they expected to be done with the

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[88] JX1 tab 11, p. 3, ¶ 2.1.

[89] JX1 tabs 21, 22 & 25. In fact, it appears that defendants suggested modifying tower crane usage as a possible savings opportunity during the value engineering process. *See* JX1 tab 27.

[90] JX1 tabs 21 & 28.

[91] JX1 tabs 18, 19 & 20.

[92] JX1 tab 20, pp. 1-2.

[93] JX1 tab 19, 20.

[94] JX1 tab 14.

crane near the end of November and transition financial responsibility for it to defendants from that point if other trades still needed it.[95] Defendants replied that "North East [sic] owns that crane until all contract work is done" with a forecast milestone completion date of December 19 "plus the additional time approved due to weather," although they acknowledged that "[i]f other trades require to use your crane they shall deal directly with Healy Long to compensate you for the usage."[96] On December 1, defendants sent a letter to plaintiffs asserting that:

> [p]er your contract "Scope of work item 4" Northeast is required to provide the use of the crane for others after completion of the tower concrete. The crane will be required starting Wednesday 12/6/06. We fully expect Northeast to abide by its contract and provide the use of the crane by others.[97]

Plaintiffs responded with a letter of their own on December 4, in which they reiterated that any extra crane time had been removed during value engineering and offered to make the crane available in accordance with the rate schedule quoted in the contract documents.[98] Relenting, defendants agreed to pay plaintiffs for the other trades' lifts according to the rate schedule, aggregating $19,465 [99] for lifts through December.[100]

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[95] JX1 tab 18.

[96] *Id.*

[97] JX1 tabs 17 & 129.

[98] JX1 tab 16.

[99] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 11-12 (Del. Super. Mar. 5, 2012) (TRANSCRIPT).

[100] JX1 tab 24, Ex. B.

In early January 2007, plaintiffs disassembled and removed the crane at defendants' direction to allow other construction activities to advance.[101]

The facts adduced lead the Court to deny defendants' counterclaim. First, their assertion that the bid solicitation's references to "an additional two months" or "80 hours" of crane time were incorporated unadulterated into their contract with plaintiffs fails on several fronts. Most obviously, the scope of this agreement expressly carved out crane rental and awarded it to HLJ in a "Short Form Contract." Any ambiguity created by these dissonant provisions must be harmonized by the maxim that "[w]here there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions."[102] The specific award of tower crane rental services to HLJ referred to in GBC's contract with Northeast clearly controls the "dusty" reference in the bid solicitation to "additional" crane time. Beyond that, however, defendants were clearly aware that the "additional" crane time had been taken out during the value engineering process; their disingenuous representations to plaintiffs notwithstanding.

Defendants' attempt to salvage these references through their contract with HLJ fails for the same and additional reasons. Beyond the definite crane rental durations specified in the HLJ contract and defendants' attempt to "take advantage" of ambiguity

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[101] JX1 tab 15; *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 10-11 (Del. Super. Mar. 5, 2012) (TRANSCRIPT).

[102] *Stasch v. Underwater Works, Inc.*, 158 A.2d 809, 812 (Del. Super. 1960), quoting the Restatement of Contracts Vol. I, § 236(c); *see also Viad Corp. v. MCII Holdings, Inc.*, 2003 WL 22853414, at *5 (Del. Super. Aug. 6, 2003).

despite their knowledge of facts to the contrary, the simple fact remains that HLJ is not a party to this action. Defendants could easily have joined HLJ as a third-party defendant, and for whatever reason chose not to do so.

On defendants' counterclaim involving the tower crane, the Court finds in favor of plaintiffs.

Shear Wall ($192,058).

The south face of the project included a 284-foot shear wall that ran the entire height of the building and provided a key part of its structural integrity. This wall also formed the penultimate exterior layer of that portion of the building's perimeter, and as such was an attachment surface for the Trespa panel system that was selected in favor of the original pre-cast exterior façade design.

While the shear wall was being completed, Mason began attaching Trespa panels.[103] It discovered, however, that the panels could not be affixed to create a smooth and even appearance because the underlying concrete surface varied in depth. Since each panel could only be shimmed an additional three-quarters of an inch,[104] the visible surface of the wall might have undulated unevenly across the 27 stories of the tower's height, including overlaps or gaps at the edges of some of the panels.

GBC arranged for a survey of the vertical surface of the shear wall, which disclosed variation from a hypothetical perfectly flat, smooth, plumb plane of as much as

[103] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 44 (Del. Super. Mar. 1, 2012) (TRANSCRIPT).

[104] *Id.* at 43.

one-and-one-quarter inch.[105] When plaintiffs were informed of the issue, they sought to address it by chiseling off high points that had been marked by paint;[106] but shortly after beginning this work, GBC concluded that this would not address the issue and directed them to stop. Mason developed and used a modified attachment system involving additional material and time which cost defendants $192,058.[107] The parties began to dispute whether the shear wall did not comply with the contract specifications or if the design involving the Trespa panels was inherently flawed.

The original tower concrete bid package that was ultimately incorporated into plaintiffs' contract with GBC included twelve pages of references to hundreds of architectural specifications and drawings[108] and cited three in particular.[109] One of these, "03300 – Cast-in-Place Concrete"[110] referred to a specification prepared by the architect[111] which required compliance with a standard for tolerances for concrete construction promulgated by the American Concrete Institute, referred to as "ACI 117-

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[105] *Id.* at 52.

[106] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 132-38, 140-44 (Del. Super. Feb. 29, 2012) (TRANSCRIPT).

[107] JX1 tab 64.

[108] JX1 tab 122, pp. PF14–PF25.

[109] JX1 tab 122, p. PF-9, ¶ M(1).

[110] JX1 tab 122, p. PF14.

[111] JX1 tab 65, p. 3, items F.1 & 2 and p. 12, item B; *see Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 31-32, 88 (Del. Super. Mar. 5, 2012) (TRANSCRIPT).

90."[112] Two components of the specification were implicated in the dispute: a maximum variation from perfectly plumb over the entire height of the wall ("vertical alignment"), and a maximum local variation from a perfectly flat plane ("relative alignment").

Vertical alignment required that the wall vary no more than one inch from plumb for the first one hundred feet of height and (according to a formula) no more than an additional 3.4 inches for the remainder of its height.[113] Relative alignment required that no two points on the face of the wall within ten feet of one another vary more than three-eighths of an inch in depth, which over the entire height of the wall could aggregate to more than a ten-inch depth variation but for the vertical alignment standard. As built, the shear wall complied with the vertical alignment standard, although parts of the wall did not meet the relative alignment standard.[114] The parties disagreed about whether Trespa panel tolerances were so strict that the design would not have worked even if ACI 117-90 had been fully complied with.

Installation instructions and designs for the Trespa panels required that they be installed "plumb and level,"[115] permitting shimming of no more than three-quarters of an inch from their attaching surface.[116] Since this standard applied to each panel over the

[112] JX1 tab 132. There is evidence that Rodman's principal had used this specification in constructing Tower One, *see* JX1 tab 135.

[113] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 120-21 (Del. Super. Mar. 5, 2012) (TRANSCRIPT).

[114] *Id.* at 81.

[115] JX1 tab 88, p. 18, ¶ 3.04(A).

[116] JX1 tab 81.

entire wall, it was, in the aggregate, far stricter than ACI 117-90, requiring that the entire height and breadth of the wall as built vary no more than three-quarters of an inch in depth from the perfectly flat, smooth, plumb plane designed by the architect. GBC apparently recognized this, as reflected in internal documents[117] and consistent with its direction to plaintiffs to stop attempting to correct areas not in compliance with ACI 117-90.[118] Nevertheless, it informed the plaintiffs that they would hold them responsible for Mason's additional costs in modifying the installation materials and techniques.[119]

Near the end of the trial, after five days of testimony and reading documents, the Court asked the defendants for the amount of damages they were seeking for non-compliance with the ACI 117-90 standards. No satisfactory answer was given which, in the Court's mind, reflected the defendants' own internal disconnect between that standard and what specifications may have been needed for the Trespa wall system. The Court's question was not idly posed. Further, the contractual document sloppiness, in part, impelled by the rush to proceed, also reflects on the defendants' own failure to work out internally and with other key, responsible entities not parties to *this* litigation, a non-contradictory set of specifications sufficiently in advance. Rather, it appears defendants' internal issues were visited on the plaintiffs.

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[117] JX1 tab 104.

[118] JX1 tab 69; *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 81 (Del. Super. Mar. 5, 2012) (TRANSCRIPT).

[119] JX1 tabs 70, 76.

After considering the evidence and the parties' contentions, the Court is persuaded that defendants misunderstood (or mischaracterized) ACI 117-90, and that even if plaintiffs had constructed the shear wall in complete compliance with the relative alignment standard, defendants' Trespa panel design still would have required modifications such as Mason made. Therefore, any minor breach of the relative alignment standard in the contract is not material to the damages defendants suffered, and not properly recoverable from the plaintiffs.[120]

Back Charge: Footers ($4,330).

Plaintiffs' scope of work under the GBC-Northeast contract included pouring four concrete footers in the vicinity of the main entrance to the building adjacent to the loading dock and a fountain. This was *de minimus* work in the context of the project, worth less than $10,000 and consisting of trenching, rebar and approximately 25 cubic yards of concrete.[121] In most circumstances, this sort of work would be done when the foundations for the building were being laid,[122] but several factors prevented that approach here. Initially, the ongoing flux in the project design left the exact location of

[120] Testimony alluded to claims defendants have asserted against the architect related not only to this issue but also to failure of their use of the Trespa system to pass certain fire and expansion tests. *See Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 188-191, 194 (Del. Super. Feb. 28, 2012) (TRANSCRIPT); *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 166-172 (Del. Super. Feb. 29, 2012) (TRANSCRIPT).

[121] JX1 tab 111.

[122] JX1 tab 111.

the footers in doubt,[123] which was compounded by the fact that the foundation for the tower crane needed for the erection of the building's superstructure interfered with pouring them.[124] After their design and location had been finalized and the tower crane was removed near the end of the job, the scaffolding used by the facade contractor was in the way.[125] When GBC requested that plaintiffs start pouring the footers, they wanted only one done initially.[126] Bringing workers, equipment and material to the jobsite were the major component of plaintiffs' costs for this work, and plaintiffs understandably preferred to pour all of the footers at once. They therefore, agreed to pour the first footer as part of the scope of work covered by the contract and, if defendants insisted on separate pours of the other footers, either bill for each return trip on a time and materials basis or credit defendants back the unused material costs and let defendants make arrangements with another subcontractor.[127] Defendants understood and agreed to this approach in principle,[128] testifying at trial that seeking additional compensation for out-of-sequence work was reasonable.[129] Plaintiffs poured the first footer as GBC requested

[123] JX1 tab 119.

[124] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 22 (Del. Super. Mar. 5, 2012) (TRANSCRIPT).

[125] *Id.*; JX1 tabs 107, 108.

[126] JX1 tab 108.

[127] JX1 tab 112.

[128] JX1 tab 112.

[129] *Rodman Constr. Co., Inc. v. BPG Residential Partners, V, LLC.*, C.A. 07L-08-084, at 149-150 (Del. Super. Feb. 29, 2012) (TRANSCRIPT).

in the spring of 2007, and when GBC asked plaintiffs to pour additional footers that summer, plaintiffs asked defendants for an extra work order accordingly.[130] It appears that GBC changed its mind as a result of this request, and made arrangements for other contractors to do the work.[131] Rather than accept plaintiffs' proposed accommodation, however, GBC backcharged plaintiffs the costs of the other contractors' work in installing the footers.[132]

The facts presented convince the Court to find in plaintiffs' favor on this claim. Whether analyzed as an accord and satisfaction of a good faith dispute, a bilateral modification of the contract supported by mutual consideration or a unilateral contract which defendants accepted by directing plaintiffs to pour the first footer after hearing their objections and offered alternatives, defendants were not justified in attempting to impose these costs upon plaintiffs.

Calculation of Actual Damages and Plaintiffs' Claims Under The Delaware Prompt Payment Act (6 *Del. C.* § 3506) and The Delaware Mechanics' Lien Statute (25 *Del. C.* § 2729).

Plaintiffs also seek to have the Court apply 6 *Del. C.* § 3506, the introductory provision of the Delaware Prompt Payment Act. First, this provision requires that:

> [e]ach construction contract awarded by a contractor . . . include:
> (1) A payment clause which obligates the contractor to pay the subcontractor . . . for satisfactory performance under the subcontract within 30 days out of such amounts as are paid to the contractor; and

[130] JX1 tab 107

[131] JX1 tabs 113, 114, 115 & 116.

[132] JX1 tab 188.

> (2) An interest penalty clause which obligates the contractor to pay the subcontractor . . . an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause included in the contract pursuant to paragraph (1) of this subsection.[133]

Defendants' contract with plaintiffs complied with the first of these requirements,[134] but failed to include the required interest penalty provision, which the Court must therefore imply by operation of law at the statutory rate,[135] calculated as provided in the statute.[136] Since the payments withheld by defendants consisted of the final two applications for payment only ($197,380.08 – which includes the footers back charge), offset by the $3,746 backcharge for material hoist operator time found in defendants' favor, compound interest at five percent over the Federal Reserve discount rate as a monthly APR began to accrue after each application was ignored,[137] accruing to a total of $241,450.18 as of December 31, 2012. To this amount is added the change order requests (numbers 11 and 13) and time-and-materials invoice (number 531) found in plaintiffs' favor, for a total award of $349,276.07 in actual damages to plaintiffs.

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[133] 6 *Del. C.* § 3506(b).

[134] JX1 tab 6, p. 6, ¶ 3.2.

[135] When no interest rate is provided in a contract, 6 *Del. C.* § 2301(a) implies a rate of 5% over the Federal Discount Rate.

[136] 6 *Del. C.* § 3506(c).

[137] Application for payment #16 ($154,180.80) accrual began June 30, 2007; Application for payment #17 ($35,123.28) accrual began July 31, 2007. The footer dispute is not included.

The statute also permits the Court to award attorneys fees to a subcontractor if the contractor withheld payment "not . . . in good faith for reasonable cause,"[138] and requires the Court to award costs and expenses (including attorney's fees) against a party that brought a claim or counterclaim "frivolously or in bad faith."[139] Hand-in-hand with this, plaintiffs have also asked for award of additional damages under the Delaware Mechanics' Lien Statute, which permits the Court to award up to double damages if it finds that a defendant in a mechanics' lien action such as the present has "grossly overstated" the disputed portion of the claim.[140] For the claims and counterclaims asserted by the parties, the Court must therefore determine whether they were "not in good faith," "frivolous," "in bad faith" or "grossly overstated."

In Delaware as elsewhere, the law of "bad faith" is not a doctrine that can be applied mechanically, as has been recently discussed at length by this Court.[141] This Court agrees that "[t]he common thread in all of the definitions of bad faith given is that there is some kind of dishonest motive or purpose. There is, thus, the implication of an element of scienter."[142] Additionally, "[i]n prompt payment disputes, the phrase is

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[138] 6 *Del. C.* § 3506(e).

[139] *Id.*

[140] 25 *Del. C.* § 2729(a).

[141] *Brittingham v. Bd. of Adjustment of City of Rehoboth Beach*, 2005 WL 1653979, at *1 (Del. Super. Apr. 26, 2005); *Nason Constr., Inc. v. Bear Trap Commercial, LLC*, 2008 WL 4216149, at *6 (Del. Super. Aug. 20, 2008).

[142] *Nason Const., Inc.*, 2008 WL 4216149, at *7; *see also DDP Roofing Services, Inc. v. Indian River School Dist.*, 2010 WL 4657161, at *3 (Del. Super. Nov. 16, 2010) (Good faith is used in many contexts, and it excludes a variety of types of conduct characterized as involving

understood to mean that substantial and justifiable reason existed to withhold payments."[143] This Court in *DDP Roofing* cited *City of Independence for the Use of Briggs v. Kerr Constr. Paving Co.*, where that Court held that under Missouri Prompt Payment Act, bad faith could be shown by: (1) a pattern of manipulation; (2) coercive efforts to intimidate a party to accept less than the contract price; (3) attempts to offset claims on other jobs; and (4) using insulting language.[144]

Therefore, a finding by the Court that defendants withheld payments due because of an honest dispute about the acceptability of the work performed or legitimate potential set-offs against claims plaintiffs were asserting under the contract would augur in favor of good faith. A determination, however, that defendants were instead holding payments "hostage" as bargaining leverage against plaintiffs in disputes unrelated to the contract or generally as a sharp-elbowed negotiation tactic would lead to the opposite conclusion.

Plaintiffs' two final applications for payment under the contract requesting disbursement of the remaining retainage[145] totaled $193,050.08. If defendants' refusal to pay these was based on good-faith disputes regarding plaintiffs' performance under the contract, then, at a minimum, defendants should have already issued back charges at least equal to this sum; but those back charges (represented in Change Order Requests 14-18)

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bad faith because they violate community standards of decency, fairness, or reasonableness) (citations omitted) (internal quotations omitted).

[143] *DDP Roofing Serv., Inc. v. Indian River Sch. Dist.*, 2010 WL 4657161, at *3 (Del. Super. Nov. 16, 2010).

[144] 957 S.W.2d 315, 321 (Mo. Ct. App. 1998).

[145] JX1 tabs 9, 10.

totaled only $107,996. Defendants did not have the right to hold sums otherwise due to plaintiffs based on unliquidated potential claims they were contemplating against plaintiffs or that they thought plaintiffs might bring against them. Preventing owners and general contractors from using this sort of financial leverage against those downstream in the cash flow from them is exactly the point of the Prompt Payment Act.

In rejecting almost all of defendants' back charges, counterclaims, setoffs and other assertions of liability against plaintiffs, the Court has, in many instances, found their grounds very tenuous. Defendants' pressing of the shear wall and tower crane counterclaims despite their implicit recognition of their invalidity is extremely troubling, and invites a conclusion that they were concocted only to justify non-payment of plaintiffs' claims. This is buttressed by remarks made by defendants' employees in emails, which are indicative of their state of mind and may reflect defendants' corporate culture. In August of 2008, defendants had a series of email exchanges regarding the tower crane claim which started when an employee asked if he correctly recalled that plaintiffs had removed all of the "extra" tower crane time during value engineering to help defendants meet their budget. An employee of the other defendant replied:

> My recollection is that Healy owned his work and we did not buy anything extra. The thought was that he would have his table forms on the project 3-4 weeks after the last pour. Subsequently the crane would be required to be on site during this period but not fully used and that any trade needing it would cut a deal with Healy. If the contract language states something different and it is not clarified, use it to your advantage. I do not expect you will get anything out of it but you can throw bullshit against bullshit when he hits you in the end.[146]

[146] John Groth email, JX1 tab 20, p. 3.

The response from a third employee of the first defendant was, "[r]ight now I do not see any exclusion from [plaintiff] on this issue. So we use it to our advantage."[147] A third employee replied that the other trade contractors were:

> responsible for there [sic] own hoisting. We let them know during the scope review that a Tower Crane would be on site for a certain duration but they would have to cut their own deal with Healy long [sic]. If they did not cut their own deal than [sic] they would have to bring in their own crane.[148]

Despite this acknowledgement, defendants pressed their claim regarding the tower crane anyway.

In addressing the dispute over pouring the footers, employees of one of the defendants exchanged e- mails about whether the new subcontractors who were being brought in to do the work had submitted a quote prior to defendants back charging plaintiffs. The response was, "[d]o not need one, I hope it costs [plaintiffs] a million dollars."[149]

Most instructive, however, is an email from an employee who started the project working for one defendant and ended it working for the other. Over two months before the contract between the parties was signed, he summarized his reaction to a conversation with plaintiffs' principal in the following message to BPG's president:

> He has me so pissed at this point, I want to choke the bastard but it will not help the issue. When I push the limits, he doesn't want to walk. He wants to

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[147] JX1 tab 20, p. 2.

[148] JX1 tab 20, p. 2.

[149] JX1 tab 115.

> make the fight between Healy and Gilbane, not BPG. He at least understands where future work will come from. We could see what type of response we get if you light him up.
>
> We have two options. Kick him out and get someone else. It kills us and him, even if we can find someone.
>
> Option two would be to offer some form of settlement with the intent that we get things going, beat the shit out of him, screw him in the end and try to make it back along the way. The reality is that we would probably not make it back all the way. Once the crane is up, he is on the hook. I know, you have been saying it for weeks. It at least gives him an incentive to move. Right now we have no hook in him for time.
>
> In my entire career I have never dealt with someone who was as deceiptful [sic] as [plaintiff's principal] and who would want to make me take this type of approach. I have always tried to be fair but firm. He is taking avantage [sic]. He has had us on the hook from day one and is taking advantage. That will not happen again but it does not help us today.[150]

John Groth was the author of this email. It appears personal enmity arose between him and John E. Healy during the construction of Tower I. Listening to the two of them testify indicated that ill-will carried over to the disputes involving the Tower II project. Groth was more in the "driver's seat," i.e., in a position to influence the defendants' positions. As this Court's earlier discussion manifests, those decisions were often not well taken. The enmity, perhaps particularly driven over problems created by other non-parties, assumed too large a role in this case. It is an important factor, but not exclusive, in the Court's decision regarding additional damages.

Having sat in a number of construction dispute trials and at one time, representing contractors, the Court is familiar with the "rough and tumble" in the construction world,

[150] John Groth email, JX1 tab 34, p. 1.

including good faith disagreement over work done or not done or quality of work, and language freely used. To be clear, therefore, it is much more here than some of the off-color language. It is the state of mind it betrays in this particular case.

It is clear to the Court that defendants' agenda from the outset was not full and faithful cooperation with plaintiffs in completion of their mutual obligations to one another. But for this attitude, this suit might never have been brought; and it is only because plaintiffs did not prevail completely on all its claims that the Court is not awarding plaintiffs their full costs and attorneys' fees. Since plaintiffs have not sought a specific sum in this regard, the Court directs them to submit a claim under the parameters established by the Delaware Supreme Court in *Mahani v. EDIX Medai Group, Inc.*[151]

With respect to plaintiffs' claims for additional damages under the Delaware Mechanics' Lien Statute, the Court finds Judge Graves' comments, in *Nason Constr.*, regarding attorneys' fees in a very similar case, instructive:

> Experience teaches us that in these types of construction cases, neither party has a monopoly as to the facts. . . . Also, I note that both parties share some of the blame that allowed the problems to develop, in that neither party followed the contract protocol for change orders. To award Plaintiff its entire requested attorneys' fees would therefore be unreasonable. I also note that the statute's intent is remedial and perhaps to level the playing field. There is a price to be paid if one violates the statute and that price is to pay the "victim's" attorneys' fees.[152]

The price to be paid under the mechanics' lien statute for grossly overstating the disputed portion of a claim is additional damages; and since plaintiffs prevailed on

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[151] 935 A.2d 242, 245-46 (Del.2007).

[152] *Nason Const.,* 2008 WL 4216149, at *9.

approximately 60% of the amounts they initially claimed, the Court awards an equal percentage of plaintiffs' awarded claims, for an additional $117,895.47. In total, plaintiffs are awarded $467,171.54 plus such additional attorneys' fees, interests, and costs as the Court determines after Plaintiffs' submission. GBC posted the $700,022.35 bond. The defendants will have to work out, among themselves, who will pay plaintiffs.[153] The plaintiffs shall prepare an order, obtaining defendants' consent as to form, incorporating the awards made herein.

IT IS SO ORDERED.

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J.

[153] In the stipulation which accompanied the bond, it is noted plaintiffs' claim was for $518,535, plus they added 35% as a hedge on interest cost.