

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY**

PAUL MOLLOY, d/b/a	:	
FRAME MASTERS,	:	C.A. No: 05L-02-004
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DAYSTAR SILLS, INC.,	:	
	:	
Defendant.	:	

ORDER

Plaintiff, Paul Molloy, d/b/a Frame Masters, (“Molloy”) is seeking judgment against Defendant, Daystar Sills, Inc., (“Daystar”) for breach of contract. Molloy complains that Daystar failed to pay him for the balance of a subcontracting agreement, plus the cost of additional work he performed at Daystar’s request on the Safe Harbor Hotel and Condominiums. Molloy also asserts a claim for unjust enrichment against Defendant, Anchor Investments, Inc., the owner of the Safe Harbor Hotel and Condominiums. Molloy also filed a mechanics’ lien,¹ which was discharged by this Court on March 18, 2005 in exchange for a letter of credit issued by Wilmington Savings Fund Society on behalf of Daystar. Daystar counterclaims against Molloy for the direct costs incurred by Molloy’s delay of the project and the costs to correct Molloy’s defective work. A two-day bench trial was held in this matter on August 14 and 15, 2005. Following trial, the parties also had the opportunity to submit post-trial briefs. After hearing the testimony of the witnesses

¹ 25 Del.C. § 2711.

at trial, examining the exhibits, and considering the submissions of counsel, the following are the findings of fact and conclusions of law.

FINDINGS OF FACTS

_____ Paul Molloy is a rough frame contractor, who does business as Frame Masters, a sole proprietorship. Molloy and Daystar entered a contract in March 2004 related to the construction of the Safe Harbor Hotel and Condominiums in Lewes, Delaware, which is owned by Defendant, Anchor Investments, Inc. (“Anchor Investments”). Daystar was the general contractor that was responsible for the overall construction of the project. Molloy was hired as a subcontractor by Daystar to perform metal and plywood framing, roof sheathing and blocking, installation of windows, exterior doors and frames, installation of “Tyvek” building paper, and ceiling grid work. The parties’ original contract provided that Daystar would pay Molloy \$179,500 for the labor required for those tasks. The parties agree that the amount of the original contract was reduced by \$31,500, because Molloy volunteered to subcontract the ceiling grid and Tyvek portions of the contract to another subcontractor.

In addition to the original contract provisions, Daystar also asked Molloy to perform \$43,260 of additional work, which increased the amount Daystar owed Molloy to \$191,260. The parties agree that Daystar has paid Molloy \$146,362 to date. Molloy is seeking payment of the outstanding balance, \$44,898, plus 1.5% interest per month from the date of the alleged breach of contract. Daystar disputes the total amount due for the additional work, arguing that the cost of the additional work was \$35,620, of which \$3,400 was already paid to Molloy. Daystar also argues that Molloy breached the contract by delaying the project, and performing defective work. Daystar claims that it incurred \$37,383 in direct costs as a result of Molloy’s

breach of contract.

A. Delay in the Critical Path.

Molloy's first task on the Safe Harbor project was framing and sheathing the roof, which the parties agree is an item on the "critical path" of the entire project.² The critical path refers to the order in which things on a project must be completed.³ Early items on the critical path must be completed before other trades can begin their work.⁴ Daystar argues that Molloy caused a delay in the critical path of the Safe Harbor project, which set back the entire project six weeks.⁵ As a result, Daystar is seeking reimbursement for the salaries of Daystar employees, Thad Kush, the project manager, and Sand Hoffman, the project superintendent.⁶

Molloy commenced work on the Safe Harbor project in March 2004, shortly after he finalized the contract with Daystar.⁷ Originally, Molloy was scheduled to begin the project in December, but because Daystar was experiencing delays in setting the footings and steel and concrete planks, he could not start until March.⁸ Molloy testified that the project's initial delays put him three months behind Daystar's schedule before he even started.⁹ However, Kush testified that the initial

² Molloy A155:9-21; Kush B73:1-4.

³ Kush B73:10-16.

⁴ Kush B73:10-16.

⁵ Kush B74:11-18.

⁶ Defendants' Exhibit 5.

⁷ Molloy A180:8-15.

⁸ Molloy A157:2-17.

⁹ *Id.*

delays had no bearing on the new schedule, which was reviewed regularly and adjusted for circumstances.¹⁰ Kush admitted, however, that the schedule for Safe Harbor was aggressive.¹¹ Kush testified that the initial delays caused Daystar difficulties, because Daystar was receiving a flat fee for the project.¹² Kush tried to push the schedule to move the project as quickly as possible, in order to get back on schedule.¹³ Although Molloy initially told Kush that he would need fourteen weeks to frame and sheath the roof, Kush did not consult with Molloy or any of the subcontractors when developing the project schedule.¹⁴

Notwithstanding the disputed impact of the initial delays on the project schedule, the evidence indicates that the delay in the roof framing and sheathing was caused by a problem with the suppliers of the roofing materials. To the contrary, Kush blamed Molloy for failing to support the job properly with enough carpenters. Kush's claim that Molloy delayed the project is not persuasive. Kush contradicted his testimony, which blamed Molloy, by his admitting that there was a "huge" delay with the supply of steel needed to do the framing.¹⁵ Although Kush testified that the supply of materials was only an issue in the beginning, his July 28, 2004 letter to State Line Building Supplies, Inc., reveals that Daystar's supply of materials was an ongoing problem.¹⁶ In the letter, Kush described the "horrible set of circumstances"

¹⁰ Kush B153:13-22; B154:9-12.

¹¹ Kush B37:19-20.

¹² Kush B135:2-9.

¹³ *Id.*

¹⁴ Kush B136:1-11; B137:8-15.

¹⁵ Kush 142:15-19.

¹⁶ PX-9

in Daystar’s supply of materials that caused Daystar to “limp along and take what we could get when we could get it.”¹⁷ Kush blamed State Line directly for the delay in metal framing. “Metal stud framing on this job should have been done months ago but could not be simply because State Line could not service the job properly.”¹⁸ Kush’s letter to State Line is also corroborated by the testimony of Sand Hoffman, Daystar’s superintendent on the Safe Harbor project until August 2004. Hoffman testified that Daystar received a “trickle of steel,” which was caused indirectly by a restriction in the steel supply in China.¹⁹ Finally, Kush conceded that framing was not the only cause of the job’s delay. Rather, he testified that at the time, only a few trades were working, and framing was the bulk of the work.²⁰

Daystar failed to establish that Molloy was the sole cause of the delay of the project, which might warrant reimbursement of the salaries of Kush and Hoffman to Daystar. The weight of the evidence established that the project was hampered by set backs before Molloy was on-site. The testimony and evidence demonstrate that Daystar had supply problems, which directly impacted the project’s progress. Although Kush claims that Molloy failed properly to staff the job with carpenters, the evidence was that Molloy had as many as eighteen carpenters on the job, often with little or no materials.²¹ Molloy’s carpenters were not idle, however, they assisted in different areas.²² Ironically, Kush, who claims that Molloy improperly staffed the job,

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Hoffman B108:6-20.

²⁰ Kush B139:14-21.

²¹ TR Kush B166:1-8

²² Hoffman B108:6-20.

attempted to use the evidence that Molloy had ample carpenters on the job to prove that there was enough material.²³ I find that the project delay was not attributable to Molloy. Therefore, Daystar's claim for \$15,357.56 in reimbursement of the salaries of Kush and Hoffman for six weeks is **DENIED**.

B. Chicago Grid Ceiling.

Daystar also seeks reimbursement for the additional costs it incurred to hire another subcontractor to install the Chicago Grid ceiling. Molloy's original bid on the project provided that Molloy would install the ceiling grid for a cost of \$15,000.²⁴ After contract negotiations, Molloy agreed to do the ceiling grid work, and remove the separate charge.²⁵ In May 2004, Molloy met with David Sills, owner of Daystar, and Kush to discuss how the project could be accelerated.²⁶ Molloy testified that, at the time, the project as a whole was behind schedule.²⁷ During the brainstorming session, Molloy suggested that Daystar bring in more help.²⁸ He also offered to give up the ceiling grid portion of his contract, and deduct \$30,000 from his contract, if Daystar wanted to hire another subcontractor.²⁹ Daystar accepted Molloy's suggestion to hire another subcontractor to install the ceiling grid. Daystar also accepted Molloy's offer to find the subcontractor. Ultimately, Peninsula Acoustical

²³ Kush 166:1-8.

²⁴ Molloy A183:19-23; A184: 1-9.

²⁵ *Id.*

²⁶ Molloy A182:6-23.

²⁷ Molloy A183:2-3.

²⁸ Molloy A181:1-15.

²⁹ Molloy A181:1-15.

was hired to do the work.³⁰ Kush testified that Daystar was frustrated in Molloy's progress in finding a new subcontractor.³¹ Kush also stated that Daystar would have been in a better position to hire a new subcontractor, if Molloy had approached them three or four months earlier.³² Daystar was put at a disadvantage, because Peninsula Acoustical was the only subcontractor who could do the job at the time.³³ Kush also blames Molloy for not finding a new subcontractor quickly enough, even though Daystar took an active role in finding the new subcontractor.³⁴

Despite the \$30,000 reduction in Molloy's contract, Daystar claims it incurred an additional \$10,172 in costs related to the ceiling grid.³⁵ In support, Daystar submitted an invoice from Peninsula Acoustical, dated December 6, 2004, with a charge of \$10,172 for drywall furring.³⁶ Rick McCoy³⁷ testified that Daystar back-charged Molloy for the Peninsula Acoustical invoice for \$10,172 for drywall furring, because the only project that required furring was the ceiling grid.³⁸ However, McCoy could not testify that Molloy should be liable for the back charge, because he did not know if Molloy was responsible for drywall furring under the terms of the

³⁰ Kush B49:9-23.

³¹ Kush B50:13-23.

³² Kush B50:7-11.

³³ Kush 51:10-19.

³⁴ Kush B51:7-8.

³⁵ Kush B52:1-2; Def. Ex. 3.

³⁶ Def. Ex. 3.

³⁷ McCoy was the Daystar superintendent who took over the Safe Harbor project in September 2004, when Hoffman left Daystar's employ.

³⁸ McCoy A84:1-10.

original contract.³⁹

Daystar has failed to establish by a preponderance of the evidence that Molloy should be held responsible for any amounts charged by Peninsula Acoustical over \$30,000. It is insufficient to infer that, because Peninsula Acoustical assumed the installation of the ceiling grid from Molloy, Molloy is responsible for any additional work that Peninsula Acoustical performed over \$30,000. The original contract only provides that Molloy will supply the labor for “ceiling grid work.”⁴⁰ However, the contract is ambiguous as to what the ceiling grid work entails. Daystar is unable to provide evidence that, under the terms of the contract, Molloy would have been responsible for drywall furring. McCoy’s testimony that the only job that required drywall furring was the ceiling grid is not sufficient. In addition, McCoy could not state affirmatively that Molloy should be back-charged for the drywall furring, because he did not know if Molloy was required to do drywall furring as a part of the original contract. Daystar’s request for reimbursement for Peninsula Acoustical’s additional charges of \$10,172 for drywall furring is **DENIED**.

C. Tub Enclosures.

Daystar is seeking \$896.00 in back charges for the repairs made around the bathtubs, which Daystar attributes to Molloy’s defective framing for the openings around the bathtubs. McCoy noticed a problem with the framing in the bathrooms, when the drywalling commenced in October 2004.⁴¹ There was a gap between the

³⁹ McCoy A84:11-19.

⁴⁰ Plaintiff’s Ex. 1.

⁴¹ McCoy A32:1-22.

bathtub and the wall that had to be repaired.⁴² McCoy telephoned Molloy, and asked he about the tub framing.⁴³ Molloy advised McCoy that he got the dimensions for the tubs from Hoffman.⁴⁴ Hoffman admitted that the framing of the bathtubs was difficult.⁴⁵ Hoffman had to consult back and forth between the architect and framers, because there were fire code issues that had to be addressed.⁴⁶ As a result, the rough openings for the tubs had to be modified on-site.⁴⁷ Based on the architect's suggestions, Hoffman measured the tub enclosures, and laid the lines for the framing.⁴⁸ Molloy explained to McCoy that Hoffman and the architect determined that, in order to conform to the fire code, multiple layers of drywall had to be installed around the tubs.⁴⁹ Molloy concluded that the drywaller had not hung the requisite layers of drywall, thereby creating a gap.⁵⁰

Molloy's impression of his conversation with McCoy was that the problem with the tubs was recognized as not being his fault, but was caused by the failure of the drywallers to install multiple layers of drywall.⁵¹ As a result, Molloy did not believe he was under an obligation to inspect or repair the problem. McCoy testified

⁴² McCoy A199:6-22.

⁴³ McCoy A32:1-22.

⁴⁴ McCoy A32:1-22.

⁴⁵ Hoffman A98:8-20.

⁴⁶ Hoffman A98:8-20; A143:1-23.

⁴⁷ Hoffman A143:1-23.

⁴⁸ Hoffman B114:1-5.

⁴⁹ Molloy A199:6-22.

⁵⁰ Molloy A202:5-7.

⁵¹ Molloy A204:1-12.

that he did not follow-up with Hoffman to verify Molloy's version of the story.⁵² Hoffman corroborated Molloy's testimony, and stated that any problems with the tub framing were not caused by Molloy.⁵³ However, Kush blamed Molloy for the problems with the tubs, based on his conversations with McCoy and the drywallers.⁵⁴ Kush never visited the site himself, nor did he contact Hoffman, who was the superintendent on-site, when the tubs were measured and subsequently framed.⁵⁵ I am satisfied that Molloy framed the tubs according to Hoffman's measurements, which were calculated after consulting with the architect for compliance with the fire code. Any remedial work was caused by the drywallers' failure to install the additional layers of drywall. Daystar's request for reimbursement for the costs to repair the tub enclosures is **DENIED**.

D. Window Extensions Jambs.

The original contract required Molloy to install the windows and exterior doors and frames on the Safe Harbor project. Daystar claims that Molloy's installation of the windows and doors was defective, and Daystar is seeking \$5,935 for the cost of repairs. The parties do not agree on any of the circumstances surrounding the windows and doors. McCoy testified that the jambs on the windows and doors were too short and required extensions.⁵⁶ Molloy stated there was nothing wrong with the

⁵² McCoy A33:4-7.

⁵³ Hoffman A148:1-3.

⁵⁴ Kush B55:16-18; B56:8-10.

⁵⁵ Kush B55:19-23; B56:1; B56:11-20.

⁵⁶ McCoy A34:1-8.

height or width of the rough openings for the windows.⁵⁷ Molloy claimed that the windows were perfectly flush, but the windows sat back too far.⁵⁸ Molloy did not believe he framed or installed the windows incorrectly. He believed that the wrong windows were ordered.⁵⁹ Likewise, Hoffman did not attribute any problems with the windows and need for extension jambs to Molloy.⁶⁰ Hoffman, who was the superintendent on-site when the windows were installed and framed, testified that Atlantic Millwork provided an incorrect list of rough openings for the windows, and the windows on the north side of the building had to be modified.⁶¹

The parties also disagree as to when Molloy was notified of the problems with the windows and doors. McCoy testified that he discovered the problem at the end of October, when the drywalling commenced.⁶² McCoy stated that he telephoned Molloy, who denied any wrongdoing.⁶³ McCoy testified that Atlantic Millwork performed the corrective work in October or November 2004, despite the fact that the invoice for the work is dated March 2005.⁶⁴ Molloy claimed that he was first notified that the windows required extension jambs in February 2005.⁶⁵ Molloy was told that extension jambs had to be put on every window.⁶⁶ But McCoy testified that not all

⁵⁷ Molloy A208:16-23.

⁵⁸ Molloy A209:1-7.

⁵⁹ Molloy A206:13-22.

⁶⁰ Hoffman A147:15-22.

⁶¹ Hoffman A144: 12-20; B113:12-18.

⁶² McCoy A33:13-23.

⁶³ McCoy A34:9-15.

⁶⁴ McCoy A80:1-13; A81:1-7.

⁶⁵ Molloy A204:17-23; A205:1-6.

⁶⁶ Molloy A204:17-23; A205:1-6.

of the windows needed extension jambs.⁶⁷ The testimony of McCoy and Molloy did not clarify the issue of why extension jambs were needed on some or all of the windows. Nor did their testimony shed any light on when Molloy was notified of the problem. Hoffman, who was on-site when the windows and doors were installed, stated that he did not see any deficiencies in the doors and windows. Thus, Daystar failed to prove that any of the corrective measures taken with respect to the doors and windows were caused by Molloy's defective work, and Daystar's request for reimbursement is **DENIED**.

E. Knee Walls,

_____ Daystar is seeking reimbursement of \$2,240 for the cost of moving the knee walls in the kitchens. Daystar claims Molloy is liable for that amount, because Molloy placed the framing for the knee walls in the wrong location. McCoy was advised of the problem with the placement of the knee walls by the cabinet installer.⁶⁸ When the cabinet installer measured for the cabinets, he discovered that there was not enough room, as he needed an additional 126 inches of clear.⁶⁹ Because the cabinets had already been ordered and received, Daystar's in-house carpenters removed the knee walls.⁷⁰

On Molloy's last day on the job at Safe Harbor, he advised McCoy to contact him if there were any problems with his work.⁷¹ McCoy admitted that he never

⁶⁷ McCoy A43:18-23.

⁶⁸ McCoy A35:3-11.

⁶⁹ McCoy A58:4-11.

⁷⁰ McCoy A58:4-11, 17-21.

⁷¹ Molloy A202: 16-22.

contacted Molloy about the problem with the knee walls.⁷² Molloy learned of the problem from Kush, when he called Kush in November 2004 to inquire about the status of the payment of his bills.⁷³ At the time of their conversation, Daystar's in-house carpenters had already corrected the alleged problem.⁷⁴ Hoffman recalled that Molloy had some questions about the knee walls, because in some units, the knee walls had to be modified to line-up with the plumbing.⁷⁵ However, Hoffman did not recall any other problem with the placement of the knee walls.⁷⁶ Hoffman also testified that the superintendent would be responsible if the knee walls were not put in the right place.⁷⁷ Daystar did not prove that Molloy was responsible for the alleged misplacement of the knee walls. The testimony was unclear why the knee walls had to be moved. That it, Daystar did not establish whether Molloy misplaced the knee walls, or whether there was a problem with the cabinets that were ordered. In addition, even if the placement of the knee walls were Molloy's fault, Daystar did not give him the opportunity to correct the problem.

F. Curved Wall, Vaulted Ceiling, and Fireplaces.

Daystar is also seeking back-charges from Molloy for his alleged defective framing of a curved wall in a stairwell, of a vaulted ceiling in a condominium unit, and of fireplaces. Similar to the knee walls, Molloy was never notified of any

⁷² McCoy A64:6-12.

⁷³ Molloy A197:6-22.

⁷⁴ Molloy A237:8-15.

⁷⁵ Hoffman A145:1-16.

⁷⁶ Hoffman A144:21-23.

⁷⁷ Hoffman A103:1-13.

problems with the framing of these areas.⁷⁸ McCoy testified that the curved wall had to be repaired, because the wall was not curved, but came to a point.⁷⁹ This problem was not discovered until the area was drywalled in March 2005.⁸⁰ McCoy also learned about the “wave” in the vaulted ceiling by the owner of the condominium in May 2005.⁸¹ Similarly, a condominium owner informed McCoy about a fireplace that was not square, which McCoy admits that he did not inspect himself.⁸²

As with the knee walls, Daystar makes blanket, conclusory statements that these problems were caused because of Molloy’s framing. For example, McCoy states that the ceiling wave was corrected by cutting out the first sheet of drywall, and installing more drywall.⁸³ This is not proof that the ceiling wave was caused by the framing. To the contrary, the testimony suggests that there was a problem with the drywalling. I find that Daystar has failed to prove that Molloy is responsible for the repairs made to the curved wall, vaulted ceiling, or fireplaces.

G. Amount Owed for Change Orders

In addition to the work encompassed by the terms of the original contract, Daystar asked Molloy to perform extra jobs during the course of the construction of the project. When Daystar made requests for additional work, Molloy would draft a

⁷⁸ McCoy A36:12-14; A37:7-11; A86:12-13.

⁷⁹ McCoy A36:1-10.

⁸⁰ McCoy A36:1-10.

⁸¹ McCoy A87:10-13.

⁸² McCoy A36:15-22.

⁸³ McCoy A52:3-9.

change order invoice, which was presented to Daystar for approval.⁸⁴ However, the parties did not have any established practice in terms of obtaining signatures on the invoices. Some of the invoices that Daystar agreed to pay were signed; some were not.

The parties dispute the total amount of those charges. Molloy has submitted invoices, totaling \$43,260. Daystar disputes that balance, arguing that the total additional work totals \$35,620. The disputed invoices are SH-003, SH-006, SH-008, SH-010, SH-015, SH-016, SH-017, and SH-018. In neither Daystar's supplemental submissions nor the witnesses' testimony does Daystar claim or deny the charges with reference to invoice number SH-003 and SH-008, dated July 29, 2004 and May 15, 2004, respectively. The invoices detail the work performed, the time required, and the number of carpenters used for the work. Without any evidence to the contrary, there is sufficient evidence to establish that Molloy performed this work in addition to his contractual obligations.

Daystar specifically rejects invoices' SH-006 and SH-010, dated May 15, 2004 and July 29, 2004, respectively. The face of each invoice has notations made by someone at Daystar. Invoice SH-006, dated May 15, 2004, is a \$1,280 charge for the installation of angle clips on the second floor deck to hold plywood and frieze board.⁸⁵ The notation on SH-006 indicates, "no soffit shows on plans," but does not explain why Daystar denied payment for the installation of angle clips. Moreover, Kush's testimony does not illuminate the issue. Kush's equivocal testimony, "I think that's why I denied it," was not probative.⁸⁶ There is no evidence that Molloy did not

⁸⁴ Molloy A158:6-15.

⁸⁵ Kush B91:1-21.

⁸⁶ Kush B91:9.

perform the work. Daystar did not sufficiently explain why the invoice should not be paid.

Invoice SH-010 is a \$3,840 charge for blocking that was done for the residential elevators. The Daystar notation on the invoice indicates, “No. Blocking and did not frame properly.” Molloy testified that he unilaterally did blocking for the elevators, which was not on the original plans, and not part of the original contract.⁸⁷ Molloy performed the blocking, because he thought it needed to be done. Without the blocking, he stated there would be nothing to bolt the elevator cars.⁸⁸ Molloy admitted that he did the work, sending the invoice to Daystar after-the-fact.⁸⁹ Kush testified that Daystar refused to pay invoice SH-010, because he did not feel that it was Daystar’s responsibility.⁹⁰ Molloy has failed to prove that Daystar should pay for the invoice, based on Molloy’s admission that he performed the blocking without approval from Daystar.

The parties also dispute SH-018, which is a \$560 charge for changing a closet in the master bathroom in Unit 4. Neither Daystar’s post-trial submission, nor the trial testimony provides any discussion of the validity of this charge. In addition to the invoice, prepared by Molloy, there is also a hand-written note, detailing the same information as the invoice. The note was signed and dated by a Daystar representative, which indicates Daystar’s acceptance of the charge.

Finally, the parties dispute SH-015, SH-016, and SH-017, which are detailed summaries of the work described on a change order invoice, dated September 24,

⁸⁷ Molloy A171:1-14.

⁸⁸ Molloy A172:1-13.

⁸⁹ Molloy A171:17-23.

⁹⁰ Kush B92:12-23.

2004.⁹¹ Molloy's testimony was that he re-wrote the original change order at the request of Daystar, who wanted a more detailed summary to present to the owners of Safe Harbor.⁹² The detailed summary is memorialized on SH-015, SH-016, and SH-017, which total \$20,960. Daystar does not dispute the original invoice for \$20,800.⁹³ Molloy does not explain the difference in the charges from the September 24, 2004 to the more detailed invoices of SH-015, SH-016, and SH-017. Therefore, I find that the correct amount due for that work to be \$20,800.

H. Retainage.

The original contract is the result of the parties' negotiation of Molloy's original bid. The contract does not provide a retainage for any portion of Molloy's fee. Retainage is the portion of the contract that is withheld until the job is complete to ensure that the work is not only completed, but is also acceptable.⁹⁴ Not all general contractors withhold retainage from subcontractors until the entire project is completed.⁹⁵ This is particularly true of subcontractors, like framers, who are on the project at its early stages. ⁹⁶ Molloy acknowledged that he assumed that Daystar would withhold 10% of the final payment as retainage, which Kush testified is

⁹¹ Daystar's Post-Trial submission and Kush's testimony indicate that the SH-012 is also included in the invoice, dated September 24, 2004. However, a calculation based on Daystar's known rejected items, leaves a balance of \$35,620, which is the amount that Daystar claims is the accurate total for the change order invoices.

⁹² Molloy B22:11-21.

⁹³ Kush B95:20-22.

⁹⁴ Molloy B16:6-12.

⁹⁵ Molloy B16:13-20.

⁹⁶ Molloy B17:2-11.

standard.⁹⁷ At the time of trial, Kush testified that Daystar had not received its retainage from the owners of Safe Harbor.⁹⁸ Despite Molloy's assumption that retainage might be withheld from his payment, the contract does not address retainage. Therefore, regardless of whether Daystar has been paid in full by the owners of the Safe Harbor project, no retainage will be withheld from the balance owed to Molloy.

I. Contract Interest.

In addition to the amount Molloy is seeking for the breach of contract, Molloy is also seeking interest at a rate of 1.5% per month (18% per annum) from the date of the breach. The parties' contract does not provide for contract interest. Citing *Carney v. McGinty*,⁹⁹ Daystar argues that the interest must be computed based 6 Del.C. § 2301(a). In *Carney*, the Court analyzed Delaware law on prejudgment interest, and found that prejudgment interest is appropriate in cases in which the damages are calculable and not liquidated in nature.¹⁰⁰ Like the present matter, the case in *Carney* was a contract dispute, in which the contract did not provide contract interest.¹⁰¹ Without a specific provision for contract interest, the Court held that interest should be assessed according to §2301(a), which provides a rate that is 5% over the Federal Reserve discount rate at the time the interest was due.¹⁰² In *Carney*, the Court found

⁹⁷ Molloy B18:9-16; Kush B52:8-16.

⁹⁸ Kush B52:20-23; B53:1.

⁹⁹ 1988 WL 55336 (Del. Super.).

¹⁰⁰ *Id.*, at *7.

¹⁰¹ *Id.*

¹⁰² *Id.*

that interest was due at the time final payment was made. As such, prejudgment interest in the present matter shall be assessed from the date final payment was due. Because the parties dispute when final payment was due, I find that final payment was due on October 13, 2004, the date that Molloy claims was his last day on the job. Interest shall be calculated from that date based on an interest rate according to §2301(a).

J. Claims Against Anchor Investments

Daystar argues that Molloy cannot maintain an equitable action against Anchor Investments on the theory of quantum meruit on two bases. The first is that Molloy never alleged that he would not be paid by Daystar eventually. The second is that Anchor Investments failed to pay Daystar for the services rendered by Molloy. Daystar cites *Griffin Dewatering Corp. v. B.W. Knox Construction Corp.*¹⁰³ for its argument that Molloy cannot maintain an action against Anchor Investments. In *Griffin*, the Court rejected claims against a party that was a third-party beneficiary to the contract at issue. The Court held that quantum meruit recovery is only appropriate if the plaintiff “establishes the services were performed with an expectation that the recipient of the benefit would pay for them, and that the services were performed, absent a promise to pay, under circumstances which should have put the recipient of the benefit upon notice that the plaintiff expected to be paid.”¹⁰⁴

Although Anchor Investments was a named Defendant in this case, and attended trial, Anchor Investments did not actively participate during trial. Anchor Investments’ presence at trial was to observe the proceedings in order to protect their

¹⁰³ 2001 WL 541476 (Del. Super.).

¹⁰⁴ *Id.* (citing *Bellanca Corp. v. Bellanca*, 169 A.2d 620, 623 (Del. 1961)).

interest in the matter. In fact, Molloy's case during trial did not address Anchor Investments directly. Molloy never claimed that he could not recover from Daystar, nor did Molloy claim that Anchor Investments failed to pay Daystar for Molloy's work. As a third-party beneficiary to the contract between Molloy and Daystar, Anchor Investments should be dismissed from this matter. Molloy's claims for breach of contract are addressed properly to Daystar, which was in privity of contract with Molloy for the subcontracting contract.

JUDGMENT IS ORDERED AS FOLLOWS:

1. In favor of Plaintiff, Paul Molloy, d/b/a Frame Masters, and against Defendant, Daystar Sills, Inc., the sum of \$40,898. This sum represents \$44,898, the amount originally requested by Molloy, less \$160 for the difference in the change order, and the total of invoices SH-015, SH-016, and SH-017. This amount is further reduced by \$3,840, the amount charged for invoice SH-010.

2. In favor of Plaintiff, Paul Molloy, d/b/a Frame Masters, and against Defendant, Daystar Sills, Inc., for interest on \$40,898 at the legal rate as established under 6 Del.C. § 2301(a) from October 13, 2004.

3. In favor of Defendant, Anchor Investments, Inc., and against Plaintiff, Paul Molloy d/b/a/ Frame Maters.

SO ORDERED this 29th day of March, 2006.

/s/ Robert B. Young

J.