STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 208-3-16 Cncv

J&K TILE COMPANY,
Plaintiff,

v.

WRIGHT & MORRISSEY, INC,
Defendant.

RULING ON DEFENDANT'S "MOTION FOR SUMMARY JUDGMENT" AND PLAINTIFF'S "RENEWED DREQUEST FOR ORDER DIRECTING THE LITIGATION TO ALTERNATIVE DISPUTE RESOLUTION

This is an action for damages for the alleged breach of a contract relating to the construction of a four-story, fifty-six-unit apartment building in Winooski, Vermont. Defendant Wright & Morrissey, Inc. of South Burlington, Vermont, was the general contractor for the project, and Plaintiff J&K Tile Company of Sachse, Texas, was the flooring and tile subcontractor. Plaintiff is represented by Mark G. Hall, Esq., and defendant is represented by Michael B. Clapp, Esq.

On December 11, 2014, the parties entered into a "Standard Form of Agreement Between Contractor and Subcontractor" (Exhibit A) ("subcontract" or "agreement"). Under the agreement, J&K Tile was to perform its flooring and tile work within a specified amount of time and for a specified amount of money. The scope of work and amounts to be paid were amended from time to time by means of change orders signed by the parties.

It is undisputed that J&K Tile fully performed its work as provided for in the agreement; Defendant Wright & Morrissey makes no claim that Plaintiff breached the subcontract or that Plaintiff's work was defective or untimely. In its Complaint, J&K Tile alleges that Wright & Morrissey breached the subcontract by failing to pay amounts that were contractually due because of a nearly four-week interruption in the work ordered by Wright & Morrissey, failing to mediate as required by the contract, and delaying payment of retainage owed after Plaintiff's work was completed. Wright & Morrissey denies all of Plaintiff's claims and asserts various defenses.

Presently before the court are Defendant's "Motion for Summary Judgement" as to all claims asserted in Plaintiff's Complaint, and Plaintiff's "Renewed Request for Order Directing the Litigation to Alternative Dispute Resolution."

"[S]ummary judgment should be granted when, taking all allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Richart v. Jackson, 171 Vt. 94, 97 (2000). Generally, the court must consider the facts presented in the light most favorable to the nonmoving party, who "is entitled to the benefit of all reasonable doubts and inferences." Lamay v. State, 2012 VT 49, ¶ 6, 191 Vt. 635; see also Madkour v. Zoltak, 2007 VT 14, ¶ 12, 181 Vt. 347.

Plaintiff's Claim for Breach of Contract for Failing to Pay Alleged Time and Cost Overruns

Plaintiff's first claim is that Defendant breached the subcontract by failing to pay Plaintiff $42,000 in time and cost overruns, which Plaintiff claims it was entitled to receive on account of a temporary work stoppage imposed by the Defendant. Defendant denies the claim and contends that Plaintiff is precluded from asserting it because Plaintiff did not assert the claim within twenty-one days of completing its work on the project. The following facts are undisputed, unless indicated otherwise.

On April 22, 2015, Wright & Morrissey notified J&K Tile that J&K's work on the project would be suspended for a few weeks beginning the following day. Wright & Morrissey claims that its action was authorized by Section 7.3.1 of the subcontract, which provided:

> The Contractor may, without cause, order the Subcontractor in writing to suspend, delay or interrupt the Work of this Subcontract in whole or in part for such period of time as the Contractor may determine. In the event of suspension ordered by the Contractor, the Subcontractor shall be entitled to an equitable adjustment of the Subcontract Time and Subcontract Sum.

(Exhibit A, p. 10). J&K Tile claims that Wright & Morrissey's action was taken pursuant to a "Memorandum of Understanding," which the parties had signed on April 16, 2015. That document provided as follows:

> Wright & Morrissey, Inc. and J&K Ti8le Co. are of the mutual understanding that J&K Tile Co. will be able to substantially complete the scope of work of its Subcontract between the dates of March 2, 2015 and May 21, 2015 with minor construction sequencing interruptions and without having to leave the project and return at a later date due to major interruptions to or delays in progress of the project that are not the fault of J&K Tile Co. It is agreed and understood the floors will become available for flooring installation on two week intervals, starting at the 4th floor on March 2, 2015 and proceeding from top to bottom.
>
> Wright & Morrissey recognizes that J&K Tile has fixed overhead costs in the form of rooms, meal costs, warehouse rental, and forklift costs. If J&K Tile is delayed beyond May 21, 2015 through no fault of its own, Wright & Morrissey agrees to pay not to exceed documented daily costs of $2,000.00 per day.

> In the event Wright & Morrissey foresees a delay in excess of five days to the project, both parties agree that Wright & Morrissey may terminate the Subcontract Agreement and pay J&K Tile for the percent complete to date or direct J&K Tile to temporarily leave the project to return at a later date to complete the work of their Subcontract. It is agreed that cost for travel and downtime are not to exceed $16,300.00.
>
> Wright & Morrissey intends to make all reasonable efforts to keep J&K Tile Co. working continuously and productively on this project.

(Exhibit 1 to the Affidavit of Jeffrey L. Slusher).

In response to Wright & Morrissey's instructions, J&K Tile stopped work on the project and returned to Texas. On May 19, 2015, J&K returned to Vermont and resumed its work. J&K finished its work at the project on June 13, 2015, and has not performed any further work on the project since that date.

On May 12, 2015, J&K Tile submitted a proposed change order to Wright & Morrissey proposing to add $16,299 to the amounts alleged due it on account of the April interruption of its work. The breakdown of that figure was as follows: "1. Costs to leave the project and return for completion of work - $8,150.00. 2. One month added warehouse costs - $2,728.50. 3. Added lodging costs two rooms for four weeks @$450 per week - $3,600.00. 4. One month added forklift rental - $1,820.50" (Exhibit C, Change Order Number 003). The following day, Wright & Morrissey signed the proposed change order, indicating its acceptance of the $16,299 increase in the amount payable to J&K Tile.

On August 8, 2015, J&K Tile submitted a proposed change order to Wright & Morrissey adding $1,875 to the contract for additional work J&K Tile had performed at Wright & Morrissey's request, over and above what had originally been contracted for (Exhibit C, Change Order Number 004). Wright & Morrissey signed this change order on September 2, 2015, and the $1,875 was later paid to J&K Tile. This change order did not relate in any way to the work interruption that Wright & Morrissey had imposed back in April of 2015.

On September 23, 2015, J&K Tile submitted another proposed change order to Wright & Morrissey seeking to add $42,000 to the amounts allegedly due it under the subcontract. The $42,000 figure was essentially $2,000 per day for the twenty-one days that J&K Tile had worked on the project past the May 21st deadline set forth in the parties' April 16th "Memorandum of Understanding."[1] On October 7, 2015, Wright & Morrissey rejected J&K Tile's request for the

[1] In a letter to Wright & Morrissey dated September 23, 2016, J&K Tile provides a somewhat different explanation for how the $42,000 figure was computed (see Exhibit D). Exactly how the figure was derived, however, is not relevant to Defendant's Motion for Summary Judgment. Therefore, the court will not address it further at this time.

change order. J&K Tile contends that Wright & Morrissey's refusal to honor this change order request constitutes a breach of contract. Wright & Morrissey denies the claim.

As noted earlier, Wright & Morrissey contends that J&K Tile is precluded from asserting this claim because J&K Tile did not assert it within twenty-one days of completing its work on the project. Wright & Morrissey bases its argument on Section 15.1.2 of the Subcontract's general conditions, which provides:

> Claims by the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

(Exhibit B, p. 40). The general conditions define the term "claim" to mean "a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract" and "other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract" (Id., Section 15.1.1). Wright & Morrissey argues that J&K Tile's request for an additional $42,000 is a "claim" within the meaning of Section 15.1.2, and that J&K Tile therefore had until July 4, 2015 (i.e., 21 days after it finished its work on June 13th) within which to assert the claim. Because J&K Tile waited until September 23rd, Wright & Morrissey contends that J&K has waived the claim and that the claim is, therefore, barred as a matter of law.

J&K Tile does not deny that Section 15.1.2 of the general conditions applies to its subcontract with Wright & Morrissey.[2] J&K argues that Section 15.1.2 does not bar its claim because the 21-day time limit is unenforceable. In the alternative, if the provision is enforceable, J&K contends that its claim is not barred because J&K substantially complied with the 21-day limit and Wright & Morrissey has not been prejudiced by any delay in submitting the request for a change order.

J&K Tile contends that Section 15.1.2 is unenforceable because it conflicts with Vermont's statute of limitations, which allows an aggrieved party six years within which to file a civil action for breach of contract. See 12 V.S.A. § 511 ("A civil action … shall be commenced within six years after the cause of action accrues and not thereafter."). Moreover, "any provision in a contract

[2] Section 5.3 of the Subcontract provides: "The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specific time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound." Exhibit A, p. 8.

which limits the time in which an action may be brought under the contract or which waives the statute of limitations shall be null and void." 12 V.S.A. § 465. J&K contends that Section 15.1.2 of the general conditions is null and void because it purports to limit to 21 days the time in which an action may be brought under its subcontract with Wright & Morrissey.

In its reply memorandum, Wright & Morrissey argues that 12 V.S.A. § 465 is irrelevant because its motion for summary judgment is based on a theory of waiver, "not … on any theory that Plaintiff is time-barred from filing its action in this Court" ("Defendant Wright & Morrissey's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment," at p. 5). For similarly reasons, Wright & Morrissey contends that the issue of prejudice is also irrelevant (Id., pp. 5-6). Lastly, Wright & Morrissey denies J&K's contention that it substantially complied with Section 15.1.2's 21-day notice requirement and that Wright & Morrissey suffered no prejudice from the delay in requesting the change order.

If Section 15.1.2 of the general conditions of the subcontract purported to bar a subcontractor from pursuing a cause of action for breach of contract, solely because 21-days' notice was not given of the claim underlying the cause of action, the court would agree that the provision violates 12 V.S.A. § 466 and is null and void. See Bergman v. Spruce Peak Realty, LLC, 847 F.Supp.2d 653, 657 (D. Vt., 2012) ("The provision in the SAS Covenant that requires a party to present a claim within one year of the date the claiming party knew or should have known of the facts giving rise to the claim is null and void," citing 12 V.S.A. § 465). For several reasons, however, the court does not interpret Section 15.1.2 as purporting to do that.

First, Section 15.1.2 does not expressly say that claims are forever barred if not asserted within the required 21-day notice period. Indeed, the provision does not spell out any consequences for failure to comply with its notice requirement. Secondly, there is another section of the general conditions that does expressly impose time limits on claims, namely Section 13.7. That section states:

> The Owner and Contractor shall commence all claims and causes of actions, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement, within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and causes of action not commenced in accordance with this Section 13.7.

(Exhibit B, p. 38). The fact that Section 13.7 expressly imposes time limits on claims whereas Section 15.1.2 does not, is further evidence that Section 15.1.2 was not intended to operate as a bar to the pursuit of claims or causes of actions. Lastly, in its supplemental response, Wright & Morrissey makes it clear that it is not claiming that Plaintiff's suit is time barred on account of its alleged failure to provide the required 21-day notice. The court concludes, therefore, that Section 15.1.2 does not bar Plaintiff's claim and, therefore, is not null and void.

As noted above, Wright & Morrissey contends that Plaintiff waived the right to assert its claim for an additional $42,000 by failing to assert it within twenty-one days, as required by Section 15.1.2 of the general conditions of the subcontract. In order to establish waiver, Wright & Morrissey must prove that Plaintiff intentionally relinquished or abandoned a known right. Lynda Lee Fashions, Inc. v. Sharp Offset Printing, Inc., 134 Vt. 167, 170 (1976) ("A 'waiver' is the intentional relinquishment or abandonment of a known right, and the act of waiver may be evidenced by express words as well as by conduct."). Moreover, "before a waiver may be Implied, 'caution must be exercised both in proof and application,' such that '[t]he facts and circumstances relied upon must be unequivocal in character.'" Smiley v. State, 2015 VT 42, ¶ 10, 198 Vt. 529 (quoting Holden & Martin Lumber Co. v. Stuart, 118 Vt. 286, 289 (1954)).

J&K Tile claims that it substantially complied with Section 15.1.2's notice requirement, and it denies that it intentionally relinquished or abandoned it right to assert its claim for an additional $42,000. Because the facts relevant to a determination of whether J&K Tile waived its right to assert its claim are disputed, summary judgment cannot be granted on this claim. State of Vermont Environmental Board v. Chickering, 155 Vt. 308, 319 (1990) ("Summary judgment is not a substitute for a determination on the merits, so long as evidence has been presented which creates an issue of material fact, no matter what view the court may take of the relative weight of that evidence." (citation omitted)).

Plaintiff's Claim for Breach of Contract By Alleged Refusal to Mediate and Plaintiff's "Renewed" Request for Mediation

In its Complaint, J&K Tile claims that Wright & Morrissey breached Section 6.1 of the subcontract, which required the parties to mediate all claims arising under the contract. More specifically, J&K alleges that it sent a written mediation demand to Wright & Morrissey on January 19, 2016, and that Wright & Morrissey breached Section 6.1 by failing to respond to the demand letter. J&K also alleges that it suffered harm as a result of Wright & Morrissey's breach (Complaint, ¶¶ 18-20, 27-28).

Wright & Morrissey not only denies the claim but contends that J&K Tile has no good faith basis for making it. In its motion for summary judgment, Wright & Morrissey contends that J&K never demanded mediation, that Wright & Morrissey responded to the one letter it received from J&K which mentioned mediation, that J&K expressly agreed to waive any mediation requirement contained in the contract, and that J&K has acted in bad faith by asserting this claim. J&K opposes the motion.

Section 6.1 of the subcontract provides, "[a]ny claim arising out of or related to this Subcontract … shall be subject to mediation as a condition precedent to binding dispute resolution" (Exhibit 1, p. 8). The parties disagree as to whether the subcontract required them to mediate in accordance with the American Arbitration Association's "Construction Industry Mediation Procedures" or under its "Construction Industry Rules and Mediation Procedures."

The court need not resolve that issue, however, since, either way, the rules required the party seeking to initiate mediation to submit a written mediation demand to the other party.[3]

It is undisputed that on January 19, 2016, counsel for J&K Tile sent a letter to Wright & Morrissey by certified mail, return receipt requested. The letter stated:

> I have not received a response to my letter of November 19, 2015. Please consider this J&K Tile's demand that the alternative dispute resolution provisions of the contract be activated on this claim. As it does not appear that mediation will be fruitful, I suggest that the parties waive the precondition and proceed directly to arbitration.
>
> I am copying Attorney Clapp on this demand. J&K Tile would still like to cash the check for the undisputed amounts while the dispute over other sums is kept separate. It considers your company's refusal to allow the check to be cashed to be a wrongful withholding in violation 9 V.S.A. §§ 4003 and 4007.
>
> Please have Attorney Clapp contact me regarding this demand.

(Exhibit H).

It is also undisputed that on January 27, 2016, counsel for Wright & Morrissey sent a letter to counsel for J&K Tile, responding to J&K's letter of January 19th. The January 27th letter from counsel for Wright & Morrissey stated:

> I have your letter of January 19, 2016 regarding J&K Tile. The contract between Wright & Morrissey and your client does not provide for arbitration. It does provide for mediation as a condition precedent to proceeding with litigation. We agree that mediation would not be productive and are therefore willing to waive the mediation requirement. Thus, if you initiate litigation, Wright & Morrissey will not insist that your claim be referred to mediation before the litigation can proceed.
>
> Wright & Morrissey requires an executed Waiver of Lien before your client may cash the retainage check. Since the time for filing a lien has now passed, your client should have no objection to executing the Waiver of Lien. Execution of the Waiver and subsequent cashing of the check will not affect your ability to initiate and prosecute your claim against Wright & Morrissey. As I previously warned you,

[3] Exhibit A, § 6.1.2, relied upon by Wright & Morrissey, provides: "A request for mediation shall be made in writing, delivered to the other party to this Subcontract and filed with the person or entity administering the mediation." Exhibit B, § 15.3.2, relied upon by J&K Tile, provides: "A request for mediation shall be made in writing, delivered to the other party to the Contract."

> however, if your client does initiate litigation, Wright & Morrissey will actively seek to recover its costs in defending the claim on the grounds that you have no good faith basis for filing that claim.

(Exhibit I).

It is additionally undisputed that on February 12, 2016, counsel for J&K Tile sent the following letter to counsel for Wright & Morrissey:

> I enclose a copy of the lien that was filed by J&K Tile within the statutory period. J&K is in the process of putting the lawsuit together to perfect the lien. Suits to perfect liens are allowed even when mediation is a precondition to litigation.
>
> Again, J&K intends to pursue the claim for the additional sums owed on the subcontract. In addition, it is seeking interest, penalties, and fees associated with the wrongful withholding of money for undisputed amounts reflected in the previously-issued check that your client won't allow us to cash.
>
> I agree the contract includes a mediation clause; however, it would seem that mediation is largely a wasted cost. If needed, J&K will comply, but it will in the meantime file to perfect its lien.

(Exhibit J).

Exhibits H, I and J are the only written communications between the parties on the subject of mediation that the parties have provided to the court. Wright & Morrissey claims that there are no others. In response to Wright & Morrissey's statement of undisputed material facts, J&K Tile filed with the court an affidavit signed by its president suggesting that Exhibit H was the second letter that J&K sent to Wright & Morrissey requesting mediation, and that an earlier letter from J&K's attorney to Wright & Morrissey had gone unanswered.[4] Wright & Morrissey denies any assertion or suggestion that an earlier letter demanding mediation had been sent or gone unanswered.

For several reasons, the court must, for purposes of Wright & Morrissey's summary judgment motion, treat Exhibits H, I and J as the only items of correspondence that were exchanged between the parties on the subject of mediation. First, J&K has not provided the court with a copy of any written mediation demand predating Exhibit H. If such a document existed, a copy of it would be in J&K's possession or that of its attorney, but J&K has not produced it. Second, J&K alleged in its Complaint that it invoked the mediation clause of the subcontract "[b]y letter to W&M dated on or about January 19, 2016" (Complaint, ¶ 19). Thus, the suggestion that J&K had made an earlier demand for mediation, predating Exhibit H, is contradicted by the

[4] The affidavit says: "In the course of pursuing the amounts owed, we requested mediation through counsel. I received no response, so my attorney sent a second letter in January 2016" (Slusher Affidavit, ¶ 17).

express allegations of J&K's own Complaint. Lastly, a party cannot create a genuine dispute of fact as to the existence of a key document simply by claiming in an affidavit that such document exists, without producing the document or accounting for its absence. V.R.C.P. Rule 56(c)(1); Cate v. City of Burlington, 2013 VT 64, ¶ 11, 194 Vt. 265 ("A party opposing summary judgment may not rest on allegations or denials, but must demonstrate, with citations to the record, that a fact is genuinely disputed."). Therefore, for purposes of Defendant's summary judgment motion, Exhibits H, I and J will be treated by the court as the only items of correspondence the parties exchanged among themselves on the subject of mediation.

J&K Tile's January 19, 2016, letter to Wright & Morrissey clearly was not a demand for mediation, as claimed by J&K. It was a demand for arbitration coupled with a suggestion that the parties waive any contractual mediation requirement and "proceed directly to arbitration," because 'it does not appear that mediation will be fruitful" (Exhibit H).

It is also clear that Wright & Morrissey did not fail to respond to the January 19th letter, as claimed by J&K Tile. In its response of January 27th, Wright & Morrissey pointed out that the contract did not provide for arbitration. Wright & Morrissey then stated: "We agree that mediation would not be productive and are therefore willing to waive the mediation requirement. Thus, if you initiate litigation, Wright & Morrissey will not insist that your claim be referred to mediation before the litigation can proceed" (Exhibit I). Wright & Morrissey's response was not a refusal to mediate; it was an acceptance of J&K's offer to forego mediation and proceed directly to a binding resolution. J&K, in its reply letter of February 12, 2016, confirmed the parties' mutual agreement that mediation would "largely [be] a wasted cost" and announced its intention to proceed directly to litigation (Exhibit J).

Wright & Morrissey did not breach Section 6.1 of the subcontract as a matter of law. Wright & Morrissey did not ignore J&K Tile's letter of January 19, 2016, nor did it refuse to mediate. Wright & Morrissey simply accepted J&K's offer to waive any contractual requirement to mediate and proceed directly to litigation. Based on the undisputed facts, Wright & Morrissey is entitled to judgment in its favor on this claim, as a matter of law.

Based on the undisputed facts, the court must also agree that J&K Tile had no good-faith basis for asserting this claim against Wright & Morrissey. Given the foregoing exchange of correspondence, the claim clearly had no evidentiary or legal support.

Lastly, for several reasons the court will deny J&K Tile's "Renewed Request for Order Directing the Litigation to Alternative Dispute Resolution."[5] First, J&K Tile has never made a request for mediation, so this is not a *renewed* request. Second, as noted above, the parties mutually agreed to waive mediation and proceed directly to suit. Thirdly, at the attachment hearing held on April 25, 2016, Superior Judge Helen Toor asked the parties if they wished to mediate their dispute. Counsel for J&K Tile replied that he did not think that mediation would

[5] This "Renewed Request" was filed on August 17, 2016, as part of J&K Tile's opposition to Wright & Morrissey's motion for summary judgment.

be worth the expense. The parties having mutually waived the contractual requirement for mediation, and the Plaintiff having then declined an invitation from the court, made at the outset of this litigation, to consider mediating this dispute, the court sees no good reason to order the parties to mediate at this time.

Plaintiff's Claim that Defendant Wrongfully Delayed Payment of Retainage and Other Sums Indisputably Owed

In Count IV of its Complaint, J&K Tile claims that Wright & Morrissey violated Vermont's Prompt Pay Act by wrongfully refusing to allow J&K to cash a check, for retainage and other sums indisputably owed to it under the subcontract, without first waiving its claims for additional sums alleged to be owed. Wright & Morrissey denies the claim and moves for summary judgment on the grounds that J&K cannot prove that it ever submitted an invoice to Wright & Morrissey for the retainage covered by the check, which, Wright & Morrissey contends, is a precondition to asserting a claim under the Prompt Pay Act. J&K denies that an invoice for retainage is necessary to trigger the Act. The following facts are undisputed, unless indicated otherwise.

Under the subcontract, J&K Tile was entitled apply for and receive monthly "progress payments" as the job progressed; the applications had to be in writing and on forms provided for that purpose (Exhibit A, Section 11.1, at p. 12; and Exhibit A, Attachments 3.1 and 3.2). The subcontract provided, "The Contractor shall pay the Subcontractor each progress payment no later than seven working days after the Contractor receives payment from the Owner" (Id., Section 11.3; see also Exhibit B, Section 9.6.2, at p. 27).

Upon final completion of its work, J&K Tile was entitled to receive "[f]inal payment, constituting the entire unpaid balance of the Subcontract Sum;" final payment was due within seven days after Wright & Morrissey received the applicable funds from the owner of the project (Exhibit A, Section 12.1, at p. 13). Unlike the situation with progress payments, the subcontract did not require the subcontractor to submit an application for the final payment, although the contractor could demand proof "that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied" and the owner could demand a signed waiver of lien (Exhibit A, Section 12.2, at pp. 13-14; see also Exhibit B, Section 9.10.2(f), at pp. 29-30). The subcontract provided, "Acceptance of final payment by the Subcontractor shall constitute a waiver of claims by the Subcontractor, except those previously made in writing and identified by the Subcontractor as unsettled at the time of final application for payment" (Id., Section 12.2, at 13-14; see also Exhibit B, Section 9.10.5, at p. 30).

In September 2015, Wright & Morrissey mailed a check to J&K Tile in the amount of $19,592.10, which represented the $1,875 referred to in Change Order #004 plus the retainage that had been withheld from J&K's progress payments during the course of the project. Wright & Morrissey intended the check to represented J&K's final payment under the subcontract. Wright & Morrissey issued this check to J&K, even though J&K had not yet submitted an invoice for those amounts, or a written application for the payment, or a final release and waiver of lien form. Wright & Morrissey did not dispute that it owed J&K the $19,592.10 at that time.

At the time J&K Tile received the check for $19,592.10, J&K believed that it was also entitled to be paid the additional $42,000 of alleged time and cost overruns referred to earlier in this decision (see pp. 2-6, above). Therefore, J&K requested Wright & Morrissey's agreement that it could cash the check without waiving its claim for the additional $42,000. The record does not indicate when exactly that request was made or how exactly Wright & Morrissey initially responded to it.

On January 19, 2016, counsel for J&K Tile sent a letter to Wright & Morrissey saying: "J&K Tile would still like to cash the check for the undisputed amounts while the dispute over other sums is kept separate. It considers your company's refusal to allow the check to be cashed to be a wrongful withholding in violation [of] 9 V.S.A. §§ 4003 and 4007" (Exhibit H). On January 27, 2016, counsel for Wright & Morrissey responded as follows:

> Wright & Morrissey requires an executed Waiver of Lien before your client may cash the retainage check. Since the time for filing a lien has now passed, your client should have no objection to executing the Waiver of Lien. Execution of the Waiver and subsequent cashing of the check will not affect your ability to initiate and prosecute your claim against Wright & Morrissey….

(Exhibit I). At the time counsel wrote this response, Wright & Morrissey was unaware that J&K had already filed a lien. On February 12, 2016, counsel for J&K Tile sent Wright & Morrissey a copy of its lien together with a letter stating that J&K "is seeking interest, penalties, and fees associated with the wrongful withholding of money for undisputed amounts reflected in the previously-issued check that your client won't allow us to cash" (Exhibit J).

The sole ground upon which Wright & Morrissey moves for summary judgment on this claim is the fact that J&K Tile has never invoiced Wright & Morrissey for the retainage that it was owed under the subcontract, which, Wright & Morrissey contends, is a precondition to asserting a claim under the Prompt Pay Act. As noted earlier, J&K Tile denies that an invoice for retainage is required in order to trigger the requirements of the Act.

At the name implies, Vermont's Prompt Pay Act requires that contractors and subcontractors receive prompt payment for work performed under construction contracts. The Act has separate provisions for the payment of retainage on the one hand, and the payment of all other obligations (i.e., progress payments and final payments) on the other hand. The provision applicable to progress and final payments is 9 V.S.A. § 4003(c), which states:

> Notwithstanding any contrary agreement, when a subcontractor has performed in accordance with the provisions of its contract, a contractor shall pay to the subcontractor … the full or proportional amount received [from the owner] for each such subcontractor's work and materials based on work completed or service provided under the subcontract, seven days after receipt of each progress or final

> payment or seven days after receipt of the subcontractor's invoice, whichever is later.

The provision in the Act relating to payment of retainage is 9 V.S.A. § 4005(c), which provides:

> Notwithstanding any contrary agreement, a contractor shall pay to its subcontractors … within seven days after receipt of the retainage [from the owner], the full amount due to each such subcontractor.

The Act goes on to provide that any contractor who "unreasonably … fails to pay retainage as required by this section" shall be liable to pay interest, penalties and attorney's fees to the aggrieved subcontractor. Id., § 4005(d).

For several reasons, the court agrees with J&K Tile that a subcontractor is not required to submit an invoice for retainage in order to trigger the contractor's seven-day payment obligation under § 4005(d). First, § 4005(d) names only one pre-condition to the requirement that a contractor promptly pay retainage to a subcontractor, namely, that the contractor must have received the applicable retainage funds from the owner. The word "invoice" does not appear in this section.

Second, § 4003(c), which deals with progress payments and final payments, does include an "invoice" requirement. It provides that contractors must make progress payments and final payments to their subcontractors within "seven days after receipt of each progress or final payment [from the owner] or seven days after receipt of the subcontractor's invoice, whichever is later." If the legislature had intended that the payment of retainage be subject to the same invoice requirement as progress and final payments, there would have been no need for § 4005. The fact that the legislature chose to deal with retainage separately from other kinds of payments, coupled with the fact that the section dealing with retainage contains no invoice requirement whereas the section dealing with other payments does, is strong evidence that the legislature intended that subcontractors receive their retainage without having to invoice for it.

Thirdly, the subcontract between Wright & Morrissey and J&K Tile makes a similar distinction. Under the subcontract, J&K Tile was required to submit a written application for progress payments, but no written application was required for "[f]inal payment, constituting the entire unpaid balance of the Subcontract Sum," which would have included retainage (compare Sections 11 and 12 of Exhibit A). Thus, the court's interpretation of the Prompt Pay Act appear to be in accord with industry practice.

Fourthly, the fact that Wright & Morrissey sent J&K Tile its retainage check in September of 2015, without first requiring J&K to submit an invoice for the retainage, is evidence that Wright & Morrissey recognized that J&K was entitled to be paid its retainage promptly, without having to invoice for it.

Lastly, there would be no practical reason to require a subcontractor like J&K Tile to submit an invoice for its retainage. J&K had already submitted a series of invoices to Wright & Morrissey in connection with its requests for progress payments (J&K's invoices are collected at Exhibit E). Each invoice listed the "total retention balance" of funds that had been withheld as of the date of the invoice. Thus, Wright & Morrissey did not need another, separate invoice for retainage; it already had all the information it needed to calculate and pay J&K the retainage that was due upon completion of its work and acceptance of its work by the owner.

For all the foregoing reasons, the court concludes that J&K Tile was not required to submit an invoice for the retainage that was owed under the subcontract, in order to trigger Wright & Morrissey's payment obligations under Vermont's Prompt Pay Act. Therefore, Wright & Morrissey's motion for summary judgment on this claim must be denied.[6]

ORDER

For all the foregoing reasons: Defendant Wright & Morrissey's "Motion for Summary Judgment" is GRANTED as to Plaintiff's refusal to mediate claim and DENIED as to Plaintiff's other claims; and Plaintiff J&K Tile's "Renewed Request for Order Directing the Litigation to Alternative Dispute Resolution" is DENIED.

The clerk will set this matter for a pre-trial conference.

SO ORDERED this 23rd day of February, 2017

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Robert A. Mello
Superior Court Judge

[6] In its "Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment," Wright & Morrissey made a new argument, one that had not been included in its original motion, to the effect that Plaintiff's Prompt Pay Act claim "was rendered moot by the order of the Court entered at the conclusion of the hearing on Plaintiff's Motion for a writ of attachment held on April 25, 2016, holding that Plaintiff would be entitled to present the 'retainage check' for payment only after delivering to Defendant a waiver of lien as required by the Contract between the parties" (Id., p. 8). Because this argument was not made in Wright & Morrissey's motion, J&K Tile did not have an opportunity to respond to it. Therefore, the court will not consider it at this time. Moreover, the court has listened to the recording of the attachment hearing, and the recording does not appear to support a conclusion that Plaintiff's claim under the Act is now moot. The transcript reveals that that an agreement was reached by the parties at the conclusion of the hearing under which Plaintiff could cash the check for $19,592.10 and submit a signed waiver of lien, without waiving its rights pursue its breach of contract claims. The recording does not appear to contain any ruling by the court that the agreement rendered Plaintiff's claim under the Pay Act moot.