IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ERNEST BOCK & SONS, INC.,	:	**MAY TERM, 2011**
Plaintiff(s),	:	**NO. 2633**
vs.	:	**COMMERCE PROGRAM**
CITY OF PHILADELPHIA,	:	
Defendant(s),	:	
vs.	:	
LIBERTY MUTAL INSURANCE COMPANY and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,	:	**Commonwealth Court Docket Nos.: 349 CD 2018**
Additional Defendant(s).	:	**350 CD 2018**

OPINION

BY: Patricia A. McInerney, J. May 8, 2018

I. BACKGROUND

The instant appeals relate to construction and renovation projects undertaken at the Philadelphia International Airport in a series of packages or phases. One of those packages was known as the "Terminal D-E Expansion & Modernization – Package 1B," and included the construction of a four-story connector building ("Connector Building") connecting Terminal D and Terminal E at the Philadelphia International Airport (collectively, the "1B Project"). Ernest Bock & Sons, Inc. ("EBS") was the successful bidder for the general construction work on the 1B Project and, on or about March 30, 2007, entered into a contract with the City of Philadelphia (the "City") to perform that work for $38,000,000. The $38,000,000 figure consisted of EBS's bid

amount of $35,855,000, plus a contingency amount of $2,145,000 to cover change orders issued by the City for additional work.

The contract between the City and EBS has a number of different parts, including Standard Contract Requirements ("SCRs") (collectively, the "Contract"). The scope of EBS's work on the 1B Project included, but was not limited to, constructing the Connector Building and setting up the scheduling, coordination, and plan for the work of other prime contractors. On March 28, 2009, the City and EBS executed an amendment to the Contract, increasing the Contract limit to $41,710,000.

On May 24, 2011, EBS commenced the instant action against the City, asserting claims for breach of contract and *quantum meruit*, among others. On July 11, 2011, the City answered EBS's complaint and counterclaimed for breach of contract. Later, the City joined Liberty Mutual Insurance Company and Fidelity and Deposit Company of Maryland as additional defendants. The additional defendants (collectively, the "Sureties") issued a performance bond in the amount of $38,000,000 for the 1B Project (the "Performance Bond"). The Performance Bond, which had been prepared by the City, named EBS as the principal and the City as the obligee. The City asserted a cause of action against the Sureties for breach of contract, alleging that the Sureties failed to correct and/or pay the cost to correct EBS's deficient, incomplete, and defective work as required by the Performance Bond.

On November 15, 2016, a bench trial commenced before this Court. The trial spanned several weeks over the course of several months. Following the trial, the parties respectively submitted proposed findings of fact and conclusions of law. Therein, EBS and the Sureties sought: (1) $1,152,466.64 for the unpaid Contract balance; (2) $1,090,653.31 for unpaid change order requests; and (3) $505,938 as damages for acceleration; or a total of $2,749,057.95. The

City, on the other hand, sought judgment in its favor in the amount of $5,087,232.25, not including attorneys' fees and interest. $4,281,586.45 of that $5 million figure related to remediation work performed by Mason Building Group ("Mason"), which the City argued had to be done as the result of EBS's failure to originally do the work as required by the Contract. The remediation work essentially consisted of the removal and replacement of parapets; the remediation of fire separation between the third and fourth floors; and the widening and replacement of fire proofing material in the floors' expansion joints. The parties also sought near-wholesale denial of each other's claims.

After reviewing the parties' submissions and the record, the Court issued comprehensive findings of fact and conclusions of law on September 25, 2017 (the "Court's Findings"). Therein, the Court found the City's net damages totaled $3,601,535.74 and EBS's net damages totaled $839,223.47. Subtracting $839,223.47 from $3,601,535.74, the Court entered a verdict in favor of the City and against EBS and the Sureties in the amount of $2,762,312.27.

On October 5, 2017, EBS and the Sureties filed a motion for post-trial relief. Therein, EBS and the Sureties asserted the Court committed a myriad of errors or abuses of discretion, which required the Court's Findings be changed or modified or a new trial be granted. One of these parties' perceived errors or abuses was the Court's alleged failure to consider evidence that the City waived its right to object to construction of the parapets with combustible plywood in contravention of the Contract, which specified non-combustible "USG FIBEROCK Brand Sheathing, Aqua Tough" ("Aqua Tough") sheathing be used in constructing the parapet walls, (Ex. CITY-10 at § 06160(2.1)(B)). Another was to thereafter award the City damages for the actual cost of removing and replacing that defective work, because the cost was allegedly clearly disproportionate to the probable loss to the City.

A major point of contention for EBS and the Sureties was also this Court's denial of EBS's delay and acceleration claim. Here, the moving parties argued, "[i]n spite of the Court's finding that EBS did not comply with SCR Section 26(e) as it pertains to notice, it is clear that the City was on notice of EBS'[s] claim for delay and acceleration at all times...." (*See* EBS and the Sureties' Br., Oct. 30, 2017, pp. 47-52 (record citation omitted)). To support this proposition, EBS and the Sureties cited, among other things, EBS's monthly progress reports and the testimony of its project coordinator, Louis "Buz" Harris.

Regarding the delay and acceleration claim, EBS and the Sureties alternatively argued, "even if EBS'[s] notice to the City did not strictly comply with the notice requirements of the SCR, Pennsylvania law takes a more lenient approach to construing notice provisions in construction contracts whereby the spirit of the provision, rather that the strict terms, dictates whether a contractor seeking compensation for a claim or claims complied with the contract's notice provisions." (*Id.* at p. 52 (quotations omitted)). To support this proposition, EBS and the Sureties cited cases such as *James Corp v. North Allegheny School District*, 938 A.2d 474 (Pa. Commw. Ct. 2007). Therefore, these parties contended that "even if EBS did not strictly comply with the notice provisions," EBS was entitled to damages for delay and acceleration because "the City clearly knew the operative facts giving rise to the construction delays and EBS'[s] claims for acceleration of the work...." (EBS and the Sureties' Br., Oct. 30, 2017, p. 52).

On October 12, 2017, the City filed a motion for post-trial relief. In its motion, the City argued that the Court's Findings should be modified to include an award of attorneys' fees in favor of the City and against the Sureties pursuant to language in the Performance Bond. The City also argued the Court's Findings should be modified to include an award of post-judgment interest.

On October 16, 2017, the Court entered an order requiring the post-trial motions be briefed and setting up a briefing schedule. In opposition to the waiver argument, the City argued in its brief that the "[t]he Court properly found that ... [it] did not waive any rights with respect to ... [its] parapet wall claim." (City's Br., Nov. 20, 2017, p. 24). The City cited *Prime Medica Associates v. Valley Forge Insurance Co.*, 970 A.2d 1149, 1157 (Pa. Super. Ct. 2009), for the proposition that "[w]aiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary." (City's Br., Nov. 20, 2017, p. 24). Thereafter, the City contended there was no waiver because, among other things, (1) "EBS ignores the numerous no waiver provisions in the Contract ... [and] the testimony of its own witness, who acknowledged that EBS is liable to the City for its own breach of the Contract even if somebody does not stop EBS's work[,]" and (2) "objections were raised and demands made for EBS to remove and replace its defective work[,]" with the City repeatedly telling "EBS that the installation of plywood was not allowed and would have to be replaced if no permission to substitute was obtained." (*Id.* at pp. 24-25 (emphasis and quotations omitted))

Then, in terms of the damages for removing and replacing defective work, the City first argued in its brief that EBS and the Sureties waived this issue by failing to raise it "in pre-trial proceedings or at trial...." (*Id.* at p. 9). Second, the City argued in most relevant part:

> EBS'[s] argument that the measure of damages was inappropriate fails because EBS failed to introduce any evidence rebutting the City's measure of damages at trial.
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> ***
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> In EBS'[s] [m]otion, EBS asserts for the first time the City's damages should have been measured by the diminution of value of the Terminal D-E [c]onnector [f]acilities rather than the cost to repair, claiming that the cost to repair

> was "clearly disproportionate." EBS, however, did not object to the measure of damages presented by the City at trial and did not offer any rebuttal evidence related to the value of the Terminal D-E [c]onnector [f]acilities with or without defects. Therefore, EBS claim that the cost of repair was "clearly disproportionate" is pure speculation.
>
> Since there is no evidence of the value of the Terminal D-E [c]onnector [f]acilities, the relief sought by EBS under this issue, a new trial, would require, at a minimum, discovery being re-opened to permit the retention of a valuation experts, property investigations and evaluations and gathering the requisite information for the preparation of an appraisal or other reports. In other words, a new trial would require this case to be re-litigated. The law simply will not allow EBS to do so after it failed to meet its own burden of rebuttal at trial.

(City's Br., Nov. 20, 2017, pp. 10-11 (case citation omitted)).

The City also thoroughly briefed EBS's delay and acceleration claim. Here, in sum, it was the City's position that "[t]he Court did not fail to consider evidence and, in consideration of all evidence presented by the parties at trial, the Court found that EBS did not establish a delay/acceleration claim including, but not limited to, finding that EBS never established the actual delay, what caused the alleged delay, and the actual expenses associated with the alleged delay." (*Id.* at p. 6 (emphasis removed)).

In terms of the City's motion, EBS and the Sureties did not *per se* object in their brief to the City's right to receive post-judgment interest on the verdict. Instead, these parties argued the City was not entitled to post-judgment interest because this Court committed errors of law and abuses of discretion which required the Court to enter a verdict in EBS's favor rather than the City's favor and award EBS interest.

However, regarding the City's argument the Court's Findings should be modified to include an award of attorneys' fees in favor of the City and against the Sureties pursuant to language in the Performance Bond, EBS and the Sureties took much exception. Here, these parties argued in their brief that "the Court correctly found that the Sureties denied liability under

the Performance Bond, and, therefore, pursuant to its plain language, the City was not entitled to attorney's fees or expert fees set forth in Paragraphs 4 and 7..." of the Performance Bond. (EBS and the Sureties' Br., Nov. 20, 2017, p. 5). Rather, they argued "because the Sureties denied liability, the City was only entitled to seek 'any legal or equitable remedies available to the City' pursuant to Paragraph 6 of the Performance Bond, which does not include a fee-shifting provision...." (*Id.* at pp. 5-6 (*quoting* Ex. P-031, at 005-007; Performance Bond, ¶ 6)(emphasis original)).

After the parties submitted their briefs, the Court also scheduled and heard oral argument on the motions for post-trial relief. Following the argument, the Court entered an order on February 9, 2018 disposing of the motions. Therein, the Court granted EBS and the Sureties relief regarding three individual items totaling $61,414, which is not at issue in these appeals. The Court also changed its findings and awarded EBS $505,938 for its delay and acceleration claim.

In terms of the City, the Court denied "[t]he City's request that the Court's Findings be modified to include an award in favor of the City and against the Sureties for legal ... costs based on Paragraph 4 of the Performance Bond...." (Order, Feb. 9, 2018). The Court, however, granted its request that post-judgment interest be awarded on the modified verdict of $2,194,960.27 in favor of the City.[1]

On February 9, 2018, the Court also issued an amended trial work sheet to, among other things, more succinctly reflect the changes and modifications to the Court's Findings mentioned above. As a result of the issuance of the amended trial work sheet, the Philadelphia Court of Common Pleas docket now reflects the disposition to be an "[a]mended finding in favor of the City of Philadelphia and against Ernest Bock & Sons, Inc., Liberty Mutual Insurance Company,

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1 $2,762,312.27 - $61,414 - $505,938 = $2,194,960.27

and Fidelity and Deposit Company of Maryland in the amount of $2,194,960.27, plus interest at the rate of six percent per annum from September 25, 2017 until the date that amount is satisfied." (Am. Trial Worksheet, Feb. 9, 2018).

With judgment having previously been entered by the City, EBS and the Sureties filed a notice of appeal to the Commonwealth Court of Pennsylvania on March 9, 2018. On March 12, 2018, the Court ordered these parties to file a *Pennsylvania Rule of Appellate Procedure* 1925(b) statement. In their 1925(b) statement, EBS and the Sureties state:

> **I. The Court Erred In Its Valuation Of Damages For Breach Of Contract Regarding the Parapets, Entitling EBS To A New Trial On The City's Damages.**
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> 1. The City's damages regarding the removal and replacement of the parapets were premised upon an alleged violation of the applicable building codes. The Department of Licenses and Inspections is the only entity with authority to determine, in the first instance, a building code violation, and there was no such evidence introduced at trial.
>
> 2. The Court did not make any finding that the parapets violated the applicable building codes. Rather, the Court found that EBS breached the contract by installing a parapet substrate that was not in accordance with [the] parties' contract.
>
> 3. The City was not entitled to the cost of removing and replacing the parapets for breach of contract, in the amount of $2,335,400.25, because it is contrary to Pennsylvania law.
>
> 4. The cost of removing and replacing the parapets was clearly disproportionate to the difference in the market value of the building with the installed parapets versus the market value of the building if the parapets were installed in accordance with the contract. The City failed to introduce any such evidence of market value.
>
> 5. The Court's award of damages for breach of contract with respect to the parapets constitutes an abuse of discretion and an error of law, and EBS is entitled to a new trial on damages with respect to the parapets.

II. The Court Erred When It Failed To Consider Evidence That The City Waived Its Rights When It Permitted Plywood To Be Installed In The Parapets.

6. The Court determined that EBS breached the parties' contract by installing combustible pressure treated plywood on the parapet walls. The Court ignored the fact that the City waived its right to object to the construction of the parapets.

7. The City, its Architect, and its Construction Manager were aware that EBS was installing plywood in the parapets, but failed to issue any notice to EBS in accordance with Paragraph 33 of the Standard Contract Requirements and stop the work and declare a default.

8. The City failed to follow its own contractual remedies, and therefore waived its right to object to EBS' installation of plywood sheathing. The Court's failure to find waiver constitutes an abuse of discretion and an error of law.

III. The Court Erred When It Failed To Consider The Evidence That The City Did Not Provide EBS With Notice And An Opportunity To Cure The Installation Of The Plywood In The Parapets.

9. There was no evidence that, pursuant to Paragraph 33 of the Standard Contract Requirements, EBS was provided with a notice of violation while constructing the parapets (or through substantial completion of the entire project), an opportunity to cure, and that EBS was declared in default and notified to discontinue its work on the parapets. The City's witnesses admitted that no such procedure was followed.

10. The Court erred in failing to find that the City failed to satisfy the contractual conditions precedent before demanding that EBS correct the parapet work under the contract and the performance bond. The Court's error constitutes an abuse of discretion and an error of law.

(EBS and the Sureties' 1925(b) Statement pp. 1-3(emphasis original; record citation omitted)).

On March 15, 2018, the City filed a notice of cross-appeal to the Commonwealth Court. On March 20, 2018, the Court ordered this party to file a *Pennsylvania Rule of Appellate Procedure* 1925(b) statement. In its 1925(b) statement, and quoting the Court's Findings as entered on September 25, 2017, the City states:

I. The Court erred by reversing its initial findings in favor of the City and awarding Ernest Bock & Sons, Inc. ("EBS") $505,938 for its acceleration and delay claim ("EBS'[s] Delay/Acceleration Claim") because its initial findings were factually and legally correct.

A. The Court erred by vacating, and in effect reversing, its thirty-two findings in its Findings of Fact, Discussion and Conclusions of Law dated September 25, 2017 ... which correctly set forth the basis for the Court's denial of EBS's Delay/Acceleration Claim. The Court erred by vacating its findings that:

1. EBS failed to perform the requisite contractual requirements to "contractually sustain its delay/acceleration claim."

2. "EBS failed to establish the requisite elements of a delay/acceleration claim[.]"

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3. "EBS was contractually barred from asserting its delay/acceleration claim" and that the "categories of interference by the City as alleged by EBS are unsupported and contradicted by the evidence."

B. In its February 9, 2018 [o]rder addressing the [p]ost-[t]rial [m]otions filed by the parties (the "Post-Trial Motion Order"), the Court improperly vacated its thirty-two (32) factually and legally supported findings in [the Court's Findings] where:

1. The Court failed to provide any basis or explanation for vacating the findings other than stating that "[l]argely through the credible testimony of Mr. [Louis] Harris, the Court concludes the City was on notice of this claim and the operative facts giving rise to it, including that the start date was delayed and the completion date remained fixed and EBS was otherwise ordered to accelerate and did so and sustained extra costs."

2. The Court did not explain what other evidence it relied on other than the unspecified testimony of Mr. Harris.

3. Mr. Harris' testimony did not establish that EBS had provided the notice required under the Contract between the City and EBS. In fact, Mr. Harris acknowledged that EBS did not comply with the Contract terms for asserting such a claim.

4. In its [p]ost-[t]rial [m]otions, EBS offered no additional evidence challenging this Court's initial findings. EBS's [p]ost-[t]rial [m]otion addressing EBS'[s] Delay/Acceleration Claim relied primarily on scheduling reports prepared by Duggan & Rhodes.

5. The author(s) of the Duggan & Rhodes reports never testified at trial and the Duggan & Rhodes reports cannot provide evidentiary support for EBS's Delay/Acceleration Claim because the City objected to their admission and EBS has acknowledged they were never admitted for the truth of the matter asserted.

6. Further, counsel for EBS correctly acknowledged during oral argument on the [p]ost-[t]rial [m]otions that, even if notice had been properly given, merely providing notice of its delay/acceleration claim [does not] get [EBS] to [its] claim.

7. EBS never proved its delay/acceleration claim in accordance with binding legal precedent and the terms of its Contract with the City.

C. The Court erred in sustaining EBS's objection to the City's introduction of City-38, EBS's Job Cost Summary, because City-38 proved that EBS did not incur excess costs to perform the work. EBS spent approximately $8 million less than planned to perform the work and earned a profit of at least $8 million. Simply put, the acceleration claim resulted in a windfall for EBS.

II. The Court erred in denying the City's claim for attorneys' fees under the Performance Bond ... issued by Liberty Mutual Insurance Company and Fidelity and Deposit Company of Maryland (the "Sureties") because the plain language of the Performance Bond entitles the City to recovery of its attorney['s] fees. As more fully set forth in the City's [p]ost-[t]rial [m]otion on this issue:

A. The Court erred by interpreting the Performance Bond in a manner inconsistent with Pennsylvania law regarding contract interpretation.

B. The Court erred by interpreting the Performance Bond in a manner inconsistent with the express and plain language of the Performance Bond.

C. The Court erred by interpreting the Performance Bond in an unreasonable manner which would result in a performing (non-breaching) surety

being liable for attorneys' fees, while a non-performing (breaching) surety would not be liable.

(City's 1925(b) Statement pp. 1-4 (record citations omitted; some quotations omitted)).

This was an exceedingly difficult and time consuming case to try. And much care was taken in issuing the Court's Findings and subsequently ruling on the parties' post-trial motions. While this Court is not infallible, none of the parties' issues complained of on appeal have merit and/or warrant relief. Accordingly, the Court issues this Opinion in support of its decisions and the verdict in favor of the City as modified post-trial should not be disturbed.

II. DISCUSSION

A. Standards and Scopes of Review

It is well-settled, appellate review "in cases arising from non-jury trial verdicts is to determine whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in any application of the law." *Stephan v. Waldron Elec. Heating & Cooling LLC*, 100 A.3d 660, 664 (Pa. Super. Ct. 2014). During a bench trial, "[q]uestions of credibility and conflicts in the evidence are for the trial court to resolve and the reviewing court should not reweigh the evidence." *Adamski v. Miller*, 681 A.2d 171, 173 (Pa. 1996). "Absent an abuse of discretion, the trial court's determination will not be disturbed." *Id.* Therefore, "[t]he findings of fact of the trial judge must be given the same weight and effect on appeal as the verdict of a jury." *Waldron Elec.*, 100 A.3d at 664. The trial court's conclusions of law, however, are not binding on an appellate court and its scope of review for a question of law is plenary. *Id.* at 665. Accordingly, the appellate court may only reverse the trial court if its findings of fact are not supported by competent evidence in the record or if its findings are premised on an error of law. *Id.* at 664-65.

B. EBS and the Sureties' Appeal

EBS and the Sureties' complaints on appeal all revolve around the parapets. Section 06160 of the 1B Project Specifications relates to the installation of non- combustible sheathing for the exterior parapet walls. And the construction drawings identify the installation of sheathing on the exterior parapet walls. Sheathing is a concealed rigid board which is part of the structure of the wall. As referenced above, the Contract, at Section 06160 of the 1B Project Specifications, requires the installation of "USG FIBEROCK Brand Sheathing, Aqua Tough" ("Aqua Tough") on the parapet walls and states that the "Architect is unaware of any other products that comply with requirements." (Ex. CITY-10 at § 06160(2.1)(B)).

Mr. Anthony DePascale, EBS's Project Manager, testified Mr. Harris was the point person for the installation of the parapets. Mr. DePascale relied exclusively on Mr. Harris to determine whether what was provided was correct with respect to the sheathing and Mr. DePascale made no independent determination whether the sheathing was appropriate or inappropriate.

Pursuant to the Contract, if EBS wanted to substitute a specified material, it was required to provide a submittal of such substitute for approval. And if EBS required a clarification regarding the sheathing to be installed, it was required to submit a "Request for Information," or "RFI."

EBS installed pressure treated plywood on the parapet walls. Pressure treated plywood is wood treated to prevent it from being susceptible to rot or fungus. The pressure treated plywood installed by EBS is combustible and not fire rated. EBS did not provide a submittal to substitute pressure treated plywood for Aqua Tough on the parapet walls. EBS did not provide a submittal for approval or a RFI prior to installing pressure treated plywood on the parapet walls. For at least a substantial portion of the parapet walls, EBS did not begin installing pressure treated plywood

until after June 12, 2008.

During the progress meeting on July 22, 2008, EBS was advised that the "[s]heathing for the roof was supposed to be Aqua Tough, however, pressure treated plywood was installed. [EBS] is currently painting the wood with intumescent paint [and] [EBS] to provide supporting document from Siplast for this action." (Ex. CITY-52 at PHL1B-069915). Intumescent paint is a paint which swells up when heated which is not a substitute for fire-retardant-treated wood. Siplast was the roofing manufacturer specified for the 1B Project. Siplast specializes in SBS-modified bitumen membrane roofing systems.

Being a flat roof, the roof membrane on the 1B project extended up onto and terminated on the parapets around the edge of the concrete roof deck. EBS had argued it was necessary to install plywood rather than Aqua Tough, and did so on Siplast's recommendation, because: (1) the Contract required EBS to follow the roofing manufacturer's specifications, recommendations, and details, and (2) only the plywood had the structural integrity necessary to mechanically fasten flashings that were part of the roof membrane system to the parapets and obtain a 20-year roof membrane warranty from Siplast.

The design team never approved the use of intumescent paint over plywood. During the progress meetings on July 27, 2008, August 5, 2008, August 12, 2008 and August 19, 2008, EBS was further advised that "a submittal was required for the current plywood." (Ex. CITY-52 at PHL1B-069915-17). On August 11, 2008, the construction manager retained by the City for the 1B Project, Gilbane McKissack ("Gilbane"), advised EBS that the issue related to the plywood and intumescent paint submittals "will not go away [and t]he longer you put it off the more costly it will become for EBS to change, if that is what is to happen." (Ex. CITY-55 at PHL1B-069954).

On or about August 20, 2008, EBS provided a submittal data sheet seeking approval of its

installation of pressure treated plywood with intumescent paint on the parapet walls. During the progress meeting on September 2, 2008, and by submittal transmittal dated September 10, 2008, Gilbane notified EBS that its submittal was rejected. EBS was notified that the plywood and intumescent paint submittal was not submitted as a substitution and EBS had never submitted a request to substitute plywood in place of the Aqua Tough sheathing.

During the progress meetings on September 9, 16, 23, and 30, 2008, EBS was advised that it was "to follow up on the design team comments" and EBS was instructed that the design team "concerns must be addressed or the plywood will need [to be] replaced." (Ex. CITY-52 at PHL1B-069917-18). EBS provided a second submittal data sheet on October 6, 2008, again seeking approval of its installation of pressure treated plywood with intumescent paint on the parapet walls. On or about October 16, 2008, EBS's second submittal was rejected.

EBS proceeded at its own risk when it installed material which was not per the specifications without an approved submittal. EBS was contractually required to install non-combustible Aqua Tough sheathing on the parapet walls. EBS breached the Contract by, instead, installing combustible pressure treated plywood without having first obtained an approval to substitute. As a result of EBS's breaches, the City retained Mason to perform remedial work on the parapet walls, among other things. This Court awarded the City $4,281,586.45 in total for the remediation work performed by Mason and attributable to EBS.

EBS asserts in its 1925(b) statement that $2,335,400.25 of the $4,281,586.45 is for the cost of removing and replacing the parapets, which the Court accepts for purposes of this Opinion. And EBS first complains "the Court erred in its valuation of damages for breach of contract regarding the parapets, entitling EBS to a new trial on the City's damages." (EBS and the Sureties' 1925(b) Statement p. 1 (format changes from original)). For the reasons that follow, this

Court does not agree.

First, as a preliminary matter, EBS and the Sureties waived their issue regarding the measure of damages by asserting it for the first time in their post-trial motion. "A party may not, at the post-trial motion stage, raise a new theory which was not raised during trial." *E.S. Mgmt. v. Yingkai Gao*, 176 A.3d 859, 864 (Pa. Super. Ct. 2017). "[E]xplaining waiver in the context of post-trial motions, our Supreme Court [has] remarked: 'Rule 227.1, which governs post-trial relief, provides in relevant part that a ground may not serve as the basis for post-trial relief, ... unless it was raised in pre-trial proceedings or at trial.'" *Id.* at 864-65, *quoting Straub v. Cherne Indus.*, 880 A.2d 561, 566 (Pa. 2005).

Here, EBS and the Sureties never objected to the measure of damages presented by the City at trial. Therefore, EBS and the Sureties waived their claim that the cost of repair was "clearly disproportionate "and the burden was on "the City to introduce evidence as to diminution in value in order for the Court to make a determination as to the appropriate measure of damages." (EBS and the Sureties' Br., Oct. 30, 2017, pp. 13-14).

Second, even if EBS had not waived the issue, it has no merit. As the City has argued, "[c]ontract damages are intended to give the parties the benefit of the bargain." (City's Br. Nov. 20, 2017, p. 10). Thus, "Pennsylvania courts ... have generally allowed damages for incomplete or defective performance of a building contract to be measured by the cost of completing the work or correcting the defects by another contractor." *Douglass v. Licciardi Const. Co.*, 562 A.2d 913, 915–16 (Pa. Super. Ct. 1989). And "once the [property owner] has presented evidence as to the cost of remedying the defects, the burden is on the contractor to challenge this evidence." *Fetzer v. Vishneski*, 582 A.2d 23, 26–27 (Pa. Super. Ct. 1990).

> If the owner has had the repair or completion performed at the time of trial, the amount paid by the owner may be presumed to be reasonable, subject to rebuttal evidence by the contractor. The amount actually paid by the owner to another contractor for correction of the defective work, within a reasonable time after the breach, is strong and reliable evidence in determining the time and amount of damages.

Id. "It is only where the cost of completing performance or of remedying the defects is clearly disproportionate to the probable loss in value to the injured party that damages will be measured by the difference between the market price that the property would have had without the defects and the market price of the property with the defects." *Douglass*, 562 A.2d *Id.* at 916.

EBS and the Sureties reliance on cases such as *Freeman v. Maple Point, Inc.*, 574 A.2d 684 (Pa. Super. Ct. 1990), is misplaced. "There, the Superior Court set aside an award based on the cost of correcting a water problem because such cost ($45,785.00) represented 48% of the cost of the house. It was because the award was grossly disproportionate on its face that the Court required some evidence of the diminution in value of the property as a result of the surface water problem." *Gloviak v. Tucci Const. Co.*, 608 A.2d 557, 560 (Pa. Super. Ct. 1992) (analyzing *Freeman*).

The facts in the instant case are different than the facts in *Freeman*. An award of $2,335,400.25 to remove and replace the parapets was not patently disproportionate to the nearly $40 million the City paid EBS for its work on the 1B Project. The City "did not receive a windfall by an award of the cost of repairing the defective [parapets]." *Gloviak*, 608 A.2d at 560 (finding an award of $7,500 to repair a defective fireplace "was not patently disproportionate to the sum of $84,000...paid for the house by the appellee-homeowners."). "Therefore, it was not essential that the [City], in order to recover the costs of making repairs, prove by separate evidence that the repair costs were not grossly disproportionate to the diminution in value caused by the defective

[parapets]." *Id.* If EBS and the Sureties "deemed the cost of making repairs disproportionate to the diminution in the value of the [Connector Building], the burden was on them to introduce evidence establishing that fact[,] [which] they did not do." *Id.*

Under such circumstances, EBS and the Sureties cannot now complain "[t]he cost of removing and replacing the parapets was clearly disproportionate to the difference in the market value of the building with the installed parapets versus the market value of the building if the parapets were installed in accordance with the contract." (EBS and the Sureties' 1925(b) Statement p. 2). As the City has argued, since there is no evidence of the value of the Connector Building:

> the relief sought by EBS under this issue, a new trial, would require, at a minimum, discovery being re-opened to permit the retention of a valuation experts, property investigations and evaluations and gathering the requisite information for the preparation of an appraisal or other reports. In other words, a new trial would require this case to be re-litigated. The law simply will not allow EBS to do so after it failed to meet its own burden of rebuttal at trial.

(City's Br., Nov. 20, 2017, p. 11).

EBS and the Sureties next two complaints both relate to Paragraph 33 of the Standard Contract Requirements. In regard to Paragraph 33, these parties complain the Court erred when it failed to consider the evidence that the City: (1) "waived its rights when it permitted plywood to be installed in the parapets" and (2) "did not provide EBS with notice and an opportunity to cure the installation of the plywood in the parapets." (EBS and the Sureties' 1925(b) Statement pp. 2, 3 (format changes from original)).

Specifically, in this regard, EBS and the Sureties argue there was waiver because "[t]he City, its [a]rchitect, and its [c]onstruction [m]anager were aware that EBS was installing plywood in the parapets, but failed to issue any notice to EBS in accordance with Paragraph 33 of the

Standard Contract Requirements and stop the work and declare a default." (*Id.* at ¶ 7). EBS and the Sureties further argue that by not issuing notice, etc. to EBS pursuant to Paragraph 33 of the SCRs, "the City failed to satisfy...contractual conditions precedent before demanding that EBS correct the parapet work under the [C]ontract and the [P]erformance [B]ond." (*Id.* at ¶ 10).

The Court did not fail to consider this argument/evidence—it just does not have any merit or dictate a different result. Paragraph 33(a) of the SCRs provides in most relevant part:

> It shall be a violation of the Contract for the Contractor to ... fail or refuse to remove any of the work which, in the opinion of the Project Manager, is defective and unsuitable and not in accordance with the Contract Documents, and to replace it with work that is in accordance with the Contract Documents ... or to otherwise violate any of the terms, conditions, and provisions of the Contract. In the event of a violation of Contract, the Operating Commissioner may notify the Contractor and its surety in writing to require that each remedy the Contractor's violation of the Contract and require the Contractor to comply with the terms, conditions, and provisions of the Contract which it has violated or is violating. The failure of the City to promptly notify the Contractor of a violation of Contract shall not constitute an acceptance by the City of work which is performed or installed in violation of the Contract.

(Ex. CITY-2, SCRs at ¶ 33(a)).

By its plain terms, Paragraph 33(a) states that "[i]n the event of a violation of Contract, the Operating Commissioner **may** notify the Contractor and its surety in writing to require that each remedy the Contractor's violation of the Contract and require the Contractor to comply with the terms, conditions, and provisions of the Contract which it has violated or is violating." (*Id.* (emphasis added)). This "may" language is permissive, not mandatory. Accordingly, notice was not a condition precedent to the City's recovery and any failure to issue notice to EBS in accordance with Paragraph 33 of the Standard Contract Requirements did not result in a waiver of the City's right to have the parapets constructed pursuant to the terms of the Contract or recover damages for EBS's failure to do so.

C. The City's Appeal

The City's complaints of error relate to: (a) denying the City's claim for attorneys' fees pursuant to the Performance Bond and (b) awarding EBS $505,938 for its delay and acceleration claim. Neither area of complaint has merit nor warrants relief.

Regarding the City's claim for attorneys' fees, the Performance Bond states:

> 3. The Surety's obligation under this Performance Bond shall arise after the City has declared a Contractor Default as defined below, formally terminated the City Contract or the Contractor's right to complete the City Contract, and notified the Surety of the City's claim under this Performance Bond.
>
> 4. When the City has satisfied the conditions of Paragraph 3 above, the Surety shall, at the Surety's sole cost and expense, undertake one or more of the following actions:
>
> > a. Arrange for the Contractor to perform and complete the City Contract, provided, however, that the Surety may not proceed with this option, except upon the express written consent of the City, which consent may be withheld by the City for any reason; or
> >
> > b. Perform and complete the City Contract itself, through qualified contractors who are acceptable to the City, through a contract between the Surety and qualified contractors, which performance and completion shall be undertaken in strict accordance with the terms and conditions of the City Contract; or
> >
> > c. Tender payment to the City in the amount of all losses incurred by the City as a result of the Contractor Default and as determined by the City for which the Surety is liable to the City, including all costs of completion of the City Contract and all consequential losses, costs, and expenses incurred by the City as a result of the Contractor Default, except that Surety's payment under this option shall in no event exceed the limit of the Bond Amount. The Surety may not proceed with this option, in lieu of the options set forth in subparagraphs (a) or (b) above, except upon the express written consent of the City, which consent may be withheld by the City for any reason.
>
> 5. The Surety shall proceed under Paragraph 4 above within fifteen (15) business days after notice from the City to the Surety of the Contractor Default, formal termination of the Contract or the Contractor's right to complete the City Contract, except that the Surety shall proceed within twenty-four (24) hours after

notice, where the notice states that immediate action by the Surety is necessary to safeguard life or property.

6. If the Surety fails to proceed in accordance with Paragraph 4 and 5 above, then the Surety shall be deemed to be in default on this Performance Bond three business days after receipt of written notice from the City to the Surety demanding that the Surety perform its obligations under this Performance Bond. Thereafter, if notice to the Surety is without effect, the City shall be entitled to enforce any legal or equitable remedy available to the City. If the Surety has denied liability in whole or in part, the City shall be entitled without further notice to Surety to enforce any legal or equitable remedies available to the City.

7. After the City has terminated the City Contract or the Contractor's right to complete the City Contract, and if the Surety is proceeding under subparagraphs 4(a) or 4(b) above, then the responsibilities of the Surety to the City shall not be greater than those of the Contractor under the City Contract, and the responsibilities of the City to the Surety shall not be greater than those of the City under the City Contract. The Surety shall be obligated to the limit of Bond Amount as set forth on the front page, subject, however, to a commitment by the City for payment to the Surety of the Balance of the Contract Price in mitigation of costs and damages on the City Contract. The surety shall be obligated, without duplication, for:

a. The responsibilities of the Contractor for correction of defective or unsuitable work and performance and completion of the City Contract;

b. Additional legal, design professional, and delay costs incurred by the City as a result of the Contractor's Default, and as a result of the Surety's actions or failure to act under Paragraph 4 above[.]

***

(Ex. P-031 ("Performance Bond") at 005-007).

The City has argued that the Sureties are liable for all losses incurred by the City as a result of EBS's default, including attorneys' fees, because they did not exercise their options under Paragraph 4 of the Performance Bond. Paragraph 7 of the Performance Bond states that when the Sureties have elected to complete performance of the Contract under Paragraph 4(a) or 4(b), the Sureties' obligations under the Performance Bond include "[a]dditional legal, design professional, and delay costs...." (*Id.* at ¶ 7). Paragraph 6 of the Performance Bond, however,

provides that when the Sureties have denied liability for a claim, the City is entitled to enforce any "legal or equitable remedies." (*Id.* at ¶ 6).

"The general rule within this Commonwealth is that each side is responsible for the payment of its own costs and counsel fees absent bad faith or vexatious conduct." *Lucchino v. Commonwealth*, 809 A.2d 264, 267 (Pa. 2002) (citations omitted). "This so-called 'American Rule' holds true unless there is express statutory authorization, a clear agreement of the parties or some other established exception." *McMullen v. Kutz*, 985 A.2d 769, 775 (Pa. 2009) (citations and some quotations omitted). "The applicant for counsel fees has the burden of proving [its] entitlement thereto." *Gall v. Crawford*, 982 A.2d 541, 549 (Pa. Super. Ct. 2009) (citation omitted).

Based upon the plain language of the Performance Bond, prepared by the City, Paragraph 7(b) only applies "if the Surety is proceeding under subparagraphs 4(a) or 4(b)." (Performance Bond at ¶ 7). Here, however, the Sureties did not proceed under either subparagraph 4(a) or 4(b) of the Performance Bond; rather, the Sureties denied liability to the City. Therefore, it is clear the provisions set forth in Paragraph 7 of the Performance Bond are inapplicable, and the City is not entitled to attorneys' fees under the plain language of the Performance Bond. Moreover, even if there was ambiguity in this regard, which there is not, Pennsylvania law requires that the ambiguity be construed against the City as the drafter and, therefore, the American Rule holds true and the City cannot recover attorneys' fees from the Sureties in this case. *See generally Belleville v. David Cutler Grp.*, 118 A.3d 1184, 1196 (Pa. Commw. Ct. 2015) (providing that "[a] contract is ambiguous if it is reasonably susceptible to different interpretations and capable of being understood in more than one sense[,]" and "any ambiguity will be construed against the drafter.").

Regarding EBS's claim for delay and acceleration, the City primarily complains "[t]he Court erred by reversing its initial findings in favor of the City and awarding [EBS] ... $505,938 for its acceleration and delay claim ... because its initial findings were factually and legally correct." (The City's 1925(b) Statement p. 1 (format changes from original)). However, for the reasons that follow, there was no error in this Court reversing its initial decision and awarding EBS $505,938 in delay/acceleration damages as the City suggests.

There is no dispute that EBS failed to *formally* "perform ... contractual requirements ... [for] sustain[ing] its delay/acceleration claim." (The City's 1925(b) Statement p. 1 (quotations and citation to the record omitted)). The Court, however, accepted EBS's reliance on cases such as *James v. North Allegheny School District* to support the proposition that where the government clearly knew the operative facts giving rise to construction delays and the contractor's claim for acceleration of the work, the notice provisions of the contract can be satisfied informally. Therefore, upon further reflection, this Court reversed its initial determination and awarded EBS damages for delay/acceleration because: (1) there was an undisputed and significant delay in turning over the 1B Project; (2) the completion date remained the same and extension requests were not granted when subsequent issues arose because the City had a predetermined date by which it needed the Connector Building finished; and (3) Mr. Harris credibly testified on a number of points regarding this claim, including that the $505,938 was spent on additional supervisory personnel brought in to accelerate EBS's work.

In *James Corp. v. North Allegheny School District*, a contractor entered into a contract with a school district to renovate an elementary school building. The project incurred a number of delays attributable to the school district, but the school district did not grant any extensions of time. 938 A.2d at 480-81. In spite of those facts, the project was completed on time and the

contractor subsequently brought suit against the school district, alleging the "[s]chool district accelerated its work because [the] [s]chool [d]istrict refused to recognize the construction delays and adjust the [p]roject completion date accordingly." *Id.* at 481. The contractor further alleged that "[i]n order to meet the [p]roject deadline, ... [it] accelerated its work and hired additional workers[,]" resulting in additional costs. *Id.*

The trial court awarded the contractor $215,000 in damages for acceleration/compression of the work. *Id.* at 482. On appeal, the Commonwealth Court affirmed in spite of arguments from the school district that the lower court erred in awarding such damages because there was a "no damages for delay" clause in the parties' contract and the "[c]ontractor failed to timely provide notice of its damages claim pursuant to the contract." *Id.* at 483-85.

As in *James Corp.*, the "no damages for delay" provision in this case was unenforceable. The City interfered with EBS's work by issuing the Notice to Proceed for the 1B Project even though the contractor for the earlier 1A phase of the construction and renovation had not completed its work, and did not so fully until ninety days later. *James Corp.*, 938 A.2d at 484 (stating that "affirmative or positive interference sufficient to overcome [a] 'no damages for delay' clause may involve availability, access or design problems that pre-existed the bidding process and were known by the owner but not by the contractor[,]" and finding the school district interfered with contractor's work by issuing a notice to proceed without having obtained a requisite permit).

Moreover, as in *James Corp.*, the notice provisions in this case were satisfied, albeit informally. The City "clearly knew the operative facts giving rise to the construction delays and [EBS's] claims for accelerated work." *James Corp.*, 938 A.2d at 486 (finding the notice provision satisfied where the school district was responsible for the delays due to its failure to obtain a

requisite permit prior to issuing the notice to proceed, but refused to adjust the project completion date because of its overriding concern that not a single school day be missed).

Finally, regarding EBS's claim for delay and acceleration, the City complains "[t]he Court erred in sustaining EBS's objection to the City's introduction of City-38, EBS's Job Cost Summary, because City-38 proved that EBS did not incur excess costs to perform the work." (The City's 1925(b) Statement p. 4). According to the City, this exhibit shows "EBS spent approximately $8 million less than planned to perform the work ... [and] the acceleration claim resulted in a windfall for EBS." (*See id.* at pp. 3-4).

"The admission or exclusion of ... evidence is within the sound discretion of the trial court, whose decision[] will not be disturbed absent an abuse of discretion." *Lower Makefield Twp. v. Lands of Dalgewicz*, 4 A.3d 1114, 1117 (Pa. Commw. Ct. 2010). This Court excluded City-38 as irrelevant.

The Contract in this case was a lump sum contract. Whether EBS spent approximately $8 million less than planned to perform the work, or earned a profit of at least $8 million, is irrelevant to EBS's delay/acceleration claim and the propriety of this Court awarding EBS $505,938 for additional supervisory costs. This is so because the additional cost for supervision was incurred as a result of the delay/acceleration attributable to the City and not contemplated in EBS's bid. What was relevant was the credible testimony of Mr. Harris that five supervisors had to be brought in after the City caused delays and accelerated EBS's work.

City-38 was not a stand-alone document and by itself proved nothing. During the course of discussion regarding this document, it became clear the City wanted to use the exhibit to show EBS cut corners and saved money; therefore, the City owed EBS nothing for delay/acceleration or the Project in general. However, EBS and the Sureties' counsel was correct when he stated:

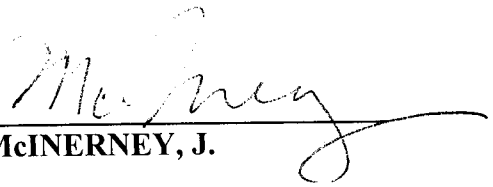
"This project is not a cost-plus project; it's a lump sum project. Whether [EBS] had a million dollars in costs or a dollar in costs is really irrelevant." (N.T., Jan. 19, 2017, pp. 45-46).

As a lump sum project, what was relevant was that the cost of additional supervision was not knowable at the time of the bid or figured into the bid. What was also relevant was that, per the credible testimony of Mr. Harris, the cost of additional supervision was incurred as a result of the delay in turning over the 1B Project and the failure to grant extension requests when subsequent issues arose because of the pressure the City was under to complete the 1B Project on time.

The City knew, or should have known, EBS's complaints regarding the late start of the 1B Project, etc. and refusal to grant any time extensions triggered the City's responsibility to remedy the situation. EBS was entitled to be awarded the cost for additional supervision and there was no error in doing so as the City suggests.

WHEREFORE, for the above-mentioned reasons, judgment having been entered, this Court's February 9, 2018 Order disposing of the parties' post-trial motions should be affirmed.

BY THE COURT:



McINERNEY, J.