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

1516-18 NORTH 15TH STREET, LP	:	**DECEMBER TERM, 2011**
v.	:	**NO. 01421**
RBS BUILDERS INC.	:	**COMMERCE PROGRAM**

ORDER

AND NOW, this 3rd day of April, 2014, after a non-jury trial, and in accord with the Findings of Fact and Conclusions of Law issued simultaneously, it is hereby **ORDERED** and **DECREED** as follows:

1. **JUDGMENT** is **ENTERED** in favor of plaintiff and against defendant on plaintiff's claim for breach of contract in the amount of $278,396.92.
2. **JUDGMENT** is **ENTERED** in favor of plaintiff and against defendant on all counterclaims asserted by defendant.

BY THE COURT:

GLAZER, J.

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

1516-18 NORTH 15TH STREET, LP	:	**DECEMBER TERM, 2011**
	:	**NO. 01421**
v.	:	
	:	**COMMERCE PROGRAM**
RBS BUILDERS INC.	:	

FINDINGS OF FACT

1. The parties submitted a joint stipulation of facts which is adopted herein and incorporated by reference and attached as Exhibit A.

2. The project on 1516-18 North Street, Philadelphia, Pennsylvania (hereinafter "the project") was to demolish two existing structures and the ground-up construction of a 36-unit student housing apartment. [N.T. 10/7/2013, pp. 22-21 at 24-25, 3-6].

3. Plaintiff entered into a contract with CANNOdesign (hereinafter "Canno") in which Canno was to serve as architect for the project. [N.T. 10/7/2013, p. 21 at 7-8; Stipulation at ¶ 1].

4. Jones Lang LaSalle (hereinafter, "JLL") was hired as the construction manager. [N.T. 10/7/2013, p. 21 at 9-10].

5. Ms. Olivia Freeland (hereinafter "Ms. Freeland") worked for JLL and was responsible for reviewing the schedules, pay application, preparing meeting minutes, and was generally on site. [N.T. 10/7/2013, pp. 154-55 at 13-25, 4-12].

6. On September 13, 2011, defendant, RBS Builders Inc. (hereinafter "defendant"), submitted a bid for the project. [Stipulation at ¶ 6; D-6].

7. Defendant submitted two revised and clarified proposals on September 22, 2011 and October 4, 2011. [Stipulation at ¶¶ 7-8].

8. On October 7, 2011, plaintiff entered into a "Standard Form of Agreement Between Owner and Contractor for a Residential or Small Commercial Project" (hereinafter "the contract"), with defendant in the amount of $3,582,682. [Stipulation at ¶ 10; P-38, Article 3.1].

9. Prior to finalizing into the contract, defendant paid its attorneys $15,000 to review the contract. [N.T. 10/8/2013, p. 162 at 9-18].

10. On October 7, 2011, plaintiff paid a Mobilization Payment of $174,534.10, 5% of the contract, to defendant. [N.T. 10/7/2013, pp. 22-23 at 21-25, 1-10].

11. The Mobilization Payment was for expenses incurred at the beginning of the job and any remaining funds in the Mobilization Payment were to be applied to the applications for payment. Specifically, no payment applications would be paid until the Mobilization Payment had been exhausted. [N.T. 10/7/2013, p. 24 at 4-9; p. 145 at 11-20].

12. The Mobilization Payment was initially viewed as a down payment on certain line items until the full amount of the payment was exhausted. [N.T. 10/7/2013, p. 145 at 21-25].

13. After the project began, plaintiff notified defendant via meeting minutes and emails of various issues relating to the project. [N.T. 10/7/2013, p. 150 at 13-24].

Demolition

14. Pursuant to the contract, defendant was to complete demolition by October 31, 2011. [N.T. 10/8/2013, p. 149 at 10-12; P-38, Article 8.2].

15. The demolition permit for the existing structure was obtained on October 11, 2011. [N.T. 10/8/2013, p. 37 at 11-12; D-39].

16. Defendant utilized laborers for the demolition of the project. [N.T. 10/8/2013, p.

119 at 9-14].

17. Defendant represented on its October 24, 2011 schedule that it would complete demolition by October 31, 2011. [P-49].

18. However, defendant did not complete the demolition by October 31, 2011. [N.T. 10/7/2013, p. 41 at 7-9; N.T. 10/8/2013, pp. 149-150 at 20-23, 4-15].

19. Defendant then represented on its November 19, 2011 schedule that demolition was to have been completed by November 8, 2011. [P-69].

20. Demolition was not completed by November 8, 2011. [N.T. 10/7/2013, p. 41 at 7-9].

Underpinning

21. Pursuant to defendant's schedule dated September 21, 2011, the need for underpinning was always anticipated on the project. [N.T. 10/7/2013, p. 134 at 2-3; P-98].

22. Moreover, there was an allowance in the contract in the event the parties determined that underpinning was necessary. [N.T. 10/7/2013, p. 134 at 3-7].

23. During excavation on the project it was determined that underpinning would be necessary at the adjacent structure located at 1520 North 15th Street (hereinafter "the neighboring property"). [N.T. 10/7/2013, p. 26 at 5-13].

24. Underpinning is a time-sensitive procedure which is required to be done carefully and sequentially. [N.T. 10/7/2013, pp. 232-33 at 9-25, 1-13].

25. Jay Rosen (hereinafter "Rosen"), was the structural engineer on the project and was responsible for the structural design of the building. [N.T. 10/7/2013, p. 227 at 9-20].

26. On November 17, 2011, Rosen performed an inspection of the site and issued an underpinning plan to defendant with instructions on how to properly underpin (hereinafter "underpinning plan"). [N.T. 10/7/2013, pp. 228-29 at 24-25, 1-6].

27. The underpinning plan required defendants to: (a) open one 4 feet piece wide; (b) pour the concrete; (c) move over 12 feet; (d) open another section 4 feet wide; (e) pour the concrete; (f) wait for the concrete to gain strength by curing; (g) open the middle section; (h) pour the concrete; and (i) knit the pieces together to form one piece. [N.T. 10/7/2013, p. 232 at 17-24; pp. 236-37 at 16-25, 1-10].

28. Defendant began underpinning on November 18, 2011. [N.T. 10/7/2013, pp. 27-28 at 24-25, 1].

29. Additionally, on November 18, 2011 Rosen visited the site and spoke with defendant. [N.T. 10/7/2013, p. 229 at 7-11].

30. On November 21, 2011, as a result of defendant failing to follow the underpinning plan, the neighboring property sustained damages. [N.T. 10/7/2013, p. 231 at 2-14].

31. Specifically, the property wall moved, and the front façade, stone sills and lintels cracked. [N.T. 10/7/2013, p. 28 at 9-12; p. 230 at 9-17; P-75].

32. Rosen again came on site and performed an investigation in which he concluded that defendant had not followed the underpinning plan. [N.T. 10/7/2013, p. 231 at 2-12; P-75].

33. Rosen issued a report on the status of the underpinning which stated that as a result of defendant not following the underpinning plan the "the southwest corner of 1520 has laterally moved outwards [and] [t]his has resulted in the cracking of the front façade, the stone sills, and lintels. Further, the interior finishes of the first floor and the basement ha[d] been damaged." [P-75].

34. The failure to follow the underpinning plan resulted in at least a seven (7) day delay on the project. [N.T. 10/7/2013, p. 236 at 12-13].

35. Further, on November 23, 2011, the Department of Licensing and Inspection

(hereinafter "L&I") deemed the neighboring property unsafe and required the eviction of tenants. [N.T. 10/7/2013, p. 30 at 1-20; P-82].

36. The neighboring property had not been in poor condition at the time of the damage. [N.T. 10/7/2013, p. 120 at 7-9].

Groundwater

37. Additionally, the contract required the defendant to:

> Carefully study and compare the Contract Documents with each other and with information furnished by the Owner. Before commencing activities, Contractor shall (1) take field measurements and verify field conditions; (2) carefully compare this and other information known to the Contractor with the Contract Documents; and (3) promptly report errors, inconsistencies or omissions discovered to the Architect and Owner.

[P-38, Article 8.1.2].

38. Prior to the excavation, plaintiff had a geotechnical investigation performed which found that groundwater was encountered at 11 ½ feet below pavement grade. [N.T. 10/7/2013, p. 33 at 5-23; P-5].

39. The reports and drawings indicated that the bottom of the elevator shaft would be below 12 ½ feet. [N.T. 10/7/2013, p. 102 at 20-23].

40. Defendant submitted the geotechnical report to L&I but failed to review or make a copy of it before excavating the elevator pit. [N.T. 10/8/2013, p. 178 at 10-20].

41. While excavating the elevator pit on December 2, 2011, defendant encountered groundwater coming up through the bottom of the pit. [N.T. 10/7/2013, pp. 32-33 at 22-25, 1-4].

42. Subsequently, the geotechnical engineer came to the project site and suggested partial back filling of the pit and dewatering. [N.T. 10/7/2013, pp. 35-36 at 20-25, 1-15; P-99].

43. The back filling and dewatering of the pit caused delays to the project. [N.T. 10/7/2013, p. 36 at 16-18].

44. On December 16, 2011, the geotechnical engineer returned to the project site because the water infiltration continued and the size of the pit multiplied. [N.T. 10/7/2013, p. 36 at 19-23; P-121].

45. Pursuant to the December 16, 2011 visit, the geotechnical engineer recommended dewatering the larger pit which caused further delays. [N.T. 10/7/2013, pp. 37-38 at 25, 1-9; P-121].

Building Permits

46. Additionally, the contract provided that, "[t]he contractor shall obtain and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of work" and that "Contractor agrees that the Owner is not an expert and that the Owner relies upon the Contractor to know, understand and adhere to all laws, regulations, and ordinances in completing this Project." [P-38, Article 8.7.1, Article 1.1.6].

47. On October 21, 2011, defendant submitted a Building Permit Application. [Stipulation at ¶14].

48. While the permit was ready to be picked up and paid for on November 10, 2011, defendant did not pick up or pay for the permit, despite defendant's contractual obligation to do so and receipt of the Mobilization Payment. [N.T. 10/7/2013, p. 43 at 1-16; P-38, Article 8.7].

49. Instead, plaintiff picked up and paid for building permit No. 369987. [Stipulation at ¶ 22; N.T. 10/7/2013, p. 44 at 1-7; P-76].

50. Defendant was supposed to issue a credit change order for the cost of the permit but failed to do so. [N.T. 10/7/2013, p. 164 at 2-10].

51. Moreover, the building permit No. 369987 states that "no underpinning proposed or approved, must protect adjacent structures and foundations." [P-73].

52. Defendant erroneously believed that the building permit would include the permit for underpinning. [N.T. 10/8/2013, p. 171 at 9-14].

53. In fact, defendant never took any measures to determine whether a separate underpinning permit was required because it assumed everything had been applied for. [N.T. 10/8/2013, p. 172 at 15-19].

54. Specifically, as of November 22, 2011, defendant was not sure whether an underpinning permit was required. [N.T. 10/7/2013, p. 189 at 10-14].

55. Defendant finally obtained the permit for the underpinning as of December 2, 2011. [N.T. 10/7/2013, pp. 254-55 at 24-25, 1-4].

56. As a result of the failure to obtain the underpinning permit, a violation was issued by The City of Philadelphia. [N.T. 10/8/2013, p. 173 at 2-6].

Other Breaches of Contract

57. The contract stated that, "[t]ime limits stated in the Contract Documents are of the essence of the contract" and that "Substantial Completion shall be no later than July 11, 2012. Final Completion shall be reached no later than July 31, 2012. " [P-38, Article 11.1 and Article 2].

58. Garvin Donaghy, President of defendant RBS Builders Inc., understood the term "substantial completion" to mean when the City of Philadelphia issued a certificate of occupancy. [N.T. 10/8/2013, p. 148 at 1-19].

59. With each new schedule it submitted, defendant's date for substantial completion continued to be pushed back further. [N.T. 10/8/2013, p. 148 at 1-5].

60. Additionally, the contract required

> The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. Such schedule shall include milestone dates that include, without limitation, the completion of demolition of the existing structure no later than October 31, 2011, and the completion of all Work necessary for the construction of a model unit no later than January 15, 2012.

[P-38, Article 8.2].

61. Pursuant to defendant's October 24, 2012 schedule, the model was projected to be completed by Thursday, February 9, 2012 and defendant would achieve substantial completion by July 17, 2012. [P-49].

62. As substantial completion was to be achieved on July 11, 2012 according to the original contract, the date proposed by defendant for substantial completion in its October 24, 2012 schedule, July 17, 2012, exceeded the contractual deadline. Moreover, according to the November 19, 2011 schedule, defendant represented the new date for substantial completion as July 23, 2012 which again exceeded the original contractual deadline of July 11, 2012. [P-38; P-49; P-69].

63. As the model unit was supposed to be completed by January 15, 2012 per the original contract, the dates proposed by defendant in its revised schedules exceeded its contractual deadline. [P-38; P-49; P-69].

64. Additionally, at a project meeting, the parties determined that they would begin to meet weekly since the project was behind schedule. A revised schedule was provided by defendant on November 30, 2011 which provided that the model could now inexplicably be completed by February 9, 2012 but substantial completion was an ever changing date. [N.T.

10/7/2013, pp. 44-45 at 22-25, 1-7; N.T. 10/8/2013, pp. 146-47 at 23-25, 1-25, p. 148 at 1-14; P-91; P-101].

65. The contract also provided that defendant was required to submit:

> an itemized Application for Payment for Work competed in accordance with the values stated in the Agreement. Such Application shall be supported by data substantiating the Contractor's right to payment as the Owner or Architect may reasonably require.

[P-38, Article 12.2.1].

66. Plaintiff's obligation to pay defendant arose directly from defendant's application for payment, as certified by Canno. [P-38, Article 4.1].

67. Defendant understood that plaintiff was not obligated to pay defendant until the architect certified the defendant's application for payment. [N.T. 10/8/2013, p. 180 at 9-13].

68. Moreover, the contract required defendant and its subcontractors to execute lien waivers. Waivers of lien were not submitted until December 13, 2011, the day after defendant was terminated from the project. [P-38, Article 17.3; Stipulation at ¶¶ 28, 29].

69. Although plaintiff had already paid the Mobilization Payment, defendant was still required to perform the work and there was still a need to evaluate the progress of the work defendant allegedly performed against the amount of the Mobilization Payment. [N.T. 10/7/2013, pp. 208-09 at 22-25, 1-23, pp. 210-11 at 1-25, 1-18].

70. The architect is a non-biased party that is put between the owner and the contractor to evaluate the progress of work completed. [N.T. 10/7/2013, p. 211 at 5-18].

71. The architect did not received the back-up necessary to justify that 100% of the Mobilization Payment had been exhausted. [N.T. 10/7/2013, pp. 213-214 at 15-25, 1-3].

72. Without the back-up documentation, the architect looked at the site to determine the percentage of work completed. [N.T. 10/7/2013, p. 213 at 24-25].

73. The architect determined that only 3% of the work had been completed and did not think defendant had substantiated funds due beyond the Mobilization Payment. [N.T. 10/7/2013, pp. 205-06 at 5-25, 1].

74. The architect felt that it was questionable for defendant to seek payment beyond the Mobilization Payment. [N.T. 10/7/2013, p. 205 at 20-22].

75. In support of its use of the Mobilization Payment, defendant submitted a "Mobilization Cost Breakdown" dated 11/30/2011, a building permit in the amount of $2,000, an invoice from JFW Electric in the amount of $7,330, and invoices from an insurance company, certified public accountant (hereinafter "CPA"), and law firm. [N.T. 10/7/2013, p. 170 at 5-25, pp. 171-72; P-98].

76. The invoice from JFW Electric included a charge to "Mobilize Job-Insurance" in the amount of $5,130, a temporary service fee of $800, temporary service labor and material of $1,400. [P-98].

77. Defendant also submitted an invoice in the amount of $7,500 for professional services and project management allegedly rendered by a certified public accountant. [N.T. 10/7/2013, p. 171 at 13-19; P-98].

78. Defendant did not provide backup in terms of hours the CPA spent, the rates he charged, or the work done to support the $7,500. [N.T. 10/8/2013, p. 183 at 2-9].

79. Defendant also submitted an invoice in the amount of $15,000 for legal services. [N.T. 10/7/2013, p. 172 at 1-12; P-98].

80. Ms. Freeland was concerned that there was no documentation for the subject invoices

other than the summary page and was concerned that the summary page did not include any details including work performed, hours worked, or the different professionals that worked on it. [N.T. 10/7/2013, p. 171 at 20-25; P-98].

81. Defendant also submitted an invoice in the amount of $12,659.80 from its insurance company as part of its mobilization costs. [N.T. 10/7/2013, p. 172 at 18-23; P-98].

82. Ms. Freeland was concerned that the submission was not actually an invoice but more a statement of payment. [N.T. 10/7/2013, p. 172 at 21-23].

83. Ms. Freeland had never seen a contractor submit invoices for insurance paid by a subcontractor on a job, invoices from a CPA, nor invoices for legal services as support of a Mobilization Payment. [N.T. 10/7/2013, p. 171 at 6-19, pp. 172-73 at 1-25, 1-3].

84. The remaining amounts on the "Mobilization Cost Breakdown" included: $2,500 for drawings/copies to subcontractor even though there were no subcontractors on the project, $1,500 for an insurance consultant fee, $16,500 for the construction manager, $4,000 for site fencing, $7,000 for temporary office furniture, $3,000 for hardware, $1,400 for software, $21,000 for erosion control, and $15,000 to a Project Manager. [P-98].

85. As of November 30, 2011, assuming each of the invoices and charges were appropriate, defendant had only spent $123,894.80 of the $174,534 Mobilization Payment. [N.T. 10/7/2013, p. 173 at 10-20; P-98].

86. However, defendant never provided any other documentation, besides the invoices described above to support any expenditure beyond the Mobilization Payment. [N.T. 10/7/2013, pp. 173-74 at 21-25, 1-18].

87. On November 8, 2011, defendant submitted an Application for Payment. [Stipulation at ¶ 18].

88. On November 22, 2011, defendant submitted another Application for Payment in the amount of $100,023. [Stipulation at ¶ 24].

89. JLL did not approve the payment applications because it was concerned that defendant was billing for more than the actual work it performed. [N.T. 10/7/2013, p. 160 at 10-25, pp. 161-165 at 7; P-61; P-101].

90. Specifically, JLL noted that percentage of work claimed to have been completed was less than the percentage of work defendant actually completed. [N.T. 10/7/2013, p. 161 at 4-13].

91. Moreover, JLL informed the defendant that it was looking for notarized lien waivers and some form of back-up documentation including invoices, receipts, contracts, or any other documentation to show what defendant spent on the project. [N.T. 10/7/2013, p. 162 at 10-25].

92. However, as of November 29, 2011, defendant had still not submitted the necessary back-up documentation to support the payment application beyond the Mobilization Payment. [N.T. 10/7/2013, p. 167 at 9-15; P-89].

93. Additionally, on November 29, 2011, JLL sent an email to plaintiff and set forth bullet points as to what documentation was needed to process the payment application. [N.T. 10/7/2013, p. 167 at 16-23; P-89].

94. The value of the work that defendant requested payment for in its application for payment exceeded the mobilization payment. [N.T 10/7/2013, p. 194 at 12-15].

95. Subsequently, Canno formally reviewed the application for payment #2 (which amounted to 12% of the contract) and rejected the application. [N.T 10/7/2013, pp. 199-200 at 23-25, 1-25; P-126].

96. As of November 8, 2011, defendant had the mechanical, electrical and plumbing (hereinafter "MEP") drawings. [N.T. 10/7/2013, p. 160 at 7-9].

97. As of November 22, 2011, JLL had not received information it had been requesting from defendant for the change order related to the MEP drawings but defendant promised to provide any cost changes by Friday November 25, 2011. [N.T. 10/7/2013, p. 165 at 4-20; P-101].

98. On December 6, 2011, defendant submitted a request for change order in the amount of $351,083.50 which was subsequently not approved by plaintiff because defendant had never substantiated how it calculated the amount sought to be paid. [Stipulation ¶ 27; N.T. 10/7/2013, pp. 47-48 at 24-25, 1-10; N.T. 10/8/2013, p. 108 at 17-21].

99. Pursuant to the contract, defendant was also required to:

> Indemnify and hold harmless the Owner... from and against claims, damages, losses and expenses, including, but not limited to attorneys['] fees, arising out of or resulting form performance of the work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself), but only to the extent caused by acts or omissions of the contractor... regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

[P-38, Article 8.12].

100. As a result of the damage to the neighboring property discussed above, the neighboring property's owner made demands on plaintiff for payment. [N.T. 10/7/2013, p. 60 at 7-12].

101. Although defendant was contractually obligated to pay such amounts, defendant failed to make the payment. [N.T. 10/7/2013, p. 60 at 13-19].

102. Further, plaintiff also attempted unsuccessfully to work with defendant's insurance company. [N.T. 10/7/2013, pp. 60-61 at 20-25, 1].

103. Plaintiff was sued due to the damages to the neighboring party and despite the fact that the lawsuit has been settled, plaintiff incurred legal expenses to defend itself in the litigation in the amount of $5,600. [N.T. 10/7/2013, p. 61 at 2-12, pp. 72-73 at 22-25, 1-6; P-151].

104. The contract also requires that as soon as practical after the award of the contract, defendant is required to "furnish in writing to the Owner through the Architect the names of subcontractors or supplies for each portion of the work." [P-38, Article 8.3.2].

105. Even though plaintiff had requested a copy of the list of subcontractors from defendant, defendant had failed to provide a copy of the list as of December 9, 2011. [N.T. 10/7/2013, pp. 48-49 at 15-25, 1-17].

106. After termination of defendant from the project on December 12, 2011, defendant produced a list of subcontractors to the plaintiff. [N.T. 10/7/2013, p. 49 at 2-20; P-100; P-115; Stipulation at ¶ 28].

107. Moreover, as of December 12, 2011, the project was still delayed as there were two major construction related incidents: one was the underpinning of the adjacent building and resulting damage to that building; the other was the excavation of the elevator pit which had ground water. Additionally, as discussed above, there were problems with obtaining documentation related to payment applications. [N.T. 10/7/2013, p. 24 at 15-25].

108. Previously, on December 4, 2011, plaintiff had a meeting with JLL in which JLL had recommended that plaintiff explore other options for the project. [N.T. 10/7/2013, p. 59 at 6-12].

109. Additionally, on December 4, 2011, JLL prepared a memorandum outlining the status of the North 15th Building Project. [P-98].

110. The memorandum outlined the two specific problems, schedule delay and

calculation of requested payment per draft applications, and encouraged plaintiff to consider other alternatives to meet their occupancy date of August 1, 2012. [P-98].

111. After encountering the damage to the neighboring property, the inability to control the dewatering pit and multiple requests for documentation related to payment and schedule, plaintiff terminated the contract with defendant on December 12, 2011. [N.T. 10/7/2013, p. 153 at 6-11; Stipulation at ¶ 28].

112. Article 16.2.2 of the contract provides that, for specifically enumerated reasons articulated in Article 16.2.1.1, .3 and .4, "[o]wner may without prejudice to any other right or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor." [P-38].

113. Article 16.2 did not require plaintiff to give defendant the opportunity to cure. [N.T. 10/7/2013, p. 26 at 2-4; P-38].

114. Pursuant to Article 16.2 of the contract, plaintiff gave notice to defendant that it was electing to terminate the contract because of defendant's material breaches. [N.T. 10/7/2013, pp. 25-26 at 22-25, 1; P-38; P-116].

115. After terminating defendant, plaintiff entered into a contract with Venco Building Group (hereinafter "Venco") for $3,785,500 which was approximately $202,818 more than what plaintiff agreed to pay defendant. [N.T. 10/7/2013, pp. 63-64 at 22-25, 1-7; P-123].

116. In addition, plaintiff executed approximately $90,000 of change orders in favor of Venco. [N.T. 10/7/2013, p. 64 at 14-18].

117. As such, the cost of finishing the project exceeded any balance owed to defendant. [N.T. 10/7/2013, p. 63 at 11-16].

118. Since none of the applications for payment were approved by plaintiff and

because the Mobilization Payment was never fully utilized, no monies were owed to defendant. [N.T. 10/7/2013, pp. 202-206; P-126].

119. The building that Venco built was significantly different than the building that defendant was obligated to build. [N.T. 10/7/2013, p. 65 at 7-11].

120. Although the original occupancy date was August 1, 2012, the resultant occupancy date and final completion was August 22, 2012. [N.T. 10/7/2013, p. 86 at 13-14].

121. The prorated rent for the 18 days of missed occupancy was approximately $27,000. [N.T. 10/7/2013, p. 67 at 6-11].

122. Plaintiff also sustained damages in that it had to pay the structural engineer in the amount of $4,000 to redesign the structure from steel to wood, $3,300 for street closure permits and equipment permits, overpayment of the mobilization fee of approximately $25,000, additional financing costs of approximately $8,174, a re-inspection fee of $50, and attorneys fees of $5,600. [N.T. 10/7/2013, pp. 67-72].

CONCLUSIONS OF LAW

Plaintiff's Claim for Breach of Contract

1. In Pennsylvania, three elements are necessary to properly assert a cause of action for breach of contract: (1) the existence of a contract, including its essential terms, (2) a breach of duty imposed by the contract, and (3) resultant damages. CoreStates bank, Nat'l Assn. v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super 1999).

2. "It is well established that the intent of the parties to a written contract is to be regarded as being embodied in the writing itself, and when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement." Steuart v. McChesney, 498 Pa. 45, 444 A.2d 659 (1982) (citation omitted).

3. Further, "[w]hen a written contract is clear and unequivocal, its meaning must be determined by its contents alone." East Crossroads Center, Inc. v. Mellon Stuart Co., 416 Pa. 229, 230-231, 205 A.2d 865 (1965).

4. "[W]here language is clear and unambiguous, the focus of interpretation is upon the terms of the agreement as manifestly expressed, rather than as, perhaps, silently intended." Steuart v. McChesney, 498 Pa. at 49, 444 A.2d at 661.

5. The language of the contract, Exhibit P-38, is clear and unambiguous.

6. Article 16.2.1 of the contract provides that:

> Owner may terminate the Contractor if the Contractor
> 1. Repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
> 2. ...
> 3. Violates any applicable laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or
> 4. Is otherwise guilty of a substantial breach of a provision of the Contract Document.

[P-38, Article 16.2.1].

7. Moreover, Article 16.2.2 of the contract provides, "Owner may without prejudice to any other right or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor." [P-38, Article 16.2.2].

8. Defendant substantially breached the contract, specifically Articles 8.1.1, 8.1.2, 8.2, 8.3.1, 8.4.1, 8.4.2, by refusing or failing to supply enough properly skilled workers or proper materials when it did not to meet the demolition deadlines, failing to follow the underpinning plan, failing to consider safety of the neighboring property, causing damages to neighboring property, failing to ask for a copy or review the geotechnical report, failing to follow the

geotechnical engineer's December 2, 2011 recommendations for de-watering the pit, and causing delays on the project.

9. Defendant is otherwise liable for other material breaches of the Contract, specifically 1.1.6, 2, 8.2, 11.1, by failing to meet the demolition deadline, failing to propose a schedule that met the model unit completion date, failing to propose a schedule that met the substantial completion date, failing to pick up and pay for building permit, and failing to properly underpin the adjoining property.

10. Defendant also materially breached Article 12.2.1 and Article 17.3 by failing to provide documentation to substantiate the use of the Mobilization Payment, failing to obtain notarized lien waivers, and failing to submit applications for payment which reflected work performed.

11. Plaintiff suffered damages as a result of defendant's material breaches which include the difference between the contract prices with defendant and Venco ($202,818), loss of rental income from August 1, 2012 to August 18, 2012 ($27,855.32), structural redesign ($4,000), street closure and permit fee ($3,300), City of Philadelphia re-inspection fee ($50), geotechnical invoices unpaid by defendant ($500), overpayment of mobilization payment ($26,099.60), financing costs ($8,174) and attorneys fees incurred as of October 7, 2012 in the litigation with neighboring property owner ($5,600) in the total amount of $278,396.92.

12. Therefore, judgment is entered in favor of plaintiff on plaintiff's breach of contract claim in the amount of $278,396.92.[1]

Defendant's Counterclaims

13. Defendant counterclaims against plaintiff for breach of contract, fraudulent

[1] Plaintiff provided no evidence regarding continued entitlement to attorney's fees.

misrepresentation, unjust enrichment, and violation of 73 P.S. § 501 et seq.

14. Defendant has the burden of proof on its counterclaims and must prove its claims by a preponderance of the evidence.

15. To prove a claim for breach of contract, defendant must prove by a preponderance of the evidence: (1) existence of a contract, including its essential terms, (2) a breach of duty imposed by the contract, and (3) resultant damages. CoreStates bank, Nat'l Assn. v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super 1999).

16. Further, a successful fraudulent misrepresentation claim requires: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting damage was proximately cause by the reliance. Bortz v. Noon, 556 Pa. 489, 499 (1999).

17. A claim of unjust enrichment must prove the following elements: (1) plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) acceptance and retention by the defendant of the benefits, under the circumstances, would make it inequitable for the defendant to retain the benefit without paying for the value of the benefit. Com. ex. Rel. Pappert v. TAP Pharm. Prods., Inc., 885 A.2d 1127 (Pa. Commw. 2005).

18. However, "[w]here an express contract already exists to define the parameters of the parties' respective duties, the parties may avail themselves of contract remedies and an equitable remedy for unjust enrichment cannot be deemed to exist." Villoresi v. Femminella, 2004 PA Super 256, 856 A.2d 78, 84 (Pa. Super. Ct. 2004) (citation omitted).

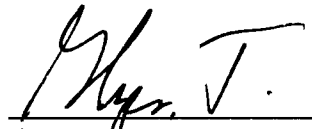
19. Additionally, a successful claim for violation of 73 P.S. § 501 et seq., requires the owner to pay the contractor in accordance with the contract terms. 73 P.S. § 505(a).

20. Defendant failed to satisfy its burden on all claims as it did not provide any credible evidence that it was wrongfully terminated or the victim of fraudulent misrepresentation.

21. Moreover, as an express contract governs the parties duties, defendant cannot recover for unjust enrichment.

22. Judgment is entered in favor of plaintiff on all counterclaims.

BY THE COURT:



GLAZER, J.

EXHIBIT A

1516-18 NORTH 15TH STREET, LP, Plaintiff, v. RBS BUILDERS INC., Defendant.	IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY Case ID No. 111201421 FILED ELECTRONICALLY

JOINT STIPULATION OF FACTS

Plaintiff, 1516-18 N. 15th Street, L.P. ("Plaintiff"), and Defendant, RBS Builders, Inc. ("Defendant"), hereby stipulate to the following facts:

1. Plaintiff entered into a contract with CANNOdesign ("Canno") to serve as architect on the Four-Story Student Housing Development at 1516-18 N. 15th Street, Philadelphia, Pennsylvania 19121 (the "Project").

2. On August 23, 2011, the Department of License & Inspections issued "Zoning/Use Permit" 352939 for the "complete demolition of all structures on the lot and for the erection of a four (4) story structure".

3. Canno issued a "Request For Competitive General Contractor Pricing" which requested that written proposals be submitted by September 9, 2011 (the "RFP").

4. Pursuant to the RFP the proposer was required to submit a milestone driven schedule which commenced demolition by October 2, 2011, and had a completion and occupancy date of August 1, 2012.

5. On September 6, 2011, Defendant requested permission from Plaintiff to submit a proposal in response to the RFP.

6. On September 13, 2011, Defendant submitted a response (dated September 12, 2011) to the RFP.

7. On September 22, 2011, Defendant submitted a revised and clarified proposal.

8. On October 4, 2011, Defendant submitted another revised and clarified proposal.

9. On October 4, 2011, Jones Lang LaSalle submitted a Fee Proposal to Plaintiff to provide Project Management Services on the Project.

10. On October 7, 2011, Plaintiff entered into a general contract (the "Contract") with Defendant.

11. On October 7, 2011, Plaintiff paid Defendant a mobilization fee of $174,534.10.

12. The mobilization fee represented five percent (5%) of the contract price of Three Million Five Hundred Eighty-Two Thousand Six Hundred Eighty-Two Dollars ($3,582,682.00).

13. On October 20, 2011, Jones Lang LaSalle provided Plaintiff with a Revised Fee Proposal.

14. On October 21, 2011, Defendant submitted a Building Permit Application.

15. On October 24, 2011, Defendant submitted an updated Progress Schedule.

16. On October 25, 2011, the City of Philadelphia, Department of License and Inspections issued a letter to Defendant in response to the Building Permit Application.

17. On October 25, 2011, Plaintiff executed a Final Revised Fee Proposal with Jones Lang LaSalle.

18. On November 8, 2011, Defendant submitted its pay application.

19. On November 17, 2011, Defendant submitted ten (10) requests for information ("RFI").

20. On November 17, 2011, Jay B. Rosen, Professional Engineer, issued an Underpinning Drawing.

21. On November 19, 2011, Defendant submitted another updated Progress Schedule.

22. On November 21, 2011, the City of Philadelphia issued Building Permit No. 369987.

23. Building Permit No. 369987 states that "no underpinning proposed or approved, must protect adjacent structures and foundations."

24. On November 22, 2011, Defendant submitted a another Application for Payment in the amount of $100,023.00.

25. On November 30, 2011, Defendant submitted a third Progress Schedule.

26. Defendant encountered groundwater during the excavation of the elevator pit.

27. On December 6, 2011, Defendant submitted a Request For Change Order in the amount of $351,083.50.

28. On December 12, 2011, Plaintiff sent Defendant a letter terminating the Contract.

29. On December 13, 2011, Defendant submitted Waivers of Lien – To Date for Revolution Recovery, LLC.

30. The Parties stipulate to the admissibility of Plaintiff's Exhibits 5-18, 20, 23-27, 29, 31, 34-35, 38, 49-50, 59, 62-64, 69, 73, 79, 91, 94-95, 101, 116, 118, 143-150.

31. The Parties stipulate to the admissibility of Defendant's Exhibits 1, 2, 4, 6-44.

32. Provided Defendant properly authenticates the photographs in Defendant's Exhibit 45, Plaintiff will not object to their admissibility even though they were not produced during discovery.

33. None of the witnesses are called as expert witnesses.