

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
D. OWENS ELECTRIC, INC.

Plaintiff,

-against-

J.W.MAYS, INC., P.J. EXTERIORS, INC., AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC., d/b/a ABC SUPPLY CO., and JASON COSCHIGNANO d/b/a JC CONSTRUCTION,

Defendants.
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MID-HUDSON STRUCTURAL CONCRETE, INC.,
d/b/a RECYCLE DEPOT,

Plaintiff,

-against-

J.W.MAYS, INC., P.J. EXTERIORS, INC., AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC., d/b/a ABC SUPPLY CO., and D. OWENS ELECTRIC, INC.

Defendants.
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BSB CONSTRUCTION, INC.,

Plaintiff,

-against-

J.W.MAYS, INC., P.J. EXTERIORS, INC., AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC., d/b/a ABC SUPPLY CO., and D. OWENS ELECTRIC, INC.

Defendants,
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DECISION AND ORDER

Index No. 2014-80001

Action No. 1

Index No. 2014-50519

Action No. 2

Index No. 2014-50518

Action No. 3

HON. PETER M. FORMAN, Acting Supreme Court Justice

These consolidated actions arise out of a construction project at the former Dutchess Mall complex, which is located at 415-453 Route 9, just south of the I-84 intersection in the Town of Fishkill (the “Premises”). Most of the work was conducted at a two-story building that is commonly referred to as the former Jamesway building (the “Building”). Each floor of the Building take up more than 100,000 square feet. The roof is also more than 100,000 square feet in size.

J. W. Mays, Inc. (“Mays”) owns the Premises. D. Owens Electric, Inc. (“Owens Electric”) is a contractor who entered into a written contract with Mays to perform roof and second floor demolition work in the Building. Owens Electric also entered into a verbal joint venture agreement with Jason Coschignano, d/b/a JC Construction (collectively, “Coschignano”) to perform that roof and demolition work. Owens Electric alleges that it also entered into verbal agreements with Mays to perform additional electric, asbestos abatement and parking lot lighting work at the Premises.

P.J. Exteriors, Inc. (“PJE”) is a roofing contractor. Owens Electric and Coschignano hired PJE to perform the roof work at the Building. Mays denies that Owens Electric and Coschignano had the authority to hire a roofing subcontractor. (Owens Electric, Caschignano and PJE are referred to collectively as the “Roof Contractors”).

Owens Electric is the plaintiff in Action No. 1, and a defendant in the other consolidated actions. Mays and PJE have been named as defendants in all three consolidated actions. Coschignano has been added to the caption in Action No. 1 as an additional defendant, solely in its capacity as a joint venturer with Owens Electric in the roof and demolition work.

BSB Construction, Inc. (“BSB”) is licensed by the New York State Department of Labor to perform asbestos abatement work. PJE hired BSB to perform asbestos abatement work as part of the roof project. BSB hired Mid-Hudson Structural Concrete, Inc., d/b/a Recycle Depot (“Mid-Hudson”) to provide 30-yard containers and waste removal services for the potential asbestos-containing materials that were being removed from the roof. PJE also hired Mid-Hudson to provide these services in connection with the project.

On October 8, 2013, Mays and Owens Electric entered into a written contract to remove the Building’s existing roof, and to replace it with a new roofing system (the “Roof Contract”). On or about October 21, 2013, Owens Electric and PJE entered into a subcontract, in which PJE agreed to remove the existing asbestos roofing material and to install the new roofing system. This subcontract also made PJE responsible for notifying the New York State Department of Labor about the asbestos removal and disposal work.

On or about October 15, 2013, PJE and BSB entered into a subcontract, in which BSB agreed to perform certain asbestos removal and disposal work in connection with the roof project. By an amendment dated December 3, 2013, the scope of that subcontract was expanded to include the removal and disposal of asbestos-containing flashing and pitch pockets located in the roof of the Building.

BSB hired Mid-Hudson to perform the waste disposal services that fell within the scope of the asbestos removal and disposal subcontract. PJE also hired Mid-Hudson to perform additional asbestos disposal services. BSB provided the asbestos removal services required by the subcontract between November, 2013 and January, 2014. BSB presented PJE with invoices for those goods and services rendered. BSB also received partial payment of these invoices from

PJE. BSB did not present any invoices directly to Mays while the goods and services were being provided. BSB never received any payments directly from Mays.

Mid-Hudson provided the asbestos-disposal services required by the subcontract in November-December, 2013. Mid-Hudson presented the invoices for these goods and services to BSB, Mid-Hudson did not present these invoices directly to Mays, and did not receive any payments directly from Mays. Mid-Hudson provided the asbestos disposal services contracted for by PJE in December, 2013 - January, 2014. Mid-Hudson presented the invoices for these goods and services to PJE. Mid-Hudson did not present any invoices directly to Mays, and did not receive any payments directly from Mays in regard to this work, as well.

Litigation History

On January 9, 2014, Mays' counsel served Owens Electric with notice that Mays intended to terminate the Roof Contract in three (3) business days. By letter dated January 10, 2014, Mays' counsel served Owens with notice that Mays intended to terminate the demolition contract in three (3) business days.

By letter dated January 21, 2014, Mays' counsel served Owens Electric with notice that Mays had terminated the Roof Contract, effective immediately. On that same date, January 21, 2014, Owens Electric filed a mechanic's lien asserting a \$332,667.00 claim for unpaid roof work and materials. Later on that same date, Owens Electric filed another mechanic's lien asserting a \$20,000 claim for unpaid parking lot lights work and materials. On January 23, 2014 Owens Electric filed yet another mechanic's lien, asserting a \$73,132.00 claim that reflected asbestos abatement work done on the first floor and time and materials for electrical work done to date.

On January 23, 2014, PJE also filed a mechanic's lien against Mays for unpaid roof work and materials in the amount of \$262,644.00.

By letter dated January 27, 2014, Mays' counsel served Owens Electric with notice that Mays had terminated the Demolition Contract, effective immediately.

On January 6, 2014, Mays engaged a professional engineer, Irv Chesner, to inspect the Building. A competing roofing contractor, Big Apple Restoration Corp. ("Big Apple") and a roofing manufacturer, Firestone, also participated in that inspection on that day. On March 24, 2014, Mays and Big Apple entered into a contract to remove the roof system that had been installed by PJE down to the concrete decking and to replace it with a Firestone 3-ply bitumen rubber roof system.

Mays paid Big Apple \$62,000 to secure and winterize the roof after Owens Electric was removed from the Premises and \$870,000 to replace the entire roof membrane. In addition, Mays paid an additional \$158,000 to repair water-damage parapets and exterior block. Mays also gave American Premier Markets ("APM") a \$34,000 rent abatement to compensate the tenant for a delay in obtaining occupancy of the first floor. APM had entered into a lease with Mays to use the first floor of the Building as an indoor flea market.

Action No. 1 is a breach of contract proceeding brought by Owens Electric regarding the installation of the roof on the Building. Owens Electric claims that he was wrongfully terminated by Mays before he could complete the work on the roof in compliance with the terms of the contract. In addition, Owens Electric claims that Mays breached the contract for the demolition work for a portion of the second floor of the Building. (First and tenth causes of action)

BSB is the plaintiff in Action No. 2 of this consolidated proceeding. The first cause of action asserts a lien against the Premises securing the value of the materials and asbestos abatement services that it provided. The second cause of action asserts a quasi-contract (unjust enrichment/quantum meruit) claim against Mays, seeking the fair and reasonable value of the materials and asbestos abatement services that BSB actually provided.

Mid-Hudson is the plaintiff in Action No. 3 of this consolidated proceeding. The first cause of action asserts a lien against the Premises securing the value of the materials and waste removal services that it provided. The second cause of action asserts a quasi-contract (unjust enrichment/quantum meruit) claim against Mays, seeking the fair and reasonable value of the materials and waste removal services that Mid-Hudson actually provided.

On September 26, 2016, the court granted Owens Electric's cross-motion for summary judgment on the Fourth, Sixth, Seventh and Ninth causes of action asserted in the First Amended Complaint in Action No. 1. That decision also granted Owens Electric's cross-motion to dismiss Mays' Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh counterclaims contained in Mays' verified answer in Action No. 1.

In addition, the court searched the record in that same decision and dismissed the Second, Fifth and Eighth causes of action asserted in the First Amended Complaint filed by Owens Electric in Action No. 1.

In a separate, but related decision by this court on September 29, 2016, the motions for summary judgment filed by Mid-Hudson and BSB were denied.

After the court entered its summary judgment decision, two plaintiffs, Mid-Hudson (Action No.2) and BSB (Action No.3) settled their claims and filed stipulations of discontinuance with the court regarding their respective claims on April 20, 2017.

A non-jury trial commenced before this court on May 22, 2017. It continued on May 23, May 26, May 30, May 31, June 5, June 7, July 31, August 1, August 2, August 3, August 4 and concluded on August 15, 2017. Thirteen witnesses testified during the trial. Jason Coschignano, Rudy Lipinski, Jason Pensabene, Donna Owens, Daniel Owens, Lloyd Schulman, Chris Sexton, George Silva, Richard Watsky, Jim Lampi, Mark Day, Joel Petrus and Richard Ryan. In addition, the depositions of two other witnesses - Doug Owens (who passed away prior to the commencement of the trial) and Irv Chesner, (who could not be produced for logistical reasons), were read into the record, either partially or in whole. During the course of the trial, over 200 exhibits were accepted into evidence by the court.

On September 8, 2017, the court entered a money judgment in favor of Owens Electric against Mays in Action No. 1, for breach of contract with respect to the parking lot lights work (pursuant to the September 20, 2016 decision awarding Owens Electric summary judgment on the fourth cause of action). This judgment was in the principal sum of \$68,000, plus interest at the statutory rate running from December 29, 2013, amounting to \$22,609.24, for a total amount of \$90,609.24. In that same judgment, the court also entered a money judgment in favor of Owens Electric against Mays in Action No. 1, for breach of contract with respect to the electrical work and asbestos remediation work on the first floor of the Building (pursuant to the September 20, 2016 decision awarding Owens Electric summary judgment on the seventh cause of action). This judgment was in the principal amount of \$73,132.00, plus interest at the statutory rate running from February 7, 2014, amounting to \$23,601.27, for a total of \$96,733.27. That judgment also awarded Owens Electric costs and disbursements in the amount of \$700.00.

Findings of Fact

The court makes the following findings of fact based upon the competent and credible evidence presented at trial:

Jason Coschignano has been self-employed for over 26 years as a master carpenter by trade who performed residential construction and home remodeling (including roofing, siding, kitchens, and bathrooms), and light commercial work (including roofing). He does business under the assumed name of JC Construction, and possesses training and certifications for dealing with hazardous materials.

Doug Owens, Jr. founded Owens Electric, and served as president and treasurer of that company during the relevant time period herein 2013-14. He passed away in September, 2016.

Lloyd Shulman is the president/CEO of Mays, which owns the Premises. The Building was constructed in 1974, and housed two major retailers, Mays and Jamesway, for many years after it was completed. The roof that is the focus of this litigation was the original roof that had been installed on the Building in 1974. It was constructed of coal tar pitch, and it leaked. The Building was vacant for 10-15 years during the 2000s. The last tenant, IBM, left partitions and other improvements behind when it vacated the leased space on the second floor of the Building.

Coschignano was introduced to Shulman by Owens. Owens Electric had installed two large generators at Shulman's Rock Ridge Farm residence in Carmel, New York, and Coschignano had constructed two generator buildings to house these generators as a sub-contractor for Owens Electric. Acting through another company that he controls (Weinstein Enterprises), Shulman also hired Coschignano directly to perform work at his sister's house. Shulman admitted that he was very satisfied with the work performed by Coschignano.

Shortly after these projects were completed, Shulman asked Coschignano to look at the roof of the Jamesway building to determine whether it could be patched. In September, 2013, Coschignano inspected the roof and reported to Shulman that the roof was beyond patching; it had large holes in it, water had penetrated into the building's second floor (which he described as a "swamp area"), there were holes under the gravel that covered the roof, and there were holes along the sides of the expansion joint. He also informed Shulman that the parapet walls that surrounded the roof had cracks and seemed to have structural damage and that the parging paint on the parapet had peeled and was not water-tight. In addition, the roof-top air conditioning units had holes in them and allowed water to enter the building at these locations as well.

Coschignano also observed old cans on the roof that contained tar-like material. Based on his construction and hazardous material experience, he suspected the tar-like material to contain asbestos. Along the parapet wall he also saw copper-flashing that was covered with the tar-like material.

Doug Owens accompanied Coschignano during this inspection and he focused on the second floor of the building. He observed that portions of the front area of the second floor had been partially demolished and there were electrical wires hanging everywhere. Light fixtures were hanging by live wires (Owens cut the power to these wires). Generally, Owens found the second floor of the building to be old, musty, dirty and nasty. When he reported this to Shulman, the owner agreed that the second-floor area needed to be demolished and the roof needed to be replaced.

The Contracts

On October 6, 2013, Owens Electric entered into a contract with Mays for the installation of a new single-ply roof system, of approximately 103,000 sq. ft. for the Building (the “Roof Contract”). The contract was prepared by Mays’ attorneys, and was in a form that it regularly used in its day-to-day operations, as a publicly traded company with over 30 employees overseeing seven commercial entities) Owens Electric was named as the general contractor in the document, and agreed to install a Versico fully-adhered system with a 20-year warranty for labor and materials. Mays agreed to pay Owens Electric \$988,000 for the new roof, and an additional \$10,000 for the removal of 14 old HVAC units from the roof. The Roof Contract also included the removal and disposal of the asbestos contaminated roofing material. Owens Electric also agreed to obtain a building permit from the Town of Fishkill, and to provide the proper authorities with notification of the asbestos material removal.

Shulman also asked Coschignano to remove the partition walls on the second floor that had been left behind by IBM. Coschignano told Shulman that he would supervise the roof work and the demolition work on the second floor under an agreement with Owens Electric, and that he (Coschignano) would be on site daily to oversee all the work.

Under a separate contract dated October 7, 2013, Owens Electric agreed to demolish a portion of the second floor of the Mays building, including the removal and disposal of non-structural walls, floor finishes and the ACT system (the “Demolition Contract”). The Demolition Contract specifically excluded the removal of any hazardous materials, which remained the separate responsibility of Mays. Mays agreed to pay Owens Electric \$292,000 for the work described in the Demolition Contract. The Roof Contract and the Demolition Contract both called for the completion of work by November 14, 2013.

On October 22, 2013, Owens Electric entered into a subcontract with P.J. Exteriors (PJE) whereby PJE agreed to perform the roofing work under the Roof Contract. The roof subcontract work included the removal and disposal of the old roof, the removal and disposal of asbestos-containing roof materials, and the installation of a Versico fully-adhered roof with a 20-year warranty for labor and materials. Owens Electric agreed to pay PJE the amount of \$787,000 for the complete performance of the roof subcontract work.

On October 28, 2013, Owens Electric entered into a subcontract with JCZ Building Services, Inc. (JCZ) for the demolition of approximately 25,000 sq. ft. of the second floor space that had previously been occupied by IBM. Owens Electric agreed to pay JCZ the amount of \$213,000 for the complete performance of the demolition work.

Coschignano and Owens Electric agreed that Coschignano would oversee and supervise the day-to-day work at the building (although no written contract was entered into between these two parties). Coschignano would be responsible for soliciting subcontractors to bid on the Roof and Demolition Contracts, and Owens Electric would perform any electrical work needed for the two aforementioned contracts. Owens Electric would also provide the insurance and office administrative services for both projects. Coschignano and Owens Electric agreed that Owens Electric would receive 4.5% for overhead. They also agreed that Coschignano would receive 90% of any profits that were realized from each project, and that Owens Electric would receive 10% of those profits.

On September 30, 2013, Mays entered into a lease agreement with American Premier Markets (APM), a firm owned by Bill Sabia, to rent the first floor of the Building for an indoor flea market. The parties anticipated that the first floor would not be immediately ready for occupancy, and agreed that rent would not be collected until possession was given or became

available. Mays delivered possession of the space to APM on December 13, 2013, and the tenant became obligated to pay for utilities at that time. On that date, Shulman and Sabia co-signed a letter confirming that while possession of the first floor space had been delivered to APM, Mays agreed to delay APM's rent commencement date by 18 days (from February 11, 2014 until March 1, 2014). The Town of Fishkill issued an operating permit and a fire inspection permit, which allowed the flea market to begin operation on December 13, 2013. The lease term was five years in length.

In preparation for the installation of the new roof, Coschignano asked Shulman if there was a hazardous material (asbestos) survey for the building. Despite informing Coschignano that such a survey existed, neither Schulman or any of his associates at Mays ever provided such a survey. Without a hazardous material survey in hand, Coschignano had to assume that there was asbestos in the old roofing materials on the building's existing roof.

Owens Electric also asked Shulman for an asbestos survey for the second floor, and, again, no survey was provided by Mays. Shulman verbally advised Coschignano that there were no hazardous materials on the property in question.

Mays did not enter into any written contracts with Owens Electric regarding any electrical and lighting work or asbestos removal performed by Owens Electric on the first floor of the building.

Chris Sexton was responsible for supervising the project on behalf of Mays. Prior to commencing the roof replacement project, Owens Electric presented the Versico roof system specifications to Chris Sexton for approval. Sexton granted that approval.

Permit for Roof and Demolition Work

After Mays signed the Roof and Demolition Contracts on October 8, 2013, Coschignano approached the Town of Fishkill Building Department seeking the appropriate building permits. He was advised that no building permit application could be filed until a meeting with the Town's building inspector, Joel Petrus, was held. The Town proceeded to cancel the first two appointments that Coschignano made with Petrus (with a one-week interval between each appointment). As a result, Coschignano and Jim Lampi (from PJE) were not able to meet with Petrus until October 29, 2013. Following this meeting, Petrus authorized Owens Electric and PJE to start loading the roof with materials in advance of the formal issuance of a roof building permit. That permit was eventually issued on November 8, 2013.

Petrus would not issue a permit for the demolition work on the second floor until the contractors submitted a blueprint of the walls that were scheduled to be removed during the process. Various representatives from Mays were unable to locate the requested blue prints. Petrus eventually performed an inspection of the second floor, and issued a demolition permit on November 18, 2013.

During the period of time that the building permits were being sought by the contractors, George Silva, a vice president with Mays, sent a letter to the Town of Fishkill giving permission for PJE to obtain the permit for the roof work on behalf of Mays.

Roof Work

Owens Electric entered into a subcontract with PJE to perform the roofing work, including the removal of asbestos contaminated materials contained in the old roofing materials. After the issuance of the building permit on November 8th, PJE began stripping off the old roof

gravel, and used ramps and chutes to facilitate the demolition and removal phase of the project. PJE removed 2-3 inches of loose stone gravel ballast that covered the old roof. The asbestos tar that covered the old counter-flashing was removed by PJE's asbestos-abatement sub-contractor (BSB), and properly disposed of as the roof work progressed.

In October, 2013, Owens Electric retained QuES&T to monitor the asbestos abatement phase of the project that was being performed by BSB. On November 7, 2013, the NYS Department of Labor posted a stop-work order on the building. The Department of Labor representative, Jason Peasabene, advised Mays that a hazardous material survey needed to be prepared, or a variance obtained, before any construction at the building could continue. Prior to the issuance of this stop work order, Mays had, independently of its contracts with Owens Electric, contracted with Terry Boalt to commence renovation work on the first floor of the building to accommodate the prospective tenant.

A variance was obtained by Mays on November 21, 2013. No violations were ever issued by the Department of Labor against Owens, PJE or BSB.

Once the variance was granted, PJE went back to work with a crew of 8-15 workers. This work included the removal of the old roof, the copper counter-flashing and related materials. As the old roofing materials were removed, PJE also began laying and installing the new Versico roof, at the rate of 3,500 - 4,000 sq. ft. per day. New base flashing along the parapet walls was installed so that no water from the surface of the parapet could get behind the base flashing. PJE started from the south side of the roof working from the west toward the east (front) side of the Building facing Route 9.

From time to time during the course of the roof project, rain and snow events occurred which required the occasional shoveling of snow from the new and old roof systems, and the use

of water pumps by PJE to remove standing water from the roof. There were three leak events during the time that PJE was working on the roof. All three leaks occurred on the old roof, none occurred on the new roof. All three were minor in nature and were dealt with by Owens or Coschignano. Chris Sexton, the project manager assigned by Mays to periodically inspect the Premises, was not concerned with any of these leaks.

When the new roofing membrane was nicked by snow shoveling activity, the nicks were all patched so that no water could infiltrate the new roofing system. There were, however, two areas of the new roof that needed to be fixed or replaced. Jim Lampi, owner/president of PJE, notified Owens Electric that one area had wrinkles, and that the other has too many shovel nicks to remain permanently in place. Neither section had yet been replaced when Mays terminated the contracts with Owens Electric on January 6, 2014. Prior to the termination, Lampi advised Owens Electric that replacement of the wrinkled area of the new roof would not jeopardize the receipt of a 20-year warranty from Versico upon project completion.

According to the field service representative from Versico, Richard Ryan, the roof installed by PJE was, to the extent that it had been completed, in compliance with the manufacturer's warranty requirements. Ryan testified that he inspected the roof shortly after the termination date (January 6, 2014). He found that the new roof appeared to be fully adhered to the substrate. He also determined that the wrinkled portions of the membrane could be repaired in less than three (3) days. In that regard, his testimony echoed the testimony of Coschignano, Lampi and Richard Watsky, an expert witness who testified on behalf of Mays. Notably, Mays did not contact or otherwise consult with Ryan or anyone else at Versico before terminating the contract with Owens Electric and PJE on January 6, 2014.

Second Floor Demolition Work

After the execution of the Demolition Contract, Owens Electric's electricians disconnected light fixtures and the electrical system so that the wall partitions on the second floor could be removed. This process took approximately two weeks to complete. Coschignano removed two windows and built temporary wooden enclosures for the window openings in the front end of the building. This allowed ventilation and facilitated the disposal of demolition debris by sliding it down chutes into dumpsters below. Coschignano's plan was to perform the demolition work from Monday to Friday, and remove the chutes and dumpsters before the weekend when the flea market was to begin operation.

Coschignano had sub-contracted the demolition work with JCZ, who planned to use a crew of 22 laborers to perform the demolition work. It was expected that the project would take 2-3 weeks to complete. The contract called for 30 days to perform the demolition work. The stop-work order issued by the Department of Labor on November 7th stopped the demolition project on that date. Mays did not ask QuES&T to obtain a variance from the NYS Department of Labor for asbestos abatement for the second floor of the building. Mays also did not retain QuES&T to monitor asbestos removal from the second floor of the building. As a result, the partitions in the IBM area, that were to be demolished, could not have been taken out of the building without disturbing the asbestos that was found on the second floor of the building.

Demolition work on the second floor of the building could not proceed until the asbestos noted in the bulk sample (found by Jason Pensabene) was properly removed from the area. The NYS Department of Labor did not issue a violation of Industrial Code Rule 6 to Owens Electric for the demolition project because substantial demolition work had not yet commenced.

Shutdown of All Projects in the Building
by the Department of Labor

At the time of the lock-down of the building by the NYS Department of Labor, Pensabene issued a Notice of Violation letter to Terry Boalt, who had contracted with Mays to perform certain demolition work on the first floor in anticipation of the flea market commencing occupancy. Boalt was cited for not being licensed or trained for asbestos abatement; for not having employees certified to perform asbestos abatement work; for disturbing presumed asbestos contaminated materials ("PACM") (because there was no asbestos survey); and for misleading and lying to a Department of Labor employee. For some reason, Mays did not terminate Boalt's contract (despite the fact that his conduct resulted in the entire building being shut down). In fact, Mays paid the \$1,500 in fines levied against Boalt by the Department of Labor on Boalt's behalf.

Nevertheless, Pensabene allowed Owens Electric to continue working on the parking lot lights while the building was closed by the Department of Labor. Owens Electric and PJE lost six days of working time due to the Department of Labor shut down of the building.

Termination of the Roof and Demolition Contracts

On January 5, 2014, Sabia reported a leak to Silva. The tenant, however, did not report any damage to his property, or to that of any of his vendors, as a result of this leak. Mays took no action until the following day (Monday) when Silva sent Sexton to inspect the building. The leak was repaired by Owens on January 6. The leak was located under the old roof.

On January 6, 2014, at approximately 3:00 pm, Chris Sexton called Coschignano and told him to stop all work on the roof and to remove all workers and leave the building. Coschignano

asked Sexton to meet with him so that they could review whatever it was that Sexton had a problem with regarding the roof work. Sexton never advised Owens that he had any concerns about the installation of new roof prior to January 6, 2014. In fact, Sexton admitted that the roof work performed by Owens and PJE did not violate the Roof Contract.

Coschignano then advised Sexton that he could not leave the roof without first checking the work to ensure that it was watertight. Sexton told him to leave the work site immediately and, that if he did not, the police would be called. Coschignano, Owens Electric and PJE promptly left the roof and the building under the threat of police intervention, without having any opportunity to make the work they were doing permanently

Coschignano continued to reach out to Sexton by leaving voice-mail messages on his cell phone. None of these calls were returned by Sexton or anyone else from Mays. Coschignano then traveled to Shulman's home in Carmel (Rock Ridge Farm) and waited for him to return from work. They spoke by phone after Shulman returned home. Shulman started yelling at Coschignano, calling Owens a "crook," complaining that an electrician could not do roof work, and stating that he wished Owens was dead. Shulman also reiterated that, if the Roof Contractors returned to the Building, the police would be called. Coschignano never had a chance to speak.

Owens was in Arizona on January 6th. After he learned about the contract termination, he called Sexton and left a message on his cell phone. Sexton did not return the call. Lampi also called Shulman in an attempt to speak with him about the project. However, Shulman claimed that he did not know Lampi's firm was involved in the project, and then hung up on him.

Mays did not give Owens Electric or PJE any opportunity to repair any of the alleged defects with the new roof that caused the contract termination on January 6, 2014. Owens Electric and PJE, accompanied by a representative of Versico, attempted to meet with a

representative of Mays, to no avail. Owens Electric sent e-mails to Sexton and Shulman on January 8-9, 2014, with no response. Owens Electric followed up with a letter to Shulman on January 14, 2014, which also resulted in no response from Mays.

According to Shulman, it was George Silva's decision to terminate the contract on January 6, 2014. Silva had worked for Mays since 1969, starting as a retail clerk on the floor, and working his way up the corporate ladder. Sexton reported to Silva.

Silva claimed that he was not aware that PJE had been sub-contracted to install the roof by Owens Electric. However, Silva did acknowledge that he signed a letter to the Town of Fishkill Building Department, authorizing PJE to apply for the roof building permit on behalf of Mays.

The Demolition Contract was terminated because Mays was dissatisfied with the roof work, and Silva did not want to have any further dealings with Owens Electric. Sexton was not aware of any violations of the Demolition Contract by Owens.

Owens Electric's Mechanic's Liens

On January 21, 2014, Owens Electric filed a Notice of Mechanic's Lien with the Dutchess County Clerk in the amount of \$332,667.00, for unpaid labor and materials furnished in connection with the roof work at the Building. On January 23, 2014, Owens Electric filed another Notice of Mechanic's Lien with the Dutchess County Clerk in the amount of \$73,132.00, for unpaid labor and materials furnished in connection with the electrical work and asbestos abatement work performed on the first floor of the Building.

The original roof work mechanic's lien was reduced to a claimed sum of \$191,093.00, by way of an unopposed motion by Owens Electric that resulted in an Order dated November 17,

2014 (Brands, J.S.C.). The second mechanic's lien was satisfied by Mays after the conclusion of the trial herein.

Expert Testimony

Each side to this dispute called an expert witness to testify on its behalf. Richard Watsky, a roofing consultant, testified on behalf of Mays that the roof installed by PJE was not installed properly. He did not know, however, that Mays did not give PJE an opportunity to "button-up" the project before being abruptly terminated on January 6, 2014. Mark Day, a local civil engineer, testified on behalf of Owens Electric and PJE and disagreed with Watsky's opinion. Day opined that the roof appeared to have been installed properly by PJE. He also disagreed with the testing methodology utilized by Watsky as not being in conformance with industry standards.

Conclusions of Law

The above Findings of Fact have been established to the court's satisfaction by a preponderance of the evidence.

The court finds that prior to performing any renovation work on the Building, Mays was legally obligated to have an asbestos survey performed to rule out the presence of any asbestos-contaminated materials, and, if any such hazardous materials were identified, to properly abate these materials using licensed abatement contractors. Mays did not have an asbestos survey performed before it commenced renovation work in and on its building. Mays' failure to perform an asbestos survey led to the lockdown of the building on November 7, 2013, and the stoppage of all work inside the building and on the roof. Mays' failure to abate the asbestos found on the

second floor of the building further prevented Owens from performing the Demolition Contract work.

“Generally, where parties agree on a termination procedure, the clause must be enforced as written.” J. Petrocelli Construction, Inc., v. Realm Electrical Contractors, Inc., 15 AD3d 444, 446 (2d Dept. 2005). *See also* Mike Building & Contracting, Inc., v. Just Homes, LLC, 27 Misc.3d 833, 843 (Sup. Ct. Kings County 2010) (“this general rule fully applies to construction agreements, whose parties cannot terminate contractors unless they follow the contractual procedures to the letter.”). However, the failure to comply with a contractual termination procedure will be excused if the breach cannot be timely cured Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle, Inc., 271 AD2d 636, 639 (2d Dept. 2000), or if the termination procedure would be futile because the breaching party has repudiated the contract. U.W. Marx, Inc., v. Koko Contracting, Inc., 124 AD3d 1121, 1122 (3d Dept. 2015); Kleinberg Electric, Inc., v. E-J Electric Installation Co., 111 AD3d 410, 410-11 (1st Dept. 2013).

Pursuant to Article VI of the Roof and Demolition Contracts, only the Owner, represented by the Chairman of the Board (Shulman), its President (Shulman), or such other designee as the Owner designates in writing at the time the contracts are signed (Sexton) is authorized to notify the contractor regarding termination of the contract.

Mays’ attorney was not designated in writing at the time of the signing of the Roof Contract or the Demolition Contract, as an Owner’s Designee, per Article XIII of said contracts. Pursuant to Article XIV of the Roof Contract and Demolition Contract, Notices of Termination must be sent by registered or certified mail. There is no evidence in the record to confirm that the letters sent to Owens by Mays’ attorneys dated January 9, 2014, January 20, 2014, January 21, 2014 and January 27, 2014 were forwarded by certified or registered mail. The court,

therefore, reverses its earlier determination to admit these letters into evidence during the course of the trial, sustaining Owens Electric's trial objection at this time. New York and Presbyterian Hospital v. Allstate Insurance Company, 29 AD3d 547 (2d Dept. 2006). Cf. Dune Deck Owners Corp. v. JJ&P Associates Corp., 71 AD3d 1075 (2d Dept., 2010).

The court also finds that Mays did not comply with Article VII of the Roof Contract entitled "Owner's Rights and Remedies." This provision requires Mays to submit a written notice to Owens Electric that Mays has determined that Owens Electric has neglected to prosecute the "work" properly, or that it had failed to perform any provisions of the contract, before terminating the agreement and taking possession of the premises and finishing the "work" by any method Mays deemed expedient.

There is no evidence in the record here that Mays ever sent any such written notice to Owens Electric to correct any defects or faults with respect to the roof work performed by Owens Electric, or its subcontractor, PJE. Instead, Mays chose to abruptly terminate the contract on January 6, 2014, without the contractually required notice. The court, therefore, finds that Mays has breached its contract with Owens Electric based upon the record as found in the Findings of Fact above.

The same analysis applies equally to the Demolition Contract between Mays and Owens. It should be noted that these contracts were form contracts used by Mays in their customary construction-related transactions, and prepared by attorneys retained by Mays. Again, Mays did not comply with Article VII of this contract which utilizes the same language that was used in the Roof Contract above. The court, therefore, finds that Mays breached its agreement with Owens Electric regarding the Demolition Contract when it abruptly terminated the contract on January 6, 2014, without the contractually required notice.

The breach by Mays of the Roof Contract with Owens Electric has also caused Owens Electric to breach the roof subcontract with PJE. Since Mays did not pay Owens Electric, Owens Electric did not pay PJE. As a result, this court finds that PJE has sustained its counterclaim against Owens Electric for breach of contract for work performed and not paid.

In addition, the court finds that PJE has sustained its first cross-claim against Mays for tortious interference with contract. In order to establish a cause of action for tortious interference with contract, a party must prove the following elements: 1) the existence of a contract between the plaintiff and a third party; 2) the defendant's knowledge of that contract; 3) the defendant's intentional inducement of the third party's breach of that contract without justification; 4) actual breach of the contract and 5) damages. Ferrandino & Son, Inc. v. Wheaton Builders, Inc. LLC, 82 AD3d 1035 (2d Dept., 2011). *See also* Lama Holding Co., v. Smith Barney Inc., 88 N.Y.2d 413, 424 (1996); Anesthesia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 A.D.3d 473, 476 (2d Dept. 2009).

In the September 26, 2016 Decision and Order deciding the competing motions for summary judgment, the Court found that a valid roof subcontract existed between PJE and Owens Electric. This roof subcontract was also established at trial by documentary evidence.

Mays' knowledge of the roof subcontract between Owens Electric and PJE was established by the testimony of Jason Coschignano. Specifically, the court credits his testimony to the effect that he advised Christopher Sexton, George Silva and Lloyd Schulman that PJE had been subcontracted to perform the roofing work on the Building. That testimony was confirmed by the letter signed by Silva on October 16, 2013 (on Mays letterhead) stating that, while Mays owned the building, it was authorizing "PJ Exteriors, Inc." to obtain a building permit on its behalf from the Town of Fishkill building department.

The third element was established by the presentation of credible and reliable evidence during the course of the trial showing that the roofing work performed by PJE was good quality work. Four different witnesses - Coschignano, Lampi, Ryan and Watsky - all agreed that the roof areas that needed to be corrected, including the wrinkled section of membrane, could have been repaired in less than 3 days.

The fourth element - actual breach of the contract - was established as outlined above. Finally, the credible and reliable evidence presented at trial demonstrates that PJE suffered damages as a result of that breach, satisfying the fifth element of PJE's cross-claim for tortious interference with contract.

As set forth above, Mays did not follow the procedure listed in the Roof and Demolition Contracts for terminating these contracts. The improper termination of the Roof Contract by Mays caused the breach of the roof subcontract between Owens Electric and PJE. All of the deficiencies alleged by Mays with respect to the roof work performed by Owens Electric and PJE were capable of being repaired within three days or less. Mays terminated the Roof Contract without giving Owens Electric or PJE any chance to repair the deficiencies alleged by Mays.

Mays wrongfully terminated both the Roof Contract and Demolition Contracts. Therefore, Owens Electric is not liable to Mays for any lost rent with respect to the flea market tenant.

Damages

The court finds that as of January 6, 2014 (the termination date), PJE had completed 52% of its obligations under the roof subcontract. That includes the work performed by PJE, the third-party monitoring by QuES&T, the removal of the 14 rooftop HVAC units by Preiser Crane, the

disconnection of electric power and connection to the HVAC units by Owens, and the procurement of insurance by Owens Electric.

The court also finds that PJE had installed approximately 43,000 sq. ft. of the new Versico roofing as of January 6, 2014 and had removed the old roof's gravel ballast, which was approximately 2-3 inches deep, over the entire 103,000 sq. ft. old roof. PJE also supervised the asbestos abatement work by BSB, and accepted delivery of the insulation board that had been delivered but not yet installed as of January 6, 2014.

The court determines that the value of the Roof Contract work completed by Owens Electric by January 6, 2014 was \$535,926. Owens was paid \$332,667 by Mays leaving a balance of \$203,259. Mays has not paid this balance over to Owens to date.

Owens Electric's total anticipated cost for the complete performance of the Roof Contract was \$861,285 and the total anticipated profit on the Roof Contract was \$136,714. The total profit realized from the down payment made by Mays was \$16,175, and the total profit that was embedded in Owens Electric's claim for the balance owed for the Roofing Contract work completed through January 6, 2014 is \$57,019. That leaves a balance of the anticipated profit lost by Owens Electric on the Roof Contract to be \$63,520.

Therefore, the Court awards Owens Electric damages in the amount of \$203,259, as payment for the work that was completed prior to the January 6, 2014 termination of the Roof Contract. The Court also awards damages to Owens Electric in the amount of \$63,520, as payment of the lost profits that Owens Electric did not receive due to the improper termination of the Roof Contract. The total amount of these combines Roof Contract damages is \$266,779.

The total anticipated cost for the complete performance of the Demolition Contract was \$250,140. No profits were included in the down payment made by Mays in this portion of the project. The total anticipated profit lost by Owens Electric on the Demolition Contract was \$41,800. Therefore, Owens Electric suffered damages totaling \$41,800 as a result of the breach of the Demolition Contract.

Mandatory pre-judgment interest, at the statutory rate of 9% per annum running from January 6, 2014 (i.e., the date that Mays wrongfully terminated the Roof and Demolition Contracts) is also awarded to Owens Electric (CPLR 5001).

The court determines that the value of the roof subcontract work completed by PJE on January 6, 2014 was \$402,290. PJE was paid \$262,334 by Owens Electric, leaving a balance of \$149,606 for the work that PJE had completed when Mays improperly terminated the Roof Contract. PJE has not received payment of this balance due.

PJE's total anticipated cost for the complete performance of the Roof Contract was \$673,825, and the total anticipated profit on the Roof Contract was \$113,175. The total profit realized from the \$262,334 payment made by Owens Electric was \$37,723. The total profit that is embedded in PJE's claim for the \$149,606 balance owed for the roof subcontract work that had been completed through January 6, 2014 is \$21,513. The anticipated profits that PJE lost when Mays improperly terminated the Roof Contract are \$53,939.

Therefore, the Court awards PJE damages in the amount of \$149,606, as payment for the work that was completed prior to January 6, 2014. The Court also awards damages to PJE in the amount of \$53,939, as payment for the lost profits that PJE did not receive due to the improper termination of the Roof Contract. The total amount of these combined damages is \$203,545.

These combined damages are awarded to PJE on both the breach of contract counterclaim against Owens Electric, and the tortious interference with contract cross-claim against Mays.

In New York, windfalls and duplicative recoveries are prohibited. [Fisher v. Qualico Contracting Co., 98 NY2d 534, 537 (2002); Cox v. Microsoft Corp., 290 AD2d 206, 208 (1st Dept. 2002)]. Therefore, Mays and Owens Electric are deemed to be jointly and severally liable to PJE on the breach of contract counterclaim and the tortious interference with contract cross-claim, to the extent that any payments that are made by either party to satisfy the judgment in this action will be credited in a manner that prevents a windfall or double recovery. [Lazar, Sanders, Thaler & Associates, LLP, v. Lazar, 131 AD3d 1133, 1134 (2d Dept. 2015)].

Pre-judgment interest, at the statutory rate of 9% per annum running from January 6, 2014 (i.e., the date that Mays wrongfully terminated the Roof Contract) is awarded to PJE (CPLR 5001). To the extent that PJE seeks prejudgment interest at a rate of 24% as against Owens Electric based upon the roof subcontract, that request is denied.

As a preliminary matter, the 24% interest rate identified in the roof subcontract does not apply to PJE's anticipated lost profits. In any event, Owens Electric did not willfully fail to pay PJE the amounts due under the roof subcontract. Rather, its breach was induced by Mays's breach of the Roof Contract and its tortious interference with the roof subcontract. Therefore, since the delay in payment was caused by Mays, and not by Owens Electric, the 9% statutory rate of interest will apply to PJE's claim. Mid-State Precast Systems, Inc., v. Corbetta Construction Co., Inc., 202 AD2d 702, 704 (3d Dept. 1994).

Finally, PJE has requested an award of attorneys' fees in connection with its counterclaim against Owens Electric and its cross-claim against Mays. Owens Electric has also requested that, if PJE is granted an attorneys' fee award on its counterclaim against Owens Electric, that this

award be added to the damages that Owens Electric may recover from Mays for breaching the Roof Contract.

“An award of reasonable attorneys’ fees is within the sound discretion of the court, based upon such factors as the time and labor required, the difficulty of the issues involved, and the skill and effectiveness of counsel.” [SO/Bluestar, LLC v. Canarsie Hotel Corp., 33 AD3d 986, 988 (2d Dept. 2006)]. “While a hearing is not required in all circumstances, ‘the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered.’ [id. at 988, quoting Bankers Federal Savings Bank, FSB v. Off West Broadway Developers, 224 AD2d 376, 378 (2d Dept. 1996)]. “There must be a sufficient affidavit of services, detailing the hours reasonably expended and the prevailing hourly rate for similar legal work in the community.” [id. at 988].

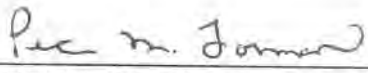
The affirmation of services that has been prepared by PJE’s counsel demonstrates that PJE has incurred attorneys’ fees totaling \$179,373.63 in connection with this matter. The affirmation is accompanied by itemized billing statements providing a detailed accounting of the legal services that have been provided.

The Court finds that PJE’s attorneys’ fee application is reasonable based upon the time and labor required; the difficulty of the legal and factual questions involved; the skills required to handle the case; the attorneys’ experience, ability and reputation; the amount involved and benefit resulting to the client; the customary fee charged by local attorneys for similar services; the results ultimately obtained; and the responsibility involved. Therefore, PJE’s attorneys’ fee application is granted with respect to its counterclaim against Owens Electric and its cross-claim against Mays. This attorney’s fee award is also added to the damages that have been awarded to Owens Electric in connection with its breach of contract claim against Mays..

The foregoing constitutes the Decision and Order of this court. Owens Electric and PJE shall file and serve a proposed judgment consistent with the terms of this Decision and Order, along with Notice of Settlement that is returnable at least fifteen (15) days after the date of service.

Counsel are directed to retrieve the exhibits in this matter within thirty (30) days, after which date they will be destroyed.

Dated: October 30, 2018
Poughkeepsie, New York



HON. PETER M. FORMAN, AJSC

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