IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LOBAR INC.,	:	
Plaintiff	:	CV 16-1320
VS	:	
COUNTY OF LYCOMING and	:	
CUMMINGS & SMITH INC.,	:	
Defendant	:	
COUNTY OF LYCOMING,	:	
Plaintiff	:	CV 16-1320
VS	:	
LOBAR INC. and FEDERAL	:	
INSURANCE COMPANY,	:	
Defendant	:	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

I. Introduction:

This matter came before this Court for argument on October 6, 2022, on the multiple Motions for Summary Judgment, as follows:

- Motion of County of Lycoming for Summary Judgment Against Lobar, Inc., filed April 22, 2022.
- Motion of Cummings & Smith, Inc., for Summary Judgment Against Lobar, Inc., filed April 22, 2022.
- Motion of Lobar, Inc., and Federal Insurance Company, Inc., for Partial Summary Judgment against County of Lycoming filed April 22, 2022.

II. The Test for Summary Judgment:

In Pennsylvania, a party may move for summary judgement "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action…" Pa.R.C.P. No. 1035.2(1). In response, the adverse party may not rest on denials but must respond to the motion. Pa.R.C.P. No. 1035.3(a). The non-moving party can avoid an adverse ruling by identifying "one or more issues of fact arising from evidence in the record" P.R.C.P.1035.3(a)(1).

Given the sheer size of the Exhibits provided to this Court in support of the Motions, the Court is reminded of the admonition of our Supreme Court that "doubtful cases should go to trial, especially those involving intricate relations demanding an inquiry into the facts

of the controversy." *Gaul v. City of Philadelphia*, 384 Pa. 494, 510, 121 A.2d 103, 112 (1956), citing *Helfenstein v. Line Mountain Coal Company*, 284 Pa. 78, 81, 130 A. 301, 302 (1925).

In considering a motion for summary judgment, it is not the Court's function to decide issues of fact. Rather, is it our function to decide whether an issue of fact exists. *Fine v. Checcio,* 582 Pa. 253, 273, 870 A.2d 850, 862 (2005).

> Summary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment. *Hovis v. Sunoco, Inc.,* 2013 Pa.Super. 54, 64 A.3d 1078, 1081, quoting *Cassel-Hess v. Hoffer*, 44 A.3d 84-85 (Pa.Super. 2012).

In the matter of *Accu-Weather, Inc. v. Prospect Commc'ns, Inc.*, 435 Pa. Super. 93, 644 A.2d 1251 (Pa. Super. Ct. 1994), the Court described the proper test for a grant of summary judgment as follows:

> First, the pleadings, depositions, answers to interrogatories, admissions on file, together with any affidavits, must demonstrate that there exists no genuine issue of fact. Pa.R.C.P. 1035(b). Second, the moving party must be entitled to judgment as a matter of law. *Id.* The moving party has the burden of proving that no genuine issue of material fact exists. *Overly v. Kass,* 382 Pa.Super. 108, 111, 554 A.2d 970, 972 (1989). However, the non-moving party may not rest upon averments contained in its pleadings; the non-moving party must demonstrate that there is a genuine issue for trial. The court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party. *Stidham v. Millvale Sportsmen's Club,* 421 Pa.Super. 548, 558, 618 A.2d 945, 950 (1992), *appeal denied,* 536 Pa. 630, 637 A.2d 290 (1993) (citing *Kerns v. Methodist Hosp.,* 393 Pa.Super. 533, 536–37, 574 A.2d 1068, 1069 (1990)). Finally, an entry of summary judgment is granted only in cases where the right is clear and free of doubt. *Ducko v. Chrysler Motors Corporation,* 433 Pa.Super. 47, 48, 639 A.2d 1204, 1205 (1993) (citing *Musser v. Vilsmeier Auction Co., Inc.,* 522 Pa. 367, 370, 562 A.2d 279, 280 (1989)). We reverse an entry of summary judgment when the trial court commits an error of law or abuses its discretion. *Kelly by Kelly v. Ickes,* 427 Pa.Super. 542, 547, 629 A.2d 1002, 1004 (1993) (citing *Carns v. Yingling,* 406 Pa.Super. 279, 594 A.2d 337 (1991).

III. Factual Background:

The parties have provided the Court with voluminous records in support of their Motions, including many hundreds of pages of construction documents and deposition testimony. The Motion for Summary Judgment filed by Lobar, Inc. (hereinafter "Lobar") contains 230 numbered allegations of fact and law. While County of Lycoming (hereinafter "Lycoming") concurs in some, the vast majority are firmly contested. Although an exhaustive examination of the record would be unwieldy, the Court has undertaken to identify the facts alleged by Lobar in which Lycoming apparently concurs, supplemented by reference to written expert reports and correspondence within the record, all in an effort to assemble a collection of the uncontroverted facts of this matter.

1. Some years ago, Lycoming began planning to expand is waste management operations to include new landfill waste locations
2. The construction of new landfill sites would lead to an increase in leachate, which is rainfall which passes through landfill waste and becomes contaminated.
3. Lycoming hired engineering firm Cummings & Smith, Inc. (hereinafter Cummings") to design a tank to store excess leachate from the expanded landfill.
4. Cummings designed a 5.6 million gallon uncovered concrete tank that would have a plastic liner on both the walls and floor. The liner provided the primary containment for leachate, and the concrete provided the secondary containment.
5. The area between the liner and the concrete walls and floor was called the leak or leachate detection zone ("LDZ").
6. Following public bidding, Lobar was awarded the Project and executed a contract with the County to provide general contracting services to construct the Tank (hereinafter the "Contract") in accordance with Project plans and specifications, which the Contract incorporated by reference.
7. Lobar agreed to achieve substantial completion for the Project by November 3, 2013 and final completion by January 2, 2014 unless otherwise agreed.
8. Not only did the Contract's incorporated plans and specifications contain detailed technical information, requirements, and directives about constructing the Project, but they also outlined certain design performance requirements.

9. Specification § 02775.1.3.A governs the Tank's Liner System Geomembrane. That Section states that the contractor must "Install HDPE Geomembranes to be watertight throughout. Pinholes, tears, scuff marks, seam defects, or other damage to geomembranes shall be repaired. Evidence of leakage into the detection zone sump prior to acceptance will require location and repair of defective area by the Contractor."
10. Lobar began Tank construction on January 2, 2012 and, after clearing and excavating the site, constructed the formwork for the concrete Tank.
11. Building the forms included affixing the wall liner to the inside of the form so that the liner would be embedded into the concrete poured into that form.
12. Over the three day test, the tank level dropped "slightly less than 1/8th of an inch," after adjusting for precipitation and evaporation.
13. By letter dated April 4, 2014, Gary L. Smith of Cummings advised Lobar and Lycoming that "in our professional opinion the HDPE wall and floor liner of the leachate storage tank has passed the requirements of the Contract Documents for the ACI 350.0-01 Tightness Testing of Environmental Structures, Tightness Testing of Tanks, for the hydrostatic test of the primary HDPE liner."
14. Lobar contends that the letter dated April 4, 2014 is conclusive evidence that Lobar complied with the Contract Documents.
15. Lycoming contends that the letter dated April 4, 2014 is a mere indication that Lobar complied with the some of the requirements of the Contract Documents, but that it does not satisfy the Specification § 02775.1.3.A more fully set forth above.
16. The Contract originally required Lobar to achieve: substantial completion of Project work 670 days from the Contract's execution. November 3, 2013; and final completion 730 calendar days from the start of the contract time, January 2, 2014.
17. An additional thirty-six days were added to these Contract times.
18. On April 4, 2014, Lisa Houser the Pennsylvania Department of Environmental Resources Solid Waste Facilities Manager sent an email to Cummings in which she advised that DEP would not accept the ACI hydrostatic test.
19. By email dated April 22, 2014, Gary Smith of Cummings advised various representatives of Lycoming that DEP would not accept the ACI hydrostatic test, that

DEP would not accept any leachate leaking into the LDZ, and that DEP took the position that "no leakage" was the required standard.

20. Within the body of his email dated April 22, 2014, Gary Smith of Cummings appears to question the "no leakage" is the standard position taken by DEP. Further, Gary Smith predicts that "Lobar and its subcontractor Golder believe that if they have passed the ACI hydrostatic test they have met the requirements of the contract."
21. By letter dated April 22, 2014, Gary Smith of Cummings advised Jason Bogle of Lobar that the leakage of approximately 10 to 13 gallons of leachate into the LDZ failed to comply with Specification § 02775, and that Lobar was "required to locate and repair the defective areas of the wall and/or liner system. Please advise us of your schedule and proposed methods to achieve a watertight lining system for the leachate storage tank as required by the Contract Documents."
22. By letter dated July 1, 2015, Jason K. Bogle of Lobar advised Gary Smith of Cummings that "we wish to reiterate to both Lycoming County and Cummings & Smith, that our leak detection efforts will continue. We understand that it's our responsibility to find all sources of water infiltration into the tank's detection manhole and we remain resolute in this goal."
23. By letter dated January 25, 2016, David A. Myers of Lobar advised Gary Smith of Cummings that "Lobar Inc. takes exception to performing any additional leak testing because the tank certification report from Leak Detection Technologies, attached, and the report from WJE dated December 16, 2015, also attached, demonstrate that the Leachate tank liner meets all of the water tightness requirements in accordance with the contract documents."
24. Golder performed leak location and remediation work between November 2014 and January 2016.
25. On January 20, 2016, Golder submitted a Request for Change Order to Lobar for that work, in the amount of $79, 028.90. Neither Cummings nor Lycoming accepted that change order.
26. Lobar performed leak location and remediation work between April 2014 and January 2016. On January 25, 2016, Lobar submitted a Request for Change Order to Cummings for that work, in the amount of $695,147.11, which included work

performed by InterGeo Services in the amount of $79,028.35, and bond, mercantile tax, and builder's risk costs totaling $23,507.40. Neither Cummings nor Lycoming accepted that change order.

27. By letter dated March 4, 2016, Cummings advised Lycoming that a full depth hydrostatic test of the leachate storage tank conducted from February 9, 2016 through March 1, 2016, "proved conclusively that the primary liner system contains leaks, which leak substantial quantities of water from the leachate tank directly into the detection zone."
28. The County rejected some requests for extensions of time, claiming Lobar did not construct a watertight Tank liner system as the Liner Specs required and within the Contract's substantial and final completion deadlines.
29. The County claims Lobar owes LDs at a rate of $1,500.00 per day—$1,869,000.00 at the time the County filed its Complaint and accruing ever since, according to the County.
30. Edward J. Zimmel of Zimmel Consulting, LLC, has provided an expert report to Lycoming dated February 11, 2022, in which he opines that the Tank leaks due to poor workmanship.
31. John M. Gardner P.E. and Joan A. Smyth P.G. have provided an expert report to Lycoming dated March 22, 2022, which contains the opinion that "the tank's design is neither deficient nor inadequate for its intended purpose" and that "lack of experience, poor planning and execution of the work by both Golder and Lobar was the primary reason for the leakage that has been experienced at this tank since its construction."

IV. Questions Presented:

A. Lycoming County's motions

1) Whether Lycoming County is entitled to summary judgment on Lobar's claim for breach of contract, where there exist multiple material issues of fact for trial on the question of whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work.

2) Whether Lycoming County is entitled to summary judgment on Lobar's claim under the Prompt Payment Act, where there exist multiple material issues of fact for trial regarding whether there was one or more deficiency items under the terms of the Prompt Payment Act.

3) Whether Lycoming County is entitled to summary judgment on Lobar's claim for penalties and attorney's fees, where there exist multiple material issues of fact for trial regarding whether Lycoming County had a proper basis upon which to withheld payment.

4) Whether Lycoming County is entitled to summary judgment on Lobar's claim for unjust enrichment, where the parties' relationship is based upon an express contract, but where there exist multiple material issues of fact for trial on the question of whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work, or had the effect of providing a benefit to Lycoming which would be unjust, without compensation to Lobar.

5) Whether Lycoming County is entitled to summary judgement on its claim against Federal Insurance Company, where the parties concede that Federal is essentially a guarantor of the financial obligations of Lobar, and where there exist multiple material issues of fact for trial on the question of whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work, whether Lobar is entitled to judgment in its claim under the Prompt Payment Act, and in the alternative, whether Lobar is entitled to judgment on its alternative claim for unjust enrichment.

B. Lobar's motions

1) Whether Lobar is entitled to partial summary judgment on its breach of contract claim, where there exist multiple material issues of fact for trial regarding the proper interpretation of the contract specification that the tank liner be "watertight", whether Lobar did or not comply with the contract specifications, and whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work.

2) Whether Lobar is entitled to partial summary on Lycoming County's clam for liquidated damages, where there exist multiple material issues of fact for trial on whether Lycoming is entitled to collect any money damages, and, if so, whether the exact amount of Lycoming's money damages are susceptible of calculation.

B. Cummings and Smith's (C&S) motions

1) Whether Cummings is entitled to summary judgment on Lobar's claim for negligent misrepresentation, where Lobar has identified proposed expert testimony in support of that claim.

2) Whether Cummings is entitled to summary judgment on Lobar's claim for negligent misrepresentation on the basis that the claim is barred by Lobar's contributory negligence, where there exist multiple material issues of fact for trial on the question of whether Lobar did or did not perform consistent with the contract requirements, and whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work.

V. Brief Answer:

A. Lycoming County's motions

1) Lycoming County is not entitled to summary judgment on Lobar's claim for breach of contract, because Lobar has identified sufficient deposition testimony, contract documents, written exhibits, and reports of proposed expert witnesses to establish the existence of multiple material issues of fact for trial on the questions of the proper interpretation of the contract specification that the tank liner be "watertight", whether Lobar did or not comply with the contract specifications, and whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work.

2) Lycoming County is not entitled to summary judgment on Lobar's claim under the Prompt Payment Act, because Lobar has identified sufficient deposition testimony, contract documents, written exhibits, and reports of proposed expert witnesses to establish the existence of multiple material issues of fact for trial on the questions of the proper interpretation of the contract specification that the tank liner be "watertight", whether Lobar did or not comply with the contract specifications, and whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work.

3) Lycoming County is not entitled to summary judgment on Lobar's claim for penalties and attorney's fees, because Lobar has identified sufficient deposition testimony, contract

documents, written exhibits, and reports of proposed expert witnesses to establish the existence of multiple material issues of fact for trial on the questions of the proper interpretation of the contract specification that the tank liner be "watertight", whether Lobar did or not comply with the contract specifications, whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work, and thus whether Lycoming County had a proper basis upon which to withheld payment.

4) Lycoming County is not entitled to summary judgment on Lobar's claim for unjust enrichment, even though the parties' relationship is based upon an express contract, because Lobar has identified sufficient deposition testimony, contract documents, written exhibits, and reports of proposed expert witnesses to establish the existence of multiple material issues of fact for trial on the questions of the proper interpretation of the contract specification that the tank liner be "watertight", whether Lobar did or not comply with the contract specifications, whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work. Losar's attempts to repair the tank liner were a contractual requirement, or extra work, and whether those attempts had the effect of providing a benefit to Lycoming which would be unjust, without compensation to Lobar.

5) Lycoming County is not entitled to summary judgment on Lycoming's claim against Federal Insurance Company, because Federal is essentially a guarantor of the financial obligations of Lobar, and Lobar has identified sufficient deposition testimony, contract documents, written exhibits, and reports of proposed expert witnesses to establish the existence of multiple material issues of fact for trial on the questions of the proper interpretation of the contract specification that the tank liner be "watertight", whether Lobar did or not comply with the contract specifications, and whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work, and whether those attempts had the effect of providing a benefit to Lycoming which would be unjust, without compensation to Lobar.

B. Lobar's motions

1) Lobar is not entitled to partial summary judgment on its breach of contract claim, because there exist multiple material issues of fact for trial regarding the proper interpretation of the

contract specification that the tank liner be "watertight", whether Lobar did or not comply with the contract specifications, and whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work.

2) Lobar is not entitled to partial summary judgment on Lycoming County's liquidated damages claim, because there exist multiple material issues of fact for trial on whether Lycoming is entitled to collect any money damages, and, if so, whether the exact amount of Lycoming's money damages are susceptible of calculation.

C. Cummings' motions

1) Cummings is not entitled to summary judgment on Lobar's claim for negligent misrepresentation, because Lobar has identified proposed expert testimony in support of that claim.

2) Cummings is not entitled to summary judgment on Lobar's claim for negligent misrepresentation on the basis that the claim is barred by Lobar's contributory negligence, because there exist multiple material issues of fact for trial on the question of the proper interpretation of the contract specification that the tank liner be "watertight", whether Lobar did or did not perform consistent with the contract requirements, and whether Lobar's attempts to repair the tank liner were a contractual requirement, or extra work.

VI. Discussion:

A. Lycoming County's motions

1) Lobar's breach of contract claim

"The necessary material facts that must be alleged for [breach of contract] are simple: there was a contract, the defendant breached it, and plaintiffs suffered damages from the breach." *McShea v. City of Philadelphia*, 995 A.2d 334, 340 (Pa. 2010). Where a party that is aware that extra work is being done without protest, there is an implied promise that they will pay for the extra work. *U. S. to Use of Viglione v. Klefstad Eng'g Co.*, 324 F. Supp. 972, 975 (W.D. Pa. 1971); *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 244 A.2d 10, 15 (Pa. 1968).

In its Complaint, Lobar's claims that Lycoming County breached the contract in refusing to pay Lobar for what it characterizes as extra work. Lobar contends that it substantially performed the terms of the contract and the additional testing and remedial work performed by Lobar should be characterized as extra work. Lycoming County asserts

that Lobar did not substantially perform the contract, and that the additional testing and remedial work were simply contract activities that Lobar was already contractually required to perform. In order to survive a motion for summary judgment, Lobar must identify facts on support the existence of genuine issues of material fact for trial. Lobar draws the Court's attention to correspondence dated April 4, 2014, from Gary L. Smith of Cummings advising Lobar and Lycoming that "in our professional opinion the HDPE wall and floor liner of the leachate storage tank has passed the requirements of the Contract Documents for the ACI 350.0-01 Tightness Testing of Environmental Structures, Tightness Testing of Tanks, for the hydrostatic test of the primary HDPE liner."

Lobar has produced three (3) expert reports to support its assertion that the liner's deficiencies are not the result of Lobar's performance of the contract. Richard Thiel opines that the design of the tank was such that "the amount of leakage through the primary Tank liner that would rationally be expected at the end of construction is on the order of 1,000 gallons per day (gpd) when the tank is full." David Rabb opines that "the Tank met the industry standard for "watertight," that the liner defects resulted from a deficient design," and that "liner leaks inevitable occur in any storage tank." Walter A. Wachter opines that "the Tank liner met the industry's watertight standard," that "the Tank design is inadequate for having a liner that does not allow any detectable water to pass through it," and that the "Tank's alleged prior "leakage" may not have resulted from water passing through the Tank liner."

Further, Lobar draws the Courts' attention to the email dated April 22, 2014, from Gary Smith of Cummings, which appears to question the conclusion that "no leakage" is the standard position taken by DEP. In that email, Gary Smith predicts that "Lobar and its subcontractor Golder believe that if they have passed the ACI hydrostatic test they have met the requirements of the contract."

The Court concludes that Lobar has identified material issues of fact related to Lobar's breach of contract claim.

2) Lobar's Prompt Payment Act claim

The Pennsylvania's Prompt Payment Act (PPA) entitles contractors to payment by a government agency for performance of a contract. 62 Pa.C.S.A. § 3931(a). Under the PPA a "government agency may withhold payment for deficiency items according to terms of the

contract." 62 Pa.C.S.A. § 3934(a). In such cases the government agency shall pay the contractor according to all other items which have been satisfactorily completed.

Lycoming County contends that it is entitled to summary judgement on Lobar's claim under PPA, because Lobar's performance constitutes a deficiency item. The contract mandated the tank to be "watertight," and Lycoming claims that it was not. Lobar disputes Lycoming's interpretation of the word "watertight," asserting that the term should be interpreted in harmony with other contract language referring to ACI 350, which would permit leachate leakage up to 727 gallons per day. Lobar contends that it constructed the tank in accordance with all project plans and specification, and claims that the tank's design made it impossible to achieve a liner through which no liquid could pass.

The record evidence discussed above in connection with Lycoming's claim for summary judgment on Lobar's contract claim is equally applicable to Lycoming's claim for summary judgment on Lobar's PPA claim. The factual issues related to whether the tank was a deficiency item under the terms of the PPA are issues for the finder of fact.

3) Lobar's attorney's fees and penalties claim

Pursuant to the PPA, a contractor is entitled to attorney's fees and penalties if a government agency withholds payment in bad faith. 62 Pa.C.S.A. § 3935. A government agent is adjudged to withhold payment in bad faith if the withholding is arbitrary or vexatious. Under the PPA arbitrary has been adjudged to mean "based on random or convenient selection rather than reason;" Vexatious has been adjudged to mean "causing or creating vexation." *Cummins v. Atlas R.R. Constr. Co.*, 814 A.2d 742, 747 (Pa. Super. Ct. 2002).

Lycoming contends that Lobar has not presented record evidence in support its claim that Lycoming's decision to withhold payment was either arbitrary or vexatious. Lobar contends that the County withheld payment for known out-of-scope work in order to coerce Lobar to relinquish its right to payment through legal action. Lobar restates it position regarding the proper interpretation of the term "watertight," and claims that Lycoming's refusal to grant Lobar's change order request to expand the scope of the contract to account for the alleged change of watertight standards constitutes vexatious conduct. Once again, the record evidence discussed above in connection with Lycoming's claim for summary

judgment on Lobar's contract claim is applicable to Lycoming's claim for summary judgment on Lobar's claim for attorney's fees and penalties.

4) Lobar's unjust enrichment claim.

Causes of action and defenses may be pleaded in the alternative. Pa. R. Civ.P. 1020(c). Relief in the alternative or of several different types may be demanded. Pa. R. Civ.P. 1021(a). In Pennsylvania, courts liberally allow parties to assert claims for alternative, inconsistent relief. *See Schreiber v. Republic Intermodal Corp.*, 375 A.2d 1285 (Pa. 1977).

A claim at equity for unjust enrichment is grounded in the equitable principal that "[a] person who has been unjustly enriched at the expense of another must make restitution to the other." *Wilson Area Sch. Dist. v. Skepton*, 895 A.2d 1250, 1254 (Pa. 2006). Unjust enrichment is inapplicable when the relationship between parties is founded upon a written agreement or express contract, regardless of how "harsh the provisions of such contracts may seem in the light of subsequent happenings." *Id.* 895 A.2d at 1254.

Lycoming claims summary judgment upon the basis that its relationship with Lobar is controlled by the terms of a written agreement. Lobar claims damages for breach of the contract, but claims in the alternative that it was required to perform additional testing and remedial work beyond its contract obligation, for which it is equitably entitled to reimbursement.

If the jury finds that Lobar breached its contract with Lycoming, and that its extra work as required to remedy that breach, Lobar's claim for unjust enrichment will fail. If the jury finds that Lobar did not breach its contract, and that it is entitled to collection contract damages, Lobar's claim for unjust enrichment will be redundant. Only if the jury finds that Lobar did not breach its contract, and that Lobar does not have any contract claim, will the Court be required to consider Lobar's alternative claim in equity. Presumably, the Court will be required to carefully craft special jury questions on that issue. In any event, the record evidence discussed above in connection with Lycoming's claim for summary judgment on Lobar's contract claim is applicable to Lycoming's claim for summary judgment on Lobar's claim for unjust enrichment.

5) Lycoming County's claim against Federal Insurance Company

Lycoming alleges that FIC must perform its obligations under the performance bond because Lobar has defaulted on the contract. As discussed above, whether Lobar defaulted on the contract is a genuine issue of material fact for the jury. Lycoming's claim against FIC is therefore inappropriate for summary judgement.

B. Lobar's motions

1) Lycoming County's claim for breach of the construction contract

As more fully set forth above, Lycoming contends that Lobar breached the terms of the construction contract by failing to comply with Specification § 02775.1.3.A, which governs the tank's liner system geomembrane. That section requires that the contractor "Install HDPE Geomembranes to be watertight throughout."

Lycoming has produced an expert report by Edward J. Zimmel (hereinafter "Zimmel") of Zimmel Consulting, LLC. Among other opinions, Zimmel opines "that the continued leakage through the HDPE liner system in the Leachate Tank is due to poor workmanship in the seaming of the geomembrane floor lining and studded wall lining materials and inadequate control testing on the Project by Lobar's subcontractor, Golder." Zimmel further opines that "the HDPE liner system, to include the wall and floor liners, is constructible as designed, and it should have been possible to provide a watertight liner system within the tank." Since these matters are disputed, these opinions obviously create material issues of fact for trial.

Lobar counters by reference to the correspondence dated April 4, 2014, from Gary L. Smith of Cummings advising Lobar and Lycoming that "in our professional opinion the HDPE wall and floor liner of the leachate storage tank has passed the requirements of the Contract Documents for the ACI 350.0-01 Tightness Testing of Environmental Structures, Tightness Testing of Tanks, for the hydrostatic test of the primary HDPE liner." It is entirely possible that the outcome of the breach of contract claim will turn on the ultimate interpretation of the term "watertight" in Specification § 02775.1.3.A.

The proper interpretation of an unambiguous contract is a question of law, for the Court. Where a contract is ambiguous, the proper interpretation becomes a question of fact. *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004). A contract is deemed ambiguous if it can reasonably be constructed or understood in more than one sense. *Trizechahn Gateway LLC v. Titus*, 976 A.2d 474, 483 (Pa. 2009); *Murphy v. Duquesne Univ. Of The Holy Ghost*, 777

A.2d 418, 430 (Pa. 2001. To the greatest extent possible, provisions within a single contract are interpreted in harmony. Contract provisions are not interpreted by Pennsylvania courts in a way that would nullify another provision of the same contract. *Lesko v. Frankford Hosp.-Bucks Cnty.*, 15 A.3d 337, 342 (Pa. 2011). Simply stated, the Court is permitted to enter summary judgment on an issue of contract construction only where the Court concludes that the contract is unambiguous, and only susceptible of a single interpretation.

In the matter at bar, the parties urge significantly different constructions of Specification § 02775.1.3.A. Lobar asserts that the term "watertight" concerning the tank's liner system geomembrane must be interpreted to be synonymous with tank tightness testing under Section 3.7, which incorporates by reference the American Concrete Institute's (ACI) 350 watertight specification. Lobar contends that to interpret watertight to mean impermeable to liquid would be tantamount to nullifying the hydrostatic tank tightness provision, since the ACI 350 specification defines watertight as allowing a defined amount of leachate loss. Lobar submits that the amount of leachate that passes through the tank liner fits within the ACI 350's limitation.

Lycoming argues that interpreting the term watertight in sections 1.3 and 1.4 to mean impermeable to liquid does not nullify section 3.7 of the contract because the competing standards can be read in harmony—the tank must meet both standard. Lycoming submits that the ACI 310 standard is not intended to address leaks or losses originating from a known cause. Rather, that standard applies to evaporation or unexplained losses. The "watertight" standard applies to the tank's liner system geomembrane. The two standards have separate purposes, and are not in conflict.

At this stage of the litigation, the Court is not required to resolve these two competing contract interpretations. The Court is only required to determine that more than one such interpretation exists. Based upon the fact that the meaning of the term "watertight" in Specification § 02775.1.3.A is subject to at least two interpretations, it creates a material question of fact, and summary judgement is inappropriate.

2) Lycoming County's liquidated damages claim.

Parties to a contract may include a liquidated damages provision where computation of actual damages would be speculative. *Wayne Knorr, Inc. v. Dep't of Transp.*, 973 A.2d 1061, 1091 (Pa. Commw. Ct. 2009). Liquidated damages clauses are enforceable where the

damage amount is a reasonable approximation of the expected loss rather than an unlawful penalty. *Id*. Liquidated damages determined to be a penalty are unenforceable as a matter of public policy. *Pantuso Motors, Inc. v. Corestates Bank, N.A.*, 798 A.2d 1277, 1282 (Pa. 2002). In contracts where liquidated damages clauses are based on the speculative nature of actual damages, liquidated damages clauses are distinguished from a penalty when, independent of the clause, "damages would be wholly uncertain and incapable or very difficult of being ascertained, except by mere conjecture." *Geisinger Clinic v. Di Cuccio*, 606 A.2d 509, 516 (Pa. Super. 1992). Lobar accurately asserts that Lycoming cannot collect both actual damages and liquated damages, on precisely the same claim.

In sum, Lycoming is entitled to assert a claim for liquidated damages under the contract terms if the jury finds that Lobar breached its contract, and finds that Lycoming cannot establish the amount of its actual damages, resulting from that breach. Presumably, the Court will be required to carefully craft special jury questions on that issue. In any event, since Lycoming's claim for liquidated damages will turn on the jury's resolution of competing contract claims, and on whether Lycoming can establish the amount of its actual damages, summary judgement is inappropriate.

C. Cummings' motions

1) Lobar's negligent misrepresentation claim

In the matter of *Gongloff Contracting LLC v. L. Robert Kimball & Associates*, 119 A.3d 1070 (Pa.Super. 2015), the Court provided a comprehensive review of claims for negligent misrepresentation by design professionals.

> We begin with an overview of the tort of negligent misrepresentation. The elements of a common law claim for negligent misrepresentation are: "(1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation." *Bilt–Rite,* 866 A.2d at 277 (quoting *Bortz v. Noon,* 556 Pa. 489, 729 A.2d 555, 561 (1999)). Negligent misrepresentation differs from intentional misrepresentation "in that the misrepresentation must concern a material fact and the speaker need not know his or her words are untrue, but must have failed to make a reasonable investigation of the truth of these words." *Bortz,* 729 A.2d at 561.
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> Pennsylvania law generally bars claims brought in negligence that result solely in economic loss. *David Pflumm Paving & Excavating, Inc. v. Foundation Services*

Company, 816 A.2d 1164, 1168 (Pa.Super.2003) ("This Court has consistently denied negligence claims that cause only economic loss"). However, a narrow exception is found in Section 552 of the Restatement (Second) of Torts entitled, "Information Negligently Supplied for the Guidance of Others," and provides:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
Restatement (Second) of Torts § 552(1).

In *Bilt–Rite,* the Pennsylvania Supreme Court adopted Section 552 and held that it applied in:

cases where information is negligently supplied by one in the business of supplying information, such as an architect or design professional, and where it is foreseeable that the information will be used and relied upon by third persons, even if the third parties have no direct contractual relationship with the supplier of information.
866 A.2d at 287. The adoption of Section 552 was not meant to "supplant [ ] the common law tort of negligent misrepresentation, but rather, [to] clarify[ ] the contours of the tort as it applies to those in the business of providing information to others." *Id.*

Subsequently, in *Excavation Technologies, Inc. v. Columbia Gas Company of Pennsylvania,* 936 A.2d 111 (Pa.Super.2007) (*en banc*), *aff'd,* 604 Pa. 50, 985 A.2d 840 (2009), this Court explained the Supreme Court's justification for sanctioning potential Section 552 liability in disputes against architects and other design professionals:

[O]ur Supreme Court found persuasive the rationale expressed by the Court of ***1077** Appeals of North Carolina in *Davidson and Jones, Inc. v. County of New Hanover,* 41 N.C.App. 661, 255 S.E.2d 580 (1979), *cert. denied,* 298 N.C. 295, 259 S.E.2d 911 (1979), wherein the *Davidson* court stated:

An architect, in the performance of his contract with his employer, is required to exercise the ability, skill, and care customarily used by architects upon such projects.... Where breach of such contract results in foreseeable injury, economic or otherwise, to persons so situated by their economic relations, and community of interests as to impose a duty of due care, we know of no reason why an architect cannot be held liable for such injury. Liability arises from the negligent breach of a common law duty of care **flowing from the parties' working**

relationship. Accordingly, we hold that an architect in the absence of privity of contract may be sued by a general contractor or the subcontractors working on a construction project for economic loss foreseeably **resulting from breach of an architect's common law duty of due care in the performance of his contract with the owner.**

Bilt–Rite, at 480–481, 866 A.2d at 286 (quoting *Davidson,* 255 S.E.2d at 584) (emphasis added). A design professional is typically responsible for the preparation of plans and specifications (information) that are supplied to and used by potential bidders in formulating a bid for a project. Additionally, a design professional may make representations to the contractor while performing administrative responsibilities, which are either assumed or specifically made a part of his or her contract with the owner. The design professional is paid a fee for using his or her skills and training to provide information that is relied on by others prior to and during construction. If the plans and specifications prove to be erroneous, the contractor is at grave risk of suffering economic loss. Under these circumstances, it is quite clear that the design professional is supplying information in his or her professional capacity, as part of his or her business, for the guidance of others in a business transaction. Furthermore, a design professional's negligent misrepresentation could injure a third party in a variety of ways. Accordingly, the Supreme Court had little trouble reaching the conclusion that the requirements of section 552(1) are met under these circumstances. This was a logical conclusion because there are numerous tasks performed by the design professional on a typical project that support the conclusion that he or she is in the business of supplying information. *Id.* at 115.

This Court then detailed the elements required to establish liability under Section 552(1) of the Restatement: the defendant is in the business of supplying information for the guidance of others and the information provider must have a pecuniary interest in the transaction; the information provided is false; the information was justifiably relied upon; and the defendant failed to exercise reasonable care in obtaining or communicating the information.

Id. at 115–116. The Court, however, noted that the scope of liability under Section 522(1) was limited to those known by the information provider who are intending to engage in a commercial transaction and whom the provider means to influence in that transaction with its information. *Id.* at 116.

We are persuaded that *Excavation Technologies,* interpreting the reach of *Bilt–Rite,* could reasonably be understood ****1078*** to subject architects to liability for Section 522 negligent misrepresentation claims when it is alleged that those

> professionals negligently included faulty information in their design documents. The design itself can be construed as a representation by the architect that the plans and specifications, if followed, will result in a successful project. If, however, construction in accordance with the design is either impossible or increases the contractor's costs beyond those anticipated because of defects or false information included in the design, the specter of liability is raised against the design professional.
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> *Gongloff Contracting LLC v. L. Robert Kimball & Associates*, 119 A.3d 1070, 1076-1078 (Pa.Super. 2015),

Cummings contends that the record evidence is simply inadequate to support any claim that Lobar reasonably relied upon any misrepresentation by Cummings. Cummings asserts that an expert opinion is required to establish the alleged breach of the applicable standard of care. Lobar asserts that Lobar has provided sufficient expert reports to support its claim.

The expert report submitted by Lobar authored by Richard Thiel provides that "I believe that the CQA (construction quality assurance) program would be deemed deficient in not having a well-planned, detailed, and thorough geophysical leak location campaign in concert with the construction of the tank liner system." Simply stated, this expert contends that Cummings was at fault for not identifying the leaks through some "CQA system." The expert report submitted by Lobar authored by David Rabb provides that "the Tank liner defects resulted from a deficient design." The expert report submitted by Lobar authored by Walter A. Wachter provides that "the Tank design is inadequate for having liner that does not allow any detectable water to pass through it." In the view of the Court, those reports alone are sufficient to raise a material issue of fact for trial on Lobar's misrepresentation claim.

2) The contributory negligence defense to Lobar's negligent misrepresentation claim

Cummings asserts that Lobar's negligent misrepresentation claim should be barred by contributory negligence, based upon its contention that Lobar did not perform the contract consistent with the requirements of the contact documents. The record evidence discussed above in connection with Lycoming's claim for summary judgment on Lobar's contract claim is equally applicable to Cummings' claim for summary judgment on Lobar's misrepresentation claim.

Lobar points to the correspondence dated April 4, 2014, from Gary L. Smith of Cummings advising Lobar and Lycoming that "in our professional opinion the HDPE wall and floor liner of the leachate storage tank has passed the requirements of the Contract Documents for the ACI 350.0-01 Tightness Testing of Environmental Structures, Tightness Testing of Tanks, for the hydrostatic test of the primary HDPE liner."

Lobar has produced the three (3) expert reports more fully discussed above. Lobar cites the email dated April 22, 2014, from Gary Smith of Cummings, which appears to question the "no leakage" is the standard position taken by DEP. In that email, Gary Smith predicts that "Lobar and its subcontractor Golder believe that if they have passed the ACI hydrostatic test they have met the requirements of the contract."

Lobar has identified material issues of fact for trial on its misrepresentation claim. On the record evidence discussed above, the Court cannot rule that Lobar's claim of misrepresentation fails on the basis of contributory negligence, as a matter of law.

ORDER

For the foregoing reasons the Court hereby ORDERS as follows:

- Lycoming County's Motions for Summary Judgment numbered 1-5 inclusive above are DENIED.
- Lobar's Motions for Partial Summary Judgment numbered 1 and 2 above are DENIED.
- Cummings and Smith's Motions for Summary Judgement, numbered 1 and 2 above are DENIED.

IT IS SO ORDERED this 3rd day of November, 2022.

By The Court,

Hon. William P. Carlucci, Judge

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