IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

REYNOLDS IRON WORKS, INC.	:	
Plaintiff	:	CV 20-0730
v.	:	
	:	
LUNDY CONSTRUCTION CO., INC	:	:
Defendant	:	
v.	:	
	:	
NICHOLAS MEAT LLC and	:	
PROVIDENCE ENGINEERING CORP.	:	
Additional Defendants	:	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

I. Introduction:

This matter came before this Court for argument on October 25, 2022, on the multiple Motions for Summary Judgment, as follows:

- Motion of Reynolds Iron Works, Inc., Summary Judgment Against Lundy Construction, Co., Inc., filed June 17, 2022.
- Motion of Lundy Construction Co., Inc., for Partial Summary Judgment filed July 22, 2022.
- Motion of Providence Engineering Corp., for Summary Judgment Against Lundy Construction Co., Inc., filed July 22, 2022.
- Motion of Nicholas Meat, LLC, for Summary Judgment Against Lundy Construction Co., Inc., filed July 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).

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 Court has reviewed the briefs, the pleadings, the various Motions for Summary Judgment, and the voluminous record filed by the parties in support of their Motions, including many hundreds of pages of construction documents and deposition testimony. The Court's review of the briefs and the record revealed a great deal of "heat", but provided very little "light."

A comparison of the three (3) page correspondence dated September 18, 2019, from Andreas R. Perez and James E. Horting, both of Providence, to the eight (8) page response dated October 1, 2019, from Frank B. Lundy, III, reflects little consensus on what occurred during the protracted course of construction by Lundy Construction Co., Inc. (hereinafter "Lundy"), and its subcontractors, on behalf of Nicholas Meat, LLC (hereinafter "Nicholas")

This litigation commenced by the filing of a Complaint on July 21, 2020, by Reynolds Iron Works, Inc. (hereinafter "Reynolds"), against Lundy, seeking to collect the claimed balance of $86,498.29 on a steel subcontract dated July 31, 2018, which appears to simply be a "follow-up" to a one- page Purchase Order by Lundy in the gross amount of $688,862.00. The Complaint contains a total of only 48 paragraphs, 38 of which allege facts, and seeks relief in only one Count of breach of express contract. The Answer filed by Lundy on August 12, 2020, admits only the identity of Lundy (Paragraphs 2 and 3) and denies every other allegation of fact in the Complaint. The accompanying "New Matter" contains 18 numbered Paragraphs, asserting virtually every affirmative defense known at Pennsylvania contract law (with no allegations of fact in support).

On October 19, 2020, Lundy filed a Third Party Complaint against its customer, Nicholas, and Nicholas' design professional, Providence Engineering Corporation (hereinafter "Providence"). The Third Party Complaint alleges a version of the material facts of the litigation at Paragraphs 6 through 53. The Answer filed by Nicholas on November 9, 2020, admits only the allegations by Lundy at Paragraphs 10 and 15, and denies the balance. The Answer filed by Providence on March 29, 2021, denies every allegation of the Lundy Third Party Complaint, including those which identify the parties to the litigation.

Rule 3.1 of the Pennsylvania Rules of Professional Conduct provides that a lawyer will not controvert an issue "unless there is a basis in law and fact for doing so that is not frivolous." While the Court expects the parties and their counsel to zealously dispute the

credibility of fact witnesses, the credentials and credibility of expert witnesses, inflated claims of damage, and opposing legal conclusions, the Court finds it remarkable that the pleadings, multiple motions for summary judgment, supporting exhibits, and accompanying briefs all reflect bitter disagreement regarding the facts which led to this litigation. Where the parties vigorously dispute the material facts of the case, 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).

The Motion for Summary Judgment filed by Nicholas on July 22, 2022, contains three hundred sixty-nine (369) numbered allegations of fact and law. Paragraphs 1 through 241 contain references to the record in support of each allegation of fact. The remaining paragraphs are mainly in the nature of advocacy claims, such as references to expert opinions, legal conclusions, and claims for money damages. In its response filed August 29, 2022, Lundy denies all but Paragraphs 281 and 282. It is curious that, in the course of two hundred forty-one (241) allegations of fact with references to the record, Lundy could not admit a single one.

The parties' disparate views of the facts are mirrored in completely disparate expert conclusions contained within their expert reports.

In their report dated June 8, 2022, Robert Edwards and Mark Edwards of Edwards & Company (hereinafter "Edwards") opine that "Lundy and its subcontractors performed their Work in a timely and workmanlike manner on the Project" and that "Light Mesa panels should not have been specified for a wrinkle free façade" and that "The inward steel misalignment did not significantly affect the panel wrinkling" and the "Nicholas Meats has not demonstrated that panel wrinkles require replacement" and that "Blemishes, roll marks, stains and concrete imperfections exist on every project, and such minor flaws do nor rise to the level of breach of contract. They are entirely aesthetic in nature and do not impact performance."

In their report dated June 10, 2022, Damian Moser and Bill Kane of Thornton Tomasetti opined that the primary cause of the insulated metal panel wrinkling failures was structural steel girt misalignment, that Lundy was responsible to ensure that the girts were properly aligned, and that installing a new layer of panels on the freezer/cooler walls was appropriate. In his ten (10) page rebuttal report of July 8, 2022, Damian Moser opines that the

contrary report by Edwards "contains omissions or errors of fact, and/or is based on fallacious reasoning or inaccurate/incomplete analysis."

In its delay analysis dated June 10, 2022, Wagner Hohns Inglish, Inc., (hereinafter "WHI") opines that Nicholas was responsible for one hundred sixty-nine (169) days of Project delay, that Lundy actually completed work on the freezer portion of the Project forty-four (44) days earlier than the original construction sequence and contract duration allowed, and that Lundy was able to complete the entire Project only seven (7) days later than the original construction sequence and contract duration allowed

In his report dated June 10, 2022, Mariusz Wiechec of HKA Global Inc. (hereinafter "HKA") opines that Project Completion should have been achieved on May 31, 2019, and that Lundy caused critical delays to the Project of at least 131 days. By rebuttal report dated July 8, 2022, he disputes the delay analysis report dated June 10, 2022 of WHI as providing "an incomplete, flawed, and misleading analysis of the delays on the Project."

IV. Questions Presented:

A. Motion by Reynolds

Whether Reynolds is entitled to summary judgment on its claim against Lundy for breach of contract, where there exists material issues of fact for trial on both the question of whether Reynolds timely completed its work under the subcontract terms, and whether full payment to Lundy is a condition precedent to the obligation of Lundy to pay Reynolds.

B. Motions by Lundy

1) Whether Lundy is entitled to partial summary judgment on Lundy's claims against Nicholas for payment under the Pennsylvania Contractor and Subcontractor Payment Act, 73 Pa.C.S. Section 501 et.seq. (hereinafter "CASPA"), based upon Lundy's claim that Nicholas failed to provide notice of withholding within fourteen (14) days of Lundy's submission of Invoices 9 and 10, where that claim was not raised in the pleadings, where there exist material issues as to whether any such notice was required under the facts of this matter, where Nicholas claims that full contract performance by Lundy is a condition precedent to payment under CASPA, and where there exist material issues of fact regarding whether Lundy and its subcontractors timely performed its obligations under the contract.

2) Whether Lundy is entitled to partial summary judgment, concluding that the termination of Lundy by Nicholas was wrongful as a matter of law, where a material issue of fact exists on the

question of whether Nicholas reasonably relied upon affirmative representations by Lundy that its contract breach would be promptly cured.

C. Motion by Providence

Whether Providence is entitled to partial summary judgment on Lundy's tort-based claims for negligent misrepresentation within the construction plans and specifications, and for Lundy's contribution claim arising from the claim of Nicholas against Lundy, where there exist material issues of fact as to whether there were any defects or omissions in the plans and specifications, whether Lundy actually relied upon the plans and specifications, and whether any alleged defect or omissions in the plans led to any project delay.

D. Motion by Nicholas

1) Whether Nicholas is entitled to summary judgment on its claims against Lundy for breach of contract.

2) Whether Nicholas is entitled to summary judgment on its alternative claim against Lundy for unjust enrichment, where the relationship of the parties is based upon an express contract, and where there are numerous material issues of fact for trial, including whether Lundy and its subcontractors are entitled to damages for breach of express contract, whether written notice by Nicholas of claimed defective performance by Lundy was contractually or legally required, whether Lundy has a valid claim for interest or other damages under CASPA, whether Nicholas enriched Lundy, and whether any claimed enrichment was unjust.

V. Brief Answer:

A. Motion by Reynolds

Reynolds is not entitled to summary judgment against Lundy for breach of contract, based upon the fact that Nicholas has asserted claims against Lundy for late and defective performance by Lundy and Reynolds (which are denied by both Lundy and Reynolds), and because a material issue of fact remains regarding whether full payment to Lundy is a condition precedent to the obligation of Lundy to pay Reynolds.

B. Motions by Lundy

1) Lundy is not entitled to partial summary judgment on Lundy's claims for payment under the terms of the Pennsylvania Contractor and Subcontractor Payment Act, 73 Pa.C.S. Section 501 et.seq. (hereinafter "CASPA"), resulting from the fact that Nicholas did not provide notice of withholding within fourteen (14) days of Lundy's submission of Invoices 9 and 10, since that claim by Lundy has not yet been raised in the pleadings, and based upon the fact there are numerous issues of fact for trial, including whether any such notice was required under the facts of this matter, whether full contract performance by Lundy is a condition precedent to payment under CASPA, and whether Lundy and its subcontractors timely performed its obligations under the contract.

2) Lundy is not entitled to partial summary judgment, determining that the termination of Lundy by Nicholas was wrongful, because there is a material issue of fact as to whether Nicholas was merely relying upon the affirmative representations of Lundy that its contract breach would be cured, and giving Lundy an extensive period of time within which to cure.

C. Motion by Providence

Providence is not entitled to partial summary judgment on Lundy's tort-based claims for negligent misrepresentation within the construction plans and specifications, and for Lundy's contribution claim arising from the claim of Nicholas against Lundy, based upon the fact that material issues of fact for trial exist on the questions of whether there were any defects or omissions in the plans and specifications, whether Lundy actually relied upon the plans and specifications, and whether any alleged defect or omissions in the plans led to any project delay.

D. *Motions by Nicholas*

1) Nicholas is not entitled to summary judgment on its claims against Lundy for breach of contract, where there exist material issues of fact as to whether Lundy and its subcontractor provided timely performance under the contract terms, whether there were any defects or omissions in the plans and specifications, whether Lundy actually relied upon the plans and specifications, whether any alleged defect or omissions in the plans led to any project delay, whether Nicholas failed to provide notice of withholding within fourteen (14) days of Lundy's submission of Invoices 9 and 10, whether any such notice is required under the facts of this matter, and whether full contract performance by Lundy is a condition precedent to payment under CASPA.

2) Nicholas is not entitled to summary judgment on its alternative claim against Lundy for unjust enrichment, where the relationship of the parties is based upon an express contract, and where there are numerous material issues of fact for trial, including whether Lundy and its subcontractors are entitled to damages for breach of express contract, whether written notice by Nicholas of claimed defective performance by Lundy was contractually or legally required, whether Lundy has a valid claim for interest or other damages under CASPA, whether Nicholas enriched Lundy, and whether any claimed enrichment was unjust.

VI. Discussion:

A. Motion by Reynolds

"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).

The proper interpretation of an unambiguous contract is a question of law, for the Court. *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004). The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the parties. *Binswanger of Pennsylvania, Inc. v. TSG Real Est. LLC*217 A.3d 256, 262 (Pa. 2019) (*citing Murphy v. Duquesne University of the Holy Ghost*, A.2d 418, 429 (Pa. 2001). The intent of the parties is embodied in the four corners of the writing; the court must assume that the contractual language is chosen carefully. *Id.* To the greatest extent possible, provisions within a single contract are interpreted in harmony. *Lesko v. Frankford Hosp.-Bucks Cnty.*, 15 A.3d 337, 342 (Pa. 2011). 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). 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.)

Section 3.2 of the subcontract between Reynolds and Lundy (hereinafter the "Subcontract") describes the payment timing of the subcontract. "Contractor agrees to pay Subcontractor for the complete and timely completion of the Work…within… 10 days after

receipt by Contractor of payment from Owner for Subcontractor's Work, which receipt shall constitute a condition precedent to and the sole source of such payment by Contractor to Subcontractor." A handwritten note immediately follows Section 3.2 reading "Per your P.O. terms are 30 days," The note is signed by both parties.

The parties dispute whether the language in the Subcontract should be interpreted to modify other language providing for a "pay if paid" payment scheme, wherein payment to Lundy is a condition precedent to Lundy's duty to pay Reynolds. Reynolds bases its contention on the language of the purchase order, asserting that the parties' subsequent subcontract incorporated the PO in a handwritten note reading "Per your P.O terms are 30 days." Reynolds cites authority for the proposition that handwritten provisions control over printed provisions of contracts. Lundy asserts that handwritten note amends the "10 days" language to 30 days and does not affect the condition precedent language. Reynolds admits that, had the parties intended to remove the condition precedent language, they could have crossed the condition precedent language out when they amended the Subcontract. Lundy contends that the Court adopt a harmonious reading of the handwritten amendment and the condition precedent language, so as to interpret the handwritten note as providing the payment timing after satisfaction of the condition precedent. The fact that the parties did not strike the condition precedent language is strong evidence that the intent of the handwritten note was not to modify that condition, *but only to establish the number of days before payment was due, after satisfaction of the condition.* Since the contract can reasonably be understood in more than one sense, the proper interpretation is a question for the finder of fact. *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.)

Reynolds argues that Lundy failed to produce facts supporting its claim that Reynolds did not perform its contract. Lundy argues that, while Lundy concedes complete performance by Reynolds, other parties claim the contrary. Lundy's burden to defeat summary judgement is to demonstrate a genuine issue of material fact, not that Lundy has raised it. Since other Defendants claim that Reynolds failed to properly perform, Lundy has met that burden by identifying evidence on the record to demonstrate a genuine issue of material fact.

B. Motions by Lundy

1) Lundy's CASPA claim

Statutory interpretation is a question of law for the court. *Crown Castle NG E. LLC v. Pennsylvania Pub. Util. Comm'n*, 234 A.3d 665, 677 (Pa. 2020). The Court's objective in statutory interpretation is to ascertain the intent of the legislature. 1 Pa.C.S.A. § 1921(a). "When interpreting a statutory provision, [the court] must presume that the legislature does not intend a result that is unreasonable, absurd, or impossible of execution." Commonwealth v. Gamby, 283 A.3d 298 (Pa. 2022); 1 Pa.C.S. § 1922(1).

Pursuant to the Contractor and Subcontractor Payment Act (CASPA), "an owner may withhold payment for deficiency items according to the terms of the construction contract." 73 P.S. § 506(a). In order to claim relief under that Section, the owner must "notify the contractor of the deficiency item by a written explanation of its good faith reason within 14 calendar days of the date that the invoice is received. 73 P.S. § 506(b)(1). Where an owner fails to comply with § 506(b)(1), the owner waives the right to withhold payment under § 506(b)(1). § 506(c). CASPA requires the court to award a penalty and reasonable attorney's fees where an amount has been wrongfully withheld. 73 P.S. § 512. An amount is not wrongfully withheld under Section 512 if the withheld amount is reasonably related to the value of a good faith claim and the claim holder complies with section 506. 73 P.S. § 512(a)(2).

While Lundy failed to properly plead the issue, Lundy now argues that, by failing to provide notice of the deficiency item within fourteen (14) days, Nicholas waived its right to withhold payment. Under Lundy's interpretation of CASPA, a contractor may enter into a contract to construct a bridge, fail to perform any work at all, and then be entitled to full payment, if the owner fails to provide a timely deficiency notice. In the view of this Court, that construction of the statute is absurd. The more sensible interpretation is that a failure to provide the notice required by 73 P.S. § 506(b)(1), results in a waiver of the "safe harbor" provided by 73 P.S. § 506(a).

The question of whether Nicholas Meats gave notice to Lundy within fourteen (14) days is disputed. While Lundy asserts that it did not receive the written notice required by 73 P.S. § 506(b)(1), Nicholas claims that Lundy had sufficient notice of Nicholas's claim of deficiencies in the insulated metal panels, and defective installation of a freezer roof, through emails, inspection reports, and the like. Thus, there exists a genuine issue of material fact as to whether the required notice was provided.

If it is judicially determined that Lundy is entitled to payment, and judicially determined that Nicholas failed to provide the required notice, Lundy is clearly entitled to interest under CASPA. Since a material issue of fact exists and to both issues, Lundy's motion is for summary judgment is denied.

2) Lundy's wrongful termination claim

Lundy claims that Nicholas gave Lundy an intent to terminate letter on April 24, 2019, but did not actually terminate Lundy until October 8, 2019. During that time, Nicholas allegedly accepted and benefited from Lundy's performance. Lundy asserts that, given the delay, Nicholas waived or was estopped from proceeding with the termination, as a matter of law.

Nicholas contends that summary judgment in favor of Lundy is inappropriate and submits that 1) a material issue of material fact exists as to the date of notice, that 2) under Pennsylvania law there is no "delay waiver" of the right to terminate, that 3) even if Pennsylvania law had such a waiver, the waiver would not be effective because the parties' contract contains a "no oral modification clause," preventing changes to the contract unless such changes are made in writing, and 4) contract amounts owed to Lundy are limited by the doctrine of recoupment.

Lundy concedes that the contract requires timely performance, but draws the Court's attention to cases in other jurisdictions which provide that acceptance of late performance after a pre-termination letter may constitute waiver of a contract right to terminate. Pennsylvania has not yet settled the question of how much delay between notice of an intent to terminate and actual termination, is too much.

Nicholas contends that the "no oral modification" language in the contract precludes Lundy's argument of waiver. Under settled Pennsylvania law, a written contract may be orally modified, even where the contract includes an explicit "no oral modification clause," so long as the parties' conduct clearly shows the intent to waive the requirement that amendments must be in writing. *Accu-Weather, Inc. v. Prospect Commc'ns, Inc.*, 435 Pa. Super. 93, 644 A.2d 1251 (Pa. Super. Ct. 1994); *Universal Builders, Inc. v. Moon Motor Lodge*, Inc., 430 Pa. 550, 557-9 (Pa. 1968); *Wagner v. Graziano Const. Co.*, 390 Pa. 445, 448-9 (Pa. 1957). The effectiveness of a non-written modification in spite of an oral modification clause "depends upon whether enforcement… is barred by equitable considerations, not… whether the condition was… expressly and separately waived before the non-written modification." *Universal* 430 Pa. at 560. Whether a contract with a "no oral modification" clause was subsequently orally modified is a

question of fact to be decided by the jury. *Achenback v. Stoddard*, 253 Pa. 338, 343; *Accuweather* 430 Pa. at 103 n.5. The oral modification must be proved by clear, precise, and convincing evidence. *Pellegrene v. Luther,* 403 Pa. 212, 215 (Pa. 1961).

Here, the parties dispute whether any such oral modification occurred. Whether a modification was made is an issue for the jury, inappropriate for summary judgement.

On the subject of the delay in termination, Nicholas draws the Court's attention to emails from Frank Lundy to his employees, stating that Lundy needed to "wrap up" the project "asap" because Lundy was "wearing out [their] welcome," to emails and letters indicating that Nicholas Meat repeatedly claimed construction errors to Lundy during the period of April 219 to October 2019, and express warnings from Doug Nicholas to Frank Lundy that Nicholas Meat had cause to terminate the contract. Given the sequence of events, there is obviously a disputed issue of fact as to whether Nicholas's delay in actually terminating the contract prejudiced Lundy, or was simply an accommodation by Nicholas in reliance upon representations by Lundy that it would faithfully complete its contract obligations. The Court has identified material issues of fact related to the delay in actual contract termination, and sees no need to rule on whether Pennsylvania should adopt a "bright line rule" of waiver of the right to terminate, based upon unreasonable delay.

Nicholas claims that, regardless of the merits of Lundy's claim, Nicholas is entitled to a "credit" (some would say setoff) for funds allegedly spent by Nicholas to secure the complete and corrected performance owed to them by Lundy. A recoupment claim can be asserted only when the plaintiff is seeking damages for a defendant's actions and the defendant counterclaims *seeking to reduce any potential damage* award because of the plaintiff's actions." *United States v. Am. Color & Chem. Corp.*, 858 F. Supp. 445, 451 (M.D. Pa. 1994) (*citing United States v. Ownbey Enterprises, Inc.*, 780 F.Supp. 817, 821 (N.D.Ga.1991)). "To recover on a claim of recoupment, the party must establish that: 1) the claim arises from the same transaction or occurrence as the main claim; 2) it seeks relief of the same kind and nature as that sought by the main claim; and 3) the claim is defensive in nature and does not seek affirmative relief." United States v. Am. Color & Chem. Corp., 858 F. Supp. 445, 451 (M.D. Pa. 1994)

Whether Nicholas is entitled to recoupment depends upon whether and to what extent the contract was materially breached. There are multiple material issues of fact for trial on whether

Lundy's work was consistent with the requirements of the contract. Similarly, the question of whether Nicholas is entitled to any recoupment implicates material issues of fact for the trial.

C. Motion by Providence

1) Lundy'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.
>
> *Gongloff Contracting LLC v. L. Robert Kimball & Associates*, 119 A.3d 1070, 1076-1078 (Pa.Super. 2015).

Providence asserts that "in this instance, each of the above required elements are clearly negated and contradicted by the facts of the case and Lundy's admissions." Providence claims that the record does support Lundy's claim of any misrepresentations of fact to Lundy. In the absence of any representation, there is no issue as to whether the representation was false. Lundy performed remedial work to the project's roof with no issues, and Providence instructed Lundy to follow the manufacturer's instructions with respect to the insulated metal panes. Providence asserts that Lundy did not rely on Providence's specifications through any phase of the project—and thus could not have been induced to act on Providence's representation. Providence claims that, in the absence of any misrepresentation, there could be no reliance.

Lundy disputes Providence's version of the facts, asserting that Providence's project drawings and specifications contained errors and omissions that failed to meet the requisite standard of care for a design professional in Pennsylvania. Lundy specifically identifies five (5) disputes of material fact. Lundy claims that project bulletins materially impacted the completion

of the project. Lundy claims that Providence's contract drawings included errors, upon which Lundy relied. Lundy claims that Providence's change in exterior panel material led to buckling. Lundy claims that Providence negligently certified the April 24, 2019 notice of certification. Lundy claims that Providence misrepresented facts in assessing back-charges of $688,502.85.

Lundy has produced the expert report, dated June 8, 2022, of Robert Edwards and Mark Edwards of Edwards & Company (hereinafter "Edwards") in which they opine that "Lundy and its subcontractors performed their Work in a timely and workmanlike manner on the Project" and that "Light Mesa panels should not have been specified for a wrinkle free façade" and that "The inward steel misalignment did not significantly affect the panel wrinkling" and the "Nicholas Meats has not demonstrated that panel wrinkles require replacement" and that "Blemishes, roll marks, stains and concrete imperfections exist on every project, and such minor flaws do nor rise to the level of breach of contract. They are entirely aesthetic in nature and do not impact performance." On the basis of the submitted expert reports alone, it appears to this Court that Lundy has demonstrated the existence of disputed issues of material fact on Lundy's claim of negligent misrepresentation.

D. *Motions by Nicholas*

1) Nicholas' breach of contract claim

Nicholas seeks summary judgement on its breach of contract claim, asserting that Lundy breached the "time is of the essence" provision of the contract, that Lundy failed to construct the project free from defects and in accordance with the contract documents, and that Lundy failed to adequately supervise the project and coordinate subcontractors.

"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). "Parties to a written agreement, which contains provisions making time of the essence and prohibiting oral modifications, may waive either or both provisions," however, absent such waiver, an extension of the time for performance to a specified future date does not defeat a provision in a contract making time the essence of the agreement." *Empire Properties, Inc. v. Equireal*, Inc., 449 Pa. Super. 476, 487, 674 A.2d 297, 303 (1996). It is settled Pennsylvania law that "where a building contract provides a time limit, but the contractor after the expiration of the time limit has been permitted to

continue the work, and receives payment therefor, the owner will be deemed to have waived the provision as to the time limit." *Pressey v. McCornack*, 449, 84 A. 427, 429 (Pa. 1912).

Lundy claims that Nicholas was at fault for the project delay rather than Lundy, that Nicholas agreed to extensions of time to Lundy, that Providence was to blame for the project completion delays rather than Lundy, that Nicholas utilized other contractors who delayed the project completion, that Nicholas is estopped from asserting the delay as a contract breach because Nicholas permitted Lundy to continue to work after the deadline, and that Lundy substantially completed the project. Lundy also contends that Nicholas' clam for summary judgment must be denied, because Nicholas relies "heavily [on] the deposition testimony and subsequent affidavit signed by" the Vice President and COO of Nicholas. Lundy accurately observes that the Court may not enter summary judgment "where the moving party relies exclusively upon oral testimony, through affidavits or depositions, to establish the absence of a genuine issue of material fact; no matter how clear and indisputable such proof may appear, it is the province of the jury to decide the credibility of the witnesses." *Kee v. Pennsylvania Tpk. Comm'n*, 743 A.2d 546, 550 (Pa. Commw. Ct. 1999) citing *Nanty–Glo v. American Surety Co.,* 309 Pa. 236, 163 A. 523 (1932).

Nicholas' "time is of the essence" claim is likely to turn on resolution of disputed issues of fact on which party caused the delay, and whether the delay was impliedly waived by Nicholas. There are certainly multiple material issues of fact on whether Lundy's work was consistent with the requirements of the contract. Summary judgement on Nicholas' breach of contract claim is thus inappropriate.

2) Nicholas' unjust enrichment claim

A cause of action for unjust enrichment is a claim in equity. The elements of the claim include 1) benefits are conferred on the defendant by the plaintiff, 2) the defendant appreciates such benefits, and 3) acceptance of the benefits would be unjust without compensation. *Weinik v. PHH U.S. Mortage Corp.*, 736 A.2d 616, 622 (Pa. Super. 1999). In the alternative to its claim of breach of contract, Nicholas seeks summary judgement on its claim for unjust enrichment. Nicholas claims that it paid Lundy in excess of $2,300,000.00 for work that was incomplete, inaccurate, and substandard.

After the jury returns its verdict, it will be the responsibly of this Court to determine whether, on the evidence presented at trial, Nicholas has established by a preponderance of the evidence that the payments made to Lundy by Nicholas conferred a benefit that would be unjust, without compensation. It is settled Pennsylvanian law that a claim of unjust enrichment is unavailable when the relationship between the parties is founded on a written agreement.

> (this) bright-line rule also has deep roots in the classical liberal theory of contract. It embodies the principle that parties in contractual privity ... are not entitled to the remedies available under a judicially-imposed quasi-contract [i.e., the parties are not entitled to restitution based upon the doctrine of unjust enrichment] because the terms of their agreement (express and implied) define their respective rights, duties, and expectations.

Wilson Area Sch. Dist. v. Skepton, 895 A.2d 1250, 1254 (Pa. 2006), citing *Curley v. Allstate Insurance Company*, 289 F.Supp.2d 614, 620 (E.D. Pa. 2002).

In this matter, the relationship of the parties is expressly founded on a written agreement. Thus, a recovery by Nicholas, limited to its theory of unjust enrichment, is not likely. Summary judgment is not appropriate.

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ORDER

For the foregoing reasons the Court hereby ORDERS as follows:

- Reynolds' Motion for Summary Judgment is DENIED.
- Lundy's Motions for Partial Summary Judgment numbered 1 and 2 above are DENIED.
- Providence's Motion for Summary Judgement, is DENIED.
- Nicholas' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED this 23rd day of November, 2022.

By The Court,

Hon. William P. Carlucci, Judge

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