

2010

White Cap Construction Supply, Inc. v. Star Mountain Construction, Inc., et al : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WHITE CAP CONSTRUCTION SUPPLY,
INC.,

Plaintiff,

v.

STAR MOUNTAIN CONSTRUCTION,
INC., et al

Defendants.

Case No. 20101007-CA

District Ct. No.: 050500453

Trial Judge: Hon. Bruce C. Lubeck
Hon. Keith Kelly

SHAMROCK PLUMBING, LLC,

Cross-Claim Plaintiff/Appellee,

v.

SILVER BARON PARTNERS, L.C.,
DAEDALUS USA, INC., et al

Cross-Claim Defendants/Appellants.

REPLY BRIEF OF APPELLANTS
AND BRIEF OF CROSS-APPELLEES

Appeal from Orders of the
Third Judicial District Court
Summit County, Utah

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INTRODUCTION

Sections I through III comprise the Brief of Cross-Appellees portion of this brief.

Sections IV through VI comprise the Reply Brief of Appellants portion of this brief.

ARGUMENT

I. *The Trial Court Properly Exercised its Discretion in Setting Aside the Default Judgment Against Owner and Contractor.*

Under Utah R. Civ. P. 60(b), the “Court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for [...] mistake, inadvertence, surprise, or excusable neglect.” Although “a trial court has broad discretion in deciding whether to set aside a default judgment” under Rule 60(b), “the trial court’s decision is not unlimited.” *Lund v. Brown*, 2000 UT 75, ¶ 9, 11 P.3d 277. “Indeed the [disfavored] nature of a default judgment and the equitable nature of rule 60 provide ... limits.” *Arbogast Family Trust v. River Crossings, LLC*, 2008 UT App 277, ¶ 23, 191 P.3d 39. A “district court should exercise its discretion in favor of granting relief so that controversies can be decided on the merits rather than on technicalities.” *Menzies v. Galetka*, 2006 UT 81, ¶ 54, 150 P.3d 480 (citing *State v. Musselman*, 667 P.3d 1053, 1055-56 (Utah 1983)).

Owner and Contractor were previously represented by Lewis M. Francis, of Jones Waldo, who filed an answer and counterclaim on April 26, 2006 to the cross claim filed by Subcontractor. R. 116-125. Significant legal work, such as discovery and other matters were then exchanged between the parties, depositions were held, and the parties attempted to resolve their disputes through mediation. *See generally*, R. 135-252. A

dispute between Owner and Contractor and another attorney at Jones Waldo occurred, and Owner and Contractor asked to meet with the president of the firm. R. 311. Without further contact from Mr. Francis explaining his withdrawal and its effects, Mr. Francis sent by regular mail a Notice of Withdrawal that did not inform Owner and Contractor the effects of such a withdrawal. *Id.* Pieces of regular mail received by Owner and Contractor's staff from Mr. Francis and his office were understood to be common client courtesy copies, which were customarily received by staff members of Owner and Contractor throughout the proceeding. R. 312. Documents and legal matters that were believed at the time to still be handled by Mr. Francis and which arrived via regular mail were filed away by staff as a matter of course without alerting management. *Id.* The Notice to Appoint sent by Subcontractor was also sent via regular mail. *Id.* Given that both the Notice of Withdrawal and Notice to Appoint were sent via regular mail, staff did not realize that Owner and Contractor were no longer represented by counsel, and did not bring this to management's attention. *Id.* Only after Owner and Contractor failed to obtain new counsel did Shamrock assert that Owner and Contractor's Answer and Counterclaim were frivolous and make a motion to strike the Answer and Counterclaim and enter a Default Judgment. R. 262-80. A default judgment was entered against Owner and Contractor on March 5, 2009. R. 284-86. Current counsel for Owner and Contractor entered their appearance on March 23, 2009, and filed a Motion and Memorandum to Set Aside Judgment. R. 314-26. The motion was granted. R. 363-68.

1. *Subcontractor Does Not Show That the Trial Court Abused its Discretion in Granting Owner and Contractor's Motion to Set Aside Default Judgment, and Reargues Facts without Properly Marshaling the Evidence.*

In *Interstate Excavating, Inc. v. Agla Dev. Corp.*, 611 P.2d 369 (Utah 1980), with facts similar to the present controversy, defendant's former counsel withdrew from the ongoing litigation, the notice to appoint counsel was misplaced with numerous papers served upon defendant's office by mail, and upon receiving the notice of judgment, defendant immediately contacted new counsel, who proceeded to prepare a motion based on Utah R. Civ. P. 60(b) and which was filed within 17 days of receiving notice of judgment. 611 P.2d at 370-71. The defendant in *Interstate Excavating* claimed the justification for its default rested primarily on confusion and service of notice by ordinary mail. *Id.* The Utah Supreme Court reversed the trial court and held that under these circumstances justice was best served by allowing the parties to try the issues on the merits. *Id.* The Court stated:

“[Default judgments] are not favored in the law, especially where a party has timely responded with challenging pleadings ... [A]ccess to the courts for the protection of rights and the settlement of disputes is one of the most important factors in the maintenance of a peaceable and well-ordered society ... The uniformly acknowledged policy of the law is to accord litigants the opportunity for a hearing on the merits, where that can be done without serious injustice to the other party. To that end, the courts are generally indulgent toward the setting aside of default judgments where there is a reasonable justification or excuse for the defendant's failure to appear, and where timely application is made to set it aside, the doubt should be resolved in favor of doing so, to the end that each party may have an opportunity to present his side of the controversy and that there be a resolution in accordance with law and justice.

Id. at 370-71.

Other authority also indicates that in the event of the withdrawal of former counsel leading to confusion and a default judgment, the court may look to whether the party acted promptly upon discovery of the fact that it was unrepresented by counsel. *See* 10A Fed. Prac. & Proc. Civ. 3d § 2695 (2011)(“judgment may be vacated when the default is due to [...] confusion resulting from the withdrawal of counsel”)(citing *Thorpe v. Thorpe*, 364 F.2d 692 (Ct. App. D.C. Cir. 1966); *Bridoux v. E. Air Lines, Inc.*, 214 F.2d 207 (Ct. App. D.C. Cir. 1954); *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372 (Cit. App. D.C. Cir. 1980); *Bavouset v. Shaw’s of San Francisco*, 43 F.R.D. 296 (S.D. Texas 1967); *Minneapolis Brewing Co. v. Merritt*, 143 F. Supp. 146 (D.C.N.D. 1956)). Upon learning of their former counsel’s withdrawal, Owner and Contractor immediately retained the undersigned law firm as new counsel, who filed an entry of appearance and motion to set aside within ten business days of the default judgment. *See* R. 314-26.

Due diligence is defined as conduct that is consistent with the manner in which a reasonably prudent person under similar circumstances would have acted. *See Menzies*, 2006 UT 81, ¶ 72. The trial court issued a five-page memorandum decision, granting Contractor’s motion to set aside the default judgment in question. *See* R. 363-68. It analyzed both the legal underpinnings and factual circumstances in granting Owner and Contractor’s motion. The trial court addressed Owner and Contractor’s conduct, stating that “given the situation with counsel and the lack of personal contact and a long-term relationship, the court will again excuse defendants failures.” R. 366. In its brief, Subcontractor fails to demonstrate that the trial court ruled incorrectly or abused its discretion in setting aside the default judgment, but instead mainly reargues its own

version of facts and offers conclusions and opinions with regard to actions taken by Owner and Contractor.

Subcontractor has also not satisfied its burden to marshal the evidence supporting any of the findings made by the trial court in its memorandum decision, and has failed to demonstrate why any findings are lacking in support. “In order to challenge a court’s factual findings, an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.” *Osborne v. Osborne*, 2011 Utah App 150, fn. 1 (quoting *Chen v. Stewart*, 2004 UT 82, ¶ 76, 100 P.3d 1177). Subcontractor has not done this. At most, Subcontractor attacks the affidavit on which the trial court’s decision rests by declaring the affiant, Alan Wright “not competent,” which Subcontractor argues for the first time in its brief. Brief of Appellee, p. 26. Rather than addressing the trial court’s rationale, Subcontractor “fails to present a substantial question for review warranting further consideration” and mainly “reargues [its] own version of the facts.” *Ivie v. Dep’t of Workforce Servs.*, 2011 UT App 13, ¶ 11, 246 P.3d 1214. Subcontractor also asserts that the “court’s ruling was not based on adequate findings of fact nor on the law.” Brief of Appellee, p. 29 (internal quotations and citations omitted). Again, no argument is provided to support or address this assertion, and Subcontractor only continues to reargue facts.

Utah case law provides that the Court should balance the equities of setting aside a default judgment on a case-by-case basis, and should resolve any doubt in favor of setting the default judgment aside. *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986); *see also*

Interstate Excavating, 611 P.2d 369. As the trial court made a finding that there was due diligence and excusable neglect on the part of Contractor, as Subcontractor has failed in its burden to marshal the evidence in attempting to attack the trial court's findings and ruling, and as there exists a strong presumption in favor of decisions on the merits, the trial court's decision to set aside the default judgment in question should be affirmed.

II. *Subcontractor Did Not Recover in Quantum Meruit as the Trial Court Found that an Express, Integrated Contract Existed. Moreover, Subcontractor Never Preserved this Issue at the Trial Court.*

Subcontractor argues that this matter should be remanded to the trial court for a determination of its pleaded *quantum meruit* claim, since no findings were made as to this issue. Brief of Appellee, p. 30.

Quantum Meruit does not appear to be preserved or argued at the trial court. In cursorily reviewing over 650 pages of trial transcripts, Contractor and Owner have found only one instance where *quantum meruit* was referenced by Subcontractor, and this was only briefly in the summation. *See* R. 901, p. 27.

Accordingly, this issue was not tried by Subcontractor, nor has it been preserved for purposes of appeal. *See generally* R. 899-901. “[I]n order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968 (citing *Badger v. Brooklyn Canal Co.*, 966 P.2d 844 (Utah 1998)); *State ex rel. D.B.*, 2010 UT App 111, ¶ 6, 231 P.3d 819. To preserve the issue, “[Appellants] must introduce supporting evidence or relevant legal authority [in the trial court].” *Pratt v. Nelson*, 2007 UT 41, ¶ 15, 164 P.3d 366. “The mere mention of an

issue without introducing . . . relevant legal authority does not preserve that issue for appeal.” *State v. Brown*, 856 P.2d 358, 361 (Utah Ct. App. 1993)(internal quotation omitted). “[A] party may not claim to have preserved an issue for appeal by ‘merely mentioning . . . an issue without introducing supporting evidence or relevant legal authority.’” *Pratt*, 2007 UT 41, ¶ 15 (internal citation omitted).

Furthermore, Subcontractor’s argument that it could recover under *quantum meruit* in this instance is flawed.

Quantum meruit is an action initiated by a plaintiff to recover payment for labor performed in a variety of circumstances in which that plaintiff, for some, reason, would not be able to sue on an express contract. Recovery under *quantum meruit* presupposes that no enforceable written or oral contract exists.

Davies v. Olson, 746 P.2d 264, 268 (Utah Ct. App. 1987)(citation omitted); *see also Karapanos v. Boardwalk Fries, Inc.*, 837 P.2d 576 (Utah Ct. App. 1992)(finding that where an enforceable contract between the parties exists, “*quantum meruit* is not applicable”); *Bailey-Allen Co. v. Kurzet*, 876 P.2d 421, 425 (Utah Ct. App. 1994) (explaining that only where there is no enforceable contract may recovery under *quantum meruit* be appropriate); *Scheller v. Dixie Six Corp.*, 753 P.2d 971 (Utah Ct. App. 1998); *Highland Constr. Co. v. Union Pac. R.R. Co.*, 683 P.2d 1042, 1048 (Utah 1984) (“damages are controlled by the contractual remedies fashioned by the parties unless it can be shown that the work performed was so different from the work contemplated by the contract that additional recovery in *quantum meruit* is warranted”); *E & M Sales West, Inc. v. Bechtel Jacobs Co.*, 2009 UT App 299, ¶ 8, 221 P.3d 838; *Uhrhahn Constr.*

& Design, Inc. v. Hopkins, 2008 UT App 41, ¶ 11 179 P.3d 808 (finding that a party cannot recover under both express and implied contracts).

The trial court found that an express, integrated contract existed between Contractor and Subcontractor (*see* R. 536; *see also* Ex. D-2, § 29; App. B-1), and Subcontractor was awarded judgment due to the trial court's determination that Contractor had breached that contract (R. 689).

Subcontractor's argument presupposes, then, either that it is entitled to prevail upon inconsistent theories of recovery (once under the express, integrated contract and once again under *quantum meruit*) or that the work it performed for the project was outside the contract and that Contractor had waived the requirement for contractual modifications to be in writing. Neither argument was presented at trial, and neither is persuasive. *See* R. 899-901. Subcontractor has shown no reason why the express, integrated contract between the parties is unenforceable or inapplicable. *See id.*

While Subcontractor is correct that parties to a construction contract can waive a contract provision that requires changes be made in writing (*see Uhrhahn*, 2008 UT App 41, ¶¶ 13-21), Subcontractor fails to point to any evidence or citation in the record that would meet the "requisite showing" that the parties waived the contractual provision requiring all modifications to the contract be made in writing. *See Uhrhahn*, 2008 UT App 41, ¶ 16; *see also* Ex. D-2, § 29; App. B-1; R. 899-901. As *Uhrhahn* emphasizes, "to prove that the owner intended to waive such a provision, the evidence must be of a clear and satisfactory character and clearly show a distinct agreement that the work be

deemed extra work and a definite agreement with the owner to pay extra for such extra work.” 2008 UT App 41 at ¶ 15.

Finally, Subcontractor misstates material findings related to this section of its argument. In support of its conclusions, Subcontractor represents that “[t]he boiler has never been a problem. It worked, and it still works [. . .] Despite the fact that the system works and has worked for nearly 7 years, to the benefit of Daedalus and Silver Baron, the [trial] court arbitrarily reduced the amount due and payable to Shamrock.” Brief of Appellee, p. 33. According to this line of thought, Subcontractor believes it is entitled to additional recovery under *quantum meruit*. *See id.*

However, in contrast to Subcontractor’s appraisals of the quality of its own work and installation of the boiler, the trial court found that:

The boiler had two components, one of which ran the water at 180 degrees and it circulated through the building and provided the heat. It was to be cooled by the other function, cooler water that ran the culinary water, for showers and washing and such, at 120 degrees. In fact Shamrock had failed to put a mixer valve in which affected the flow of water through the building and the cooler water from the culinary system was not being mixed with the original 180 degree water and so the radiant air was always too hot, unless the boiler was turned down to 110 or some lower temperature. When that new mixer valve was installed, the over heating problem ceased. The court finds that Shamrock did not do the work properly and did not install that mixer valve properly originally until mid February 2005.

R. 684-85; *see also* R. 689.¹

¹ Additionally, throughout its brief, Subcontractor implies, or states explicitly, such as on page 35, that Contractor designed the mechanical system. *See* Brief of Appellee, pp. 17, 35, and 37. This is inaccurate. Contractor, as part of a pre-construction consulting contract with Owner, did provide suggestions and other input during the design phase of the project. R. 900, p. 26. This input was given to the Owner’s architect and the Owner’s mechanical engineering firm as to the entire hotel and condominium project, including the mechanical system. R. 900, pp. 26-27. But Contractor did not design the mechanical

In addition, the trial court found that Subcontractor breached the agreement by failing to provide written notice of a design defect and intent to substitute equipment (R. 675-76, 689)(concluding that such breach was “a most material breach”), that the boilers and related venting system substituted by Subcontractor were installed without notice to Contractor, were not equivalent and involved a system that Contractor did not want (R. 685, 689), that Subcontractor’s failure to properly install a mixer valve caused serious overheating problems of the building even months after “substantial completion” (R. 682-85, 689)(concluding that Subcontractor “did not do the work properly and did not install that mixer valve properly [] until mid February 2005”), and that Subcontractor was responsible for either replacement of the substituted boiler and allied venting system or the cost of having another subcontractor provide such work and equipment (R. 690). The cost to remedy Subcontractor’s work was later determined to be \$80,000, not including attorney fees and collection costs to enforce correction of the breach. *See generally* R. 781-89. The defective work performed by Subcontractor, not the arbitrary determination of the trial court, led to the reduced contractual recovery.

system. Mr. Lynn Padan explained that Contractor, during the design phase, advised the owner's design representatives (architect and mechanical engineer) that the “last thing that the owner needed was a VFD, variable frequency drive, and a computer monitoring—a control system that cannot be managed by the owner or the maintenance individual without getting a technician with a computer to set the system parameters.” Contractor recommended to the Owner’s representatives that the mechanical system be as simple as possible, controlled by individual unit thermostats. R. 900, pp. 26-28. Interestingly, the type of computer controlled mechanical system-with VFD (variable frequency drive) that Contractor recommended against is the type of system that Subcontractor installed, and Contractor rejected, and the trial court ordered be replaced.

III. *Subcontractor's Failure to Provide Written Notice of the Design Defect was a Material Breach, Depriving Contractor of Its Bargained-for Expectation.*

Subcontractor asserts on appeal that its failure to give written notice of a known design defect in the mechanical system was not a material breach of the contract. Brief of Appellee, p. 35. The trial court, however, expressly found such to be a “most material breach” of the subcontract. R. 675-76, 689. The trial court found that the parties had expressly bargained for written notice of “any design defect” and that the subcontractor had “an absolute duty to immediately provide written notice thereof to the contractor.” R. 670-71; *see also* R. 674-76 (including Finding # 12, where the trial court discusses its rational in finding that Subcontractor's breach was material).²

The determination of whether a breach of contract constitutes a material breach is a question of fact. *Orlob v. Wasatch Medical Management*, 2005 UT App 430, ¶ 26, 124 P.3d 269. The *Orlob* court stated:

It is well-settled law that one party's breach excuses further performance by the non-breaching party if the breach is material. Whether a breach of a contract constitutes a material breach is a question of fact [. . .], which we review under a

² “[...] The court finds and concludes that given the strong language of paragraph 10, emphasized above by the court, that Shamrock has an absolute duty to advise contractor in writing of a change in equipment or design deficiency. The burden was on Shamrock to obtain that approval FROM CONTRACTOR, not from an engineer with whom Shamrock had no contract. While obviously Bartee could have and should have done more to follow through, the court concludes that under the Subcontract it was Shamrock’s responsibility to obtain Daedalus’ consent by advising Daedalus in writing, and that duty under the contract was not fulfilled by an oral statement well before the contract was even signed. Even if Subcontractor is correct that at the time of advising Daedalus there was no written contract, that duty arose when the contract was signed. If, as Shamrock claims, the possible danger of having an incompatible system was life threatening, the court finds and concludes that the duty on Shamrock, negotiated for by Daedalus, is clear.” R. 674-76 (emphasis original).

clearly erroneous standard. As we stated above, to challenge a district court's finding of fact, an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.

Orlob v. Wasatch Medical Management, 2005 UT App 430, ¶ 26 (internal quotations and citations omitted).

Subcontractor acknowledges that the issue it is challenging is a question of fact, and therefore subject to the marshaling requirement. Brief of Appellee, p. 3. Notwithstanding, it appears that Subcontractor does not attempt to marshal the evidence in support of the trial court's finding (Subcontractor's breach was a "most material breach"), or to demonstrate that the evidence is legally insufficient to support the finding even when viewing the finding in a light most favorable to the court below. *Orlob*, 2005 UT App at ¶ 26; *Traco Steel Erectors, Inc. v. Control, Inc.*, 2009 UT 81, ¶ 17, 222 P.3d 1164. Consequently, the arguments Subcontractor makes in this portion of its brief would seem to be wholly without merit because the issue is not framed or discussed in light of the controlling standard of review, which necessitates marshaling. Moreover, in the absence of proper marshaling this Court traditionally assumes the evidence adduced at trial supports the trial court's findings and accordingly affirms. *Traco Steel*, 2009 UT 81, ¶ 17, citing *Chen*, 2004 UT 82, ¶ 19, 100 P.3d 1177 ("If the evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence.")

Respectfully, any attempt by Subcontractor to marshal the evidence would fail as there is more than adequate evidence for the trial court to find that Subcontractor's breach

was material. *See* ¶ 10 of the subcontract, App. B-1; *see also* testimony of A. Wright (R. 900, pp. 63-72), in which Mr. Wright explained why it was so important³ for the Contractor to receive notice of a design defect and why Contractor specifically negotiated ¶ 10 of the subcontract, requiring written notice from the subcontractor of any discovered or known design defect in the mechanical system.

IV. *The Subcontract Allowed Contractor to Withhold Payment, and Subcontractor Offers No Substantive Refutation or Analysis of the Subcontract.*

In the Brief of Appellants, Owner and Contractor provided detailed analysis of the subcontract between Contractor and Subcontractor. This analysis included recitation of at least seven contractual provisions that specifically allow Contractor to make contractual withholdings from Subcontractor. *See* Brief of Appellant, pp. 22-28. Owner and Contractor also supplied factual support and record cites to afford contextual application of the subcontract. *See id.*

In response, Subcontractor makes the bald assertion that Owner and Contractor are “mislead[ing]” the Court in arguing for enforcement of the subcontract. Brief of Appellee, p. 38. Not only is Subcontractor’s assertion unfounded, but a succinct review of Subcontractor’s statements on the issue of contractual interpretation shows that Subcontractor’s statements are simply inaccurate or not germane to the interpretation of the subcontract. The following five examples are illustrative:

³ *See also* RESTATEMENT (SECOND) OF CONTRACTS §241 cmt. b. (2011): “In construction contracts, for example, defects affecting structural soundness are ordinarily regarded as particularly significant.”

(1) Subcontractor's Brief states that: "[T]he substitute boiler has always performed correctly. It still does." Brief of Appellee, p. 38.

However, the trial court found that:

The boiler had two components, one of which ran the water at 180 degrees and it circulated through the building and provided the heat. It was to be cooled by the other function, cooler water that ran the culinary water, for showers and washing and such, at 120 degrees. In fact Shamrock had failed to put a mixer valve in which affected the flow of water through the building and the cooler water from the culinary system was not being mixed with the original 180 degree water and so the radiant air was always too hot, unless the boiler was turned down to 110 or some lower temperature. When that new mixer valve was installed, the over heating problem ceased. The court finds that Shamrock did not do the work properly and did not install that mixer valve properly originally until mid February 2005.

R. 684-85; *see also* R. 689. This is in addition to the numerous other problems with Subcontractor's work, including failing to provide written notice of a design defect and intent to substitute equipment. *See* R. 675-76, 689 (the trial court concluding that such was "a most material breach").

(2) Subcontractor's Brief states that: "Daedalus and Silver Baron did not inform Shamrock they were withholding payments to enforce the contract." Brief of Appellee, p. 38.

Again, to the contrary, on February 22, 2005 and April 26, 2005, Mr. Alan Wright, on behalf of Contractor, sent written notifications to Subcontractor regarding the defective work. Exs. D-18, D-22; Apps D-1, D-2. On April 26, 2005, Contractor requested that the defective work and equipment be remedied and specifically referencing contractual provisions to be enforced. Ex. D-22; App. D-1; *see also* R. 687. The April 26, 2005 letter states in its opening sentence that "[t]here are several outstanding issues

and some serious equipment issues that we need to address prior to closing out the contract for the [Project] between Shamrock and Daedalus.” *Id.* The letter goes on to state that “[Daedalus] would also like to be able to pay all monies remaining on the contract; however, if no immediate action is taken by Shamrock to resolve all outstanding equipment issues, Daedalus will resolve them as provided for in the contract documents, including but not limited to the hiring of outside consultants, engineers, and mechanical subcontractors to remedy any defects.” *Id.*

(3) Subcontractor’s Brief states that: “They [i.e., Owner and Contractor] never asked Shamrock to replace the boiler.” Brief of Appellee, p. 38.

In contrast to Subcontractor’s claims, the trial court found that “On April 26, 2005, Daedalus sent a letter to Shamrock asking, among other things, that the defective equipment be replaced.” R. 687. The April 26, 2005 letter from Mr. Alan Wright states that “[a]t this point I see no alternative but to replace the unstable equipment, and am formally requesting that you do so immediately.” Ex. D-22; App. D-1. Moreover, as the trial court found, the very boiler installed by Subcontractor “was not equivalent” (R. 689), was installed without notice (*id.*), and was not what was contracted for (*id.*; R. 686).

(4) Subcontractor’s Brief states that: “They [i.e., Owner and Contractor] owed the majority of Shamrock’s claim since December 2004.” Brief of Appellee, p. 38.

This statement, which Subcontractor supports solely by citing to testimony from its own vice-president/CFO (Brief of Appellee, p. 38; R. 899, p. 31), is not persuasive and relies on no analysis of the parties’ contract. The subcontract, as evidenced by Sections 4, 5, 6, 10, 11, 13, and 17, provides otherwise. Exs. D-2, D-7; Apps. B-1, B-2.

Payment was properly withheld by Contractor under the subcontract, as a critical analysis of that instrument shows.

(5) Subcontractor's Brief states that: "Daedalus did not give Shamrock the written notice of default required by the contract." Brief of Appellee, p. 39.

Nothing in subcontract Sections 4, 5, 6, 10, 11, 13, or 17, which provisions Contractor seeks to enforce, requires such written notice. *See* Exs. D-2, D-7; Apps. B-1, B-2. The citation to which Subcontractor refers relates only to Section 15 of the subcontract, which is a remedy not exclusive to other contractual remedies. *See id.*, § 15. Specifically, Section 15 states that it exists "without any prejudice to any rights or remedies," and that the Contractor has the right, in its sole discretion to exercise the remedies in Section 15. Ex. D-2, § 15; App. B-1.

Subcontractor's efforts to re-characterize Contractor's withholding of payments instead of providing substantive contractual analysis underscore the lack of merit to Subcontractor's position on this issue.

The trial court found that Subcontractor breached the agreement by failing to provide written notice of a design defect and intent to substitute equipment (R. 675-76, 689) (concluding that such breach was "a most material breach"), that the boilers and related venting system substituted by Subcontractor were installed without notice to Contractor, were not equivalent and involved a system that Contractor did not want (R. 685, 689), that Subcontractor's failure to properly install a mixer valve caused serious overheating problems of the building even months after "substantial completion" (R. 682-85, 689)(concluding that Subcontractor "did not do the work properly and did not install

that mixer valve properly [] until mid February 2005”), and that Subcontractor was responsible for either replacement of the substituted boiler and allied venting system or the cost of having another subcontractor provide such work and equipment (R. 690). The cost to remedy Subcontractor’s work was later determined to be \$80,000, not including attorney fees and collection costs to enforce correction of the breach. *See generally* R. 781-89. The actions of, and defective work performed by, Subcontractor directly violated the subcontract.

Under the subcontract, Contractor is entitled to withhold payment from Subcontractor for certain stated conditions related to Subcontractor’s defective and non-conforming work. Exs. D-2, D-7; Apps. B-1, B-2. Specifically, Contractor is allowed to withhold payment under Sections 4, 5, 6, 10, 11, 13, 17, and the warranty. *Id.* A more detailed analysis of these provisions was originally provided in the Brief of Appellants. *See* Brief of Appellants, pp. 20-32.

V. *As the Subcontract Allowed Contractor to Withhold Payment, an Award of Prejudgment Interest is Improper.*

1. *Under Application of the Subcontract, Subcontractor is Not Entitled to Prejudgment Interest.*

In responding to Owner and Contractor’s claim that Subcontractor should not be awarded prejudgment interest, Subcontractor mainly focuses on issues of the materiality of any breaches of the subcontract. Such a discussion, however, is not germane or relevant in determining whether prejudgment interest in this case is appropriate, and is discussed in Section IV, *supra*. Subcontractor continues to assert that Owner and Contractor received actual, rather than written notice of a design defect, and that this

served as sufficient notice. Brief of Appellee, p. 40. The trial court, however, determined that the lack of written notice as required under the Subcontract constituted “a most material breach,” that Subcontractor should have obtained Owner and Contractor’s consent by advising of such in writing, and that this duty was not fulfilled with actual notice before the subcontract was signed. R. 675-76, 689. Also, after a supplemental evidentiary hearing held subsequent to the trial, the trial court found that the system installed by Subcontractor was “not the system desired and bargained for [by Contractor and Owner][...]” R. 787-88. Subcontractor, however, continues to allege that Contractor and Owner designed the system and any attendant defects. *See* Brief of Appellee, p. 39.

The subcontract allows Contractor and Owner to withhold payment for deficient or non-conforming work under at least seven different sections of the subcontract. Brief of Appellant, Exs. D-2, §§ 4, 5, 6, 10, 11, 13, 17, D-7; Adds. B-1, B-2. As Owner and Contractor were entitled to withhold all payments to Subcontractor given Subcontractor’s breaches and deficient work, any additional award of prejudgment interest in favor of Subcontractor is improper.

2. *Prejudgment Interest Cannot be Awarded Until a Definite Sum is Fixed.*

Prejudgment interest may only be awarded when a loss can be fixed as of a definite time and calculated with mathematical accuracy. *Bailey-Allen Co., Inc. v. Kurzet*, 876 P.2d 421, 427 (Utah Ct. App. 1994)(internal citations and quotations omitted). If damages cannot be determined with such accuracy, prejudgment interest is inappropriate. *See Bjork v. April Indus., Inc.*, 560 P.2d 315, 317 (Utah 1977). In its January 29, 2010 Memorandum Decision, the trial court held that Owner and Contractor

were entitled to the original system bargained for, and not that of Subcontractor's choosing. R. 690. Subcontractor was made responsible for replacing the boiler and venting system in question or paying the cost of having these replaced. *Id.* No findings were made as to how much this would cost until after the supplemental evidentiary hearing, after which the trial court determined that the amount due to Subcontractor should be reduced by \$80,000.00. R. 785. Given that the amount of this "fix" was not determined until after the supplemental evidentiary hearing, the amount due to Subcontractor was unknown, and prejudgment interest should not have been applied.

As Subcontractor provided incomplete and deficient work, prejudgment interest should not be based on the \$209,915.00 figure. Rather, the \$80,000.00 cost of the fix along with the \$60,000 in attorney fees apportioned by Contractor to enforce the subcontract (*see* R. 725), should have been counted against the value of the defective work of Subcontractor to arrive at a more accurate determination of value, and prejudgment interest should never have been awarded. Subcontractor does not refute Owner and Contractor's argument that prejudgment interest was improper until a definite sum could be fixed, and mainly focuses on misconstruing the materiality of its breach in not providing the written notice required by the subcontract.

3. *If the Court Determines That Prejudgment Interest is Appropriate, it Should Be Awarded on No More Than \$129,915.00 of the Judgment.*

As discussed in the Brief of Appellant, when a "breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time of performance on the amount due less all

deductions to which the party in breach is entitled.” RESTATEMENT (SECOND) OF CONTRACTS § 354(1) (2011). If any award of prejudgment interest is made, it should be calculated on the sum of \$129,915.00 (\$209,915.00 minus \$80,000.00), less collection costs and attorney fees Owner and Contractor have incurred (and are entitled to withhold for enforcing the contract both at trial and upon appeal). Again, Subcontractor does not provide any refutation or position on this prong of Owner and Contractor’s argument with regard to the improper award of prejudgment interest.

VI. *As Expert Witnesses Were Not Identified or Designated Pursuant to Utah R. Civ. P. 26(a)(3)(A), It Was Error for the Trial Court to Admit Expert Testimony. Appellants Are Entitled to a New Trial Under Utah R. Civ. P. 59.*

In response to this issue, Subcontractor goes to great length to set out in its brief all of the factual information elicited from its witnesses. Brief of Appellee, pp. 43-47. Owner and Contractor are not concerned about the factual testimony these witnesses provided. However Subcontractor’s witnesses (as detailed in the Brief of Appellants, pp. 36-43) were also allowed, over Appellants’ counsel’s objections, to give opinion testimony based on their experience in the construction industry.⁴ It is the expert

⁴ The Court: It may be wrong, and I realize and I agree it’s something of an opinion, but he’s licensed. R. 899, p. 95 (discussing the testimony of Bill Payne, Commercial Manager for Shamrock Plumbing, R. 899, pp. 91-95).

[...]

Mr. Martin: Well, Okay. If you had to grade Shamrock’s performance of work on the project, what would you grade it?

Mr. Chambers: Object, foundation.

The Court: Overruled. He stated his experience of some 25 years, so –

Mr. Shoemaker: I would grade them a B+ or A- in my professional opinion. R. 899, pp. 254-55.

testimony that the witnesses were allowed to offer to which Owner and Contractor object because it surprised and prejudiced them.

Subcontractor argues that the opinion testimony was admissible under Utah R. Evid. 701. However, the scope of testimony went far beyond that allowed by Rule 701. *See* Brief of Appellants, pp. 36-43. The Advisory Committee Note indicates that Rule 701 was amended in 2009 to reflect the Utah Supreme Court's holding in *State v. Rothlisberger*, 2006 UT 49, ¶¶ 23-24, 147 P.3d 1176, adopting a bright line test between lay and expert witnesses.⁵

The offending expert opinion testimony in question went far beyond that permitted under Rule 701; it was admitted based on the licensed status or substantial experience of the witnesses (e.g., 25 years of experience in the case of Mr. Rusty Shoemake being allowed to testify). As opinion testimony, it was expert testimony. *See* Utah R. Evid. 702. Because it constitutes expert testimony, the parties were required to disclose to the opposing party “the identity of any witness who may testify as an expert at trial.” Utah R. Civ. P. 26(a)(3)(A). This disclosure rule applies to all expert witnesses, even those who were not retained specifically to provide expert testimony, but will, based on their

⁵ “Even more compelling, rule 701 by its explicit terms applies only to lay testimony. That rule states that the witness may not be ‘testifying as an expert.’ The reference to ‘an expert’ logically leads to rule 702, which essentially defines an expert as one who testifies based on ‘scientific, technical, or other specialized knowledge.’ Given the language of these two rules, the requirement that we give effect to all portions of a rule demands that we maintain a distinction between rules 701 and 702 and, accordingly, disallow admission of testimony under 701 where it is based on specialized knowledge. In essence, expert testimony—testimony based on ‘scientific, technical, or other specialized knowledge’ -- may not be admitted as lay opinion testimony under rule 701.” *Rothlisberger*, 2006 UT 49 at ¶ 23 (citations omitted).

education, training, experience, etc., be allowed to provide opinions or otherwise testify as to matters beyond the normal experience of a person. *Rothlisberger*, 2006 UT 49 at ¶¶ 23-24. Although no expert report was required, the disclosure of the identity of any person who may testify as an expert was required. *See Brussow v. Webster*, 2011 UT App 193, ¶ 3 (a party must disclose to an opposing party the identity of any witness who may testify as an expert at trial).

The ultimate result of a party's failure to disclose the identity of any witness who may testify as an expert at trial under Utah R. Civ. P. 37(f) is that the trial court shall not allow such witness to testify (as to expert matters) at trial or any other hearing. Utah R. Civ. P. 37(f) expressly prohibits the use of an undisclosed witness, subject to two exceptions:

If a party fails to disclose a witness ... as required by Rule 26(a) or Rule[] 26(e)(1), ... that party shall not be permitted to use the witness ... at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.

Subcontractor cannot assert good cause for its failure to disclose. Six months prior to trial, Subcontractor's counsel informed the trial court there was no need for an expert witness as to his case. R. 904, p. 13. Owner and Contractor's counsel had moved the trial court to re-open discovery for the limited purpose of conducting two depositions and designating expert witnesses. *See generally* R. 383-86; 401-03; 904. By the time counsel for Owner and Contractor became involved in the case, discovery had closed, and neither party had designated an expert. Since the case involved a construction dispute, Owner and Contractor's counsel, albeit new to the case at that time, could not see how such a

complex case could be tried without expert witnesses. Subcontractor objected to the case being reopened for this limited purpose and the trial court denied the request to allow an extension of time to designate experts for trial. *See generally* R. 904. Now Subcontractor argues, even though it was fully aware that it had not designated any expert witness as required by Rule 26(a)(3), and notwithstanding the clear import of Rule 37(f) that a party may not use a non-disclosed witness, that such opinion testimony was merely harmless error. “Even if the trial court allowed some testimony that could be perceived to be expert testimony, it was harmless.” Brief of Appellee, p. 46.

Owner and Contractor's response is twofold: First, Utah R. Civ. P. 37(f) is clear. The non-disclosed witness cannot be used unless the trial court rules on one of two exceptions: Good cause for non-disclosure exists or the failure to disclose was determined to be harmless. Utah R. Civ. P. 37(f). In this case, the trial court made no Rule 37(f) inquiry, and even if the trial court had made such an inquiry, the burden of establishing no prejudice or surprise to Appellants would have been on the Subcontractor as the offending or non-disclosing party, not on the party who was surprised by the use of the non-disclosed witness. Subcontractor's argument subtly attempts to shift the burden to prove the testimony from a non-disclosed witness was harmful to the surprised party, contrary to Rule 37(f) which places the burden on Subcontractor.

Second, Rule 26 (a)(3)(A) serves an important function to each party receiving a full, impartial trial. The Utah Supreme Court has stated that the general purpose of discovery is “to remove elements of surprise or trickery so the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as

possible.” *Ellis v. Gilbert*, 429 P.2d 39, 40 (Utah 1967). In *Turner v. Nelson*, 872 P.2d 1021, 1023 (Utah 1994), Justice Zimmerman wrote:

[Proper disclosure] gives both parties the opportunity to prepare adequately for trial, including, among other things, deposing witnesses, investigating witnesses' testimony, and preparing an effective cross-examination. *See, e.g., Gardner*, 505 P.2d at 52. It also encourages the parties to make a serious effort to investigate the facts and discover all relevant witnesses in a timely manner. Finally, it furthers the orderly and efficient administration of justice by avoiding trial delays which might otherwise be necessary to accommodate the need to prepare for a surprise witness.

Concerning the disclosure of expert witnesses and trial preparation, this Court recently observed in *Brussow*, 2011 UT App 193 at ¶ 8:

Formal disclosure of experts is not pointless. Knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial, including attempting to disqualify the expert testimony ... , retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report.

(citing *Pete v. Youngblood*, 2006 UT App 303, ¶ 17, 141 P.3d 629)(internal citations and quotations omitted).

The admission of expert testimony in this instance was harmful. It was not expected. It could not have been anticipated, as the usual consequence of not disclosing the identity of any person to testify as an expert witness is the exclusion of the witness's testimony (or at least that portion which was opinion or expert testimony) under Utah R. Civ. P. 37(f). The pretrial order which denied counsel's motion to reopen discovery for the limited purpose of designating expert witnesses misled Owner and Contractor's counsel to believe that no expert testimony would be allowed by either party. As such, counsel for Owner and Contractor did not prepare their own expert witnesses, or prepare

material to disqualify any of Subcontractor's witness who would testify as to expert matters, or prepare rebuttal expert testimony. When the trial court decided to admit the expert testimony it was completely contrary to the trial court's pretrial order and was a total surprise. *See* Brief of Appellants, pp. 36-43. Had Appellants' counsel known that the trial court (notwithstanding its pretrial order) would allow the use of expert witnesses, then trial preparation and case presentation would have been much different, particularly with regards to the damages Owner and Contractor suffered as a result of Subcontractor's "most material breach." Given the several salient purposes discussed above relative to timely disclosure, the clear mandate of Utah R. Civ. P. 26(a)(3) for disclosure of the identity of all persons who will offer expert testimony, and the mandatory nature of Utah R. Civ. P. 37(f), it is difficult to understand how it can be argued that the introduction of expert testimony under the circumstance of this case was merely harmless error. Respectfully, it was not harmless.

CONCLUSION

For the reasons set forth above, Subcontractor's arguments addressing reversal of the trial court's ruling setting aside default judgment; recovery in *quantum meruit*; and the materiality of its contractual breach should be rejected.

Owner and Contractor request that the Court of Appeals reverse the trial court's Conclusions of Law regarding the interpretation and application of the contract, remanding the matter to the trial court for a determination as to the exact amount Contractor was entitled to withhold. Upon remand, Owner and Contractor request specific instructions that the contract expressly allows Contractor to withhold payment

from the Subcontractor to enforce the subcontract, including the anticipated enforcement costs and attorney fees incurred to remedy the Subcontractor's breach. These attorney fees and costs to enforce the subcontract, both at trial and upon appeal, should be determined and calculated as contractual damages pursuant to the parties' agreement.


Additionally, the trial court should be reversed as to the prejudgment interest awarded to Subcontractor.

Next, Owner and Contractor request that the Court of Appeals reverse the trial court and order a new trial.

Lastly, Owner and Contractor request an award of their attorney fees incurred on appeal, also to be included as contractual damages.

DATED this 27th day of June 2011.

HARRIS, PRESTON & CHAMBERS



Joseph M. Chambers
Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that one (1) original and seven (7) true and correct copies of the foregoing **Reply Brief of Appellants and Brief of Cross-Appellees** and **Addenda** were mailed by first class mail with sufficient postage prepaid this 27th day of June 2011 to the following:

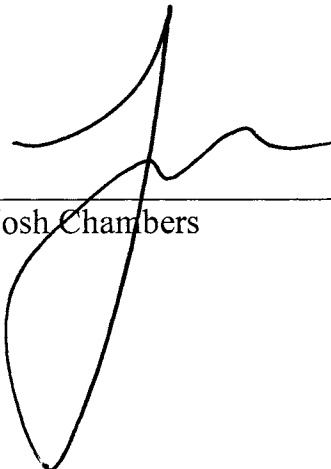
Utah Court of Appeals
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230

I also certify that two (2) true and correct copies of the foregoing **Reply Brief of Appellants and Brief of Cross-Appellees** and **Addenda** were mailed by first class mail with sufficient postage prepaid this 27th day of June 2011 to the following:

Mel S. Martin
5286 South Commerce Drive, #A-136
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Jeremy C. Sink
McKay, Burton & Thurman
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Salt Lake City, UT 84101-1656

Matthew G. Cooper
5286 South Commerce Drive
Suite A-136
Murray, UT 84107-4712



Josh Chambers

Appendix D-1

FINAL
FILE COPY
MAILED 4/27

April 26, 2005

DAEDALUS USA

Craig Barrus
Vice President
Shamrock Plumbing
340 West 500 North
North Salt Lake City, Utah 84054

RE: Lodges at Deer Valley building F

Deer Mr. Barrus:

There are several outstanding issues and some serious equipment issues that we need to address prior to closing out the contract for the Lodges Building F between Shamrock and Daedalus.

I have attempted resolution with the parties involved, but as of yet have been unsuccessful. The reality is that the parties ultimately responsible for all contract related issues are you and I. Our responsibility to the owners can not be delegated to any other party; nor can the resolution of problems be avoided by pointing the finger elsewhere.

I have had several meetings and conversations with Bill Payne, but as of yet have been unable to come to resolution on the outstanding issues.

I sent a letter dated February 22, 2005 in which I spelled out some of the issues and requested specific information. (See attached) To date I have not received the requested items.

I met with Bill on February 10, 2005 and we agreed that he would provide the following things, which I spelled out in my February 22nd Letter.

1. A list of work remaining.
2. A request for additional time under the contract terms.
3. A review of daily reports as backup to any requests for additional time.
4. A summary of fixture costs and overage.

This information was not received and Daedalus submitted its owner change requests without including an extension of time for Shamrock.

I specifically asked Bill for his understanding of the actual contract date of substantial completion as reflected by the contract documents, and any approved extensions of time. The contract currently indicates a completion date for Shamrock's work of September 20, 2004 with a \$1,500 daily penalty.

Paragraph 9- SCHEDULE: Clearly allows for revisions in the work Schedule and the Subcontractor's responsibilities relating to such schedule changes.

Paragraph 10- SUBCONTRACTOR CHANGE ORDERS spells out the Subcontractor's responsibilities to provide immediate documentation and notice of any Change requests in the contract amount or completion date.

No requests for additional time were submitted during the course of construction, however several Subcontractor Change Orders were submitted and approved in which it was agreed that no additional time would be required. I personally had conversation with Bill about the pending contract deadline and it was agreed that no additional time was necessary.

I indicated to Bill in a November email that if Shamrock could achieve substantial completion by December 10, 2004, Daedalus might choose not to pursue delay penalties. This did not occur, and in fact, the contract work remains incomplete as of today. Conditional TCO was achieved on December 17, 2004. It was agreed that due to a high rate of occupancy, balancing would not take place until after the close of the ski season in April. That has not yet occurred.

In case Bill has not communicated it directly to you, there is an even larger problem that persists. The boiler and water heaters are continually shutting down at random intervals as recently as this week. On some occasions it has been several times a day and on other occasions it is once a week. This has resulted in our having to monitor the system around the clock to prevent the additional refund of monies to the Hotel guests on a daily basis. Even with continual monitoring, we have refunded many thousands of dollars over the course of the past few months.

Daedalus has never in its history issued a delay back charge to one of its Subcontractors, nor has an owner ever charged Daedalus for delays until now. In this case however, Daedalus has been assessed a very sizable delay penalty.

My letter of February 22, 2005 also requests an immediate meeting of all parties involved to find a resolution to the equipment failures that are impacting us at the Lodges. No such meeting has taken place (I just receive notice of one scheduled for Tuesday May 3rd). I would think that given the seriousness of the problems that have plagued us, and the costs associated with them, that such a meeting would be a very high priority for Shamrock.

Upon fire-up of the system, the units and hallways were averaging over 90 degrees, and in some places over 100 degrees; day and night, seven days a week in the middle of January. After innumerable hours, late nights and weekends spent personally investigating and inspecting the system It was discovered that Shamrock had omitted the installation of a mixing valve that prevented 160 degree boiler loop water from circulating throughout the entire building. Once this mixing/separation

valve was installed the temperature of the building loop was decreased to an average of 87 degrees in all units at all hours of the day.

Heating problems have now been masked by the addition of cooling to the building in March, though we have no similar ability to mask the ongoing equipment failures. At this point I see no alternative but to replace the unstable equipment, and am formally requesting that you do so immediately.

Paragraph 13 of the contract allows Daedalus to replace defective equipment and charge the costs to the subcontractor in accordance with paragraph 19. Allowing Shamrock three months to resolve the issues is more than ample time to debug any minor issues, and eighty nine days too long considering the costs associated with each shutdown during a period of full occupancy.

The months of April and May are low occupancy months, and therefore the only time that will allow this work to be done without major loss of revenue to the owner. The replacement of defective equipment and all remaining work must be completed during this period of time.

After receiving my letter detailing some of these issues and the required information, Bill Payne responded with a letter demanding payment. He asserted that with the exception of balancing, all contract work has been completed as of February 22, 2005. He fails to acknowledge that this is almost five months behind schedule and did not acknowledge at all that the equipment is not functioning properly. Daedalus has communicated on numerous occasions that the continuing failure of the water systems and unit controls, combined with the inability to control the unit temperatures is a problem with very serious consequences, especially given that these units rent for as much as \$1,500 each per night.

Bills letter also makes the statement that normal retention is more than adequate to handle any and all verifiable claims and the balancing still remaining to be completed. Our contention is that the total remaining payable may not be adequate to replace the defective equipment and cover the costs incurred to date, let alone any still to come. Paragraph 5 of the contract clearly defines the Contractor's rights to withhold payment for the equipment and work in question.

Paragraph 3 of Bill's letter states that Shamrock could possibly be due delay damages of it's own. Paragraph 9 of the contract specifically precludes such a back charge to the Contractor under any circumstances; although continued failures, improper functionality, and work still remaining would seem to preclude such an assertion in and of itself. I have attached a brief list of dates of work completed long after the hotel opened for partial occupancy, and almost six months after Shamrocks contract completion date.

In addition to the aforementioned items, my letter of February 22nd also requests the following items:

1. All submittals and approvals
2. All communications with any and all involved parties
3. All equipment specifications
4. All equipment operation and maintenance manuals

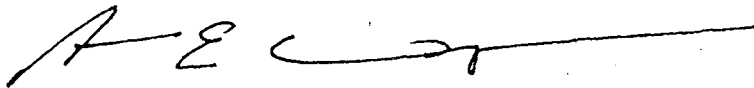
We have not yet received the requested information. In my review of the original submittals provided there was nothing relating to the boiler and/or water heaters, therefore I cannot address the issue with either the Architect or the Mechanical Engineer. To avoid an outright rejection of the equipment on that basis alone I will need all communications between your office and the Architect/Engineer

I have also requested on more than one occasion an immediate meeting with all parties responsible in any way for the system. This meeting has not taken place. Without immediate action to resolve the outstanding issues, it is likely that our companies will end up in litigation within weeks. I am therefore again requesting the needed information and sufficient action to resolve all outstanding issues and avoid litigation.

I am fully aware of how hard everyone worked on this job, and in fact believe that Shamrock is, and its field personnel are, dependable. I would much prefer to not be in this situation. I would also like to be able to pay all monies remaining on the contract; however, if no immediate action is taken by Shamrock to resolve all outstanding equipment issues, Daedalus will resolve them as provided for in the contract documents, including but not limited to the hiring of outside consultants, engineers, and mechanical subcontractors to remedy any defects.

I trust that I will receive the needed information soon and hear from your company with a schedule for the work remaining. Your immediate response is requested so that we may resolve these issues without litigation. If we continue on a path of inaction for more than a day or two I will be forced to find resolution elsewhere.

Sincerely,



Alan E. Wright
Vice President/Daedalus USA

Cc: Lynn Padan-Daedalus USA
Craig Elliot-EMA Architects
Tom Colvin-Colvin Engineering
Bret Christiansen-Colvin Engineering
Kevin Flannery-Shamrock Plumbing
Bill Payne- Shamrock Plumbing
Jones Waldo Holbrook & McDonough

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Appendix D-2

February 22, 2005

Bill Payne
Shamrock Plumbing
340 West 500 North
North Salt Lake City, Utah 84054

RE: Lodges Building F Equipment Issues

Dear Mr. Payne:

We recently met in our office to discuss remaining work in progress, contract completion dates, persisting equipment troubles, contract close out and the status of final payment to Shamrock.

You were to provide the following information:

1. A list of work remaining.
2. A request for additional time under the contract terms.
3. A review of daily reports as backup to any requests for additional time.
4. A summary of fixture costs and overage.

I have not yet received this information, which is necessary for the preparation of any request for additional time and payment between Daedalus and the owners, and which is holding up our contract closeout with the Owners.

As you are aware, the heating and culinary systems at the Lodges Building F have been experiencing problems since they were first fired up. These issues have as of yet not been resolved. Given that the building is part of a fully occupied luxury hotel, this problem is of a most critical nature and must be immediately and permanently resolved.

I have allowed substantial time to pass while all parties involved have attempted to resolve the following persistent issues of overall system functionality:

1. The entire building temperature is uncontrollably high.
2. Many units are at 75-80 degrees at 6 am, and can not be cooled with outside air
3. The boiler and water heaters will not stay lit for any extended period of time.
4. Unit culinary hot water temperature fluctuates at random.

As I have investigated the above issues I have become aware of several situations where the equipment installation is not as originally designed for a number of reasons.

Due to some of the above-mentioned problems, we have and are currently refunding substantial monies to unhappy guests, and we are regularly feeling the pressure on sales.

Please provide a copy of all documentation relating to the current equipment installation; including but not limited to the following:

1. All Submittals and Approvals.
2. All communications with any and all involved parties
3. All Equipment specifications
4. All equipment operation and maintenance manuals.

We should immediately schedule a meeting with all parties to discuss the problems and find the proper solutions. We cannot continue to experience equipment failures as we have been. We have been patiently allowing you the time to rectify the problems, but we can no longer continue to experience similar problems without a deadline for them to be rectified. We must also be confident that if the equipment remains, that it will be trouble free and that the HOA will not incur abnormal service charges once the warranty period is up.

If necessary we will require that all equipment be removed and replaced with a stable system.

Please forward the requested documentation immediately and schedule the necessary meeting of all individuals with the Architect.

Sincerely,

Alan E. Wright
Vice President
Daedalus USA

Cc: Lynn Padan – Daedalus USA,
Craig Elliot - EMA Architects,
Tom Colvin – Colvin Engineering
Bret Christiansen – Colvin
Kevin Flannery –Shamrock