

2010

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

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 Appeal from Third Judicial District Court Summit County, Utah District Case No. 050500453 Hon. Bruce B. Lubeck Hon. Keith Kelly
SHAMROCK PLUMBING, LLC, Cross-Claim Plaintiff and Appellee/Cross-Appellant v. SILVER BARON PARTNERS, L.C., DAEDALUS USA, INC., et al., Cross-Claim Defendants and Appellants.	

**BRIEF OF APPELLEE/CROSS-APPELLANT SHAMROCK PLUMBING, LLC
FROM THE DECISION OF THE THIRD JUDICIAL DISTRICT COURT**

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FILED
UTAH APPELLATE COURTS

MAY 25 2011

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LIST OF PARTIES

Pleadings:

Defendant and Cross-Claim Plaintiff: Shamrock Plumbing, LLC

**Defendants and Cross-Claim Defendants: Silver Baron Partners, L.C.
Daedalus USA, Inc.**

At Trial:

Plaintiff: Shamrock Plumbing, LLC

Defendants: **Silver Baron Partners, L.C.**
Daedalus USA, Inc.

On Appeal:

Appellants: Silver Baron Partners, L.C.
Daedalus USA, Inc.

Appellee/Cross-Appellant: Shamrock Plumbing, LLC

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to U.C.A. § 78A-3-102(4) and U.C.A. § 78A-4-103(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

- I. Did the trial court abuse its discretion in granting Daedalus' and Silver Baron's Motion to Set Aside Judgment and Alternatively Motion for New Trial when, absent any due diligence, they failed to show excusable neglect for their second time in default during lengthy litigation, and when they ignored a Notice to Appoint Counsel, and when they ignored multiple filings served upon each of them both before and after default judgment was entered in favor of Shamrock?**

1. Standard of Review

The Court reviews the trial court's findings of fact for clear error, reversing only where the finding is against the clear weight of the evidence, or if it otherwise reaches a firm conviction that a mistake has been made. *See State v. Goodman*, 763 P.2d 786, 786 (UT 1988); *ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (UT 1997); *Cummings v. Cummings*, 821 P.2d 472, 476 (UT App 1991)

Absent a finding of due diligence, it is not within the trial court's discretion to grant relief from final judgment. The trial court may set aside a default ... "for good cause shown," but it may set aside a default judgment only "in accordance with Rule 60b." U.R.C.P. 55(c). *See Calder Bros Co. v. Anderson*, 652 P.2d 922, 926n4 (Utah 1982); *Davis v. Goldsworthy*, 184 P.3d 626 (UT App 2008)

This court has said:

We will overturn a trial court's decision to set aside a default if it has abused its discretion ... "As a threshold matter, a court's ruling must be 'based on adequate findings of fact' and 'on the law.'" Davis v. Goldsworthy, 184 P.3d 626, 629 (UT App 2008)

"The supreme court has previously defined 'excusable neglect' as 'the exercise of due diligence by a reasonably prudent person under similar circumstances.'" (Cite omit) Otherwise, his neglect or mistake was not excusable." Swallow fka Kennard v. Kennard, 183 P.3d 1052, 1058 (UT App 2008) (Mail delivery problems are not excusable neglect when coupled with failure to exercise due diligence.)

2. Citation to Record or Statement Showing Issue Was Preserved in the Trial Court:

An appellant can challenge the trial court's interlocutory order setting aside a party's default once a final judgment has been entered. See Zions First Nat'l Bank v. Rocky Mountain Irrigation, Inc., 931 P.2d 142, 144 (Utah 1997); Davis v. Goldsworthy, 184 P.3d 626, 629n 2 (UT App 2008)

Shamrock timely filed its Notice of Cross-Appeal. (R. 891-893)

II. Did the trial court err in reducing Shamrock's claim by failing to consider Shamrock's *quantum meruit* claim?

1. Standard of Appellate Review:

This Court has said: "Whether a contract implied in fact exists is generally considered a question of fact and we review a trial court's factual findings under the deferential, clearly erroneous standard. (Cite omit) However, we 'retain the power to decide whether, as a matter of law, a reasonable [fact finder] could find that an implied

contract exists.’” (Cite omit) Uhrhan Const. & Design, Inc. v. Hopkins, 179 P.3d 808, 812 (UT App 2008)

2. **Citation to Record or Statement Showing Issue Preserved in Trial Court:**

A court’s ruling must be based on adequate findings of fact, and on the law. (*See Davis v. Goldsworthy, supra*) No findings were made on Shamrock’s claim for *quantum meruit*.

III. **Did the trial court err by finding Shamrock materially breached the contract by failing to give written notice of a design defect in Daedalus’ specifications as required by the contract, when Shamrock gave Daedalus actual notice of the design defect months before the contract was signed?**

1. **Standard of Appellate Review:**

Whether a breach of contract constitutes a material breach is a question of fact, which is reviewed under a clearly erroneous standard. Orlob v. Wasatch Medical Management, 124 P.3d 269, 275 (UT App 2005)

2. **Citation to Record or Statement Showing Issue Preserved in Trial Court:**

Ruling of trial court. (R. 665 p. 25 ¶ 2)

CONSTITUTIONAL OR STATUTORY PROVISIONS

Utah Rules of Civil Procedure 5, 52, 55, 60, and 74 are set forth in their entirety in the Addendum. Pertinent provisions are:

U.R.C.P. 5(a)(2)(C) - a party in default for any reason shall be served with notice of any hearing necessary to determine the amount of damages to be entered against the defaulting party;

U.R.C.P. 5(a)(2)(D) - a party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d);

U.R.C.P. 5(b)(1)(A)(iv) - by mailing it to the person's last known address;

U.R.C.P. 5(b)(1)(B) - Service by mail, email or fax is complete upon sending.

U.R.C.P. 52(a) Effect - In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

U.R.C.P. 55(c) - Setting Aside Default - For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

U.R.C.P. 60(b) - Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The

motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceedings was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

U.R.C.P. 74(c) - If an attorney withdraws other than under subdivision (b), dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

STATEMENT OF CASE

1. Nature of the Case

This case is about a subcontractor's (Shamrock Plumbing) suit for non-payment against a Project's Owner (Silver Baron Partners), and against the General Contractor (Daedalus). Silver Baron and Daedalus share common ownership and management, (R. 900 p. 247-248). They shared the same office, and the same mailing address during all relevant periods. (R. 64-79, 253-255, 256-258)

The Project was the construction of a building in Park City for short-term rentals, which Daedalus and Silver Baron later decided to sell as condominiums. Construction was in 2004 and early 2005. (R. 669)

In 2005, an unpaid materialman sued Daedalus, Silver Baron, and other subcontractors, including Shamrock. Shamrock cross-claimed against Daedalus and Silver Baron for non-payment of their subcontract (herein called “the contract”) on the Project. (R. 41-50; Addendum A-1)

Course of Proceedings

Daedalus and Silver Baron failed to answer Shamrock’s cross-claim, and their defaults were entered in 2006. (R. 80-81, 82-83) They obtained counsel and the court set aside the defaults. (R. 666-667)

All claims in the underlying action were resolved except for Shamrock’s cross-claim against Daedalus and Silver Baron. So, the trial court treated Shamrock as the plaintiff, and treated Daedalus and Silver Baron Partners as the defendants. (R. 665) These parties conducted discovery through December 2008. (R. 667) Thereafter, counsel for Daedalus and Silver Baron withdrew. (Id.)

Shamrock mailed Daedalus and Silver Baron notices to appoint counsel; and also mailed several additional filings. (R. 256-295) Absent any response, the trial court entered their default, and their answer and counterclaim were “stricken and dismissed with prejudice.” (R. 281) In addition, Shamrock obtained default judgment against Daedalus

and Silver Baron in the amount of \$418,095.71. (R. 284-286, Addendum A-16) The judgment was corrected for a typographical error. (R. 293, Addendum A-17)

Thereafter, Daedalus and Silver Baron hired a new attorney who moved the court to set aside the default judgment. Without a hearing, the court set aside the judgment on April 23, 2009. (R. 363-368, 387-389, Addendum A-4)

Daedalus and Silver Baron performed additional discovery. (R. 407-408)

On October 16, 2009, Daedalus and Silver Baron filed a motion for partial summary judgment and a motion *in limine*. (R. 432-435) The motion was granted in part and denied in part. (R. 530-543)

A 3-day bench trial was conducted January 20-22, 2010. (R. 641-655) The court issued its Memorandum Decision in favor of Shamrock Plumbing on January 29, 2010. (R. 665-693, Addendum A-5)

Supplemental proceedings were conducted by the trial court to clarify its judgment. (R. 710-755) The court received expert testimony from a mechanical engineer who Daedalus and Silver Baron used to perform related work on a contiguous building. The court also heard expert testimony from 2 of Daedalus' employees. (R. 772-777, R. 903) The final judgment in favor of Shamrock was entered July 27, 2010. (R. 798-801, Addendum A-7)

Daedalus and Silver Baron moved the trial court for a new trial. (R. 830-869) The court denied the motion. (R. 880-883)

2. Disposition in the Trial Court

The trial court set aside Shamrock's default judgment in the amount of \$418,095.71 against Daedalus and Silver Baron Partners. (R. 387-389, Addendum A-4) The court partially granted a motion for partial summary judgment by Daedalus and Silver Baron, finding that Shamrock had breached the parties' contract, the materiality of which was reserved for trial. (R. 530-543) Following a 3-day bench trial, the court rendered judgment for Shamrock. (R. 665-693) The court conducted two supplemental proceedings on April 6, 2010 and June 11, 2010 and issued its Supplemental Memorandum Decision on June 15, 2010 (R. 781-789, Addendum A-6) The supplemental memorandum decision was expressly incorporated into its final Judgment entered on July 27, 2010. (R. 798-801, Addendum A-7) After noting it apportioned Shamrock's legal fees, the court ordered:

It is ordered and adjudged that Shamrock Plumbing, LLC recover from defendant SILVER BARON PARTNERS, LC and DAEDALUS USA, INC., jointly and severally, the sum of ONE HUNDRED TWENTY NINE THOUSAND NINE HUNDRED FIFTEEN DOLLARS (\$129,915.00), plus prejudgment interest in the sum of ONE HUNDRED SEVEN THOUSAND SIX HUNDRED THREE DOLLARS (\$107, 603.00), plus post-judgment interest at the statutory rate of 2.47%; and

IT IS FURTHER ORDERED AND ADJUDGED that Shamrock Plumbing, LLC recover from Silver Baron Partners, LC, court costs of \$4,400.00 and attorney fees of \$45,000, for a combined amount of FORTY NINE THOUSAND FOUR HUNDRED DOLLARS (\$49,400.00) to be taxed as costs pursuant to U.C.A. § 14-2-2. (R. 799-800)

Daedalus and Silver Baron moved for a new trial. The motion was denied.
(R. 880-883)

Daedalus and Silver Baron filed their Notice of Appeal. (R. 888-890), and
Shamrock filed its Notice of Cross-Appeal. (R. 891-893)

STATEMENT OF FACTS RELEVANT TO THE ISSUES
PRESENTED FOR REVIEW

Daedalus hired Shamrock to perform “HVAC and Plumbing work as described in the Contract Documents ...” (Contract ¶ 1, in Addendum A-1) Shamrock did not design the mechanical, HVAC, or plumbing for the Project. (R. 669-670) Daedalus provided the design and specifications to Shamrock, including the equipment specifications. (R. 670, R. 900 pp. 100-102)

Silver Baron, the owner, did not apply for a performance bond, contrary to the requirements of U.C.A. § 14-2-1 and §14-2-2. (R. 900 p. 249; R. 690-691)

At the request of Daedalus, Shamrock began work in April 2004, even though their contract was not signed until June 7, 2004. (R. 669 ¶ 2)

Early on, before their contract was signed, Shamrock’s Bill Payne informed Daedalus’ Roy Bartee that there was a design defect in Daedalus’ specifications. (R. 674 ¶ 12, p. 676) The problem was the boiler Daedalus specified for the Project was incompatible with the water heaters they specified for the Project. (Id.) The venting of the boiler was incompatible with the venting of the water heaters. They could not be combined in the same fluing system. (Id.)

Roy Bartee told Bill Payne to “work it out” with the Project Engineer, which Payne did. (Id.)

Thereafter, the contract was signed. (R. 669) The contract provides:

10. SUBCONTRACT CHANGE ORDERS: In the event Subcontractor finds any design deficiency, error in measurements, or errors in the Contract Documents or conditions which Subcontractor believes to be at variance with approved plans, Subcontractor shall have an absolute duty to immediately provide written notice thereof to Contractor ...
(Contract ¶ 10, Addendum A-1)

Having given oral notice of Daedalus’ design defect, and being told to “work it out” with the Project’s mechanical engineer, Shamrock did not give additional written notice when the contract was signed. (R. 674 ¶ 12)

Shamrock substantially completed its work on December 18, 2004. (R. 681 ¶ 21) On December 22nd or 23rd, Daedalus took possession of the building and started renting the units. (Id., R. 681 ¶¶ 21, 22)

The contract provided Daedalus with remedies if they believed Shamrock defaulted. (Contract ¶ 15, Addendum A-1; R. 671 ¶¶ 5, p. 672) The pertinent language gave Daedalus “The right, in its sole discretion, upon a two working day written notice to Subcontractor [Shamrock], to declare this Subcontract null and void, and to exercise any or all of the following remedies: ...” (Id.) The court found Daedalus failed to give Shamrock such notice. (R. 672 ¶ 6, Addendum A-5, p. 8)

After Shamrock substantially completed its work, Daedalus pressed Shamrock to do additional work. (R. 677 ¶ 14; R. 679 ¶ 19) In addition, Shamrock worked with

Daedalus' engineer and the product manufacturer of the A. O. Smith water heaters to remedy problems with the heating system. (R. 899 pp. 113-114) It was determined that the pilot light assembly was defective on the water heaters specified by Daedalus, which the court determined was not Shamrock's doing at all. (R. 682 ¶ 23)

There was no problem with the operation of the substitute boiler installed by Shamrock. (R. 899 p. 100)

Under their contract with Daedalus, Shamrock was owed \$225,000 in December 2004. (R. 899 pp. 45-46) Instead of paying, Daedalus claimed some of the equipment was not installed correctly, and asked that it be replaced. (Exs. D-18, D-22, R. 687) However, the "defective equipment" was never identified to Shamrock. (Id., also *see* R. 899 pp. 101-102)

The contract allowed Daedalus the right to revise the contract schedule. (Contract ¶ 9, Addendum A-1) Shamrock was required to attend construction progress meetings. (Contract ¶ 12, Addendum A-1) Exhibit BI.1.c to the contract states:

In addition to Subcontractor's other duties under the Subcontract Agreement, Subcontractor shall:

* * *

c. Cause a qualified supervisory representative (while Subcontractor has personnel at the Project site and for two (2) weeks prior thereto) to attend weekly progress meetings. Furthermore, and notwithstanding anything in this Subcontract Agreement to the contrary, Subcontractor agrees to be bound by such modifications to the Project Schedule as are discussed at the weekly progress meetings unless written objection is made by Subcontractor within forty-eight (48) hours of the occurrence of such meeting. (emphasis added)

The court found the contract was ambiguous regarding the scheduling, (R. 679 ¶ 20) and during the weekly progress meetings, Shamrock was often asked to do different work by Daedalus. (R. 679 ¶ 19)

Craig Barrus, Shamrock's Chief Financial Officer, testified Shamrock was not paid \$256,785.96, and all of it was owed on or before March 2005. (R. 899 pp. 45-46)

The court concluded:

1. Shamrock did the work and has not been paid. Daedalus has breached the contract by failing to pay \$256,786 and owes Shamrock that amount, less whatever the cost of replacing the current system as discussed below. (R. 689 ¶ 1)
7. Because Silver Baron did not obtain a bond, under U.C.A. §14-2-2, as the owner Silver Baron is liable for the reasonable damages as above concluded. Shamrock is entitled under that statute as the prevailing party overall to its attorney fees to be taxed as costs in the action. (R. 690 ¶ 7)

Statutory prejudgment interest was awarded from April 2005. (R. 691 ¶ 8)

The court also concluded:

9. Shamrock is not entitled to the amount paid (loaned) by Daedalus to Stewart, \$46,871. Thus, the amount owing by Daedalus to Shamrock is \$256,786 minus the amount owed to Stewart which Daedalus has paid, \$46,781, and minus the cost of replacement of the system installed defectively and not bargained for by Daedalus. (R. 691 ¶ 9)

To determine what would be needed to replace the system, the parties stipulated to providing the court with expert testimony from Knute Peterson. (R. 763-766) Knute

Peterson was Daedalus' mechanical engineer on the contiguous building, which Daedalus and Silver Baron built after the building which is the subject of this lawsuit. (R. 903 pp. 5, 12-14)

Unknown to Shamrock, Daedalus had combined the hot water system built by Shamrock, with the system in the contiguous building built by Daedalus. (R. 903 ¶ 6) Knute Peterson testified that the boiler and hot water system installed by Shamrock was combined with the contiguous building. The boiler and system are still being used by Daedalus and Silver Baron. (R. 903 pp. 13-19) The system continues to work. (Id., also p. 42) But, if the system is to be separated, Peterson estimated the cost would be \$35,000 under one option. (R. 903 p. 20) A second option would be to change the boiler and fluing system (which was designed by Daedalus' and Silver Baron's architect and mechanical engineer) and to change the water heaters specified by Daedalus.

To Shamrock's surprise, the court allowed Daedalus' Alan Wright and Roy Bartee to give expert testimony about mechanical engineering. (R. 903 p. 32; p. 43) Neither man is a mechanical engineer. (R. 903 pp. 38, 47)

The court issued its Supplemental Memorandum Decision. It found the system installed by "Shamrock remains to this date in Building F and is functioning." (R. 783 ¶ 1) The court concluded that the re-installation work would cost \$80,000 and concluded:

5. This expert opined that there were two options to eliminate the induced draft fan. In essence the two options were to replace the Rite boiler or the two water heaters. In

the first, Option 1, there would need to be a new boiler which he estimated would cost \$45,900 and new flues for the water heaters which would cost \$16,500. (R. 784 ¶ 5)

The court also concluded that “the promise of Shamrock to give written notice is not a dependent or reciprocal obligation tied to payment.” (R. 785 ¶ 2)

The court found the sum owed to Shamrock was known and certain, minus the re-installation work. (R. 787 ¶ 5); also *see* (R. 691 ¶ 8) “The sum certain was calculable, now minus the re-installation costs, from April 2005.” (R. 788 ¶ 5) Judgment for Shamrock was entered July 27, 2010. (R. 798-801)

Facts Pertinent to Trial Court’s Error in Setting Aside Default Judgment

Discovery was scheduled to end in the Fall of 2008, but counsel agreed to extend to the end of December 2008. Thereafter, in January 2009, counsel for Daedalus and Silver Baron withdrew. (R. 253-255)

Shamrock sent a notice to appoint counsel to Daedalus and to Silver Baron pursuant to U.R.C.P. 74. (R. 256-261) These defendants shared common ownership and maintained the same mailing address throughout. (R. 64-79; 253-255; 256-258)

The defendants failed to appoint counsel, and Shamrock filed and served each of them with a default certificate. (R. 262-267) This was the second time the defendants defaulted in this case. The first time was three years earlier. (R. 80-87)

After Daedalus and Silver Baron defaulted the second time, and failing to appoint counsel, on February 12, 2009, Shamrock filed and served each of the defendants with a proposed order entering their default, and striking their answer and counterclaim with

prejudice. The court signed the order on March 5, 2009. (R. 281) Shamrock also served Daedalus and Silver Baron with a motion for default judgment, together with a memorandum and affidavit of damages. (R. 271-277) After two more weeks, Shamrock filed and served each of the defendants with a request to submit the motion for decision. (R. 278-280) Shamrock filed and served each of the defendants with a proposed judgment, which was entered. (R. 284-286)

Shamrock filed and served each of the defendants with a motion and memorandum to correct a typographical error in the judgment. (R. 287-292) A corrected judgment was entered on March 19, 2009. (R. 293-295) Notice of the corrected judgment was served on each defendant. (R. 327-332)

Daedalus and Silver Baron hired a new attorney who entered an appearance on March 19, 2009, and moved to set aside the judgment. (R. 296-326)

The basis for defendants' motion to set aside the judgment was the affidavit of Alan Wright. (R. 309-313) He did not deny receiving the notices and filings. He said they were not read because they were received via first-class mail (Id.) His affidavit is set forth in Addendum A-2.

All parties requested oral argument. (R. 357-362)

Without a hearing, the court entered its ruling and order setting aside the judgment. (R. 363-368)

SUMMARY OF ARGUMENT

After judgment was entered, Rule 60 required Daedalus and Silver Baron to show inadvertence or excusable neglect that couldn't be avoided by due diligence. Setting aside Shamrock's default judgment was not supported by any finding of fact or on the law because Daedalus and Silver Baron failed to show due diligence that would constitute excusable neglect. The decision was against the clear weight of evidence.

The court shouldn't have considered whether or not there appeared to be a meritorious defense, unless and until Daedalus and Silver Baron showed due diligence in keeping themselves apprised of the litigation and participating therein, and that their neglect was excusable.

Daedalus and Silver Baron were aware the law firm representing them was going to withdraw. They received, but ignored the notice of withdrawal, the notices to appoint counsel, and multiple pleadings leading up to their answer and counterclaim being "stricken with prejudice," and judgment being entered.

They didn't consider materials received by regular mail to be important enough to read. In all, they acted with reckless indifference to the lawsuit.

This Court should reverse the decision to set aside the default judgment. By doing so, all other issues raised in this appeal will be moot.

If the Court determines the trial court set aside the judgment in accordance with U.R.C.P. 60(b), the Court should reverse the trial court's arbitrary reduction of

Shamrock's claim, without making any findings on Shamrock's claim for *quantum meruit*.

Daedalus and Silver Baron provided Shamrock with the design and specifications for the hot water system. Shamrock installed that system with the exception they had to substitute the boiler. The boiler specified by Daedalus was incompatible with the specified water heaters. Daedalus told Shamrock to "work it out: with their mechanical engineer, and Shamrock did.

Daedalus and Silver Baron got the system they designed. It worked, and it still works. They received a benefit, they knew about the benefit, and Shamrock expected to be paid. The court found Shamrock did the work and was not paid. It would be unjust for Daedalus and Silver Baron to retain the benefit without paying for it.

Shamrock's failure to give written notice of a design defect was not a material breach of the contract. Daedalus had actual notice of the incompatibility of the boiler. They had the same level of protection they would have received by written notice. They acquiesced, and in fact instructed Shamrock to work it out with the mechanical engineer. The substitute boiler did not increase the cost of Shamrock's contract. It did not delay the Project. The boiler continues to work.

Daedalus and Silver Baron claim the contract allowed them to withhold payment. However, after Shamrock substantially completed its work, Daedalus and Silver Baron took possession and started renting the building. Some months later, in response to Shamrock's request for payment, they demanded replacement of unspecified equipment.

They did not specify the equipment they claimed to be defective. They did not give Shamrock written notice of default as required by the contract.

Daedalus and Silver Baron want to avoid prejudgment interest because the Shamrock/Daedalus contract allowed Daedalus to withhold payment under specified circumstances. At a minimum, they want to avoid prejudgment interest on the \$80,000 judgment reduction for a different system. But, they have had the use and benefit of Shamrock's work for more than 6 years. They still do. Shamrock's claimed damages were a sum certain calculable for their work.

Daedalus and Silver Baron claim the court improperly allowed expert testimony from fact witnesses. However, the court only allowed Shamrock witnesses to testify about what they observed, what they did and occasionally, why they did it.

This was a bench trial. If any "expert testimony" was received by the court, it was harmless. The outcome in favor of Shamrock would not have been different.

Shamrock's fact witnesses did not give expert testimony. On the other hand, the appellants elicited expert testimony from their own witnesses, Wright and Bartee. They testified about mechanical engineering issues, but neither man is a mechanical engineer. The court properly weighed the evidence.

This Court should reverse the setting aside of Shamrock's default judgment, or should reverse the decision reducing their judgment by an amount required to re-install a working system.

ARGUMENT

I. The trial court abused its discretion when it set aside the default judgment against Daedalus and Silver Baron.

A. Absent a finding of due diligence, it was not within the trial court's discretion to grant Daedalus and Silver Baron relief from final judgment.

“Rule 60(b) allows a court ‘upon such terms as are just’ and ‘in the furtherance of justice’ to relieve a party from a judgment for mistake, inadvertence, surprise, or excusable neglect ... or ... any other reason justifying relief’ ... ‘To demonstrate that the default was due to excusable neglect, ‘[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control’” (cite omit) ‘In the absence of such a showing, [a defaulting party]’s assertion does not demonstrate his neglect was excusable.” (cite omit)

Davis v. Goldsworthy, 184 P.3d 626, 630 fn6 (UT App 2008) (The Court also noted the importance of finality in judgments, and said “the standards for setting aside a default may be less stringent than those for setting aside a default judgment.”)

To the same effect, Chrysler v. Chrysler, 303 P.2d 995 (UT 1956) (A prime requisite precedent is that the movant demonstrate he comes to the Court with clean hands and in good faith. His entire conduct is considered. Movant’s conduct included failure to appear after he initiated action, and ignoring legal process that was mailed); also see Swallow fka Kennard v. Kennard, 183 P.3d 1052 (UT App. 2008) (Mail delivery problems are not excusable neglect when coupled with failure to exercise due diligence.) In Swallow, this Court said, “the supreme court has previously defined ‘excusable

neglect' as 'the exercise of due diligence by a reasonably prudent person under similar circumstances.'" (cite omitted)) Swallow, 183 P.3d 1058.; also *see* Arbogast v. River Crossings, LLC, 191 P.3d 39 (UT App 2008) (fn 13 Problems with mail insufficient where due diligence lacking); Meadow Fresh Farms, Inc., v. USU, et al., 813 P.2d 1216 (UT App 1991) (Confusion over whether previous counsel has withdrawn, and failure to communicate with counsel did not excuse default absent due diligence); Black's Title, Inc. v. Utah State Ins. Dept., 991 P.2d 607 (UT App 1999) (Regular mail sufficient notice, actual notice unnecessary, when lack of knowledge results from failure of due diligence neglect is not excusable.)

Rule 60 also requires a showing of a meritorious defense before default judgment can be set aside. However, that question only arises after the Court finds "excusable neglect." The Utah Supreme Court said:

This court's statement in the Cox decision ... clearly sets forth the policy in this jurisdiction requiring that the lower court consider and resolve the question of excusable neglect (when the motion to vacate the default judgment is based on excusable neglect) prior to its consideration of the issue of whether a meritorious defense exists. Furthermore, in accordance with this policy, it is unnecessary, and moreover inappropriate, to even consider the issue of meritorious defenses unless the court is satisfied that a sufficient excuse has been shown. (emphasis added)

State By and Through D. of S.S. v. Musselman, 667 P.2d 1053, 1056 (UT 1983)

In support of their request to set aside the judgment, Daedalus and Silver Baron relied upon the Affidavit of Alan E. Wright. (R. 309-313) Mr. Wright was a member of

Silver Baron Partners, L.C. He was also a shareholder and officer of Daedalus USA., Inc. (Id.) At the time of trial, Lynn Padan was the only other shareholder of Daedalus, and the only other member of Silver Baron. (R. 901 p. 248) At all times, Padan was the President of Daedalus. (R. 901 p. 247-248) Padan and Wright owned and operated Daedalus and Silver Baron. They shared the same office.

The only evidence offered by Daedalus and Silver Baron to show excusable neglect, inadvertence, or other just cause was Alan Wright's statement:

With respect to Silver Baron's and Daedalus' failure to submit a notice of appearance through a licensed member of the Utah State Bar, we would offer the following explanation: The attorney at Jones Waldo whom had represented Daedalus and Silver Baron Partners in the Shamrock matter was Lewis Francis. Mr. Lewis [sic] has represented us on various matters for over 10 years during which time we¹ had been fully satisfied with his representation. When we needed someone to file a lien foreclosure action, Mr. Francis said that this was not his area of expertise, and recommended Mr. Mike Kelly from his firm to handle those matters for us. After an initial period of representation by Mr. Kelly in which he filed several lawsuits on our behalf, we determined that he acted in a grossly unprofessional manner on numerous occasions and consequently we could not allow him to continue to represent Daedalus. We telephoned Mr. Francis and had what we felt was a productive discussion with him regarding Mr. Kelly's behavior and our dissatisfaction with Mr. Kelly's representation. We indicated that the situation as to Mr. Kelly was not acceptable and we requested an audience with the firm's president to resolve the matter. Within a few days of the call, we received a very terse email from Mr. Kelly indicating that we didn't know what we were talking about, that he was correct in all matters, and we were wrong and that he was firing us, not the other way around. He then indicated that he had saved us the time of writing a letter to the firm's president by copying him on the email. Importantly we never received any further communication from Mr. Lewis [sic]

regarding his representation in the Shamrock matter. We understood that Mr. Kelly's involvement was being terminated but not Mr. Lewis' [sic] involvement. To us it appeared that Mr. Lewis [sic] was deliberately avoiding getting involved in a very explosive situation with another member of his firm. While we were waiting to be contacted by Jones Waldo's president in response to Mr. Kelly's email, and unbeknownst to us, both Mr. Kelly and Mr. Francis withdrew their representation of Daedalus (and Silver Baron Partners) in their respective matters, and informed us via regular mail. There was no further communication via email or voice and we never heard from nor were we granted a meeting with the president of Jones Waldo. Neither Mr. Kelly nor Mr. Francis contacted us and explained what the legal effect of their withdrawal would be or what we needed to do to protect ourselves.

We receive a significant volume of "client copies" from our legal representation in various active lawsuits. Normally any legal matter, particularly one that our staff was under the impression was being handled by the attorney (Mr. Francis), would not be routed to an officer but would be filed as a matter of course. If a matter comes in through personal service or registered mail it goes directly to the Office Manager, who then is responsible for reviewing the matter in-house and bringing it to the attention of the appropriate officer. Because both of the pleadings, the Notice of Withdrawal and Notice to Appoint came in via regular mail the staff member responsible for opening the mail did not realize that the practical effect of the pleadings was that we no longer had legal representation on this matter. We understood the mail which we received to be the typical client copies normally sent to us and that the legal case was still being handled by Mr. Lewis [sic]. Mr. Lewis [sic] never contacted us to orally inform us that he was withdrawing or what effect this would have on us.

In addition we would ask the Court to take note that as to the underlying dispute Shamrock has been paid \$1,084,384.45 on their original subcontract sum of \$1,119,038.00. The remainder of the dispute involves change orders and other matters which are legitimately disputed by Daedalus, and are set forth in the Answer to the Cross-claim filed by Shamrock and the Counterclaim we filed against Shamrock.

We would ask the Court to accept this as excusable neglect, inadvertence or other just cause on our part.

Both Daedalus USA, Inc. and Silver Baron Partners, L.C., have a meritorious defenses [sic] to the action and we would ask to be allowed to proceed to have this heard by the Court on the merits of the claims.

¹ Throughout this Affidavit “we” refers to both Silver Baron Partners, L.C. and Daedalus USA, Inc.

¶ 5 of Alan Wright Affidavit in Addendum A-2; and R. 309-313)

Shamrock requested a hearing on the motion to set aside the judgment.

(R. 357-359) Daedalus and Silver Baron also requested a hearing on the motion.

(R. 360-362)

Without a hearing, the court decided the motion based on the pleadings.

(R. 363-368) It did not make separate findings, but ruled as follows:

DISCUSSION

The court is aware of the strong presumption in favor of decisions on the merits rather than by default. The court first looks to determine if there has been excusable neglect before it turns to an examination of whether there is a meritorious defense.

Defendants here seem, at least in this case, to be less than concerned at times about this case. It has been lengthy litigation and the court is hard-pressed to really understand how so many pleadings could be overlooked. However, given the situation with counsel and the lack of personal contact and a long-term relationship, the court will again excuse defendants failures.

This motion was filed within weeks of the default judgment. There is a cross claim and significant discovery and litigation which the court believes fills the meritorious defense element. While a close call, the court first finds and concludes that under

all the circumstances, the failure to appoint new counsel amounts to excusable neglect.

Given the short time and given that attorney fees of Shamrock will be paid by defendants, there is no prejudice to Shamrock in resolving this case on the merits.

The motion to set aside the March 5 and corrected order of March 18, 2009, is GRANTED.

Defendants are to prepare an order in compliance with Rule 7 which incorporates this ruling and awards attorney fees to Shamrock in obtaining the default and in responding to this motion. (R. 366-367, Addendum A-3)

The memorandum decision was reduced to an order. (R. 387-389)

The court's ruling was contrary to the clear weight of the evidence, and was clearly erroneous. *See generally, ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (UT App 1997) No court has properly granted relief from default judgment when the movant failed to exercise due diligence.

The rules of civil procedure are designed to protect all parties to litigation. The rules are intended to avoid unnecessary delays, the needless increase of attorney fees, and preserving the sanctity of final judgment. Although a default judgment may be set aside under Rule 55, a default that becomes a final judgment can only be disturbed under the stricter Rule 60(b). 12 Moore's Federal Practice, § 60.22[3][b]

A party who seeks to set aside default judgment doesn't have a right to relief. The court is to exercise its discretion, considering all the circumstances, and in accordance

with accepted legal principles. The ‘accepted legal principles’ that govern the exercise of discretion include:

The principle that finality of judgments is of great importance and that final judgments should not be disturbed lightly.
(Id., § 60.22[2])

The grounds for relief should be closely scrutinized. As the Utah Supreme Court said in Chrysler, *supra*, a movant for relief from judgment must demonstrate he comes to Court with clean hands and in good faith. His entire conduct is considered. In addition, he must show he had used due diligence, and “was prevented from appearing by circumstances over which he had no control.” Davis, *supra*

In this case, Silver Baron and Daedalus blame their default on a vague claim of confusion with counsel, and upon their in-house staff member who opens their mail. No court has ever burdened a litigant with his opposition’s personal problems. Indeed, in cases seeking relief from judgment under Rule 60(b), courts refuse to find excusable neglect for problems between clients and their attorneys (12 Moore’s Federal Practice, § 60.22[4]), or persistent inattention to obligations and rules (12 Moore’s Federal Practice, § 60.41[1][c][i]), or for inadvertent conduct that leads to the default, such as simple carelessness in failing to read legal papers. (Id., § 60.41[c][ii]) Utah law is in accord, *see* cases cited above.

This Court has observed:

The supreme court has previously defined “excusable neglect” as “the exercise of ‘due diligence’ by a reasonably prudent person under similar circumstances.” Mini Spas, Inc., v. Industrial

Comm'n, 733 P.2d 130, 132 (Utah 1987) (citing Airkem Intermountain, Inc., v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973))

Swallow v. Kennard, 183 P.3d 1052, 1058 (UT App 2008)

Although he was not competent to attest to what another employee did or did not “realize,” Alan Wright stated:

Because both of the pleadings, the Notice of Withdrawal and Notice to Appoint came in via regular mail the staff member responsible for opening the mail did not realize that the practical effect of the pleadings was that we no longer had legal representation on this matter.
(Affidavit, *supra*, Addendum A-2 ¶ 5)

Daedalus and Silver Baron similarly ignored multiple pleadings after receiving the Notices. A reasonably prudent person will read his mail. Especially one who had defaulted 3 years earlier because, as Wright stated then, they didn’t think they had been served because the pleadings were mailed to them, rather than formally served upon them. (Affidavit of Alan Wright, March 6, 2006, at Record pp. 94-98) Their attorney at the time acknowledged to the trial court that service by mail was proper. (Id.) In his 2009 Affidavit, *supra*, Alan Wright asked the court to set aside Shamrock’s judgment because they still ignore things received by regular mail.

While failure to read one’s mail may have justified the court’s setting aside the default certificates at the beginning of the case in 2006, it does not constitute excusable neglect 3 years later, sufficient to set aside a final judgment under U.R.C.P. 60(b).

Daedalus and Silver Baron knew they were in this lawsuit. They made a claim against Shamrock in 2006, after their first defaults were set aside. Both Wright and Padan (the only two principals of Daedalus and Silver Baron) had been deposed.

A reasonably prudent person would have read his mail. He would have kept himself apprised of the case. Daedalus and Silver Baron knew their attorney withdrew. Notice was given that if they failed to appoint counsel, there could be serious consequences. Their neglect was inexcusable, and U.R.C.P. 60(b) prohibited the trial court from setting aside Shamrock's judgment. Otherwise, it would eliminate the requirement that due diligence is required under Rule 60(b) to constitute excusable neglect. And, litigants like Daedalus and Silver Baron can choose to not read their mail, and thereby avoid any responsibility for what is sent to them pursuant to the Utah Rules of Civil Procedure.

Silver Baron and Daedalus completely failed to exercise diligence. They showed reckless indifference. They are familiar with litigation. Mr. Wright said "they receive a significant volume of 'client copies' from our legal representation in various active lawsuits." (Addendum A-2, ¶ 5) They filed a counterclaim against Shamrock 3 years earlier. They (Daedalus and Silver Baron) had a duty to keep themselves apprised of this litigation. Moreover, it was their second time in default.

They knew their attorney had withdrawn. They each received a notice to appoint counsel, a default certificate, a motion for entry of judgment, with memorandum and

affidavit, a proposed judgment and order, and a request to submit for decision. They ignored all.

They knew the consequences of being in default by failing to have legal representation. They came to the trial court for relief from default 3 years earlier.

(R. 91-93) In support of their motion to set aside their first default, Alan Wright filed an affidavit that said they didn't realize they had been formally served, because the cross-claim was received by mail. (R. 94-98) Their attorney acknowledged the service by mail was appropriate. (Id.)

Then, 3 years later, in their motion to set aside default judgment, Mr. Wright told the court that they only pay attention to registered mail. (Affidavit, *supra*) The Utah Rules of Civil Procedure and the Utah Supreme Court do not require notices of withdrawal, or to appoint counsel, or any of the additional mailings sent by Shamrock, to be sent certified or registered mail. (U.R.C.P. 5 and 74)

It strains believability that their attorneys didn't explain the consequences of their withdrawal. Even more incredulous is their ignorance of the consequence of being unrepresented. They defaulted 3 years earlier, and had to ask the court to set it aside. (R. 91-93) They were not strangers to litigation according to Mr. Wright's affidavit. (Addendum A-2, ¶ 5)

In response to the notices and mailings, they did nothing. They didn't read their mail. They didn't hire an attorney. They didn't contact Shamrock and claim confusion or any problems. They didn't ask for additional time to find new representation.

Absent a showing they exercised the due diligence of a reasonably prudent person under similar circumstances, their neglect or mistake is not excusable. Arbogast, *supra*. In addition, they must show that after exercising due diligence, they were prevented from appearing by circumstances over which they had no control. Davis, *supra*.

Instead, Daedalus and Silver Baron acted with reckless indifference to the lawsuit and to the trial court. Absent due diligence, there was no excusable neglect.

B. Default judgment should not have been set aside because it was not supported by any findings of fact or on the law because Daedalus and Silver Baron failed to show excusable neglect to set aside the default judgment.

The court's ruling was not "based on adequate findings of fact" nor "on the law." *See May v. Thompson*, 677 P.2d 1109, 1110 (UT 1984)

Daedalus and Silver Baron were not huge companies. Two men owned both entities. They were not strangers to litigation, as stated in Mr. Wright's affidavit. They had a duty "to keep themselves apprised of ongoing court proceedings. *See, e.g., District Court Rule 83-1.3(b). Volostnykh v. Duncan*, Case No. 20000288-CA, unpublished (UT App. Feb 1, 2001)

They defaulted in February 2006. They were both deposed, and participated in this litigation for 3 years. Then, they defaulted a second time.

They both ignored their attorney's notice of withdrawal. They both ignored a notice to appoint counsel. They both ignored receipt of a default certificate, and a motion for entry of default judgment, and a supporting memorandum with affidavit of damages,

and a request to submit for decision, and the court's order, and a proposed judgment, and a motion to correct the judgment, and the corrected judgment.

The two principals of Daedalus and Silver Baron were not incapacitated. The review of mail was not outside their control. There was no due diligence that would support the court's setting aside the judgment under Rule 60.

This Court should reverse the trial court's decision to set aside default judgment against Daedalus USA, Inc. and Silver Baron Partners, L.C. (R. 363-368, Addendum A-3) and reinstate the corrected judgment against the defendants. By doing so, all other issues presented in this appeal will be moot.

II. The trial court erred by arbitrarily reducing Shamrock's damages, without considering Shamrock's *quantum meruit* claim.

If the Court decides the trial court set aside the default judgment in accordance with U.R.C.P. 60(b), then the Court should remand the case for the court to address Shamrock's *quantum meruit* claim. Although Shamrock prevailed at trial, the court reduced Shamrock's damages without addressing Shamrock's *quantum meruit* claim. U.R.C.P. 52(a) requires the court to make findings. Nothing was said about Shamrock's *quantum meruit* claim.

Daedalus and Silver Baron believe they did not get the system they wanted. However, Shamrock was not the architect for the Project. (R. 900 pp. 100-103) Neither was Shamrock the mechanical engineer on the Project. (Id.) Shamrock did not design the

system. (Id.) Daedalus and Silver Baron may not have received the system they wanted.

But, they got the system they designed, and the system they told Shamrock to build.

Shamrock told Daedalus' Roy Bartee there was a design defect. The specified boiler was incompatible with their specified water heaters. (R. 674 ¶ 12) "Bartee told Shamrock to work it out with Colvin, the mechanical engineer." (Id.) Shamrock did just that. With Colvin's agreement, Shamrock substituted the Rite boiler for the Bryant boiler. (Id.) However, the court said:

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 Sub-contract 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." (Id.)

The court also concluded:

27. Daedalus did not obtain what it wanted, and did not get written notice of such change. Daedalus wants it removed and a better system installed. (R. 665 ¶ 27, Addendum A-5, p. 21)

The court then concluded:

1. Shamrock did the work and has not been paid. Daedalus has breached the contract by failing to pay \$256,786 and owes Shamrock that amount, less whatever the cost of replacing the current system as discussed below. (Id. ¶ 1, Addendum p. 25)
5. Daedalus is entitled to what it bargained for, a system of its choosing and not of the choosing of Shamrock. Shamrock is responsible for either the replacement of the

boiler and allied venting system, or to pay Daedalus the cost of having another subcontractor do such work and provide such equipment. (Id. ¶ 5, Addendum p. 26)

In its Supplemental Ruling, the court found:

1. The system that was eventually installed in Building F by Shamrock remains to this date in Building F and is functioning. Daedalus continues to contend, however, that it did not get the system it desired. The court so found in its January 29, 2010 memorandum decision. (R. 783 ¶ 1, Addendum A-6, p. 3)

The court went on to conclude:

2. Shamrock did the work and has not been paid. Daedalus has breached the contract by failing to pay \$209,915. However, because Shamrock did not install the system Daedalus wanted, and indeed Shamrock could not do so and comply with applicable codes, Shamrock is to install the proper “fix” and remediate the system as Peterson outlines in his Option 1 by re-installing the proper boiler and new flue system. The court finds and concludes that in fact that can be done for an amount less than Daedalus claims, but more than Shamrock claims ... (R. 784 ¶ 1, Addendum A-6, pp. 4-5)

The court reduced Shamrock’s adjudicated damages by \$80,000. (Id.) But in fact, Daedalus got the system they designed.

In addition, Daedalus’ instruction to Shamrock to “work out” the boiler issue with their mechanical engineer constituted a contract amendment.

To establish a contract implied in law or a quasi-contract, the plaintiff must show “(1) the defendant received a benefit; (2) an appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to

retain the benefit without paying for it.” Davies v. Olson, 746 P.2d 264, 269; accord Bailey-Allen Company v. Kurzet, 876 P.2d 421, 425. To establish a contract implied in fact, the plaintiff must show “(1) the defendant requested the plaintiff to perform work; (2) the plaintiff expected the defendant to compensate him or her for those services; and (3) the defendant knew or should have known that the plaintiff expected compensation.” Davies v. Olson, 746 P.2d at 264, 269; Pro Max, *supra*, 943 P.2d at 247.

All of the testimony was consistent. Daedalus and Silver Baron designed the system. Shamrock built the system. The only difference was a substituted boiler to comply with codes. The boiler has never been a problem. It worked, and it still works. The court found Shamrock did the work and has not been paid.

Daedalus and Silver Baron are using the boiler in the building worked on by Shamrock (Building F), and are also using it in Building G, the building they constructed afterward. (R. 903 pp. 12-19) The systems have been homogenized, and the Rite boiler installed by Shamrock services both buildings. (Id.)

Despite the fact that the system works and has worked for nearly 7 years, to the benefit of Daedalus and Silver Baron, the court arbitrarily reduced the amount due and payable to Shamrock.

Bartee’s instruction to Shamrock to “work it out with Colvin Engineering,” constituted a contract change. Parties to a construction contract may change the express written terms by waiver, oral agreement, or course of dealing. This is true even when the contract contains a provision requiring changes to be in writing.

In Uhrhahn Construction & Design, Inc., v. Hopkins, 179 P.3d 808 (Utah App 2008), the court held a party can explicitly or implicitly waive a contract provision that requires changes to be in writing. The court said:

First, we note that parties to construction contracts frequently make changes to the project as originally agreed upon. As stated in Corbin on Contracts, “it must be a rare case in which parties to [construction] contracts do not find reason for variation or addition after the work is in progress. The owner changes his mind and the architect gives new directions. It is universal custom to rely upon the spoken word in such cases; the oral modification is enforced and compensation for ‘extra work’ adjudged. 6 Arthur Linton Corbin, Corbin on Contracts § 1294, at 203 (West Pub. Co. 1962); Uhrhahn 179 P.3d at 814

The court went on to say the parties may waive written provisions orally or by conduct, and can thereby also create an implied-in-fact contract.

That has long been the universal law. When a contract that requires changes can only be in writing, the parties can waive or modify. Richards Contracting Company v. Fullmer Brothers, 417 P.2d 755 (UT 1966) (“A contract with specific terms cannot remain hypertechnically specific after the parties decide on extras ... in which event another contract arises based on a so-called quantum meruit theory.”)

The court’s construction of a contract is not limited to the four corners of the document. The Utah Supreme Court has long recognized this principle:

The interpretation of a contract is controlled by the intentions of the parties. Cent. Fla. Invs., Inc., v. Parkwest Assocs., 40 P.3d 599 (UT 2002) Waiver of a contractual right occurs when a party intentionally acts in a manner inconsistent with its contractual rights,

and, as a result, prejudice accrues to the opposing party to the contract. See Flake v. Flake, 71 P.3d 589 (UT 2003) “It is well established that parties to a contract may, by mutual consent, modify any or all of a contract.” Pasker, Gould, Ames & Weaver, Inc., v. Morse, 887 P.2d 872, 877 (Utah App 1994) When parties to a contract ignore a clause of the contract, the clause is waived and cannot then be enforced against one party in favor of the other. Ryan v. Curlew Irrigation & Res. Co., 104 P.2d 218, 220 (UT 1909)

It was clearly against the weight of evidence for the court to arbitrarily reduce Shamrock’s judgment by an amount the court estimated it would cost to change the boiler that Shamrock installed in accordance with Daedalus’ instruction (“work it out”). Moreover, the court erred by ordering Shamrock to change a fluing system designed by Daedalus. Designing a fluing system was never part of Shamrock’s contract.

The court made no findings on Shamrock’s *quantum meruit* claim. U.R.C.P. 52(a) requires findings be made.

III. Shamrock’s failure to give written notice of a defective design (incompatible boiler and water heaters) was not a material breach of the contract that was not signed until later, and it should not have caused the court to reduce Shamrock’s damages.

The court found:

[sic] Shamrock breached the contract by failing to provide written notice of its knowledge that there was a design deficiency and of Shamrock’s intent to substitute equipment. However, even considering the first breach rule, the court finds that the breach by Shamrock was not one that resulted in Daedalus’ right to fail to pay. Even though the contract has many provisions allowing Daedalus to withhold payment for various reasons, the promise of Shamrock to give written notice is not a dependent or reciprocal

obligation tied to payment. The court has found that notice was given by Shamrock, but not written notice. Daedalus in letters asked Shamrock to change the system and Shamrock did not do so, but this order of the court reducing the damages for non-payment by the amount of the re-installation of the “new” system amounts to the only damages suffered by Daedalus. (R. 785 ¶ 2)

The elements of a material breach are:

In determining whether a failure to perform or offer to perform is material, the following factors are significant.

1. The extent to which the injured party will be deprived of the benefit which the party reasonably expected;
2. The extent to which the injured party can be adequately compensated for that benefit;
3. The extent to which the non-performing party will suffer forfeiture;
4. The likelihood that the non-performing party will cure the failure, taking account of all the circumstances including any reasonable assurances;
5. The extent to which the behavior of the non-performing party comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1979); MUJI 26.41

In this case, Daedalus and Silver Baron received the benefit they reasonably expected. They received actual notice of a design defect in their own design. Daedalus had actual notice of its design defect, even before the contract was signed that created the requirement of written notice. They received the same amount of protection they would have had if written notice had been given.

Daedalus’ Bartee told Shamrock to “work it out” with the Project’s mechanical engineer. Shamrock did just that. Daedalus and Silver Baron received a substitute boiler

that is still working to their benefit. The cost of Shamrock's contract did not change.

(R. 686 ¶ 29, Addendum A-5, p. 22)

The trial court reduced Shamrock's judgment by \$80,000. (R. 784 ¶ 2, Addendum A-6, pp. 784-785) The reduction was the cost to replace the boiler (still being used), design and install the allied venting. But designing a new fluing system was never part of Shamrock's contract. (R. 903 pp. 22-23)

Shamrock should not have to replace a boiler that was installed in accordance with Daedalus' instruction. Acquiescence removes their ability to object to it. Shamrock did not materially breach the contract by failing to provide written notice of the contractor's design defect because they had actual notice. Shamrock acted in good faith and it did not deprive Daedalus or Silver Baron of any benefit.

Shamrock's failure to give written notice did not delay the Project, did not prevent Daedalus or others from performing their work, and did not increase the cost of Shamrock's contract. Shamrock participated in a collective effort to resolve the design defect. The decision was made by the Project's architect and mechanical engineer, not solely Shamrock.

Shamrock should not have to suffer because Daedalus and Silver Baron designed a system they no longer want.

Respectfully, the court found Shamrock's failure to give written notice was a material breach. However, when considered in light of the above, Shamrock submits it was clearly erroneous for the court to conclude the breach was material.

IV. The appellants claim that the Daedalus/Shamrock contract allowed Daedalus and Silver Baron to withhold payment to Shamrock for the purpose of enforcing the Sub-Contract. However, Daedalus and Silver Baron mislead the Court by stating they withheld payment to enforce the Sub-Contract. They were simply delinquent in their payments and, after the fact, attempted to justify withholding under various provisions of the contract.

For example, if the system is defective, it's because they designed a defective system. Also, the substitute boiler has always performed correctly. It still does. Daedalus and Silver Baron use the boiler not only to service Building F, which was the subject of the contract, but also use it for the system in Building G. It worked in 2005. It continues to work today.

Daedalus and Silver Baron were delinquent and in default on making payments to Shamrock. Shamrock consistently billed them. They owed the majority of Shamrock's claim since December 2004. (Testimony of Craig Barrus, R. 899 pp. 31-78)

Shamrock substantially completed its work in December 2004. However, they continued to be unpaid for much of their work. (Id.)

Daedalus and Silver Baron did not inform Shamrock they were withholding payments to enforce the contract. (Id.) They took possession of the building and started renting the units. Later, in response to Shamrock's demand for payment, in February and April of 2005, Daedalus claimed unspecified equipment was faulty and they wanted it replaced. (Exhibit D-18, D-22) They never asked Shamrock to replace the boiler. (R. 899 p. 101)

The court specifically found that Shamrock did not delay the Project to the damage of Daedalus and Silver Baron. It did conclude that they were entitled to the system they expected. However, they received what they expected insofar as Shamrock built the system that Daedalus and Silver Baron designed, and contracted for Shamrock to install. (Addendum A-5, pp. 15-17, 25 ¶ 4 [sic])

Daedalus did not give Shamrock the written notice of default required by the contract. (R. 672, Addendum A-5, pp. 7-8, p. 25 ¶ 4)

V. Appellants claim they had the right to withhold under the contract and therefore should not have to pay prejudgment interest.

Daedalus incurred no monetary damages as a result of not receiving “written notice” of their own design defect. The trial court concluded:

2. Shamrock breached the contract by failing to provide written notice of its knowledge that there was a design deficiency and of Shamrock’s intent to substitute equipment. However, even considering the first breach rule, the court finds that the breach by Shamrock was not one that resulted in Daedalus’ right to fail to pay. Even though the contract has many provisions allowing Daedalus to withhold payment for various reasons, the promise of Shamrock to give written notice is not a dependent or reciprocal obligation tied to payment. The court has found that notice was given by Shamrock, but not written notice. Daedalus in letters asked Shamrock to change the system and Shamrock did not do so, but this order of the court, reducing the damages for non-payment by the amount of the re-installation of the “new” system amounts to the only damages suffered by Daedalus.
3. As found previously, Daedalus did not give written notice of termination of the contract nor declare it null and void. (R. 785-786 ¶¶ 2; Addendum A-5, p. 25 ¶ 4)

The Utah Court of Appeals has held:

A breach of contract claim requires four essential elements of proof, one of which is damages. (Cite omit) ... 'Damages' is commonly defined as 'the estimated money equivalent for detriment or injury sustained.' (Cite omit) Eleopulos v. McFarland and Hullinger LLC, 145 P.3d 1157, 1159 (UT App 2006)

The Court went on to say without proof of actual damages, the possibility of future damages is not adequate to sustain a present cause of action. (Id., 145 P.3d 1161)

In this case, Daedalus was not damaged when they didn't receive written notice of a design defect. They had actual notice.

Daedalus did not suspend the work, or refuse to perform the contract as a result of failure to receive written notice. They have consistently told the court that they stopped paying Shamrock because the hot water system did not perform to their expectations.

Bill Payne (Shamrock Plumbing) gave Roy Bartee (Daedalus Project Manager) actual notice in April 2004, before the Subcontract was signed. (F/F #12) Bartee could have told the Project Engineer (Colvin Engineering) to redesign the defect. Instead, he told Payne to "work it out" with Colvin Engineering. (F/F #12)

The subcontract was signed June 8, 2004. Paragraph 10 required Shamrock to provide written notice of design defects. At that time, Daedalus already had actual notice. Pursuant to Paragraph 15 of the subcontract, Daedalus had several remedies it could have pursued if they thought the lack of written notice was material. Instead, they told Shamrock to resolve it with the engineer, and to continue performance.

Under the doctrine of substantial compliance, Shamrock substantially performed by giving actual notice in April, and written notice in October. Daedalus received the same protection that it would have received by written notice on June 8th when the contract was signed.

In October 2004, they received written notice of the matter, and the specifications for the substitute boiler. (Addendum A-5, F/F #30) They did not object. Rather, they pressed Shamrock to continue performing the contract. In November 2004, Daedalus demanded Shamrock add additional manpower. (Id., F/F #20)

Moreover, the first breach doctrine is inapplicable when the non-breaching party chooses to proceed, and the “breaching party” has substantially performed. *See e.g.*, MUJI 26.21 The trial court held that the breach by Shamrock was not one that allowed Daedalus to withhold payment The court held:

... However, even considering the first breach rule, the court finds that the breach by Shamrock was not one that resulted in Daedalus’ right to fail to pay. Even though the contract has many provisions allowing Daedalus to withhold payment for various reasons, the promise of Shamrock to give written notice is not a dependent or reciprocal obligation tied to payment ... (R. 785 ¶ 2, Addendum A-6, p. 5 ¶ 2)

Shamrock performed all work in accordance with the drawings and specifications Daedalus provided, with the sole exception of the boiler substitution.

Shamrock has been owed a definite sum since April 2005.

U.C.A. § 15-1-1 provides for the award of interest as a matter of law. Jack B. Parson Construction Co. v. State of Utah, 552 P.2d 107 (UT 1976), McCormick on Damages, Section 55 (Horne Book Series)

As the Utah Supreme Court has said:

The policy reason for this rule 'is that, because of the delay, the debtor has the beneficial use of monies that do not belong to it. while the creditor is denied the beneficial use of those same monies to which it is legally entitled.' Vali Convalescent and Care Inst. v. Division of Health Care Fin., 797 P.2d 438, 445 (UT App 1990) (Quoting Boards of Educ. v. Salt Lake County Comm'n, 749 P.2d 1264, 1267 (UT 1988))

Shamrock has borne the cost of the equipment and manpower needed to provide Daedalus and Silver Baron with a functioning system which they've used and benefitted from for more than 6 years. Shamrock is entitled to interest on the money that the court has found due and payable since April 2005.

A contract right to temporarily withhold disputed funds is not authorization to completely forgive the failure to pay such funds. This should be especially true when Daedalus failed to send notice of default in the manner prescribed by the contract.

We found no case law that would disallow statutory interest during the pendency of a contract dispute, when the court finds a sum certain owing. Moreover, the defendants' argument certainly cannot extend to the owner, Silver Baron, whose obligation arose from its failure to require a performance bond on the Project. *See*, U.C.A. §§ 14-2-1, 14-2-2.

The court found Shamrock did the work and wasn't paid. (R. 784 ¶ 2) Addressing prejudgment interest, the court concluded:

5. As to prejudgment interest, the court again believes that Shamrock is correct, that Shamrock did not have the use of this sum owed and again the pure math figures were not really disputed. Even though this complex case shows the difficulty between sub-contractors and contractors, the court believes the sum known and certain, minus the re-installation work, is justified. Interest is to be calculated on the \$209,915 figure from April 2005 to this date. Even though the amount due is now reduced by the cost of re-installation, the court believes the sum was certain and fixed and known. In fact and in deed, the system is still working and being used by the owners after more than 5 years. It is not the system desired and bargained for, however, but under the law the court believes the sum certain was calculable now minus the re-installation cost, from April 2005. (R. 787 ¶ 5, Addendum A-6, pp. 7-8 ¶ 5)

Daedalus and Silver Baron have had the use and benefit of the system since December 2004 which Shamrock installed pursuant to their design.

VI. Appellants complain that expert witnesses were not identified and that it was error to permit expert testimony.

Discovery closed in December 2008. Then defendants' default was entered and their answer and counterclaim were "stricken and dismissed with prejudice."

(R. 281-283) Then default judgment was entered in favor of Shamrock. (R. 284-286)

Then, defendants' new attorney attempted to re-open discovery and requested the right to designate expert witnesses. The case had been prosecuted by the parties for more than 3 years. (R. 41-50)

In open court, Judge Lubeck said the case was way beyond the time in which to designate expert witnesses. In its minutes, the court said, "Discovery will not be opened for expert witnesses." (R. 401-403)

The court allowed Daedalus and Silver Baron to take the depositions of Shamrock's Bill Payne and Colvin Engineering's Bret Christiansen. (R. 404-406)

At trial, Daedalus and Silver Baron objected to the testimony of Bill Payne on the grounds it was expert testimony. (R. 899 p. 92) The trial court ruled that the fact witnesses could testify about what they did, and why they did it. (R. 899 pp. 95-96)

Bill Payne is a licensed journeyman plumber employed by Shamrock. (R. 899 p. 80) He oversaw the Project for Shamrock. (Id.) His direct testimony appears at R. 899 pp. 79-126. He was disclosed as a fact witness in Shamrock's initial disclosures. (R. 181) He testified about what he saw, what he did, and occasionally, why he did what he did.

Fact witnesses Bret Christiansen and Rusty Shoemake were identified as fact witnesses early in the litigation. Counsel discussed their intention to call them as witnesses. Later, counsel for Daedalus and Silver Baron withdrew.

Bret Christiansen was employed by Colvin Engineering. Colvin was the Project's mechanical engineer for Silver Baron and Daedalus. Christiansen's direct testimony appears at R. 899 pp. 193-207. He took over construction administration for Colvin on the Project. (R. 899 p. 194) He coordinated with Shamrock. (R. 899 p. 195) He testified about Shamrock's performance on the Project.

The attorney for Daedalus and Silver Baron took the depositions of Payne and Christiansen. None of their testimony at trial was a surprise.

Rusty Shoemake was an employee of Daedalus during the Project. He was their project superintendent. (R. 899 p. 232) His direct testimony appears at R. 899 pp. 231-255. His duties included coordinating the work of the various subcontractors on the Project. (R. 899 p. 235) He conducted weekly scheduling meetings with the subcontractors. (Id.) He was responsible for sequencing the work. (Id.)

Shoemake testified about Shamrock's compliance with the schedule and instructions given by Daedalus. (R. 899 p. 240) He testified about how he coordinated with Bartee (also Daedalus) several times each day. (R. 899 pp. 242-243) He testified about how Daedalus delayed the Project, and that Shamrock did not delay the Project. (R. 899 pp. 245-248)

Daedalus and Silver Baron were not surprised by the testimony of these 3 witnesses. Payne and Christiansen testified consistent with their depositions. The defendants chose not to depose Shoemake who was their own project superintendent.

On the other hand, Shamrock was surprised when Daedalus and Silver Baron called Wright and Bartee to give expert testimony about mechanical engineering issues. (R. 903 pp. 5, 6, 32) Neither man is a mechanical engineer. (R. 903 pp. 38, 47) But, Shamrock is not claiming their testimony was reversible error in this appeal. The trial court was capable to adjudge the credibility of the witnesses.

Even if the trial court allowed some testimony that could be perceived as expert testimony, it was harmless.

The Utah Supreme Court said:

Rule 61 of the Utah Rules of Civil Procedure reflects another established rule of appellate review:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Utah R. Civ. P. 61. Accordingly, to succeed on appeal, an appellant must show “not only that an error occurred, but that it was substantial and prejudicial in that the appellant was deprived in some manner of a full and fair consideration of the disputed issues.” Onyeabor v. Pro Roofing, Inc., 787 P.2d 525, 529 (Utah Ct. App. 1990) (quoting Ashton v. Ashton, 733 P.2d 147, 154 (Utah 1987)).

Pro Max, *supra* 943 P.2d at 247.

Appellants have not shown any prejudice. There is no evidence that the testimony they allege was “expert testimony,” affected the outcome, or that there was a reasonable likelihood of a more favorable result for the appellants without the testimony. There was plenty of non-objectionable testimony about the points highlighted.

If any of their testimony was “expert testimony,” it was harmless error.

Contrary to State v. Rothlisberger, 2004 UT App, 95 P.3d 1193, relied upon by the appellants, this case was not a criminal matter tried to a jury. Neither did Shamrock ask

hypothetical questions of its witnesses, calling for opinions beyond the facts of the case. The witnesses were asked what they observed, what they did, and occasionally, why they did it. The court held they were allowed. (R. 899 pp. 92-96) If any opinions were given, they were within U.R.E. 701 because they were helpful to a clear understanding of their testimony, and it was based upon their factual involvement.

Daedalus and Silver Baron were allowed to depose Payne and Christiansen after discovery was closed. They testified at trial consistent with their depositions.

When Daedalus and Silver Baron requested a new trial under Rule 60, they claimed error on the grounds that these gentlemen gave expert testimony without having been identified as expert witnesses. However, Daedalus and Silver Baron failed to present the trial court with any examples of the alleged objectionable testimony, and their motion was denied. (R. 880-883)

CONCLUSION

Shamrock asks the Court to reverse the trial court's setting aside the default judgment, and to reinstate the corrected judgment. (Addendum A-17) By doing so, all other issues raised in this appeal will be moot.

If the Court decides the trial court set aside the default judgment in accordance with U.R.C.P. 60(b), then Shamrock asks the Court to reverse the trial court's arbitrary reduction of Shamrock's judgment by an amount required to change the system designed by Daedalus and Silver Baron.

The trial court's award of prejudgment interest should be affirmed because Daedalus and Silver Baron received the system they designed, and required Shamrock to build. They have had the use and benefit of the system since December 2004.

The trial court's admission of testimony concerning the construction Project was proper. The fact witnesses testified as to what they observed, what they did, and occasionally, why they did it. If any testimony was "expert testimony," it was harmless error.

Shamrock asks the Court to award Shamrock a reasonable attorney fee for this appeal. The basis for an award of fees against Daedalus is paragraph 17 of the parties' contract that allows an award of attorney fees to the contractor (Daedalus) to enforce the contract. That entitlement is made reciprocal by U.C.A. § 78B-5-826 which provides:

A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

An award of attorney fees and costs against Silver Baron would be based upon U.C.A. § 14-2-2 (3) which provides:

In an action for failure to obtain a bond, the court shall award reasonable attorneys' fees to the prevailing party. These attorneys' fees shall be taxed as costs in the action.

In this case, Silver Baron failed to obtain a bond for the Project. (R. 688) They didn't even apply for one. (R. 900 p. 249)

Dated this 24th day of May, 2011.



Mel S. Martin,
Attorney for Appellee/Cross-Appellant
Shamrock Plumbing, LLC

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of May, 2011, I caused to be mailed, first-class postage pre-paid, two (2) copies of the foregoing **BRIEF OF APPELLEE/CROSS-APPELLANT SHAMROCK PLUMBING, LLC**, to the following:

Joseph M. Chambers
Josh Chambers
Maybell Romero
Harris, Preston & Chambers, P.C.
31 Federal Avenue
Logan, UT 84321

Jeremy Sink
McKay Burton & Thurman
170 S. Main Street, #800
Salt Lake City, UT 84101



Addendum: A-1

Job No.: 1422
Phase Code: 15-011
Contract No.: 1422-08

SUBCONTRACT AGREEMENT

Contractor:

Daedalus USA, Inc.
1850 Sidewinder Drive, Suite 320
P.O. Box 1937
Park City, Utah 84060
(801) 647-0065
(801) 658-1159 Fax

15864 Lodges at Deer Valley -F
S400 2900 Deer Valley Drive
5513
7/21/04 Park City, UT 84060
Daedalus-USA
CHARLENE / 1-435-647-0065 / 1-801-880-1540

Subcontractor:

Shamrock Plumbing, LLC
340 West 500 North
North Salt Lake, Utah 84054
(801) 295-1690
(801) 295-1699 Fax

AGREEMENT:

This Subcontract Agreement is entered this 20th day of May, 2004 by and between DAEDALUS USA, INC. ("Contractor") and Shamrock Plumbing, LLC, ("Subcontractor") for subcontract work to be performed on the designated portion of the following project in Park City, Utah (the "Project"):

Project Description:

The Lodges at Deer Valley – Building F
4 Story 24 unit condominium building with below grade parking structure
Approximately 84,024 square feet

For the purposes of this Agreement, the following Definitions shall apply:

General Contract: The agreement between Owner and Contractor.

Work: All work required to be performed by Contractor pursuant to the terms of the General Contract, including Subcontract Work.

Site: The real property on which the Work is to be performed, as more particularly described in the Contract Documents.

Subcontract Work: All work required to be performed by Subcontractor pursuant to the terms of this Subcontract.

Contract Schedule: Contractor's schedule for performance of the Work.

Subcontract Price: The price Contractor agrees to pay Subcontractor for performance by Subcontractor of the Subcontract Work.

Working Day: For purposes of this Subcontract, working day shall mean Monday through Friday, except holidays.

For good and valuable consideration, Contractor and Subcontractor agree as follows:

Building 1
Job No.: 1422
Phase Code: 15-011
Contract No.: 1422-08

1. THE WORK : The work of Subcontractor under this Subcontract Agreement (the "Subcontract Work") shall include the HVAC and Plumbing work as described in the Contract Documents per EXHIBIT "A", including all labor, material, equipment, services and other items required to complete such portion of the Work and in accordance with the following clarifications:
 - 1.1. All Subcontract Work shall comply with all applicable local, state and national codes and follow the installation procedures outlined in the ICBO approval for any product used.
 - 1.2. The following items are specifically included in this contract:

SEE EXHIBIT "B"
 - 1.3. The following items are specifically excluded from this contract:

SEE EXHIBIT "B"
2. SUBCONTRACT AMOUNT: The amount to be paid to Subcontractor for the Subcontract Work (the "Subcontract Amount") shall be One Million One Hundred Nineteen Thousand Eight Three Dollars (\$1,119,083) and shall include all costs of the Subcontract Work including tax, freight and other charges.
 - 2.1. Unit prices, if any, are as follows:

SEE EXHIBIT "B"
 - 2.2. Alternates, if any, are as follows:

SEE EXHIBIT "B"
3. REVIEW OF CONTRACT DOCUMENTS AND PROJECT SITE: Subcontractor acknowledges that prior to its execution of this Subcontract Agreement: (i) it has reviewed and examined all of the construction plans, drawings, models, specifications, measurements, schedules and addenda for the Project that it deems relevant to the performance of the Subcontract Work (collectively, the "Contract Documents"), (ii) it has examined, inspected and investigated the location and condition of the Site on which the Subcontract Work is to be performed (the "Site"), (iii) it knows the conditions under which the Subcontract Work is to be performed, (iv) it has determined that the Contract Documents are sufficient to enable Subcontractor to determine the Subcontract Amount for completion of its Subcontract Work; and (v) it has examined and approves of all lines, grade, elevations, and its price reflects all work necessary and incidental to provide a complete project. Subcontractor is entering into this Subcontract Agreement on the basis of Subcontractor's own examination, inspection, review, and investigation of the Contract Documents and the Site, and is not relying on the opinion or representations of Contractor. No allowance in the form of any additional compensation, including, without limitation, any adjustment to the Subcontract Amount, is to be made by reason of any error of the Subcontractor in its review, inspection and interpretation of the Construction Documents or the Site. Subcontractor shall assure and guarantee that all of its own subcontractors are subject to all terms of this Subcontract Agreement.
4. PROGRESS PAYMENTS: Contractor shall pay Subcontractor the Subcontract Price and other amounts that may come due to Subcontractor under this Subcontract on a percentage of completion basis, as determined by Contractor and, if Owner has reserved a right to so determine, by Owner (or Architect or other designee of Owner), when and as Contractor receives payment in unrestricted funds from Owner, for the Subcontract Work completed by Subcontractor; provided, however, that (a) Contractor may retain as security for Subcontractor's fulfillment of its obligations under this Subcontract an amount equal to five(5%) percent of Subcontractor's gross billings, or such other amount as is set forth in this Subcontract Agreement, (b) payments by Contractor to Subcontractor are to be made exclusively from funds paid by

Owner to Contractor as unrestricted funds for the Subcontract Work performed by Subcontractor, and (c) Contractor's obligation to make payments to Subcontractor is based solely on Contractor's receipt of payment of unrestricted funds from Owner. Subcontractor specifically assumes the risk of nonpayment should Owner fail to pay Contractor. As long as Subcontractor is in compliance with this Subcontract, Contractor shall pay Subcontractor each progress payment within ten working days after receipt by Contractor of Contractor's payment from Owner.

Contractor may withhold monthly progress payments, in whole or in part, in order to protect Contractor and/or Owner from loss from:

- 4.1 Defective work not remedied, material not furnished, clean-up not performed or any other non-complying aspects of the Subcontract Work;
- 4.2 Claims, levies, attachments, stop notices or court orders filed or which Contractor has reasonable cause to believe are likely to be filed against Subcontractor, including claims covered by insurance until such claims are accepted by insurance carrier;
- 4.3 Failure of Subcontractor to make timely and proper payments for materials, equipment, transportation or shipping costs, taxes, fees or payments to its subcontractors for labor (including fringe benefits owed and payments due under collective bargaining agreements), or any other claims of any nature growing out of the Subcontract Work;
- 4.4 Reasonable indication that the Subcontract Work will not be completed for the remaining unpaid balance of the Subcontract Price or in compliance with the Contract Schedule;
- 4.5 Unsatisfactory prosecution of the Subcontract Work by Subcontractor;
- 4.6 Failure to deliver to Contractor requested releases, lien waivers, supplier affidavit forms, insurance certificates, "as built" drawings, written guarantees or warranties or the approvals of the Subcontract Work required by any authority having jurisdiction;
- 4.7 Damage to any portion of the Work, another contractor or subcontractor, Owner and/or Contractor;
- 4.8 Filing by or against Subcontractor of a petition for bankruptcy or reorganization;
- 4.9 Any claim or potential claim under any law related to the protection of human health or the environment, including without limitation any claim related to a release by Subcontractor of a hazardous substance, hazardous waste, or other pollutant or contaminant on the Site;
- 4.10 Any other conditions of any nature which may arise from Subcontractors action or failure to act which, in Contractor's reasonable opinion, will result in loss to Owner and/or Contractor.

When the grounds set forth in subparagraphs 4.1 through 4.10 are removed by Subcontractor to the satisfaction of Contractor, payment of the amounts so withheld will be made by Contractor pursuant to the procedures set forth in paragraph 4 above. However, as a condition to resuming such payments, Contractor may require that Subcontractor furnish releases in a form satisfactory to Contractor for all claims made under subparagraphs 4.1 through 4.10 and/or supporting invoices, receipts or other records satisfactory to Contractor to substantiate the amounts owed or paid.

5. **FINAL PAYMENT:** The balance of the Subcontract Price and any other amounts owed to Subcontractor under the terms of this Subcontract shall be due and payable when all of the following have occurred: (a) completion and acceptance of the Work by Owner; (b) within ten days following receipt by Contractor from Owner of the entire amount, including any and all retention due Contractor from Owner; (c) removal of any grounds for withholding payments under paragraph 4 above; (d) receipt by Contractor of

satisfactory proof that all claims, including taxes, arising out of the Subcontract Work (and any liens related thereto) have been released; and, (e) receipt by Contractor of satisfactory proof that all labor, including fringe benefits owed and payments due under collective bargaining agreements, and all Subcontractor's material suppliers have been paid and are waiving their lien rights upon the final payment of the balance due. If minor items remain to be completed by Subcontractor, Contractor may retain a sum equal to two hundred (200%) percent of Contractor's estimated cost to complete any unfinished items.

6. INVOICE PROCESSING: The billing cut-off for this project is the 25th day of each month. Invoices received by the 25th day of the month will be paid on the 25th day of the following month contingent upon Contractor's receipt of a properly prepared application for payment. Any applications for payment received sixty (60) days or more after work has been completed shall not be honored. All applications for payment must be submitted to Contractor's office. In order for any application for payment to be "properly prepared," all of the following must be true with respect to each application for payment:
 - 6.1 The Subcontract Work billed is complete in the opinion of Contractor at the time of receipt of the application;
 - 6.2 Subcontractor's insurance policies are in full force and effect;
 - 6.3 All prices must agree with the contract amount and progress payment schedule of values;
 - 6.4 The application shall include appropriate lien releases and waiver of claims arising out of Subcontractor's performance of the Subcontract Work on the forms provided by Contractor;
 - 6.5 Contractor has the right, but not the obligation, to make any payment due to Subcontractor hereunder by joint check to Subcontractor and its sub-subcontractors, material suppliers, or employees which have performed work or furnished materials under this Subcontract, irrespective of whether lien releases have been submitted.
7. DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION: The date of commencement of the Subcontract Work shall be April 26, 2004, unless the Contractor issues a notice to proceed of a different date. Contractor shall substantially complete the Subcontract Work not later than September 20, 2004, ~~calendar days after the Subcontract date of commencement~~, subject to adjustments to this Subcontract Agreement. ~~The date of substantial completion shall therefore be~~.
8. TIME: Time is of essence for this Subcontract. Subcontractor agrees to diligently perform the Subcontract Work in accordance with the Contract Schedule. Without limiting the generality of the foregoing, Subcontractor shall perform the Subcontract Work in accordance with the Contract Documents at such a rate and in such a manner as not to delay the Work, the Contract Schedule, or final completion of the project. Subcontractor shall begin the Subcontract Work within five working days after receipt of written notice to proceed from the Contractor and thereafter perform the Subcontract Work continuously and expeditiously in accordance with the requirements of this Subcontract as determined by Contractor.
9. SCHEDULE: During the progress of the Work, Contractor shall have the right to revise the Contract Schedule to accommodate changes in conditions affecting the Work if deemed by Contractor to be necessary or convenient to the overall progress of the Work. Subcontractor shall adjust its operations to conform to all Contract Schedule changes and shall make no claim for acceleration or delay by reason of the schedule revisions as long as the revisions are reasonable, taking into account the scope and complexity of the Work. Contractor shall have complete control of the Site and shall have the right to decide the time and order in which the various portions of the Subcontract Work shall be performed. If the Subcontract Work is divided into parts, Subcontractor will perform several or all parts simultaneously if required by Contractor. Subcontractor shall have no claim for damages against Contractor for delay, hindrances, obstructions to its work, or other such events no matter how or by whom caused. In case of

such delays, hindrances, or obstructions not due in any part to Subcontractor fault, Subcontractor shall be entitled only to such extension of time or performance as may be allowed by Contractor provided that Subcontractor has given all written request notices and can substantiate the delay in a form and substance to the satisfaction of the Owner and Contractor.

10. **SUBCONTRACT CHANGE ORDERS:** In the event Subcontractor finds any design deficiency, error in measurements, or errors in the Contract Documents or conditions which Subcontractor believes to be at variance with approved plans, Subcontractor shall have an absolute duty to immediately provide written notice thereof to Contractor. Contractor shall have the right at any time to make changes to drawings and in the Subcontract Work. If any changes cause a material increase or decrease in the amount of work, Subcontractor agrees to accept any such changes subject to this paragraph and to proceed without delay to perform the Subcontract Work as changed. Prior to the commencement of any such material changes in the Subcontract Work, Subcontractor shall submit a written claim for any required adjustment to the Contract Amount with a breakdown, supporting invoices and/or quotes. If Contractor and Subcontractor cannot agree on the amount of the addition or deletion, the dispute for adjustment shall be submitted to binding arbitration in Summit County, Utah, and Subcontractor shall nevertheless and unconditionally proceed with the material changes, if directed by Contractor during the pendency of arbitration. If Subcontractor makes such change or any other changes to the Subcontract Work without written direction from Contractor, such change constitutes an agreement by Subcontractor that it will not be paid for that changed work and Subcontractor shall be liable for any and all losses, costs, expenses, damages, and liability of any nature whatsoever associated with or in any way arising out of any such change made without written direction from Contractor.
11. **MATERIALS, INSPECTION, TESTING AND CLEAN-UP:** Subcontractor warrants that all materials used in the Subcontract Work shall be new, free from defects, and be in quantities sufficient to facilitate the expeditious execution of the Subcontract Work. Subcontractor shall, upon request, furnish for approval full information and/or samples concerning the materials. Machinery, equipment, materials, and articles installed or used without approval shall be used at the risk of subsequent rejection by Contractor. All material and workmanship shall be subject to inspection, examination, and testing, at any and all times during manufacture and/or construction. Contractor shall have the right to reject improper or defective material or workmanship or require correction without charge to Contractor. Subcontractor shall promptly segregate and remove rejected material and its construction debris daily from the Site. In addition, Subcontractor shall at all times keep the premises and surrounding area free from accumulation of waste materials, rubbish, or unclean conditions.
12. **CONSTRUCTION MEETINGS:** Subcontractor will attend construction progress meetings as directed by the Contractor.
13. **WARRANTY:** If the General Contract requires Contractor to warranty or guarantee materials or workmanship, Subcontractor hereby warrants and guarantees the Subcontract Work for the same period and to the same extent. This warranty shall run to Contractor and the Owner and their successors and assigns. In addition to and without limiting the scope of the warranties herein provided, Subcontractor warrants the Subcontract Work as follows:
 - 13.1 Any design work required to be performed by Subcontractor as part of the Subcontract Work shall be performed (a) by duly licensed and certified architects and engineers, (b) with due diligence and to a professional standard of competence, quality and technical accuracy, and (c) in strict conformity with all requirements of this Subcontract.
 - 13.2 All materials and equipment furnished pursuant to this Subcontract will be new unless otherwise specified by Contractor, and shall comply strictly with any applicable environmental requirements.
 - 13.3 All Subcontract Work will be thorough, first class, sound, workmanlike and of substantial quality; constructed by qualified, careful and efficient workers; and free from defects in design, workmanship

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and materials, and will conform to all provisions of this Subcontract.

- 13.4 The warranties and guarantees provided in subparagraphs 13.1 through 13.3 shall apply to all defective or non-conforming Subcontract Work that appears within one year following the completion and acceptance of the Subcontract Work, or for the period for which Contractor is obligated to Owner to correct such defective or non-conforming Work, whichever is longer; provided, however, that if such defective or non-conforming Work is latent; i.e., not reasonably ascertainable prior to or within one year following completion of and acceptance of the Subcontract Work, then such warranty shall apply to each latent defective or non-conforming Work that appears for a period of time equal to the statute of limitation period applicable to such latent defective or non-conforming Work, or for the period for which the Contractor is obligated to Owner to correct said latent defective or non-conforming Work, whichever is longer.

The obligations of the Subcontractor under subparagraphs 13.1 through 13.4 shall include the correction of the defective or non-conforming Subcontract Work, the removal and replacement of other portions of the Work that are necessary to be removed to gain access to the Subcontract Work to be corrected, the repair or replacement of any damage caused by said defective or non-conforming Subcontract Work, and all consequential damages suffered by Contractor or Owner as a result of said defective or non-conforming Subcontract Work or the failure of Subcontractor to promptly and properly correct same. Subcontractor shall promptly remove from the Site all defective or non-conforming materials, which Contractor requires to be replaced, at Subcontractor's sole expense. If Subcontractor fails to promptly correct any defect or non-conformity as directed by Contractor, Contractor may correct the defect or non-conformity and charge its cost to correct to Subcontractor in accordance with paragraph 19 below.

The provisions of the warranties provided in paragraph 13, together with any applicable warranties and guarantees of Subcontractor's subcontractors and suppliers, shall survive inspection, approval, testing and acceptance of and payment for the Subcontract Work and shall run to and inure to the benefit of Contractor and Owner and their successors and assigns.

14. **ASSIGNMENTS AND SUBCONTRACTING:** No part of this Subcontract may be assigned or subcontracted without the prior written approval of Contractor.
15. **DEFAULT, SUBCONTRACT TERMINATION:** If Subcontractor, in the opinion of Contractor, at any time (i) fails to supply supervision, properly skilled workers and proper materials; (ii) fails to properly and diligently prosecute the Subcontract Work in a timely manner according to the schedule as established or modified from time to time by Contractor; (iii) fails to provide an action plan suitable to Contractor for correction of any deficiency when so requested by Contractor; (iv) fails to make prompt payment of its workers, subcontractors, materialmen, laborers, or suppliers; (v) fails to provide adequate quantities of labor or materials to meet schedules; (vi) fails to attend construction progress meetings as directed by Contractor; (vii) either loses its license or fails to renew its license; or (viii) otherwise fails to perform any term, covenant or condition contained in this Subcontract, including but not limited to clean-up; Contractor, without any prejudice to any rights or remedies, and without terminating this Subcontract shall have the right, in its sole discretion, upon a two working day written notice to Subcontractor, to declare this Subcontract null and void, and to exercise any or all of the following remedies:
- 15.1 **Assess delay penalties against Subcontractor in the amount \$1,500.00 per calendar day for each day that the Subcontract Work remains incomplete;**
- 15.2 Supply such of its own workers and quantity of materials, equipment, and other facilities as Contractor deems necessary for the orderly progress of or completion of the Subcontract Work or any part thereof which Subcontractor has failed to complete or perform, and charge the costs to Subcontractor, including overhead at 20% profit, together with attorney's fees incurred as a result of Subcontractor's failure of performance;

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- 15.3 Contract with other subcontractors to perform such part of the Subcontract Work as Contractor shall determine will provide the most expeditious completion thereof, and charge the cost to Subcontractor, including costs which exceed the unpaid Contract Amount;
- 15.4 Withhold payment of any monies due Subcontractor pending corrective action to the extent required by and to the satisfaction of Contractor;
- 15.5 Use any materials, implements, equipment, appliances, or tools furnished by or belonging to Subcontractor to complete the Subcontract Work without any further compensation to Subcontractor;
- 15.6 File legal action for damages, including consequential damages and loss of profits. Subcontractor shall also be liable for all losses, costs, expenses, liabilities, and damages including consequential damages and liquidated damages, sustained by Contractor, or for which Contractor may be liable to third parties because of Subcontractor's default, delay or negligence.

In the event of any emergency affecting the safety of persons or property, Contractor may proceed as described above without notice.

- 16. **TERMINATION OR MODIFICATION FOR CONVENIENCE.** Contractor may, at any time with a five (5) working day written notice, terminate or modify Subcontractor's services and the Subcontract Work at Contractor's sole convenience. Upon receipt of such notice, Subcontractor shall, unless the notice directs otherwise, immediately discontinue or modify the Subcontract Work and placing of orders for materials, facilities and supplies in connection with the performance of this Subcontract and shall, if requested, make every reasonable effort to procure cancellation or modification of all existing orders or contracts upon terms satisfactory to Contractor, or at the option of Contractor, give Contractor the right to assume those obligations directly, including all benefits to be derived therefrom. Subcontractor shall only be entitled to payment of the actual portion of the Subcontract Work completed in conformity with this Subcontract, as of the date of termination. There shall be deducted from such sums the amount of any payments made to Subcontractor prior to the date of termination or modification and all applicable back charges. No other claim shall be made as compensation for compensatory or consequential damages. Subcontractor shall not be entitled to any claim or claim of lien against Contractor or any other person or entity for any additional compensation or damages in the event of such termination or modification and payment.
- 17. **WITHHOLDING PAYMENT.** Contractor may withhold all or part of any payment to the extent necessary to protect Contractor from loss, including costs and attorney's fees, on account of (i) defective Subcontract Work not remedied; (ii) claims filed or reasonable evidence indicating probable filing of claim; (iii) failure of Subcontractor to make payments promptly to its subcontractors or for material, or labor; (iv) reasonable doubt that this Subcontract can be completed for the balance then unpaid; (v) damage to other subcontractors; (vi) penalties assessed against Contractor or Subcontractor for failure of Subcontractor to comply with laws; or (vii) any other ground for withholding payment allowed by law or as otherwise provided in this Subcontract Agreement including but not limited to attorney's fees incurred by Contractor to enforce this Subcontract or remedy Subcontractor's default. When the above matters are rectified, such amounts as then due and owing shall be paid or credited to Subcontractor.
- 18. **PROTECTION OF WORK AND SECURITY:** Subcontractor shall take all necessary precautions to protect the Project, all construction work, materials, employees, equipment and the work of other trades from theft, vandalism, collapse, wind and other damage. In the event that Subcontractor, or any of its employees, subcontractors, suppliers or deliverymen, cause damage to the Project or the property of Contractor, the Subcontractor shall promptly remedy such damage to the satisfaction of Contractor. In the event Subcontractor fails to remedy such damages to Contractor's satisfaction within two (2) working days of notice thereof from Contractor, Contractor may remedy the damage itself and deduct the cost thereof from such payments currently due, or thereafter to become due, the Subcontractor in accordance with Paragraph 19.

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19. **BACK CHARGES:** Contractor shall have the right to make back charges plus a 20% administrative charge (the "Back Charges") to Subcontractor for damages remedied by Contractor on behalf of Subcontractor or for damages remedied on behalf of Subcontractor under other subcontracts with Contractor. In the event that the retained amount is insufficient to satisfy the Back Charge(s), Subcontractor shall pay the amount of the Back Charge(s) within fifteen (15) working days after Subcontractor's receipt of an invoice thereof.

Prior to the execution of this agreement, the Contractor had a portion of work, which is included in the contract amount and Subcontractor scope of work (see exhibit B attached hereto), performed by another contractor on a "Time and Materials" basis. Subcontractor (Shamrock) shall be responsible for both function of and payment for said work.

20. **INSURANCE:** Subcontractor shall maintain at its sole cost and expense and with insurers reasonably approved by Contractor, during the entire term of this Subcontract:

20.1 Statutory Worker's Compensation insurance; and

20.2 Comprehensive general liability insurance, with limits of at least \$1,000,000 per person per accident, and at least \$1,000,000 property damage, or Combined Single Limit of at least \$2,000,000, aggregate consisting of both bodily injury and property damage coverage, and including products liability coverage and contractual liability expressly covering, without limitation, all of Subcontractor's obligations, including, but not limited, to the following: premises/operations, products/completed operations, owners/contractors protective, independent contractors, blanket contractual liability, broad form property damage, automobile, and personal injury. In the event the Contract Documents require higher coverage or additional coverages then Subcontractor agrees to provide such higher and additional coverages as are required in the Contract or Contract Document of the Contractor.

20.3 Contractor, and its personnel, shall be named as additional insureds under the comprehensive general liability policy and the Workman's Compensation Insurance. The policy shall stipulate that the insurance afforded the additional insured shall apply as primary insurance, and that any other insurance carried by Contractor, its officers, directors, and employees will be excess only and will not contribute to Subcontractor's insurance.

20.4 Subcontractor's Certificate of Insurance shall indicate that the Subcontractor's insured coverage includes Residential Construction Operations.

20.5 Waiver of Subrogation: Subcontractor shall obtain from each of its insurers a waiver of subrogation on Commercial General Liability in favor of Contractor and Owner with respect to Losses arising out of or in connection with the work.

20.6 Certificates of insurance acceptable to the contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. These certificates and the insurance policies required by this agreement shall contain a provision that coverage afforded under the policies will not be canceled or allowed to expire until at least 30 days prior written notice has been given to the Contractor. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required in paragraph 5. If the insurer does not furnish any information concerning reduction of coverage, the Subcontractor shall furnish it with reasonable promptness according to the Subcontractor's information and belief.

20.7 The Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor under this agreement.

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20.8 No acceptance of insurance certificates by Contractor shall in any way limit or relieve Subcontractor of its duties and responsibilities.

21. **SUBCONTRACTORS INDEMNITY:** Subcontractor agrees to indemnify, defend and hold harmless Contractor, including its officers, agents, employees, subsidiary companies, architect and owners, and each of them (individually "Indemnified Party" and collectively, the "Indemnified Parties") from and against any and all claims, causes of action, liabilities, losses, costs, damages and/or expenses in law or equity (including, without limitation, attorney's fees and expenses) of every kind and nature whatsoever (collectively, the "Claim") regardless of types or amounts of insurance carried by Subcontractor arising out of or in connection with this Subcontract, the Work hereunder, or any other work performed by Subcontractor arising out of this contract, and arising out of any act or omission to act or willful misconduct by Subcontractor, anyone directly or indirectly employed by Subcontractor, or anyone for whose acts Subcontractor may be liable, regardless of any concurrent negligence whether active or passive, primary or secondary, by any other entity.
22. **COMPLIANCE WITH LAWS:** Subcontractor agrees to be bound by all applicable federal, state and local laws, orders, rules and regulations, including, but not limited to, federal, state and local tax laws, social security act, unemployment compensation acts, workers' compensation acts, OSHA, the Toxic Substance Control Act, the Fair Labor Standards Act, as applicable, Equal Employment Opportunity Act and the rules and regulations issued pursuant thereto which are hereby incorporated by reference in this Subcontract Agreement. Subcontractor agrees to indemnify, defend and hold harmless Contractor and its customers from any liability, loss or damage arising out of Subcontractor's failure to so comply.
23. **SAFETY AND SITE RULES AND REGULATIONS:** Subcontractor shall be responsible to report in writing to the Contractor any safety hazards on the Site that it becomes aware of in accordance with Exhibit "C" – Project Safety Program. Subcontractor shall take all necessary steps to maintain good order and professional conduct of its employees, agents, and subcontractors. Subcontractor agrees to be bound by the Site Rules and Regulations and Safety Procedures as may be posted on the Site. In order to maintain communication on job site, each subcontractor shall procure, at Subcontractor's sole expense, and as designated by Contractor, a mobile phone and/or a radio compatible with Contractor's radio frequencies.
24. **DISPUTE RESOLUTION:** Subcontractor agrees to strictly adhere to the requirements of any provisions in the General Contract Documents relating to notice, submission, processing and resolution of claims or disputes. Any and all claims or disputes not specifically covered elsewhere in this Agreement arising out of or relating to this Agreement or breach thereof shall be decided, at the sole discretion of Contractor, either by submission to (1) arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association or (2) judicial decision by the Third District Court of Summit County; provided however, the determination by Owner, the Engineer, Architect, or any Court, Board of Arbitration or any tribunal pursuant to the provisions of the General Contract Documents with respect to any dispute or claim relating to this Agreement or the Work performed or to be performed hereunder shall be binding upon Subcontractor, and Subcontractor agrees to accept such determination, provided Subcontractor shall have been given reasonable notice of such dispute, proceeding or litigation and an opportunity to defend or present claims. At the sole discretion of Contractor, any arbitration with Subcontractor shall be consolidated with any other arbitration proceeding relating to the work under the General Contract. The parties agree to waive their rights to trial by jury ,
25. **GOVERNING LAW:** The laws of the state of Utah shall govern the terms of this Subcontract Agreement and any resulting contract disputes.
26. **WAIVER:** The provisions of this Subcontract Agreement requiring written notice may not be waived by oral agreement, act, or failure to act or object, by Contractor. No restriction, condition, obligation or provision of this Subcontract Agreement shall be deemed to have been abrogated, or waived, by reason of any failure or failures to enforce by Contractor. Subcontractor hereby acknowledges and agrees that

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no individual employee of Contractor has the authority either express, implied or apparent, to waive the notice provisions set forth in this Agreement with respect to the making of claims for additional compensation, time extensions, or otherwise. Any such written notice must be delivered in the time required by this Agreement and cannot be waived except by a written waiver executed by an individual authorized by the President of Contractor.

27. **SEVERABILITY:** The invalidity of any one or more paragraphs, subparagraphs, phrases, sentences or sections hereof shall not affect the remaining portions of this Subcontract or any part thereof. In the event that any portion or portions of this Subcontract should be deemed invalid or should operate to render this Subcontract invalid, this Subcontract shall be construed as if such paragraphs, subparagraphs, phrases, sentences or sections thereof had not been included in the Subcontract.

28. **ADDITIONAL PROVISIONS:**

- 28.1 Exhibit "A" Contract Document List, dated May 20, 2004
28.2 Exhibit "B" Subcontract Specific Provisions, dated May 20, 2004
28.3 Exhibit "C" Project Specific Safety Program, dated May 20, 2004

28.4. Shamrock Plumbing will contract with Stewart's Heating and Refrigeration as its HVAC subcontractor to perform HVAC work under the subcontract scope of work. Shamrock is responsible for coordinating the complete installation of all HVAC and plumbing, to provide a complete and operational system. The contractor will look to Shamrock for completion of the entire scope of work; both Plumbing and HVAC. Quality of installation, system functionality and warranty of the entire HVAC system is the responsibility of the primary Subcontractor (Shamrock).

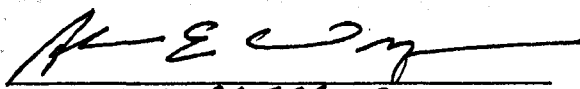
29. **ENTIRE AGREEMENT:** This Subcontract Agreement constitutes the entire agreement of the parties, and may not be modified or amended except in writing. Parol evidence shall not be admitted in interpretation of the provisions of this Subcontract Agreement.

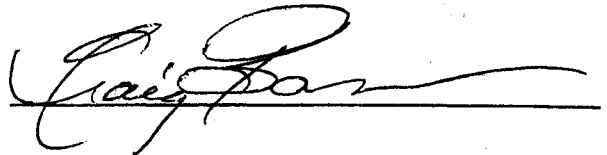
DATED as first above written.

Contractor:

Subcontractor:

DAEDALUS USA, INC.


FOR DAEDALUS



92-251990-5501
(Contractor's State License No.)

5034847-SS01
(Contractor's State License No.)

Sr. Vice President Initial: 

DAEDALUS USA, INC.
CONTRACT DOCUMENT LIST

May 20, 2004

JOB NAME: Lodges at Deer Valley - Building F
JOB NO.: 1422
PHASE CODE: 15-011
SUBCONTRACTOR: Shamrock Plumbing, LLC
CONTRACT NO.: 1422-08

THIS LIST COMPRISES ALL OF THE DRAWINGS, SPECIFICATIONS & REPORTS INCLUDED IN THE
CONTRACT DOCUMENTS

SHEET DESCRIPTION		ORIGINAL DATE ISSUED	REV. NO.	CURRENT REV. DATE
ARCHITECTURAL DRAWINGS - Prepared By: EMA Architects, LLC				
G-001	Cover Sheet	06/30/2003	3	03/22/2004
G-002	Code Review, General Notes	06/30/2003	3	03/22/2004
G-003	Specifications	06/30/2003	3	03/22/2004
G-004	Specifications	06/30/2003	3	03/22/2004
G-005	Specifications	06/30/2003	3	03/22/2004
G-006	Specifications	06/30/2003	3	03/22/2004
G-007	Specifications	06/30/2003	3	03/22/2004
G-008	Not in Current Set	06/30/2003	2	02/06/2004
G-009	Not in Current Set	02/06/2004	N/A	02/06/2004
G-010	Not in Current Set	02/07/2004	N/A	02/06/2004
G-011	Not in Current Set	02/08/2004	N/A	02/06/2004
G-012	Not in Current Set	02/09/2004	N/A	02/06/2004
A-000	Overall Site Plan	06/30/2003	2	02/06/2004
A-001	Project Site Plan	06/30/2003	3	03/22/2004
A-002	Enlarged Ramp Plan	06/30/2003	2	02/06/2004
A-100	Basement Floor Plan	06/30/2003	3	03/22/2004
A-101	Level One Floor Plan	06/30/2003	3	03/22/2004
A-102	Level Two Floor Plan	06/30/2003	3	03/22/2004
A-103	Level Three Floor Plan	06/30/2003	3	03/22/2004
A-104	Loft Level Floor Plan	06/30/2003	3	03/22/2004
A-105	Roof Plan	06/30/2003	3	03/22/2004
A-106	Typical Unit Floor Plan - Type 'A'	02/06/2004	3	03/22/2004
A-107	Typical Unit Floor Plan - Type 'B'	02/06/2004	3	03/22/2004
A-108	Typical Unit Floor Plan - Type 'C'	02/06/2004	3	03/22/2004
A-109	Typical Unit Floor Plan - Type 'D'	02/06/2004	3	03/22/2004
A-110	Typical Unit Floor Plan - Type 'E'	02/06/2004	3	03/22/2004
A111	Enlarged Plan 'E' Unit Upgrade	03/22/2004	3	03/22/2004
A-201	Exterior Elevation	06/30/2003	3	03/22/2004
A-202	Exterior Elevation	06/30/2003	3	03/22/2004
A-301	Building Section	06/30/2003	3	03/22/2004
A-302	Building Section	02/06/2004	3	03/22/2004
A-303	Building Section	02/06/2004	3	03/22/2004
A-304	Building Section	02/06/2004	3	03/22/2004
A-305	Building Section	02/06/2004	3	03/22/2004
A-306	Building Section	02/06/2004	3	03/22/2004
A-307	Building Section	06/30/2003	3	03/22/2004
A-308	Building Section	03/22/2004	3	03/22/2004
A-601	Wall and Ceiling Types	02/06/2004	3	03/22/2004
A-602	Building Details	02/06/2004	3	03/22/2004
A-603	Building Details	02/06/2004	3	03/22/2004

DAEDALUS USA, INC.
CONTRACT DOCUMENT LIST

May 20, 2004

SHEET	DESCRIPTION	ORIGINAL DATE ISSUED	REV. NO.	CURRENT REV. DATE
A-604	Building Details	02/06/2004	3	03/22/2004
A-605	Building Details	02/06/2004	3	03/22/2004
A-606	Building Details	02/06/2004	3	03/22/2004
A-607	Building Details	02/06/2004	3	03/22/2004
A-608	Building Details	03/22/2004	3	03/22/2004
A-609	Building Details	03/22/2004	3	03/22/2004
A-701	Door & Window Schedule	02/06/2004	3	03/22/2004
A-702	Door & Window Details	02/06/2004	3	03/22/2004
A-703	Door & Window Details	02/06/2004	3	03/22/2004
A-801	Vertical Circulation Plans	06/30/2003	3	03/22/2004
A-802	Unit Stair Sections	02/06/2004	3	03/22/2004
A-900	Basement Reflected Ceiling Plan	02/06/2004	3	03/22/2004
A-901	Level 1 Reflected Ceiling Plan	02/06/2004	3	03/22/2004
A-902	Level 2 Reflected Ceiling Plan	02/06/2004	3	03/22/2004
A-903	Level 3 Reflected Ceiling Plan	02/06/2004	3	03/22/2004
A-904	Level 4 Reflected Ceiling Plan	02/06/2004	3	03/22/2004

CIVIL DRAWINGS - Prepared By: Mountain Cross Engineering, Inc.

C-100	Civil Subsurface Drainage Plan	06/30/2003	1	05/04/2004
C-200	Civil Site Utility Plan	06/30/2003	1	05/04/2004
C-300	Civil Details	06/30/2003	1	05/04/2004

STRUCTURAL DRAWINGS - Prepared By: ARW Engineers

S-001	Structural Notes & Schedules	06/30/2003	1	04/23/2004
S-002	Shear Wall Schedule and Details	02/06/2004	1	04/23/2004
S-003	Special Inspection Schedule	06/30/2003	1	04/23/2004
S-101	Footing & Foundation Plan	06/30/2003	1	04/23/2004
S-101B	Footing & Foundation Plan	06/30/2003	1	04/23/2004
S-102	Level 1 Floor Framing Plan	06/30/2003	1	04/23/2004
S-102B	Level 1 Floor Framing Plan	06/30/2003	1	04/23/2004
S-102C	Level 1 Shear Wall Plan	02/06/2004	1	04/23/2004
S-103	Level 2 Floor Framing Plan	02/06/2004	1	04/23/2004
S-103B	Level 2 Shear Wall Plan	02/06/2004	1	04/23/2004
S-104	Level 3 Floor Framing Plan	02/06/2004	1	04/23/2004
S-104B	Level 3 Shear Wall Plan	02/06/2004	1	04/23/2004
S-105	Loft Floor Framing Plan	02/06/2004	1	04/23/2004
S-105B	Loft Shear Wall Plan	02/06/2004	1	04/23/2004
S-106	Roof Framing Plan	02/06/2004	1	04/23/2004
S-201	Typical Structural Details	06/30/2003	1	04/23/2004
S-202	Typical Structural Details	06/30/2003	1	04/23/2004
S-203	Footing Details	06/30/2003	1	04/23/2004
S-204	Floor Framing Details	06/30/2003	1	04/23/2004
S-205	Braced Frame Details	02/06/2004	1	04/23/2004
S-206	Wood Framing Details	02/06/2004	1	04/23/2004
S-207	Wood Framing Details	02/06/2004	1	04/23/2004
S-208	Wood Framing Details	02/06/2004	1	04/23/2004

DAEDALUS USA, INC.
CONTRACT DOCUMENT LIST

May 20, 2004

SHEET DESCRIPTION	ORIGINAL	REV.	CURRENT
	DATE ISSUED	NO.	REV. DATE
ELECTRICAL DRAWINGS - Prepared By: BNA Consulting Engineers			
E-001 Schedule & Notes	06/30/2003	N/A	12/16/2003
E-002 Electrical Site Plan	06/30/2003	4	04/23/2004
E-003 Basement Level Plan	06/30/2003	4	04/23/2004
E-004 Electrical Raceway Risers	02/06/2004	4	04/23/2004
E-100 Symbols, Schedules & Notes	02/06/2004	4	04/23/2004
E-101 Specifications	02/06/2004	4	04/23/2004
E-102 Specifications	02/06/2004	4	04/23/2004
E-200 Lighting Plan - Basement Level	02/06/2004	4	04/23/2004
E-201 Lighting Plan - First Floor	02/06/2004	4	04/23/2004
E-202 Lighting Plan - Second Floor	02/06/2004	4	04/23/2004
E-203 Lighting Plan - Third Floor	02/06/2004	4	04/23/2004
E-204 Lighting Plan - Fourth Floor	02/06/2004	4	04/23/2004
E-300 Power Plan - Basement Level	02/06/2004	4	04/23/2004
E-301 Power Plan - First Floor	02/06/2004	4	04/23/2004
E-302 Power Plan - Second Floor	02/06/2004	4	04/23/2004
E-303 Power Plan - Third Floor	02/06/2004	4	04/23/2004
E-304 Power Plan - Fourth Floor	02/06/2004	4	04/23/2004
E-305 Enlarged Mechanical Room Plan	02/06/2004	4	04/23/2004
E-401 Enlarged Unit Plan	02/06/2004	4	04/23/2004
E-402 Enlarged Unit Plan	02/06/2004	4	04/23/2004
E-403 Enlarged Unit Plan	02/06/2004	4	04/23/2004
E-404 Enlarged Unit Plan	02/06/2004	4	04/23/2004
E-405 Enlarged Unit Plan	02/06/2004	4	04/23/2004
E-501 One Line Diagram	02/06/2004	4	04/23/2004
E-601 Panel Board Schedules	02/06/2004	4	04/23/2004
E-602 Panel Board Schedules	02/06/2004	4	04/23/2004
E-603 Panel Board Schedules	04/23/2004	4	04/23/2004
E-701 Electrical Details	02/06/2004	4	04/23/2004
E-702 Electrical Details	02/06/2004	4	04/23/2004

MECHANICAL DRAWINGS - Prepared By: Colvin Engineering Associates			
MF-100 Mechanical Basement Level Plan - Block-outs	02/06/2004	N/A	02/06/2004
P-001 Plumbing Legend & Schedules	06/30/2003	1	12/15/2003
P-100 Underfloor Basement Plumbing Plan	06/30/2003	1	12/15/2003
M-001 Legend, Abbreviations & Index	02/06/2004	3	05/03/2004
M-100 Mechanical Basement Floor Plan	02/06/2004	3	05/03/2004
M-101 Mechanical / Plumbing Level 1 Floor Plan	02/06/2004	3	05/03/2004
M-102 Mechanical / Plumbing Level 2 Floor Plan	02/06/2004	3	05/03/2004
M-103 Mechanical / Plumbing Level 3 Floor Plan	02/06/2004	3	05/03/2004
M-104 Mechanical / Plumbing Level 4 Floor Plan	02/06/2004	3	05/03/2004
M-105 Mechanical Roof Plan	02/06/2004	3	05/03/2004
M-106 Snow Melt Plan	02/06/2004	3	05/03/2004
M-201 Chilled and Heating Water Piping Schematics	02/06/2004	3	05/03/2004
M-202 Natural Gas Schematic	02/06/2004	3	05/03/2004
M-203 Piping Schematics	02/06/2004	3	05/03/2004
M-204 Plumbing Isometric	04/23/2004	3	05/03/2004
M-401 Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-402 Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004

DAEDALUS USA, INC.
CONTRACT DOCUMENT LIST

May 20, 2004

SHEET	DESCRIPTION	ORIGINAL DATE ISSUED	REV. NO.	CURRENT REV. DATE
M-403	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-404	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-405	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-406	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-407	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-408	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-409	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-410	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-411	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-412	Mechanical / Plumbing Enlarged Plan	04/24/2004	3	05/03/2004
M-501	Mechanical Details	02/06/2004	3	05/03/2004
M-502	Mechanical Details	02/06/2004	3	05/03/2004
M-601	Mechanical Schedules	02/06/2004	3	05/03/2004
M-602	Plumbing Schedules	02/06/2004	3	05/03/2004
M-701	Mechanical Specifications	02/06/2004	3	05/03/2004
M-702	Mechanical Specifications	02/06/2004	3	05/03/2004
M-703	Mechanical Specifications	02/06/2004	3	05/03/2004
M-704	Mechanical Specifications	02/06/2004	3	05/03/2004
M-705	Mechanical Specifications	02/06/2004	3	05/03/2004
M-706	Mechanical Specifications	02/20/2004	3	05/03/2004

SOILS REPORT - Prepared By: AMEC Earth & Environmental, Inc.

Job No. 3-817-004428

06/30/2003 N/A

N/A

Geotechnical Investigation

ACKNOWLEDGEMENT: (Please initial and return with Subcontract Agreement)

Subcontractor: 

Contractor: 

DAEDALUS USA, INC.
SUBCONTRACT SPECIFIC PROVISIONS

May 20, 2004

JOB NAME: Lodges at Deer Valley – Building F
JOB NO.: 1422
PHASE CODE: 15-011
SUBCONTRACTOR: Shamrock Plumbing, LLC
CONTRACT NO.: 1422-08

The following is a general description of portions of the Contract Documents, together with any deviations therefrom or additions thereto, which apply to the Subcontract Work to be performed by Subcontractor. The Subcontractor is responsible for all of the Subcontract Work that appears in the Contract Documents, whether or not included in the following description, unless specifically excluded herein. Subcontractor acknowledges that the contract amount includes all items necessary for the completion of work as designed:

I. GENERAL REQUIREMENTS:

1. In addition to Subcontractor's other duties under the Subcontract Agreement, Subcontractor shall;
 - a. Submit with it's proposed schedule the time required to prepare and approve shop drawings, to fabricate and deliver materials and equipment, and to install the Subcontract Work.
 - b. Furnish Contractor within thirty (30) days of execution of this Agreement a list of major material and equipment suppliers required for the Subcontract Work, including name, address, and telephone number of the supplier and the date on which such material and equipment is expected to be delivered to the Site.
 - c. Cause a qualified supervisory representative (while Subcontractor has personnel at the Project site and for two (2) weeks prior thereto) to attend weekly progress meetings. Furthermore, and notwithstanding anything in this Subcontract Agreement to the contrary, Subcontractor agrees to be bound by such modifications to the Project Schedule as are discussed at the weekly progress meetings unless written objection is made by Subcontractor within forty-eight (48) hours of the occurrence of such meeting.
 - d. Subcontractor shall provide scheduling and coordination of all inspections pertaining to the Subcontract Work. Subcontractor must designate and have present individuals, as required, to schedule, coordinate, and achieve all required inspections. Subcontractor must also notify the Contractor, within two (2) hours of inspection visits, of the outcome of the inspection. Subcontractor will be responsible for all re-inspection fees and penalties associated with Subcontract Work.
2. **Use of Contractor's tools:** Subcontractor shall not use Contractor's tools without prior approval from Contractor. If Subcontractor utilizes Contractor's tools or equipment, Subcontractor shall do so at its own risk. In the event that one or more of Contractor's personnel operate said tools or equipment to assist Subcontractor in performing the Subcontract Work, said personnel shall be employees of Subcontractor for all purposes while so operating said tools or equipment, whether or not such personnel are placed on Subcontractor's payroll.
3. **Submittals:** Subcontractor shall submit to the Contractor for approval all shop drawings, product data and samples for all work, material and equipment required by the Contract Documents, including any amendments or modifications thereto. By submitting these, Subcontractor represents that it has reviewed and verified all required materials, field

DAEDALUS USA, INC.
SUBCONTRACT SPECIFIC PROVISIONS

May 20, 2004

measurements and field construction criteria and has checked and coordinated the information with the requirements of the Subcontract Work and the Contract Documents. Approval by the Architect or Contractor of any submittal by Subcontractor does not relieve Subcontractor from responsibility for errors or omissions in any such submittals and or from any deviation from the requirements of the Contract Documents. Subcontractor is strictly responsible for any additional costs to it or others resulting in any way from use of nonspecified material or equipment.

4. **Occupancy:** Whenever it may be useful or necessary for Contractor to do so, Contractor or Owner shall be permitted to occupy and use any portion of the Subcontract Work which has been either partially or fully completed by Subcontractor before final inspection and acceptance thereof by Owner. Such use or occupation shall not relieve Subcontractor of its guarantee of said Subcontract Work nor of its obligation to correct/repair/replace, at its own expense, any defect in materials and workmanship that may occur or develop.
5. **Hazard Communication Standard:** Prior to the start of the Subcontract Work, Subcontractor shall furnish Contractor's Project Superintendent with Hazardous Material Safety Data Sheets (MSDS) for all Subcontractor furnished materials.
6. **Parking:** Parking for Subcontractor's employees shall be located in an area designated by Contractor's Project Superintendent.
7. **Safety Meetings:** Subcontractor shall conduct weekly safety meetings with its on-site employees and provide Contractor's Project Superintendent with safety meeting documentation.
8. **Layout:** Subcontractor shall provide all layout engineering from main control lines and a benchmark provided by Contractor.
9. **Cleanup:** Subcontractor shall perform continuous cleanup of the Subcontract Work area, including removal of all rubble, boxes, crates, cartons and any other debris generated by Subcontractor on a daily basis. Cleanup debris shall be placed in on-site trash containers provided by Contractor. Subcontractor shall leave its work area(s) broom clean at the end of each day. Should Subcontractor fail to perform cleanup as defined herein, the Contractor shall, after a written two working day notice, have the right to perform the required cleanup for Subcontractor and deduct all associated costs for such services from the Subcontract Amount in accordance with Paragraph 17 of the Subcontract Agreement. Subcontractor shall remove all debris materials classified as hazardous from the Site and dispose of them in accordance with all federal, state and local laws. Subcontractor shall not dispose of any hazardous materials in Contractor's on-site trash containers.
10. **Schedule:** Subcontractor warrants that it has reviewed the Contract Schedule attached as Exhibit "D", and affirms that it has included all costs necessary in the Subcontract Price to comply with this schedule. If the Subcontractor fails to commence, perform, finish or deliver parts of the Subcontract Work in accordance with the Contract Schedule, Contractor has the right to, upon two working day's notice, to furnish additional labor materials and equipment at Subcontractor's sole cost and expense and if such labor is not available, Contractor shall have the right to require Subcontractor, at Subcontractor's sole cost and expense, to work overtime or multiple shifts (and/or weekends and holidays) to such extent as, in Contractor's opinion, is necessary to accelerate and complete the Subcontract Work in accordance with the Contract Schedule.
11. **Overtime:** Overtime authorized for reimbursement by Contractor shall be chargeable at actual expense of the premium portion of the labor only, plus legally applicable labor taxes and fringes.

DAEDALUS USA, INC.
SUBCONTRACT SPECIFIC PROVISIONS

May 20, 2004

No markup for overhead and profit will be allowed on the premium portion of overtime. All other overtime shall be at Subcontractor's sole expense.

12. **Time and Material:** In any case where time and material, hourly rate or overtime work is authorized by Contractor, Subcontractor shall be responsible to obtain time sheets and material delivery records signed on a daily basis by Contractor. Subcontractor shall include a copy of signed time sheets and material delivery records with its request for a Subcontract Change Order to the Contractor. No payment will be made for time and material, hourly rate or overtime work performed by Subcontractor without prior approval by Contractor and Contractor signed time sheets and material delivery records.
13. **Back Charges:** Should the Subcontractor default or neglect to carry out the Subcontract Work in accordance with the Contract Documents, including the terms and conditions of this Subcontract Agreement, and fails to within two working days after receipt of written notice from Contractor to commence and continue correction of such default or neglect with diligence and promptness. The Contractor shall have the right, without prejudice to any other remedy Contractor may have, to take any action necessary to correct such deficiencies. In such case an appropriate deductive Subcontract Change Order shall be prepared and issued to Subcontractor for all costs and damages incurred by Contractor for correcting such deficiencies, including a twenty (20%) percent administrative charge. If the payments then, or thereafter, due Subcontractor are not sufficient to cover such deductive amount, the Subcontractor shall pay the difference to Contractor within fifteen (15) working days after Subcontractor's receipt of an invoice thereof.

II. INCLUSIONS:

1. Provide all labor, materials, equipment, tools, incidentals and supervision required to furnish and install HVAC and Plumbing and all other appurtenances required for a complete installation in accordance with the Contract Documents, applicable codes and governing agencies.

a. **SUBCONTRACT AMOUNT:**

Phase	Description	Amount
05-011	Plumbing Work	\$744,600
05-011	Stewart's Heating	351,440
05-011	Additional inclusions	
	Permits and fees	2,500
	Fire Caulking and Stopping	5,000
	Concrete coring and patching	5,000

Total Subcontract Amount: \$ 1,119,083.00

2. The Subcontractor shall provide all required plumbing and HVAC work for a complete system which principally includes, but is not limited to the following.

DAEDALUS USA, INC.
SUBCONTRACT SPECIFIC PROVISIONS

May 20, 2004

- a. Furnish and install all fixtures and piping, including, but not limited to: water heater, water softener, toilets, sinks, shower pans, tubs, washer hookups, faucets, floor drains, hose bibs, drain piping, vent piping, and supply piping.
- b. Subcontractor shall provide a floor drain by laundry facilities and water heater.
- c. Subcontractor to connect the water heater to the gas line. The gas line is to be provided by others.
- d. Subcontractor to connect the dishwasher to the plumbing.
- e. Subcontractor shall provide all trenching required for their work.
- f. Subcontractor shall provide all block outs and sleeves through floors, walls, and ceilings required for their work.
- g. Subcontractor shall coordinate with the framing Subcontractor for location and size of all required backing for the plumbing.
- h. Subcontractor shall furnish and install fire stops, fire retardant compound and/or safing to seal all of the Subcontractor's penetrations through fire-rated assemblies.
- i. Subcontractor shall furnish all pipe flashings and sheet metal jacks for their work. Pipe flashings and sheet metal jacks are to be installed by others.
- j. Furnish and install all equipment required to complete the HVAC system, including, but not limited to: furnace, fan coil unit, and air conditioning unit.
- k. Furnish and install all required ducting, including, but not limited to: ducting, supply registers, return-air grills, combustion air ducting, and weather caps.
- l. Furnish and install smoke dampers as required by code or by the Contract Documents.
- m. Furnish and install ducting for clothes dryer.
- n. Furnish and install ducting to all exhaust fans. Exhaust fans provided by electrician.
- o. Furnish and install a set back thermostat and all required low-voltage wiring. Provide temporary thermostats for use during construction.
- p. XXX
- q. Furnish and install all refrigerant lines. Provide protection from nail puncher for all lines.
- r. Furnish and install all condensate drain lines and piping for all mechanical equipment.
- s. Furnish and install all natural gas lines including gas line service to gas ranges, gas dryers, gas fireplaces, and water heater.
- t. Subcontractor to connect gas dryer and gas ranges to gas lines after appliance installation.
- u. XXX.
- v. Subcontractor shall furnish all pipe flashings and sheet metal jacks for their work. Pipe flashings and sheet metal jacks are to be installed by others.
- w. Subcontractor shall provide all block outs and sleeves through floors, walls, and ceilings required for their work.
- x. Subcontractor shall coordinate with the framing Subcontractor for location and size of all required backing for the HVAC.
- y. Subcontractor shall furnish and install fire stops, fire retardant compound and/or safing to seal all of the Subcontractor's penetrations through fire-rated assemblies.
- z. Subcontractor will provide all layout and drilling of holes for penetrations through the concrete on metal deck.
- aa. Subcontractor will provide fastening system for horizontal fan coil units. General Contractor will provide framed rough opening of.
- bb. Furnish and install Access panels.
- cc. Subcontractor shall be responsible for fire caulking of all plumbing and mechanical penetrations through rated walls, ceilings, and floors.
- dd. Subcontractor shall be responsible for coordination of its requirements with the structural steel drawings. Includes fire stops, fire retardant compound and/ or having to seal all of the Subcontractor's penetrations through fire-rated construction as required.
- ee. Furnish and install specified labeling, stenciling, tagging and identification of work included in this subcontract.

DAEDALUS USA, INC.
SUBCONTRACT SPECIFIC PROVISIONS

May 20, 2004

- ff. Subcontractor to perform flushing, start-up, testing, and balancing of its systems as specified.
- gg. Subcontractor to seal all penetrations.
- hh. Subcontractor will provide all gas flex hose connections where necessary for gas connections at fireplace, range, etc.
- ii. Subcontractor will responsible for caulking around toilet base, sinks, and fixtures to provide a finish product.
- jj. Subcontractor shall perform all low voltage electrical control wiring required for the temperature controls and instrumentation.
- kk. Subcontractor shall furnish and install any miscellaneous iron shown on the mechanical drawings, or required for completion of Subcontractor's Work which is not shown on the Architectural or Structural Drawings.
- ll. Subcontractor shall be responsible for lifting and hoisting of it's own materials or equipment.
- mm. Subcontractor will be responsible for coordination with the chimney vent cap installer (Stewarts) to provide adequate vent pipe at chimney vents.
- nn. Include all prime and /or finish painting of plumbing work and equipment if it is specifically required by the contract documents to be performed by the plumbing contractor.
- oo. All clamps, hangers, supports, wires and seismic anchorage for all work in this subcontract.
- pp. All drains to be set at required heights and to be taped or protected in some manner as to not allow construction debris or grout from the Tile installation process to enter the waste water system. Floor drains must be polished at completion of Plumbing Finish Trim.
- qq. Subcontractor shall provide removal, repair, capping off, re-routing of existing services where required for connection to and interface with existing work.
- rr. Subcontractor will be responsible for Mechanical Sound and Vibration Control as listed in project documents.
- ss. Subcontractor shall be responsible for all trash or shall participate in the cost of the on site dumpster.
- tt.

III. EXCLUSIONS:

- 1. Chiller Line from Building E to Building F
- 2. All Fireplace venting is bid for direct vent.

IV. UNIT PRICES:

V. ALTERNATES:

ACKNOWLEDGEMENT: (Please initial and return with Subcontract Agreement)

Subcontractor: CB

Contractor: AK

DAEDALUS USA, INC.
PROJECT SPECIFIC SAFETY PROGRAM

May 20, 2004

JOB NAME: Lodges at Deer Valley -- Building F
JOB NO: 1422
PHASE CODE: 15-011
SUBCONTRACTOR: Shamrock Plumbing
CONTRACT NO.: 1422-08

The Contractor's Project Superintendent shall be in charge of all safety requirements and regulations on the project site. Contractor shall provide Subcontractor a copy of Contractor's Project Safety Program. Subcontractor shall comply with the following:

1. Subcontractor shall comply with all Federal Occupational Safety and Health Act (OSHA) and Utah Occupational Safety and Health Act (UOSHA) rules and regulations, including Hazard Communication Standards and the requirement to provide the appropriate Material Safety Data Sheets (MSDS).
2. Subcontractor shall be solely responsible for all fines, penalties and costs resulting from safety violations on the Subcontract Work.
3. Subcontractor shall comply with Contractor's Project Safety Program dated February 20, 2001 (attached) and cooperate with Contractor's field supervisors to prevent or eliminate conditions that could result in personal injury.
4. Subcontractor shall furnish and maintain all safety equipment required in the execution of the Subcontract Work.
5. Hard hats shall be worn at all times as required by OSHA and UOSHA.
6. Subcontractor shall provide Contractor an accident report for any accident that results in either personal injury or property damage.
7. Individuals who do not comply with Contractor's Project Safety Program will be asked to leave the project site. Repeated safety violations, or refusal to comply with the Safety Program is cause for termination of this Subcontract Agreement.

ACKNOWLEDGEMENT: (Please initial and return with Subcontract Agreement)

Subcontractor: OB

Contractor: Am

Addendum: A-2

IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY, STATE OF UTAH, PARK CITY DEPARTMENT
6300 North Silver Creek Rd., Park City, UT 84098

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STATE OF UTAH)
 :SS
COUNTY of Summit)

Allen E. Wright being first duly sworn upon oath states and represents as follows:

1. I am over the age of 21.
2. The information provided below is based on my personal information.
3. If called to testify in this matter I would testify as follows:
4. I am a member of the Defendant Silver Baron Partners, L.C. and also a shareholder

and officer of Daedalus USA, Inc. In my capacity as an officer of Daedalus USA, Inc., I was responsible for oversight of the construction of the Silver Baron Lodge, a large condominium project. The Cross-Claimant Shamrock Plumbing, Inc., acted as a subcontractor on the project and was responsible for the plumbing and HVAC installation. As alleged in the answer to the Cross-Claim and the Counterclaim asserted by both the owner of the project (Silver Baron Partners) and the general contractor (Daedalus, USA), the contract was breached by Shamrock resulting in significant damages to Silver Baron Partners, L.C. and Daedalus USA, Inc., as outlined in the discovery which is submitted and attached hereto as Exhibit A.

5. With respect to Silver Baron's and Daedalus' failure to submit a notice of appearance through a licensed member of the Utah State Bar, we would offer the following explanation:

The attorney at Jones Waldo whom had represented Daedalus and Silver Baron Partners in the Shamrock matter was Lewis Francis. Mr. Lewis has represented us on various matters for over 10 years during which time we¹ had been fully satisfied with his representation. When we needed

someone to file a lien foreclosure action, Mr. Francis said that this was not his area of expertise, and recommended Mr. Mike Kelly from his firm to handle those matters for us. After an initial period of representation by Mr. Kelly in which he filed several lawsuits on our behalf, we determined that he acted in a grossly unprofessional manner on numerous occasions and consequently we could not allow him to continue to represent Daedalus. We telephoned Mr. Francis and had what we felt was a productive discussion with him regarding Mr. Kelly's behavior and our dissatisfaction with Mr. Kelly's representation. We indicated that the situation as to Mr. Kelly was not acceptable and we requested an audience with the firm's president to resolve the matter. Within a few days of the call, we received a very terse email from Mr. Kelly indicating that we didn't know what we were talking about, that he was correct in all matters, and we were wrong and that he was firing us, not the other way around. He then indicated that he had saved us the time of writing a letter to the firm's president by copying him on the email. Importantly we never received any further communication from Mr. Lewis regarding his representation in the Shamrock matter. We understood that Mr. Kelly's involvement was being terminated but not Mr. Lewis' involvement. To us it appeared that Mr. Lewis was deliberately avoiding getting involved in a very explosive situation with another member of his firm. While we were waiting to be contacted by Jones Waldo's president in response to Mr. Kelly's email, and unbeknownst to us, both Mr. Kelly and Mr. Francis withdrew their representation of Daedalus (and Silver Baron Partners) in their respective matters, and informed us via regular mail. There was no further communication via email or voice and we never heard from nor were we granted a meeting with the president of Jones Waldo. Neither Mr. Kelly nor Mr. Francis contacted us and explained what the legal effect of their withdrawal would be or what we needed to do to protect ourselves.

We receive a significant volume of "client copies" from our legal representation in various active lawsuits. Normally any legal matter, particularly one that our staff was under the impression was being handled by the attorney (Mr. Francis), would not be routed to an officer but would be filed as a matter of course. If a matter comes in through personal service or registered mail it goes directly to the Office Manager, who then is responsible for reviewing the matter in-house and bringing it to the attention of the appropriate officer. Because both of the pleadings, the Notice of Withdrawal and Notice to Appoint came in via regular mail the staff member responsible for opening the mail did not realize that the practical effect of the pleadings was that we no longer had legal representation on this matter. We understood the mail which we received to be the typical client copies normally sent to us and that the legal case was still being handled by Mr. Lewis. Mr. Lewis never contacted us to orally inform us that he was withdrawing or what effect this would have on us.

In addition we would ask the Court to take note that as to the underlying dispute Shamrock has been paid \$1,084,384.45 on their original subcontract sum of \$1,119,083.00. The remainder of the dispute involves change orders and other matters which are legitimately disputed by Daedalus, and are set forth in the Answer to the Cross-claim filed by Shamrock and the Counterclaim we filed against Shamrock.

We would ask the Court to accept this as excusable neglect, inadvertence or other just cause on our part.

Both Daedalus USA, Inc. and Silver Baron Partners, L.C., have a meritorious defenses to the action and we would ask to be allowed to proceed to have this heard by the Court on the merits of the claims.

DATED this 19th day of March, 2009.

ALAN E. WRIGHT

Subscribed and sworn to before me on the 19th day of March, 2009.

Notary Public

C:\docs\jmc\S\Silver Baron Partners\Shamrock Plumbing\affidavit of alan e wright.wpd

Addendum: A-3

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

WHITE CAP CONSTRUCTION SUPPLY,
INC,

Plaintiff,

vs.

STAR MOUNTAIN CONSTRUCTION,
et.al.,

Defendants,

SHAMROCK PLUMBING, LLC,

Cross Claim plaintiff,

vs.

SILVER BARON PARTNERS, LC,
et.al.

Cross claim defendants.

RULING and ORDER

Case No. 050500453

Judge BRUCE C. LUBECK

DATE: April 23, 2009

The above matter came before the court for decision on motion of cross claim defendants Silver Baron and Daedalus (defendants) to set aside a default judgment.

The motion was filed March 23, 2009. Cross claim plaintiff Shamrock (Shamrock) filed an opposition response on April 6, 2009. Defendants filed a reply April 21, 2009. Each party filed a request to submit April 22, 2009, and requested oral argument.

The court has reviewed the pleadings and determined oral is

not necessary. The issues are authoritatively resolved by clear law. The court has a good deal of discretion in such matters. Oral argument would not benefit the court. The court will decide the issues based on the pleadings.

ARGUMENTS

Defaults were entered March 5, 2009. Counsel for defendants, who had represented defendants for over 10 years, withdrew but did not personally contact and advise defendants of such. A notice to appoint or appear was filed by Shamrock but defendants claim they did not receive that or it was inadvertently overlooked by staff. The answer and counterclaim were stricken and judgment entered because of the failure to appoint or appear. The affidavit of Wright, a member of defendant. It alleges long-term counsel withdrew by regular mail and that correspondence was simply filed and not brought to the attention of an officer.

Shamrock opposes the motion. After service originally in 2005 a default was entered February 15, 2006. That was set aside by the court on April 18, 2006. Discovery then proceeded and counsel withdrew on January 9, 2009, three years later. Defendants did not respond to the notice of withdrawal. Shamrock sent, to the same address, a notice to appear or appoint. It

notified defendants that a default and dismissal of claims may occur if counsel were not appointed. After notice of entry of judgment in February, defendants did not respond. A proposed order was sent to defendants and they did not respond, nor did they respond to a request to submit mailed to them. After the judgment was signed March 5, Shamrock moved to correct it and gave notice to defendants. No response followed. This motion followed.

Shamrock claims that getting notice in the mail, even if regular mail, and ignoring it is not due diligence. Defendants are familiar with litigation, knew their attorney had withdrawn, but did nothing. Defendants got notice to appoint counsel, a default certificate, a proposed order and request to submit. All were ignored. This lawsuit at that time was over three years old. A previous default was set aside based on the claim of defendants, through Wright, that it was received by certified mail and this claim is that the notices were by regular mail.

Further, there is no meritorious defense.

In reply defendants again urge the standard and presumption of law in favor of decisions on the merits. Defendants agree they will assume the attorney fees for Shamrock in obtaining the default judgment and in this motion.

DISCUSSION

The court is aware of the strong presumption in favor of decisions on the merits rather than by default. The court first looks to determine if there has been excusable neglect before it turns to an examination of whether there is a meritorious defense.

Defendants here seem, at least in this case, to be less than concerned at times about this case. It has been lengthy litigation and the court is hard-pressed to really understand how so many pleadings could be overlooked. However, given the situation with counsel and the lack of personal contact and a long-term relationship, the court will again excuse defendants failures.

This motion was filed within weeks of the default judgment. There is a cross claim and significant discovery and litigation which the court believes fills the meritorious defense element. While a close call, the court first finds and concludes that under all the circumstances, the failure to appoint new counsel amounts to excusable neglect.

Given the short time and given that attorney fees of Shamrock will be paid by defendants, there is no prejudice to Shamrock in resolving this case on the merits.

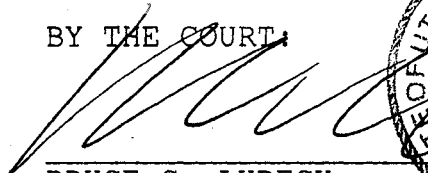
The motion to set aside the March 5 and corrected order of

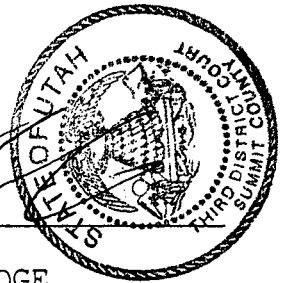
March 18, 2009, is GRANTED.

Defendants are to prepare an order in compliance with Rule 7 which incorporates this ruling and awards attorney fees to Shamrock in obtaining the default and in responding to this motion.

DATED this 23 day of April, 2009.

BY THE COURT:


BRUCE C. LUBECK
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

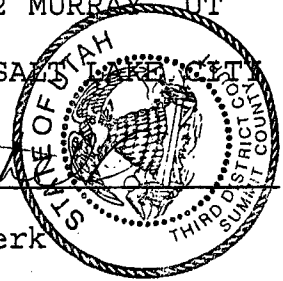
I certify that a copy of the attached document was sent to the following people for case 050500453 by the method and on the date specified.

MAIL: JOSEPH M CHAMBERS 31 FEDERAL AVE LOGAN, UT 84321
MAIL: JOSH M CHAMBERS 31 FEDERAL AVE LOGAN UT 84321
MAIL: MATTHEW G COOPER 5282 S COMMERCE DR # D-292 MURRAY UT 84107
MAIL: LEWIS M FRANCIS 170 S MAIN ST STE 1500 SALT LAKE CITY UT 84101-1644
MAIL: MELVIN S MARTIN 5282 S COMMERCE DR STE D-292 MURRAY UT 84107
MAIL: HAROLD C VERHAAREN 5217 S STATE ST 4TH FLR SALT LAKE CITY UT 84107

Date:

April 23, 2009

By Mitchell
Deputy Court Clerk



Addendum: A-4

Joseph M. Chambers (0612)
Josh Chambers (11045)
HARRIS, PRESTON & CHAMBERS, P.C.
31 Federal Avenue
Logan, Utah 84321
Telephone: (435) 752-3551
Facsimile: (435) 752-3556
*Attorneys for Defendants Silver Baron Partners, L.C.
and Daedalus USA, Inc.*

THIRD DISTRICT COURT SUMMIT

2009 MAY 21 PM 3:13

FILED BY

[Signature]

IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY, STATE OF UTAH, PARK CITY DEPARTMENT
6300 North Silver Creek Rd., Park City, UT 84098

WHITE CAP CONSTRUCTION SUPPLY,
INC.,

Plaintiff,

vs.

STAR MOUNTAIN CONSTRUCTION,
INC., ED ZITE, SILVER BARON
PARTNERS, L.C., DAEDALUS USA, INC
FRED W. FAIRCLOUGH, JR., CHRISTINE
FAIRCLOUGH, THOMAS STREBEL dba
RESORT CONSTRUCTION DRYWALL,
IDAHO PACIFIC LUMBER COMPANY,
INC., BINGGELI ROCK PRODUCTS, INC.,
WESTERN STATES EQUIPMENT CO.,
INC., SHAMROCK PLUMBING, LLC, AND
JOHN DOES 1-5,

Defendants.

Order Setting Aside March 5, 2009,
and Corrected March 18, 2009,
Default Judgment

Civil No.: 050500453

Judge Bruce C. Lubeck

SHAMROCK PLUMBING, LLC,

Cross-Claim Plaintiff,

vs.

SILVER BARON PARTNERS, L.C.,
DAEDALUS USA, INC., FRED W.
FAIRCLOUGH, JR., and CHRISTINE
FAIRCLOUGH,

This matter came before the Court on the Motion to Set Aside Judgment and Alternatively Motion for New Trial of the Cross Claim Defendants Silver Baron Partners, L.C., and Daedalus USA, Inc. (hereinafter "Defendants"). The Court entered its Ruling and Order dated April 23, 2009, granting the motion and directing the Defendants attorneys to prepare an order in compliance with Rule 7 U.R.C.P.

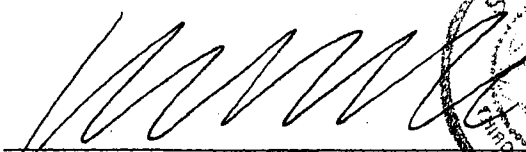
Having considered the motion, the parties' memorandum, applicable case and statutory law, based thereon, and upon good cause appearing, the Court now enters the following:

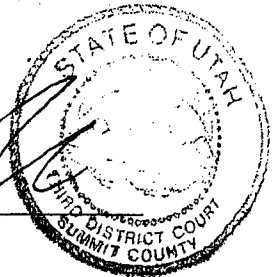
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The Motion to Set Aside the March 5, 2009, Default Judgment and corrected order of March 18, 2009, is hereby granted and said judgments are set aside.

2. The Cross Claim Plaintiff Shamrock Plumbing, LLC, is awarded attorney fees for obtaining the default and in responding to the Defendants' Motion to Set Aside Judgment and Alternatively Motion for New Trial in the amount of \$ 5500.00 ⁵⁰

DATED this 21 day of May ~~April~~ 2009.


Bruce C. Lubeck
District Court Judge



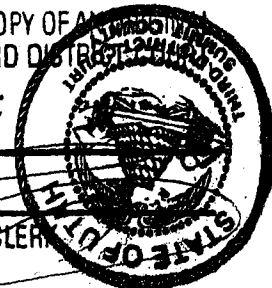
APPROVED AS TO FORM:

Melvin S. Martin
Attorney for Shamrock Plumbing

I CERTIFY THAT THIS IS A TRUE COPY OF A
DOCUMENT ON FILE IN THE THIRD DISTRICT COURT
SUMMIT COUNTY STATE OF UTAH.

DATE: 9/9/09


DEPUTY COUNTY CLERK



AFFIDAVIT OF SERVICE

STATE OF UTAH)
 :SS
COUNTY OF Cache)

Jennifer Torgesen, being duly sworn, says that he/she is employed in the law offices of Harris, Preston & Chambers, P.C., attorneys for Defendants herein; that he/she served the attached **Order Setting Aside March 5, 2009, and Corrected March 18, 2009, Default Judgment**, in Case No.: 050500453 pending before the Third Judicial District Court, Summit County, State of Utah, upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

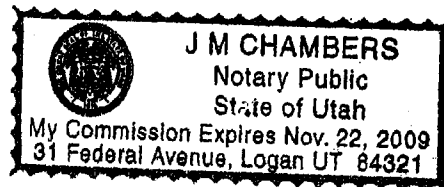
Matthew G. Cooper
5282 South 320 West, Suite D-292
Murray, Utah 84107

Mel S. Martin
5282 South 320 West, Suite D-292
Murray, Utah 84107

Jennifer Torgesen 5/8/09

SUBSCRIBED AND SWORN TO before me this 8 day of May, 2009.

[Signature]
Notary Public



Addendum: A-5

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

WHITE CAP CONSTRUCTION SUPPLY,
INC,

Plaintiff,

vs.

SHAMROCK PLUMBING, LLC, et.al.,

Defendant.

SHAMROCK PLUMBING LLC,

Cross claim plaintiff,

vs.

SILVER BARON PARTNERS, LC;
DAEDALUS USA INC.; FRED W.
FAIRCLOUGH; and CHRISTINE
FAIRCLOUGH,

Cross claim defendants.

MEMORANDUM DECISION

Case No. 050500453

Judge BRUCE C. LUBECK

DATE: January 29, 2010

The above matter came before the court for a bench trial on
January 20, 21, and 22, 2010.

Third party plaintiff (hereinafter plaintiff) Shamrock was
present through Mel S. Martin and cross claim defendants Daedalus
and Silver Baron (hereinafter defendants) were present through
Joseph M. Chambers and Josh Chambers.

BACKGROUND

White Cap as plaintiff filed this case September 2, 2005. The complaint alleged in summary that it was a subcontractor to Daedalus on a project in early 2004 . Shamrock was alleged to claim an interest in the property through a lien Shamrock had filed.

On October 13, 2005, Shamrock filed an answer and cross claim against Silver Baron, Daedalus, and Fred and Christine Fairclough.

Shamrock in its causes of action (1) sought to foreclose a mechanic's lien, alleging that Daedalus as general contractor and agent of Silver Baron contracted with Shamrock to provide plumbing and mechanical materials and services. Shamrock began work April 26, 2004, and the last work was March 8, 2005. Shamrock claimed \$275,128 and that it had not been paid. On March 23, 2005, Shamrock recorded a lien and sent notice to Silver Baron. Other claims are (2) breach of contract, (3) quantum meruit, and (4) failure to bond by Silver Baron under UCA 14-2-1.

The case brought by White Cap was dismissed against all defendants, except Shamrock, on November 7, 2005. Shamrock was dismissed as a defendant on December 5, 2005. Thus, only these claims by Shamrock and Daedalus and Silver Baron remain.

On February 15, 2006, default certificates were entered against all cross claim defendants. Those were set aside April

18, 2006 after motion.

These cross claim defendants Silver Baron and Daedalus filed an answer and counter claim against Shamrock for (1) breach of contract alleging Shamrock did not timely do its work under their sub contract with Daedalus, under which Silver Baron was a third party beneficiary. Further, the work was not done properly.

Shamrock filed an answer to the counterclaim on May 15, 2006.

Almost a year later a motion was filed by Silver Baron and the court on June 20, 2007, dismissed Shamrock's lien foreclosure claim as untimely. A case management order was entered in December 2007. It was amended by stipulation in June 2008 and again in September 2008.

On April 29, 2008, the Faircloughs were dismissed.

After motion by Shamrock, and withdrawal of counsel for defendants, an order was entered March 5, 2009, striking the counter claim and answer of defendants and judgment was entered for Shamrock in the amount of \$418,095. Shortly thereafter new and current counsel entered and that judgment, after motion, was set aside April 23, 2009. The court did grant Shamrock attorney fees in the sum of \$5500.

On July 21, 2009, this trial date was scheduled.

Thereafter various motions were filed and after oral argument the court on December 4, 2009, the court concluded the

work was not timely done by Shamrock under the contract and that no written notice of deficiency was given by Shamrock and that was a breach, but that such issue remained open as to whether that was a material breach. The court further ruled Shamrock could present its evidence as the claimed damages of Daedalus were dependent on the completion date and why that was the date of completion and why it was not achieved. The court ruled the amount of damages was in dispute and must be tried.

On December 31, 2009, Shamrock moved to prevent the testimony of certain witnesses. The court issued a brief ruling on January 15, 2010. On the morning of the first day of trial defendants also moved to exclude and objected to various witnesses and exhibits. The court ruled orally that it would hear the testimony and allow objections to be lodged during the trial.

The court heard evidence, received exhibits, heard argument of counsel, and is fully advised. The court took the matter under advisement.

The court finds as follows:

FINDINGS OF FACT

1. Silver Baron owned The Lodges at Deer Valley and hired

Daedalus as the general contractor for Building F. The project was a luxury condominium hotel in Deer Valley. Daedalus hired Shamrock as a sub-contractor to do mechanical and plumbing work. Currently Daedalus is owned 75% by Lynn Padan and 25% by Alan Wright. Silver Baron is now dissolved. During the time involved in this case, 2004 and 2005, Daedalus was a member of Silver Baron along with Padan and several others. This was design-build project in which Daedalus participated in design, not as the general contractor but as a consultant, then the architect EMA made plans, presented them to Silver Baron, and Silver Baron selected Daedalus as the general contractor, who hired many subcontractors, including Shamrock.

2. Shamrock and Daedalus signed a contract June 7, 2004, but Shamrock actually had begun work in April 2004. Neither party offered an explanation as to why the contract was signed well after the work began by Shamrock. The court finds that during that time, before the actual signing of the contract in June 2004, Daedalus went over the sub-contract with Shamrock, through Shamrock's representative Payne, and stressed time frames because as will be found below Daedalus had a contract with Silver Baron, who had a contract with Premier Resorts for occupancy of the units. The sub-contract at issue has exhibits and refers to drawings and specifications. Among those are the engineering specifications completed by Colvin Engineering, who had a

contract with EMA, the architect who had a contract with and was hired by Silver Baron. AME and Silver Baron had a contract, and AME and Colvin had a contract. Bill Payne was the principle Shamrock project manager. Rusty Shoemake was the project supervisor for Daedalus and Roy Barteel was the project manager for Daedalus. The "chain of command" for Daedalus was thus Rusty Shoemake as the supervisor who reported to Barteel, a licensed architect, the manager who reported to Wright the vice president who reported to Padan the president. All have considerable and impressive experience in the construction field.

3. The sub-contract was for the base amount of \$1,119,083. It provided for changes and those are the main issues in this case. This case presents the seemingly ever-present tension and conflict between contractors and sub-contractors.

4. The sub-contract provided, at paragraph 10:

In the event Subcontractor finds any design deficiency, error in measurements, or errors in the Contract Documents or conditions which Subcontractor believes to be at variance with approved plans, Subcontractor shall have an absolute duty to immediately provide written notice thereof to Contractor. Contractor shall have the right at any time to make changes to drawings and in the subcontract work. If any changes cause a material increase or decrease in the amount of work, Subcontractor agrees to accept any such changes subject to this paragraph and to proceed without delay in the Subcontract Work. Subcontractor shall submit a written claim for any required adjustment to the Contract Amount with a breakdown, supporting invoices and/or quotes. If Contractor and Subcontractor cannot agree on the amount of the addition or deletion, the dispute for adjustment shall be submitted to binding arbitration in Summit County, Utah, and Subcontractor shall nevertheless and unconditionally proceed with the material changes, if directed by Contractor

during the pendency of arbitration. If Subcontractor makes such changes or any other changes to the Subcontract Work without written direction from Contractor, such changes constitutes an agreement by Subcontractor that it will not be paid for that changed work and Subcontractor shall be liable for any and all losses, costs, expenses, damages, and liability of any nature whatsoever associated with or in any way arising out of any such change made without written direction from Contractor. (Emphasis added).

The subcontract work under the contract means all work required to be performed by Subcontractor under the Sub-contract.

4. The Sub-Contract provided the subcontract work was to commence April 26, 2004, and be substantially completed by September 20, 2004. It stated time was of the essence. The Sub-contract also provided, at paragraph 9, that contractor had the right to revise the Contract Schedule to accommodate changes in conditions affecting the work. At paragraph 3 the Sub-contract provided that subcontractor had examined all the Contract Documents, which included the specifications and schedules relevant to do the subcontract work.

5. The Sub-contract at paragraph 15 provided the procedure if contractor believed there was a default. If contractor believed the subcontractor failed to follow supervision, to do the work timely, to correct deficiencies when requested, to pay its workers or material men, to provide adequate labor or materials to meet schedules, to attend progress meetings, or other wise failed to perform any covenant, contractor could, without terminating the subcontract, give a two working day

written notice declare the Sub-contract null and void and do any or all of the following: (1) assess delay penalties of \$1500 per day for each day the subcontract work remained incomplete, (2) supply its own workers or materials and charge costs to subcontractor and include 20% profit, (3) contract with other subcontractors and charge the cost to subcontractor, (4) withhold payment, (5) use tools and implements of subcontractor or (6) file a legal action for damages including consequential damages and loss of profits, including those for liquidated damages or consequential damages for which contractor may be liable to third parties.

6. Daedalus never provided such written notice nor declared the contract null and void. Daedalus claims it issued a written notice by email, but could not find it. The court finds otherwise that there was no written notice nor was the contract ever declared null and void as Daedalus has failed to prove that by a preponderance of the evidence.

7. Under paragraph 17 of the Sub-contract contractor could withhold payment to protect contractor from loss, including costs and attorney fees, on account of defective subcontractor work not remedied and for other reasons. It provided that attorney fees could be sought if incurred enforcing the subcontract.

8. Exhibit B to the Subcontract, Specified Provisions, was incorporated into the Subcontract. It provided, among other

things, in paragraph 1 (c), that subcontractor was to attend weekly progress meetings.

Furthermore, and not withstanding anything in this Subcontract Agreement to the contrary, Subcontractor agrees to be bound by such modifications to the Project Schedule as are discussed at the weekly progress meetings unless written objection is made by Subcontractor within 48 hours of the occurrence of such meeting.

9. The engineering specifications, part of the Contract Documents, called for a Bryant boiler and A.O. Smith water heaters. At some point in time this became problematic.

10. In April 2004, before the Subcontract was signed, Shamrock determined that those two items (boiler and water heaters) were incompatible and would not function properly together and would create a danger for human safety due to the incompatible venting process. The Bryant boiler had a positive pressure flue and the water heaters had an atmospheric pressure flue and they are not compatible and would cause dangerous situations.

11. An exhibit shows that Daedalus on April 26, 2004, provided a work schedule to Shamrock which provided the plumbing work was to be done by October 1, 2004, and the mechanical work was to be done by November 11, 2004. Those dates of course vary from the Sub-contract dates of substantial completion by September 20, 2004. Thus, the court finds and concludes that the contract documents are ambiguous as subject to two reasonable interpretations as to the time of completion and thus the trial

was needed to determine the intent of the parties. While the time schedule provided on April 26, 2004, is not a contract document, the Sub-contract makes clear that contractor can adjust the schedule and subcontractor is to follow it. Overall the court finds that the time schedule in the Sub-contract is ambiguous because of that feature of the Sub-contract.

12. The sequencing of events appears clear to the parties but not to the court. The court cannot find that any of the parties are wilfully misleading the court yet the evidence is in conflict. While it is the role of the court as fact finder to reconcile those conflicts as best as can be accomplished, the burden of proof in this case lies with each party on their claims. The timing of some things remains unproven by the parties and unknown by a preponderance of the evidence to the court. Yet, the court finds that before the Sub-contract was signed, sometime in April 2004, Shamrock through Payne advised Bartee of Daedalus that the boiler and water heaters were incompatible and would not work together. Bartee told Shamrock to work it out with Colvin, the mechanical engineer. The court, unless it wholly rejects the testimony of Colvin's representative Bret Christiansen, cannot find Christiansen was even on the project then in April 2004. The court finds Christiansen did not even appear on the scene for Colvin until much later, well after the contract was signed. That is based on the testimony of

Christiansen himself, backed up by Wright who said Christiansen was only on site at the end of the project for a month. The court finds thus that Shamrock did not advise Colvin until shortly before Shamrock ordered the boiler. Christiansen testified, and the court credits that testimony, that Shamrock approached Colvin about installing a different boiler from the specifications, different from the Bryant boiler. Colvin was advised by Shamrock that installing another boiler would be faster and it would not be more expensive and there would be a delay in obtaining the Bryant boiler. Colvin at first indicated that should not be done but then relented and that is when, on September 1, 2004, Shamrock first ordered the boiler. Shamrock ordered a Rite boiler on September 1, 2004. The court finds that at the time of the contract, Shamrock did not directly advise Daedalus at the time of the contract of the incompatibility of the two systems and Shamrock should have done such. The court finds and concludes that given the strong language of paragraph 10, emphasized above by the court, that Shamrock had 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 Sub-contract 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 Shamrock 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.

13. The court has already ruled on December 4, 2009, on motion for summary judgment, that the subcontract was unambiguous. That, after presentation of the facts at trial, was wrong at least in part. The court determined it was not disputed that Shamrock had not provided a written notice of a deficiency in the design as required by paragraph 10 and that such was a breach, and the court now finds, as above, that factually and legally that is still correct. The court reserved and found there was a factual issue about whether that breach was material, which is a question of law for the court but the court needed further factual development to make that determination. The court also determined that there had not been substantial completion of the work by September 20, 2004, and that remains true and undisputed. The court allowed evidence, and thus this trial, to allow evidence to be presented to determine if the failure to substantially complete the work under the contract

affected the damage claims of the parties. The reasons for the delay were to be factually determined.

14. The last work done was in March 2005 and a lien was filed by Shamrock. The lien foreclosure claim of Shamrock was dismissed because it was not timely enforced.

15. Daedalus had a deadline to turn the project over to Silver Baron who had a contract with Premier to allow Premier to lease the units for the holiday season, and thereafter, so the project was on a deadline and time was of the essence.

16. Under the Daedalus-Silver Baron prime contract, signed in 2003, the project was to be turned over to Silver Baron by November 1, 2004, but that was later negotiated, evidently orally as there were no documents showing such, and extended to December 1, 2004. Under paragraph 2.2.5 of the prime contract, if the work was not done on time by Daedalus, Daedalus was to lend Silver Baron each month an amount equal to the difference between what Silver Baron would have received in rentals and the net revenue that Silver Baron did receive, not to exceed \$400,000. Here, the date Silver Baron was able to actually take possession was December 18, 2004 rather than December 1, 2004, approximately one half month. Under that prime contract, if the work was done on time, there was no liquidated damage provision.

17. There was a lease between Silver Baron and Premier, from October 2003, which relates to this. At the time of that lease

Snow Park was the predecessor of Silver Baron, thus the lease was actually between Snow Park Associates and Premier Resorts. In substance that allowed Snow Park (succeeded to by Silver Baron) to lease the premises, and Snow Park in turn leased the units to others and under the lease shared the profits with Silver Baron. It provided, in summary, in sections 2.5 and 2.6, that Snow Park was to be able to begin renting on December 1, 2004, which date was defined in the lease as the commencement date and the delivery of possession date, the defined possession date, was November 1, 2004, or when Snow Park delivered possession of the units to Premier, and the date was set at November 1, 2004, unless extended pursuant to the lease. The court finds that because the date in the agreement between Daedalus and Silver Baron was extended from November 1 to December 1, 2004 when Silver Baron could take possession of the building, those dates of the Snow Park lease were also necessarily extended as Snow Park could not take possession November 1, 2004, if Silver Baron did not have possession until December 1, 2004. Snow Park was to pay a monthly base rent to Silver Baron, which was \$4417 for a two bedroom unit and \$5583 for a three bedroom unit. That was the fixed rate. If there was a delay in occupation beyond December 1, 2004, there was to be a one time extension for one year. Here, a temporary certificate of occupancy was issued December 22 or 23, 2004, by Park City, so Snow Park could begin

rentals then. If a unit was sold or removed by Snow Park, the agreement ceased to apply to that unit under the lease.

18. During the work by Shamrock several changes were requested but only three signed change orders exist. In none of them did Shamrock request an extension of time to complete the work though the change order forms allowed a space for such a request to be made.

19. During the weekly progress meetings Shamrock was often asked to do different work by Daedalus.

20. The construction of the building was delayed overall by various factors, some of which were not of Shamrock's making or caused by Shamrock. The court finds from an examination of the work records and the testimony that Shamrock had a crew of varying sizes but that the work did not get done quickly enough to comply with the September 20, 2004, date. However, the court finds that the ambiguity in the contract itself, with the September 20, 2004 date set but in at least two other places (paragraph 9 and Exhibit B) that date was obviously meant to have some flexibility in it. The court cannot find that date was intended to be a fixed immovable date and it was not. Changes were made and other factors interfered with it, some of those not of Shamrock's making. There were delays "built into" the contract which as noted in a schedule given by Daedalus to Shamrock called for the final mechanical work to be done by November 11, 2004.

The entire course of conduct between these parties and their practice shows flexibility up to a certain point, as there must be, depending on many circumstances in a project such as this. While the minutiae of the times need not be detailed, obviously there were other trades that were part of the delay, as well as Daedalus itself. For example, it is undisputed that on November 23, 2004, Shamrock notified Daedalus that Shamrock could not finish because various counter tops, cabinets, paint and tile were not completed in various named units and so the finish plumbing could not be finished in those 12 units detailed. While the evidence is not strong as to why that was so, November 23, 2004, is well after the claimed September 20 substantial completion date and yet other trades were still not completed with their work so that Shamrock could complete its work. The court is aware that such delay occasioned by lack of cabinets or counter tops perhaps was only a minor delay because Shamrock had at that point probably only to install finish faucets and handles and such after counter tops are installed, a short task for a crew of 4-8 people. Further, though it is disputed as to its effect, there seems little dispute that in fact a main water line was not available until November 17, 2004. That is the responsibility of Daedalus. Even though there was another water line available for some purposes, the main line was not available until then and that was not Shamrock's responsibility. Even

though there is a non-waiver provision, clearly in early December 2004 Daedalus stated that Daedalus needed the plumbing done by December 8 and called for increased manpower from Shamrock. The court generally finds in favor of Daedalus on that issue, that Daedalus asked for increased manpower and Shamrock did not provide it. However, overall the court cannot join Daedalus in putting the blame for the failure to turn over the project on December 1, 2004 to Silver Baron all on Shamrock. Clearly some delay was caused by Shamrock but there was some delay of an unknown duration in the overall project because of a structural steel issue about design and cost in Quadrant 3 of Building F. While some trades, perhaps even Shamrock, perhaps were not unduly delayed, the court finds that the overall project was delayed as much as 60 days from some of those issues apart from Shamrock, and that cannot all be upon Shamrock.

21. Even though Shamrock continued to do certain repair and finish work into March 2005, the court finds that Shamrock had substantially completed its work under the Sub-contract on December 18, 2004. A temporary certificate of occupancy was issued by Park City December 22 or 23, 2004, allowing occupancy of the units.

22. The buildings were occupied in December for rentals. Problems with the work Shamrock had done began almost immediately. During that time problems became evident, as the

units, especially on the top floor, were very hot as well as the hallways.

23. The hot water also had a problem which turned out to be a defective part manufactured by A.O. Smith, which recalled the part and replaced them, and that was not Shamrock's doing at all.

24. Once the units were turned over to Silver Baron for rental by Premier, there was excess heat in the units and the halls. This project was heated by water circulating from the boiler through the units and halls, and then coil fans blew that radiant heated air into the units and halls. With the venting system installed by Shamrock, the heat of each unit was not controlled by a thermostat in each room. The boiler installed was controlled by what is called a VFD, or variable frequency driver. Under the leases by Premier guests paid \$1000-1500 per night and had temperatures of 80 or 90 degrees F or above, and were told to open the windows by Premier agents. Most of the guest asked for and many received refunds. Those amounts were not shown directly to the court, however.

25. After that "over heating" problem was evident, all involved began examining the problem, and various solutions were proposed, none of which worked until sometime in February 2005. The parties disagree on the solution. The court is obviously no expert but applies its common sense to the issue. Shamrock claims, based on the testimony of the mechanical engineer,

Christiansen, that the solution was basically air conditioning, or a chill line to combat the heat. Daedalus claims, and the court finds, that the problem was the installation, or lack of installation, of a mixer valve in the boiler water circulation system.

26. On February 3, 2005, Christiansen told Daedalus, in summary, that chilled water piping being installed on Building F will cool the temperatures. The court finds based on all the evidence that on February 15, 2005, Wright and Padan were still trying solve the problem. Earlier all (Daedalus, Shamrock Colvin, manufacturers' representatives) had several meetings and no solutions to the overheating were found. Padan deduced that because there was only one heat source, the boiler, that must be the problem. It was set to heat the water at 180 degrees F. That boiler was manually turned down to 110 degrees and the building was properly cooled at that point. That, however, created its own problem with the boiler which would be affected as to its performance and longevity. Then on February 15, 2005, Padan and Wright went into the mechanical room at 11:30 pm. There they found two Shamrock employees working on the system. That is highly in conflict and the court does not determine the issue on the basis that anyone is being intentionally deceptive, but the documents and circumstances lead the court to these findings. Those employees of Shamrock were working on and installing a

mixer valve. Shamrock insists that was on the culinary water and Daedalus insists it was on this issue of overheating from the boiler. The court concludes that the greater amount of evidence supports Daedalus. First, there is a daily log of January 18, 2005, showing receipt by Shamrock of "material for hot water heat loop that was missed." Then these employees were seen working at 11:30 at night and Padan and Wright identified with photographs the hot water heating loop and mixer valve those men were working on. It is apparent from photos and the evident scorching on the insulation that work was done in that area after the installation of the insulation. Further, the daily work report log codes the work as "48" which is under the system of Shamrock "hot water piping." There are two other codes for culinary water, one under ground and one above ground. Those are coded as 43 and 44. This work done on February 15, 2005, was again coded as hot water piping, 48. There appear no categories for boiler work. From all this, and what the court believes is a strong dose of common sense, the court cannot accept that hot radiant air at a high temperature is sent through a 84,000 square foot building and the only way to cool it is through a counter cool air or chiller pipe. It makes far more sense that the explanation of Daedalus personnel is the answer. 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. Again, as noted, the part arrived January 18, 2005, for a valve "missed." As will be discussed, however, that did NOT delay the occupancy date by Silver Baron and thus the damages resulting from that breach of contract to perform proper work are in issue.

27. Daedalus did not obtain what it wanted, and did not get written notice of such change. Daedalus wants it removed and a better system installed.

28. Another problem that developed after rentals began in late December 2004 was not Shamrock's doing, but the water heaters would randomly kick on and off, there would be no hot water at times and at times there would be and the guests were at the mercy of the water heaters. That turned out to be, after much investigation during the same time period and by a

determination of the manufacturer of the water heaters, A.O. Smith, to be a problem in the circuit board of those heaters. Those circuit boards were in fact recalled and new ones installed by A.O. Smith and they then functioned. That is NOT attributable to Shamrock as those heaters were the ones specified by the architect and engineer.

29. Instead of the Bryant boiler and associated system a Rite boiler was substituted at a slightly less overall cost, but increased venting expense, but Shamrock has not bill for that greater cost.

30. Daedalus was not aware of that change until sometime in October 2004.

31. Shamrock billed Daedalus \$1,309,512 but that was in error due to a mistaken double billing in the sum of \$18,342. Thus the correct billing should have been \$1,291,170. Daedalus claims Shamrock has billed more, \$1,305,638. Shamrock claims that Daedalus owes it \$256,787. As pure math, Daedalus does not contest that figure but asserts of course breaches by Shamrock and damages owing to Daedalus offset that amount.

30. Shamrock still owes its subcontractors a total of \$112,686, which is part of the claimed \$256,786 Shamrock claims it is owed by Daedalus. One of those subs of Shamrock is Stewart Heating. That entity is operated by a friend of Padan, and because of the dispute Stewart was not paid. As a small

contractor Stewart was struggling and Daedalus determined to "pay" Stewart directly and issued on its books a \$50,000 loan to Stewart, to be repaid if and when Shamrock paid Stewart. In fact Shamrock owes Stewart the sum of \$46,871.

31. On April 26, 2005, Daedalus sent a letter to Shamrock asking, among other things, that the defective equipment be replaced.

32. Silver Baron asserts that because there was no transfer by the date set, it shared in the rents with Premier, resulting in damages of over \$678,000, the difference between what the fixed rent (base monthly rental) would have been and the variable rate (on a 60-40 split in favor of Silver Baron over Premier).

33. Daedalus felt strongly about subcontract provisions and having the specified boiler.

34. At first Silver Baron attempted to sell fractional shares of these units as a residence club but then opted to begin selling the units outright in mid-2005. They were all sold by sometime in 2006, though the evidence was not convincing as to when that was, and most were sold in 2005. Silver Baron did not provide evidence of its profit from those sales. Silver Baron promised to provide tax return information to Shamrock at Padan's deposition and failed to do so after three formal discovery requests, blaming their change in lawyers for that oversight. No such documents were produced nor shown to the court. The court

finds Silver Baron, for some reason, failed to provide that legitimate discovery consisting of their tax return information which would have shown any profit made on these sales. Daedalus also failed to provide, until recently, their claimed damage calculations. Silver Baron's evidence on its damages is too speculative to amount to convincing evidence, sufficient to award such delay damages even under the contract.

35. Neither Daedalus nor Silver Baron had a performance bond.

36. Daedalus claims it paid, under their prime contract, \$400,000 to Silver Baron when Silver Baron was dissolved. Daedalus was unable to make the loan required by the prime contract and nothing happened until Silver Baron was dissolved, then Silver Baron was credited the sum of \$400,000, but it is not clear to the court just when that happened. Padan was and is the principle in both Daedalus and Silver Baron.

37. Shamrock filed a post-trial motion to admit exhibits 21, 22 and 27, urging Shamrock mistakenly believed they had been admitted as they were discussed at trial. The court will admit those exhibits and has considered them in this decision.

Based on the above findings and discussion, the court makes the following:

CONCLUSIONS OF LAW

1. Shamrock did the work and has not been paid. Daedalus has breached the contract by failing to pay \$256,786 and owes Shamrock that amount, less whatever the cost of replacing the current system as discussed below.

2. Shamrock breached the contract by failing to provide written notice of its knowledge that there was a design deficiency and of Shamrock's intent to substitute equipment. The court concludes that under this negotiated contract that was a most material breach.

3. Shamrock installed the other boiler without notice. The court concludes that it was not equivalent because it was not what Daedalus wanted and its upkeep and maintenance and operation involve a system Daedalus specifically did not want. Shamrock also failed to properly install the mixer valve which caused the over heating in the units until that was remedied in February 2005.

4. Daedalus failed to give written notice and did not declare the contract null and void for failure to timely complete the work.

4. Shamrock caused some delay but did not delay the date that Daedalus could turn over the project to Silver Baron such that Shamrock is responsible for any delay damages. Not only is Shamrock not responsible for any rental losses alleged by Silver

Baron, Shamrock is not responsible for the claimed \$400,000 Daedalus allegedly lost to Silver Baron. Moreover, under the Daedalus-Silver Baron prime contract, if there was a delay by Daedalus in turning the project to Silver Baron, the rental provisions were merely extended by one year and there are and can be no delay damages attributable to Shamrock for rental loss. Even if Shamrock did cause some delay, whatever rentals Silver Baron lost are not the responsibility of Shamrock entirely and the evidence is not such that the court can find any particular portion or percentage of fault by Shamrock in delay of the overall project.

5. Daedalus is entitled to what it bargained for, a system of its choosing and not of the choosing of Shamrock. Shamrock is responsible for either the replacement of the boiler and allied venting system or to pay Daedalus the cost of having another subcontractor do such work and provide such equipment.

6. Under the Sub-contract Shamrock does not appear to the court to be entitled to attorney fees against Daedalus. The paragraph 17 provision relied on by Shamrock refers to contractor being able to recover fees under certain circumstances but it does not provide that the subcontractor can recover attorney fees as best the court can discern.

7. Because Silver Baron did not obtain a bond, under UCA 14-2-2, as the owner Silver Baron is liable for the reasonable

damages as above concluded. Shamrock is entitled under that statute as the prevailing party overall to its attorney fees to be taxed as costs in the action.

8. Shamrock is entitled to pre-judgment interest, but not on the amount it owed Stewart, since April 2005.

9. Shamrock is not entitled to the amount paid (loaned) by Daedalus to Stewart, \$46,871. Thus, the amount owing by Daedalus to Shamrock is \$256,786 minus the amount owed to Stewart which Daedalus has paid, \$46,781, and minus the cost of replacement of the system installed defectively and not bargained for by Daedalus.

Shamrock is to prepare an order and judgment in compliance with URCP, Rule 7(f) setting forth this ruling. THIS MEMORANDUM DECISION IS INCORPORATED INTO THE FINAL JUDGMENT AND ORDER. Plaintiff should provide, in the proposed order, a provision awarding attorney fees in the amount of \$_____. A rule 73 affidavit should be filed, and that can be objected to as to necessity and reasonableness and any other basis in law and the

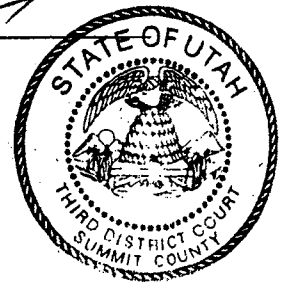
court will then fill in the amount the court determines should be awarded to Shamrock against Silver Baron.

DATED this 29 day of Jan, 2010.

BY THE COURT:



BRUCE C. LUBECK
DISTRICT COURT JUDGE



Case No: 050500453 Date: Jan 29, 2010

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050500453 by the method and on the date specified.

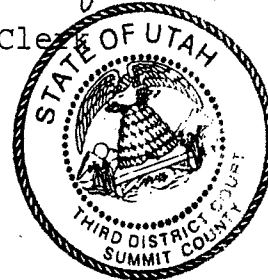
MAIL: JOSEPH M CHAMBERS 31 FEDERAL AVE LOGAN, UT 84321

MAIL: JOSH M CHAMBERS 31 FEDERAL AVE LOGAN UT 84321

MAIL: MELVIN S MARTIN 5282 S COMMERCE DR STE D-292 MURRAY UT 84107

Date: 01/29/10

B. B. Langquist
Deputy Court Clerk



Addendum: A-6

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY STATE OF UTAH

WHITE CAP CONSTRUCTION SUPPLY, INC,

Plaintiff,

vs.

SHAMROCK PLUMBING, LLC, et.al.,

Defendant.

SHAMROCK PLUMBING LLC,

Cross claim plaintiff,

vs.

SILVER BARON PARTNERS, LC;
DAEDALUS USA INC.; FRED W.
FAIRCLOUGH; and CHRISTINE
FAIRCLOUGH,

Cross claim defendants.

**SUPPLEMENTAL MEMORANDUM
DECISION**

Case No. 050500453

Judge BRUCE C. LUBECK

DATE: June 15, 2010

The above matter came before the court for a supplemental evidentiary hearing and argument on June 11, 2010, in the West Jordan Department of the court.

Third party plaintiff (hereinafter plaintiff) Shamrock was present through Mel S. Martin and cross claim defendants Daedalus and Silver Baron (hereinafter defendants) were present through Joseph M. Chambers and Josh Chambers.

BACKGROUND

The above matter came before the court for a bench trial on January 20, 21, and 22, 2010. The court issued a 28 page memorandum decision on January 29, 2010.

On February 5, 2010, plaintiff filed an affidavit seeking attorney fees. Defendants filed a counter declaration on February 19, 2010.

Thereafter on February 19, 2010, defendants filed an objection to a proposed judgment provided by plaintiff and a request to clarify the court's ruling. Defendant also urged it was the prevailing party and should be awarded attorney fees. Plaintiff filed a response on March 2, 2010, and also asked for clarification of the court's ruling. Defendants filed a combined reply and opposition on March 23, 2010.

Oral argument was held April 6, 2010 and the court issued a Minute Entry on April 15, 2010, scheduling a further evidentiary hearing in the West Jordan Department due to the re-assignment of the undersigned judge. That hearing was held, together with further oral argument, and the court took the issues under advisement.

The court finds supplemental facts as follows:

FINDINGS OF FACT

1. The system that was eventually installed in Building F by Shamrock remains to this date in Building F and is functioning. Daedalus continues to contend, however, that it did not get the system it desired. The court so found in its January 29, 2010 memorandum decision.

2. Later Building G was constructed by Daedalus, using other tradesmen rather than Shamrock. That building is basically the same as Building F in its design and function and purpose. The mechanical engineer who designed that Building G heating system testified at this hearing and the hot water system in Building G is tied into the system of Building F. That was done in 2007, well after the Building F issues of 2004-05.

3. That expert, Peterson, opined in common with Shamrock in 2004 that the specifications as called for were not permitted by the International Fuel Gas Code in that a natural draft appliance could not be connected into a system operating with a positive pressure system.

4. The specifications were not followed and in place is the Rite boiler with a negative pressure, or natural draft at the vent connector and two A.O. Smith water heaters which were as specified.

5. This expert opined that there were two options to eliminate the induced draft fan. In essence the two options were to replace the Rite boiler or the two water heaters. In the first, Option 1, there would need to be a new boiler which he estimated would cost \$45,900 and new flues for the water heaters which would cost \$16,500.

6. Defendant's project supervisor, Roy Bartee, opined that to do such work in what is called Option 1 would not cost \$54,200 (\$35,900+\$16,500) but would cost approximately \$133,000 because of the need for a good deal of other structural changes involving walls and roofs and other trades such as electricians, drywall, painting, and other sub contractors together with permit costs.

Based on the above findings and discussion, and the previous findings and discussion and conclusions of law, the court makes the following:

CONCLUSIONS OF LAW

1. To the extent the findings are conclusions of law and that these conclusions of law contain findings of fact, each is to be treated as a finding or conclusion as appropriate.

2. Shamrock did the work and has not been paid. Daedalus has breached the contract by failing to pay \$209,915. However, because Shamrock did not install the system Daedalus wanted, and

indeed Shamrock could not do so and comply with applicable codes, Shamrock is to install the proper "fix" and remediate the system as Peterson outlines in his Option 1, by re-installing the proper boiler and new flue system. The court finds and concludes that in fact that can be done for an amount less than Daedalus claims but more than Shamrock claims. The court is somewhat unguided here but notes that Peterson is a licensed mechanical engineer but his figures were in his words an "estimate" or even a "guestimate" and were not a bid. Barteo, a man of great expertise and experience, has considered factors the court believes Peterson has also included. Thus, the court will find and conclude, as best it can, that the true cost of this "fix is \$80,000 and that amount of judgment is to be reduced by that latter figure.

2. Shamrock breached the contract by failing to provide written notice of its knowledge that there was a design deficiency and of Shamrock's intent to substitute equipment. However, even considering the first breach rule, the court finds that the breach by Shamrock was not one that resulted in Daedalus' right to fail to pay. Even though the contract has many provisions allowing Daedalus to withhold payment for various reasons, the promise of Shamrock to give written notice is not a dependent or reciprocal obligation tied to payment. The court has found that notice was given by Shamrock, but not written

notice. Daedalus in letters asked Shamrock to change the system and Shamrock did not do so, but this order of the court, reducing the damages for non-payment by the amount of the re-installation of the "new" system amounts to the only damages suffered by Daedalus.

3. As found previously, Daedalus did not give written notice of termination of the contract nor declare it null and void.

4. The court indicated that Shamrock was entitled to attorney fees not under the sub-contract but under the bonding statute. Shamrock is entitled under that bonding statute as the prevailing party overall to its attorney fees to be taxed as costs in the action.

5. The court now, however, agrees with defendants that the entirety of the claim for fees by Shamrock is not justified. Shamrock did not prevail on its lien foreclosure claim and did not prevail on some of the issues for which it seeks attorney fees, such as the default judgment being set aside and the summary judgment motion. The affidavit of Shamrock does not properly differentiate some of those claims, successful and unsuccessful. However, using the flexible and reasoned approach, Daedalus did not prevail on its claim for delay damages either. The court believes Shamrock is entitled under the bonding statute to attorney fees. The court cannot second guess an affidavit that a particular task ought to take a certain amount of time,

for example, 1.2 hours rather than 3 hours, nor that costs should have been X rather than Y because of the cost, for example, of trial binders or postage or mileage. As best the court can calculate, carefully going over the affidavits of counsel, the court believes that using the flexible and reasoned approach and parsing out the tasks that were clearly not successful for Shamrock, Shamrock is entitled to costs in the sum of \$4400 and attorney fees in the sum of \$45,000. The court full well realizes those are rounded figures but again the court believes Shamrock prevailed overall, but not on some claims, and the court cannot figure on an hour-to-hour basis any closer than that sum. Thus, Shamrock is entitled to attorney fees and costs as found and concluded herein.

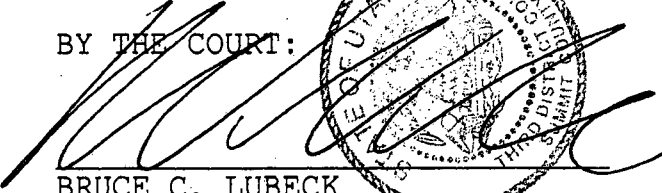
5. As to pre-judgment interest, the court again believes that Shamrock is correct, that Shamrock did not have the use of this sum owed and again the pure math figures were not really disputed. Even though this complex case shows the difficulty between sub-contractors and contractors, the court believes the sum known and certain, minus the re-installation work, is justified. Interest is to be calculated on the \$209,915 figure from April 2005 to this date. Even though the amount due is now reduced by the cost of re-installation, the court believes the sum was certain and fixed and known. In fact and in deed, the system is still working and being used by the owners after more

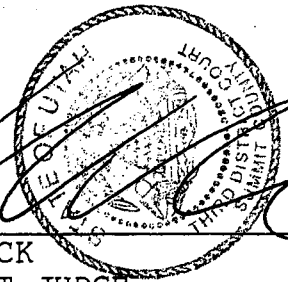
than five years. It is not the system desired and bargained for, however, but under the law the court believes the sum certain was calculable, now minus the re-installation costs, from April 2005.

Shamrock is to prepare an order and judgment in compliance with URCP, Rule 7(f) setting forth this supplemental ruling showing the judgment against Daedalus for the breach claim and Silver Baron for the bonding claim. THIS SUPPLEMENTAL MEMORANDUM DECISION and the January 29, 2010, MEMORANDUM DECISION ARE INCORPORATED INTO THE FINAL JUDGMENT AND ORDER.

DATED this 15 day of June, 2010.

BY THE COURT:


BRUCE C. LUBECK
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050500453 by the method and on the date specified.

MAIL: JOSEPH M CHAMBERS 31 FEDERAL AVE LOGAN, UT 84321

MAIL: JOSH M CHAMBERS 31 FEDERAL AVE LOGAN UT 84321

MAIL: MATTHEW G COOPER 5286 S COMMERCE DR STE A-136 MURRAY UT 84107

MAIL: LEWIS M FRANCIS 170 S MAIN ST STE 1500 SALT LAKE CITY UT 84101-1644

MAIL: MELVIN S MARTIN 5286 S COMMERCE DR STE A-136 MURRAY UT 84107

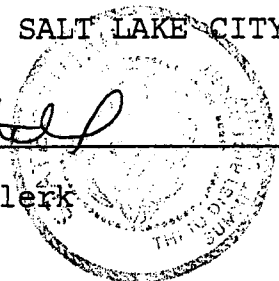
MAIL: HAROLD C VERHAAREN 5217 S STATE ST 4TH FLR SALT LAKE CITY UT 84107

Date:

June 10, 2010

Deputy Court Clerk

Deputy Court Clerk



Addendum: A-7

2010 JUL 27 AM 8:48

Matthew G. Cooper, Bar No. 5268
5286 South Commerce Drive, Suite A-136
Murray, UT 84107
Telephone: 801-284-7242
Facsimile: 801-284-7313

FILED BY

BM

MEL S. MARTIN, P.C.
Mel S. Martin, Bar No. 2102
5286 S. Commerce Drive, Suite A-136
Murray, UT 84107
Telephone: 801-263-1493
Facsimile: 801-284-7313
Attorneys for Cross-Claim Plaintiff

**IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY - STATE OF UTAH - PARK CITY DEPARTMENT
6300 N. Silver Creek Drive, #A, Park City, Utah 84098**

WHITE CAP CONSTRUCTION SUPPLY,
INC.,

Plaintiff,

vs.

STAR MOUNTAIN CONSTRUCTION,
INC., ED ZITE, SILVER BARON
PARTNERS, L.C., DAEDALUS USA, INC.
FRED W. FAIRCLOUGH, JR., CHRISTINE
FAIRCLOUGH, THOMAS STREBEL dba
RESORT CONSTRUCTION DRYWALL,
IDAHO PACIFIC LUMBER COMPANY,
INC., BINGGELI ROCK PRODUCTS,
INC., WESTERN STATES EQUIPMENT
CO., INC., SHAMROCK PLUMBING,
LLC, AND JOHN DOES 1-5,

Defendants.

JUDGMENT

Civil No.: 050500453

Judge Bruce C. Lubeck

<p>SHAMROCK PLUMBING, LLC,</p> <p>Cross-Claim Plaintiff,</p> <p>vs.</p> <p>SILVER BARON PARTNERS, L.C., DAEDALUS USA, INC., FRED W. FAIRCLOUGH, JR., and CHRISTINE FAIRCLOUGH,</p> <p>Cross-Claim Defendants</p>	
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This action came on for trial before the Court on January 20-22, 2010, the Honorable Bruce C. Lubeck presiding. The Court rendered its Memorandum Decision dated January 29, 2010, which is expressly incorporated into this final Judgment. Requests for Clarification were argued to the Court on April 6, 2010, and the Court took the matters under advisement. A Supplemental Evidentiary Hearing was held on June 11, 2010, and the Court issued its Supplemental Memorandum Decision on June 15, 2010, which is expressly incorporated into this final Judgment.

IT IS ORDERED AND ADJUDGED that Shamrock Plumbing, LLC recover from defendants SILVER BARON PARTNERS, L.C. and Daedalus USA, Inc., jointly and severally, the sum of ONE HUNDRED TWENTY-NINE THOUSAND NINE HUNDRED FIFTEEN DOLLARS (\$129,915.00), plus pre-judgment interest in the sum of ONE HUNDRED SEVEN THOUSAND SIX HUNDRED THREE DOLLARS (\$107,603.00), plus post-judgment interest at the statutory rate of 2.47%; and

*the court has considered Defs objections
filed 8/10/2010 - the court appointed
fees in
175
6/15/10
Keweenaw*

IT IS FURTHER ORDERED AND ADJUDGED that Shamrock Plumbing, LLC recover from Silver Baron Partners, L.C., court costs of \$4,400 and attorney fees of \$45,000, for a combined amount of FORTY-NINE THOUSAND FOUR HUNDRED DOLLARS (\$49,400.00) to be taxed as costs pursuant to U.C.A. § 14-2-2.

Dated this 13 day of July, 2010.

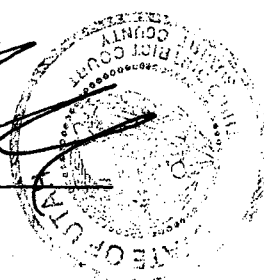

CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, UMMIT COUNTY, STATE OF UTAH.

DATE

July 27 2010

[Signature]
DEPUTY COUNTY CLERK

BY THE COURT:

[Signature]


CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 2010, I mailed a true and correct copy of the foregoing, **JUDGMENT**, via first-class mail, postage prepaid, to the following:

Joseph M. Chambers
Josh Chambers
Harris, Preston & Chambers, P.C.
31 Federal Avenue
Logan, UT 84321

[Signature]

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of July, 2010, I mailed a true and correct copy of the foregoing, **JUDGMENT**, via first-class mail, postage prepaid, to the following:

Clerk of the Court
Third Judicial District Court - Park City Department
6300 N. Silver Creek Drive, #A
Park City, UT 84098

M. Kowalczyk

Addendum: A-8

Rule 5. Service and filing of pleadings and other papers.

(a) Service: When required.

(a)(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(a)(2) No service need be made on parties in default except that:

(a)(2)(A) a party in default shall be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers;

(a)(2)(C) a party in default for any reason shall be served with notice of any hearing necessary to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) pleadings asserting new or additional claims for relief against a party in default for any reason shall be served in the manner provided for service of summons in Rule 4.

(a)(3) In an action begun by seizure of property, in which no person is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made.

(b)(1) If a party is represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. If an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice, service shall be made upon the attorney and the party.

(b)(1)(A) If a hearing is scheduled 5 days or less from the date of service, the party shall use the method most likely to give prompt actual notice of the hearing. Otherwise, a party shall serve a paper under this rule:

(b)(1)(A)(i) upon any person with an electronic filing account who is a party or attorney in the case by submitting the paper for electronic filing;

(b)(1)(A)(ii) by sending it by email to the person's last known email address if that person has agreed to accept service by email;

(b)(1)(A)(iii) by faxing it to the person's last known fax number if that person has agreed to accept service by fax;

(b)(1)(A)(iv) by mailing it to the person's last known address;

(b)(1)(A)(v) by handing it to the person;

(b)(1)(A)(vi) by leaving it at the person's office with a person in charge or leaving it in a receptacle intended for receiving deliveries or in a conspicuous place; or

(b)(1)(A)(vii) by leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

(b)(1)(B) Service by mail, email or fax is complete upon sending. Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.

(b)(2) Unless otherwise directed by the court:

(b)(2)(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(b)(2)(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(b)(2)(C) an order or judgment prepared by the court shall be served by the court.

(c) Service: Numerous defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service. Rule 26(i) governs the filing of papers related to discovery.

(e) Filing with the court defined. A party may file with the clerk of court using any means of delivery permitted by the court. The court may require parties to file electronically with an electronic filing account. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge. The filing date shall be noted on the paper.

Advisory Committee Notes

Addendum: A-9

Rule 52. Findings by the court; correction of the record.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(c)(1) by default or by failing to appear at the trial;

(c)(2) by consent in writing, filed in the cause;

(c)(3) by oral consent in open court, entered in the minutes.

(d) Correction of the record. If anything material is omitted from or misstated in the transcript of an audio or video record of a hearing or trial, or if a disagreement arises as to whether the record accurately discloses what occurred in the proceeding, a party may move to correct the record. The motion must be filed within 10 days after the transcript of the hearing is filed, unless good cause is shown. The omission, misstatement or disagreement shall be resolved by the court and the record made to accurately reflect the proceeding.

Addendum: A-10

Rule 55. Default.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party.

(b) Judgment. Judgment by default may be entered as follows:

(b)(1) By the clerk. Upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if :

(b)(1)(A) the default of the defendant is for failure to appear ;

(b)(1)(B) the defendant is not an infant or incompetent person;

(b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and

(b)(1)(D) the claim against the defendant is for a sum certain or for a sum that can be made certain by computation.

(b)(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment against the state or officer or agency thereof. No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

Addendum: A-11

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Addendum: A-12

Rule 74. Withdrawal of counsel.

(a) An attorney may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and no hearing or trial has been set. If a motion is pending or a hearing or trial has been set, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing or trial.

(b) An attorney who has entered a limited appearance under Rule 75 shall withdraw from the case by filing and serving a notice of withdrawal upon the conclusion of the purpose or proceeding identified in the Notice of Limited Appearance. An attorney who seeks to withdraw before the conclusion of the purpose or proceeding shall proceed under subdivision (a).

(c) If an attorney withdraws other than under subdivision (b), dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

(d) Substitution of counsel. An attorney may replace the counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel and the client. Court approval is not required if new counsel certifies in the notice of substitution that counsel will comply with the existing hearing schedule and deadlines.

Addendum: A-13

§ 14-2-2. Failure of owner to obtain payment bond—Liability

(1) An owner who fails to obtain a payment bond required under Section 14-2-1 is liable to each person who performed labor or service or supplied equipment or materials under the commercial contract for the reasonable value of the labor or service performed or the equipment or materials furnished up to but not exceeding the commercial contract price.

(2) An action to recover on the liability described in Subsection (1) may not be commenced after the expiration of one year after the day on which:

(a) the last of the labor or service was performed; or

(b) the equipment or material was supplied by the person.

(3) In an action for failure to obtain a bond, the court shall award reasonable attorneys' fees to the prevailing party. These attorneys' fees shall be taxed as costs in the action.

Laws 1987, c. 218, § 4; Laws 1989, c. 271, § 3; Laws 1994, c. 308, § 2; Laws 2004, c. 111, § 2, eff. May 3, 2004.

Addendum: A-14

CHAPTER 1

INTEREST

Section

- 15-1-1. Interest rates—Contracted rate—Legal rate.
- 15-1-2, 15-1-2a. Repealed.
- 15-1-3. Calculated by the year.
- 15-1-4. Interest on judgments.
- 15-1-5. Repealed.
- 15-1-6. Repealed.
- 15-1-7. Repealed.
- 15-1-8, 15-1-9. Repealed.
- 15-1-10. Repealed.

§ 15-1-1. Interest rates—Contracted rate—Legal rate

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

(3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

Laws 1907, c. 46, § 1; Laws 1935, c. 42, § 1; Laws 1981, c. 73, § 1; Laws 1985, c. 159, § 6; Laws 1989, c. 79, § 1.

Codifications C.L. 1907, § 1241; C.L. 1917, § 3320; R.S. 1933, § 44-0-1; C. 1943, § 44-0-1.

Addendum: A-15

§ 14-2-2. Failure of owner to obtain payment bond—Liability

(1) An owner who fails to obtain a payment bond required under Section 14-2-1 is liable to each person who performed labor or service or supplied equipment or materials under the commercial contract for the reasonable value of the labor or service performed or the equipment or materials furnished up to but not exceeding the commercial contract price.

(2) An action to recover on the liability described in Subsection (1) may not be commenced after the expiration of one year after the day on which:

- (a) the last of the labor or service was performed; or
- (b) the equipment or material was supplied by the person.

(3) In an action for failure to obtain a bond, the court shall award reasonable attorneys' fees to the prevailing party. These attorneys' fees shall be taxed as costs in the action.

Laws 1987, c. 218, § 4; Laws 1989, c. 271, § 3; Laws 1994, c. 308, § 2; Laws 2004, c. 111, § 2, eff. May 3, 2004.

Addendum: A-16

Matthew G. Cooper, Bar No. 5268
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Facsimile: 801-284-7313

THIRD DISTRICT COURT-SUMMIT

2009 MAR -5 PM 4:01

FILED BY



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Attorneys for Cross-Claim Plaintiff

**IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY - STATE OF UTAH - PARK CITY DEPARTMENT
6300 N. Silver Creek Road, Park City, Utah 84098**

WHITE CAP CONSTRUCTION SUPPLY,
INC.,

Plaintiff,

vs.

STAR MOUNTAIN CONSTRUCTION,
INC., ED ZITE, SILVER BARON
PARTNERS, L.C., DAEDALUS USA, INC.
FRED W. FAIRCLOUGH, JR., CHRISTINE
FAIRCLOUGH, THOMAS STREBEL dba
RESORT CONSTRUCTION DRYWALL,
IDAHO PACIFIC LUMBER COMPANY,
INC., BINGGELI ROCK PRODUCTS,
INC., WESTERN STATES EQUIPMENT
CO., INC., SHAMROCK PLUMBING,
LLC, AND JOHN DOES 1-5,

Defendants.

JUDGMENT

Civil No.: 050500453

Judge Bruce C. Lubeck

<p>SHAMROCK PLUMBING, LLC,</p> <p>Cross-Claim Plaintiff,</p> <p>vs.</p> <p>SILVER BARON PARTNERS, L.C., DAEDALUS USA, INC., FRED W. FAIRCLOUGH, JR., and CHRISTINE FAIRCLOUGH,</p> <p>Cross-Claim Defendants</p>	
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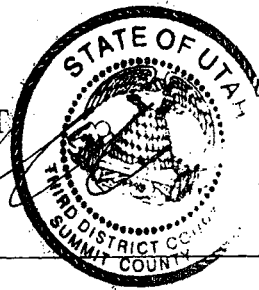
This matter came before the Court, without hearing, the Honorable Bruce C. Lubeck presiding, upon the Motion of Shamrock Plumbing, LLC for default judgment. The Court, having reviewed the pleadings and file in this matter, and good cause appearing therefore, now orders and adjudges:

JUDGMENT

That Shamrock Plumbing, LLC recover of Cross-Claim defendants Daedalus USA, Inc. and Silver Baron Partners, L.C., the sum of \$418.095.71, with interest thereon at the rate of 2.40% as provided by law.

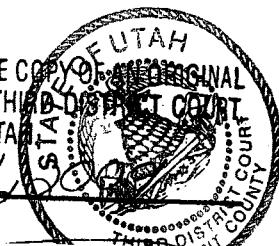
Dated this 5 day of March, 2009.

BY THE COURT



I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT SUMMIT COUNTY STATE OF UTAH

DATE: March 11, 2009




CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February, 2009, I mailed a true and correct copy of the foregoing, **JUDGMENT**, via first-class mail, postage prepaid, to the following:

Silver Baron Partners, L.C.
2900 Deer Valley Drive
P.O. Box 1937
Park City, UT 84060

Daedalus USA, Inc.
2900 Deer Valley Drive
P.O. Box 1937
Park City, UT 84060

A handwritten signature in cursive script, appearing to read "M. Kowalski", is written over a horizontal line.

Addendum: A-17

2009 MAR 19 AM 10:30

Matthew G. Cooper, Bar No. 5268
5282 South 320 West, Suite D-292
Murray, UT 84107
Telephone: 801-284-7242
Facsimile: 801-284-7313

FILED BY _____

MEL S. MARTIN, P.C.
Mel S. Martin, Bar No. 2102
5282 S. Commerce Drive, Suite D-292
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Telephone: 801-263-1493
Facsimile: 801-284-7313
Attorneys for Cross-Claim Plaintiff

**IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY - STATE OF UTAH - PARK CITY DEPARTMENT
6300 N. Silver Creek Road, Park City, Utah 84098**

WHITE CAP CONSTRUCTION SUPPLY,
INC.,

Plaintiff,

vs.

STAR MOUNTAIN CONSTRUCTION,
INC., ED ZITE, SILVER BARON
PARTNERS, L.C., DAEDALUS USA, INC.
FRED W. FAIRCLOUGH, JR., CHRISTINE
FAIRCLOUGH, THOMAS STREBEL dba
RESORT CONSTRUCTION DRYWALL,
IDAHO PACIFIC LUMBER COMPANY,
INC., BINGGELI ROCK PRODUCTS,
INC., WESTERN STATES EQUIPMENT
CO., INC., SHAMROCK PLUMBING,
LLC, AND JOHN DOES 1-5,

Defendants.

CORRECTED JUDGMENT

Civil No.: 050500453

Judge Bruce C. Lubeck

<p>SHAMROCK PLUMBING, LLC,</p> <p>Cross-Claim Plaintiff,</p> <p>vs.</p> <p>SILVER BARON PARTNERS, L.C., DAEDALUS USA, INC., FRED W. FAIRCLOUGH, JR., and CHRISTINE FAIRCLOUGH,</p> <p>Cross-Claim Defendants</p>	
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This Judgment corrects a typographical error in the Judgment entered on March 5, 2009.

This matter came before the Court, without hearing, the Honorable Bruce C. Lubeck presiding, upon the Motion of Shamrock Plumbing, LLC for default judgment. The Court, having reviewed the pleadings and file in this matter, and good cause appearing therefore, now orders and adjudges:

JUDGMENT

That Shamrock Plumbing, LLC recover of Cross-Claim defendants Daedalus USA, Inc. and Silver Baron Partners, L.C., the sum of FOUR HUNDRED EIGHTEEN THOUSAND NINETY-FIVE DOLLARS AND SEVENTY-ONE CENTS (\$418,095.71), with interest thereon at the rate of 2.40% as provided by law.

Dated this 18 day of March 2009.

BY THE COURT:

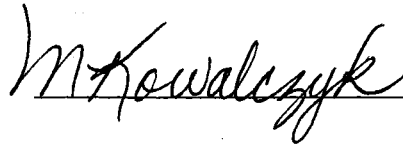
151

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2009, I mailed a true and correct copy of the foregoing, **CORRECTED JUDGMENT**, via first-class mail, postage prepaid, to the following:

Silver Baron Partners, L.C.
2900 Deer Valley Drive
P.O. Box 1937
Park City, UT 84060

Daedalus USA, Inc.
2900 Deer Valley Drive
P.O. Box 1937
Park City, UT 84060

_____