94CV02436-CLP-MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF F&G MECHANICAL CORPORATION, IN ITS INDIVIDUAL CAPACITY,

Plaintiff,

- against -

MANSHUL CONSTRUCTION CORPORATION AND AETNA CASUALTY AND SURETY COMPANY,

Defendant.
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MEMORANDUM
AND ORDER

94 CV 2436 (CLP)

On May 19, 1994, F&G Mechanical ("F&G") brought suit against Manshul Construction Corp. ("Manshul" or the "contractor"), pursuant to the Miller Act, 40 U.S.C. § 270a, 270b, alleging breach of a subcontract between F&G and the general contractor, Manshul, in connection with services performed by F&G at the United States Navy Administration Building, located at Fort Wadsworth, in Staten Island, New York (the "Navy Project"). Aetna Casualty and Surety Company ("Aetna"), as the holder of a payment bond issued for Manshul in connection with the Navy Project,[1] was named as a co-defendant in the suit.

In this action, F&G seeks judgment against Aetna in the amount of $55,529.11, plus prejudgment interest, representing the remaining amount owed under its agreement with

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[1]Pursuant to the Miller Act, 40 U.S.C. §§ 270a, et seq., Aetna had agreed to pay the subcontractors and suppliers of Manshul who provided labor or materials for the Navy Project, but who did not receive payment from Manshul. As the surety for Manshul, Aetna assumes and is entitled to the defenses available to Manshul and to assert as set-offs, any counterclaims which Manshul had against F&G. See, e.g., United States ex rel. Hussman Corp. v. Fidelity & Deposit Co., 999 F. Supp. 734, 748 (D.N.J. 1988).

Manshul, along with additional amounts incurred as the result of extra work performed by F&G. F&G contends that Manshul deliberately withheld progress payments for work completed by F&G, and that this material breach of the contract between the parties excused further performance by F&G.[2] Defendant contends that F&G is not "justly due" any amount because Manshul experienced total out-of-pocket expenses in the amount of $66,593.77[3] as a result of F&G's defective and incomplete contract performance. Specifically, defendant alleges that: 1) F&G's work was substandard; 2) F&G was responsible for water damage to the sheet rock and should pay the alleged cost of replacing it; 3) F&G was responsible for and should pay the remedial costs associated with certain damage that occurred to the underground sewer and sanitary system; 4) F&G never completed its subcontract requirements, including certain "punch-list"[4] items; and 5) finally, F&G's refusal to return to the Navy Project to complete the outstanding work constituted a material breach of the contract.

Following the trial of the matter before this Court, which commenced on July 18, 1996, Manshul filed for reorganization under Chapter 11 of the Bankruptcy Code, and the action

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[2]Indeed, F&G argues that its good faith is demonstrated by the fact that it continued to return to the Navy Project even though F&G had not received a payment from Manshul for nearly five months.

[3]Defendant notes that neither F&G's claim for $55,529.11 nor Aetna's calculated set-off of $66,593.77 include a 10% overhead and 10% profit charge which general contractors generally charge when they perform work on a subcontractor's behalf. (Def.'s Mem. at 1 n.3 (citing United States ex rel Perosi Elec. Co. v. Manshul Construction Corp., 940 F. Supp. 492, 498 n. 4 (E.D.N.Y. 1996)).

[4]The "punch list" contained a number of corrective items needed to be completed before the work under the Agreement was concluded. See generally United States v. ex rel Perosi Elec. Corp. v. Manshul Construction Corp., 940 F. Supp at 496.

against Manshul was automatically stayed pursuant to 11 U.S.C. § 362.[5] On November 21, 1996, pursuant to a motion filed by F&G, this Court severed that portion of the case pertaining to F&G's claims against Manshul and ordered Aetna and F&G to file the post-trial briefs that had been stayed pending the Manshul bankruptcy proceedings.

On January 22, 1997, a motion to disqualify Manshul's trial counsel on the case, Carol A. Sigmond, Esq., from continuing to act as Aetna's counsel was filed by Allan Schulman, former president and sole shareholder of Manshul. Following extensive briefing on the issue,[6] the motion for disqualification was denied on August 6, 1997, and the parties were ordered to submit their post-trial briefs by September 11, 1997. Having heard the testimony of the witnesses at trial and considered the exhibits and post-trial briefs of both parties,[7] this Court makes the following findings of fact and conclusion of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Contract

On September 26, 1991, the Navy issued a contract to Manshul to construct the new headquarters and administration building for the now defunct Staten Island naval station. The

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[5]On December 5, 1996, Manshul's Chapter 11 case was converted to a Chapter 7 proceeding under the Code and a Trustee was appointed by the Bankruptcy Court, pursuant to Chapter 7 of the Code.

[6]The controversy surrounding the motion for disqualification of Ms. Sigmond was discussed in an August 6, 1997 Order of this Court, familiarity with which is presumed.

[7]Due to the pending bankruptcy of Manshul and the severance order, this order deals only with the potential liability of the defendant Aetna.

three-story building encompassed 40,000 square feet made of structural steel and metal decking with concrete slabs and masonry walls. On November 22, 1991, F&G entered into a written agreement with Manshul to perform a variety of plumbing related work at the Navy Project, including all of the plumbing installation within the perimeter of the building to five feet outside the perimeter, in exchange for the base sum of $173,000, with additional amounts to be paid upon the performance of additional work agreed upon pursuant to change orders.

B. The Witnesses

At the trial, plaintiff F&G presented the live testimony of two witnesses: Peter Stassi, F&G's project manager, employed by F&G for 23 years; and John Sanmarco, a civilian employee with the Navy who worked as an engineering technician and representative of the Resident Officer in Charge of Construction ("ROICC"). Plaintiff also introduced the deposition testimony of William J. Schneider,[8] a professional engineer, with a degree in civil engineering, formerly employed by Manshul.

John Sanmarco testified at trial that he was assigned to the Navy Project at its inception in approximately October 1990 and worked as an engineering technician, with the title of ROICC representative, [9] until June 1994 when he was forced to leave the job[10] as a result of any injury he

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[8]Due to his untimely death, William J. Schneider, a former employee of Manshul, could not testify in person. Accordingly, portions of his deposition transcript were admitted into evidence.

[9]On direct examination, Sanmarco testified that he held the title of ROICC; on cross-examination, however, he clarified his testimony, stating that he was actually the "representative" of the ROICC, First Commander Stasziewicz and later Commander Pandoleck. (Tr. at 259-60). On cross-examination, Mr. Sanmarco also testified that he had previously worked as a carpenter

suffered in September 1993. As the ROICC representative, Mr. Sanmarco's job was to check on the people responsible for contractor quality control (the "CQC") and ensure that the inspections were being done properly on a daily basis, to oversee safety on the Project, and to deal with other construction related items. As part of his job, he would observe the testing of the subcontractors' work, which would be conducted by an independent testing agency other than Manshul or the subcontractor themselves. (Tr. at 215-16). Also as part of his responsibility, Mr. Sanmarco recorded on a daily basis his own observations with respect to out of sequence work and contract noncompliance. (Tr. at 222). Project engineering personnel employed by the Navy would then review the CQC Report, as well as Sanmarco's Contractor Representative Report ("RR"). If a noncompliance was not corrected, Sanmarco would then issue a noncompliance notice to the superintendent and the contractor, and generally, the contractor would be given seven to fourteen days to correct the deficiency. (Tr. at 225). Mr. Sanmarco estimated that he issued fifty to sixty noncompliance notices to Manshul. Mr. Sanmarco testified that within the confines of the specifications set out in the contract, the means and methods of construction were left to the discretion of Manshul. (Tr. at 263). He testified that Manshul had a critical path schedule and that there were also two-week schedules discussed in the CQC meetings. (Tr. at 264).[11] However, he testified that the work did not proceed smoothly; there was out-of-sequence work,

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for the Navy, but that he was not a professional engineer. (Tr. at 259).

[10]As a result of his job-related injury, Mr. Sanmarco brought suit against Manshul.

[11]Mr. Sanmarco noted that there were delays in the schedule, due in part to the sheetrocking and a glass factory strike which delayed delivery of the windows.

and subcontractors left the job before their work was completed, some complaining that they weren't getting paid. (Tr. at 226-227). The Navy contract contained a completion clause, which was extended at least twice for change order work. (Tr. at 229). Mr. Sanmarco further testified that he reviewed reports prepared by Manshul's representative, Alfred Haugland, indicating the percentage of work completed and noted that Manshul was paid regularly every thirty days based on the percentage of work completed. (Tr. at 228).

In his deposition, Mr. Schneider testified that beginning in approximately August 1992, he served in the capacity of "supplemental personnel" under Mr. Szubiski, the "CQC," responsible for contractor quality control on the Navy Project. According to Mr. Schneider's testimony, he was responsible for inspecting the work on the job and then preparing a daily report for the CQC. Mr. Schneider would not approve any work that was not in compliance with the contract and indeed, the Contractor Quality Control System specifications in the Navy's contract with Manshul explicitly provided that "the CQC Representative shall not allow the Contractor to add or to build upon non-conforming work[12] unless, in the opinion of the Contracting Officer, correction can be made without disturbing the continuing work." (Ex. SA at 7-8). The Contracting Officer on the Navy Project, Navy Lieutenant Commander, Stasiewicz, was responsible for deciding if the Navy would permit "out-of-sequence" work to be done. (S Tr. at 18, 51). In addition to the CQC plan, which established how quality control would be maintained, Donald Warnett, Project Manager for Manshul prepared the scheduling report, which

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[12]"Non-conforming work" was defined by the witness as work that "doesn't conform to the plan and specifications" of the contract. (S Tr. at 17). References to "Ex. S" or S Tr." refer to exhibits introduced at the Schneider deposition or pages in the transcript of the Schneider deposition, respectively.

established the sequence in which the various types of work were to be performed, and which was submitted to the Navy for approval.

Mr. Schneider testified that he observed all of the testing required under the plumbing subcontract with F&G, and if he observed any non-conforming items, he would write it up on his daily report, advise Mr. Szubiski, and if the nonconformance wasn't corrected, then it went on a non-conformance list. (S Tr. at 27). He testified that there were delays in the Navy Project and one of the delays was caused by the plumber, F&G, not coming to the job. (S Tr. at 29).

Defendant called as a witness Alfred Haugland, project superintendent with Manshul since December 1991. Mr. Haugland testified that he had an Associate of Science degree in civil technology and one in architecture, and that he had thirty-two years of experience in Construction According to Mr. Haugland's testimony, he served as project superintendent on the Navy Project from the beginning until it was completed and accepted by the Navy on June 15, 1994. Mr. Haugland testified that he was on site every day but that Mr. Stassi, project manager for F&G, was there "[v]ery rarely." (Tr. at 328).

LEGAL DISCUSSION

F&G's CLAIMS

The Miller Act, 40 U.S.C. §§ 270a and b (the "Act"), requires a government contractor "to post a surety bond 'for the protection of all persons supplying labor and material in the prosecution of the work provided for' in the contract." Id. (quoting 40 U.S.C. § 270b(a)). The Act was intended to provide an alternate remedy to protect subcontractors who supplied material and labor to federal public works projects. See FD Rich Co., v. United States ex rel Indus.

Lumber Co., 417 U.S. 116, 122 (1974). Under the Act, the subcontractor may sue on the bond for "the balance . . . unpaid at the time of institution" of the suit and to recover "the sum or sums justly due him." 40 U.S.C. § 270b)(a). The subcontractor bears the burden of proving that it complied with the terms of its agreement and that it has not been paid for those sums that are "justly due." 40 U.S.C. § 270b(a).[13] See United States ex rel Foster Wheeler Corp. v. American Sur. of New York, 142 F.2d 726, 728 (2d Cir. 1944).

The defending general contractor and here the surety company, Aetna, standing in the shoes of Manshul, are entitled to recoup the value of any defective or incomplete performance. See United Structures of America, Inc. v. G.R.G. Eng'g, S.E., 9 F.3d 996 (1st Cir. 1993) (holding that the aim of recoupment "would seem to match the statute's requirement of determining the sums 'justly due' a supplier, making recoupment an appropriate defense in Miller Act cases"). Even when a subcontractor has substantially performed its contract, courts have held that the contractor is entitled to a set-off for damage caused to other trades as a result of defective performance on the part of the subcontractor. See United States ex rel. Coffey v. National Construction Co., 155 F. Supp. 368, 372-73 (N.D.N.Y. 1957); see also United Structures of America v. G.R.G. Eng'g, S.E., 9 F.3d at 999; United States ex rel. Perosi Elec. Corp. v. Manshul Construction Corp., 940 F. Supp. at 503; United States ex rel. Foster Wheeler v. American Sur. of New York, 142 F.2d at 728. However, the general contractor or in this instance, Aetna, bears the burden of proof as to the recoupment or set-off. See United States ex

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[13]The Act provides that suits instituted under this provision "shall be brought in . . . the United States District Court for any district in which the contract was to be performed and executed." 40 U.S.C. § 270b(b). Thus, venue here properly lies in the Eastern District of New York.

rel. Foster Wheeler v. American Sur. of New York, 142 F.2d at 728.

Accordingly, there are two basic issues to be decided: 1) whether F&G has carried its burden of establishing that it is entitled to payment for the remainder of the work as well as the contract change orders; and 2) whether Aetna has proven that it is entitled to any credit or set-off due to incomplete or defective work.[14]

F&G Completed It's Work on the Project

F&G contends that it completed the work that it was required to perform under the contract and that it is entitled to full payment. In support of its claim, F&G presented both documents and testimony which this Court finds prove, by a preponderance of the evidence, that F&G performed essentially all of its required services under the Agreement for over a year and a half.

Specifically, Peter Stassi testified that F&G successfully bid for the plumbing subcontract at the Navy Project and entered into a written agreement with Manshul, dated November 21, 1991 (the "Agreement"). Under the Agreement, F&G was required to perform all plumbing system work for five feet outside the building and within the inner structure of the building, including "the waste and vent system, sanitary system, storm system, domestic water system and

[14]Since the parties stipulated in the pre-trial order that F&G is a claimant entitled to seek reimbursement under the Miller Act bond provided by Aetna for supplying labor and materials to a federal government project, that issue is not in dispute. Similarly, there does not appear to be any dispute that F&G filed its claim under the bond in a timely fashion.

natural gas piping system along with the fixtures and trim." (Tr. at 20; Ex. A).[15] A rider to the Agreement further specified that F&G was to install all gas and water meters and appurtenances, as well as "[p]erform all interior building excavation as required for the completion of the work of this subcontract agreement, including compaction and back-fill." (Id.). F&G was also required to obtain the necessary materials, furnish and install a temporary water system for three construction trailers, perform all required inspections, ensure that all submittals and testing reports are certified by a professional engineer, provide layout drawings and a hot water system in storage tanks, perform the sanitation of the new system, furnish and install terrazo shower base and skins for all cabinetry and furnish and install domestic water heaters and gas service to two boilers. (Tr. at 21-22). There was a provision in the Agreement that specified that F&G was not to make "any claim for extra or additional work unless the same shall be done in pursuance of a written change order." (Ex. A ¶ 10). There was also a provision which stated that Manshul would not be responsible for loss or damage to the work "until after final acceptance of the work by the Owner and itself." (Id.). Finally, F&G was required to furnish a payment and performance bond.

Mr. Stassi testified that, with the exception of installing certain sinks and cabinets, all of the work required to be done under the Agreement was ultimately completed by F&G. (Ex. A, Rider A, at 2). Mr. Stassi testified that these cabinets were not installed because the Navy did not select the sinks for those cabinets until after F&G left the site for nonpayment. (Tr. at 22, 107).

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[15]References to "Tr. at " are references to pages from the transcript of the trial before this Court. References to "Ex." are references to exhibits admitted into evidence during the trial.

According to Mr. Stassi, F&G submitted requisitions for payment from Manshul for services performed every thirty days. In the beginning, payments were received every 30 to 45 days. However, by May 1993, the periodic progress payments made by Manshul had become sporadic and incomplete, often with months going by between payments. Mr. Stassi testified that beginning in May of 1993, Manshul began to send payments only every 90 to 120 days. In August 1993, F&G stopped work altogether for nonpayment. Thereafter, following the last payment received in May 1993, F&G did not receive another payment from Manshul until September 27, 1993, when F&G received a check for $5,577.00. (Ex. R). After some additional payments were made by Manshul, F&G returned to work, only to stop again in January 1994, when Manshul failed again to make payments. After that, F&G did not return to the site. Mr. Stassi testified that of the total amount owed to F&G - - $185,629.00 - - F&G received total payments from Manshul in the amount of $130,100.00.

On January 25, 1994, Mr. Stassi wrote a letter to Mr. Schulman, President of Manshul, seeking payment in the amount of $55,000 owed for the remainder of the work performed by F&G under the Agreement. (Ex. U). When Mr. Stassi failed to receive a response to his January 1994 letter from either Schulman or anyone else at Manshul, Mr. Stassi wrote another letter on February 14, 1994, addressed to Larry Horowitz, who had replaced Don Warnett as Project Manager at Manshul. (Ex. V). In response, Mr. Horowitz sent a letter dated February 23, 1994, informing F&G that it had not received payment because F&G owed $44,324.00 for the cost of cleanup and sheetrock removal due to water damage caused by F&G. (Ex. J).[16] When Mr. Stassi

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[16]See discussion infra at 34-35.

subsequently asked for documentation of this amount or an explanation of the estimate, Mr. Stassi received no response from Manshul. (Tr. at 103).[17]

Indeed, F&G never received any documentation to support Manshul's claims with respect to these charges. According to Mr. Stassi, he submitted this claim to the insurance company and denied that F&G was responsible. He then informed Manshul that Manshul was in breach for nonpayment under the Agreement and that F&G would not be returning to the jobsite until it received payment. (Tr. at 100-01).

F&G contends that it was entitled to cease its work on the Project when Manshul breached the Agreement through its failure to make substantial progress payments. It is well-established that a substantial failure to comply with a payment provision in a construction contract, which requires the provision of materials or services over an extended period, constitutes a breach of contract where the conditions precedent have been satisfied. See Guerini Stone Co. v. P.J. Carlin Constr. Co., 248 U.S. 334, 344 (1919); A-1 Gen. Contracting Inc. v. River Market Commodities Inc., 212 A.D.2d 897, 900, 622 N.Y.S.2d 378, 381 (3d Dep't 1995); Louis N. Picciano & Son v. Olympic Construction Co., 112 A.D.2d 604, 607, 492 N.Y.S.2d 476, 479 appeal dismissal, 66 N.Y.2d 854, 489 N.E.2d 253, 498 N.Y.S.2d 366 (1985).

Defendant does not dispute the base contract price of $173,000. Nor does it dispute that F&G provided the drainage, waste and vent system ("DWV"), the domestic water system, the

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[17]By letter dated August 30, 1995, F&G was notified by Manshul's insurance company that due to F&G's negligence, Manshul received a payment of $30, 218 for water damage, allegedly incurred on April 15, 1993. (Ex. PPPPP). According to Mr. Stassi, F&G was not conducting any waterline testing at that time and therefore, could not have been responsible for any waterline damage. (Tr. at 117).

underground system, most of the plumbing fixtures, and the hot water heater and gas installation as required under the Agreement. Rather, defendant contends that F&G is not entitled to the payments it now seeks because F&G explicitly waived its right to seek these payments and because it breached its Agreement with Manshul by failing to complete its work under the Agreement in a satisfactory condition. In addition to the $44,324.00 that Manshul claimed was owed by F&G for cleanup work required to repair water-damaged sheetrock, Aetna argues that there were other items required by the Agreement which F&G failed to complete. Among these items were the punch list, the temporary water hookups, access doors, and removal of piping and materials and miscellaneous items. Specifically, defendant claims that F&G defectively installed the sanitary line in the underground system, resulting in leaks and damage to the system; that it defectively installed and tested the hubless joints in the DWV system; that it failed to provide firestopping and sleeves in a timely fashion, resulting in damage to the ceiling tiles during corrective work; that it was late in delivering a hot water heater, requiring refabrication of the exhaust flue; that it failed to properly install a drain; that it failed to provide a sink and two access doors; that it failed to provide certain temporary water hookups; that it failed to complete the punch list; and failed to pay for required inspections.

F&G concedes that there were a number of items on the punch list which it did not complete. (Tr. at 421-23). On February 5, 1994, February 9, 1994, and April 7, 1994, Mr. Haugland sent letters to Mr. Stassi requesting that he complete the punch list items. (Exs. 140, 142, 143). According to Haugland, Stassi did not respond nor did F&G complete the work. Manshul then hired Al Harbert, a plumbing contractor, to complete the work on F&G's punch list. (Ex. 138).

By letter dated April 12, 1994, Manshul notified F&G that until the items on the punch list were completed, F&G would not be paid. (Tr. at 101; Ex. X). The value of the items to be completed on the punch list was calculated by Mr. Stassi to be $750.00, and by Mr. Haugland to be over $1,700. (Tr. at 102; Exs. Y; AA). Mr. Stassi thereafter informed Mr. Haugland that there were certain items specified in Mr. Haugland's letter - - namely, dark room sinks and furnishings - - which were not in F&G's Agreement, and that, in any event, F&G was not returning to complete the punch list items because F&G had not yet been paid for the work already completed. (Ex. BB).

Mr. Haugland's letter also notified F&G that it had not supplied the required temporary water lines to the building, nor had it removed the ones that had been installed. (Ex. W). Mr. Haugland testified that item 3 of Rider A to the Agreement required F&G to "furnish and install temporary water system at new building location and for three construction trailers," as well as "two general outlets at site." (Ex. A, Rider A at 2).[18] Specifically, with respect to the temporary water hookups, Mr. Haugland testified that there was only one trailer hookup, and one water outlet connection provided by F&G, despite the fact that the Agreement called for three trailer hookups and two general water outlets. (Tr. at 383; Ex. A, Rider A at 2) The letter also indicated that because someone had placed pavement over the temporary water lines, F&G would have to remove the pavement first.

According to Mr. Haugland's testimony, it was F&G's responsibility to remove the

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[18]There was no evidence presented to this Court to indicate whether F&G was ever advised by Manshul that it was not in conformance with the agreement because it only supplied two water hookups.

water lines. On June 27, 1994, Mr. Haugland faxed a letter to Mr. Stassi, asking him to remove the water lines. (Exs. 98, 99). Two subsequent memoranda, dated February 7, 1994, and March 17, 1994, were faxed to Mr. Stassi repeating the request to remove the water lines, but Mr. Stassi never responded. (Tr. at 387; Exs. 100, 101). Since F&G refused to return to the site to remove the temporary water hookups, Mr. Haugland testified that Manshul was forced to perform the task. In order to remove the hookup, Manshul had to remove the asphalt of the street under which the temporary water lines ran. (Tr. at 384). [19] The total cost of removing the temporary water line and repairing the road was $3,063.81. (Ex. 104; Tr. at 389). Thus, Manshul seeks to charge F&G for the $2,500 needed to disconnect the waterline and backfill the asphalt. (Tr. at 113).

Mr. Haugland testified that F&G failed to complete a number of other items required by the Agreement. Specifically, F&G was required to provide access doors to enable someone to access a valve or plug or other plumbing device requiring maintenance. (Tr. at 396). However, according to Mr. Haugland, Manshul was forced to acquire and install two access doors because F&G failed to do so. (Exs. 109, 110; Tr. at 396-97). F&G was also required to provide a hot water heater, but when the heater was finally submitted, it was determined that there was a problem in that the heater required a six-inch sleeve rather than the four-inch sleeve originally called for in the drawings. (Tr. at 397-98). Accordingly, Manshul had to have a new six inch flue made by Meadow Mechanical, the sheet metal subcontractor. (Ex. 111; Tr. at 398-99). Meadow Mechanical thereafter charged Manshul $1336.67 to fabricate and install the new flue

[19] At this point, the lawsuit had already begun.

for the hot water heater. (Tr. at 400; Exs. 112, 113). Manshul believed that this was also F&G's responsibility and seeks reimbursement for that amount from F&G.

There was also a problem with a drain in the janitor's closet which had to be lowered, and Manshul arranged to do the work even though it was F&G's responsibility. Certain work was performed by Nastassi White in connection with patching tile on the first, second, and third floors, the cost of which Mr. Haugland testified that he divided among the responsible subcontractors, including Meadow Mechanical, Mr. Perosi, the electrical subcontractor, and F&G. Finally, on June 10, 1994, Mr. Haugland faxed a memorandum to Mr. Stassi indicating that Manshul had been forced to move certain material and piping that F&G had been storing at Manshul's trailer because the Navy had asked Manshul to clean up the site. (Tr. at 330; Ex. 7).

Apart from these items, Mr. Haugland did not refute the testimony of either Mr. Schneider or Mr. Stassi that F&G had performed its responsibilities under the Agreement and its work had been approved by the Navy. (Tr. at 435-437; S Tr. at 78-90). Haugland also admitted that Manshul received payments from the Navy for the work that was completed by F&G.

In response, F&G admits that these items were not completed, but contends that it was justified in not performing this work because F&G had not been paid for work previously performed. F&G argues that since Manshul refused to pay for work already performed by F&G, Manshul cannot now claim that F&G was in breach of the Agreement for failing to perform the few remaining outstanding tasks. See Kooleraire Serv. & Installation Corp. v. Board of Educ. of of New York, 28 N.Y.2d 101, 105, 320 N.Y.S.2d 46, 48, 268 N.E.2d 782, 783 (1971) (holding that a party to a contract cannot rely upon the failure of another to perform when he has prevented performance); see also Louis N. Picciano & Sons v. Olympic Construction Co., 112

A.D.2d at 607, 492 N.Y.S.2d at 479 (holding that where a valid contract for "rework" or "extra work" is agreed upon by both parties, failure to compensate the subcontractor justifies the subcontractor's refusal to continue work).

Based on the evidence presented, this Court finds that Manshul's failure to pay F&G for substantial work performed constituted a material breach of the contract, and, in the absence of any countervailing considerations, acted to discharge F&G from further performance under the Agreement. See Alesayi Beverage Corp. v. Canada Dry Corp., 947 F. Supp. 658, 667 (S.D.N.Y. 1996) aff'd, 122 F.3d 1055 (2d Cir. 1997); Department of Economic Devel. v. Arthur Anderson & Co. (USA), 924 F. Supp. 449, 483 (S.D.N.Y. 1996); Jafari v. Wally Findlay Galleries, 741 F. Supp. 64, 68 (S.D.N.Y. 1990).

AETNA'S CLAIMS OF WAIVER AND SET-OFF

Aetna argues that even if F&G substantially performed its obligations under the Agreement and Manshul's failure to pay is considered to be a breach, F&G is still not entitled to recover the additional amounts owed under the Agreement because: 1) F&G waived its right to seek additional payment; 2) F&G's work was substandard, requiring Manshul to undertake additional costs necessary to repair the problems created by F&G's failure to perform competently; and 3) F&G is not entitled to any additional monies owed on change order requests because F&G failed to carry its burden of proving that these change orders were in fact approved by the Navy.

A. Waiver

As an initial matter, defendant argued for the first time as the basis for a motion for a directed verdict, that F&G waived its right to receive additional payments under the Agreement, by signing a "Payment Lien Waiver." Specifically, defendant Aetna[20] contends that prior to receiving each of the periodic progress payments under the Agreement, F&G signed various Payment Lien Waivers, stating that it had no outstanding claim for payment against the general contractor. Defendant presented eleven releases executed by either the president or vice president of F&G, or by Mr. Stassi.[21] Each of the releases provided:

> And to induce the making of the payment hereby requisitioned, the undersigned subcontractor represents that it has no claims against Manshul Construction Corp., or the Owner to the date of this requisition and hereby waives and releases any and all claims, obligations, costs, expenses, causes of action and liens on the premises and/or the improvement thereon . . . .

(Ex. 82). Defendant argues that by signing each of these releases, F&G waived its right later to seek reimbursement for the additional work for which it now claims payment is due and owing. Included among the items which defendant claims were released are plaintiff's claims for reimbursement of the broken stand pipe (Ex. B), the crushed sanitary line in the underground system (Exs. C, D, F, G), the costs associated with relocating pipe in the second and third floor

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[20]It is unclear whether defendant is pursuing this issue since it was not discussed in defendant's brief. Nevertheless, this Court will address the issue.

[21]The releases are dated September 24, 1993, May 20, 1992, July 2, 1992, July 17, 1992, July 30, 1992, November 16, 1992, December 11, 1992, January 5, 1993, April 8, 1993, May 20, 1993, and October 27, 1993. (Exs. 82-92).

bathrooms (Ex. E), and the work done in a shaft wall that was never approved by the Navy and for which defendant contends F&G bore the risk of loss under the Agreement.

A virtually identical release was contained in the subcontract at issue before this court in United States ex rel Perosi Elec. Corp. v. Manshul Construction Corp., 940 F. Supp. at 503-04. There, the court distinguished the waiver provision of the release from the language of the form in Kay-R Electric Corp. v. Stone & Webster Construction Co., 23 F.3d 55 (2d Cir. 1994), which contained several blank lines and a provision which allowed the subcontractor to exclude "material furnished, labor performed, or expenses incurred for which written authorization has not been given, as follows." Id. at 57-58. The court in Perosi found that not only did the Manshul release form not contain space for Perosi to list "extra work" for which it expected payment in the future, but the court found that the language "the payment hereby requisitioned" and "to the date of this requisition" to be meaningless in light of Manshul's practice of payments. U.S. ex rel Perosi Elec. Corp. v. Manshul Construction Co., 940 F. Supp. at 504.

The exact language questioned by the court in Perosi appears in F&G's releases and the practices of Manshul in making payments to F&G are similar to those in Perosi. Thus, this Court finds that the ambiguous language of the waivers must be construed against Manshul and the waivers are thus unenforceable against F&G. See Wong v. Michael Kennedy, P.C., 853 F. Supp. 73, 80 (E.D.N.Y. 1994) (holding that ambiguous contract terms must be construed against the party who prepared the contract).

Such a finding comports with New York law which is instructive on this issue. Specifically, under New York Lien Law, a contract provision that requires a subcontractor to execute a lien waiver upon receipt of a payment from the contractor is enforceable with respect to

that payment. The courts have, however, recognized that this type of lien provision presents a problem to subcontractors where the timing of payments lags behind the actual completion of work. See Orange Steel Erectors, Inc. v. Newburgh Steel Prods., Inc., 225 A.D.2d 1010, 640 N.Y.S.2d 283 (3d Dep't 1996). Even though the subcontractor may have recognized at the time he is asked to execute the lien that there are outstanding claims for completed work not covered by the payment, the subcontractor knows that in the absence of an executed lien waiver, the payment will not be made. In Orange Steel Erectors, the court found that even though the subcontractor had executed waivers purportedly acknowledging that no other sums were due and owing, based on the course of dealings between the parties, the waivers were merely viewed as receipts for payment of the monies referenced in the waiver, and not meant by either party to be a release for amounts still owed for work performed. The court found that there was no evidence to show that the general contractor had relied to its detriment on a belief that these waivers really meant that no other sums were due and owing. Ultimately, the court denied the general contractor's estoppel argument, finding that the waivers were not a bar to recovery of the remaining amounts owed under the contract. See id.

In this case, as in Orange Steel Erectors, many of the progress payments made by Manshul were not made in the amounts requested by F&G. Moreover, the testimony is clear that the many of the payments by Manshul were not made in a timely fashion, even though all of the witnesses testified that Manshul received payments from the Navy every thirty days for the work performed by its subcontractors including work performed by F&G. There was no testimony presented to this Court to even begin to suggest that at the time the waivers were signed, Manshul believed that F&G was waiving its right to collect the additional amounts owed for

work performed. Similarly, no testimony was presented to demonstrate detrimental reliance by Manshul on these waivers. Instead, all of the evidence before this Court demonstrates that the parties were operating under the understanding that by signing these waivers, F&G was merely acknowledging receipt of payment.

Accordingly, defendant's motion for directed verdict is denied, and the court holds that F&G's endorsement of these lien waivers does not constitute a bar to any recovery that it may otherwise be entitled to for breach of contract.

B. Aetna's Claims for Set-off

Aetna concedes that like the subcontractor in Perosi, F&G substantially completed the plumbing systems both above and below the building foundation and that both systems ultimately passed inspection. However, defendant argues that certain items, including the punch list items, a sink, and the access doors, were not completed as required by the Agreement and that what had been completed contained certain defects.

Defendant has argued that F&G's work was substandard in that there were numerous fittings that failed to hold during the testing and that inadequate manpower was provided by F&G to perform the testing of the above ground plumbing system. (Tr. at 357, 359).[22] Aetna contends that it is entitled to recoup or set-off the costs associated with the work required to

[22]Mr. Schneider, however, refuted this, finding F&G's testing methods to be sound and within industry guidelines. (S Tr. at 78-90).

repair the damage created by F&G's "shoddy workmanship".[23]

1. Aetna's Claim for Set-Off For the Costs of Locating and Repairing the Underground Pipe

Aetna's first claim for set-off relates to problems that arose in connection with underground sewer sanitary system. Aetna contends that it is entitled to recoup or set-off the costs associated with locating and repairing a damaged pipe in the underground system. The testimony on this issue was contradictory and contested.

a. Installation and Testing of the Underground System

F&G commenced its work at the Navy Project with the installation of bedding for the pipes inside the building. According to Mr. Stassi's testimony, at the time of the signing of the Agreement, no official start date was set for the commencement of the work. However, Mr. Stassi testified that pursuant to a telephone call from Mr. Haugland, F&G began work in the spring of 1992. Under the supervision of a full time professional engineer, the underground pipe was installed, the system was fully tested and passed inspection, and the area was then back-filled. According to Mr. Stassi, this work was completed in October 1992.

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[23]Defendant also contends that F&G caused delays to the work schedule. A pretrial ruling of the court precluded defendant from offering evidence of delay damages allegedly caused by F&G's conduct. Defendant had failed to comply with a discovery order of the district court that required pretrial disclosure of certain information relating to this claim. Indeed, the evidence presented shows that Manshul was given several contract extensions, and was never assessed liquidated damages under its contract with the Navy. Moreover, there was no evidence presented to this Court to show that F&G was given a particular time frame in which certain work was required to be done. To the contrary, Mr. Stassi testified that no specific work schedules were issued to F&G nor was any notice sent to inform F&G as to the progress of other subcontractors' works. Mr. Stassi testified that within a week after Mr. Haugland called in the spring of 1993, F&G was back on the Navy Project, conducting tests.

With respect to the installation of the piping for the storm drainage system, Mr. Schneider confirmed the fact that the underground system was successfully installed in October 1992. He testified that in October 1992, he[24] observed testing by F&G of the underground storm and sanitary system. (S Tr. at 42, 45). At that time, the entire system was leak-tested and performed satisfactorily. (S Tr. at 42).

However, by letter dated October 20, 1992, F&G notified Manshul that another subcontractor had damaged a four inch cast-iron pipe installed by F&G. Manshul directed F&G to repair the broken pipe on a "T&M basis," which meant that, upon verification by Manshul, F&G would be paid for the time and materials used to repair the damage. (Ex. K). Plaintiff submitted into evidence the change order request form evidencing the time spent and the total price of $1,424.04 needed to repair this broken pipe. (Ex. B). A notation on the document by Mr. Haugland indicated that he was going to back-charge that amount to the mason contractor, who Mr. Haugland felt was responsible for the damage. (Ex. B). However, Mr. Stassi testified that F&G never received payment for this repair work. (Tr. at 27).

According to Mr. Stassi, following F&G's completion of the underground system in October 1992, F&G could not continue to perform any of the remaining plumbing work until the floors in the building had been poured, so F&G withdrew from the job site. Although F&G was given no definite date to return, Mr. Haugland contacted F&G by telephone in early 1993 and F&G returned at that time to prepare the "sleeve" for the pipes to go through around the decks

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[24]Schneider did not approve or observe any work done by F&G prior to his assuming the title of supplemental personnel under the CQC in August 1992. Prior to that time, the work was observed by Testwell Craig. (Tr. at 48).

and to install the aboveground waste and vent system. According to Mr. Haugland, the drain, waste, and vent system is composed of cast-iron piping fitted together above ground with a "hubless" system, composed of the pipes placed together with a rubber gasket around the connection, and a stainless steel clamp over the gasket. The pipes are made waterproof by tightening the nuts on the clamp. (Tr. at 329). However, due to some architectural changes ordered for the second and third floor bathrooms, which required Navy approval, F&G could not complete the work necessary to install the waste and vent system.

Following the work on the DWV system in April 1993, F&G was told by Manshul that F&G would be notified when it was time to continue with the plumbing work. Although Mr. Stassi testified that Manshul held regular meetings with the subcontractors to discuss work coordination, Manshul never issued daily work orders, nor did it give F&G notice regarding the commencement of work by other subcontractors. Indeed, according to Mr. Stassi, he never saw any formal schedule of work dates.

Thus, it was not until the end of May 1993, that Mr. Haugland called to have F&G return to the Project to test the DWV system even though F&G had still not received word on the change order requests for the second and third floor bathrooms and had not completed that initial phase of the work. Mr. Haugland told Mr. Stassi not to wait, but to start testing, leaving that unfinished area out of the testing. Mr. Stassi agreed, but indicated that it would take "a few days to get remobilized." (Tr. at 35).

By letter dated June 4, 1993, F&G was informed that if it failed to appear to commence the testing within the next three days, F&G would be off the job and someone else would be brought in for the testing. (Ex. M). According to Mr. Haugland's letter, the urgency was due to

Manshul's desire to begin the sheetrocking. In response, Mr. Stassi indicated by letter dated June 7, 1993, that he had begun work on June 7, but that there were still open items, including the second and third floor toilets, that could not be completed. (Ex. N). Manshul apparently never responded to this letter.

b. Testing for Leaks in the Underground System

Following Manshul's request, F&G proceeded on June 7, 1993 with the testing of the entire system, both underground and aboveground systems, in accordance with site inspector William Schneider's instruction. According to Mr. Stassi's testimony, Mr. Schneider wanted the entire system tested even though the underground system had been tested separately in October 1992, because during the winter of 1992-93, one of the other subcontractors had continuously run heavy equipment over the underground pipes and Schneider was concerned about possible damage to the underground pipes.

The actual testing of the entire system began on June 7, 1993. In order to conduct a full systems test, F&G plugged the sanitary line that led to the outside, as well as every drain and opening, so that no water could get out. Once all of the openings were closed, the system was filled with water to the roof level so that F&G could determine if there were any leaks.[25] (Tr. at 40). By June 18, ten working days later, F&G realized that there was a problem in the underground system. (Tr. at 42). At that point, Mr. Stassi told Don Warnett, Project Manager of

[25]Mr. Stassi testified that although a full system test had not originally been factored into F&G's bid and additional costs were incurred as a result of this testing, F&G did not request a change order from Manshul. (Tr. at 42).

Manshul, that F&G would have to isolate the underground system and test it separately. (Tr. 43-44). Mr. Stassi informed Mr. Warnett that F&G believed that damage had occurred underground and that the on-site inspector, Mr. Schneider, also believed there had been damage done over the winter. According to Mr. Stassi's testimony, Mr. Warnett told him that "we [don't] have to retest the underground, we already passed inspection. We did not owe the Navy another test; just to concentrate on the aboveground." (Tr. at 45).

Mr. Schneider testified that in June 1993, he sent a memorandum to Mr. Haugland informing him of the problems encountered during F&G's subsequent testing of the entire system.[26] The memorandum informed Mr. Haugland that during the course of the testing of the entire system, it was determined that "there must be a sizeable leaks [sic] in the underground piping as no leaking is occurring above the 1st floor & no water is passing the plugs at the housetrap or the storm drain MH [manhole]." (Ex. SF). Mr. Schneider noted in his memorandum that following the successful testing of the underground system in October 1992, other work was done, including backfill work by WWC, one of the concrete subcontractors, in which a forklift was used and "several cast-iron pipe stub-ups were broken by this machinery." (S Tr. at 46-47). Mr. Schneider admitted that it was a "possibility" that this work had also caused the leaks in the underground system, as demonstrated by the testing. (S Tr. at 49).

With respect to the testing, Mr. Sanmarco testified that when F&G was conducting the testing, it was determined that there was a "possible leak under [the] concrete slab of first floor

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[26]Schneider noted that although the Navy wanted all three floors tested simultaneously, the specifications in fact required testing floor by floor. According to Schneider, the full system test "was the cause of some of the pipes coming apart." (S Tr. at 46).

sanitary pipes." (Tr. at 233; Ex. TTT). In preparing the CRR (Construction Representative's Report) dated June 18, 1993, Mr. Sanmarco noted: "prior to placement of concrete heavy equipment road over newly installed plumbing pipes and utility lines at contractor's own risk." (Tr. at 233). Apparently, Mr. Sanmarco had warned Mr. Haugland at the time not to "drive over the area with heavy equipment because it is possible some of the pipes will break, which has happened on another site prior to this one, and the contract said it could be at his [Haugland's] own risk." (Tr. at 234). Nevertheless, Mr. Haugland ignored the advice and the activity continued. (Id.).

In a CRR dated June 28, 1993, Mr. Sanmarco noted that F&G had not been on site since June 23, 1993 due to problems with leaks in the sanitary and storm drainage system. (Tr. at 238; Ex. WWW). On June 30, he noted that the underground piping system[27] was to be tested separately, isolating the first floor from the second floor. (Tr. at 239). The evidence presented, including the testimony of Sanmarco, demonstrates Manshul's resistance in acknowledging the problem and in commencing the testing to locate and repair the leak. (Tr. at 238-9; Ex. VVV). Sanmarco's CRR memorializes a conversation in which Schneider was apparently asked to fabricate reports stating that the CQC was requesting testing not required by Manshul's contract with the Navy. According to Sanmarco, Schneider told the Manshul representatives that he would not do it. However, as of July 2, 1993, nothing still had been done to test for the underground leak. (Tr. at 240).

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[27]Throughout the trial, the underground system was sometimes referred to as the "under slab" system. The two terms are interchangeable. (Tr. at 241).

Following the testing of the aboveground system in June 1993, Mr. Stassi and Mr. Fichera were called by Mr. Warnett and Allan Schulman, to meet to discuss the Navy's insistence on a retest of the underground system. (Tr. at 59-60). At the meeting, on July 13, 1993, they discussed the problem with the underground system and Manshul asked F&G to assist in locating and fixing the leak. (Tr. at 61-62). Mr. Stassi informed the Manshul representatives that sheetrock would have to be removed from the walls to allow F&G access to the pipes and F&G would have to open up the floor to break into the underground system in order to locate the leak. According to Mr. Stassi, no one at the meeting ascribed the leaks in the underground system to F&G, nor did they propose that F&G do the additional work without compensation. Instead, it was agreed that they would be paid for the testing and repair on a time and materials basis. (Tr. at 62; Ex. L).

In confirming this agreement, Mr. Stassi informed Manshul by letter dated July 16, 1993 that F&G would not be responsible for removing or replacing the drywall and reminded Manshul that the change order request to move certain items in the second and third floor bathrooms was still outstanding. (Ex. Q). At a subsequent meeting, Manshul agreed to these terms and indeed, Manshul's field supervisor, Mario Montalbano,[28] who was present at the July 13, 1993 meeting, signed a daily worksheet for F&G's performance of this work. (Ex. F). Stassi testified that Manshul never told F&G that it expected F&G to submit an insurance claim on these charges. (Tr. at 64).

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[28]Manshul did not call Montalbano as a witness at trial despite the fact that his testimony regarding this approval was critical to Manshul's claim and that as an employee of Manshul, reasonably could have been expected to testify on behalf of Manshul. As such, the court may infer that the testimony would be unfavorable to Manshul. See Karavas Compania Naviera S.A. v. Atlantica Export Co., 588 F.2d 1, 9 (2d Cir. 1978).

Following this meeting, F&G marked the locations where they felt they could isolate the system. Manshul then opened the floors and excavated, digging seven pits in order to conduct the testing. (Tr. at 332-33; Ex. 97). Once the holes were dug, F&G then began capping and filling various sections, probing the pipe with television cameras in an effort to locate the leak. (Tr. at 272-73).

Ultimately, the leak in the underground system was located near the bathroom on the first floor where a bent pipe was found.[29] (Tr. at 272). Once located, the leak was repaired by F&G, which removed the broken pipe, put in a new piece of pipe and, tested it. The area was then backfilled by Manshul. The same was done with respect to the other six holes which were filled and then the concrete was replaced. After F&G completed the repair work on the underground system, it was tested successfully and passed inspection. (Tr. at 248). Then, F&G completed the domestic water system and the gas piping system. (Ex. VVVV). Mr. Sanmarco testified that he was on site everyday, sometimes two to four hours (Tr. at 273), and that he was either present during conversations between Mr. Haugland, Mr. Schneider, and Mr. Szubiski or that Lieutenant Webster or the other project engineer would keep him apprised of the progress in the retesting. (Tr. at 262). He testified that it was "quite a time" before anyone took steps to test for the underground leak (Tr. at 276-77), but that "[i]t didn't take that . . . long once they found it, no, okay." (Tr. at 279).

While Mr. Haugland conceded that following a meeting between F&G's and Manshul's owners, F&G was permitted to submit change orders for the retesting of the underground system, Aetna now contends that F&G bears responsibility for the crushed pipe and for the costs of

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[29]Since there was no sub-floor or cellar in the building, the first floor rested directly on the ground.

inspection and repair, and therefore is not entitled to recovery under the change orders that it submitted for this work.[30] In addition, defendant argues that Aetna is entitled to recoup the costs[31] incurred by Manshul in locating the leak and repairing the damage to the slab resulting from the testing. These costs include the amount of labor and material required to repair the broken pipe in the underground system, including the costs incurred in hiring the lighting corporation, TV Inspeco, which was hired to inspect and locate the leak in the sanitary sewer.

Defendant contends that F&G bears responsibility for the damage for several reasons. First, defendant contends that the pipe in question was not installed in its proper location within the confines specified. Instead, it was located in the corridor and, like the stubups, was not marked. Moreover, defendant argues that it was F&G's own subcontractor, Cross Bay, that damaged the pipe while performing the backfill and compaction of the underground system, and that F&G did not properly backfill the area. Finally, defendant contends that under the Agreement, F&G bore the risk of loss to its completed work until the time of final acceptance.

With respect to the proof presented by Manshul in support of its claim that F&G was somehow responsible for the damage, this Court finds that defendant has failed to present any evidence to establish their contentions. Mr. Haugland, the only witness to testify for Manshul, testified for the first time at trial that Cross Bay had not yet backfilled the underground system when it was tested on October 2, 1992 and therefore he inferred that the damage to the pipe

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[30]See discussion infra at 52-53.

[31]Manshul's claimed out-of-pocket costs include 158 hours of labor; hiring the underground television camera; materials to restore the slab; and fabric and waste container for materials from the test pits, totalling $11,109.32. (Tr. at 346-47; Exs. 8, 9, 97).

occurred during the subsequent backfilling process. Although Haugland conceded that the underground system successfully passed inspection and testing in October 1992, he argued that the testing was completed before the trenches were filled and compacted. He contends that the pipe must have been damaged during the subsequent compaction work, which was done by Cross Bay, pursuant to a contract with F&G. Apart from this suggested inference, Haugland presented no evidence to support his theory.[32]

Moreover, this Court finds that based on Mr. Schneider's testimony, the task of back-filling had been completed as of August 1992, when Mr. Schneider started on the Project, and that the compaction work of Cross Bay had been completed prior to F&G's testing of the underground systems and its acceptance by Testwell Craig. This Court finds credible the testimony of both Schneider and Sanmarco regarding the continued use of heavy equipment by other subcontractors and Manshul's refusal to heed warnings of potential damage to the underground piping.

Aetna argues that even if neither F&G nor its subcontractors were responsible for actually causing the damage, F&G bears the risk of loss to any of its work under the Agreement until final acceptance by the Navy. Aetna relies on the provision in the Agreement which states that "the general contractor shall not be responsible for loss or damage . . . to the work included in

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[32]Defendant's argument that F&G's own subcontractor Cross Bay was the only excavation contractor on site (see Def's. Mem. at 37 n.11) is inaccurate because the testimony is clear that WWC, a concrete subcontractor, used a forklift and was responsible for damage to the stub-up pipe. (S Tr. at 46-47). Moreover, Mr. Haugland's testimony is contradicted by an earlier statement where he conceded that Lacatosa was the subcontractor who ran over this area with heavy equipment, and damaged the stub-up pipes. It should be noted that while plaintiff refers to "Lacatosa," defendant refers to "Lacertosa." This Court assumes that the two refer to the same subcontractor and uses the former spelling herein.

this contract until after final acceptance of the work by the Owner and itself." (Ex. A). Specifically, defendant argues that regardless of who was responsible for causing the damage, this provision makes the subcontractor responsible for any loss or damage to its work that occurrs prior to the date of final acceptance of the entire Project by the Navy. As Mr. Haugland testified, despite the fact that Cross Bay's work was subsequently inspected and approved by Testwell Craig, it was Mr. Haugland's position that if other contractors broke pipes running heavy equipment over them, F&G was responsible. Thus, defendant contends that F&G was responsible for the costs of hiring the television cameras needed to locate the damaged pipe, as well as any other costs incurred by Manshul in repairing the problem.

The issue raised, of course, is how one construes the language "until after final acceptance by the Owner." Here, it is clear from Schneider's and Stassi's testimony that the work done by F&G in installing the underground system was accepted by the contractor and by the Navy in October 1992. While the language of the Agreement could be construed to place the risk of loss on the subcontractor for damage that occurred at any time prior to completion of the entire Project, Manshul's actions with respect to damage caused by other subcontractors belies its claim that this was how the provision was intended to be construed.

For example, Manshul's witness, Mr. Haugland could not explain why the sheetrocking subcontractor, American National, was not backcharged for the water damage sustained by the sheetrocking it installed prior to the completion of the entire Project nor does defendant's explanation with respect to the damage caused to the stub-up pipe make sense in light of the argument made here. In the case of the damaged stub-up pipe, Manshul sought and received reimbursement for the damage from Lacatosa, the subcontractor who broke the stub up pipe, not

from F&G. Essentially, defendant contends that the reason Lacatosa was held responsible for reimbursing Manshul for the costs incurred to fix the stub-up pipe is because Manshul did "not incur a loss of damage; that loss is incurred by the other subcontractor and [Manshul] acts as a pass through." (Def.'s Mem. at 39 n.14). For this argument to make sense in the context of the damage to the underground system, it must be assumed that F&G was responsible for causing that damage. This Court has found otherwise.

F&G's argument that it should not be held responsible for the costs associated with locating the leak in the underground system is further supported by the fact that while the repair and testing process was in progress, Manshul never told F&G that F&G would not be paid for the costs associated with repairing the underground leak; nor did Manshul tell F&G that it would be backcharged for Manshul's costs incurred in the repair process. Indeed, all of F&G's worksheets for costs incurred were approved by Manshul. It is only now that Manshul claims that this was for insurance purposes.

Since this Court finds that there has been no credible evidence presented that would demonstrate F&G's responsibility, this Court finds that the contract provision does not apply. It is clear that the damage to the underground system occurred after the system had been accepted by Manshul and the Navy; that there was evidence presented to Manshul early on that other subcontractors were driving heavy equipment over this area and fear of damage to the pipes was expressed. It is also clear that Manshul chose to ignore these warnings and as such should be held responsible for the costs of repair incurred by F&G at Manshul's requests.

2. Aetna's Claim for Set-Off For the Damage to the Sheetrock

Defendant contends that F&G's workmanship in installing the hubless piping and in conducting the aboveground testing was also substandard and caused damage to installed sheetrocking primarily on the first floor. F&G argues that the damage was caused because Manshul had permitted the installation of the sheetrocking to proceed prior to the successful completion of the piping system and that it was this out-of-sequence work coupled with the damage caused to the underground system that was responsible.

Specifically, while the parties were attempting to resolve the problems with the underground system, separate testing on the aboveground system was performed by F&G. In accordance with Don Warnett's instructions, F&G disconnected the underground system from the aboveground system and commenced testing the aboveground system floor by floor, beginning the week of June 23. According to Mr. Schneider's testimony, as of June 10, 1993, F&G was on site, "cleaning up the non-conformance list" and "preparing the roof drain for testing." (S Tr. at 78). On June 30, 1993, the water test on the vent/drain stack #4 was successfully completed. (S Tr. at 79; Ex. SQ). Of the remaining four stacks, Mr. Schneider testified that they all eventually passed the required testing as noted in a memorandum from Schneider to Haugland dated July 1, 1993. (S Tr. at 80-81, 84-85; Exs. SR, SS). Thus, as of July 13, 1993, all aboveground testing had been successfully completed. (Ex. SU). The underground re-testing was still required because the leaks still remained. By September 24, 1993, however, the entire domestic water system had been successfully tested and had passed inspection (Ex. SV), and by September 29, the gas piping testing had also been successfully completed.

(Ex. SW; Ex. EEE, FFF, GGG, HHH, III, JJJ;[33] Tr. at 45).

According to Mr. Stassi, while F&G was attempting to complete the full system testing, Manshul was proceeding to install the sheetrock, in some instances covering F&G's piping. Indeed, Mr. Sanmarco testified that the sheetrocking on the first floor began an April 21, 1993, even before F&G commenced its testing of the whole system in June. (Tr. at 230; Ex. SSS). On June 3, 1993, Mr. Schneider issued a non-conformance memorandum to Manshul indicating that American National, the subcontractor responsible for drywall installation, was performing out-of-sequence-work and was covering piping that had not yet been tested by F&G. (S Tr. at 67-68; Ex. SK). Mr. Schneider explained that if the pipes were covered with drywall, he could not verify if the joints were tight or if there were leaks. (S Tr. at 68-69).

In a hand-written memorandum dated June 9, 1993, the CQC, Mr. Szubski, issued a stop order memorandum to Mr. Haugland, directing Manshul to stop installing the sheetrock in the second floor washrooms where the slab penetrations for the piping still had not been sealed, thus creating a potential fire hazard. (Ex. AAA; SL). The memorandum also referenced an earlier June 3, 1993 notice of nonconformance with respect to the sheetrocking which was covering untested pipes in certain areas. (Ex. 22). Although Mr. Stassi never received a copy of these memoranda until discovery in this litigation, he was informed of the June 9, 1993 nonconformance by Mr. Schneider. (Ex. AAA; Tr. at 48). After learning of the nonconformance, Mr. Stassi complained to Mr. Haugland that by putting up the sheetrock and

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[33]Although Mr. Stassi gave the dates of testing as July 23 through July 31, the documents clearly indicate June 23 through July 1, which is consistent with the sequence of events as testified to by Mr. Stassi.

covering F&G's pipes, Manshul had created problems for him. Mr. Stassi testified that Mr. Haugland's response was that he had a job to do and he had to continue installing the sheetrock. (Tr. at 49).

Mr. Schneider testified that after the stop order was issued on June 9, 1993, the drywall was removed where it had covered the pipes and it was then subsequently replaced after the testing was completed. (S Tr. at 70). However, on June 11, 1993, Mr. Schneider issued another non-conformance memorandum regarding the installation of sheetrocking enclosing plumbing lines that had not been fire-stopped. (S Tr. at 73; Ex. SN).[34]

In a later CCR dated June 24, 1993, notifying Manshul of a noncompliance,[35] Mr. Sanmarco noted that drywall had to be removed from the bathroom areas because it had been installed prior to the installation of the fire-stopping in the floor sleeve. (Tr. at 235-36; Ex. UUU). Mr. Sanmarco instructed Manshul to fix the problem and noted in the CRR that a stop order regarding the installation of the sheetrock had been issued to the superintendent two weeks earlier. (Tr. at 236-37; Ex. UUU).

On July 7, 1993, Brian Webster, Assistant Resident Officer in Charge of the Construction from the Navy, sent a letter to Manshul, enclosing four notices of noncompliance, a number of

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[34]Mr. Haugland explained that "firestopping" prevents the spread of smoke from one floor to another and essentially requires the installation of a caulking compound such as fiberglass, between the pipe and the insulation within the fire sleeve. (Tr. at 379). According to Mr. Haugland, F&G was required under the Agreement to install firestopping. Manshul ultimately hired R&R, another subcontractor, to perform the task. Manshul apparently did not charge F&G for this material or labor charge because "it is so little involved, really . . . ." (Tr. at 380).

[35]Mr. Sanmarco explained that generally a contractor is given an opportunity to correct his deficiencies before a noncompliance notice is issued. "You write a noncompliance when its your last resort and you don't have any other choice." (Tr. at 246).

which related to noncompliances with the plumbing. (Ex. RRR). Specifically, one noncompliance notice indicated that drywall had been installed and completed before the fire sleeves, plumbing, heating and HVAC systems had been installed. (Tr. at 24-42; Ex. RRR). The necessary corrective action required the removal of the sheetrock and the installation of the fire sleeves. (Tr. at 244).

On July 9, 1993, Mr. Sanmarco noted that F&G was still testing the piping while the sheetrock was being installed and due to a "broken elbow," the drywall was becoming soaked with water. Mr. Sanmarco explained that if the sheetrock gets wet, it can "bubble up," deteriorate, or develop mildew (Tr. at 249), and he noted that during the testing of the plumbing system, the drywall was developing mildew "two to three feet high." In the northeast part of the third floor, the mildew was spreading even through painted drywall. (Tr. at 249-50). Manshul was eventually ordered to remove the damaged drywall.[36] Manshul installed a two foot piece of sheetrock at the bottom where the mildew was the worst.

On July 14, 1993, Mr. Sanmarco noted a conversation that he had with Mr. Haugland in which Mr. Sanmarco told Mr. Haugland that "he needed to coordinate work in place and not build nonconformance work. [Haughland's] reply was that he has the option to do rework . . . ." (Tr. at 251). This particular discussion revolved around the fact that the subcontractors were installing closed collars without sleeves, a collar being a piece of metal that goes around the sheetrock through the wall. (Tr. at 252). There was also other work noted at the time that had been closed in by the sheetrock. Ultimately, the sheetrock had to be removed so that the sleeves could be installed. (Tr. at 253-4).

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[36]Mr. Sanmarco did not know if it was even done, although he testified that Manshul was going to try to bleach it first. (Tr. at 250).

By letter dated June 10, 1993, Mr. Warnett advised F&G that Manshul was charging them for all added costs incurred as a result of Manshul's need to remove and replace certain sections of the installed drywall. According to the letter, despite the fact that F&G had been advised of the schedule of drywall work, F&G's untimely testing of the systems had required the removal of certain drywall previously installed. In addition, the letter stated that an "inordinate amount of your installed piping has leaks, caus[ing] the sheetrocking to become wet, and suffer from mildew, thereby requiring replacement." (Ex. P).

In response, F&G explained the testing problems that had developed and mentioned the nonconformance notices. (Tr. at 51). Mr. Stassi told Mr. Warnett that the sheetrock should not have been installed until the testing and the installation of the system was complete, which could not be done because of the outstanding change orders. (Tr. at 51). Mr. Warnett allegedly did not respond.

A second letter from Manshul, dated July 13, 1993, complained that during the testing, leaks developed in the system which caused water damage and fungus to form on the installed drywall. (Ex. I). F&G was instructed to take steps to correct the work within 48 hours or Manshul would engage the drywall subcontractor, American National, to do the work and backcharge F&G for the cost. (Ex. I; Tr. at 57). American National's estimated cost for the work was $4,693.35. (Proposal dated July 12, 1993; Ex. H). Mr. Stassi informed Mr. Warnett that F&G was not responsible and refused to pay. (Tr. at 57). He told Mr. Warnett that the sheetrocking should not have been started until the system testing had been completed. (Tr. at 59).

According to Haugland's testimony, the damage to the sheetrock was caused by F&G's negligence. Mr. Haugland testified that he had been told by Mr. Stassi in a letter, dated June 7, 1993, that the testing would only take about a week. (Tr. at 351; Ex. N). Instead, it took five or six weeks. Moreover, Haugland testified that when F&G began testing, the fittings, which were located in the ceiling, were leaking because the stainless steel couplings were not tightened properly. In some instances, Mr. Haugland testified, that the whole fitting fell off, flooding the area. However, because F&G had only one man on the job, nobody was on the other floors watching what occurred. (Tr. at 352). Sometimes the leak wouldn't be noticed for a half hour or until Mr. Haugland or Mr. Schneider would tell the F&G representative to turn off the water. (Tr. at 354). In total, the witness testified that eight to ten fittings fell at various times. (Tr. at 354). When the fittings broke, the area would flood, soaking the sheetrock, and causing mildew.

By memorandum dated June 21, 1993, Mr. Haugland asked Mr. Stassi to send more manpower to come to the job to complete the testing. (Tr. at 357; Ex. 53). Then again, on June 30, he sent yet another memorandum referring to the "two kids" F&G had sent for testing and noting damage to walls which had already been primed. (Tr. at 360). On July 9, 1993, Mr. Haughland sent yet another memorandum to Mr. Stassi noting that there was still flooding from the testing and complaining that F&G was not providing adequate manpower or supervision and that it was "sloppy workmanship." (Tr. at 359; Ex. 49).

On July 14, 1993, Donald Warnett sent a memorandum to Stassi with a copy to Mr. Haugland, setting up a meeting, but Mr. Stassi never appeared. (Tr. at 364; Ex. 160). On July 1, 1993, Mr. Haugland sent a memorandum to Mr. Stassi complaining that F&G was behind in the fire stopping and that Manshul had hired laborers to clean up the flooding from F&G's testing.

(Tr. at 365-66; Ex. 161) . Manshul was also attempting to chlorinate the mildewed sheetrock in an effort to kill the mildew. (Tr. at 366; Exs. 116, 117). Manshul paid Leeds Painting $1,832.95 for the chlorination of the sheetrock. (Exs. 116, 117). When the sheetrock could not be saved through the chlorination process, Manshul was directed by the Navy to take the whole sheetrock down. Drywall Institute, the sheetrocking subcontractor, suggested removing the sheetrock up to the mildew, plus six inches, which was a procedure the Navy agreed to. It took from July 1993 to September 23, 1993 to remove the damaged sheetrock. Approximately 130 sheets of sheetrock were required to replace the damaged area. (Tr. at 375-76; Ex. J). According to Mr. Haugland, F&G never made arrangements to take care of the damage to the sheetrock, although Mr. Stassi was asked by Manshul to do so. (Tr. at 381; Ex. 161).

When asked to explain the cause of the leaks, Mr. Stassi explained that an inordinate amount of water had been generated by testing the complete system, and had F&G tested only the aboveground system, all of the excess water would have flowed off into the underground system. However, because F&G had to plug all the water drains, in order to test both underground and aboveground systems, the water "had no place to go" and collected on the ground floor. (Tr. at 59). Moreover, Mr. Stassi explained that during the course of the testing, he observed rain water entering the building through openings where the glass was missing. (Tr. at 60).

With respect to the window coverings, both Mr. Sanmarco and Mr. Schneider testified that prior to the installation of the glass, there was plastic nailed to the frame of the windows in the building, covering the openings. (Tr. at 230; S Tr. at 33). Mr. Sanmarco testified that "[t]he [plastic] blew off quite a few times" (Tr. at 230), and that he observed "water entering through

the window walls" on the north and east side of the building. (Tr. at 231). In addition, he testified that he observed water coming in from the roof areas. (Tr. at 232).

By memorandum dated March 5, 1993, Mr. Schneider informed Mr. Szubiski of certain damage caused by a storm on March 4-5, 1993. (Ex. SD). The memorandum indicated that canvas sheeting on the east side of the building where a window wall was to be installed had been torn, that water had penetrated the insulation on the roof and that sheet pipes were wet as a result of the water leaking in. Schneider testified that there were other rain storms where water entered the building and collected on the floor in the basement.

On August 17, 1993, Mr. Sanmarco noted damage to the drywall from the rain on the east and south sides of the second and third floors, the window wall, and the library opening at the promenade. (Tr. at 255; Ex. EEEE). He indicated that the "contractor did not protect [these] areas by covering window frames." (Id.). Mr. Sanmarco then reviewed this damage with Mr. Haugland, Mr. Schneider, and the CQC, but not all the wet sheetrock was removed. (Tr. at 255). Only some was removed and some was painted over. (Tr. at 256).

With respect to the storm in March 1993, Mr. Haugland testified that the only material damaged was some sheetrock stored on the roof when the canvas that had been covering the sheetrock blew off. This particular sheetrock was a "green board, which is sort of a water resistant sheetrock" (Tr. at 349), which is different from the sheetrock referred to in Exhibit I, which is partition sheetrock installed on the interior of the building. (Tr. at 350). Mr. Haugland testified that this interior sheetrocking developed mildew after the testing of the F&G plumbing system when a lot of pipe joints pulled apart, causing leaks.

In August 1993, Mr. Stassi instructed his foreman at the site to notify Mr. Haugland of

certain water damage caused by the rain and to prepare a memorandum indicating that rain was still coming in two months after F&G had completed its testing of the piping system. (Tr. at 91). According to Mr. Stassi, Mr. Haugland apparently signed the memorandum relating to rain damage on the second and third floors and told Mr. Stassi that "it [was] all rain water damage, nothing to do with plumbing leaks." (Tr. at 92).

Defendant first argues that it is entitled to recoup or set off the cost of cutting and patching the mildewed sheetrock which was damaged during the testing of the aboveground system in June 1993. Aetna contends, without citation, that F&G was one to two months late in beginning the testing of the DWV, that F&G was asked to begin testing the system in April 1993, and that, as a result of poor workmanship and inadequate testing procedures, sheetrock that had been installed prior to the commencement of the testing procedures was damaged.

When the testing began, defendant argues that F&G failed to properly tighten the pipe fittings and, as a consequence, the fittings failed and, in approximately eight to ten instances and simply fell off. Since F&G had only one workman responsible for the testing procedure, the leaks would go unchecked for a period of time, spilling water over the sheetrock. Defendant contends that despite being informed of the problems and notified that the staffing was inadequate, F&G took no corrective action over the five to six week period that the testing process consumed.[37] Defendant argues that the poor workmanship in tightening the joints and

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[37]Defendant seems to suggest that F&G should be held accountable for the length of time required for the testing in that F&G originally represented that the tests would only require one week. (Tr. at 350-51, 361). F&G contends and this Court finds that much of the additional time required was due to the leaks in the underground system and the request to perform a full system test which placed additional stress on the joints.

conducting the testing constituted a breach of the Agreement. Moreover, defendant seeks recoupment of the amounts incurred by Manshul in repairing the damaged sheetrock as a result of the flooding caused by the failures in the system during the testing.[38] Specifically, defendant contends that F&G owes Manshul $23,846 for the cost of cutting the sheetrock, and an additional $12,785 for repairing and replacing the sheetrock. (Def's. Mem. at 33).

In response, F&G raises several arguments. First, it argues that the damage to the sheetrocking was due to the windows not being tightly covered prior to the installation of the glass and that, as a result of numerous rainstorms, standing water was located throughout the building. However, this Court is not persuaded that the damage to the sheetrocking for which defendant now seeks a set-off was in the area where this storm damage occurred. Instead, the damaged sheetrocking for which Aetna now seeks reimbursement appears to be located primarily in areas where F&G's hubless joints failed. (Ex. BBB, CCC; Tr. at 348-50; 371-78, 394-95).

F&G's second argument is, however, more persuasive. F&G contends that had Manshul not proceeded with the sheetrocking out of sequence and before the testing of the aboveground system, the damage would not have occurred. It is undisputed that F&G successfully completed the installation of the underground system in October 1992 and that thereafter F&G returned to the Project in early 1993, completing the installation of the aboveground system with the exception of certain work in the second and third floor bathrooms which could not be completed

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[38]Defendant notes that the amount requested as a set-off is limited to the sheetrock damaged by flooding when the joints failed. Defendant does not seek amounts for the removal and reinstallation of sheetrock surrounding certain plumbing chase walls that were enclosed prior to testing, nor does it include additional sheetrocking necessitated by F&G's failure to fire stop its pipes. Similarly, the claim for set-off does not include damage to the roofing sheetrock or in the area of the curtain wall following various storms. (Def's. Mem. at 13 n. 5).

until the Navy approved certain change orders. Mr. Stassi testified that in April 1993 when nothing more could be done until the change orders were approved, he was told by Manshul that F&G would be contacted when it was time to continue with the plumbing work. It is also undisputed that in April 1993, Manshul commenced the sheetrocking process before F&G was asked to return to the site to begin testing the aboveground plumbing system. Not until the end of May did Manshul notify F&G that they should return to do the testing even though the change orders for the second and third floor bathrooms had still not been approved and the work was incomplete.

While there may have been a delay of a week or so until F&G returned to do the testing, this Court finds that much of the subsequent delay and the need for extended testing was due to Mr. Schneider's order to test the entire system - - both underground and aboveground - - because of his concerns that some pipe in the underground system may have been damaged during the winter months. The evidence shows that once it was determined that there was a leak, there was a certain period of delay until a decision as made to test the aboveground system separately, floor by floor. Thus, this Court finds that there was no significant delay caused by F&G in the testing of the aboveground system.

With respect to the damage caused to the sheetrock during testing, while there was some evidence that the pipe fittings were not adequately tightened, Mr. Sanmarco testified that this was not unusual and Mr. Stassi attributed some of the problems to stress placed on the system during the testing of the entire system. The evidence which this Court finds to be determinative, however, is the uncontroverted evidence that Manshul permitted American National, the sheetrocking subcontractor, to commence the sheetrocking months before the testing was

ordered. Manshul was then issued several non-conformance notices by Mr. Schneider who noted that once the pipes were covered, he could not determine whether the pipes were adequately tightened. The evidence is clear that Manshul was warned about continuing with the sheetrocking and out-of-sequence work and was even issued a non-conformance notice which Manshul apparently ignored.

F&G also argues that even if it is responsible for the damage, the requested amount of $53,000 that Manshul seeks with respect to the damaged sheetrock is inflated. Instead, F&G notes that the quote from American National, the sheetrocking subcontractor was only $4,693.35, and included damage to sheetrock which allegedly occurred on April 15, 1993 - over a month before F&G returned to the site to begin testing the system. (Ex. S). The claim also included damage to the sheetrocking that allegedly occurred in August of 1993 when F&G had completed its testing on July 11, 1993. Given Manshul's failure to adequately explain the basis for its back charge for this work and the lack of evidentiary support for the claimed amounts, this Court finds that even if F&G were responsible for the damage to the sheetrock, Manshul has failed to sustain its burden of showing that F&G should be held responsible for these costs.

3. Aetna's Claim for Recoupment of the Cost of Inspections

The final element of Aetna's counterclaim is based on F&G's refusal to pay for the costs of the independent inspectors who reviewed and tested F&G's work. Specifically, Manshul was charged $13,612.50 by the professional engineer and source inspectors for testing the plumbing and the soil compaction over the underground system (Tr. at 129-131, 183-86, 420-21; Ex. XXXX). At the time of the submission of the pre-trial order, Manshul indicated for the first time

that it was seeking recoupment of this amount from F&G, representing the costs of inspection incurred by Manshul in testing F&G's work, including pipe bedding, backfill, and compaction. However, it is undisputed that prior to that time, Manshul had never requested payment from F&G for the costs of inspections.

According to Aetna, the costs of the inspections were chargeable to F&G under the Agreement. Subsections 4 and 5 of Rider A of the Agreement provide:

> 4. Provide all inspections as required
>
> 5. All submittals, testing reports, etc. shall be certified by a New York State P.E.

F&G contends that the language itself is ambiguous and should be construed as simply requiring testing and reporting by F&G, rather than be construed as requiring F&G to hire and pay for outside inspectors. This Court agrees. The language of Subsection 4 of the Agreement does not clearly require F&G to provide outside inspectors to review the work. The language simply indicates that when inspections are required, F&G should provide the inspectors. Similarly, the subsection requiring testing reports to be certified by a certified professional engineer is not without ambiguity. It could be argued, as did F&G, that by providing their reports for approval by Mr. Schneider or CQC Szubiski - - both of whom were professional engineers - - F&G had complied with the requirements of the agreement.

Where, as here, there is an ambiguity in the language of an agreement, it is well-established that the ambiguity should be construed against the drafter - - in this case, Manshul. See 67 Wall St. Co. v. Franklin Nat'l Bank, 37 N.Y.2d 245, 371 N.Y.S.2d 915, 333 N.E.2d 1984 (1975); Restatement (Second) of Contracts, § 202(3)(a) (1979). Indeed, in this case, defendant

did not even present the testimony of a witness to explain or corroborate the arguments made by Manshul as to the meaning of the terms used. Manshul's only witness, Mr. Haugland, could not explain why the invoices for testing services had never been given to F&G, claiming unfamiliarity with office procedures. Indeed, Mr. Haugland could not respond when asked why these charges were only first raised in the pretrial order. (Tr. at 433-34).

The evidence presented as to Manshul's course of dealing with respect to outside inspectors serves to confirm plaintiff's interpretation of the Agreement. Specifically, the evidence established that F&G conducted it's own testing and inspections of the building's plumbing systems for which it was responsible. Manshul was the one who then engaged the outside testing agencies - - Inspeco and Testwell Craig. Moreover, even though the invoices requesting payment from these testing services are dated January 20, 1992, it was not until three years later, when F&G withdrew from the Project, that Manshul ever indicated that it intended to seek payment from F&G for this testing.

The testimony of Sanmarco and Schneider provide further support for plaintiff's proposed contract interpretation. Both testified that the responsibility for hiring independent testing laboratories to conduct inspections and testing of the subcontractors' work was part of the prime contract specifications. It is undisputed that Manshul was, under its contract with the Navy, required to hire CQC personnel to ensure compliance with Navy requirements and to oversee the subcontractors' work. (S Tr. at 11-12). Moreover, the Navy's contract with Manshul specifically provides that:

> [t]he contractor shall provide an independent, commercial testing laboratory accepted by the contracting officer, to perform all sampling and testing services required . . . .

(Ex. QQ, Section 3.2.1.). Sanmarco, the ROICC representative, testified that the independent testing was the responsibility of the prime contractor, Manshul. (Tr. at 221).

Based on all of this evidence, and Manshul's belated efforts to claim these expenses as part of its counterclaim, this Court finds that defendant has failed to sustain its burden of proof on this counterclaim.

CHANGE ORDERS

F&G seeks reimbursement for various change orders for additional work performed by F&G beyond the scope of the Agreement. As explained by the witnesses, whenever a subcontractor performs work which is additional to that specified in the contract, the subcontractor may request payment for that work from the contractor in the form of a change order request. The evidence demonstrates that the various change order requests that are the subject of this controversy were signed by Manshul's representative, Mr. Haugland, verifying the time and materials expended by F&G. (Tr. at 437-39). There was no evidence presented to indicate that F&G had ever been told that the change orders were being approved for insurance claims only or that Manshul did not intend to reimburse F&G for this extra work.

A. The Broken Stub-Up Pipe

One of the earliest change order requests for which F&G now seeks payment is the request for $1,424.04 required to repair a "[four inch] cast iron line" (Ex. K) which had been damaged when heavy equipment ran over the piping. (Ex. B) . This four inch "stub-up pipe" was installed by F&G as part of the underground system and was damaged at some point after

the underground system had been successfully tested and passed inspection in October 1992. Manshul authorized F&G to make the necessary repairs and Haugland signed the daily change order worksheets verifying the work.[39] It is undisputed that Manshul then backcharged the amounts required for the remedial work to Lacatosa Masonry, the subcontractor that Manshul determined was responsible for damaging F&G's work. It is also undisputed that F&G was never paid for these completed repairs nor was F&G ever told that Manshul was submitting the change order to its insurance company for reimbursement. (Tr. at 86-87).

Defendant raises a number of arguments in support of their refusal to pay this change order. First, they argue that the Navy did not accept F&G's claims as change orders. This, however, does not resolve the issue because as Mr. Haugland testified, change orders can be subject to payment by the general contractor (Tr. at 440-41) and indeed, Mr. Stassi believed that this one was approved pursuant to an agreement with Manshul.

Defendant also contends that even though Mr. Haugland signed page two of the change order, his signature only indicated that the physical work had been done; he was not approving payment on the change order request. Defendant argues that the absence of Haugland's signature on the first page of the change order is proof that he did not accept the work as a change order. There is no evidence, however, to suggest that prior to his testimony at trial, Mr. Haugland ever informed Mr. Stassi or anyone else at F&G that the lack of a signature on the front page of the

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[39]In United States ex rel. Perosi Elec. Corp. v. Manshul Construction Corp., 940 F. Supp at 509-511, the court examined each change order request to determine if there was sufficient supporting documentation to suggest that Manshul had agreed to compensate plaintiff for the work. Signed time sheets and invoices endorsed by Haugland were found to constitute sufficient evidence of Manshul's agreement and those change order requests were accordingly approved by the court.

change order request form meant that Manshul was not approving the change order, and expected F&G to do the work without reimbursement. In the absence of such a representation, the testimony is clear that F&G relied to their detriment in completing this work which Mr. Haugland had approved, fully expecting to be reimbursed on a time and materials basis. Given the fact that Manshul was reimbursed for the damages by the other subcontractor who broke the pipe, this Court finds that F&G is entitled to recover the amount in this change order.[40]

B. Second and Third Floor Bathrooms

The second change order for which F&G seeks reimbursement is based upon the costs of supplying materials and labor for work done in the second and third floor bathrooms.

Specifically, in April 1993, F&G submitted a change order request to relocate certain items in the second and third floor bathrooms because some duct work was in the wrong place. (Ex. NNNN). F&G did not receive authorization to perform the work until they were notified of the change order approval by the Navy in a memorandum from Mr. Haugland, dated August 3, 1993. (Ex. OOOO). Although F&G performed the work, it never received the $4,434.00 due as payment for the work from Manshul. (Ex. NNNN; Tr. at 72-73). Another change order request for time and materials in the amount of $4,352.86 was also submitted for the completed relocation work in the second and third floor bathrooms (Ex. E), but payment was never received. (Tr. at 81). The second and third floor bathrooms were subsequently retested in

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[40]Defendant raises a third argument based on F&G's alleged waiver of the right to seek reimbursement for any of its change orders. That argument is addressed supra at 18-21.

September 1993, following the design modification, at a charge of $1,362.90 (Ex. G). Again, F&G completed the testing, but was never paid. (Tr. at 84-85).

Defendant contends that it was entitled to refuse to pay F&G, arguing that the Navy required this revision to the plumbing along the toilets on the second and third floors as a result of a change in design made by the Navy, but that the Navy did not accept the change order or issue a contract modification. Mr. Haugland testified that Manshul submitted a change order to the Navy but the Navy never approved the change order. (Tr. at 427-30). Instead, the Navy advised Manshul to take other steps to deal with the problem and, according to Mr. Haugland, the cost for doing that work was F&G's responsibility. (Tr. at 429). In this case, however, the change order negotiations with the Navy on this issue were not completed until June or July of 1994, after F&G had stopped coming to the Project and had not responded to the punch list items. (Ex. NNNN). Defendant contends that in this instance, F&G bears the risk of loss in the event the owner does not recognize such a change. (Tr. at 426-30).

Apart from Mr. Haugland's testimony, however, there is nothing in the contract itself that directly places the risk of loss on F&G. Perhaps more important, is that there is nothing in the record before this Court, apart from Mr. Haugland's testimony, that supports defendant's claim that the Navy refused to authorize these change orders. Defendant failed to introduce any documentary evidence at trial to demonstrate the Navy's rejection of the change order request. Moreover, plaintiff contends that despite requests for discovery of Manshul's payment requisitions to the Navy and any approvals for payment authorized or rejected by the Navy, defendant never produced any of these items. Thus, plaintiff argues t hat defendant have failed to produce any evidence to refute plaintiff's claim for such payment. Indeed, Mr. Schneider,

who was employed by Manshul to ensure compliance with the Navy contract, approved the performance of the work, supporting plaintiff's argument that the Navy did approve the work.

The evidence establishes that Manshul directed F&G to proceed to perform the work, even though Manshul was aware that the change order request was still outstanding and had not been approved by the Navy. (Ex. OOOO). Based on the evidence presented by plaintiff and the lack of any evidence to the contrary, this Court finds persuasive plaintiff's argument that by ordering F&G to do the work, knowing that the change order had not been approved, Manshul was assuming an obligation to pay F&G in the event that the Navy did not approve the change order. Manshul's remedy was with the Navy to recoup monies incurred as a result of a change in design made by the owner, not to seek to transfer the costs to the subcontractor in the absence of a clear contractual provision to that effect.

C. Retesting and Repairs on the Underground System

As set forth above in more detail, certain problems developed in the underground sewer and sanitary system following F&G's successful installation of the system in October 1992. Due to certain leaks which developed in the system, F&G was asked to perform additional testing in order to locate and then repair the leaks.

F&G submitted several change order requests dated August 25, 1993, September 14, 1993, and September 27, 1993, noting labor and material costs in the amounts of $1,812.24, $3,393.77, and $1,362.90, respectively. (Exs. C, F, G, respectively). These amounts were incurred by F&G in connection with its need to retest the underground sewer and storm system which developed a leak after it had been successfully tested in October 1992. The time and

material changes noted on the requests were verified by Mr. Haugland. (Tr. 67; Ex. C). F&G was never paid for this work, nor was it ever advised by Manshul to seek reimbursement for this amount from F&G's insurance company. (Tr. at 67, 69-70).

With respect to the retest of the underground system, Mr. Haugland testified that it was F&G's responsibility to conduct the testing for the problem in the underground system and that "the damage was caused by F&G." (Tr. at 444). Mr. Haugland cited to that portion of the contract which specified that general contractor was not responsible for any loss or damage caused to the work.

To the extent that defendant seeks to preclude F&G from reimbursement for these change order requests on the grounds F&G was responsible for the breakage of the pipe and the risk of loss, those arguments have been dealt with in detail in connection with defendant's claim for backcharges for the work performed by Manshul in connection with the leak, and this Court has found that the defendant has failed to carry its burden of showing that F&G was responsible. Apart from those considerations, it appears that F&G is otherwise entitled to recover the amounts expended to retest the underground system as "extra" work performed, for which change orders were properly submitted and approved by Mr. Haugland.

D. Broken Pipe

The final change order for which F&G seeks reimbursement is for labor and materials required to repair a two-inch broken sanitary line. This change order request, in the amount of $283.30 dated August 25, 1993, was never paid to F&G. (Ex. D).

Again, defendant contends, without any evidentiary support, that F&G was responsible

for the broken pipe due to improper backfill. This argument, similar to the one made with respect to the breakage in the underground pipe[41] is based on conjecture and hypothesis. However, since F&G's system passed inspection in October 1992, as did its compaction and backfill operation, this Court finds that there was no evidence of negligence on the part of F&G presented in this instance. Rather, this Court finds the testimony of Mr. Schneider and Mr. Sanmarco persuasive to the extent that they warned Manshul against allowing other subcontractors to ride over the already compacted area with heavy equipment.

PREJUDGMENT INTEREST

F&G argues that it is entitled to prejudgment interest on the award, running from May 14, 1994 through the date of satisfaction of judgment. This Court agrees.

Although discretionary, in Miller Act cases, the courts have consistently held that the prevailing party is entitled to an award of prejudgment interest as part of the scope of the remedy available. See United States v. Seaboard Sur. Co., 817 F.2d 956, 965 (2d Cir.) cert. denied, 484 U.S. 855 (1987); Strolier New Jersey Bldg. Supply Ctrs, Inc. v. Aetna Cas. & Sur. Co., No. 94 CV 5283, 1995 WL 450977, at *1 (E.D.N.Y. July 21, 1995). In applying the rule, however, federal courts look to the law of the forum state to determine the appropriate interest rate. See Feel The Heat, Inc. v. Centurian Agency Inc., 622 F. Supp. 273, 274 (S.D.N.Y. 1985). In this case, New York law applies, providing for a 9% legal rate of interest on contract actions such as this. See N.Y. C.P.L.R. § 5004 (McKinney 1992). The appropriate date from which to calculate

[41]See discussion supra at 29-33.

the prejudgment interest owed is 30 days from the date notice is given by the subcontractor of a claim under the bond. See United States ex rel. Balf Co. v. Casle Corp., 895 F. Supp. 420 (D. Conn. 1995) (citing United States v. Quinn, 122 F. 65 (2d Cir. 1903).

Accordingly, since it is stipulated that F&G gave notice on April 14, 1994, plaintiff is entitled to receive an award of prejudgment interest at 9% from May 14, 1994 to the date of payment.

ATTORNEY'S FEES

Although conceding that attorney's fees are not generally recoverable in Miller Act cases, F&G argues that fees should be assessed against defendant because it "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 130 (1974) (holding that attorney's fees are not recoverable in Miller Act cases, but noting in dicta that they may be awarded where bad faith is shown). Plaintiff argues that the circumstances here are similar to those in the case of Treat Bros. Co. v. Fidelity & Deposit Co., 986 F.2d 1110 (7th Cir. 1993). There, the court awarded fees where it found that the general contractor acted in bad faith by seeking to recoup monies from the subcontractor through litigation based on groundless backcharges and inflated estimates for work not completed.

Plaintiff points to the fact that Manshul was responsible for performing out-of-sequence or non-conforming work and that Manshul has attempted to lay the blame for all of its problems on F&G. Moreover, plaintiff argues that Manshul's failure to call key witnesses and to present substantiating evidentiary proof suggests that Manshul knew it did not have support for its

claims. In further support of its claim of bad faith, F&G points to the fact that throughout the litigation, the defendant has prolonged the litigation in an effort to stall F&G's recovery by refusing to tender relevant documents in discovery, asserting new counterclaims after the close of discovery, and raising the frivolous issue of a conflict of interest in the representation of Aetna by Manshul's former counsel. F&G seeks reimbursement of fees and disbursements in the amount of $78,434.89.

Having been familiar with the discovery proceedings, the motion for disqualification, and the trial, this Court is fully aware of the problems and the delays encountered by F&G in reaching a resolution of its claims. While it is true that Manshul was late in providing discovery and did attempt to raise new counterclaims at the time of the pre-trial order and after the close of discovery, this Court finds that the delays were due to the negligence of counsel and not due to bad faith or any deliberate effort to delay or obstruct the proceedings.

With respect to the motion for disqualification of Ms. Sigmond, this Court does not agree that the motion was frivolous. Rather, there were a number of difficult and novel issues raised by the unusual set of circumstances presented in this case and the motion required extensive briefing by the affected parties.

Finally, with respect to the factual issues raised during the trial, even though this Court has found in plaintiff's favor, I cannot say that the case was comparable to the situation faced in Treat Brothers Co., where the general contractor "disingenuous[ly]" asserted a counter-claim seeking to recover an amount already awarded to the subcontractor by an arbitration. 976 F.Supp. at 1113. Here, although the court has found in favor of plaintiff, there were clear issues for the trier of fact and this Court does not find defendant's counterclaims for set-off and recoupment to be disingenuous.

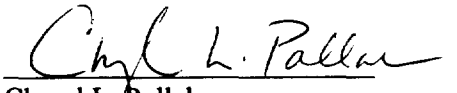
In sum, this Court finds that the circumstances presented here are not sufficient to establish the requisite bad faith necessary to justify fee shifting. Accordingly plaintiff's request for attorney's fees is denied.

CONCLUSION

Based on the foregoing, this Court finds in favor of plaintiff F&G and awards $55,529.11, representing $42,900.00 in unpaid amounts owed under the Agreement, $12,629.11 in amounts owed for additional work performed pursuant to change order requests, plus prejudgment interest calculated at the rate of 9% from May 14, 1994 to the date of payment. This Court denies plaintiff's claim for attorneys' fees, and finds that defendant has failed to satisfy its burden of proof on its claims for set-off or recoupment.

SO ORDERED.

Dated: Brooklyn, New York
October 1, 1998



Cheryl L. Pollak
United States Magistrate Judge