
NEW YORK STATE SUPREME COURT

Appellate Division – Third Department

Wand Electric, Inc.,

Petitioner – Appellant

Against

Clinton County Highway Department,

Respondent

BRIEF AND APPENDIX OF PETITIONER – APPELLANT
WAND ELECTRIC, INC.

Case # 79028

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QUESTIONS PRESENTED

1. Did the New York State Supreme Court improperly deny the petition of plaintiff?

Yes.

2. Did the arbitration panel improperly and without any explanation combine two separate and distinct contracts into one award and fail to award monies owed on the separate electrical contract despite admission from respondent/defendant that money was due and owing to the appellant?

Yes.

3. Did the arbitrators improperly let the respondent/defendant file claim against appellate/plaintiff nearly six months after contract termination in violation of the terms of the contract?

Yes.

4. Did the arbitrators act so irrationally by ignoring so many defendant/respondent contract violations that the intent of the contract was rendered worthless and without protection for plaintiff/appellant and sets worrisome precedent for any future construction contract?

Yes.

STATEMENT OF FACTS

This case emanates from an arbitration hearing that took place from March, 1995 through October 1995 in Plattsburgh, NY, Clinton County and lasted 11 days.

During March 1993, Wand Electric, Inc. (hereafter referred to as Appellant/Plaintiff) was the low bidder relative to a general construction contract and a separate electrical contract in connection with a renovation project at the Clinton County Highway Garage. One of the other bidders that Appellant/Plaintiff edged out for the general construction contract was Murnane Building Contractors, Inc., the second low bidder. James Arvay, an architect with the firm of Arvay Whitford Associates was the architect who designed the plans and specifications for the project for the County/owner (hereafter referred to as Respondent). He was also the owner's representative on the job during the course of the project. Francis LaBarge was the Respondent's Highway Superintendent during this time period in question.

Written contracts for the general and electrical portions were entered into on or about May 18th, 1993, approximately 60 days after this project was bid. Signatories were the Appellant/Plaintiff and the Respondent relative to said renovation project being undertaken at the Clinton Respondent Highway Department garage located on Route 3 in the Town of Plattsburgh, County of Clinton, State of New York. One of the terms and conditions of the contracts was that the job had to be completed within 120 calendar days.

Two specific contracts were entered into between the parties, i.e., a general construction contract and a separate electrical contract. Work was originally scheduled to commence on these contracts soon after bid date in mid-March, 1993. However, due to the Respondent's failure to secure a building permit (A16 – A18) the starting date was pushed forward until July 19, 1993. Work under the general construction project actually

began on the first day the job site was made available to Appellant/Plaintiff, i.e., Monday, July 19th, 1993 (A19). With subsequently agreed upon change orders the total contract price for the general construction contract was \$175,696.00

Work continued on Appellant/Plaintiff's general construction project by Appellant/Plaintiff's employees until late December 1993 and by one of Appellant/Plaintiff's subcontractors, Adams Glass, until January 1994. By letters dated January 11th, 1994 (A20 – A21) and January 21st, 1994, the Respondent terminated Appellant/Plaintiff's general construction contract and ultimately hired Murnane Building Contractors, Inc. to finish said general construction contract on a time and materials basis. Although the Respondent did not formally terminate the general construction contract in writing until January 1994, it became clear that the Respondent was intending to terminate Appellant/Plaintiff by early November 1993 by sworn testimony of Francis LaBarge, Respondent's Highway Superintendent, at a time when there were virtually no complaints made as to any defects in workmanship or materials. Items that were stated as being deficient in the architect's deficiency list after contract termination had been seen, reviewed, accepted, and paid for by the architect and the owner (A22).

Despite the January 1994 termination of its general construction contract, Appellant/Plaintiff continued to perform its obligations under the separate electrical contract. This portion of the job was fully completed, although a problem did occur with respect to the electrical thermal storage heat. Yet, as in the general construction contract, the Respondent denied Appellant/Plaintiff the opportunity to correct this problem (A23 – A29). The Respondent admits owing Appellant/Plaintiff approximately \$18,440.06 of its "base claim" of \$21,608.06 in connection with the electrical contract. Thus, the only item

in dispute relative to the “base” claim of Appellant/Plaintiff under its electrical contract is the \$3,168.00 credit the Respondent claims it is entitled to for correcting the ETS problem which it admittedly refused to let Appellant/Plaintiff correct.

The general construction job was to be completed in two phases, i.e., phase one was the first floor and phase two was the second floor of the Respondent Highway garage. While phase one was being done, Respondent highway operations continued out of the second floor. When the first floor became available, those same operations became concentrated on the first floor to permit construction work to proceed on the vacated second floor. Working under these cramped conditions offended Highway Superintendent LaBarge and he was unquestionably anxious to return to normal working conditions as soon as possible. This difficulty was compounded by the advent of autumn/winter weather and cold temperatures. The Respondent Highway Superintendent was exerting unrelenting pressure upon Appellant/Plaintiff to complete the job at the same time substantial delays were occurring. These delays were directly due to the Respondent’s failure to timely obtain a building permit (A30 – A32), several changes in materials used on the project as directed by the architect (A33 – A38), and the failure of the architect/Respondent to promptly make appropriate selections (A39 – A44)(A45 – A59).

Therefore, the Respondent on one hand was pressuring Appellant/Plaintiff to move the project forward, yet on the other hand, was creating the very delays it railed against. The Respondent-created delays in turn caused the project to languish into cold weather months. This created an impossible atmosphere for Appellant/Plaintiff to work under. Certainly, the fact that, (I) Respondent employees moved filing cabinets, desks, chairs, computers and other heavy objects over a newly installed floor without permitting

the requisite setting or drying time, in their haste to re-occupy the first floor, (II) Respondent personnel, office equipment and furniture rapidly moved in to occupy the first floor before it was ready for occupancy without a joint inspection being conducted to document any deficiencies, and (III), numerous complaints about delay voiced by the Respondent and its representatives in letter form and at the construction meetings, all reveal the level of anxiety the Respondent felt at moving the project along. Yet this same anxiety caused some of the very defects and deficiencies the Respondent later cited to terminate the contract.

It is also important to point out that Appellant/Plaintiff was not the only prime contractor on this job. K&L Plumbing and Heating was responsible for performing certain plumbing and air-conditioning work as a prime mechanical contractor. It should be noted that K&L Plumbing and Heating was operating under a separate prime contract with the Respondent and was an entity entirely distinct and separate from Appellant/Plaintiff. Also, Twin State Telephone was a different contractor performing work for the Respondent under a separate contract with the Respondent. Both of these prime contractors caused construction problems for which Appellant/Plaintiff was blamed.

With the foregoing as general background, it is critical to point out that the Respondent of Clinton had no right to terminate Appellant/Plaintiff's general construction contract and also refuse to pay any portion of the electrical contract. The arrogant and acrimonious refusal of the Respondent to meet Appellant/Plaintiff half-way in the spirit of working together to get the job done caused a breakdown of

communication, cooperation and mutuality of purpose which led to the original arbitration.

POINT I

THE SUPREME COURT OF NEW YORK IMPROPERLY DENIED APPELLANT/PLAINTIFF'S REQUEST FOR VACATION OF THE ARBITRATION DECISION

Appellant/Plaintiff through its President, Terry J. Chilton, presented a petition to vacate an arbitration award to the Honorable James P. Dawson, J.S.C. on May 24th, 1996 at a Special Term of the Supreme Court held at the Clinton County Government Center. Judge Dawson found that the entitled proceedings were in all aspects regular and subsequently ordered that this petition be denied in all respects and that a total of \$7,257.81 be confirmed as the award to the Clinton County Highway Department (A2). Judgment was rendered and filed on June 12th, 1996 confirming award (A5).

The issue before the Supreme Court was not the regularity of the proceedings, nor the size of the award. The issue was that the arbitrators had acted irrationally in so egregiously ignoring the contract between the Respondent and Appellant/Plaintiff that said contract was rendered worthless as a document protecting the rights of the Appellant/Plaintiff. The arbitrators further compounded the issue by making only a one-sentence determination as the end result of 11 days of hearings and 2499 pages of testimony and over 100 exhibits.

CPLR 7511 gives the grounds for vacating an arbitration award. It also states that though an arbitrator does not necessarily have to follow the law (CPLR 7511 582), he must follow the contract from what he derives his authority. Statutory requirement that

arbitration determination be final does not necessarily preclude judicial review for substantiality of evidence or procedural fairness (Mt. St. Mary's Hospital v. Catherwood 311 NYS 2d 864). Where an arbitrator in a compulsory arbitration has applied a wrong rule of law, particularly a rule of substantive law, court should vacate determination rather than let it stand as would be the case in a voluntary arbitration (Furstenburg v. Aetna Cas. 415 NY Supp.2d 850). This arbitration was mandated by contract (A201 1987) section 4.5.1. Further, (Furstenburg v. Aetna Cas. 415 NY Supp. 2d 852) states “the arbitrator must be limited by the same constitutional requirements which limit the statute conferring power on him. Otherwise an arbitrator would have a power greater than the Constitution permits the Legislature to delegate to an administrative or regulatory agency, namely, to resolve a dispute or make regulations on less than substantial evidence or without reasonable basis or *in disregard of applicable rules of law*”. Section (6) of this Supplement states “we should do what we would do if an administrative agency had applied a wrong rule of law, i.e., vacate the determination, rather than let it stand as we would in a voluntary arbitration”.

J.S.C. Dawson did not address the irrationality of the arbitrator's decision. His decision was rendered on the regularity of the proceedings and that the size of the award was not out of line.

POINT II

THE ARBITRATORS MAY HAVE BASED THEIR DECISION ON THE COMBINATION OF BOTH THE GENERAL AND ELECTRICAL CONTRACTS, THOUGH EACH WERE SEPARATE AND THE RESPONDENT HAD ADMITTED OWING MONEY ON THE ELECTRICAL CONTRACT.

There were two separate, distinct contracts awarded to Appellant/Plaintiff. One was for the general construction work and the other for electrical work. Two separate contracts were signed, two individual bonds were provided, and two separate companies performed the work on each contract. Employees of Appellant/Plaintiff, a Vermont “C” corporation, performed the electrical contract. Appellant/Plaintiff performed the general construction contract entirely with employees of Chilstead Building Company, Inc., a New York State “C” corporation. The only thing in common between the two contracts was singularity of ownership by the owner/contractor. Appellant/Plaintiff, the senior construction entity with the greater amount of assets, provided the bonds in each instance. Appellant/Plaintiff was able to procure the level of bonding needed without payment of cash collateral. Chilstead Building Company had limited bonding capabilities as a relatively new business and was required to post 10% cash collateral in addition to the bonding fees. Therefore, it was decided to bid both jobs, the electrical and general construction for the highway garage, under one name, Wand Electric, Inc.

It was decided between the parties to the arbitration that the claims of Appellant/Plaintiff for both contracts would be heard at the same time for the sake of brevity. This was agreeable with the arbitrators. Nothing was said or agreed upon about any award being a combination of both contracts.

It was admitted during testimony that money was and still is due and owing under the electrical contract (A60 – A62). Indeed, the fact that the Respondent coerced Appellant/Plaintiff into finishing the electrical contract implied that they intended to honor the terms of the electrical contract for payment. Thus, Appellant/Plaintiff expended labor and materials after the general contract was terminated of an additional \$21,610.06

which is still due and owing only to have the Respondent deny payment in total. At various times, the Respondent has claimed that the architect hadn't certified complete payment, all contract documentation hadn't been completed, and that the arbitration award was in full settlement of the amount owed.

The arbitrators, by virtue of their one-sentence decision failed to differentiate between the contracts. It has been determined that a contract is severable where the part to be performed by the party consists of several distinct and separate items or is implied by law. Ming v. Corbin (1894) 142 NY 334, 37 NE 105; Rogers v. Graves (1938) 254 AD 467, 5 NYS2d 967, revd on other grounds 279 NY 375, 18 NE2d 626; Wagner v. G.Gaudig & Blum Corp. (1928) 223 AD 254, 228 NYS 139. The brevity and lack of specificity prevents the Appellant/Plaintiff from knowing if it was properly credited with the \$18,440.06 the Respondent has admitted owing Appellant/Plaintiff.

It is because of the fact that there were two separate, severable contracts that the decision of the arbitrators leaves the question of a definitive award. As far back as 1838 in Mayor & C. of NY v. Butler, Barbours Supreme Court Reports, Vol. 1, Kings General Term, Nov., 1847, it has been decided that "Where an award is indefinite as to the subjects investigated and determined, parol evidence is admissible to show that the arbitrator has exceeded his authority, and that therefore his award is null and void".

POINT III

**THE ARBITRATORS WRONGLY LET THE RESPONDENT FILE A CLAIM SIX MONTHS
AFTER CONTRACT TERMINATION.**

Section 4.3.3 of the general construction contract – *Claims and Disputes* – states “claim made by either party must be made by written notice 21 days after recognition of the condition”. Section 4.4.1 further requires the written claim to be submitted to the architect for his review and answer. The Respondent unquestionably violated this provision in that it never served a written notice of claim.

After contract termination by the Respondent, it was obvious that the Appellant/Plaintiff would seek redress by any means available under the terms of the contract. Such terms required compulsory arbitration per section 4.5.1. Appellant/Plaintiff gave such notice of claim to the architect on January 17th, 1994, 6 days after contract termination and well within the 21-day limit as mandated by contract (A52). The Respondent never filed a notice of claim and did not file an answer or counterclaim to Appellant/Plaintiff’s claim until June 3rd, 1994 (A63 – A68), nearly six months after contract termination and never filed said counterclaim with the architect but submitted it directly to the American Arbitration Association. This was admitted in testimony by the architect (A69 – A73).

Therefore, under the terms and provisions of the contract, the Respondent failed to follow the necessary procedures to give notice of claim. The Respondent’s claims with respect to both contracts should thus be in all respects denied.

POINT IV

THE ARBITRATORS DECISION APPARENTLY IGNORED NUMEROUS BREACHES OF THE CONTRACT BY THE RESPONDENT SO THE CONTRACT HAS BEEN RENDERED MEANINGLESS.

In the Matter of Furstenberg (AETNA CAS) [67 AD2d 580], the court stated that “the test in compulsory arbitration cases is whether the award is supported by evidence or other basis in reason, and appearing in the record, and an award may be found on review to be rational if any basis for such a conclusion is apparent to the court”. It further held that “Where an arbitrator in a compulsory arbitration has applied a wrong rule of law, particularly a rule of substantive law, the determination should be vacated”.

It is recognized that arbitrators do not have to give a reason for their decisions, Maidman v. O’Brien 473 F.Supp. 25 yet their very lack of clarification has left more unanswered questions than their one-sentence decision has solved.

The Appellant/Plaintiff asked for over \$2,000,000.00 in unpaid receivables, lost profits and other damages. The claim took 11 days to hear and resulted in 2499 pages of testimony and dozens of exhibits, yet the arbitrators rendered a terse, one-sentence decision (A7). The basis for the claims of Appellant/Plaintiff were (A52 – A59):

CLAIMS FOR DELAY CAUSED BY THE RESPONDENT

1. Failure by the owner to obtain building permit in a timely manner
2. Failure by the owner to provide timely access to all work areas
3. Failure by the owner/architect to approve materials and color selections in a reasonable period of time
4. Failure by the owner to provide an adequate design and proper specifications

5. Failure by the owner to provide and maintain heat during the extended construction period
6. Failure by the owner to issue time extensions for extra work and for the owner caused delays

CAUSES FOR CLAIM OTHER THAN DELAYS

1. Failure by the owner to pay Appellant/Plaintiff timely and for all work performed
2. Breach of Contract and unjustified contract termination by owner
3. Improper rehiring of Appellant/Plaintiff's original subcontractors by owner's new general contractor
4. Appellant/Plaintiff was improperly denied access to and use of materials, tools, and equipment at the work site by the owner, after contract termination
5. Failure of the owner to notify police of theft of Appellant/Plaintiff materials and equipment stored in Appellant/Plaintiff trailer after unjustified termination
6. Failure by owner to anticipate completion costs with Appellant/Plaintiff's bonding company
7. Failure by the owner to notify Appellant/Plaintiff of presence of lead paint in extra work

8. Failure of owner to provide an environmentally safe work site while removing asbestos tile
9. Failure of owner to file an EPA notification permit

All of these issues were presented over 11 days of hearings to the arbitration panel. Expert witness testimony by Dr. Richard Pikul, P.E., with accompanying photographic proof was provided by the Appellant/Plaintiff, in repudiation of the Respondent's claims and substantiation of its own. The Respondent provided no independent expert witness testimony other than the labor foreman for the contractor that was hired to replace Appellant/Plaintiff.

A. CONTINGENT ASSIGNMENT OF SUBCONTRACTS

Section 5.4.1.2 of the contract documents states that "assignment is subject to the prior rights of the Surety, if any, obligated under bond relating to the Contract" (A74).

The Respondent rejected the Surety's proposal of \$61,574.00 (A75 – A81) and instead elected to hire another contractor on a time and materials basis without regard to mitigation of costs for a sum of \$125,980.00 (A82) while changing the scope of the contract (A83 – A91) and rehiring of some of the Appellant/Plaintiff's original subcontractors. The arbitrator's decision ignored the consequences of 1) allowing the respondent to enter into a time and materials agreement with another contractor without proper mitigation with the Appellant/Plaintiff's surety (A74 – A75), 2) of changing the scope of the original work (A83 – A91), and 3) permitting the architect

and owner to do what they wanted while saddling the Appellant/Plaintiff with the bill which increased the cost to the Appellant/Plaintiff by some \$64,406.00 (A82). This is completely irrational as it gives an owner carte blanche to affect design changes on whatever terms they wish and expect the contractor to pay the difference from what the original work could have been finished.

B. ARCHITECT'S ADMINISTRATION

Section 4.2.7 of the contract documents state “the Architect will review and approve or take other appropriate action upon the Contractors submittals such as Shop Drawings, Product Data, and Samples.....” “the Architect’s action will be taken with such reasonable promptness as to cause no delay in the Work” (A92).

The architect admitted during testimony that the Appellant/Plaintiff’s transmittal dates were accurate (A93 – A97) for all Appellant/Plaintiff’s submittals. There were further delays caused by the respondent in making color selections (A45 – A46), delay in securing the building permit (A30 – A32), and delay for owner/architect changes (A33) for which delay claim was made. The arbitrators had to ignore these delays in their entirety in order to make any award for the respondent. Again, because there is no definitive answer, the question still remains.

C. CORRECTION OF WORK

Section 12.2 of the contract documents states that “the Contractor shall promptly correct Work rejected by the Architect.....” and Section 12.2.4, “if the Contractor fails to correct nonconforming Work within a reasonable time, the Owner may correct it”. (A24)

The Appellant/Plaintiff was never allowed to correct any nonconforming work (A25 – A29). Section 9.9.2 requires the owner, architect, and the contractor to conduct a joint inspection prior to occupancy by the owner. This was never done (A98 – A100). The arbitrators apparently failed to accept the fact that the Appellant/Plaintiff attempted to correct nonconforming work that he was aware of but not allowed to do so. Rejection of this Section by the arbitrators gives the owner further occasion to prevent a contractor from complying with the contract while allowing the owner to hire whomever he wants to correct whatever he wants for whatever price is rendered and deducts this change from the contractor's progress payment without going through proper procedures.

D. PROTECTION OF PERSONS AND PROPERTY

Section 10.1.4 states that “the owner shall indemnify and hold harmless the contractor....” “only to the extent caused in whole or in part by negligent acts or omissions of the owner” (A101).

One of the owner's employees admitted in testimony (A102 – A103) that he removed asbestos tile at the direction of the owner and had no training or certification to do so. The architect directed the Appellant/Plaintiff's employees to remove peeling lead based paint from the second floor ceiling (A104 – A106), a violation of the 40 Code of Federal Regulations Parts 260, 261, and 263 which are part of RCRA of 1976 (A107 – A108). No EPA report was ever filed by the architect (A109). The arbitrators apparently failed to take into account these clear violations of law by the owner and refused to reprimand or censure the owner while denying the Appellant/Plaintiff 's claim for costs incurred for lead testing of employees.

E. TERMINATION OR SUSPENSION OF THE CONTRACT BY THE CONTRACTOR

Section 14.1.1.4 states that the contractor may terminate the contract “if repeated suspensions, delays, or interruptions by the owner.... Constitute in the aggregate more than 100 per cent of the total number of days scheduled for completion, or 120 days in any 365 day period, whichever is less...” (A33).

The Appellant/Plaintiff had every right to stop work and terminate the contract under this section because of the respondent caused delays, however it was the Appellant/Plaintiff’s intent to resume work as soon as payment had been made on Payment Requisition #5. Instead the respondent chose to terminate the contract. The only punch list ever prepared was after the contract termination and was refuted by the Appellant/Plaintiff’s expert witness (A110 – A118) who concluded that there was no reason for termination and that the contractor should have been allowed to correct any deficiencies. The arbitrators apparently failed to address the fact that the Respondent offered no verifiable substantiation for the respondent’s list of termination reasons and that termination was for convenience, not cause.

F. THE RESPONDENT OF CLINTON UNLAWFULLY TERMINATED

APPELLANT/PLAINTIFF’S GENERAL CONSTRUCTION CONTRACT

It is the most fundamental position of Appellant/Plaintiff that the Respondent of Clinton illegally, improperly, arbitrarily and unjustly terminated its general construction contract with Appellant/Plaintiff. By doing so, it breached its contractual obligations with Appellant/Plaintiff.

It is axiomatic that a contract may be rescinded only for a material breach or default in performance. 22 NY Jur. 2d, Contracts, Section 443, pages 366-367. Although an owner may rescind a building contract for the contractor's inability to perform it after it is made, for the contractor's repudiation of the contract or an essential part thereof and for such a breach as substantially defeats its purpose. 22 NY Jur. 2d, Contracts, Section 444, pages 367-370. The owner may not rescind a building and construction contract for a slight, casual, or technical breach, but as a general rule, only for such breaches as are material and willful, or, if not willful, so substantial and fundamental as to tend strongly to defeat the object of the parties in making the contract. The failure of the contractor to perform in every respect is not essential to the right of the owner to terminate, but a failure which leaves the subject of the contract substantially different from what was contracted for is sufficient. 22 NY Jur. 2d, Contracts, Section 444, page 368. Where a building or construction contract in effect gives the owner the right to terminate the contract on the certificate of an architect that the contractor's default is sufficient ground for such action, such a provision makes the certificate of the architect a condition precedent to the right of the owner to rescind the contract. This provision must be strictly followed in order to justify the owner in rescinding the contract thereunder. 22 NY Jur.2d, Contracts, Section 444, page 370.

By letter dated January 11th, 1994 James Arvay, the architect handling this construction project, as the owner's representative, provided written certification to the Respondent that Appellant/Plaintiff had breached its contract and sufficient cause existed to justify termination by Respondent. On the same date, Francis LaBarge, Respondent Highway Superintendent issued a letter dated January 11th, 1994 providing

Appellant/Plaintiff seven days written notice of the Respondent's intention to terminate Appellant/Plaintiff's general construction contract. This letter merely echoed Arvay's letter of the same date. By letter dated January 21st, 1994 the Respondent terminated said contract based upon Mr. Arvay's written certification and the written notification of Mr. LaBarge. Yet a decision had been made to terminate the contract well before January 11th, 1994.

Despite the fact that virtually no complaints had been voiced to the appellant/Appellant/Plaintiff by the architect or by the Respondent as to any specific deficiency in the workmanship of the work performed or the quality of the materials used, the Respondent was considering terminating Appellant/Plaintiff general contract by early November, 1993 (R86).

Sensing there was difficulty involving the contract due to letters that had been written to Appellant/Plaintiff's bonding company, Terry Chilton, an officer of Appellant/Plaintiff arranged for a meeting between representatives of Appellant/Plaintiff, the Respondent Highway Department, the architect, and certain Clinton County legislators during November, 1993. Mr. LaBarge testified that during that meeting he was contemplating terminating Appellant/Plaintiff's contract at that time.

Yet there is even more evidence that the Respondent fully intended to terminate Appellant/Plaintiff's general construction contract by November, 1993. Arvay wrote a letter dated November 12th, 1993 stating that Appellant/Plaintiff had breached its contract. Arvay also wrote another letter dated the same date in which he stated that he was withholding a progress payment because "there is reasonable evidence that the work

will not be completed within the contract time and that the unpaid balance will not be adequate to cover actual or liquidated damages for the anticipated delay, as well as the cost to finish the work.”

By this letter the architect was stating that a decision had been made not to pay Appellant/Plaintiff for work already performed or for work to be performed after that date. A decision had been made to refuse to extend the contract time, despite the fact that the delays were due to the owner/architect’s actions or lack of action. No showing was ever made that reasonable evidence existed that the work would not be completed within the contract time. And finally, his stated intention to use the unpaid balance to cover “actual or liquidated damages for the anticipated delay, as well as the cost to finish the work”, telegraphs the Respondent’s intention to improperly use this money and terminate the contract.

Thus by November, 1993 a decision had been made to terminate Appellant/Plaintiff without any perceived deficiency in work or materials. There was no substantial or material breach by Appellant/Plaintiff. The Respondent merely delayed a formal written termination until January, 1994 while causing Appellant/Plaintiff to spend additional monies in its attempt to complete the work. This decision was without justification, it was malicious and it was made with reckless disregard of Appellant/Plaintiff’s contractual rights.

It is absolutely critical to point out that with only a couple of exceptions there was no written notification given to the contractor of any claimed deficiencies in the work or materials utilized in connection with the construction project prior to January, 1994.

In the letter of January 11th, 1994 seven reasons were cited in support of the Respondent claim that Appellant/Plaintiff breached its contract. Yet only one of those seven reasons (number 7) was ever the subject of any written complaint made by the Respondent or its representative prior to January, 1994.

It is respectfully submitted that each and every one of the seven cited reasons simply constitute a smoke screen to disguise the Respondent's unjustified, bad faith objective to remove Appellant/Plaintiff from this construction project at all cost (A36 – A38). It is clear that the Respondent merely utilized the termination procedure to award the job to the other contractor it originally sought to award the bid to; and to effectuate certain changes in its inadequate original plans and specifications on a time and material arrangement. This was done without consideration of cost, thereby hiding numerous mistakes in the original drawings and specifications and avoiding the bidding process. It is noteworthy that Appellant/Plaintiff had to obtain a Supreme Court injunction to prevent the Respondent from destroying the work Appellant/Plaintiff had already completed prior to an independent expert witness inspection. One thing is crystal clear – the Respondent had no right to terminate Appellant/Plaintiff on January 11th, 1994. No substantial or material breach had occurred on Appellant/Plaintiff's part to justify termination.

The arbitrators heard the expert witness testimony of Dr. Richard Pikul, a nationally renowned consulting engineer. Dr. Pikul's investigation of the site and analysis of the deficiency list that was prepared after contract termination by the architect (A110 – A118) saw no reason for contract termination. He supported his investigation with photographic and videotaped evidence of the construction. There was introduced into

evidence two volumes of written documentation prepared by claims expert KRC International supporting the Appellant/Plaintiff, portions appearing in the Record (R135-R140) and the Respondent's own admission to several breaches of contract. Yet the arbitrators failed to do their job despite the overwhelming evidence of the bad faith conduct of the architect and the Respondent and subsequently ruled in their favor.

CONCLUSION

For reasons stated above, the order, decision, and judgment of Honorable James Dawson, JSC, should be reversed, the arbitrators award vacated, and the matter remitted for a new arbitration proceeding.

We would respectfully ask that if this arbitration award is vacated that it not be returned to the same three individuals for a rehearing as we feel that their personal biases were prevalent in their non-decision.

Dated: _____

Respectfully Submitted,
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