

Appellant's Reply Brief

Arguments Advanced by Respondent do not Address the Issues

The arguments advanced by the defendant/respondent, herein identified as respondent, do not address the issues before the court. Instead respondent merely attempts to rehash the arbitration hearing. It is respectfully submitted that the Appellant Division should determine this appeal by deciding whether the arbitrator's award was rational, which appellant contends it was not.

The appellant's President, rather than an attorney, prepared the original submission to Special Term because the actions of the respondent have caused the demise of the appellant's 20-year old business and the personal bankruptcy of the appellant's family. This has left the appellant without sufficient resources to pursue this gross miscarriage of justice. The entire 2499 pages of testimony and over 100 exhibits adduced during the 11-day arbitration proceeding were not presented to the Honorable Judge Dawson at Special Term. The appellant determined that a full submission of all testimony and exhibits to Special Term was not necessary to enable the lower court to decide the issue of the rationality of the arbitrator's award.

Respondent states that the arbitration was voluntary. Appellant contends it was not. It was mandated by the A201 1987 contract, Section 4.5.1.

Respondent states on Pg. 8 of its brief that even though respondent admits owing at least \$18,841.20 on the electrical contract, the arbitrators have obviously taken this into consideration in arriving at their award. Arbitrator Davis stated for the record during the arbitration (page 10 Vol. 1), "We will consider these claims separately but we'll hear the proof essentially however you chose (sic) to educe the proof." This is exactly the point.

The decision does not decide the claims separately. One cannot tell if only one or both claims were ultimately determined. Did the arbitrators forget about the separate electrical contract and the money due appellant in their haste to make a decision? Was the appellant afforded a credit for the amount admittedly due it? Respondent also admits having control over stolen tools and equipment in a bailment. Yet was appellant ever given credit for this? There is no clue given as to how the arbitrators arrived at their one-sentence decision. If the general contract was the only contract involved then it would be fair to say that their decision was premised on the one general construction contract. But there were two contracts involved in this case. We simply don't know what they did. Therefore, the award should be vacated.

The third point made by the appellant was that the arbitrators apparently allowed the respondent to present its claim against appellant for the first time nearly six months after contract termination. Admittedly, no notice of claim was ever presented by respondent to the architect in writing as required by the contract documents (A69). The language of the 1987 A201 contract documents is clear. As appellant has stated before (R22), appellant feels that if the respondent had presented its claim in a timely manner to the architect or had asked for a short time extension within which to present its claim, i.e., within a week or two after the 21 day time period, then the arbitrators would have had the discretion to accept the respondent's claim. To allow a six-month period to pass before a claim is presented and to allow respondent to completely circumvent the submission process to the architect negates the clear wording and intent of this section. It is therefore fair to assume that the respondent only filed a claim (or counterclaim) in retaliation to the claims filed by appellant. Appellant's written notice of claim was made and served within

days of contract termination and also during the work's progression. So why was the respondent permitted to ignore and avoid the very provision of the contract it imposed upon the appellant? This alone should result in a vacation of the award.

The rest of the respondent's argument is a rehash of the arbitration. Appellant replies to these allegations because they are untruthful and do not fairly present the true picture.

Respondent's Four Basic Claims Against Appellant

The respondent states there were four basic claims against the appellant. They are addressed as follows:

Failure to Provide a Competent Superintendent

1) Failure to provide a competent superintendent – The only reference ever made by the respondent to the appellant on this issue before arbitration was when this issue was raised by the architect on Aug. 3, 1993. This was incorrect, unfounded, and never substantiated. Nowhere has it ever been shown exactly what the architect objected to that substantiated his allegation of lack of supervision. The architect's objection most probably came about because the architect asked the working foreman on the jobsite, George Daniels, what he thought of the architect's solution for the floor underlayment. This "floor solution" to cover asbestos tile laid on concrete with plywood was a non-standard application that the appellant and his flooring subcontractor, Dandrow, had expressed their reservations about to the architect at the beginning of the job. The architect's "floor solution" was also repudiated by expert witness, Dr. Richard Pikul (R155 – R156) who concluded that the architect's solution was "vague" and non-

standard” When told that it “sucked” by the appellant’s working foreman, the architect’s letter rejecting the “lack of supervision” followed.

The lack of supervision testimony presented by the respondent on pages (RA7 – RA8) fail to tell the whole story.

This was a small contract (\$175,000.00) as general commercial construction contracts go. The contract called for the renovation of some offices in a highway garage. The confusion surrounding who was the appellant’s supervisor arises only because it became an issue during the claim proceedings. In reality, no contractor hires a full-time supervisor on a job of this nature and magnitude. One person is designated the “working foreman or superintendent” and the other is a helper. Two other prime contractors on this jobsite did not have a full-time supervisor. The separate electrical contract for \$95,000.00 with Wand Electric, Inc. had only two personnel working, i.e., a working foreman and a helper. The separate mechanical contract (approx. \$90,000.00) had only two working personnel, i.e., a working foreman and a helper. There were no full-time supervisory personnel on either of these contracts even though both were subject to the same contract document, the 1987 A201. Yet no objection was ever made to the lack of supervisory personnel on either of these other contracts. It is stated that the respondent’s preferred contractor, Murnane Associates, which came on the job after the appellant’s contract was terminated, did indeed provide a full-time supervisor that kept a daily log and did little hands-on work. It is surprising to note that the respondent only had one superintendent on the job site. They could have had a superintendent on each floor and one stationed by every door to greet the architect and the highway superintendent when they entered. After

all, they were being paid on a time and materials basis with no regard to cost restraints and respondent claimed the entire amount against the appellant.

Poor Workmanship

2) Poor workmanship – The only reference ever made on this issue prior to the respondent’s effort to terminate the appellant’s contract was about wet drywall. The respondent’s “expert” witness, one Robert Wichikowski, was only a carpenter foreman for the respondent’s preferred general contractor, Murnane Associates. He made untruthful allegations that were not substantiated by any proof. No sheetrock was kept as evidence, no photographs were taken to prove their allegations. A representative of the U.S. Gypsum Company investigated this matter on Jan. 17, 1994 and the appellant’s expert witness, Dr. Richard Pikul also investigated this issue at the time of his on-site visit on February 22, 1994. Dr. Pikul did take photographic evidence that was introduced. Both expert witnesses stated that there was nothing wrong with the installed material (R161)(R163). Respondent has neglected to say that the reason the drywall had gotten wet in the first place is because respondent had deliberately plowed snow over and around the sheetrock while it was stored outside.

Respondent further claims that lack of proper heat was a significant factor in the tile floor being unacceptable (RA9). Dr. Pikul rejected that argument in his report (R157). Lack of heat was not a factor of poor workmanship as respondent contends. The tile was installed only when room temperature was adequate for the installation. The testimony that the respondent cites merely states the obvious fact that lack of proper heat prevented the flooring contractor, Dandrow, from installing his floor in a timely manner. The appellant did not see the value of providing his own temporary heat because (a) had the

respondent obtained a building permit in a timely manner, the entire job would have been completed prior to the heating season and as such, no money had been allocated for heat, (b) a changeorder was requested by the appellant on October 15, 1993 for the cost of this temporary heat and refused by the architect, (c) there was adequate heat in the building to keep the room temperature above 50 degrees at night but the respondent kept turning the heat off despite several verbal and written requests by the appellant to leave the heat on. These requests were made in writing to the respondent on October 15, November 15, November 16 (by FAX), and November 22. While the architect stressed the construction environmental requirements, the respondent continually denied the appellant the required heat to properly apply materials and finishes, when turning the heat off at night. For November and December, 1993, the heat was turned off at night by the respondent approximately 20 times, causing a morning start-up delay of about two hours which totaled a delay due to lack of heat of approximately 40 hours and claim was made for such. To provide portable heaters would have been counter-productive as the respondent's actions showed that it would undoubtedly have turned those heaters off also in an apparent attempt to drive the appellant from the jobsite.

Because of the delays occasioned by the respondent in turning off the heat, the tile floor was not ready until the deadline date of November 26th. A barricade was erected with notices to stay off the finished floor. The respondent chose to ignore this warning and promptly moved heavy office furniture over the floor in effect ruining the installation.

Dandrow, the flooring subcontractor responsible for the installation has over 20 years experience in laying floors, is a Color Tile franchise owner, and was promptly

rehired by the respondent's new preferred general contractor to re-lay the same floor after appellant's contract was terminated!

The carpet "ghosting" and plywood sub-floor problem was simply due to poor design for which the appellant is not responsible (R155 – R156). The respondent is attempting to direct the responsibility for proper design and inspection away from respondent's architect and onto the appellant who did it's best to comply with a vague specification and attempted to alleviate the problem at it's own expense and was criticized for doing so. The specifications only stated to attach the plywood to the floor with "adhesive and ballistic fasteners", to which both the appellant and the flooring contractor expressed reservations to the architect. By letter dated July 7, 1994, and provided as an exhibit, the flooring subcontractor reaffirmed that he had expressed his concerns to the appellant on the method to be used in attaching the plywood to the floor as designed by the architect. He was told by the appellant that "the architect had said the plywood is called for in the plans therefore install it".

The issue of the respondent not allowing the appellant to affect repairs as they progressed in the job has been expounded on previously (R97).

The respondent attempts to portray the appellant as a substandard contractor by not extending the sheetrock to ceiling height as required and that holes in the sheetrock had not been patched. What the respondent has neglected to state is that the contract was terminated before this item was finished. The extension of the sheetrock to the ceiling would ordinarily be done after all the trades had finished their above the ceiling work. Much of the patching was to be done by the mechanical contractor, who was under prime

contract to the respondent and had made most of the holes while installing his plumbing and refrigeration lines.

The issue of the ceiling not being level is nothing but a gross exaggeration. The level of the ceiling was never an issue during the term of the contract. Nowhere is it ever stated that there was a problem of the ceiling being unlevel. It was not recorded as such in the architect's meeting notes and it was not the subject of any correspondence. There was a problem caused by the mechanical contractor and admitted by the architect in his minutes. The mechanical contractor had installed his ceiling air handling units after the ceiling grid was in place and had jacked the elevation of the grid up in the middle. This ordinarily would have been resolved between the trades and addressed as a punch list item at the conclusion of the job. Because the ultimate objective was to get rid of the appellant it became a 'cause celebre' once the decision had been made to terminate the appellant at all costs.

Every single issue that the respondent has singled out as an example of poor workmanship is either untrue, repudiated by a legitimate expert witness with documented exhibits, or caused by the respondent and its own separate prime contractors. Further, those items that did need to be corrected and the appellant attempted to fix, the respondent refused to allow appellant to do so (R97)! Appellant could continue with an item-by-item rebuttal of the respondent's attempt to twist the truth and unsubstantiated testimony without any written documentation, but the general ideas have been presented and addressed.


Failure to Pay Subcontractors

3) Failure to pay subs – The respondent states that several subcontractors had not been paid (RA17). Dandrow (flooring subcontractor) “had not been paid despite his billings”. Dandrow’s first invoice was dated October 28th, 1993 (Pg. 677 Vol. III of the testimony). This invoice was included in the November invoice of the appellant. The respondent never paid it! Nor was December’s or January’s invoicing ever paid! How can the respondent cry about unpaid subs when they themselves had paid no invoices to the appellant for three months? As for Mr. Adams (glass and exterior entryways), the respondent states that he had submitted invoices in September and hadn’t been paid. What the respondent fails to state here is that the contract documents (pg.1, section 00811, article 9.3 Payment, Supplementary Conditions) say that “Paragraph 9.3.2 regarding payment for materials stored, is hereby deleted in it’s entirety, from the General Conditions of the Contract”. In other words, all the stored material appellant had on and off site was not to be paid for until it was installed. This unpaid for stored material amounted to some \$19,000.00 for which the appellant has never been paid. The appellant could hardly be expected to pay for stored material from subcontractor Adams that itself was not permitted to invoice! The statement made by the respondent (RA17) that “Adams was falsely advised by Chilton (appellant) that he hadn’t been paid because the County had refused payment (Adams 763) is a blatant lie. Adams was not “falsely advised”. It was the truth. The respondent had not and never has been paid for the November, December, and January invoices that contained Adams billing.

Mr. Johnson, painting and wall-covering subcontractor, was the only subcontractor not paid by the appellant when appellant had already been paid for some of

Johnson's work. Though the terms of the contract do indeed call for all subs and material suppliers to be paid once the contractor has himself been paid, contract terms and reality are far different. All contractors depend upon cash flow as the lifeblood of their business. At any given period in time, a contractor will have multiple jobs in operation and multiple accounts receivable and payables outstanding. In a perfect world, all of these outstanding invoices for payment and bills would be promptly attended to. The reality is far different. The number one problem among all contractors today is collecting prompt payment from other contractors and owners. Mr. Johnson was told upfront that the appellant couldn't pay his first invoice from funds received. Mr. Johnson had no problem with this and said as much during testimony (pg. 530). Section 14.2.1.2 of the contract documents (termination by the Owner for Cause) states "fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors". The only agreement concerning payment among the subs and the appellant was a signed purchase order for the respective amounts of their subcontracts with no specific payment terms. Because the appellant had worked with each and every one of these subs many times in the past there was a high degree of trust and no written contract other than the purchase order was made.

The hypocrisy of the respondent is evident because while the respondent is using this failure to pay subcontractors as a valid termination reason, the respondent is even more egregiously guilty than the appellant! The November invoice of over \$25,000.00 was not paid because the architect claimed "some doors were not closing properly and there was a buckle in the floor". This is insufficient justification to deny a 100% payment rejection of the invoice. December and January's payment requisitions were held hostage

while the respondent was busy terminating appellant's contract. The most telling evidence of the hypocrisy of the respondent is shown under the separate electrical contract between appellant and respondent. Respondent insisted that appellant complete the work required under the electrical contract, which it did. Some \$21,000.00 became due and owing to appellant from respondent. The respondent refused to allow the appellant to correct some non-conforming work and elected to hire its preferred contractor on a time and materials basis to repair this work at six times the cost to the appellant and deducted this amount from appellant's request for payment. The architect then certified a partial payment of over \$8,000.00 and submitted the invoice to the respondent for payment. This invoice was never paid despite the protests of the appellant to the respondent and two certified letters to the Chairman of the Clinton County Legislature insisting that payment be made. No answer was ever received. It became quite evident to the appellant that this was just another example of the lengths to which the respondent wanted to go to force the appellant off the job and out of business so their preferred contractor, Murnane, could obtain all their work. There were also over  \$2,000.00 in tools and equipment stolen from the appellant while under the lock and key of the respondent after contract termination for which the appellant has never been reimbursed.

Appellant's Delay and Failure to Keep to a time Schedule

4) Contractors delay and failure to keep a time schedule – The respondent states that the appellant was totally unprepared at the pre-construction meeting with no building permit and no bonds. Then the respondent goes on to say that it was respondent's responsibility to obtain the permit in the first place which was why it had to issue a

changeorder for the delay. The appellant did not agree to the changeorder because the delay was 62 days, not 55 days as the respondent tried to slip through. The architect stated by FAX on July 13th, 1993 that “actual work at site (mobilization) is Monday, July 19th – Owner will have 1st floor vacated by Monday”. The permit delay effectively denied the appellant access to the site until July 13th. The architect further extended the delay until July 19th. How can the architect and the respondent impose a commencement date of July 12th, when he doesn’t FAX the memo until the following day and in the same memo acknowledges that the site is not available for mobilization until July 19th, and that the first floor of the building won’t be vacated until that date?

The reason why no bonds were given at the pre-construction meeting was because the appellant and the respondent had no idea when the building permit would be in hand. As the appellant’s officer had stated in testimony, “why would I want to take some \$8,000.00 out of my checking account and pay for bonds when they’re not needed for God knows how long at that time”? (Chilton - pg. 1166 of arbitration testimony). Once the architect’s FAX came through in July stating that a permit had been secured, the bonds were paid for and given to the respondent immediately.

The submittals were timely given to the architect before the job even commenced. Any submittals given thereafter were the result of architect/respondent changes and obsolescence of materials specified by the architect. The architect admitted that the transmittal dates of these submittals were accurate (R66) and that the respondent never did make color selections in a timely manner (R72). This failure to make color selections caused delay in ordering materials yet the respondent kept unrelenting pressure on the appellant to meet respondent’s unilaterally imposed deadlines. Respondent was

unconcerned about the cause of delays; it only was concerned with the 120-day time limit. The total respondent caused delays was longer than the contract period (R135) and gave the appellant, not the respondent, the right to terminate the contract per Section 14.1.1.4 of the General Conditions. The frustration that the appellant felt was apparent in a letter sent to the architect on Jan. 10, 1994 (R136) and probably triggered the termination letter of respondent dated January 11th, 1994.

The respondent claims (RA19) that the appellant was given several changeorders reflecting the time delays with Phase 1 to be completed by November 26th, 1993. What the respondent has failed to state is that it was the respondent who was turning the heat off at night delaying the work by some 5 days as stated previously. It was the respondent who was dragging it's feet in making color selections thereby causing more delay. It was the respondent's architect who made the changes to the doorway entry system and window designs causing more delay. Phase 1 was not 100% complete by the occupancy date of November 26th because of these respondent-caused delays. It was substantially done. A walk-through and punch list should have been done as required by contract (R107). The architect has stated that there were so many items needing correction he didn't know where to start. However, that didn't preclude the architect from preparing a punch list on January 14th, 1994 some three days after contract termination. The appellant's expert witness, Dr. Pikul, in his report (R153) substantially repudiated this "punch list". The appellant never denied that there were items that needed correcting. Some of the items that needed correcting were caused by others not under contract to the appellant, most notable being the ceiling unevenness and the holes needing patching in the firewalls. Others were caused by the respondent such as ruining a newly installed

floor by dragging furniture over it. Still others were architect incompetence, most notably the inadequate plywood floor specification and lack of threshold details. Appellant was also at fault. There were uneven wall seams, a window sill was warped and needed replacing (a warranty item), some ceiling grid tiles needed replacement/re-cutting. Dr. Pikul's report elaborates on these items and concludes (R162); "The noted problems are not unusual for a renovation project and are generally handled by Punch List completion and/or Change Orders for unanticipated field conditions. In my opinion, the problems noted were not sufficient to justify contract termination".

The final accusation by the respondent that it was clear to the respondent (RA19) that no Phase II date could be reached is entirely without basis. No proof has ever been forthcoming from the architect or respondent that this was the case. By contract, 60 days was allowed for completion of Phase II. With November 26th as the substantial completion date of Phase I; that implied that Phase II was to be completed by January 25th, 1994. Photographic and video tapes show that the Phase II floor had been installed, all the partition walls were in place, sheetrocking was approximately 50% completed, and all subcontract rough-in work completed by the end of the first 30 days. This left another 30 days for taping, painting, ceiling grid installation, and floor covering for approximately 5 small rooms and 2 baths totaling approximately 1600 square feet.

CONCLUSION

The appellant realizes that it is not the job of the Appellate Division to rehear the issues of workmanship which were the subject of days of testimony. That is what the arbitration was all about. In this reply brief, appellant has merely responded to the

patently false allegations of the respondent to show a balanced picture of what the appellant endured.

The issues before the Appellate Division are the irrationality of the award made by the arbitrators. It is and remains the appellants position that the arbitrators have so acted irrationally.

The lack of clarity of the award and the undeniable circumvention of several major areas of the contract documents by the arbitrators is justification to vacate their award as being irrational.

Dated: _____

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