

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED FORMING, INC.)
)
) Plaintiff,)
)
)
)
 v.)
) CIVIL ACTION)
) FILE NO.: 1:09-cv-01480-CC)
)
) BOVIS LEND LEASE, INC., TRAVELERS)
) CASUALTY AND SURETY COMPANY OF)
) AMERICA, FEDERAL INSURANCE)
) COMPANY, FIDELITY AND DEPOSIT)
) COMPANY OF MARYLAND, AND)
) LIBERTY MUTUAL INSURANCE COMPANY)
)
) Defendants.)
)
)

**BOVIS LEND LEASE, INC.’S
ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM**

Defendant/Counterclaimant Bovis Lend Lease, Inc. (“Bovis”), hereby answers and defends against the Complaint of United Forming, Inc. (“Plaintiff” or “UFI”), and sets forth its Counterclaim against UFI.

FIRST AFFIRMATIVE DEFENSE AND ANSWER

As its first affirmative defense and as its Answer to the Complaint, Bovis responds to the specifically enumerated averments of Plaintiff’s Complaint as follows:

GENERAL ALLEGATIONS

1. Bovis lacks knowledge sufficient to form a belief as to the truth of the averments contained in paragraph 1 of Plaintiff’s Complaint, which therefore stand denied.

2. The averments contained in paragraph 2 of Plaintiff's Complaint are admitted.

3. The averments contained in paragraph 3 of Plaintiff's Complaint are admitted.

4. The averments contained in paragraph 4 of Plaintiff's Complaint are admitted.

5. The averments contained in paragraph 5 of Plaintiff's Complaint are admitted.

6. The averments contained in paragraph 6 of Plaintiff's Complaint are admitted.

7. The averments contained in paragraph 7 of Plaintiff's Complaint are admitted.

8. The averments contained in paragraph 8 of Plaintiff's Complaint are admitted.

9. The averments contained in paragraph 9 of Plaintiff's Complaint are denied.

COUNT I
BREACH OF CONTRACT
CONTRACT BALANCE AND EXTRA WORK

10. Bovis reavers and reincorporates all prior enumerated responses as if fully incorporated herein.

11. The averments contained in paragraph 11 of Plaintiff's Complaint are admitted.

12. Bovis admits that it entered into a subcontract with Plaintiff, which speaks for itself, and any averments inconsistent with the terms of the subcontract are denied. Except as expressly admitted, all other averments in paragraph 12 of Plaintiff's Complaint are denied.

13. The averments contained in paragraph 13 of Plaintiff's Complaint are denied.

14. The averments contained in paragraph 14 of Plaintiff's Complaint are denied.

15. The averments contained in paragraph 15 of Plaintiff's Complaint are denied.

16. The averments contained in paragraph 16 of Plaintiff's Complaint are denied.

17. The averments contained in paragraph 17 of Plaintiff's Complaint are denied.

COUNT II
BREACH OF CONTRACT
DELAY DAMAGES

18. Bovis reavers and reincorporates all prior enumerated responses as if fully incorporated herein.

19. The averments contained in paragraph 19 of Plaintiff's Complaint are denied.

20. The averments contained in paragraph 20 of Plaintiff's Complaint are denied.

21. Bovis admits that it entered into a subcontract with Plaintiff, and that the subcontract contained a “rider,” the terms of which speak for themselves, and any averments inconsistent with the terms of the subcontract are denied. Except as expressly admitted, all other averments in paragraph 21 of Plaintiff’s Complaint are denied.

22. Bovis admits that Plaintiff has presented delay claims to Bovis and that Bovis denies the validity of such claims. Bovis admits that Plaintiff has not sought arbitration on these claims, and Bovis is likewise willing to waive any arbitration provision such that all claims by and between these parties may be resolved in this action. Except as admitted herein, the averments contained in paragraph 22 of Plaintiff’s Complaint are denied.

23. Bovis admits that all claims, including delay claims, which Bovis contends are without merit, should proceed in this action. Except as admitted herein, the averments contained in paragraph 23 of Plaintiff’s Complaint are denied.

COUNT III
QUANTUM MERUIT / UNJUST ENRICHMENT

24. Bovis reavers and reincorporates all prior enumerated responses as if fully incorporated herein.

25. Bovis admits that Plaintiff provided labor and materials for the construction of the St. Regis Hotel. Except as explicitly admitted, all other averments contained in paragraph 25 of Plaintiff’s Complaint are denied.

26. The averments contained in paragraph 26 of Plaintiff’s Complaint are denied.

27. The averments contained in paragraph 27 of Plaintiff’s Complaint are denied.

28. The averments contained in paragraph 28 of Plaintiff's Complaint are denied.

29. The averments contained in paragraph 29 of Plaintiff's Complaint are denied.

30. The averments contained in paragraph 30 of Plaintiff's Complaint are denied.

COUNT IV
GEORGIA PROMPT PAY ACT

31. Bovis reavers and reincorporates all prior enumerated responses as if fully incorporated herein.

32. The averments contained in paragraph 32 of Plaintiff's Complaint are denied.

33. The averments contained in paragraph 33 of Plaintiff's Complaint are denied.

34. The averments contained in paragraph 34 of Plaintiff's Complaint are denied.

COUNT V
LIEN DISCHARGE BOND

35. Bovis reavers and reincorporates all prior enumerated responses as if fully incorporated herein.

36. Bovis admits that Exhibit A of Plaintiff's Complaint is a copy of a document filed with the Clerk of Superior Court Fulton County, Georgia, which speaks for itself. Except as expressly admitted, all other averments contained in paragraph 36 of Plaintiff's Complaint are denied.

37. Bovis admits that Plaintiff commenced this action within one year of the date from which it last performed work on the St. Regis Hotel. Except as expressly admitted, all other averments contained in paragraph 37 of Plaintiff's Complaint are denied.

38. The averments contained in paragraph 38 of Plaintiff's Complaint are admitted.

39. The averments contained in paragraph 39 of Plaintiff's Complaint are denied.

40. The averments contained in paragraph 40 of Plaintiff's Complaint are denied.

COUNT VI
ATTORNEYS' FEES

41. Bovis reavers and reincorporates all prior enumerated responses as if fully incorporated herein.

42. The averments contained in paragraph 42 of Plaintiff's Complaint are denied.

43. The averments contained in paragraph 43 of Plaintiff's Complaint are denied.

44. The averments contained in paragraph 44 of Plaintiff's Complaint are denied.

45. Each and every remaining averment of Plaintiff's Complaint and all *ad damnum* pleas of Plaintiff's Complaint are denied.

SECOND DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

Some or all of Plaintiff's claims are barred by the express terms of the subcontract between Bovis and Plaintiff.

FOURTH DEFENSE

Plaintiff's claims are barred by payment of all or part of the amounts alleged to be due.

FIFTH DEFENSE

Plaintiff's claims are barred by setoff and/or recoupment, as Plaintiff owes money to Bovis.

SIXTH DEFENSE

Plaintiff's claims are barred by virtue of waiver; accord and satisfaction; and estoppel, as Plaintiff has provided periodic waivers and releases to Bovis.

SEVENTH DEFENSE

Some or all of Plaintiff's claims are barred by failure of conditions precedent, including specifically the conditions and terms set forth in Plaintiff's subcontract with Bovis, and conditions imposed by Georgia Statutes.

EIGHTH DEFENSE

Plaintiff's lien amount is overstated and exaggerated, such that Plaintiff's lien should be reduced or expunged, and lien bond premiums refunded.

NINTH DEFENSE

Plaintiff's lien is legally defective and fails to comply with the Georgia Mechanics Lien laws, and as such should be expunged and this action dismissed as to the Lien Bond Sureties.

TENTH DEFENSE

Plaintiff's claim for unjust enrichment and any other claim that Plaintiff attempts to assert in equity is barred by virtue of the existence of an express contract, and by virtue of Plaintiff's unclean hands.

ELEVENTH DEFENSE

Plaintiff's claim for unjust enrichment is barred because Bovis is not the owner of the property and has received no value for which payment has not been made.

WHEREFORE, the Bovis Lend Lease, Inc. respectfully prays that Plaintiff's Complaint be dismissed, that all fees and costs be awarded to Bovis Lend Lease, Inc., and that Plaintiff go hence without delay.

COUNTERCLAIM AND SETOFF

As an additional affirmative defense, and by way of setoff and Counterclaim, Bovis alleges as follows:

BREACH OF CONTRACT BY UFI

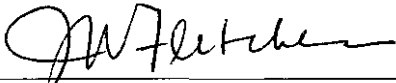
1. UFI breached its subcontract with Bovis by, among other things, performing defective work that required correction to comply with the subcontract; causing delays to project progress; submitting payment requests to Bovis for amounts not due and for falsely stated claims that are not due from Bovis; placing an overstated and unjustified lien on the project real estate, requiring Bovis to procure a bond to remove the lien; permitting UFI's subcontractor(s) to file a lien on the project real estate and refusing to remove the lien and/or indemnify Bovis as required by the subcontract; and otherwise causing Bovis to incur costs and damages that are the responsibility of UFI under the terms of the subcontract.

2. As a direct and proximate cause of UFI's breaches of the subcontract, Bovis has incurred damages that it is entitled to recover from UFI, in an amount in excess of \$75,000, exclusive of interest and costs.

WHEREFORE, Bovis respectfully prays that UFI take nothing on its claims, and that Bovis have a full recovery on its Counterclaim, together with all interest, fees, and costs that this Court deems just.

Respectfully submitted this 25th day of June, 2009.

SUTHERLAND ASBILL & BRENNAN LLP

By:  _____

Jennifer W. Fletcher
Georgia Bar No. 751233
Email: Jennifer.Fletcher@sutherland.com
Eric L. Hurst
Georgia Bar No. 142330
Email: Eric.Hurst@sutherland.com
999 Peachtree Street, NE
Atlanta, Georgia 30309-3996
(404) 853-8000
(404) 853-8806 (Fax)

*Attorneys for Defendant/Counterclaimant
Bovis Lend Lease, Inc.*

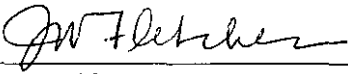
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing BOVIS LEND LEASE, INC.'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM via e-file and facsimile to the following attorney of record:

T. Bart Gary, Esq. and
Kamyar Molavi, Esq.
Freeman Mathis & Gary, LLP
100 Galleria Parkway, Suite 1600
Atlanta, Georgia 30339-5948
Attorneys for Plaintiff

This 25th day of June, 2009.

SUTHERLAND ASBILL & BRENNAN LLP

By: 

Jennifer W. Fletcher
Georgia Bar No. 751233

999 Peachtree Street, NE
Atlanta, Georgia 30309-3996
(404) 853-8197
(404) 853-8806 (Fax)