

JUN 03 2009

JAMES N. HATTEN, Clerk
By: *JNH* Deputy Clerk

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

UNITED FORMING, INC.)
)
Plaintiff,)
)
v.)
)
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.)

CIVIL ACTION
FILE NO.

1 09 - C.V. - 1480 - CC

COMPLAINT

COMES NOW, UNITED FORMING, INC. ("Plaintiff" or "UFI") and hereby makes its complaint against Defendants BOVIS LEND LEASE, INC., ("Bovis"), TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA ("Travelers") FEDERAL INSURANCE COMPANY, ("Federal"), FIDELITY AND DEPOSIT COMPANY OF MARYLAND ("Fidelity"), and LIBERTY MUTUAL INSURANCE COMPANY, ("Liberty Mutual"), showing the Court as follows.

1.

Plaintiff is a corporation organized and existing under the laws of the State of Georgia and has its principal place of business in Austell, Cobb County, Georgia.

2.

Bovis is a corporation organized and existing under the laws of the State of Florida and has its principal place of business in New York, New York. Bovis is registered to do business in the State of Georgia, and may be served through its Georgia registered agent, CT Corporation System, 1201 Peachtree Street, N.E., Atlanta, Georgia 30361.

3.

Travelers is a corporation organized and existing under the laws of the State of Connecticut and has its principal place of business in Connecticut. Travelers is registered to do business in the state of Georgia and may be served through its Georgia registered agent, Corporation Service Company, 40 Technology Parkway South, #300, Norcross, Georgia 30092.

4.

Federal is a corporation organized and existing under the laws of the State of New Jersey and has its principal place of business in New Jersey. Federal is registered to do business in the state of Georgia, and may be served through its Georgia registered agent, CT Corporation System, 1201 Peachtree Street, N.E., Atlanta, Georgia 30361.

5.

Fidelity is a corporation organized and existing under the laws of the State of Maryland and has its principal place of business in Illinois. Fidelity is registered to do business in the state of Georgia, and may be served through its Georgia registered agent, Corporation Service Company, 40 Technology Parkway South, #300, Norcross, Georgia 30092.

6.

Liberty Mutual is a corporation organized and existing under the laws of the State of Massachusetts and has its principal place of business in Massachusetts. Liberty Mutual is registered to do business in the state of Georgia and may be served through its Georgia registered agent, Corporation Service Company, 40 Technology Parkway South, #300, Norcross, Georgia 30092.

7.

This Court has subject matter jurisdiction of this action, under 28 U.S.C.A. § 1332(a), in that there is complete diversity of citizenship between the plaintiff on the one hand the defendants on the other, and the amount in controversy exceeds the sum of \$75,000.00, excluding interest and costs.

8.

Venue is proper in this district and division of the Court in that the contract that is the subject of this action was performed in Fulton County, Georgia. 28 U.S.C.A. § 1391(a).

9.

All conditions precedent to the bringing of this action and to the recovery of the relief sought herein have occurred or have been waived.

COUNT I
BREACH OF CONTRACT
CONTRACT BALANCE AND EXTRA WORK

10.

Plaintiff incorporates herein by reference the allegations contained in Paragraphs 1 through 9 of this Complaint.

11.

Plaintiff UFI is engaged in the business of furnishing labor, materials, equipment and services for the erection of reinforced concrete structures.

12.

On or about November 6, 2006, UFI, as subcontractor, entered into a written Subcontract ("Subcontract") with Defendant Bovis, as prime Contractor, whereby UFI agreed to provide a portion of the labor, materials, services, and supervision to construct the cast-in-place, reinforced concrete for the St. Regis Hotel and Residences, located at 88 West Paces Ferry Road, Atlanta, Fulton County, Georgia 30305 (the "Project").

13.

UFI has substantially completed and performed all work required by the Subcontract.

14.

Furthermore, at the request of Bovis, UFI performed certain work that was not included in the scope of the Subcontract. Pursuant to the terms of the Subcontract, UFI is entitled to equitable adjustment of the Subcontract and fair compensation for that extra or additional work.

15.

In addition, as a result of events, conditions, and circumstances for which Bovis is responsible, UFI's work was rendered more difficult and costly to perform, and was delayed. Pursuant to the terms of the Subcontract, UFI is entitled to equitable adjustment of the Subcontract and fair compensation for the unanticipated cost incurred in performing its work.

16.

Bovis has breached the Subcontract by failing or refusing to pay UFI sums justly due and owing to UFI for its work on the Project and for failing to compensate UFI for the unanticipated costs of performing that work.

17.

Accordingly, under the Subcontract, Plaintiff is entitled to payment in the amount of at least \$4,000,000.00, which includes the balance of the Subcontract Price, including retainage, and the value of extra and additional work, which amount remains unpaid.

COUNT II
BREACH OF CONTRACT
DELAY DAMAGES

18.

Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 17 of this Complaint.

19.

Plaintiff's work on the Project was delayed, hampered, and impeded by the actions or omissions of Bovis or those for whom Bovis is responsible. The actions or omissions included Bovis' intentional interference with Plaintiff's work, failure to provide site access to Plaintiff, and failure to coordinate the work of Plaintiff with the activities of others, all of which delayed or prolonged Plaintiff's work.

20.

As a consequence of Bovis' conduct, which was in material breach of Bovis's obligations pursuant to the express and/or implied terms of the Subcontract, Plaintiff incurred additional costs and expenses in performing the work, including without limitation, additional site administration costs, and labor overtime premium to mitigate the effects of the delays, in the aggregate amount of at least \$1,100,000.00.

21.

The Subcontract included a "Rider" containing special terms which superseded other terms of the Subcontract with which the Rider conflicted.

Among the terms of the Rider was Paragraph 4, which states in part:

As an exception to the foregoing, Subcontractor does not waive claims for damages for delays that are solely attributable to the Contractor's intentional interference, failure to provide site access, failure to coordinate, fraud or bad faith. Subcontractor's entitlement to monetary damages pursuant to this exception is expressly conditioned upon all of the following: (a) Subcontractor provides notice of such claim not later than seventy-two (72) hours after the commencement of the claimed delay or in the event Subcontractor could not have reasonably determined the existence of the event (s) which resulted in such claim within seventy-two (72) hours, seventy-two (72) hours after Subcontractor should have reasonably determined the existence of such event(s); (b) Subcontractor agrees to continue performance of the Subcontract pending resolution of the claim; and (c) in the event the claim is denied by the Contractor; notwithstanding Article 27 hereunder, Subcontractor agrees that its only recourse to resolve any such claim is to submit such claim to binding arbitration with the American Arbitration Association ("AAA") pursuant to the Construction Industry Arbitration Rules and be solely responsible for all costs and fees charged by the AAA and the arbitral panel related to any such claims. Notwithstanding the foregoing, any dispute that would not be subject to such arbitration in accordance with the requirements of this Article 7 shall be subject to the requirements of Article 27 hereunder.

22.

Plaintiff has presented the delay claims to Bovis, and Bovis denied them by its conduct, if not expressly. Plaintiff has not sought arbitration of the delay

claims, and is willing to waive arbitration and litigate its entitlement to the damages for delay claims in this civil action.

23.

If Bovis insists upon arbitration of the delay claims, then Plaintiff requests the Court to sever this Count from this action, and order arbitration of the delay claim before the American Arbitration Association, as provided in the Rider. The remainder of the counts and claims should proceed in this action.

COUNT III
QUANTUM MERUIT / UNJUST ENRICHMENT

24.

Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 23 of this Complaint.

25.

At the request and instance of Bovis, UFI provided labor, materials, equipment, and services for use in the performance of the Subcontract.

26.

Bovis accepted said labor, materials, equipment, and services and knew or should have known that UFI expected to be paid the reasonable value thereof.

27.

Bovis furthermore accepted the benefit of said labor, materials, equipment and services, including without limitation the performance of the Subcontract and receipt of progress payments thereon.

28.

Bovis has refused to pay for all such labor, materials, and services provided by Plaintiff and, therefore, have been unjustly enriched.

29.

The foregoing events have given rise, there exists an implied promise by Bovis to pay or reimburse UFI the reasonable value of the labor, materials, equipment, and services provided by UFI for use in the performance of the Subcontract.

30.

Accordingly, Bovis is liable to UFI for an amount representing the reasonable value of labor, materials, equipment, and services provided by UFI, which amount has not been paid.

COUNT IV
GEORGIA PROMPT PAYMENT ACT

31.

UFI realleges and incorporates paragraphs 1 through 30 of this Complaint as though fully set forth herein.

32.

Bovis has failed and refused to make payment to UFI in accordance with the Georgia Prompt Payment Act (O.C.G.A. §§ 13-11-1 et seq.).

33.

UFI has been forced to retain counsel to pursue payment and file this action for payment, and is entitled to recover from Bovis all reasonable attorneys' fees and costs incurred.

34.

In addition, UFI is entitled recover from Bovis interest on all late payments and amounts past due at the rate of one and one-half percent (1 1/2%) per month pursuant to O.C.G.A. §§ 13-11-7 and 7-4-16.

COUNT V
LIEN DISCHARGE BOND

35.

Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 34 of this Complaint.

36.

Pursuant to O.C.G.A. § 44-14-361.1, on April 17, 2009, Plaintiff recorded its Claim of Lien in the Fulton County, Georgia records for the principal amount of \$5,118,986.55, against the property on which the Project is situated (the "Property"). A true accurate and correct copy of said Claim of Lien is attached hereto as Exhibit "A."

37.

Pursuant to O.C.G.A. § 44-14-361.1, Plaintiff commenced this action within one year of the date from which it completed work on the Property and last provided labor, materials, and services for use in the construction and improvements of the Property.

38.

On April 22, 2009, Defendant Bovis, as Principal, and Defendants Travelers, Federal, Fidelity and Liberty Mutual, as Sureties, executed a Bond to Discharge Claim of Lien ("Bond"), to transfer Plaintiff's Claim of Lien to the Bond as

permitted by Georgia law, O.C.G.A, § 44-14-364. The bond was approved by the Clerk of the Superior Court of Fulton County, Georgia and recorded on April 23, 2009. A true, accurate and complete copy of the Bond is attached hereto as Exhibit “B.”

39.

Defendants Bovis, Travelers, Federal, Fidelity and Liberty Mutual have breached the Bond by failing to perform the condition of the Lien Removal Bond, i.e., payment for the satisfaction of the lien for which the Claim of Lien was recorded.

40.

Accordingly, Defendants are jointly and severally liable to UFI in the amount of \$5,118,986.55, plus interest and all costs of this action.

COUNT VI
ATTORNEYS’ FEES

41.

Plaintiff incorporates herein by reference the allegations set forth in Paragraph 1 through 40 of the Complaint as if set forth herein.

42.

Plaintiff has demanded and requested payment from Defendants for the sums sought in this action.

43.

Defendants have failed and refused to honor or address those requests and demands.

44.

Defendants have been stubbornly litigious and have caused Plaintiff unnecessary trouble and expense. Pursuant to O.C.G.A. §§ 13-6-11, 13-11-8 or both, Plaintiff is entitled to recover its expenses of litigation, including reasonable attorneys' fees from Defendants.

WHEREFORE, Plaintiff prays that:

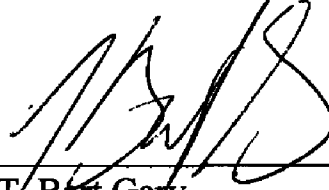
- (a) Process issue and be served on each Defendant;
- (b) Plaintiff have a trial by jury on all issues so triable;
- (c) This Court enter, pursuant to the allegations contained in Count I, judgment against Bovis in the amount of \$4,000,000.00 or such other amount as may be proved at trial, plus prejudgment interest and all costs of this action;
- (d) This Court enter, pursuant to the allegations contained in Count II, judgment against Bovis in the amount of \$1,100,000.00 or in such other amount as may be proven at trial plus prejudgment interest and all costs of this action. Alternatively, Plaintiff requests the Court to

sever Count II from the remainder of this action and order arbitration thereof if Defendant Bovis requests arbitration;

- (e) This Court enter, pursuant to the allegations contained in Count III, judgment against Bovis in the amount to be proven at trial of this action;
- (f) This Court enter, pursuant to the allegations contained in Count IV, judgment against Bovis in an amount to be proven at trial of this action;
- (g) This Court enter, pursuant to the allegations contained in Count V, judgment against all Defendants in an amount in the amount of \$5,118,986.55 or such other amount as may be proven at trial, plus prejudgment interest and all costs of this action;
- (h) This Court enter, pursuant to the allegations contained in Count VI, judgment against Defendants, jointly and severally, for expenses of litigation including attorney's fees, in an amount to be proven at trial of this action; and
- (i) That this Court award Plaintiff any and all further relief as it deems just and proper.

This the 3rd day of June, 2009.

FREEMAN MATHIS & GARY, LLP



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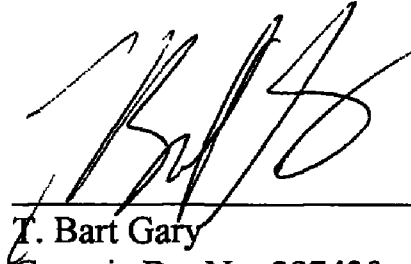
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PLAINTIFF DEMANDS A TRIAL BY JURY

FONT CERTIFICATION

I hereby certify that this document is presented in Times New Roman, 14-point type, in compliance with the type and point restrictions set out in LR 5.1B.



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