

WDF Inc. v Vamco Sheet Metals, Inc.

2020 NY Slip Op 33852(U)

November 19, 2020

Supreme Court, New York County

Docket Number: 651314/2011

Judge: Andrew Borrok

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

WDF INC.,

Plaintiff,

- v -

VAMCO SHEET METALS, INC., FIDELITY AND DEPOSIT
COMPANY OF MARYLAND (3RD PARTY DEFT.)

Defendant.

-----X

INDEX NO. 651314/2011

MOTION DATE 11/19/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and for the reasons set forth below, WDF Inc.'s (**WDF**) motion for partial summary judgment against Vamco Sheet Metals, Inc. (**Vamco**) pursuant to CPLR § 3212 is granted. WDF adduces sufficient admissible evidence of Vamco's breach and of its damages. Vamco's objection to the court's consideration of such evidence fails and Vamco otherwise fails to raise a material issue of fact.

I. The Facts Relevant to the Motion

Reference is made to (i) a certain Contract No. 126308, 1288309999 / CR 106 (the **Contract**), dated January 21, 2007, by and between the Dormitory Authority of the State of New York (**DASNY**) and WDF (NYSCEF Doc. No. 105), and (ii) a certain WDF Inc. Subcontract

Agreement (the **Subcontract**), dated October 30, 2006 and executed on February 16, 2007, by and between WDF and Vamco (NYSCEF Doc. No. 106).

DASNY awarded the Contract to WDF to perform all mechanical and fire protection work in connection with the Expansion Project at John Jay College of Criminal Justice in New York City (the **Project**) as prime mechanical contractor for \$44,625,000 (NYSCEF Doc. No. 105, ¶¶ 1, 2 [a]). The Project involved of the construction of a 14 story multi-use building located at the westerly portion of the block surrounded by West 57th Street and West 58th Street at 10th Avenue and 11th Avenue (the **Building**). Turner Construction Company (**Turner**) served as the Project's manager.

Pursuant to the Subcontract, Vamco agreed to perform the sheet metal ductwork for the Project for \$15,999,000 (NYSCEF Doc. No. 106, Art. 2, 3). Article 2 of the Subcontract provides:

As a part of its obligation to provide and perform the Work, [Vamco] agrees to furnish and maintain a competent and adequate staff and use its best skill and attention for the proper administration, coordination, supervision and superintendence of the Work including, without limitation: (i) organizing the procurement of all relevant materials and equipment so that they will be available at the time and location they are needed for the Work; (ii) mustering and keeping an adequate force of skilled workers on the job to perform and complete the Work in strict accordance with all requirements of this Subcontract and the Contract Documents; (iii) assigning and maintaining throughout the duration of the Work a competent superintendent and any necessary assistants, all of whom shall be acceptable to [WDF]; (iv) not employing at the Project any unfit person or anyone not skilled in the task assigned; (v) providing supervision by experts in all aspects of the application names, responsibilities and titles of the principal members of [Vamco's] staff assigned to the Work.

(*id.*, Art. 2).

In addition, Article 4 of the Subcontract requires Vamco to submit progress payment applications to WDF each month showing the value of the completed work, including the value of material and equipment suitably insured and stored at the Project site, and required WDF to make progress payments to Vamco within 14 days after receipt of each requisition, less any previous payments for the work billed and the applicable retainage, provided that all other conditions for payment have been met (*id.*, Art. 4).

Article 7 of the Subcontract provides that, “TIME IS OF THE ESSENCE of this Subcontract, and it pertains to the start of Work, the completion of Work, each intermediate milestone appearing on the job schedule . . . and to such additional dates as [WDF] may inform the [Vamco]” (*id.*, Art. 7).

Further, Article 19 of the Subcontract provides:

[Vamco] shall proceed with the Subcontract Work in a prompt and diligent manner, without delay, and shall perform the work so as not to delay other contractors and subcontractors at the Project and to endure completion of the Subcontract Work in accordance with the progress schedule

[Vamco] shall coordinate its work and cooperate with [WDF] and other contractors and subcontractors whose work might interfere with the Subcontract Work.

(*id.*, Art. 19).

Moreover, Pursuant to Article 22 of the Subcontract, any of the following constitutes an event of default:

Should [Vamco] at any time:

- (a) Fail to supply the labor, materials, equipment, supervision and other things required of it in sufficient quantities for sufficient durations and of required quality to perform the Work with the Skill, conformity, promptness and diligence required hereunder;
- (b) Cause interference, stoppage, or delay to the Project or to an activity necessary to complete the Project;
- (c) File a petition under the United States Bankruptcy Code, is adjudged bankrupt, makes a general assignment for the benefit of creditors, becomes insolvent, or becomes subject to a receivership;
- (d) Fail to make payment properly and promptly for all labor, materials and services provided in the performance of the Work; without provision of a payment bond, mechanic's lien, discharge bond or other security;
- (e) Fail to promptly and timely prosecute the Work.

(*id.*, Art. 22).

Article 22 of the Subcontract authorizes WDF to take any steps necessary to cure any such defaults, including correcting or completing Vamco's work and deducting the cost of correcting or completing the work, together with an administrative burden allowance of 10% of such costs, from any payments due to Vamco (*id.*). Article 22 further provides that Vamco "shall be entitled to stop the Work or terminate this Subcontract only (i) on account of [WDF's] failure to pay an amount to [Vamco] . . . under [Vamco's] application for payment that is approved in accordance with the Contract Documents; and (ii) where a good faith reason does not exist as to the withholding of such payments claimed by [Vamco]" (*id.*).

Further, Article 24 of the Subcontract provides that, "in its sole, unaided discretion . . . [WDF] may, at any time prior to final payment, terminate this Subcontract for its convenience for any reason whatsoever, or for no reason, upon the giving of written notice to [Vamco]" (*id.*, Art. 24). In the event of termination "for convenience," i.e., not for cause, Vamco is "entitled to be paid

all costs of all Work provided hereunder, including reasonable and necessary costs of termination” (*id.*).

The original Project schedule established by DASNY called for substantial completion by June 18, 2010 and final completion by September 22, 2010 (NYSEF Doc. No. 103, Vettorino Aff., ¶ 23). However, the redesign of the Building’s foundation, unanticipated site conditions, delays in the structural steel work, and the failure to timely award the General Construction Contract, among other issues, resulted in a 14-month delay prior to the start of Vamco’s work (*id.*, ¶ 24; NYSCEF Doc. NO. 107). Accordingly, DASNY updated the substantial completion date to June 14, 2011 and the final completion date to September 30, 2011 (NYSCEF Doc. No. 103, Vettorino Aff., ¶ 25). However, the initial 14-month delay forced Vamco to abandon the anticipated vertical progress of the work—i.e., from floor to floor, starting from the bottom and working up to the roof—and to instead perform work on multiple floors simultaneously (*id.*, ¶ 31). This impeded the orderly progress of work on the Project among the numerous contractors (*id.*, ¶¶ 30-33).

Beginning in May 2009, after Vamco started its sheet metal work at the Building, WDF began identifying issues with Vamco’s performance. First, in a series of emails, dated May 29, 2009, WDF and other contractors indicated that Vamco’s uncoordinated deliveries of large quantities of ductwork and improper storage of ductwork was causing delays and work stoppages (NYSCEF Doc. No. 38). According to Vamco’s Vice President, Michael Vettorino, however, the issues raised by WDF relating to the delivery and storage of ductwork were caused by a lack of appropriate on-site storage and the challenges of delivering custom-built ductwork to the

Project site where “multiple trades were working everywhere and some on top of one another” (*id.*, ¶¶ 33-36). Mr. Vettorino further explains that the delivery and storage issues occurred as a result of a directive issued by Turner on June 15, 2010, which required work on floors 1 through 4 to be performed simultaneously to allow for early beneficial occupancy (*id.*, ¶¶ 37-38). But the issues with Vamco’s performance went beyond the delivery and storage of ductwork. At a meeting on December 16, 2009, representatives of WDF, Vamco, and Turner discussed issues concerning Vamco’s manpower, supervision, project management, performance, and quality of work (NYSCEF Doc. No. 39). Specifically, the meeting minutes indicate that Vamco’s “progress is not meeting scheduled timeframes. More manpower is needed” (*id.*). As result, WDF directed Vamco to increase its manpower on the Project to a minimum of 18 sheet metal workers (NYSCEF Doc. No. 40).

Vamco’s President, Augie Vettorino, replied to WDF’s request to increase manpower by letter, dated January 18, 2010, stating that it was unwilling to satisfy this request due to numerous coordination problems, including:

- Vamco has mobilized to receive, set and assemble equipment. This schedule has changed or been canceled due to crane permits not in place.
- Vamco [has] mobilized to hang fan powered VAV boxes and were told to go do something else and return back after lunch.
- Vamco has mobilized to assemble the cooling tower without proper assembling directions only to be relieved until the tower representatives arrived on site.
- Vamco has mobilized to install duct work in areas on the 4th floor only to be stopped due to incomplete fire proofing.
- Vamco has mobilized to install coordinated duct work in several mezzanine areas only to find other trades ignored signed coordination drawings.
- Vamco requested an equipment delivery schedule several times only to see it change.

(NYSCEF Doc. No. 113).

Additionally, Augie Vettorino stated that WDF was in violation of Article 4 of the Subcontract because “WDF has never honored Vamco’s Contract and paid within 14 days of receiving an approved/signed payment requisition” (*id.*).

Following a progress meeting on March 26, 2010 regarding Vamco’s ductwork installation status, Bob Rush of Turner noted further deficiencies in Vamco’s performance in the minutes, stating that Vamco’s failure to complete its work throughout the building was causing delays to other contractors (NYSCEF Doc. No. 41). Mr. Rush stated that Vamco was to have all work on floors 2, 3, and 4 finished by April 30, 2010, increase its manpower to 20 journeymen by March 29, 2010 and 24 journeymen by April 5, 2010, and organize its deliveries to allow for installation according to the established workflow (*id.*). By email dated May 12, 2010, from Mr. Rush to Mr. Limanov and other contractors, Mr. Rush stated that Vamco had previously been instructed to send manpower to the penthouse level and begin ductwork on that floor, but Vamco had made no effort to comply with that directive, which caused Vamco to become “blocked out” from performing its work (NYSCEF Doc. No. 42). Shortly thereafter, WDF assigned one of its employees, Alex Schlitten, to manage Vamco’s ductwork progress (*see* NYSCEF Doc. No. 43).

By letter, dated May 27, 2010, from Mr. Limanov to Augie Vettorino, Mr. Limanov directed Vamco to “immediately increase the manpower to the counts shown for the current time period” and “assure that the delivery of material is sufficient and un-interrupted and the management, tools and equipment supply is maintained for maximum efficiency of workforce” (NYSCEF Doc. No. 44).

Turner and WDF identified continued deficiencies with Vamco's progress on the ductwork through the end of 2010 and into early 2011 (*see* NYSCEF Doc. Nos. 45-68). After determining during a pressure test of a duct riser that Vamco had installed a hidden plastic tarp inside of the duct over the test port to cheat the test, WDF banned a Vamco representative, Ray Fox, from the Project (NYSCEF Doc. No. 69). Attached to the email were photographs of the duct with the plastic tarp (NYSCEF Doc. No. 70).

Throughout this time, WDF continued withholding progress payments. In a letter, dated February 25, 2011, from Augie Vettorino to Mr. Limanov, Augie Vettorino reiterated that WDF remained in breach of the Subcontract as a result of its failure to make progress payments (NYSCEF Doc. No. 113). Augie Vettorino sent a follow-up letter on March 2, 2011 (*id.*). However, WDF did not remit the outstanding progress payments (NYSCEF Doc. No. 103, Vettorino Aff., ¶ 49).

Subsequently, by letter, dated March 14, 2011, from Mr. Limanov to Augie Vettorino, Mr. Limanov stated that WDF had determined that it was necessary to use its own forces and to hire Airtech Systems Inc. (**Airtech**) to correct and complete Vamco's work, and directed that Vamco cooperate and coordinate with Airtech (NYSCEF Doc. No. 77). WDF was to back charge Vamco for the cost of hiring Airtech but agreed to waive a 10% administrative burden allowance for Airtech's costs (*id.*). Augie Vettorino responded by letter, dated March 15, 2011, agreeing to cooperate with Airtech but stating that Vamco would assist in the direction and management of Airtech and WDF could only back charge costs directly related to full time working mechanics on the Project site (NYSCEF Doc. No. 78). Augie Vettorino further stated that, "Vamco has not

been paid for the past due requisitions for January and February,” and that, “[i]f Vamco does not receive payment in full . . . by Thursday March 17, 2011 we will have no alternative but to seize all work” (*id.*). Subsequently, in a letter dated April 5, 2011, from Augie Vettorino to Neil Walsh, Augie Vettorino stated:

Please be advised that WDF is in breach of contract pertaining to Article 4 of the contact between WDF and Vamco Sheet Metal for [the] John Jay Expansion Project, payments are seriously past due. Due to the breach of contract Vamco has been forced to reduce its labor force to THREE full time sheet metal workers and two field supervisors.

Please find attached a payment schedule showing all payments for the project and when they were due versus when they were received. As you can see by the schedule WDF has been in violation of the contract since the beginning of the project.

Please forward past due payments within 3 business days of the date of this letter.

(NYSCEF Doc. No. 111).

By letter, dated April 7, 2011 (the **Termination Letter**), WDF declared Vamco in default of the Subcontract as a result of its failure to cure various material breaches and notified Augie Vettorino that the Subcontract was terminated:

[WDF] hereby provides notification that [Vamco] is in default of its Contract with WDF because Vamco has breached material terms of its contract and failed to perform its obligations under the contract. Among other things, Vamco failed to cure the following:

- Failure to supply sufficient labor to satisfy demands of the project and to produce work according to project schedule
- Failure to supply qualified and skilled labor
- Failure to correct the work of inferior quality
- Failure to supply sufficient materials to satisfy demands of the project and schedule
- Failure to supply quality material
- Failure to supply proper material
- Failure to perform quality work

- Failure to supply required project management
- Failure to supply qualified project management
- Failure to supply required project supervision
- Failure to supply qualified project supervision
- Failure to supply required tools, equipment and safety equipment as required to perform the work
- Cause interferences, stoppages and cause delays to the project
- Failure to promptly and timely prosecute the work
- Failure to properly coordinate physical work with other trades
- Failure to protect material during transportation to the jobsite
- Failure to protect material during storage on the jobsite
- Failure to protect installed work
- Damaging work of other trades
- Disregard notices to proceed
- Failure to provide required job records
- Attempt to falsify critical duct system pressure test
- Failure to provide labor of proper union jurisdiction
- Failure to provide drafting and sketching support required by the project
- Failure to provide required shop drawing documentation
- Work performed is not in accordance with submitted and approved documentation
- Failure to properly support equipment and ductwork
- Failure to comply with WDF directives

In accordance with the Contract provisions, your Contract is terminated immediately as of the date of this letter. WDF will complete Vamco's work under the Contract with other forces and back charge to Vamco all costs and expenses related to completion in accordance with the Contract. WDF shall invoice Vamco for all costs and expenses in excess of the Contract price that it incurs to complete the Contract work plus administrative burden in accordance with the Contract.

WDF is in the process of analyzing all applicable back charges to Vamco and any payments that may be due to or due from Vamco for work completed to date of this notice of default. Upon completion of these analyses applicable back charges or payments will be applied.

WDF reserves all of its rights under the Contract, including its right to other remedies for Vamco's default, and waives none. Please be guided accordingly.

(NYSCEF Doc. No. 80).

Subsequently, WDF sued Vamco for breach of the Subcontract and willful exaggeration of lien, claiming at least \$12 million in damages and alleging that Vamco (i) failed to supply adequate labor, materials, equipment, and supervision, (ii) failed to perform its work with the requisite skill, conformity, promptness, and diligence, (iii) caused interference, stoppage, or delay to the Project, (iv) failed to promptly remit payments for labor, materials, and services, and (v) failed to timely perform its work as required under the Subcontract. Vamco filed an answer and counterclaims for (i) breach of contract, (ii) extra work, (iii) delay claim, (iv) lost profits, and (v) foreclosure of public improvement lien (NYSCEF Doc. No. 9).

The court heard oral arguments on WDF's motion for partial summary judgment on September 29, 2020. Because a document had not been uploaded properly by WDF as it related to their damages, and given that Vamco argued only generally that all of WDF's evidence (including deposition transcripts of Vamco's own witnesses) was inadmissible hearsay, the court authorized (i) WDF to upload the document that had not been uploaded properly and submit a supplemental affidavit if it thought it was necessary and (ii) Vamco to make specific objections of the evidence that was submitted (NYSCEF Doc. No. 124).

Following the hearing, WDF uploaded the document that had not been previously uploaded properly and submitted, in addition to the affirmation of Richard Ward III, the additional affirmation of WDF's former General Counsel, Becky Tung Agostisi, who had previously been deposed by Vamco. In her affirmation (the **Agostisi Affirmation**), which echoes her deposition testimony, Ms. Agostisi identified the basis for WDF's computation of damages. Her affidavit together with her deposition testimony and the affidavit of Mr. Ward establish that the evidence

submitted by WDF was either not hearsay or subject to the business records exception and otherwise properly considered by the court on the motion for summary judgment.

Notwithstanding the foregoing, in its supplemental papers submitted in opposition to WDF's motion, Vamco again essentially argues that nearly every piece of evidence submitted by WDF is inadmissible as hearsay and that the Agostisi Affirmation fails to lay a proper foundation for WDF's documentary evidence as business records.

II. Discussion

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

To prevail on a cause of action for breach of contract, a plaintiff must establish “the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). In support of its motion for partial summary judgment, with respect to liability, WDF argues that the evidence establishes that Vamco defaulted on its obligations under the Subcontract by (i) providing an

inadequate number of laborers, (ii) failing to complete its work correctly or on time, (iii) failing to conduct proper pressure, leak, and smoke testing of installed ductwork, (iv) attempting to cheat one pressure test run by installing a hidden plastic tarp, (v) failing to coordinate deliveries of sheet metal and to protect its ductwork onsite, and (vi) performing its work unsafely, resulting in employee injuries, and that WDF therefore properly terminated the Subcontract for cause. In support of its motion, WDF adduces email communications (*see, e.g.*, NYSCEF Doc. Nos. 38-40, 42-43, 45-56), letters (NYSCEF Doc. No. 44, 63, 68, 70), meeting minutes (NYSCEF Doc. Nos. 41, 61), progress reports (NYSCEF Doc. Nos. 57-59), and the Termination Letter (NYSCEF Doc. No. 80), which evidence Vamco's numerous delays and deficiencies in its work on the Project. The evidence establishes that Vamco failed to meet its obligations under Article 2 of the Subcontract by failing to provide an adequate and competent staff and properly supervise the work, including by failing to properly coordinate the delivery and storage of materials and equipment (*see, e.g.*, NYSCEF Doc. Nos. 38, 39 [emails discussing issues with Vamco's progress including failure to coordinate delivery and storage of ductwork]). The evidence further establishes that Vamco failed to comply with Article 19 of the Subcontract by failing to conduct its work in a prompt and diligent manner and failing to coordinate its work and cooperate with other contractors (*see, e.g.*, NYSCEF Doc. Nos. 41, 42, 44, 45-56, 70), and by installing a hidden tarp within the ductwork in an attempt to cheat a pressure test (NYSCEF Doc. No. 69). Despite numerous notices of Vamco's delays and deficiencies and multiple opportunities to correct its course and resume the orderly progress of work, Vamco repeatedly failed to meet its obligations, resulting in chronic delays and other issues at the Project site (*see, e.g.*, NYSCEF Doc. No. 87). The foregoing conduct constitutes a default under Article 22 of the Subcontract, thus, WDF has met its burden in coming forward with evidence

that Vamco breached the Subcontract as a result of its persistent failures to perform its work in a timely and diligent manner and that WDF properly terminated the Subcontract (*Alvarez*, 68 NY2d at 324).

In its opposition papers and its supplemental memorandum, as discussed above, Vamco makes both general and specific objections to WDF's proffered evidence on hearsay grounds. To wit, Vamco generally argues that the court should not consider the evidence submitted by WDF because it lacks foundation as a business record, and it is otherwise inadmissible hearsay. In its supplemental opposition papers, Vamco makes specific objections to virtually every exhibit offered by WDF in support of its motion (NYSCEF Doc. No. 137). The arguments fail. For clarity, the evidence that Vamco objects to can be broken down into the following categories: (i) emails and letters about the lack of progress at the construction site, (ii) project meeting minutes (iii) project deficiency reports, and (iv) change orders.

With respect to the emails and letters, Vamco argues that they are inadmissible because WDF failed to establish that such emails were sent in the course of regular business activities, were regularly relied upon in WDF's day-to-day operations, and were made pursuant to an established policy or procedure. As to the meeting minutes, Vamco argues that they were created by non-parties including Turner Construction, the construction manager, and there is no foundation to establish that WDF regularly relied on such documents in the course of its business or that the drafter had a business duty to make them. In addition, Vamco argues that there is no foundation for the deficiency reports to qualify as business records because, Vamco argues, there is no indication as to who directed that they be created or why, or whether such reports were routinely

relied upon by WDF in the regular course of its business. Finally, with respect to the change orders, Vamco argues that there is no foundation laid by any witness with firsthand knowledge of these documents or what they purport to be.

A business record is admissible “if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter” (CPLR § 4518 [a]; *Viviane Etienne Medical Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498,508 [2015]). A proper foundation for the admission of a business record requires an affidavit by a person with knowledge of the business’s practices and procedures (*Citibank, N.A. v Cabrera*, 130 AD3d 861, 861 [2d Dept 2015]).

In support of the admission of these documents, WDF submitted both the Reply Affidavit of WDF’s General Counsel, Richard Ward III, and the Agostisi Affirmation – i.e., the affirmation of WDF’s former General Counsel. In his affidavit, Mr. Ward states that he is familiar with the facts of this case and has personal knowledge of WDF’s institutional recordkeeping practices and procedures (NYSCEF Doc. No. 122, Ward Aff., ¶ 2). He further states that the evidence submitted by WDF was prepared by WDF employees, project design professionals, or other contractors and was “used by WDF employees in the regular course of business ***contemporaneously with the work performed***” (*id.*, ¶ 4 [emphasis added]). Ms. Agostisi, who had testified at a deposition and was subject to cross examination by Vamco, further clarifies in the Agostisi Affirmation that that she was the General Counsel of WDF and that as such she was familiar with WDF’s business practices and procedures and that, “[t]he Combined Project

Records [i.e., including email communications] were all maintained by WDF in [the] regular course of business” (NYSCEF Doc. No. 126, ¶ 8).

Additionally, in Paragraph 9 of her affirmation, Ms. Agostisi states:

Throughout the entire duration of the Project it was WDF’s standard custom and practice for WDF’s project personnel to communicate with the Project’s construction manager, [Turner], other prime contractors on the Project, WDF’s subcontractors, including Vamco, and the project design team, including engineer JB&B, as well as with other WDF personnel via e-mail correspondence.

(*id.*, ¶ 9).

Ms. Agostisi further explains in Paragraph 10 of her affirmation that:

[t]he Project Email Correspondence was the typical means for WDF personnel to communicate information to other project stakeholders, and all Project Email Correspondence was considered official Project Records. WDF personnel were at all times under a duty to be truthful and accurate in their preparation of all Project Records, including in Project Email Correspondence and all other Project Records.

(*id.*, ¶ 10).

Thus, WDF’s (i) emails and letters about progress at the construction site, (ii) project meeting minutes (iii) project deficiency reports, and (iv) change orders are properly considered by the court on this motion as they were part of WDF’s project records made contemporaneously and relied upon in the ordinary course of WDF’s business, and otherwise have sufficient indicia of reliability to qualify as business records (*Pencom Sys., Inc. v Shapiro*, 237 AD2d 144, 144 [1st Dept 1997]). Because, as Vamco admits in its chart (NYSCEF Doc. No. 137), several of the communications contain admissions by Vamco, these are also properly considered by the court. A proper foundation having been established, the alleged lack of personal knowledge regarding

the circumstances of the creation of any document goes to its weight, not its admissibility (CPLR § 4518[a]).

Vamco also argues that the evidence raises issues of fact as to whether the alleged delays and deficiencies relating to Vamco's work were attributable to actions of WDF or other contractors or otherwise outside of Vamco's control, and whether WDF breached the Subcontract by repeatedly failing to make payments to Vamco when due. Among other evidence, Vamco submits the affidavit of Vamco's Vice President, Michael Vettorino (NYSCEF Doc. No. 103), WDF's change order and delay claim documents (NYSCEF Doc. Nos. 107, 108), and Vamco's proposed change order regarding Turner's notice of early beneficial occupancy (NYSCEF Doc. No. 109). Vamco also submits its letters to WDF regarding WDF's failure to remit progress payments (NYSCEF Doc. Nos. 111, 113) and WDF's voided check evidencing non-payment of requisition number 36 (NYSCEF Doc. No. 112). Vamco's arguments fail. Although Michael Vettorino contends in his affidavit that many of the delays and deficiencies were the result of factors outside of Vamco's control, Vamco offers no evidence to explain its persistent failures to increase its manpower as instructed, coordinate the delivery and storage of material and equipment, resolve certain union issues, complete work on one floor before moving to the next, and numerous other issues. Nor does Vamco offer any evidence to rebut WDF's well-documented account of how Vamco attempted to cheat a duct pressure test, an unequivocal violation of its contractual obligations. In addition, Michael Vettorino's assertion that WDF orchestrated the termination of the Subcontract in order to hire Airtech is simply conclusory and not supported by the record. Moreover, Vamco's argument that its evidence of WDF's failure to

remit timely progress payments raises an issue of fact is without merit as WDF has established that it had a good faith basis to withhold payments pursuant to Article 22 of the Subcontract.

With respect to its claim for damages, WDF adduces change orders, invoices, and other relevant backup documentation together with a compilation summary (the **Compilation Summary**) which support the amount of damages demanded (NYSCEF Doc. Nos. 127-132). Vamco argues that the Compilation Summary is hearsay and is inadmissible as a business record because it was prepared solely in anticipation of litigation and not in the ordinary course of business. The argument is without merit. The Compilation Summary is a summary or compilation of the voluminous change orders, invoices, and other records that were, as set forth above, made in the ordinary course of business of WDF's business and which are adduced by WDF together with the Compilation Summary in support of its claim for damages. The Compilation Summary was one of the subjects of Ms. Agostisi's deposition where she was subject to cross-examination about its creation and about the calculation set forth therein which is based on the business records of WDF submitted in connection with such Compilation Summary. Specifically, at her deposition, where she was subject to cross-examination, Ms. Agostisi testified that the Compilation Summary was created by WDF under her direction and supervision and in consultation with the project manager, superintendent and foreman based on the various documents that establish the total amount of damages to which WDF is entitled from Vamco (NYSCEF Doc. No. 96, Agostisi Tr. at 16:24-20:14). At her deposition, Vamco failed to thwart WDF from having the Summary Compilation properly authenticated and from laying a proper foundation for the admission of the Summary Compilation. As such, the Summary Compilation may be considered by the court as it merely summarizes the backup documentation which are

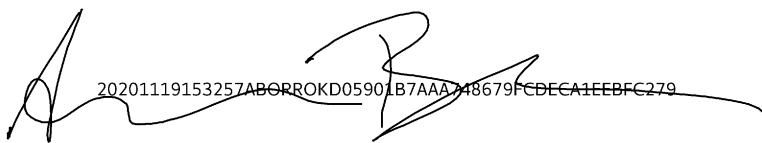
business records to help explain the calculation of damages (*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 228 [1st Dept 1996] [“Without the summary charts, the workpapers had little meaning to the jury and the court’s failure to admit them was error.”]). Thus, WDF’s motion for partial summary judgment on its first cause of action for breach of contract is granted.

Accordingly, it is

ORDERED that the plaintiff’s motion for partial summary judgment on its first cause of action for breach of contract is granted, and the Clerk shall enter judgment in favor of plaintiff and against defendant in the amount of \$2,384,903.40, together with costs and disbursements as calculated by the Clerk of Court, for a total amount of _____ and statutory interest at the rate of 9% per annum from the date of notice of entry of judgment, thereafter, and it is further

ORDERED that the balance of the claims are severed and the action shall continue, and it is further

ORDERED that the parties are directed to appear for a status conference on January 19, 2021 at 11:30 AM via Microsoft Teams.



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11/19/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE