AMERICAN ARBITRATION ASSOCIATION

CCC

Claimant,

v

GENERAL

Respondent.

Case No. 00-00-0000-0000

John Doe, Jane Smith, Joe Jean Arbitrators

CLAIMANT'S BRIEF and SUMMARY

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CLAIMANT'S BRIEF and SUMMARY

During the delayed performance of a contract a seasonal weather problem arose that had financial consequences to the project. CCC, the subcontractor, referred to herein as (CCC) and GENERAL, the general contractor, are the parties to this arbitration. They discussed the weather matter. Exhibits begin on page 30. Exhibit 1 *Answer to Amended Claim* paragraphs 25 and 26. CCC states that GENERAL agreed to pay for the work

needed to resolve the problem. GENERAL states that they did not agree to pay. CCC performed work to resolve the problem and billed GENERAL for the work. GENERAL benefited from the work and paid CCC its invoice for the work. The weather-related work is called winter cost. By contract GENERAL is the holder of assets of CCC. Those assets are in the form of a retainage. Five months after having paid CCC for the winter cost GENERAL took a reimbursement of the amount they had paid for the winter cost from CCC's retainage.

CCC, filed this action to recover its retainer which was earned on this building project. The project is a Big Building in Gotham Michigan. Per CCC's contract with respondent, GENERAL, "all and any retained percentages will be forwarded to the subcontractor upon substantial completion of the project." Exhibit 2, Contract, Page 5, (*beginning on the 6th line of the second paragraph)*. The paragraph preceding the quoted line indicates that GENERAL *"will"* pay 90% of the materials and labor that had been furnished during the billing period. The word "will," requires specific contractual conduct. Per the contract GENERAL was required to pay CCC 90% of the total earned and to hold the remainder of the amount earned as retainer, until substantial completion of the project. There is no provision in the contract for GENERAL to charge back against the retainer once the sub-contractor has substantially completed the work. The contract - language implies that the retained withholding would be 10%. Claimant states that he is owed $93,525.50. This is the amount of retainage stated in CCC's invoice of 12/19/2222, Exhibit 3. That Invoice was paid according to its terms by GENERAL about two months

after it had been submitted. The same amount of retainage is also claimed in CCC's final invoice, which was not paid.

The retainage is CCC's and not GENERAL's. The IRS requires that retainage be declared as an asset by the party from whom it is withheld until it can be billed, and thereafter, it is to be treated as income. Retainage funds are earned funds withheld to ensure future performance. By treasury regulation, the contract that details the retainage agreement determines when the asset converts to income and when it is payable to the party from whom it has been withheld. A specific date for when this retainage converted to income was not determined by CCC but it has occurred. It is CCC's position that GENERAL has unlawfully converted CCC's retained funds.

CCC states that payment for the winter cost were agreed upon during a telephone conversation between Mike Cli, president of CCC and Gen Jones, president of GENERAL, and that this telephone agreement constituted a separate express oral contract. See Mike Cli Affidavit Exhibit 7. Gen Jones states a different position. He claims that a conversation took place but that he never agreed to pay for the winter cost. See Notarized Affidavit Gen Jones. Exhibit 43

It is CCC's position that its invoicing, on 12/19/2222 for "winter costs" and GENERAL's payment of 90% of the winter cost on 2/28/2223 constitute performance of the contract. Next, CCC states that these facts support an "implied in fact" contract theory. Another theory that can be applied to these facts is the theory of quantum meruit. A fourth theory also comes to mind; a contract "implied in law." These theories, including the conversion theory mentioned above, will be discussed later.

The invoice of 12/19/2222 was paid to CCC by GENERAL on 2/28/2223. Payment was made by GENERAL without any objection concerning the inclusion of winter costs within the invoice or comment about the retainer. At no time, contemporaneous with the payment of 2/28/2223, did GENERAL indicate that they were returning the retainer or a portion of the retainer. The amount invoiced was $935,255.00 and from that amount 10% was deducted for retainage ($93,525.50). The total submitted for payment was $841,725.00.

In GENERAL's Exhibits, the accounts payable employee's affidavit states that, she knowingly paid the winter costs to CCC. Respondent's Exhibits *Affidavit of Betty Book* #4. Further, she states that she billed CCC's invoice to the owner, Big Building, #4 supra.

CCC failed to investigate and pursue other avenues to ensure payment of its winter costs, in part, because they were paid according to the invoice. The payment was exactly what CCC expected based on Mike Cli's conversations with Gen Jones, the owner of GENERAL, and the course of conduct between the parties. In Gen Jones's affidavit he acknowledges that he approved the payment. Both he and the accounts payable clerk state that they were knowingly paying the amount but treating it as a payment of retainage, albeit secretly form CCC. So, assuming for purposes of this argument that the two of them are accurately remembering their states of mind at the time the payment was made, the legal question becomes whether holding your hand behind your back and crossing your fingers while paying a bill is sufficient protection from a claim of performance of an

oral agreement. I have found no authority that supports the "crossing of the fingers" defense.

This author believes that, in an attempt to control the narrative, Respondent, GENERAL, claims that no additional money is due CCC because CCC breached the contract by delaying the project. This author believes that GENERAL knows that this claim is without merit. The lack of merit can be deduced from the following facts. There are no letters or emails to CCC in September of 2222 stating that they were in breach for not having showed up for work on 9-25-2222. Is that because there had been an oral modification of the contract delaying the start due to the site condition? Is that because the excavation work was incomplete, and a sewer line needed to be installed? Looking at the October 2222 record, I see that there were no emails or letters to CCC stating that they were causing a delay or that they were in breach. On the other hand, I do see where Gen Jones hired CCC to do another job for GENERAL in late October. Was this so CCC could remain working while the Big Building site was being fixed? Was that to help CCC mitigate its lost profit claim against GENERAL because the Big Building site wasn't ready? Again, in December of 2222 there is no claim, or even a mention of a delay caused by CCC. CCC invoiced for the Big Building job and winter cost in December and yet, there is no mention of a delay caused by them in any of the correspondence concerning that invoice. Also, during December, CCC billed for the other job they did for GENERAL in October 2222. This is the job they did while waiting to get on the

Big Building site. This other job was called Star on CCC's time sheets. There is no mention of any Big Building delay caused by CCC in the correspondence from GENERAL regarding that work either.

In January of 2223 there is no mention of CCC causing a delay in any emails or letters. In February of 2223, GENERAL pays CCC's invoice for 90% of winter costs and 90% of the Big Building, but GENERAL still doesn't mention that CCC caused a delay or that they breached the contract. They also don't mention that they are altering the contract retainage agreement or that they are paying a portion of the retainage. In fact, there is no mention of a breach or delay in March, April, May, or June of 2223. GENERAL makes no mention of a delay or a breach of the contract by CCC concerning the Big Building in any correspondence with CCC during any of the nine months from the date GENERAL alleges that CCC breached the contract until they are billed for CCC's retainer. Nine months after the alleged breach GENERAL's attorney contacts CCC concerning the Big Building contract. *Opponent Law Firm, PLC, Letter of July 7,2223 SENT BY EMAIL. This exhibit was offered by Respondent and is contained in their 2'nd set of pdf files.*

The letter details the claims that GENERAL has an action against CCC for breach of contract. It states that they will pay CCC once CCC cures the alleged breaches contained within the letter, which include the return of a brick cart and execution of waivers. There are two mentions of a delay within that letter but they are in reference to a

delay in delivery of the waivers not a reference to a delay in the completion of Big Building.

General claims that CCC was entitled to $84,172.50 of the $85,000.00 at the time GENERAL paid CCC's invoice. Their claim, if accepted, is that they unilaterally modified the 90% payment 10% retainage provisions of the contract and that they intended the payment of 2/28/18 to be a payment of 99.026470588 % of the contract amount and that they were withholding 0.9735294117 % as the retainage. It is this authors belief that they make the above claim to avoid admitting to having substantially performed on the oral winter costs agreement. Please note, $84,172.50 is an interesting number. It happens to be the amount invoiced. I believe it is proper for a fact-finder to infer that GENERAL's claim, that it intended to pay CCC the above claimed portion of the retainer is untrue and to find that GENERAL paid 90% of the winter costs agreement and 90% of the sub-contractor agreement on 2/28/1018. That would mean that GENERAL performed the winter costs agreement. It would also mean the following is inaccurate. *Affidavit of Betty Book #4* "...we had submitted this amount to Big Building, we paid CCC $84,172.50, which included a portion of its retainage."

In addition, Gen Jones states that they paid the billed amount to avoid any additional delay. CCC invoiced on 12/19/2222. GENERAL didn't pay the invoice for almost six weeks. Their claim, that they didn't have time to seek an adjusted invoice, seems less than candid, to say the least. Did they also lack the time to email and say, "by the way, we're not paying winter costs, we're paying retainer!?" The bottom line is that GENERAL isn't being truthful.

This author believes that GENERAL has never considered CCC to have caused the delay in the project and has manufactured this argument to present a false defense to CCC's claim.

GENERAL also claims that any modification to the contract was required to be in writing. Of course, that isn't true if they unilaterally modified the 90% pay 10% retainage contract provision. Further, both parties agree that the contract was orally modified concerning CCC's starting date. Gen Jones states that the delay was requested by CCC and Mike Cli states that the delay was requested by GENERAL. But both parties agree, there was a phone call an there was an agreement to change the start date. So, I guess not all modifications have to be in writing.

GENERAL now claims that CCC owes them over $560,000.00 for alleged contract breaches. CCC denies that it breached the contract. Primarily, GENERAL claims that CCC breached the contract by failing to complete the work according to the contract's schedule. Both parties agree that the masonry work was not performed according to schedule. The parties offer different reasons for the change in the schedule. CCC states that the cause of the delay was the result of GENERAL's failure to install a sewer pipe which caused the property to flood and required the site to be re-excavated. Exhibit 4 is a written statement by Joe Dirt, the excavator on the job.

"I swear that this statement is true.

I was the excavator on the new Big Building in Gotham, Michigan. In September we discovered major problem with the city sewer hook-up. We found an old manhole on Big Building property had a 6" pipe connected to the city sewer

and the city would not allow that, they wanted a 24" pipe connection. GENERAL did not want to pay me to convert the 6" pipe to a 24" pipe. The job was shut down for a good 6 weeks. Meanwhile the lot had no drainage so as it rained the lot became flooded and impossible to drive in, the water had nowhere to go. It wasn't until the end of October, beginning of November that I could get the lot straightened up for the masons to come in. When they got there, around the 9th of November 2222, we saw that the Tyvek still wasn't up."

It was signed by Joe Dirt April 10, 2222.

Joe Dirt's site-photos back up his claim, Exhibit 4, photo 1) XXXXXXXXXX 1107 is the same photo as Exhibit 4 #2 except that #2 contains some file data and a date. That information covers much of the image. Photo 2) is numbered XXXXXXX1144 and indicates that the photo was taken on 9/26/2222. Notice the person on far right of both photographs; that's how you can be sure these two photographs are the same image. This photo was taken within 24 hours of the time CCC was to have begun laying the brick. Its view is from the front of the building looking east to the public road. The hole is where CCC needed to drive its telehandler (telescopic fork-truck) to front load brick on the scaffolding for laying brick on the south side. Even after getting on the site in November this area was still too soft and CCC fork truck sunk into the spot where the hole had been dug. It sank so much that it got stuck. As an alternative to loading on the east side of the building CCC looked at the possibility of altering its material handling plan and front loading the scaffolding from the west side of the building. But GENERAL had dug a retaining pond in the rear of the building and the slant roof drained into the area where the telehandler needed to traverse to load the material. The area was too wet and soft as a

result of the lack of drainage. Therefore, the materials could not be loaded from the west side either. In addition to these three sides having issues, the north side of the site was wet due to the lack of drainage. It is believed that any repeated use of the area for the telehandler travel would have resulted in the vehicle sinking to its wheel wells. The entire site was inaccessible for masonry work. That accounts for all four sides of the building. Even if two sides had been available CCC would not have been able to begin the masonry part of the project due to the need to move materials around the job site. In this case all four sides were inaccessible. One of the affidavits states that scaffolding could have been erected in the back if structured properly. The author of that affidavit is incorrect. The amount of erosion caused by the roof runoff, the softening of the ground from the lack of drainage, and the position of the retainer pond made it impossible to erect scaffolding that would be safe and stable on the west side of the building.

Exhibit 4 Photo 3 XXXXXXX 1350 and Exhibit 4 photo 4 XXXXXXXX 1408 are also photos from November 26. This view is facing north.

Once again, Joe Dirt states that the building had no Tyvek in early November. The Tyvek situation is somewhat interesting because in their exhibits GENERAL provides three photos claimed to have been taken on October 25, 2222 showing a fully Tyvek wrapped building. Yet, Joe Dirt says that there was no Tyvek at that time. Further, their own employee stated, Larry Lee Affidavit #322. "... he (Mike Cli) noted that the Tyvek building wrap was not installed. However, we do not install Tyvek ***until the masonry is being done*** as it is susceptible to being blown off by the wind...." Emphasis added. If, as Larry Lee states, the Tyvek wasn't installed until after the masonry work had begun then

those three photos could not have been taken on October 25. Additionally, October 25 is five days before CCC began working for GENERAL on the Star job. According to Gen Jones the Tyvek wasn't installed until he had confirmation that CCC was ready to be on site. He could not have had that confirmation before CCC had even started the GENERAL Star project. Those pictures were not taken on October 25, 2222.

CCC had a crew visit the site on or about October 3, 2222, and again on November 9. In Exhibits 5 and 6 both employees note that the lot was inaccessible in October due to excavation work and that the building was not wrapped with Tyvek on the 9'th of November. The President of CCC is Mike Cli. He provided an affidavit that has been marked as Exhibit 7. In that Exhibit, numbers 8 through 17, provide detail concerning the condition of the job site and the causes behind that condition. Michael Baxter is a resident of the community where the building was erected. He provided a statement as well. In Exhibit 20, he states that the parking lot was tore up, flooded and there was no Tyvek on the building until late October or November.

The reader might wonder why CCC is not claiming lost profit for the time it was unable to get on this job site. Fortunately for CCC they had some work that was not time sensitive and they were able to mitigate their damages. In Gen Jones's affidavit he claims, in paragraphs 4 and 5, that CCC was on another job and that Mike Cli called and asked GENERAL for a later start date. There was a conversation between Mike Cli and Gen Jonesthe week previous to Sept 25, 2222, but Gen Jones's description of that conversation is inaccurate. Mike Cli was actually trying to find out how long it would be before the site would be ready for his crew because there was another job he could work,

but that other job would last between two and three weeks. After talking with Gen Jones, Mike Cli was confident that the Big Building site would not be ready for at least three weeks and CCC began the other project on September 25, 2222. That's the date Mike Cli had been planning to start the Big Building job. From this authors perspective the fact that this alternative project wasn't started until the date that the Big Building project was scheduled to begin supports the idea that this was not a request by CCC to delay the start but, in fact, an accommodation provided by CCC for GENERAL's benefit. CCC was utilizing its surprise available time and mitigating its damages. In CCC's time sheets this alternative job is called Delta. Looking at the first page of Exhibit 19, in the last column, on the third line, you can see the "start" declaration. Subsequent to completing that job CCC did another non-time-sensitive project. That was called Barn and it lasted three days. That is the second page of Exhibit 19. The Big Building site still wasn't ready. To avoid down time and lost profits GENERAL and CCC entered into the contract for the Star job. It was started 10/30/2222 and finished during the morning of 11/9/2222. That's the third page of Exhibit 19. It was after this third non-time-sensitive project that the Big Building site was ready for CCC to begin. But let's not gloss over this Star job. The Big Building project was, according to GENERAL and Gen Jones, months behind. According to them it was CCC's fault. Further, Mike Cli was an impossible person to work with. And yet, with all these mounting losses supposedly caused by Mike Cli, and Mike Cli's horrible work habits and personality Gen Jones and GENERAL provided additional work for CCC; and that additional work was to be performed while CCC was supposed to be at Big Building? At some point a claim of a liar cannot be rationalized and excused. This is

that point. What would compel Gen Jones to provide work for CCC during late October and early November of 2222 if CCC could have been working at Big Building instead. I suggest that the reason Gen Jones provided the alternative work was because the Big Building site was not in a condition that would support CCC's work. And the reason the property was in such disrepair was because GENERAL had failed to fix the drainage issue in a timely manner.

In their Exhibits GENERAL has two photographs claimed to be progress photos for the week ending September 22, 2222. They allegedly show a parking lot ready to receive workers and material. These photos are in the original set of GENERAL's Exhibits and titled *GLG 1 Week Of 922 Progress Photo .jpg*, and *GLG 2 Week of 922 Progress Photo.jpg*. The embedded file information on the photographs indicates that they were taken October 2, 2222. (to see the embedded information: open a thumbnail view of the photo, right click anywhere on the photo, click properties, click the "details" tab, and scroll to "date taken") Clearly there is a problem with the dates. These could not be photos of the building progress by Friday 9/22/2222 if they were not taken until October 2, 2222. Thus far, the proof that the dates are incorrect is based entirely on information provided by GENERAL. Joe Dirt stated that these photos were taken much later than either of the offered dates. Exhibit 8 *Response to viewing GENERAL PHOTOS 1 AND 2)*. Mike Cli believes they were taken before the sewer problem was discovered. In addition to the inherent contradiction within the photos are some external proofs. The photos in Exhibit 3 support the fact that GENERAL's parking lot photos could not have been taken in late September or early October.

GENERAL submitted three photographs dated 12-25-22 and the two other photos mentioned above and dated either 10/22 or 11/2. None of the five photographs were taken on the dates reported. Perhaps the inaccurate dating was done by mistake; but considering the probable lack of truth and candor pointed out earlier it seems reasonable to believe this was another attempt to falsify evidence.

Joe Dirt's photographs also support the claim that the site was inaccessible due to flooding and excavation.

PHOTOS REDACTED

Looking south at the back of store. This is not the retainer pond. This is the north parking lot.

PHOTOS REDACTED

North Parking Lot looking southeast.

Some facts should be evident by this point.

1. CCC invoiced for the Winter Costs
2. GENERAL knowingly paid the Winter Costs
3. Contrary to their statements GENERAL did not intend for the 2/28/2223 payment to include the retainer
4. Due to excessive excavation needed to upgrade the sewer, much of the site could not support CCC's equipment and material

5. Much of the site could not support CCC's equipment and material due to flooding caused by a failure to upgrade the sewer
6. CCC attempted to, and with GENERAL's help, succeeded in mitigating its lost profit damages
7. GENERAL provided additional work for CCC to offset the loss of work caused by the delay
8. GENERAL's photographic record is corrupted and cannot be trusted
9. CCC did not cause the delay.

Why would GENERAL make a claim that CCC caused the delay when it is so obviously not CCC's fault? In Mike Cli's Affidavit; Exhibit 7, numbers 1, 2, and 66 and 67 provide a possible reason for the claim. GENERAL implies in its filings that they intentionally withheld $82,750.00 of the retainer from, what they claim should have been, an $85,000 retainage. In the Affidavit of Betty Book she claims that she knowingly paid the winter costs. So, either they are claiming that the withheld amount was due to CCC's contract breaches or they intentionally paid the winter costs and are seeking rescission. In fact, CCC believes that GENERAL's claim, that it was withholding a portion of the retainage, is an attempt to avoid admitting to having intentionally paid the winter costs bill. They want to avoid the claim of performance because, once performed, an oral contract is binding. If binding, GENERAL would have to prove a right to rescission. Obviously, GENERAL didn't calculate the cost of some alleged breach and intentionally

withhold $827500.00. Instead they intentionally paid the 12/19/2222 invoice, including the winter cost component and withheld 10% of the $850,000 and 10% of the winter costs. Although the agreement for winter costs was oral the invoice was a writing, as was the payment. Those two writings are sufficient to remove this case from consideration as an un-performed verbal contract and recast it into the performed written contract realm. The invoice and check constitute contractual supporting writings. In addition, in Klas v. Pearce Hardware & Furniture Co., 202 Mich. 334, 339-340, 168 N.W. 425 (1918), the court stated that a defendant impliedly waives the requirement that a modification be in writing when he is benefitted by plaintiff's services and knowingly accepted those benefits. In this case Gen Jones claimed that he could not have any additional delays on this build. There was significant time pressure. Gen Jones told Mike Cli to go ahead, Exhibits 5, 6 and 7, lines 19 through 30.

Ancillary Issues

In their filings GENERAL claims that CCC misappropriated a brick cart. This is not true. Exhibits 9 and 10 are statements from CCC employees stating that they had approval to remove the cart. Exhibit 31 is comprised of 31a and 31b, a two-page exhibit showing that the cart was returned on 7/6/2223. Exhibit 27 Lines 45 through 49 and paragraph 62 also address the brick cart issue. In their Exhibits GENERAL has shown an advertisement for a new brick cart. The brick cart provided by GENERAL was a heavily used cart which, Mike Cli says was worth maybe $100.00. It is important to note, CCC never used the cart.

In their fillings GENERAL claims that CCC failed to keep the job site clean. Exhibits 12 and 13 are statements that contradict this claim. Exhibit 27, line 64 also deals with this issue. Two of GENERAL photos of the job site show a standard 8x8x16 inch block and a plank on the ground near the retaining wall on the south side of the building. If you look to the left of the expansion joint and about 45 courses up the wall, you will see a seven-course-high repair. The mortar in the repair is still wet. These photographs were taken just after that repair was completed and before the cleanup had been finished. The plank and block were used to stand on to make the repair. The brick on the ground is the brick that was removed from the wall during the repair.

In their fillings GENERAL claims that Mike Cli bent a pipe in anger. Exhibit 7 line 63 considers this claim as does Exhibit 14. For CCC's part, they don't have any idea what this claim is about. For the record, to the best of Mike Cli's knowledge, neither he nor any of his employees bent any pipes while on this job.

In their fillings GENERAL claims that the cap stone for the dumpster enclosure was not ordered timely. Exhibit 27, line 65 addresses this issue. It should be noted that the capstone wasn't ordered in September because there was no place to store it because the site was torn up by excavation and the site was too wet.

CCC provided winter preparations and procedures for the project because Mike Cli had been informed that CCC would be compensated for the work. He doesn't do this work for the fun of it. Interestingly, CCC was compensated, Exhibit 16, the check stub, and yet, here we are months and over a hundred claimant attorney billable hours later discussing recession.

The idea of winter-costs being involved in the project was not considered at the time of bidding because the schedule indicated that the work would be complete before winter conditions would be encountered. In fact, winter costs were excluded from consideration, Exhibit 15 CCC's Bid. When it became apparent that winter weather was a factor Mike Cli escalated the consideration of the issue and accepted the word of Gen Jones that the details of payment would be addressed later because the project could not be further delayed. An award of quantum meruit would result in the same amount as the original amount claimed, Exhibit 36, *Reasonableness of Winter Costs Charges*. On 2/28/2223 CCC provided GENERAL a Partial Unconditional Waiver in the amount of $841,725.00, Exhibit 17. GENERAL never objected to that waiver. They didn't ask for a final waiver for months. GENERAL didn't indicate at any time contemporaneous to the time of payment that the payment they made in February was a final payment or a payment that included retainage. They didn't account for the retainer in their payment. They never indicated that they intended to withhold a portion of the retainer until after this action was commenced. GENERAL is just making stuff up as they go through this process. Their modus operandi has been to increase CCC's cost in violation of the contract they drafted and presented to CCC.

Exhibit 2, The original Contract, Page 8 contains Article XVII of the contract. The beginning of the second paragraph states that "Subcontractor and contractor agree to prompt and efficient resolution of all disputes." In that spirit CCC sought an early resolution to this conflict, Exhibit 18, letter regarding mediation effort. GENERAL didn't

even respond to the offer to resolve this claim. Clearly, they did not enter into this provision in good faith.

GENERAL continued to use trickery, avoidance, and forced an unwarranted increase in cost on CCC as CCC sought resolution of this dispute. GENERAL is in violation of the contract provision mentioned above.

MCL 600.2591 provides relief for frivolous civil action or defense to civil action. When Respondent filed GENERAL'S COUNTERCLAIM AGASINST CCC they knew that paragraphs 6, 8, 9, 14, and 17 were completely and entirely false. They knew that GENERAL was responsible for the contract breaches and other issues as stated in paragraphs 7, 12, and 15. They knew that paragraph 10 contained so little truth to be fairly characterized as being false and they should have known that paragraph 11 was false. Considering all the untrue statements made by Respondent and since Mike Cli and one of GENERAL's site supervisors walked the site to look for any issues after the job was complete and before CCC left the job site, Claimant believes that paragraph 13 is also false. GENERAL has done everything it could to increase the cost of obtaining a prompt and efficient resolution of this matter. That includes the filing of frivolous defenses.

THEORIES OF RECOVERY

Conversion or Implied in Law

Keeping in mind that CCC filed this action to recover its retainer I think a synopsis of the law concerning conversion and its cousin contracts which are “implied in law” is appropriate. CCC earned the retainer on a building project in Gotham Michigan. An conversion occurs "where one party, without any expression of assent from the other, obtains or retains possession of money or other property that actually belongs to the latter, by oppression, extortion, deceit or similar means. This remedy is not based in contract it is not grounded in an implied promise to pay, but in a duty that arises, independent of any promise. The goal is to restore property to its rightful owner. There is no real dispute whether GENERAL is withholding CCC retained funds. The funds do not belong to GENERAL and they need to be returned. Unlike many other states Michigan does not have a statute concerning construction retainage agreements for private construction projects. On the other hand, the contract is clear. Ten percent shall be retained and will be paid upon substantial completion of the project. The project was completed a long time ago. GENERAL’s payment to CCC is past due. The retainer on the first contract was $85,0000. GENERAL withheld that amount. The retainer on the second contract was $85,250.00. GENERAL also withheld that amount. GENERAL owes CCC $935250.00. As to Implied in law contract theory GENERAL has been unjustly enriched and they should pay the retained funds to CCC. *Pomann, Callanan & Sofen, PC v Wayne Cty Dep’t of Soc Servs*, 166 Mich App 342, 347, 419 NW2d 787 (1988). This is where this case should have ended.

a. Oral Contract

The general rule is that where there is a conflict between an express provision in a written contract and an alleged oral agreement, the oral agreement is unenforceable. Here, defendants cite as a "conflict" the written procedural requirements for additional charges contained in the original contract. However, the original contract was clearly modified at some point when the start date was postponed. Further that start date was critical to the contract as indicated by the recital that “time [was] of the essence.” That modification was done orally. “Winter costs” were not addressed in the contract but they were considered in the bid. The bid expressly stated that “winter costs” were excluded.

According to GENERAL the contract was again modified without a writing when GENERAL unilaterally decided to modify the percentages being withheld for retainage.

Since, the contract was already modified by unilateral action and by an oral agreement and the contract cannot be considered fully integrated as a result of those modification; then either a new oral contract or an oral modification of the original contract occurred concerning the winter costs. Since both claimant and respondent concur that the matter was discussed, and respondent’s employee acknowledges that she knowingly paid the winter costs, it follows that claimant has shown a prima facia cause of action for breach of an oral contract.

b. Quantum Meruit

To state a claim for quantum meruit, a claimant must show that it conferred a benefit for the amount claimed on defendant, that defendant accepted the benefit, that plaintiff reasonably expected compensation for the benefit, and that "the reasonable value" of the

benefit is the amount sued for. The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in equity for events arising out of the same subject matter. However, it is not the current view that a claim in contract and one in quasi contract are mutually exclusive in all events and under all circumstances. Where there is a bona fide dispute as to whether the contract covers the controversy in issue, a plaintiff may proceed upon a theory of quantum meruit as well as contract and will not be required to elect his or her remedies. In this case the winter-cost issues were specifically excluded from the bid and independently agreed upon after a critical component of the contract had been breached by the respondent. The claimant did the work, the work needed to be done. The respondent benefited from the work. The respondent knew the work needed to be done. The respondent paid for the work. The respondent should not now be allowed to charge back his payment against funds he holds for the benefit of the claimant when there is no contractual right to do so.

c. Implied in Fact

In the absence of an express written contract between the parties, it is well settled that a contract may be implied in fact where inferences may be drawn from the facts and circumstances of the case and the intention of the parties as indicated by their conduct. A contract implied-in-fact contemplates not assurances or promises but conduct. Normally, a contract cannot be implied in fact where there is an express contract covering the subject matter involved. In this case the contract does not address winter-costs and winter-costs were reserved within the bid. More importantly, the work was agreed to be

performed, payment was assured, the work was completed, and payment was made. That's a lot of conduct!

If any one of the above theories are upheld for the Claimant he should have his full retainer of $93,525.00 returned.

Rescission

Respondent seeks a right to attach Claimant's retainer to affect a rescission of the contract for winter costs. Michigan courts sitting in equity, have long had the power to reform an instrument that does not express the true intent of the parties as a result of fraud, mistake, accident, or surprise." 51382 Gratiot Ave. Holdings, LLC v. Chesterfield Dev. Co., LLC, 835 F.Supp.2d 384, 404 (E.D. 2011) (citing Scott v. Grow, 301 Mich. 226, 3 N.W.2d 254, 258-59 (1942)).

Contract rescission requires:

(1) a seasonable assertion of the rescission right;

(2) tender of the consideration and benefits received; and,

(3) demand for repayment of any price paid. See Mesh v. Citrin, 299 Mich. 527, 300 N.W. 870, 872 (1941). The party seeking rescission must first return the other party to the pre-contract status quo, McIntosh v. Fixel, 297 Mich. 331, 297 N.W. 512, 518 (1941), and rescission is not available to a party who has failed to make payments required by a contract and is thus in default. Hafner v. A.J. Stuart Land Co., 246 Mich. 465, 224 N.W.

630, 631 (1929). Heidtman Steel Prods., Inc. v. Compuware Corp., 178 F.Supp.2d 869, 879 (N.D. Ohio. 2002).

Respondent has not made any attempt to return Claimant to the pre-contract status quo nor do they have the ability to do so. The work was performed. Respondent paid for the work. Respondent has no right to rescission.

Anticipated Argument Contract

Article V

The second full paragraph reads:

Subcontractor agrees that as a condition precedent to the Contractor's obligation to make any payment to Subcontractor under subcontract agreement, the Contractor must receive payment for the Subcontractor's work from the Owner. It is anticipated that GENERAL might claim that they did not receive payment from the owner for the winter costs. According to their accounts payable affidavit they submitted the 12/19/2222 invoice to Big Building and it was paid in full. Under that logic GENERAL was paid 90% of the winter costs and still owes CCC its retainer. It is anticipated that they might claim that they only received 90% of the original contract and 90% of the winter costs which they have already paid. That would be a slight of hand. Again, that would be placing the hand behind the back and crossing the fingers. Their claim would be that they paid a portion of the original 90% with the retainer which they were required to maintain and that they didn't tell CCC that they used CCC's retainer until after CCC had forfeited

its right to seek payment from other sources. In criminal law that is called larceny-by-trick. For our purposes its conversion.

CCC incorporates its Answer to GENERAL's Counter claim by this reference.

CCC incorporates the Affidavit of Mike Cli in its entirety by this reference.

CCC demands the return of its retainer and:

a finding that retainage is owned by the entity for whom it is held,

that GENERAL engaged in conversion of that retainage and is responsible for treble the full amount pled pursuant to MCL 600.2919a,

or that GENERAL is responsible for the full amount pled according to one or more of the contract theories presented,

or that GENERAL is responsible for the subcontract retainer,

or that GENERAL is responsible for the remainder of the retainer on the subcontract,

and respectfully request, in accord with MCL 600.2591, attorney fees, costs and all appropriate compensation for the inappropriate and frivolous claims perpetrated by GENERAL.

$93,000.00 x 3 = $280,000.00 or $ 93,525.00 or $85,000.00

137 hrs at $38,360=$.00 attorney fees

53 hrs at $60 = $ 3,180 attorney support staff

Respectfully submitted:

/s/

_____
Stephen C. Rulison P37858 June, 24 2222

Exhibits

redacted