

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
CIVIL ACTION
DOCKET NO. BCD-WB-CV-07-28

SME CORPORATION,

Plaintiff

v.

DECISION AND ORDER

BELFAST BRIDGE, LLC,

Defendant

This matter was tried before the court without jury on the claims of Plaintiff SME Corporation (“SME”) for Breach of Contract (Count I), Quantum Meruit (Count II) and Unjust Enrichment (Count III); and on the counterclaims of Defendant Belfast Bridge, LLC (“Belfast Bridge”) for Breach of Contract (Counts I), Breach of Implied Warranties (Count II), Negligence (Count III) and Set Off and Recoupment (Count IV). The facts, below, are based on evidence that this court finds credible.

FINDINGS OF FACT

In the summer of 2002, Thomas Roberts first saw and became interested in the former Stinson Canning property in Belfast, Maine, as a potential commercial project (“project”). The waterfront property is bounded on the northeasterly side by Belfast Harbor in Penobscot Bay. Roberts envisioned that the project would combine retail and residential condominium uses with a marina and a boat repair facility.

In November 2003, he acquired an option to purchase the property and began work on the permitting process with the Town of Belfast. In late summer 2004, he was joined in the venture by Burleigh Hutchins. They formed and were the initial member/owners of Belfast Bridge,

which is a Maine limited liability company and was to be the owner/developer of the project they named "Wakeag Landing."

There were four existing buildings on the property and Roberts' initial plan was to salvage and use all of the existing structures on the property. Hutchins, on the other hand, was concerned about the adequacy of the concrete superstructure of the buildings.¹ Ultimately, Roberts and Hutchins opined that it would cost more to tear all the buildings down and they went forward with a plan to renovate some buildings, including Building # 1, and demolish the rest. Although they developed financial models for the project, they did not do a thorough analysis to compare the cost to renovate the buildings versus the cost to tear them all down.

Roberts and Hutchins also worked on major permitting requirements with several government entities in order to be able to obtain building permits from the Town. They were assisted by an architect, Richard Sullivan, who eventually became a member/investor in Belfast Bridge.

Belfast Bridge engaged the services of Randolph Scamfer, a structural engineer. Among other things, Scamfer examined the architectural drawings, reviewed the condition of the existing buildings and prepared structural drawings. His duties included determining whether the concrete, steel and structural work on the project complied with various codes. Although this was to be a renovation project, Scamfer was not asked to do an evaluation of the existing structures to determine whether the old construction would support the new.² Scamfer felt that the foundation for Building #1 was stable, but he expressed ongoing concerns about the

¹ Hutchins testified that he walked through Building #1 with Roberts and the project's structural engineer, Randolph Scamfer. Although Hutchins asked a lot of questions about the adequacy of the superstructure, there was no mention of testing the building. Scamfer suggested that the columns should be examined in order to determine how much steel was needed.

² For example, assessing the stability of building foundations; soils evaluations; and testing existing structural load capacities.

structural integrity of the building itself. Roberts never approved a testing program for the structure and Scamfer was not asked to certify the structural integrity of the building before the work began.

In August 2005, Steve Martin, Sr., the founder and Vice President of SME, met with Roberts and Hutchins at the project site. Roberts said he was the construction manager for the project and indicated that he had commercial construction experience and had owned a steel fabrication company. Roberts was interested in engaging SME as the general contractor for the renovation of Building #1. He explained that this was to be a Fast Track construction project in which initial plans and documents would be sparse and time schedules would be continuously refined and updated.³ Roberts told Martin that Belfast Bridge planned to locate retail businesses and a restaurant on the first two floors of the building and residential condominiums on the upper floors. Martin was not given much detail at the time, but did review a set of architectural plans.

Roberts told Martin that, although the permitting process was not complete and Belfast Bridge was awaiting BOCA approval, demolition and some water-related work could soon begin. Martin represented that SME was qualified as a general contractor and was experienced in the fabrication, erection and welding of steel, together with related shop work. Martin also noted

³ A Fast Track construction process is sometimes used by developers to speed up the construction schedule in order to meet certain deadlines and/or offset the costly time-value of borrowed money. Whereas the typical construction process often involves a series of discrete functions in a predetermined order, a Fast Track schedule is used to reduce construction time by overlapping or varying the order of some of those functions – for example, doing two things at the same time or starting one phase of the work before another phase is completed. However, it is not appropriate to fast track demolition and rehabilitation work without first doing a complete analysis of the existing structure.

In the Fast Track process, which may vary from project to project, the developer continually changes work schedules and decides what work needs to be done at any given point in time. The basic strategy is to do what needs to be done and defer doing work that can be postponed to a later time. As a result, there are continuous unscheduled changes to the work.

that SME was not expert in re-bar and concrete work, but could bring in people who were skilled in those tasks.

Martin prepared and gave Roberts a draft handwritten contract. It was not accepted, but Belfast Bridge's attorney drafted a revised agreement based on Martin's notes. The parties executed a contract on September 7, 2005. Plaintiff's Exh. 7.

Roberts had wanted a fixed-price contract. However, the parties settled on the time-and-materials contract preferred by Martin in part because of time constraints associated with the project and because of Roberts' desire for flexibility in directing the work. In particular, water work for the marina was a significant feature of the project. Roberts knew that BOCA approval might not be obtained until February 2006 and any construction delays would run into the brief six-month window of time, from November 15 to March 15, during which water work was allowed in Belfast Harbor. To compound the scheduling issue, Belfast Bridge intended to fund the marina work with the proceeds of a Boating Infrastructure Grant, which required the developer to close on the property before going out to bid. That, together with delays associated with the bidding process and with getting permits post-closing, would leave little time to get the water work done by the March 15th deadline.

The contract specified that SME was to do demolition work, as directed by Belfast Bridge, and do the following work on Building #1: "Superstructure, window installation, siding, roof and trim per working drawings." *Id.* The superstructure work included concrete work and the fabrication and erection of steel for the building.

In late September 2005, Martin met with Roberts and Hutchins at the project site and examined Building #1. Martin expressed concern about the structural integrity of the building and observed that a lot of demolition work would be necessary.

SME was not provided with a formal construction schedule. However, Roberts said that the construction sequence would have to account for the narrow time-frame for doing the water work. In addition, Roberts told Martin that Belfast Bridge wanted to be able to show progress on the building's residential condominium units to customers by April 15, 2006.

SME understood that its work in the first phase of the project would include demolition, clearing out materials and debris, shoring up the building and filling trenches. In this phase, concrete and steel work would be necessary in order to support the parts of the building that were not going to be demolished. The second phase would include concrete and steel work for the renovation of the building.

Belfast Bridge's purchase of the project property, originally scheduled for December 1, 2005, was delayed because of a boundary dispute with an abutter. However, the property owner allowed Belfast Bridge to begin some work on the property in the fall of 2005.

On September 20, 2005, Belfast Bridge entered into a contract-zoning agreement with the Town and the next day Roberts obtained a demolition permit.⁴

On September 23, 2005, SME began demolition at the site under the supervision of SME's project foreman Christopher Kenney. Kenny's responsibilities included overseeing the work and the workers' daily routines, and dealing with safety, scheduling and time-and-materials issues. Kenney expected that SME's order of work would progress "from the bottom up" (e.g., demolition; concrete rehab; steel fabrication; and then erection). However, the actual progression of the work varied. Kenney and his crew were directed on the job primarily by Roberts, who issued on-the-job instructions and verbal change notices on a regular basis. On

⁴ David Studer, the Codes Enforcement Officer ("CEO") for the Town of Belfast at the time, said that when he issued a demolition permit he thought Belfast Bridge was going to tear everything down because the existing structures did not seem salvageable. Studer relied on the project's structural engineer, Randolph Scamfer, to resolve the Town's concerns about Belfast Bridge's plan to rehabilitate some of the existing structures.

many occasions, Roberts would direct Kenney's crew on matters without telling Kenney. In Kenney's words, Roberts seemed to schedule the work on a "shotgun basis" and he told Roberts that the latter's decisions were affecting the work.

Kenney did not have much contact with the project's structural engineer Randolph Scamfer. Roberts often gave Kenney information or instructions that he said were from Scamfer. In addition, Roberts made changes to drawings prepared by Scamfer or made his own notations on them without involving Scamfer.⁵

The concrete demolition turned out to be a much larger task than anyone had realized. The existing concrete had suffered extensive deterioration due to years of exposure to salt air. Acting without detailed plans, Roberts used paint to mark all of the walls and other areas of the building that were to be saved or were to come down.⁶

During the demolition phase, Scamfer had ongoing concerns about the structural integrity of the existing concrete that Roberts wanted to salvage. Although both ends of Building #1 appeared to have serious structural problems, there was no effort by Belfast Bridge to inspect the building. At its southern end, the earth had eroded and the floor appeared to have sunk approximately two inches. Roberts directed Kenney's crew to begin work on the northern end.

A & L Construction ("A & L") was a subcontractor hired by SME to do the concrete and rebar⁷ work during the demolition and renovation phases. SME expected that Kenney would supervise and direct A & L's work, which included building forms for the concrete, fabricating and installing the rebar and pouring the cement. Robert Corey worked for A & L and was part of

⁵ It is not customary for the project owner to make changes to plans without first checking with the structural engineer.

⁶ This is not an uncommon practice. However, by the end of the demolition work, most of the walls that Roberts marked to "save" were torn down.

⁷ Rebar is a steel bar, or several steel bars tied or welded together to form a mesh or cage, that is embedded in concrete. Rebar reinforces the concrete by increasing its tensile strength.

a two man crew initially assigned to the project.⁸ Corey was a carpenter by trade and occasionally did concrete work. He was not familiar with rebar work and this was his first experience refacing concrete. Kenney assigned Paul Hamilton, one of SME's carpenters, to assist A & L with the rebar work. Hamilton had no prior rebar experience.

Although A & L was brought onto the project by SME, Corey and the rest of A & L's crew received their directions from Roberts, not Kenney. And, consistent with the course of the project, those directions often changed. For example, Roberts initially told Corey to use 12 vertical pieces of rebar steel around each pier in the building. Later, Roberts told him to downsize to 8 vertical pieces per pier. Then, later still, Roberts told Corey to use wire mesh instead of rebar. In some places, Roberts directed that old exposed rebar be left and not replaced.

SME also hired a mason, Christopher Peasley, to assist with shoring up deteriorating concrete beams. Peasley was often directed in his work by Roberts and there were frequent work changes.

During October and November 2005, A & L installed anchor bolts on the roof of Building #1. Anchor bolts were used to attach steel to concrete and hold the concrete columns in place. There were no plans or specifications describing the placement and size of the anchor bolts to guide SME. Instead, Roberts spray painted the areas where the anchor bolts were to be placed. This was primarily at the north end of Building #1.

To properly secure a plate to a concrete column with anchor bolts, particularly when dealing with old concrete, it is important to drill down to the solid core of the concrete to firmly affix all four anchor bolts for each plate. However, when SME's subcontractor had difficulty drilling down to solid core in some places, Roberts said that it was sufficient if two or three bolts on a plate were into solid core. In addition, some of the anchor bolts installed by A & L were

⁸ Toward the end of A & L's involvement on the project, the size of its crew was increased to five.

crooked, misaligned or missing washers. As a result, in some places anchor bolts had to be replaced or adjusted, and in others the steel had to be cut in order to fit.

In early November 2005 Martin met with Roberts and Scamfer to discuss the steel work to be done by SME. Scamfer had structural drawings of Building #1 that included dimensions taken from the architect's plans. However, Scamfer did not take any measurements of the building himself, nor was he asked to prepare steel erection schedules. Martin told Roberts he needed shop drawings in order to fabricate and erect the steel.⁹ He asked Roberts to request shop drawing from Bayshore Detailing.¹⁰ The cost was expected to be in the range of \$2,500 to \$3,000.

On November 16, 2005, at Martin's request, Scamfer sent a set of his structural drawings and CAD information to Bayshore Detailing to be used in creating shop drawings for the steel. However, neither Roberts nor Martin ordered the shop drawings from Bayshore. Instead, Roberts told Kenney that he, Roberts, would do the shop drawings himself and he gave Kenney a list of steel to order.

Roberts directed Kenney to put steel on the roof of the building even though the supporting concrete there did not have enough time to cure and the roof was not ready to accept steel. Roberts also told Kenney to use some of the steel intended for Building #1 for the marina piles.

⁹ Shop drawings are ordinarily used by a contractor on a project to guide the fabrication of structural steel, the connections of the steel members, and the placement and erection of the steel.

¹⁰ According to Scamfer, if a steel contractor is responsible for getting shop drawings for the steel, it is not customary for the contractors to get pre-approval from the owner of the project before ordering the shop drawings. By the same token, Scamfer also noted that it is also important for contractors to follow the owner's instructions.

Roberts never asked Scamfer to evaluate SME's work. However, Scamfer determined that some of the rebar work was faulty¹¹ and that the cement had not been poured properly in some places.¹² A & L subsequently corrected some of the rebar and concrete problems.

On December 2, 2005, the Town's CEO, David Studer, issued a violation notice to Belfast Bridge. Studer determined that, although most of the new concrete and steel work in Building #1 was appropriate under the demolition permit issued by the Town, construction on the southeast wall of the building was not support work and therefore exceeded the scope of the demolition permit.

The work was shut down in December 2005. By this time, winter had set in and it was becoming too cold for SME to pour concrete. In addition, because Belfast Bridge still had not closed on the property and could not get building permits, it could go no further with the renovation. Although the demolition was about 90% complete at this point, the project was on hold and Belfast Bridge could not make accurate projections of its construction costs and schedules. As a result, the project fell at least one or two months behind in Roberts' desired timeline for the sale of residential condominiums. Further, on January 24, 2006 the town's CEO issued a stop-work order for the entire project because Belfast Bridge had done work on the boat ramp without a shoreland zoning permit. During the shut down period, which lasted from mid-December to mid-March, SME shifted key manpower, including Kenney, to other job sites. Also during this period, Martin fell ill and, although he was on the project site during most of the demolition phase, he was not often present during the subsequent renovation or construction phase.

¹¹ For example, ties for the rebar were either incorrectly connected or not connected at all in some places.

¹² Scamfer noted that the cement had not been tamped down in places, a flaw that could create pockets of air holes or honeycombing that weakens the cement.

On January 27, 2006 Belfast Bridge purchased the project property. On March 13, 2006, it was finally able to obtain a building permit for Building #1 from the town. The permit was only for the shell of the building.

SME returned to the Belfast Bridge project after the building permit was obtained. It expected to do steel erection for the renovation phase. It took SME approximately one week to “gear up” before actually beginning the work in early April. According to Kenney, under normal circumstances, all of the steel (94 pieces) could have been erected in approximately 1 ½ weeks. However, the pace of SME’s work was hampered by work and materials diversions ordered by Roberts. Kenney told Roberts that SME had additional crew available if Roberts wanted to sequence the work in order to bring them in. However, Roberts did not do that.

According to Kenney, steel erection is not complicated and does not require a lot of time if there are sufficient shop drawings, if the steel is cut correctly and if the normal sequence of steel erection and inspections are followed – including, bolt inspections, moment corrections and weld inspections. Typically, after the steel is welded, the work is inspected and mistakes are corrected. Timely inspections reveal errors in the work that can often be easily and quickly corrected. Roberts told Martin that the steel work looked fine to him and he did not want to have it inspected.

Roberts again directed SME to began erecting steel in some places even though the supporting concrete work was not finished or cured. Roberts wanted it installed so that the project’s financing bank and potential condominium buyers could see progress on the project. Roberts made drawings for the steel work and gave them to Kenney. Martin saw the drawings, as well, and concluded that they lacked necessary information and that the steel could not be erected based on them. However, Roberts insisted that SME use his plans and said it didn’t

matter if his designs for the steel were not correct because the steel would be buried within the walls. In spite of Martin's misgivings, SME used Roberts' drawings for the steel work. It fabricated and cut the steel and the supporting columns pursuant to Roberts' instructions. During the course of that work, changes were frequently made to extend the length of the steel and the supporting columns.

SME's crew was large enough to have completed its work on Building #1 by mid-April 2006. However, the lack of adequate plans and work diversions by Roberts prevented this from happening. These diversions included tasks that were outside the scope of SME's contract with Belfast Bridge, such as: two weeks on marina-related work; and work on buildings #2 and #3. In addition, severe wind issues delayed outside crane work for three or four days.

On May 23, 2006 all prospective buyers for residential condos in Building #1 had withdrawn their letters of intent to purchase. And, around that same time, it was clear to Hutchins that Roberts' estimates of the cost of the project were wrong and that hoped for scheduling deadlines could not be met.¹³

That same month, SME stopped working on the project because it was not being paid and because Martin felt that the job was out of control. In particular, Martin felt that safety had become an issue; that Roberts was redirecting SME's efforts away from the work it agreed to do; and that SME was working far beyond the scope of its contract. When SME stopped work, steel had only been erected at one end of Building #1. Some of the steel beams and columns were misaligned,¹⁴ some cap plates and clips were missing, and there were gaps in the joinder of some steel pieces that exceeded weld requirements of the structural drawings.

¹³ Hutchins also expressed the view that Building #1 should have been torn down, not salvaged. However, his view was not shared by all of the member/owners of Belfast Bridge.

¹⁴ At the time SME stopped work, some of the standing steel had not yet been plumbed and, while that would likely correct some of the alignment problems, the steel was not then ready to be plumbed.

At the time SME stopped working, it had prepared invoices to Belfast Bridge totaling \$323,729.68. See Pl's. Exh. 42(a)-(c). Belfast Bridge has not paid these invoices and, other than this litigation, has not notified SME in writing of any errors or challenges to those invoices. In addition, other than this litigation, neither Belfast Bridge, nor its principals has ever informed SME that it or they were dissatisfied with SME's work.

In June 2006 Scamfer's services were terminated by Belfast Bridge and the project stopped. Some time after that, Roberts approached Martin about taking an ownership interest in Belfast Bridge in exchange for a reduction of SME's outstanding bill for services and materials. However, Martin declined.

Later in 2006, a new construction manager was hired for the project. Roberts has since relinquished his ownership interest in Belfast Bridge.

DISCUSSION

A. Complaint – SME's Claims

(1) Breach of Contract (Count I)

The parties had a time and materials contract that covered the work that SME did and was directed to do by Roberts. SME claims that Belfast Bridge breached the contract by failing to pay the unpaid invoices totaling \$323,729.68. This sum is comprised of three separate invoices, as follows: Invoice dated April 4, 2006 in the amount of \$151,510.95, Pl's Exh. 42(a); Invoice dated May 11, 2006 in the amount of \$139,381.61, Pl's Exh. 42(b); and Invoice dated May 26, 2006 in the amount of \$32,837.12, Pl's Exh. 42(c).

These invoices reflect the labor, work and materials that were expended in connection with work on Building #1 pursuant to the parties' written contract as well as work that was done when Roberts diverted SME's efforts to other components of the project. None of these invoices

were paid by Belfast Bridge. The parties' contract provides that SME would submit invoices at (or around) the end of each month and Belfast Bridge would pay them within ten days. In light of Belfast Bridge's undisputed failure to pay SME's invoices, the court concludes that it did, in fact, materially breach its contract with SME. See *Jenkins, Inc. v. Walsh Brothers, Inc.*, 2001 ME 98, ¶ 13, 776 A.2d 1229, 1234 (explaining that a material breach occurs when a party to a contract fails to perform a "duty so material and important [to the contract] as to justify the injured party in regarding the whole transaction as at an end").

However, a determination of whether and to what extent SME is entitled to payment of these sums, at least with respect to the work on Building #1, also requires an analysis of the counterclaims by Belfast Bridge. See *McCarthy v. U.S.I. Corp.*, 678 A.2d 48, 53 (Me. 1996) (citing *United States v. Premier Contractors, Inc.*, 283 F. Supp. 343, 348 (D. Me. 1968) ("It is axiomatic in the law of contracts that a party cannot recover on his contract unless he can show substantial performance of his own obligations under the contract or that performance was made impossible by the breach of the other party."))

SME also claims that it is entitled to recover damages under the theories of quantum meruit and unjust enrichment.

(2) Quantum Meruit (Count II)

Quantum meruit is grounded in a theory of implied contract and is based on proof that services or materials were provided "under circumstances consistent with contract relations." *Forrest Assocs. v. Passamaquoddy Tribe*, 2000 ME 195, ¶ 11, 760 A.2d 1041, 1045 (quantum meruit involves liability under an implied contract theory). See also *Siciliani v. Connolly*, 651 A.2d 386, 387 (Me. 1994) (a contemporaneous understanding that compensation is anticipated for the services being rendered is a necessary element). In order to "sustain a claim in quantum

meruit, a plaintiff must establish that (1) services were rendered to the defendant by the plaintiff; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment.” *Forrest Assocs.*, 2000 ME 195, ¶ 11, 760 A.2d at 1045 (internal citations and quotation marks omitted).

Although not expressly articulated, the court assumes that SME is claiming that to the extent it is deemed to have performed work beyond that contemplated by the parties’ written contract, it did so with the knowledge and consent of Belfast Bridge and under circumstances that make it reasonable for SME to expect payment. In light of the evidence that Roberts repeatedly diverted SME’s crew to areas of the project other than Building #1, and that he did so with the apparent expectation that SME would abide by his requests for that additional work, the court concludes that SME is entitled to recover for any work it performed outside the scope of the written agreement under an implied contract. Here too, however, the extent of SME’s damages must be calculated following an assessment of Belfast Bridge’s counterclaims. In fact, the parties appear to have seamlessly treated all of SME’s work as being within the contract. Neither SME’s invoices to Belfast Bridge, nor the manner of the earlier payments that were made ever distinguished between work that might be considered within or without the contract.

(3) Unjust Enrichment (Count III)

"Unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship." *In Re Wage Payment Litigation*, 2000 ME 162, ¶ 19, 759 A. 2d 217, 224 (quotations omitted); *see also Me. Eye Care Assocs. P.A. v. Gorman*, 2006 ME 15, ¶ 26, 890 A.2d 707, 712. A contemporaneous understanding that compensation is anticipated for the services being rendered is not a necessary element. *Siciliani v. Connolly*, 651 A.2d 386, 387 (Me. 1994). As with SME’s quantum meruit claim, the court assumes that SME claims that it

rendered services to Belfast Bridge beyond those contemplated by the parties' written contract with the latter's knowledge and under such circumstances as to make it inequitable for Belfast Bridge to retain the benefit of those services without payment of its value. *Bowden v. Grindle*, 651 A.2d 347, 350 (Me. 1994). However, because there was an express contract governing SME's work on Building #1 and because the court has found an implied contract as to the work on other aspects of the project, SME's claim for unjust enrichment is barred. *See Danforth v. Ruotolo*, 650 A.2d 1334, 1335 n.2 (Me. 1994) ("Unjust enrichment applies only in the absence of any quasi-contractual relationship.").

B. Counterclaims – Belfast Bridge's Claims

(1) Breach of Contract (Count I)

Belfast Bridge counterclaims that SME breached the contract in two major respects. First, it claims that SME failed to timely complete the work contemplated by the parties' contract and failed to meet the construction schedule because it did not provide sufficient staff to do the work; diverted manpower to other jobs; and did not manage or supervise the work, largely due to Martin's absence from the job site. Belfast Bridge further maintains that SME breached the parties' agreement by grossly exceeding the anticipated costs of the project, and wasting materials and labor. These assertions may be quickly addressed. They are without merit. The scheduling issues, delays and increased costs of which Belfast Bridge complains were directly attributable to (a) Belfast Bridge's inability to close until the end of January 2006 or get a building permit until March 13, 2006, (b) stop work orders issued by the Town's CEO, and (c) the overriding, scattered and ever-changing managerial style and demands of Roberts. The latter reason was the most contributory.

SME was never given a full set of plans and specifications for the work it was supposed to do. Rather, Roberts directed the means and the methods of SME's work by verbal commands and hand written sketches, which included changes to the structural plans made without the engineer's knowledge. He regularly gave onsite instructions to SME's crew and subcontractors that he just as regularly changed. Some of those instructions were contrary to sound construction practices. He often diverted SME's crew and materials to other tasks not related to the work on Building #1, such as the marina and Buildings#2 and #3. He ignored Kenney's suggestion that Roberts change the sequence of the work so that SME could bring more workers onto the job. In light of this evidence, the court concludes that SME has adequately demonstrated both that it substantially performed under the contract and that any failure by it to perform its obligations in strict compliance with the parties' written agreement was due to the actions of Belfast Bridge and, more particularly, Roberts.

(2) Breach of Implied Warranties (Count II)

Belfast Bridge claims that SME's work was defective and not done in a workmanlike manner regarding the fabrication and placement of rebar, the pouring of cement, the installation of anchor bolts, and the fabrication and erection of the steel. As such, Belfast Bridge invokes the well-established principle that, "[n]otwithstanding the absence of an express provision respecting the quality of the work to be done or the manner of its performance in any oral or written construction contract, the law implies therein an undertaking to perform the work in a reasonably skillful and workmanlike manner." *Parsons v. Beaulieu*, 429 A.2d 214, 218 (Me. 1981) (quoting *Gosselin v. Better Homes, Inc.*, 256 A.2d 629, 639 (Me. 1969)). The court will address each area of the project implicated by Belfast Bridge's claim, in turn, in order to determine whether it has proved a failure to complete that work in a workmanlike manner.

Because SME was not proficient in rebar and concrete work, including the installation of anchor bolts, it engaged the services of A & L. However, some of the workers were inexperienced and some of the work A & L performed was inadequate. It is more than likely that the inexperience of the crew resulted in additional unnecessary time required for performing and correcting the work. Some of the defects in A & L's work were of the type that commonly occur and in the course of construction were detected by the structural engineer and, with the expenditure of additional work, were corrected. However, other defective work was not corrected – for example, pilestars were cracked and did not contain any rebar.

As SME argues, and Belfast Bridge concedes, under Maine law “a contractor who completes a construction project in a workmanlike manner and in strict compliance with plans furnished by the owner will not be held liable for damages resulting from defects in the owner's specifications.” *Paine v. Spottiswoode*, 612 A.2d 235, 238 (Me. 1992). Although most of the problems with the work related to the concrete, rebar and anchor bolts are attributable to the owner's plans and directions, the court concludes that approximately one-fourth of the work performed by A & L was simply not done in a workmanlike manner. This is imputed to SME and constitutes a breach of its implied warranty to Belfast Bridge.

Finally, Belfast Bridge alleges that there were defects in the steel work. Here, the court concludes that the problems with respect to the steel work were singularly related to Belfast Bridge's refusal to provide sufficient plans and specifications. There were no professionally rendered shop drawings to guide SME in the fabrication, cutting and erection of the steel and Roberts instructed SME to complete the steel work according to his own plans. Additionally, Roberts frequently changed the plans he provided and declined to undertake inspection procedures, common in the industry that would have revealed some, if not all, of the defects that

resulted from the faulty plans. Roberts' decision to forego such inspections foreclosed the opportunity to make timely and appropriate adjustments and corrections.

Belfast Bridge is correct that the state of some of SME's steel work when it stopped work in May 2006 was not yet in a finished workmanlike condition. However, as architect David Nowlin testified, the erected steel at the time SME left the job had not yet been plumbed and, in fact, was not yet ready to be plumbed. That process, together with corrections or adjustments that could have resulted from an established inspection regimen, would likely have rendered the steel work in a finished workmanlike condition had the project continued, and had SME been paid and completed its work.

The court concludes that SME did follow the plans and instructions provided by Belfast Bridge and that its steel work was consistent with its implied warranty. Problems with the quality of the steel work were the direct result of problems with the quality of the plans and directions provided by Roberts, together with his insistence that corners be cut in order to save time and money.

(3) Negligence (Count III)

Belfast Bridge claims that SME was negligent because it breached its duty of care to properly supervise and manage its work on the project and its duty to perform the work in a workmanlike manner. As such, the duty that Belfast Bridge alleges was owed and breached by SME is the duty to adequately perform under the parties' contract. Belfast Bridge does not allege the existence of a duty other than that contemplated by the contract. The damages it seeks for the alleged breach are those resulting from the delays and the cost of repairing alleged defects in the construction. The court concludes that this claim is barred by the economic loss doctrine,

which prohibits the recovery of purely economic losses in tort actions. *Firemen's Fund Insurance Co. v. Childs*, 52 F.Supp.2d 139, 142 (D. Me. 1999).

The economic loss doctrine applies when the “injury suffered is merely the failure of the product to work properly rather than personal injury or resulting injury to other property.” *Firemen's Fund*, 52 F.Supp.2d at 142. The Law Court has barred recovery in tort for a defective product's damage to itself. *Oceanside at Pine Point Condominium Owners Association v. Peachtree Doors, Inc.*, 659 A.2d 267 (Me. 1995). In determining whether a product has damaged itself, it is appropriate to look at what has been purchased in its entirety, not just the defective part. *Id.* at 271.

Although the contract at issue in this case includes services, as well as materials, the economic loss doctrine has been applied to service contracts by Maine courts and the majority of courts in other jurisdictions appear to hold that the doctrine applies to service contracts as well as contracts for the sale of goods. *See e.g. Me. Rubber Int'l v. Eenvtl. Mgmt. Group, Inc.*, 298 F. Supp. 2d 133 (D. Me. 2004) (applying the economic loss doctrine to a service contract); *Bayreuther v. Gardner*, 2000 Me. Super. LEXIS 140 (Mills, J.) (citations omitted); and *Twin Town Homes, Inc. v. Molley*, 2002 Me. Super. LEXIS 209 (Brennan, J.). *See also Fireman's Fund* 52 F. Supp.2d (discussing the economic loss doctrine in Maine and collecting cases from around the country applying the doctrine to service contracts).

In addition, to the extent it can be said here that any of the steel was fabricated or erected in a negligent manner, that negligence is met by the greater comparative negligence of Belfast Bridge. Roberts represented that he was knowledgeable and experienced regarding steel work. He told SME's foreman that he, Roberts, would make the shop drawings for SME, and he gave directions to SME's crew regarding the size and placement of the steel. In significant measure,

the manner and condition of the steel, as cut and erected, was the result of Robert's contributory actions.

(4) Set Off & Recoupment (Count IV)

Belfast Bridge has also counterclaimed for a set off and recoupment of its damages arising out of SME's alleged negligence and breaches of contract and warranties. A "set-off" is a demand that the defendant has against the plaintiff arising out of a transaction extrinsic to the plaintiff's cause of action whereas a "recoupment" is a reduction of part of the plaintiff's damages because of a right in the defendant arising out of the same transaction. *Inniss v. Methot Buick-Opel, Inc.*, 506 A.2d 212, 217-18 (Me. 1986); *see also Cheung v. Wu*, 2008 ME 131, ¶ 3, 955 A.2d. 746, 747. Thus, as alleged, Belfast Bridge's counterclaim seeks recoupment, not set off.¹⁵

The court finds that Belfast Bridge is entitled to recoupment for the sums it paid SME for Kenney's labor during the project shut down period from December 2005 to March 13, 2006. Kenney testified that he did not work on the project during that period. However, Belfast was billed and paid \$17,600.00 for 440 hours of Kenney's services at \$40 per hour,

Belfast Bridge is also entitled to a recoupment in the amount of \$11,553.00 representing one-fourth of the amount it has already paid SME for work by A & L. See Pl's Exh. 43((b) & (c).

Based upon the foregoing, Belfast Bridge is entitled to a total recoupment in the amount of \$29,153.00 and this amount must be subtracted from the damages awarded to SME before interest is applied. *Cheung*, 2008 ME 131, ¶ 3.

C. Damages

(1) SME's Net Damages

¹⁵ Under the Maine Rules of Civil Procedure recoupment is required to be plead either as an affirmative defense, pursuant to Rule 8(c), or as a counterclaim, pursuant to Rule 13. *Inniss v. Methot Buick-Opel, Inc.*, 506 A.2d 212, 217-18 (Me. 1986).

As noted earlier, SME's outstanding unpaid invoices total \$323,729.68. Deducting the recoupment figure from that total leaves a balance of \$294,576.68. In addition, as also noted above, approximately one-third of the work by A & L was defective and SME is liable to Belfast Bridge for the condition of that work. SME's unpaid invoices include charges related to A & L's work totaling \$85,716.50. After deducting one-fourth of that amount from SME's outstanding unpaid invoices, the net amount owed to SME by Belfast Bridge on account of the unpaid invoices is \$273,147.55.

(2) Statutory Interest, Penalties and Attorneys' Fees

SME also claims that it is owed statutory interest, penalties and attorney's fees under 10 M.R.S. §§ 10 M.R.S. § 1113(3) & (4)¹⁶ and 1118(2).¹⁷ Belfast Bridge argues that these laws relating to construction contracts do not apply in this case.

¹⁶ Section 1113 provides:

Payment to a contractor for work is subject to the following terms.

1. CONTRACTUAL AGREEMENTS. The owner shall pay the contractor strictly in accordance with the terms of the construction contract.
2. INVOICES. If the construction contract does not contain a provision governing the terms of payment, the contractor may invoice the owner for progress payments at the end of the billing period. The contractor may submit a final invoice for payment in full upon completion of the agreed upon work.
3. INVOICE PAYMENT TERMS. Except as otherwise agreed, payment of interim and final invoices is due from the owner 20 days after the end of the billing period or 20 days after delivery of the invoice, whichever is later.
4. DELAYED PAYMENTS. Except as otherwise agreed, if any progress or final payment to a contractor is delayed beyond the due date established in subsection 3, the owner shall pay the contractor interest on any unpaid balance due beginning on the 21st day, at an interest rate equal to that specified in Title 14, section 1602-C.

Id.

¹⁷ Section 1118 provides:

1. WITHHOLDING PAYMENT. Nothing in this chapter prevents an owner, contractor or subcontractor from withholding payment in whole or in part under a construction contract in

Belfast Bridge points to section 1113(2), and argues that the language relating to allowable invoices and the deadlines imposed for failure to timely pay those invoices contained in subsection (3) are conditioned on the failure of the parties to include payment terms in their contract. According to Belfast Bridge, because the parties' contract contains a term regarding the submission by SME of invoices and timely payment by Belfast Bridge, section 1113 and the penalties authorized therein do not apply. Although the court is not inclined to agree with Belfast Bridge's interpretation of the statute, it need not decide the question because it concludes that SME has failed to meet its burden of proving a violation of the statute in the first instance.

The Law Court has explained that Maine's prompt payment statute "provides for penalties against owners or contractors who do not make payments to [contractors or] subcontractors in a timely fashion." *Jenkins, Inc. v. Walsh Bros., Inc.*, 2001 ME 98, ¶ 23, 776 A.2d 1229, 1237 (citing 10 M.R.S.A. §§ 1111-1120). These penalties are provided in addition to those available for breach of contract or quantum meruit claims and, as such, a higher burden of

an amount equaling the value of any good faith claims against an invoicing contractor, subcontractor or material supplier, including claims arising from unsatisfactory job progress, defective construction or materials, disputed work or 3rd-party claims.

2. PENALTY. If arbitration or litigation is commenced to recover payment due under the terms of this chapter and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this chapter, the arbitrator or court shall award an amount equal to 1% per month of all sums for which payment has wrongfully been withheld, in addition to all other damages due and as a penalty.

3. WRONGFUL WITHHOLDING. A payment is not deemed to be wrongfully withheld if it bears a reasonable relation to the value of any claim held in good faith by the owner, contractor or subcontractor against which an invoicing contractor, subcontractor or material supplier is seeking to recover payment.

4. ATTORNEY'S FEES. Notwithstanding any contrary agreement, the substantially prevailing party in any proceeding to recover any payment within the scope of this chapter must be awarded reasonable attorney's fees in an amount to be determined by the court or arbitrator, together with expenses.

Id.

proof applies. *Id.* ¶ 24, 776 A.2d at 1237. As the Court in *Jenkins* explained, “[b]ecause the remedies provided by the prompt payment provisions are intended to augment damages that are traditionally available for contracts or quantum meruit claims, it is not sufficient for the party seeking penalties to prove that work was completed and that an outstanding balance exists.” *Id.* To the extent a claimant fails to demonstrate the amounts due “and the dates from which penalties should run,” a court may “not award enhanced interest or a monthly penalty” pursuant to the statute. *Id.* ¶¶ 29 & 32, 2001 ME 98, 776 A.2d at 1238-40.

In this case, although the court has concluded that Belfast Bridge has failed to pay the money due to SME and reflected in the invoices in evidence, Pl’s Exh. 42(a)–(c), there is nothing in the record demonstrating when those unpaid invoices were received by Belfast Bridge. Without knowing when Belfast Bridge received the invoices at issue, the court cannot determine the dates from which penalties and interest should run under the combined provisions of section 1113 and the parties’ written agreement. Given that SME bore the burden of proof of a violation of the statute and given the insufficient proof in the record on this point, the court concludes that SME has not demonstrated a violation of the prompt payment statute and is therefore not entitled to recovery under it.

Similarly, an award of attorney’s fees under 10 M.R.S. § 1118(4) is dependant upon a successful claim under the prompt payment statute. *Jenkins, Inc.*, ¶ 32, 776 A.2d at 1240. In light of the court’s conclusion that SME has failed to demonstrate a violation of the statute, the court similarly concludes that it may not recover its attorney’s fees under section 1118(4).

DECISION

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Decision and Order on the Civil Docket by a notation incorporating it by reference, and the entry is

- A. After adjusting for the Judgments in favor of Defendant in Counts II and IV of the Counterclaims, as hereafter provided, Judgment for Plaintiff on Counts I II of the Complaint in the combined amount of \$273,147.55, together with pre-judgment interest at the rate of 5.36% and post-judgment interest at the rate of 6.40%; and Judgment for Defendant on so much of Count I of the Complaint that seeks statutory interest, penalties and attorney's fees pursuant to 10 M.R.S. §§ 1113 and 1118.;
- B. Judgment for Defendant on Count III of the Complaint;
- C. Judgment for Plaintiff on Count I of the Counterclaims;
- D. Judgment for Defendant on Count II of the Counterclaims and the amount of damages awarded to Defendant on this Count II is accounted for in the award of damages to Plaintiff on Count I of the Complaint;
- E. Judgment for Plaintiff on Count III of the Counterclaims;
- F. Judgment for Defendant on Count IV of the Counterclaims and the amount of recoupment awarded to Defendant on this Count IV is accounted for in the award of damages to Plaintiff on Count I of the Complaint;
- G. Plaintiff is awarded its costs of this action.

Dated: April 8, 2009



Chief Justice, Superior Court

docket entry:
c.c. to counsel
4/9/09