UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MORGANTI NATIONAL, INC.,	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	3:98cv309 (SRU)
	:	
PETRI MECHANICAL CO., INC. and	:	
INTERNATIONAL FIDELITY	:	
INSURANCE COMPANY,	:	
Defendants.		

RULING ON MOTIONS FOR SUMMARY JUDGMENT

Morganti International, Inc. ("Morganti") sued Petri Mechanical Co., Inc. ("Petri") and International Fidelity Insurance Company ("IFIC") for breach of contract. Petri counter-sued Morganti and it sureties, claiming breach of the same contract.[1] The contract in question is a construction subcontract under which Petri (with IFIC as surety) agreed to perform plumbing and mechanical work on a federal construction project. Morganti was general contractor for the project. Both parties have moved for summary judgment on some of their own claims and on all the other party's claims. Because, for the most part, the factual record in this case would permit reasonable jurors to grant judgment in favor of either side, Petri's motion is denied in its entirety and Morganti's motion is denied in substantial part.

[1] Trusting to context to clarify any ambiguity, I use the names "Morganti" and "Petri" to refer both individually to those entities and collectively to the entities along with their respective sureties.

I. Facts

The following facts are undisputed.

A. Background

In a joint venture named the Morganti Trataros Joint Venture ("MTJV"), Morganti, and Trataros Construction ("Trataros") bid to become the general contractor for a 1,000 bed prison facility known as the Metropolitan Detention Center ("the Detention Center") in Brooklyn, New York. The United States Department of Justice, Federal Bureau of Prisons ("FBOP") accepted the MTJV bid, and on September 28, 1993, entered into a $103,440,000 lump sum contract with MTJV.

As principals, Morganti and Trataros posted a $103,440,000 performance bond and a $2,500,000 payment bond. American Home Assurance Company ("AHAC") and Seaboard Surety Company ("Seaboard") served as sureties on the bonds.

On July 8, 1994, MTJV executed a $4,125,000 subcontract with Petri to perform the mechanical and plumbing work on the project. IFIC, as surety, and Petri, as principal, issued a performance bond and a labor and material payment bond, both in the amount of $2,500,000, for the benefit of MTJV, as obligee.

B. The Subcontract

The subcontract contains a "pay-if-paid" clause that required Morganti to pay Petri only if the FBOP paid Morganti. Specifically, Paragraph 2(e) of the subcontract provides that "[Petri] expressly agrees that payment by [FBOP] to [Morganti] for any Work performed by [Petri] is a condition precedent to any payment by [Morganti] to [Petri] and that [Morganti] is under no obligation until and unless [Morganti] has been paid by [FBOP]."

The subcontract states that MTJV would not be liable for delays or disruptions caused by MTJV, although Petri could receive an extension of time to complete performance under such circumstances. Paragraph 6(d) of the subcontract provides:

> Should [Petri's] performance of this Subcontract be delayed, impacted or disrupted by any acts of [MTJV], other subcontractors, or [MTJV's] suppliers, or delayed, impacted or disrupted by any acts or causes which would entitle [MTJV] to an extension of time under the Contract Documents, [Petri] shall receive an equitable extension of time for the performance of this Subcontract, but shall not be entitled to any increase in the Subcontract Price or to damages or additional compensation as a consequence of such delays, impacts, disruptions, or acceleration resulting therefrom unless the [FBOP] is liable and pays [Morganti] for such delays, impacts, disruptions, or acceleration. [MTJV] will pay [Petri] the amount allowed and paid by the [FBOP] for [Petri's] delay, impact, disruption or acceleration. Within five (5) days after the commencement for any delay, impact or disruption, or acceleration caused by [MTJV], other subcontractors, or [MTJV] suppliers, [Petri] shall notify [MTJV] in writing stating full details of the cause of the alleged delay, impact, disruption or disruptions or acceleration for which the [FBOP] is responsible in sufficient time so that its claim may be timely processed against the [FBOP].

The subcontract provides that MTJV may require Petri to sign a release of liens prior to making any subsequent partial payment to Petri. Paragraph 11(d) of the subcontract provides that "[i]f required by [MTJV], [Petri] shall furnish releases of liens with respect to all prior payments, as part of each request for partial payment other than the initial request."

The subcontract also provides that, if the FBOP terminates MTJV's contract, MTJV may terminate the subcontract. Paragraph 13 of the subcontract states that "[MTJV] shall have the right to terminate this Subcontract in whole, or in part, for convenience, if there is a termination of [MTJV's] contract with [FBOP], by providing [Petri] with a written notice of termination, to be effective upon receipt by [Petri]."

MTJV was dissolved on April 2, 1996, and with the approval of FBOP, Morganti continued performance of the contract on its own.

C. Pre January 31, 1997 Payments

On March 12, 1997, Petri executed a requisition for payment that waived any claims it may have had for additional compensation for work performed prior to January 31, 1997. (Ex. D to Pl.'s 9(c) statement.) The January 31, 1997 requisition provided that Petri released "Morganti and the owner from any further liability as regard to payment for all materials, labor and services furnished by us through the period stated above." Id. Morganti paid Petri for the requisition on April 8, 1997. (Ex. E. to Pl.'s 9(c) statement.) On April 12, 1997, Petri executed a lien waiver that released all of Petri's claims against Morganti prior to January 31, 1997. (Ex. F to Pl.'s 9(c) statement.)

D. Morganti's Termination and Subsequent Disputes

On April 23, 1997, Petri submitted a subsequent requisition for payment for work performed in February 1997.[2] (Ex. M to Peterson Cert.)

On April 30, 1997, the FBOP terminated Morganti from the project. On May 7, 1997, Morganti sent a letter to Petri notifying it that the FBOP had terminated Morganti, and that Morganti would challenge what it considered to be a wrongful termination. (Ex. G to Pl.'s 9(c) statement.) While its challenge was pending, Morganti advised Petri that their work was suspended, but that the subcontracts remained in full force and effect until further notice. Id.

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[2] Though the parties spend almost no time addressing it, there is also some evidence of other claims for payment made by Petri for various work done or expenses incurred between January 31, 1997 and April 30, 1997. (See Peterson Cert. ¶ 16; Exs. J, K, L, N to Peterson Cert.)

On May 8, 1997, Petri sent a letter to Morganti requesting payment for the February requisition and stating that it understood that Morganti had received payment for that requisition from the FBOP. (Ex. N. to Peterson Cert.)

On May 22, 1997, counsel for Petri sent a letter to Morganti stating that it considered the subcontract to be terminated, both because the FBOP had terminated Morganti, and because Petri did not have access to the worksite. (Ex. H to Pl.'s 9(c) statement.) The letter stated in part that:

> Your letter purports to suspend Petri's work while maintaining Petri's subcontract in full force and effect pending the resolution of the default declared against Morganti by the Federal Bureau of Prisons. We are not aware of any authority under Petri's subcontract or under the law that would permit Morganti to declare such a suspension. To the contrary, we believe that Petri's subcontract has been terminated by Morganti's default and the unavailability of the site for Petri to perform its work.
>
> Please provide us with any legal support that you have for the concept of a "suspension." If you have such support, we shall re-evaluate Petri's position.

Id. The letter also noted that, if Morganti had been paid by the FBOP for the month of February, Morganti's failure to timely pay Petri's February requisition was a default. Id.

On June 10, 1997, Petri sent another letter to Morganti, restating its belief that the subcontract was terminated. (Ex. C to Wiss Cert.) ("termination of the subcontract seemed self-evident following the decision by the FBOP to declare Morganti in default of the general contract as of April 30, 1997.") The letter also notified Morganti of Petri's intention to cancel its insurance, remove its supplies and equipment, submit requisitions for work completed in March and April, and file a subsequent claim for damages and losses. Petri submitted requisitions for work completed in March and April 1997 at a later date, apparently after Petri first notified Morganti that it considered Morganti to be in default.

(Pl.'s Reply at 29) ("it is undisputed that the March and April 1997 requisitions were not submitted to Morganti until some time after June 10, 1997").

E. Project Takeover

The performance of Petri and Morganti's other subcontractors remained suspended until Morganti's surety could negotiate a takeover agreement with the Bureau of Prisons to complete the project. Under the terms of the takeover agreement, Lehrer McGovern Bovis was hired as the completion contractor for the project.

By letter dated October 14, 1997, Morganti directed Petri to continue construction. (Ex. I to Pl.'s 9(c) statement.) Petri refused, stating it would have been willing to remobilize had Morganti not been in default for nonpayment. (Ex. J to Pl.'s 9(c) statement) ("As we indicated months ago, if Morganti had been willing to pay Petri Mechanical what you owe to date, Petri Mechanical would have agreed to complete the plumbing work on a fair basis. … Do not complain when we refuse your unjustified and unrealistic demand to remobilize.")

Petri did not continue to work on the project and another subcontractor was eventually chosen.

II. Procedural History

A. Pleadings

1. *Morganti's Complaint*

Morganti filed a complaint against Petri in February 1998 (doc. # 1), and an Amended Complaint in August of that year (doc. # 36).

Count One of the complaint alleges that Petri breached the subcontract with Morganti by refusing to complete performance, performing defective work, and refusing to pay its subcontractors

and suppliers, among other reasons.

Count Two of the complaint alleges that IFIC failed to perform its responsibilities under the performance bond, specifically by refusing to arrange for the completion of Petri's responsibilities.

Count Three alleges that IFIC breached the implied covenant of good faith and fair dealing by denying Morganti's claim under the performance bond without performing an investigation into the merits of the claim.

Count Four alleges that IFIC's alleged breach of the contract and of the covenant of good faith are "unfair, deceptive, immoral, unethical, unscrupulous, oppressive" acts that violate the Connecticut Unfair Trade Practices Act.

2. *Petri's Answer and Counterclaim*

Petri answered the amended complaint and counterclaimed in August of 1998 (doc. # 37).

Among other defenses, Petri alleges that Morganti is barred from seeking relief because it breached the subcontract.

Petri alleges in its counterclaim that Morganti breached the subcontract by failing to pay IFIC or Petri for work performed and by blocking Petri's access to the worksite, and that, due to the work suspension, Petri incurred additional costs. Those costs allegedly arose from lost productivity and the sale of construction materials at a loss.

B. Summary Judgment Motions

Morganti moved for summary judgment on Count One of its complaint and on Petri's counterclaim (doc. # 57). IFIC and Petri filed a cross-motion for summary judgment on their

counterclaim and on Morganti's claims (doc. # 65). As discussed at the hearing on the cross-motions for summary judgment, the court considers Petri's motion to have been timely filed.

III. Discussion

A. Standard for Summary Judgment

Summary judgment is appropriate when the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law, under the applicable substantive law." Anderson, 477 U.S. at 248. An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.; see also Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). Thus, if reasonable minds could differ in the interpretation of evidence that is potentially determinative under substantive law, summary judgment is not appropriate. See R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 59 (2d Cir. 1995).

When ruling on a summary judgment motion, the court must construe the facts in a light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970) (quoting Diebold, 369 U.S. at 655); see also Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992), cert. denied, 506 U.S. 965 (1992).

B. Pre January 31, 1997 Claims

As a preliminary matter, Morganti argues that all claims for payment for work done, or expenses incurred, prior to January 31, 1997 have been expressly waived by Petri. I agree and will grant summary judgment in Morganti's favor on those claims.

As discussed above, On March 12, 1997, Petri executed a requisition for payment which stated that "we [Petri] hereby release Morganti and the owner from any further liability in regard to payment for all materials, labor and services furnished by us through the period stated above." (Ex. E. to Pl.'s Rule 9(c) statement.) On April 8, 1997, Morganti issued Petri a check for the amount it approved for payment. (Ex. E. to Pl.'s Rule 9(c) statement.) Petri then executed, on April 12, 1997, a lien waiver and release that released Morganti, AHAS, Trataros, and Seaboard "of and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in laws, in admiralty, or in equity ... from the beginning of the world to the 'release date.'" (Ex. F. to Pl.'s Rule 9(c) statement.) The "release date" was defined as January 31, 1997. Id.

Petri, first, argues that the requisition waiver is not valid because Morganti did not pay the full amount of the requisition. There is no need to address this argument, however, because the lien waiver and release – executed *after* payment was made – was sufficient to waive all claims arising prior to January 31, 1997.

Petri does not dispute that, in general, waivers of this type are enforceable in Connecticut. See SnyderGeneral Corp. v. Lee Parcel 6 Assocs. Ltd., 43 Conn. App. 32 (1996) (holding clearly stated

waiver enforceable); Herb Holden Trucking v. Vinco Inc., 2000 WL 192451 (Conn. Super. Feb. 2, 2000) (same) (collecting cases). Instead, it argues that the waiver is not enforceable in this case because (a) it was the product of economic duress and (b) it did not contain a space to list exceptions. Neither argument is persuasive.

Though there is relatively little Connecticut case law on the subject of economic duress, Petri has shown no evidence to support economic duress under any legal standard. Its sole argument is that it was "forced" to execute the lien waiver because, absent its execution, Morganti would have withheld payment.

In general, to assert a defense of duress, a party must show that the other party's conduct "stripped [him or her] . . . of his or her free will for the purposes of obtaining a contract." Zebedeo v. Martin E. Segal, Co., 582 F. Supp. 1394, 1417 (D. Conn. 1984). The mere existence of financial pressure is insufficient, particularly when the parties are experienced in business. See 25 Am. Jur. 2d., Duress and Undue Influence § 7. Moreover, where one insists on enforcing a right to which he believes himself honestly entitled, unless that belief is unreasonable, his conduct does not constitute duress. See Weiner v. Minor, 197 A. 691, 692 (Conn. 1938).

Here, Petri has offered absolutely no evidence showing how it was stripped of its free will or ability to refuse the contract. At most, it has asserted that it would not have been paid had it not entered into the contract. It has offered no evidence to demonstrate why it could not have brought suit to recover the payment. On the contrary, Petri now appears perfectly capable of bringing such a lawsuit, and, even at the time, letters from its attorneys indicate that it was represented by counsel willing to vigorously defend its rights. (See, e.g. Ex. H to Pl.'s 9(c) statement; Ex. C to Wiss Cert.)

Moreover, the initial subcontract agreement explicitly provided that Petri might be required to furnish waivers and a copy of the type of waiver ultimately assigned was attached to the subcontract. (Ex. A. to Pl.'s 9(c) statement.) Consequently, Petri was on notice from the time it signed the initial subcontract – well before there were any allegations of economic duress – that it might be required to execute such a waiver. Furthermore, the terms of the subcontract make it reasonable for Morganti to have believed it had a valid right to demand such a waiver, precluding the possibility that such a demand constituted economic coercion.

Petri next argues that, under the holding of Perosi Electrical Corp. v. Manshul Construction Corp., 940 F. Supp. 492 (E.D.N.Y. 1996), the release is unenforceable because it did not provide a space for listing exceptions to the waiver. Even assuming that the holding of that case was binding on this court, it is inapposite for a number of reasons.

First, there was extra space on the second page of the release form, and there is no reason given for why exceptions could not have been written there. Second, in Perosi the court was primarily concerned with the vague identification of payments released by the contract, which referred ambiguously to "the payment hereby requisitioned" and the "date of this requisition" when there was no corresponding requisition. Perosi, 940 F. Supp. at 504. Here, by contrast, there is no uncertainty about what the claim the waiver releases, namely, *all* claims prior to January 31, 1997. If anything, this case is closer to the case from which Perosi distinguished itself, namely Kay-R Electrical Corp. v. Stone & Webster Construction Co., 23 F.3d 55 (2d Cir. 1994), where the Second Circuit held that a release similar to the one signed by Petri *was* enforceable.

Accordingly, because Morganti has offered undisputed evidence that pre-January 31, 1997

claims were waived by Petri in a clear and unambiguous document, and because Petri has offered no evidence to support an affirmative defense to the waiver, summary judgment is granted to Morganti on all of Petri's claims to the extent they arose prior to January 31, 1997.

C. Post January 31, 1997 Claims

The post January 31, 1997 claims are more difficult. Neither party denies that, at some point, it ceased performance of the subcontract. On the record evidence, it appears undisputed that Morganti has not made any payments to Petri since the January 31, 1997 payment. Similarly it appears undisputed that Petri has not done any work under the subcontract since the end of April 1997. The dispute centers around the chicken-and-egg question of who breached the contract first, or, more precisely, who committed the first material, uncured breach.

Considering each party's motion in turn and viewing the evidence in the light most favorable to the nonmoving party, reasonable jurors could find that it was the moving party that committed the first material uncured breach. Put more simply, regardless of how the evidence is viewed, there are disputed issues concerning the material fact of who breached first. I conclude, therefore, that neither party is entitled to summary judgment, on the post January 31, 1997 claims.

Before turning to the parties' respective motions, it will be useful to briefly outline the relevant events and the parties' positions on them.

• February Payments - In April 1997, Petri submitted a requisition for work done in February; it was not paid. Petri claims this was a material breach. Morganti argues that there is no evidence that the FBOP ever paid Morganti for the February work, and so – under the subcontract's "pay-if-paid"

clause -- payment never became due to Petri.[3]

• March and April Payments - Sometime after June 10, 1997, Petri submitted a requisition for work done in March and April; it was not paid. Petri claims this was a breach. Morganti argues that it was not required to pay, because these payments did not become due until after Petri had breached the subcontract.

• Termination and Suspension - On April 30, 1997, the FBOP terminated Morganti. Morganti then directed Petri to suspend its work; Petri replied that it believed these actions terminated the subcontract. Petri now argues that the termination by the FBOP ended the subcontract, and, in addition, Morganti's suspension of Petri was an independent breach of contract. Morganti responds that the FBOP termination did not terminate the subcontract. Morganti further argues that it was entitled to suspend Petri under the subcontract, and that even if not, Petri's only remedy was an extension of time under the "no damages for delay" clause of the subcontract. Consequently, Morganti argues, Petri unjustifiably repudiated the contact.

• Assignment of the Subcontract – Sometime in October 1997, Morganti attempted to assign Petri's subcontract to the new general contractor. Petri refused to acknowledge the assignment. Morganti argues that this was a breach. Petri argues that there was no contract to assign, because Morganti had already breached it, and, in any event, the assignment was otherwise invalid.

1. *Standard for Material Breach*

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[3] Though it is difficult to tell from their papers, presumably the parties intend these arguments to apply to other work done or expenses incurred between January 31, 1997 and Morganti's termination. (See Peterson Cert. ¶ 16; Pl.'s Reply at 30.)

Connecticut has adopted the Restatement's multi-factored test for determining whether a breach of contract is material and therefore excuses performance by the non-breaching party. See Bernstein v. Nemeyer, 213 Conn. 665, 670 (1990). The Restatement reads as follows:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) Contracts § 241. Whether or not a breach is material is a question of fact. Bernstein, 21 Conn. at 670.

2. *Morganti's Motion*

Morganti contends that Petri committed the first material breach by its anticipatory repudiation of the subcontract. As a predicate, Morganti contends that none of Morganti's actions prior to Petri's repudiation constituted a material breach. Because reasonable jurors could find that Morganti committed a material breach prior to Petri's repudiation, Morganti's motion must be denied.

Though there is apparently no dispute that Petri ultimately repudiated the subcontract, reasonable jurors – viewing the evidence in the light most favorable to Petri – could find that this repudiation did not occur until, at least, June 10, 1997. It is true that on May 22, 1997 Petri sent a letter to Morganti stating that it believed the subcontract terminated. Nevertheless, reasonable jurors

would not be compelled to conclude that this amounted to a repudiation. For one thing, the letter notes that – should Morganti provide legal authority for its position – Petri would reconsider its position. Moreover, there was evidence that Petri was willing to return to work provided it was paid what it believed was owed by Morganti. (Peterson Cert. ¶ 7.) It was not until the June 10 letter that Petri decisively declared its intention to cancel its insurance, remove its equipment, and submit final demands for payment. Based on this evidence, jurors could reasonably conclude that the May letter was nothing more than a "notice to cure," and that no repudiation took place until June.

The question then becomes whether reasonable jurors could find that Morganti had committed a material uncured breach prior to June 10, 1997. I conclude they could, making summary judgment inappropriate.

There is sufficient evidence from which reasonable jurors could conclude that Morganti's failure to pay Petri for its February requisition was a material uncured breach. The requisition was submitted on April 23, 1997. On May 8 Petri sent another letter demanding payment. In the May 22 letter, Petri also made reference to the fact that it was owed payment for the February requisition by Morganti. Moreover, both Petri's letters and its representative's subsequent declaration note that Petri understood that Morganti had been paid by the FBOP for the February requisition.[4] There is no

[4] At various points in its brief, Petri argues that the "pay if paid" clause of the contract is either not enforceable or not applicable to its current claims. It argues that the clause is not enforceable, because AHAC, Morganti's surety, took over the project and its surety agreement did not incorporate the clause. Petri also argues that the clause is not applicable to its claims because, if the FBOP did not pay, it was because Morganti defaulted and was terminated, and so, because Morganti prevented the fulfillment of the condition precedent, it cannot use it as a defense. Presumably Petri does not mean to make these arguments with respect to the February requisition. This requisition was made prior to AHAC's taking over the project and prior to Morganti's termination; accordingly, neither of Morganti's

evidence that Morganti had not – or any reason given why it would not have – been paid by the FBOP for that requisition. Based on this evidence, reasonable jurors could conclude that (1) Morganti's obligation to pay Petri for the February requisition came due before June 10, 1997, (2) that Morganti did not make the payment when due, and (3) that Morganti was given adequate notice and opportunity to cure this default prior to June 10, 1997. Jurors could then reasonably conclude that Petri's June 10 repudiation was justified by Morganti's prior uncured material breach – namely, it's failure to pay for the February requisition.

There is also sufficient evidence from which reasonable jurors could conclude that Morganti's suspension of Petri's work constituted a material uncured breach of the subcontract. As a general rule, indefinite suspension of work by an owner or general contractor constitutes material breach of a construction contract. See Guerini Stone Co. v. P.J. Carlin Constr. Co., 248 U.S. 334, 340 (1919) ("a contract for the construction of a building, even in the absence of an express stipulation upon the subject implies as an essential condition that a site shall be furnished"). Morganti does not take issue with this, but instead argues that in this case the remedy for suspension – under the "no damages for delay" clause of the subcontract – is limited to an extension of time.

"No damages for delay" clauses are enforceable in Connecticut, subject to the limitation, among others, that they cannot cover "unforeseen" delays. White Oak Corp. v. Dept. of Transp., 217 Conn. 281, 289 (1991) . Whether a particular type of delay is unforeseen is a question of the intent of the parties at the time of the contract. Id.

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arguments are applicable to the February requisition.

In this case, the "no damages for delay" clause is general and does not specifically discuss indefinite suspensions due to the termination of the general contractor. Morganti has offered no evidence (such as parol evidence, course of dealing, trade usage, or custom) that the parties intended to cover such a delay. Accordingly, faced simply with the contract and the fact of FBOP's termination of Morganti, jurors could reasonably conclude that the "no damages for delay" clause in the subcontract was not intended to apply to this situation.

If the "no damages for delay" clause were found inapplicable, then jurors could conclude that Morganti's suspension of Petri's performance, along with preventing Petri from having access to the job site, was a material uncured breach of the subcontract.

Because reasonable jurors could find that Morganti breached the subcontract (either by failing to pay the February requisition or by suspending Petri's performance), and that its breach was material, uncured, and prior to Petri's breach, there is a genuine issue concerning whether Petri breached the subcontract. Consequently, Morganti's motion for summary judgment on its breach of contract claim must be denied.

3. *Petri's Motion*

The disposition of Morganti's summary judgment has little or no bearing, however, on Petri's motion, because the evidence must – for the purpose of *Petri's* motion – be viewed in *Morganti's* favor.

Petri claims that Morganti breached the subcontract by failing to pay Petri for its February requisition and by suspending Petri's work after Morganti was terminated by the FBOP. Petri further argues that these material breaches occurred before any possible breach on its part. Because

reasonable jurors could find that Petri had already breached the subcontract by the time of any possible breach by Morganti, summary judgment is inappropriate.

Viewed in the light most favorable to Morganti, the evidence is sufficient to support a finding that Petri repudiated the subcontract on May 22, 1997. The letter sent on that date could be read as a statement that Petri considered the contract over and was refusing to perform any further work.[5] Accordingly, for Petri to be granted summary judgment, the evidence must compel the conclusion that Morganti breached the subcontract prior to May 22, 1997. It does not.

The failure to pay the February requisition does not establish the necessary breach. Though I concluded above that reasonable jurors *could* find that the FBOP had paid Morganti, that is not the same as concluding – as I would have to in order to grant Petri's motion – that reasonable jurors would be *compelled* to find that the FBOP had paid Morganti prior to May 22. The evidence that Morganti had been paid (two statements by Petri), is hardly sufficient to meet that burden.[6]

Moreover, even assuming that Morganti was paid by the FBOP, a reasonable juror could still conclude that Morganti was not given adequate notice of the breach, prior to Petri's May 22 repudiation of the contract, and so the breach was not material.

A party who believes the other party has committed a curable breach is ordinarily required to provide the other party with notice and an opportunity to cure before the breach is considered material. See Restatement (Second) Contracts § 241(d) (one of the factors in determining materiality is "the

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[5] It could, of course, be read a different way, as discussed above, but for the purpose of *Petri's* motion it must be read in the light most favorable to *Morganti.*

[6] As noted above, Petri's arguments concerning the inapplicability or unenforceability of the "pay if paid" clause are not relevant to the February requisition.

likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances"). In this case, Petri has offered no evidence that the failure to pay the February requisition was incurable. In fact, insofar as the breach was non-payment of money, absent some extraordinary circumstances, it necessarily admits of a cure – payment. The only evidence of a possible post-breach notice of cure is the May 8 letter demanding payment. Reasonable jurors could, however, conclude that this letter did not, by its terms, provide adequate notice to Morganti that Petri considered it in breach. Moreover, jurors could conclude that the time between Morganti's receipt of the letter (sometime after May 8) and Petri's repudiation (May 22) provided insufficient opportunity for Morganti to cure. Consequently, even if non-payment of the February requisition was a breach, there is a genuine question whether it was a material breach that would excuse Petri's subsequent repudiation of the subcontract.

The evidence also does not compel the conclusion that Morganti's suspension of Petri's work constituted a material breach, excusing Petri's repudiation. As discussed above, the applicability of the "no damages for delay" clause to Morganti's suspension is a question of the intent of the parties. Though I noted that Morganti failed to supply evidence that the clause was intended to cover the suspension, Petri has similarly failed to present evidence that it was *not* intended to cover this type of suspension. Accordingly, reading the subcontract alone (but this time in Morganti's favor), reasonable jurors could conclude that the "no damages for delay" cause *was* intended to cover this type of situation. On this reading, Morganti's suspension (and the attendant consequences such as Petri's inability to access the job site) was not a material breach, and was only remediable by an extension of Petri's time. Consequently, reasonable jurors could find Petri's repudiation unjustified.

Petri also argues that, even if the "no damages for delay" clause is enforceable, it is nevertheless not applicable to Petri's claim against AHAC – Morganti's Miller Act surety – because it was not incorporated into the bond. Morganti counters that all defenses available to it are available to AHAC. Neither party is exactly right. As a general matter, a surety's liability is defined by the liability of the underlying contract. This is true for a Miller Act surety with the exception that this rule cannot, of course, conflict with the actual terms of the Miller Act. Accordingly, Petri's argument that defenses not incorporated into the bond are not available is wrong, because a Miller Act surety – like other sureties – assumes only the liability of the principal. On the other hand, Morganti's argument that *all* defenses available to the general contractor are available to the surety is also wrong – specifically, defenses precluded by the Miller Act are not available to the surety.

An example of this latter situation is found in the case of United States ex. rel. Walton Technology, Inc. v. Weststar Engineering, Inc., 290 F.3d 1199 (9th Cir. 2002), where the Ninth Circuit held that a "pay when paid" clause was not enforceable against a surety because it conflicted with the Miller Act. The Ninth Circuit pointed out that the Miller Act granted a cause of action against the surety 90 days after performance, whereas the subcontract provided for payment (and hence a cause of action) only after the general contractor was paid.

The situation here, however, does not concern a limitation that conflicts with the Miller Act. The Ninth Circuit noted in Walton that its concern was only with defenses regarding the *timing* of payment, not the *measure* of payment. Id. at 1207. This concern arose from the fact that Miller Act specifies its own time period within which a claim may be brought. The "no damages for delay" clause, by contrast, is one that affects the measure of damages, i.e., whether there is any liability for monetary

damages. If the clause is enforceable (which I assume – as a factual matter – it is for this purpose), then it simply delineates the extent of the general contractor's liability or, in the context of the Miller Act, what sums are "justly due" to the subcontractor. Accordingly, the "no damages for delay" clause just as much defines the liability of AHAC as it does the liability of Morganti, and so, both parties are entitled to raise this clause in their defense. See, e.g. United States ex rel. Woodington Elec. Co. v. United Pac. Ins. Co., 545 F.2d 1381, 1383 (4th Cir. 1976) (holding amount of "sums justly due" determined by reference to subcontract); United States ex rel. Harrington v. Trione, 97 F. Supp. 522, 526 (D. Col. 1951) ("it was not the intention of Congress to extend or enlarge the contractual or quasi-contractual obligations of the contractor. . . . [R]ecovery is limited against the contractor, or surety, to the contract price").

The case cited by Petri, United States ex rel. Pertun Construction Co. v. Harvesters Group, Inc., 918 F.2d 915 (11th Cir. 1990), is not to the contrary. That case merely held (1) that the Miller Act did not limit a surety's liability to only planned expenditures and (2) that a "no damages for delay" clause was not enforceable against *either the general contractor or the surety* when a condition precedent to its applicability was not met. Neither situation is present here.

Lastly, Petri argues that the FBOP's termination of Morganti, in and of itself, terminated the contract and excused Petri from further performance. This view is completely unsupported by the contract. The subcontract explicitly gives Morganti the *option* to terminate the subcontract if Morganti itself was terminated.[7] If, in fact, the parties intended that the subcontract would *automatically*

[7] Specifically, paragraph 13 of the subcontract states that "[MTJV] shall have the right to terminate this Subcontract in whole, or in part, for convenience, if there is a termination of [MTJV's]

terminate upon termination of the general contract, then this provision would be meaningless. It is, therefore, clear from the express terms of the subcontract that termination of Morganti's contract with the FBOP did not terminate the subcontract. Consequently, the FBOP's termination of Morganti did not excuse Petri's repudiation.[8]

D. Other Issues

The above analysis disposes of the primary issues of the parties' motions – namely, the issue of summary judgment on their affirmative claims. There still remain some issues regarding other parts of the motions for summary judgment, particularly the motions for judgment *against* the other party's claims. For the most part, the substance of these arguments has been addressed above, but, for the sake of completeness, it will be simplest to go through them all, recapping the above holdings where necessary. For reasons explained below, the remaining parts of both motions are denied.

1. *Morganti's Remaining Arguments*

February Requisition - For the reasons set forth above, reasonable jurors could find that Morganti breached the subcontract by not paying Petri for this requisition. Consequently Morganti is not entitled to summary judgment against this claim.[9]

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contract with [FBOP], by providing [Petri] with a written notice of termination, to be effective upon receipt by [Petri]." (Ex. A to Pl.'s 9(c) statement.)

[8] It does not appear that Petri is making an affirmative claim for damages based solely on the FBOP's termination of Morganti. If it is, however, there is no genuine issue of fact concerning whether the subcontract automatically terminates upon the termination of the general contract. It does not. Therefore, to the extent Petri is making an affirmative claim of breach based solely on the FBOP's termination of Morganti, Morganti's motion for summary judgment on that claim is granted.

[9] To the extent Morganti is asking for summary judgment on Petri's claims for damages for other work or expenses accruing between January 31 and Morganti's suspension, it will not be granted

Suspension and Delay Damages - For the reasons set forth above, reasonable jurors could find that Morganti breached the subcontract by suspending Petri's work and that this claim is not barred by the "no damages for delay" clause. Morganti also makes the argument that any injury to Petri from Morganti's suspension – such as increased expenses – is not compensable under the "pay if paid" clause, because Petri has not offered evidence that Morganti has been paid by the FBOP. This argument is unpersuasive because reasonable jurors could find that the FBOP's failure to pay for increased expenses or other damages was solely the result of Morganti's default. In other words, the "pay if paid" condition was frustrated by Morganti's own actions. If this is the case (and jurors could reasonably find it to be so), Petri is not barred from relief on account of the fact that the condition precedent – "pay if paid" – was not fulfilled. See Decarlo & Doll, Inc. v. Dilozir, 45 Conn. App. 633, 643 (1997) ("Where a debt has arisen, liability will not be excused because, without fault of the creditor and due to happenings beyond his control, the time for payment, as fixed by the contract, can never arrive."). Consequently Morganti is not entitled to summary judgment against this claim.

March and April Requisitions – Morganti's argument for why it should be granted summary judgment against Petri's claim for these requisitions is that Petri had breached the contract by the time these payments came due. For the reasons set forth above, reasonable jurors could find that Petri had not breached the contract by the time these payments came due. Therefore, Morganti is not entitled to

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for the same reasons as summary judgment is not granted on the February requisition – namely, that reasonable jurors could find that Morganti had notice of (see Peterson Cert.), and did not pay, those claims prior to any breach by Petri. Alternatively, to the extent Morganti might assert a "pay if paid" clause defense to these amounts, that is denied for the same reasons given in the next paragraph, namely, that jurors could find frustration of a condition precedent.

summary judgment against this claim.

Subcontract Assignment - Morganti argues that it is entitled to summary judgment on its claim that Petri breached the subcontract by refusing to accept its assignment to the new general contractor. Because, for the reasons set forth above, reasonable jurors could find that Morganti had already breached the contract by the time of the assignment, Morganti is not entitled to summary judgment on this claim.

FBOP Caused Injury - In Morganti's briefs it makes the claim that it cannot be liable for harm caused by the actions of the FBOP. Morganti never explains why it thinks such harms exist, and on the record there is no evidence concerning such harms.[10] Presumably they occurred – if at all – before Morganti's termination, but there is no indication of what they are. Nevertheless, Morganti argues that such claims are barred either because of the "no damages for delay" clause or because the contract provides that such claims are to be "passed through" by Morganti to the FBOP. In the absence of any indication of what these claims are, Morganti is essentially asking the court to rule that *if* such claims exist, they are barred. This is inappropriate on summary judgment. Summary judgment is not a vehicle for posing hypothetical legal questions. When, and if, evidence of FBOP-caused injuries arises, Morganti may pursue this argument again.

2. *Petri's Remaining Arguments*

February Requisition - Petri argues that it is entitled to summary judgment on its claim that

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[10] There is general evidence tending to show that the FBOP did cause some delays to the project as a whole but there is no evidence showing specifically what delays caused harm to Petri. Neither is there any evidence showing how these damages are to be disaggregated from Petri's non-FBOP caused injury.

Morganti breached the subcontract by failing to pay for this requisition. Because, for the reasons set forth above, reasonable jurors could find that this payment did not come due until after Petri had breached the subcontract, Petri is not entitled to summary judgment on this claim.[11]

Anticipatory Repudiation - To the extent Petri argues that it is entitled to summary judgment on Morganti's claim that Petri repudiated the subcontract, it is not, because, for the reasons set forth above, reasonable jurors could find that Petri did repudiate the subcontract.

March and April Requisitions – Petri argues that it is entitled to summary judgment on its claim that Morganti breached the subcontract by failing to pay it for these requisitions. For the reasons set forth above, reasonable jurors could find that Petri had already breached the subcontract by the time these amounts came due. Consequently, Petri is not entitled to summary judgment on this claim.

Subcontract Assignment - Petri's argument for why it should be granted summary judgment against Morganti's claim that Petri breached by refusing to acknowledge the subcontract assignment is that Morganti was already in breach at the time of the assignment. For the reasons set forth above, reasonable jurors could find that Morganti had not breached the subcontract at the time of the assignment, consequently, Petri is not entitled to summary judgment on this claim.

[11] Petri is also not entitled to summary judgment for other pre-termination, post January 31 claims because reasonable jurors could find that the time for such payments had not come due by the time Petri committed a material breach.

IV. Conclusion

For the aforementioned reasons, Morganti's motion for summary judgment (doc. # 57) is GRANTED in part and DENIED in part. Petri's motion for summary judgment (doc. # 65) is DENIED.

It is so ordered.

Dated at Bridgeport, Connecticut, this 13th day of May 2004.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge