

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF INDIANA
 HAMMOND DIVISION

IN RE:)	
)	CASE NO. 01-64433 JPK
FIELDHOUSE, INC.,)	Chapter 7
)	
Debtor.)	

STACIA YOON, TRUSTEE)	
)	
Plaintiff,)	ADVERSARY NO. 02-6304
)	
vs.)	
)	
LEOPARDO COMPANIES, INC. d/b/a)	
LEOPARDO CONSTRUCTION,)	
)	
Defendants)	

ORDER ON TRUSTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This adversary proceeding was commenced by a Complaint, based upon a breach of contract, filed on December 5, 2002 by the plaintiff, who is the Trustee of the Chapter 7 bankruptcy estate of Fieldhouse Inc., ("Trustee"). The defendants Leopardo Companies Inc. d/b/a Leopardo Construction ("Leopardo") filed their answer, along with affirmative defenses, on January 17, 2003.

On January 30, 2004, Trustee filed a Motion for Partial Summary Judgment, which included an Affidavit of Michael Fieldhouse, the President of Fieldhouse Inc., Leopardo's Response to the Trustee's Interrogatories, Stipulation of the Parties, and a Memorandum in Support of Partial Summary Judgment. On March 2, 2004, Leopardo filed its Response To Trustee's Motion for Partial Summary Judgment, along with an Affidavit of Matthew Miller, the Project Manager at Leopardo Companies, Inc. On March 8, 2004, Leopardo filed its Corrected

Response to Trustee's Motion for Partial Summary Judgment, which was permitted by the Court's order of March 10, 2004. Trustee's reply to Leonardo's Corrected Response was filed on March 22, 2004. On March 25, 2004, Leopardo filed a Request for Oral Argument, which was denied by the Court's order of April 2, 2004.

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157 (a) and N.D.Ind.L.R. 201(a)(2). However, this action does not constitute a "core proceeding", but rather is a matter "related to a case under title 11" under the provisions of 28 U.S.C. §157(a) and N.D. Ind. L.R. 200.1(a) ; *In re World Solar Corp.*, 81 B.R. 603 (Bankr. S.D. Cal. 1988); *Hughes-Bechtol v. Construction Management*, 144 B.R. 755 (S.D. Ohio 1992); *Midwest Communications Corporation v. Black Entertainment Television*, 144 B.R. 354 (Bankr. E.D. Ky. 1992); 1 Collier on Bankruptcy ¶ 3.02[3][c] (Alan N. Resnick and Henry J. Sommer eds., 15th ed. rev.); *Acolyte Elec. Corp. v. City of New York*, 69 B.R. 155 (Bankr. E.D. N.Y.1986) *aff'd* 1987 WL 47763 (E.D. N.Y.1987); *In re Morse Elec. Co., Inc.*, 47 B.R. 234, 237 (Bankr. N.D.Ind. 1985); Shapiro & Szilagyi, *Guide to Core vs. Noncore Jurisdiction under the Bankruptcy Code* (2d ed. 1989)(chart at 177-78 lists construction contracts). Absent consent of the parties, the Court does not have jurisdiction to enter a final judgment, or orders on dispositive motions in this case. By written statement filed with the Court, the parties have consented to the Court's exercise of full jurisdiction in the case, and thus the Court may itself enter all orders, including final judgment.

This adversary proceeding is now before the Court for consideration of the Trustee's motion for partial summary judgment.

Standards for Review of Motions for Summary Judgment

The procedural mechanism of summary judgment is provided by Rule 56 of the Federal

Rules of Civil Procedure, made applicable to adversary proceedings by B.R. 7056. The principal standard to be followed by the Court in determining a motion for summary judgment is stated as follows in Fed.R.Civ.P. Rule 56(c):

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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.

The inquiry that the court must make is whether the evidence presents a sufficient disagreement to require trial or whether one party must prevail as a matter of law. *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2509-10 (1986). In deciding a Motion for Summary Judgment, the Court should not “weigh the evidence.” *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510-11; *Illinois Bell Telephone Co. v. Haines and Co., Inc.*, 905 F.2d 1081, 1087 (7th Cir. 1990). However, “if evidence opposing a summary judgment is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson*, 106 S. Ct. at 2511; *Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990).

The moving party bears the burden of showing that there is an absence of evidence to support the non-movant’s case; *Celotex Corp. v. Catrett*, 106 S. Ct. at 2548, 2554 (1986), i.e., the lack of a genuine issue of material fact. *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984); *Korf v. Ball State University*, 726 F.2d 1222, 1226 (7th Cir. 1984).

When ruling on a motion for summary judgment, inferences to be drawn from underlying facts contained in such materials as attached exhibits and depositions must be viewed in a light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 82 S. Ct. 993, 994 (1962); *See also, Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356, (1986) (All inferences to be drawn from the underlying facts must be viewed in a light most favorable to the nonmoving party); *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d

1215, 1218 (7th Cir. 1984); *Marine Bank Nat. Ass'n. v. Meat Counter, Inc.*, 826 F.2d 1577, 1579 (7th Cir. 1987).

When a motion for summary judgment is made and supported by the movant, Fed.R.Civ.P. 56(e) requires the nonmoving party to set forth specific facts, which demonstrate that genuine issues of fact remain for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S.Ct. at 1355; the opposing party may not defeat the motion by merely relying on the allegations or denials in its pleadings.

It bears emphasizing that it is the Trustee's motion for partial summary judgment that is before the Court. There is no cross-motion for summary judgment by Leopardo. The inquiry is thus whether, based upon the record before the Court, the Trustee, as plaintiff, is entitled to judgment as a matter of law on issues relating to the five counts of her complaint.

The Record Before the Court

Fed.R.Civ.P. Rule 56(c) provides that the Court is to consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," in determining whether or not a genuine issue/genuine issues of material fact exist. N.D.Ind.L.B.R. B-7056-1 sets forth certain procedural requirements which must be met to properly present a motion for summary judgment to the Court for decision. Principal among the requirements of that rule is the submission of a "Statement of Material Facts." On January 30, 2004, the Trustee filed a "Statement of Material Facts" and the affidavit of Michael Fieldhouse, Leopardo's Answer & Objections to Plaintiff's Interrogatories, and a Stipulation of the Parties. In its opposition to the motion, Leopardo submitted the affidavit of Matthew Miller, a Project Manager at Leopardo. The parties' affidavits constitute a part of the record, to the extent admissible, for the purposes of this motion for summary judgment; B.R. 7056/ Fed.R.Civ.P.

56(c)

The material facts on which there is no genuine issue are the following. Between 1999 and 2000, Leopardo and Fieldhouse entered into five (5) subcontracts by which Fieldhouse became obligated to perform certain work on heating, ventilating, and air conditioning systems ("HVAC") at the Edgewater Medical Center ("EMC") in Chicago, Illinois.¹ The complaint is comprised of five counts; each count solely concerns one of the five subcontracts by reference to the project to which each subcontract related, as follows: Count I, "Surgery"; Count II, "Core and Shell"; Count III, "Patient Care Units"; Count IV, "Edgewater Medical Center - Hollywood"; and Count V, "Patient Rooms".

The subcontract for the Surgery project [Count I] called for a contract price of \$201,400.00 [count I - complaint ¶ 6; answer ¶ 6] for performance by Fieldhouse of certain HVAC work on the project; [count I - complaint ¶ 7; answer ¶ 7]. Leopardo has paid Fieldhouse the sum of \$181,260.00; [count I - complaint ¶ 8; answer ¶ 8]. There is no dispute that Fieldhouse has not been paid the balance of \$20,140.00, and no dispute that Fieldhouse has properly completed the work on this project. Leopardo's defenses with respect to Count I do not relate to the balance owed to Fieldhouse for this project.²

The subcontract for the Core & Shell project [Count II] called for a contract price of

¹ Although certain provisions of the written contracts between the parties have been stated in materials filed with the Court, none of the five contracts has been placed in the record. Because the issues framed by the parties require review and interpretation of these contracts under the so-called "four corners" rule of contract construction [See, e.g., *Air Safety, Inc. v. Teachers Realty Corporation*, 185 Ill.2d 457, 706 N.E.2d 882 (1999)], the fact that those contracts have not been placed of record precludes as complete a resolution of the matters addressed by the parties as would have otherwise been possible.

² As stated in the table set out on page two of its response brief, Leopardo asserts the defenses of failure to provide final lien waivers and of recoupment with respect to this subcontract.

\$1,040,487.00 [count II - complaint ¶ 7; answer ¶ 7] for performance by Fieldhouse of certain HVAC work on the project; [count II - complaint ¶ 7; answer ¶ 7]. Leopardo has paid Fieldhouse the sum of \$1,038,714.00; [count II - complaint ¶ 10; answer ¶ 10]. The Trustee contends that Fieldhouse performed additional work agreed to by the parties in the amount of \$30,765.00 [count II, ¶ 8], which Leopardo denies [answer, ¶ 8]. The Trustee contends that Fieldhouse is owed a balance of \$32,538.00 under this subcontract, which Leopardo denies. The Trustee concedes that there is a genuine issue of material fact regarding the amount due under this subcontract which precludes summary judgment for the plaintiff; [Trustee's reply brief, first paragraph].³

The subcontract for the Patient Care project [Count III] called for a contract price of \$231,122.00 [count III - complaint ¶ 7; answer ¶ 7] for performance by Fieldhouse of certain HVAC work on the project; [count III - complaint ¶ 7; answer ¶ 7]. The parties agree that Fieldhouse performed additional work on the project which increased the subcontract price to \$239,046.00; [count III- complaint ¶ 8; answer ¶ 8], and that Leopardo is entitled to a credit of \$22,524.00 for work deleted from the project by agreement of the parties [count III - complaint ¶ 10; answer ¶ 10]. Leopardo has paid Fieldhouse the sum of \$191,369.00; [count III - complaint ¶ 10; answer ¶ 10]. Contrary to the Trustee's statement on page 8 of her reply brief, there does not appear to be any issue as to the balance of the contract price unpaid by Leopardo; the parties agree that \$25,153.00 has not been paid to Fieldhouse, and that this constitutes the entire balance under this subcontract for the work performed by Fieldhouse.⁴ There is no

³ As stated in the table set out on page two of its response brief, Leopardo asserts the defenses of full payment and of recoupment with respect to this subcontract.

⁴ Confusion appears to arise from the Count III's prayer for relief in which the demanded amount of \$21,153.00 does not correctly mirror the averments of paragraph 10 of that count.

dispute that Fieldhouse has properly completed the work on this project. Leopardo's defenses with respect to Count III do not relate to the balance owed to Fieldhouse for this project.⁵

The subcontract for the Hollywood project [Count IV] called for a contract price of \$730,109.00 [count IV - complaint ¶ 7; answer ¶ 7] for performance by Fieldhouse of certain HVAC work on the project; [count I - complaint ¶ 7; answer ¶ 7]. The parties agree that Fieldhouse performed additional work on the project which increased the subcontract price by \$76,100.00; [count IV- complaint ¶ 8; answer ¶ 8], and that an additional change order reduced the subcontract price by \$10,237.00; [count IV- complaint ¶ 9; answer ¶ 9]. The Parties agree that the adjusted subcontract price is \$795,972.00; [count IV- complaint ¶10; answer ¶10].

Leopardo has paid Fieldhouse the sum of \$433,857.00; [count IV - complaint ¶ 11; answer ¶ 11]. The parties agree that \$362,115.00 has not been paid to Fieldhouse, and that this constitutes the entire balance under this subcontract for the work performed by Fieldhouse.

There is no dispute that Fieldhouse has properly completed the work on this project. Leopardo's defenses with respect to Count IV do not relate to the balance owed to Fieldhouse for this project.⁶

The subcontract for the Patient Rooms project [Count V] called for a contract price of \$26,208.00 [count V - complaint ¶ 6; answer ¶ 6] for performance by Fieldhouse of certain HVAC work on the project; [count I - complaint ¶ 6; answer ¶ 6]. The parties agree that

⁵ As stated in the table set out on page two of its response brief, Leopardo asserts the defenses of nonreceipt of final payment from EMC, of failure to provide final lien waivers, and of recoupment with respect to this subcontract.

⁶ As stated in the table set out on page two of its response brief, Leopardo asserts the defenses of nonreceipt of final payment from EMC, of failure to provide final lien waivers, and of recoupment with respect to this subcontract.

Fieldhouse performed additional work on the project which increased the subcontract price by \$36,625.00; [count V- complaint ¶ 7; answer ¶ 7]. The Parties agree that the adjusted subcontract price is \$62,833.00; [count V- complaint ¶ 8; answer ¶ 8]. Leopardo has paid Fieldhouse the sum of \$23,600.00; [count V - complaint ¶ 8; answer ¶ 8]. The parties agree that \$39,246.00 has not been paid to Fieldhouse, and that this constitutes the entire balance under this subcontract for the work performed by Fieldhouse. There is no dispute that Fieldhouse has properly completed the work on this project. Leopardo's defenses with respect to Count V do not relate to the balance owed to Fieldhouse for this project.⁷

To support its contention that the subcontracts provide that full payment to Leopardo by EMC is a condition precedent to its obligation to pay Fieldhouse, Leopardo relies on clauses 3.4⁸ and 3.12, which the parties appear to agree appears in each project's subcontract. These provisions state, at least in pertinent part:

3.4 "All *payments* to Subcontractor will be made *only if* and after the Contractor has received payment from the Owner for the work."

3.12 "...Contractor shall not be *liable* to Subcontractor for final payment unless and until Owner has paid Contractor in full for Contractor's Work on the project and any and all claims of Subcontractors."

The affidavit of Matthew Miller, paragraph 22, states that EMC has not paid Leopardo in full on the Patient Care, Hollywood and Patient Rooms projects; the Trustee has presented no evidence to refute this assertion.

⁷ As stated in the table set out on page two of its response brief, Leopardo asserts the defenses of nonreceipt of final payment from EMC, of failure to provide final lien waivers, and of recoupment with respect to this subcontract.

⁸ The numbers of the clauses are taken from the "Conditions to the Subcontract Agreement" portion of the subcontracts as submitted of record, and not from the parties' pleadings or briefs.

To support its contention that submission of lien waivers from Fieldhouse is a condition precedent to its obligation to pay Filedhouse, Leopardo relies on clauses 3.12 and 4.11, which the parties appear to agree appears in each project's subcontract. These provisions in pertinent part state:

3.12 The final payment...will be made...*provided that...* (iii) Subcontractor has properly submitted all affidavits, sworn statements, guarantees, as built, owner manuals, and waivers of lien required of Subcontractor by the Contract Documents, Owner and Contractor; and (iv) if requested, the Subcontractor has evidenced that all payrolls, bills for materials and equipment and all obligations connected with the Work have been satisfied and that the Contractor and Owner are protected against mechanics liens.

4.11 Subcontractor's Payments to Others: Subcontractor shall pay for materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by payments received from the Contractor. Subcontractor shall furnish evidence to verify compliance with these requirements.

There appears to be no dispute that Fieldhouse has not provided Leopardo with the lien waivers provided for by the foregoing contract provisions with respect to any of the five projects; [affidavit of Michael Filedhouse, paragraph 2]. It was the general practice of Fieldhouse and Leopardo to exchange waivers of lien for payments; [affidavit of Michael Filedhouse, paragraph 4]. The Fieldhouse affidavit asserts that if Leopardo had requested waivers, Fieldhouse would have provided them in exchange for the balance owed to Fieldhouse by Leopardo; [affidavit of Michael Filedhouse, paragraph 3]. The Trustee states in her briefs that she can now supply the lien waivers, but no lien waivers have been placed in the record.

The affidavit of Michael Miller states that four sub-subcontractors have filed mechanics liens against Edgewater and seek liability personally against Leopardo as a

prime contractor under the Illinois Mechanics Lien Act. Id. ¶ 17.⁹ These subcontractors – who performed work exclusively on the Core and Shell project [Miller affidavit, paragraph 16] – and the amounts each asserts is owed to it are the following: Columbia Pipe, \$13,401.62; Parkside, \$52,620.00; Johnson Controls, \$69,704.00 and \$58,500.00; and American Standard, \$83,404.65; [Miller affidavit, paragraph 17]. There is no evidence in this record which establishes the liquidated amount determined to be owed to any of these entities by Leopardo, or for which EMC's property is obligated with respect to their mechanics' lien claims.

The parties have stipulated that Leopardo has filed a complaint to foreclose its mechanics against EMC; that subsequent to the filing of the complaint, EMC filed a voluntary Chapter 11 bankruptcy case in the Northern District of Illinois; and that the time has now passed to record a valid mechanic's lien with respect to any of the five projects.

To support its contention that recoupment is a defense to the Trustee's claims, Leopardo relies on clauses 3.9, 3.10, 3.11 and 4.11, which the parties appear to agree appear in each project's subcontract. These provisions state in pertinent part, apparently (it's hard to be sure without the full contract in the record):

3.9 If there is a claim, lien or security interest concerning Project payments or the Project because of any action of the Subcontractor, or there is reasonable evidence indicating the probable filing or assertion of such, then Contractor may retain out of any payments then due or to

⁹ The parties agree that if Leopardo is entitled to recoupment, it would only be able to recoup the amounts claimed by these sub-subcontractors who had timely filed their mechanics liens.

become due an amount sufficient to indemnify and protect the Contractor and the Owner against such lien, claim or security interest and the cost of defending same.

3.10 The Contractor has the right, whenever it deems appropriate, to pay directly to any person any sum due or to become due from Subcontractor for performing or furnishing any work or materials, supplies, tools or equipment to the project. All such payments will be on account of Subcontractors.

3.11 All payments to Subcontractor which are in turn due from the Subcontractor to sub-subcontractors or others as shown on any sworn statements shall be held in trust by Subcontractor for such other persons and cannot be used for any other purpose until such obligations are satisfied.

4.11 Subcontractor's Payment to Others: Subcontractor shall pay for materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by payments received from the Contractor. Subcontractor shall furnish evidence to verify compliance with these requirements.

Legal Analysis

The review of the issues raised by the Trustee's partial summary judgment motion, and by the defenses raised by Leopardo, is severely hampered by the fact that the entirety of the subcontracts under which the claims/defenses arise have not been placed of record. Based upon the record before it, the Court can resolve only certain of the issues presented by the parties; the Court can only tentatively address other of the issues.

The fact that certain defenses have not been asserted by Leopardo with respect to all five of the complaint's counts causes the format of this decision to be difficult to determine. The Court has chosen to address the three affirmative defenses asserted by Leopardo first, and to then evaluate the Trustee's motion with respect to each of the five projects in light of those

defenses.

The parties implicitly agree, and the Court finds, that the law of Illinois applies to the issues of contract law presented by this case.

I. Do the Subcontracts Create a Valid Condition Precedent of Payment by EMC?

Leopardo contends that its obligation to pay Fieldhouse is conditioned upon Leopardo's receiving full payment from EMC. More particularly, the Court must determine whether the subcontracts contain a "pay-when-paid" clause, as the Trustee would like the Court to hold, or whether, as Leopardo contends, the subcontracts contain a "pay-if-paid" clause.

Because Leopardo does not contend that it was not paid in full by EMC with respect to the Surgery, and the Core and Shell, projects, this defense does not apply to those projects.

To support its conclusion that the subcontracts provide for a condition precedent to its obligation to pay Fieldhouse, Leopardo relies on provisions in clauses 3.4 and 3.12.

3.4 "All *payments* to Subcontractor will be made *only if* and after the Contractor has received payment from the Owner for the work."

3.12 "...Contractor shall not be *liable* to Subcontractor for final payment unless and until Owner has paid Contractor in full for Contractor's Work on the project and any and all claims of Subcontractors."

While it is true that "conditions precedent are not generally favored and courts will not construe stipulations to be a condition precedent when such a construction would result in forfeiture"; *A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp.*, 447 N.E.2d 30, 33, 133 Ill.App.3d 325 (1985); also *Department of Public Works and Buildings v. Porter*, 158 N.E.2d 366, 327 Ill. 28 (1927), courts are in harmony that "the plain, unambiguous language contained in the contract binds the parties to a condition precedent." *A.A. Conte*, 477 N.E.2d at 33. Thus, the initial issue for consideration is whether the clauses 3.4 and 3.12 of the subcontract create an unambiguous condition precedent to payment. The *A.A. Conte* court found a condition

precedent to exist where the contract provided that "invoices...will be paid... *if* payment for invoiced materials has been received by..." the general contractor. *Id.* at 32. The *A.A. Conte* court found a condition precedent to exist because the contract explicitly conditioned payment.

The Trustee relies on the case of *Brown & Kerr Inc. v. St. Paul Fire and Marine Ins.*, 940 F.Supp. 1245, 1249 (N.D.Ill., 1996). In distinguishing the *A.A. Conte* decision, the *Brown & Kerr* court stated that in *A.A. Conte* the subcontractor proceeded directly against the general contractor to recover payment for work performed under the subcontract [*Brown & Kerr*, 940 F. Supp at 1249], while the subcontractor in *Brown & Kerr*, on the other hand, proceeded not against the contractor, but against a surety under a bond. Accordingly, although the *Brown & Kerr* court stated that a contractual statement containing a 'when' provision to payment was not a condition precedent, but rather "created a timing provision requiring the contractor to pay the subcontractor within a reasonable time," that statement is pure *dicta* as the court held that the "pay-when-paid" provision in the subcontract did not apply to a dispute between a subcontractor and a bonding company. The Court declines to follow the analysis of *Brown & Kerr*, both because the statements therein as to the issue in this case are strictly *dicta*, and also because the Court deems a state appellate court's decision (i.e., *A.A. Conte*) to be more accurately declarative of state law than is a federal court's interpretation.

The Trustee contends that clauses 3.4 and 3.12, taken together, are ambiguous. The issue of whether or not a contract is ambiguous is a preliminary question of law suitable for determination on summary judgment. *ECHO, Inc v. Whitson Co., Inc.*, 52 F.3d 702, 705 (7th Cir. 1995). "The primary objective in construing a contract is to give effect to the parties' intent." *Home Ins. Co. v. Chicago & Northwestern Transp. Co.*, 56 F.3d 763, 767 (7th Cir. 1995). "[I]f a contract is clear on its face and the text contains no clue that the contract might mean something different from what it says, then the inquiry is over - no evidence outside of the contract may be

considered." *Id.* at 767. As the Seventh Circuit holds, the threshold inquiry is whether the contract is ambiguous on its face. *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1036 (7th Cir. 1998).

A contract is intrinsically ambiguous if the contract language is reasonably susceptible to more than one meaning. *Bourke*, 159 F.3d at 1032. A contract is not ambiguous simply because the parties do not agree on the meaning of its terms. *Id.* *PPM Finance, Inc. v. Norandal USA, Inc.*, 297 F.Supp.2d 1072, 1081 (N.D.Ill., 2004); see also *Olin Mathieson Chemical Corp. v. J.J. Wuellner & Sons, Inc.*, 218 N.E.2d 823, 825, 72 Ill.App.2d 488 (1966); *Premier Electrical Construction Co., v. American National Bank of Chicago*, 658 N.E.2d 877, 276 Ill.App.2d 816 (1995) (pay-when-paid provision was rendered inoperable by a conflict between an owner and general contractor).

The Court agrees with the reasoning of *A.A. Conte* and finds persuasive the reasoning of cases from other jurisdictions which provide that in order for the court to find a condition to payment to exist, such condition must be explicitly stated, as condition to payment will not be implied. See *Main Elec., Ltd. v. Printz Services Corp.*, 980 P.2d 522, 524 (Colo., March 15, 1999) ("We hold that in order to create a condition precedent, the language of the parties' agreement must clearly express their intent that the subcontractor is to be paid *only if* the owner first pays the general contractor"); *Framingham Heavy Equipment Co., Inc. v. John T.*, 807 N.E.2d 851, 855 (Mass.App.Ct., May 11, 2004)("a condition precedent to payment may not be inferred; the contract must clearly state that payment to the subcontractor is to be directly contingent upon the receipt by the general contractor of payment from the owner"); *L. Harvey Concrete, Inc. v. Agro Const. & Supply Co.*, 939 P.2d 811, 814 (Ariz.App. Div. 1, June 19, 1997)("In order to transfer the normal credit risk incurred by the general contractor from the general contractor to the subcontractor, the contract between the general contractor and

subcontractor should contain an express condition clearly showing that to be the intention of the parties"). Here, clause 3.4 expressly and unequivocally provides that Fieldhouse will be paid *only if* Leopardo receives payment from EMC, and as so stated it must be enforced. Thus, although conditions precedent are not generally favored as often time they result in forfeiture, the plain and unambiguous language contained in the contract binds the parties to a condition precedent. *A.A. Conte*, 477 N.E.2d at 33.

Contrary to the Trustee's assertions, the two subcontract provisions, 3.4 and 3.12, do not create an internal ambiguity in the contract. Clause 3.4 provides that "all payments to Subcontractor will be made *only if and after* the Contractor has received payment from the Owner for the work" [emphasis supplied]. This provision unequivocally conditions payment to Fieldhouse upon Leopardo's receipt of payment from EMC, and then states that payment is due the Subcontractor at the time that payment is received from EMC. Clause 3.12 provides that "Contractor shall not be liable to Subcontractor for final payment *unless and until* Owner has paid Contractor in full for Contractor's Work on the project and any and all claims of Subcontractors" [emphasis supplied]. The phrase "unless and until" in this clause is essentially the equivalent of "only if and after" in clause 3.4. Both clauses clearly state that Leopardo is obligated for payment only if it receives payment from EMC, and that when payment is so received, it will be obligated to pay the Subcontractor at that time. The Trustee's construction entirely removes the "only if" and "unless" phrases from these provisions.

However, the inquiry cannot stop here. The evidence submitted by Leopardo is that Leopardo has not been paid in full by EMC with respect to the Patient Care Units, Medical Center, and Patient Rooms projects. The evidence is not that Leopardo has not been paid at all. Under the strict reading of the "pay if paid" clause for which Leopardo apparently contends, it is not required to pay Fieldhouse at all until it has been paid by EMC, even if the payment received

from EMC is only \$1.00 less than the full amount owed. The Court will not adopt such a strict interpretation of this clause, not only on grounds of reasonableness of contract interpretation, but also because such a construction violates the payment timing provisions of clauses 3.4 (“after”) and 3.12 (“until”). The Court suspects that something is missing from this record, and that the “something” would be in other provisions of the subcontracts which have not been placed before the Court. Construction contracts such as these ordinarily have a progress payment schedule, followed by a final payment upon completion. Clause 3.12 refers only to final payment; unfortunately, the record does not provide the evidence necessary to determine how much of the subcontract price is to be withheld until final payment. While the Trustee’s motion for summary judgment must be denied on Counts III, IV and V of the complaint due to the “pay if paid” provisions, further proceedings are necessary to determine the extent of payments received by Leopardo from EMC on those projects and the thus- far undisclosed provisions of the subcontracts which relate to payments which may be required to be made to Fieldhouse in light of those received payments.

II. Whether Payment was Conditioned Upon Fieldhouse's Submission of Lien Waivers

There is no dispute that Fieldhouse did not provide lien waivers with respect to any of the five subcontracts. Leopardo asserts that Fieldhouse’s contractual obligations to provide Leopardo with lien waivers is a condition precedent to Leopardo’s obligation to pay Fieldhouse the unpaid balances of the subcontracts.

First, again the Court suspicions that something is missing from this record. Leopardo has made substantial payments to Fieldhouse under all five contracts, giving rise to the question of why those payments were made if no waivers were provide. The Court reckons that the issues concerning the unpaid balances primarily relate to the final payments under the contracts, and

that progress payments have already been made in conformity with the contracts.

Secondly, Leopardo raises this defense only with respect to the four projects which did not generate filed mechanic's liens from Fieldhouse's (allegedly) unpaid subcontractors. This defense has not been asserted by Leopardo with respect to the Core and Shell project, which is the only project concerning which Fieldhouse's subcontractors filed liens. The parties have stipulated that valid liens cannot now be filed against EMC.

To support this defense, Leopardo focuses the Court's attention on clauses 3.12 and 4.11. Those clauses state:

3.12 The final payment...will be made...*provided that...* (iii) Subcontractor has properly submitted all affidavits, sworn statements, guarantees, as built, owner manuals, and waivers of lien required of Subcontractor by the Contract Documents, Owner and Contractor; and (iv) if requested, the Subcontractor has evidenced that all payrolls, bills for materials and equipment and all obligations connected with the Work have been satisfied and that the Contractor and Owner are protected against mechanics liens.

4.11 Subcontractor's Payments to Others: Subcontractor shall pay for materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by payments received from the Contractor. Subcontractor shall furnish evidence to verify compliance with these requirements.

The Trustee's evidence concedes that it was the practice of the parties to exchange waivers for payment. In addition, the Trustee states that Fieldhouse was able to provide the waivers had Leopardo requested them, or in the alternative that the lien waivers can now be provided. The Trustee has submitted no admissible evidence which establishes her ability to obtain those lien waivers. More interestingly, the Trustee asserts that "she is in a position to provide waivers in exchange for the balance due. This is true, not because Fieldhouse will pay the sub-subcontractors and material suppliers, but because they are now unsecured creditors in

Fieldhouse's Chapter 7 bankruptcy. The only rights that they now have are to share in any assets that may be available to unsecured creditors who file a valid proofs of claim." Trustee's Reply pg. 6. Assuming Trustee's position is correct on its face, all that the Court has to consider are the Trustee's own beliefs not supported by any admissible evidence.

The real issue is whether even the Trustee's total inability to provide lien waivers excuses payment to Fieldhouse on the four projects with respect to which no liens can now be filed. Because of the nature of the record, including the lack of the full contracts between the parties, the Court is not prepared to determine in this Order whether or not the provisions cited by Leopardo create enforceable conditions precedent with respect to those four contracts. The Court is inclined to think that they do not in view of the fact that the harm sought to be avoided by the requirement of submission of lien waivers cannot now occur. Under these circumstances, requiring the submission of waivers potentially works a forfeiture for no legitimate purpose, and under Illinois law, "courts will not construe stipulations to be a condition precedent when such a construction would result in a forfeiture," *A.A. Conte, Inc.*, supra., 477 N.E.2d, at 33.

Interestingly, Leopardo has not asserted this defense with respect to the Core and Shell project, concerning which four of Fieldhouse's subcontractors filed liens against EMC's property. Contrary to the Trustee's assertions, these liens may cause these subcontractors to be more than mere unsecured creditors in Fieldhouse's Chapter 7 case; they have potentially fully secured claims allowable in EMC's bankruptcy, depending upon their priority/equity position in the property to which their liens attached.¹⁰ Despite Leopardo's apparent waiver of this defense concerning the Core and Shell project – possibly due to its assertion that it has paid Fieldhouse in full for this project -- on this record it cannot be said that the failure to provide lien waivers with

¹⁰ Again, based upon this record, whatever these subcontractors may have cannot be ascertained.

respect to these four subcontractors would have been, or is now, a purposeless act, and the Trustee has not suggested, even hypothetically, that she can produce lien releases from these four claimants. The Trustee has conceded that she cannot obtain a summary judgment on Count II, and thus the Court will not now determine the efficacy of this defense in relation to the Core and Shell project.

In short, because the full scope of the parties' contractual arrangements cannot be gleaned from the present record, the Court need not go further at this time to decide whether or not the lien waiver provisions are conditions precedent to payment. Because there is no evidence that the Trustee can provide the waivers, the Trustee has failed to establish that she is entitled to judgment as a matter of law on Leopardo's defense on this ground.

III. Whether Leopardo is Entitled to Recoupment

Leopardo asserts the defense of recoupment with respect to all five counts of the complaint. On page 14 of its brief, Leopardo concedes that this defense is asserted only with respect to its obligations to the four subcontractors who filed liens with respect to the Core and Shell project.

In order to succeed on its affirmative defense to the Trustee's motion for partial summary judgment, Leopardo must establish a *prima facie* case to a right of recoupment. Recoupment is a mitigation of damages. *PPM Finance, Inc. v. Norandal USA, Inc.*, 297 F.Supp.2d 1072,1098 (N.D. Ill. 2004). Recoupment "is a mechanism by which a party may calculate the proper amounts due from it by offsetting obligations which arise **from the same transaction** and which are essentially a defense to the debtor's claim. The essential element of recoupment is that the debts must arise **from the same transaction.**" *In re A and C Elec. Co.*, 211 B.R. 268, 273 (Bankr.N.D.Ill., 1997) [emphasis supplied]. Stating it another way, "recoupment is an equitable remedy which allows a defendant to reduce the amount of a plaintiff's claim by asserting that

there are funds due to it from the plaintiff which **arose out of the same transaction.**" *A and C Elec. Co.*, 211 B.R. at 273 [emphasis supplied]. See also *Olin Mathieson Chemical Corp., v. J.J. Wuellner & Sons, Inc.*, 218 N.E.2d 823, 825, 72 Ill.App.2d 488, 492 (1966).

Leopardo relies on several subcontract provisions which it argues provide it with the right of recoupment. Those provision are 3.9, 3.10, 3.11, and 4.11.¹¹ Clause 3.9 is most on point and it provides:

3.9 If there is a claim, lien or security interest concerning Project payments or the Project because of any action of the Subcontractor, or there is reasonable evidence indicating the probable filing or assertion of such, then Contractor may retain out of any payments then due or to become due an amount sufficient to indemnify and protect the Contractor and the Owner against such lien, claim or security interest and the cost of defending same.

Based upon the record, the Court must assume that there are five separate projects governed by five separate contracts. There are thus five separate transactions between Fieldhouse and Leopardo.¹² There can therefore be no right of recoupment by which Leopardo

¹¹ Clause 3.10 provides: The Contractor has the right, whenever it deems appropriate, to pay directly to any person any sum due or to become due from Subcontractor for performing or furnishing any work or materials, supplies, tools or equipment to the project. All such payments will be on account of Subcontractors.

Clause 3.11 provides: All payments to Subcontractor which are in turn due from the Subcontractor to sub-subcontractors or others as shown on any sworn statements shall be held in trust by Subcontractor for such other persons and cannot be used for any other purpose until such obligations are satisfied.

Clause 4.11 provides: Subcontractor's Payment to Others: Subcontractor shall pay for materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by payments received from the Contractor. Subcontractor shall furnish evidence to verify compliance with these requirements.

¹² In a prior life, the author dealt extensively with construction law and construction contracts. The Court suspicions that the term "Project" in clause 3.9 is defined in each subcontract, and as so defined refers only to the discrete portion of the entire construction project to which that subcontract relates, as contrasted to the "project" to build a new facility for EMC. Again, the lack of the full contract documentation allows for only surmise on this issue.

can obtain reimbursement for its losses on the Core and Shell project from any source other than the balance of the payment owed to Fieldhouse under that subcontract. Clause 3.9 does not state otherwise; on its face it is a holdback/retention clause operative only with respect to the Core and Shell project.

However, there may be more to this defense than meets the eye. The Court ponders that perhaps Leopardo has mislabeled its defense: The more accurately designated concept for the defense which Leopardo has advanced may be set-off. At any rate, the principle for which Leopardo contends involves the cross-crediting of debts owed to Leopardo by Fieldhouse under one subcontract against debts owed by Leopardo to Fieldhouse under other subcontracts. The Trustee has not established that as a matter of law, Leopardo is not entitled to the cross-crediting among separate projects for which it claims.

At this juncture, the Court merely notes that the defense asserted by Leopardo does not fit within the principle of recoupment. Without the full contract documentation, the Court cannot determine whether the concept advanced by Leopardo is a viable defense to the Trustee's complaint, and cannot determine as a matter of law that it is not.

Determination of the Trustee's Motion by Counts

Remaining is the task of applying the determinations stated above to the five Counts of the complaint.

The Trustee concedes that there are genuine issues of material fact with respect to both the Core and Shell, and the Patient Care, projects. The motion for partial summary judgment must therefore be denied with respect to Counts II and III of the complaint.

Based upon the record, the Court determines that the "pay if paid" defense asserted by Leopardo with respect to Counts III, IV and V constitutes a condition

precedent to payment which precludes the granting of the Trustee's motion on those counts. However, the extent of the amounts which may be held back under that defense with respect to the Patient Care, Hollywood, and Patient Rooms projects cannot be determined from this record.

Based upon the record, the Court cannot determine that as a matter of law the failure of Fieldhouse to provide waivers of lien does not constitute a viable defense to the Trustee's claims under all five counts. However, the Court suspects that a complete record may demonstrate that this defense can be validly asserted only with respect to the Core & Shell project, which is the subject of Count II.

Based upon the holdback/retention provision in the contract itself, the Trustee's motion must be denied with respect to the Core & Shell project, i.e., Count II.

The Court deems the defense asserted as recoupment to be potentially mislabeled. The Court determines that the Trustee has failed to establish as a matter of law that Leopardo is not entitled to cross-credit amounts potentially recoverable from Fieldhouse with respect to the Core & Shell project against amounts potentially owed to Fieldhouse with respect to the other four projects.

Decision

IT IS ORDERED that the Trustee's motion for partial summary judgment is DENIED as to all five Counts of the complaint.

IT IS FURTHER ORDERED that a scheduling conference shall be held on January 20, 2005 at 9:30 a.m. to determine the course of further proceedings in this case.

Dated at Hammond, Indiana on December 8, 2004.

J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:

Debtor, Attorney for Debtor
US Trustee
Chapter 7 Trustee
All Parties-in-interest