UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re:

RUSS JAMES & ASSOCIATES, INC.,

Debtor.

Case No. 97-25972

Chapter 11

RUSS JAMES & ASSOCIATES, INC.,

Plaintiff,

v.

Adversary No. 97-2474

RIVER PARK MEADOWS LIMITED PARTNERSHIP,
RUDY-JANICE DEVELOPMENT CORPORATION,
JANICE GREIL, RANDY GREIL,
TIM ZIGNEGO, ZIGNEGO BROTHERS, INC.,
FOX CREEK LIMITED PARTNERSHIP,
BOURAXIS PROPERTIES, LLC,
PAUL BOURAXIS, and
PINECREST BAY, LLC,

Defendants.

MEMORANDUM DECISION

INTRODUCTION

The plaintiff, Russ James & Associates, Inc. ("RJA"), filed a petition for relief under chapter 11 of the Bankruptcy Code on June 18, 1997. The debtor brought this adversary proceeding against the above named defendants[1] for various breaches of construction contracts. A trial was held over the course of two weeks, followed by oral argument and post-trial briefs, after which the court took the matter under advisement.

[1]Default judgments were entered against defendants River Park Meadows Limited Partnership, Rudy-Janice Development Corporation, Janice Greil and Randy Greil on March 3, 1998.

This court has jurisdiction under 28 U.S.C. § 1334(b), and this is a core proceeding under 28 U.S.C. § 157(b)(2)(B) as it relates to the claims of the defendants, and it is not a core proceeding as it relates to claims by the debtor against the defendants, but all parties have consented to entry of a final order by the bankruptcy court. Because of the identical subject matter, the debtor's objections to defendants' claims and the breach of contract action by the debtor against the defendants were consolidated for trial.

This decision represents the court's findings of facts and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

BACKGROUND

The debtor, Russ James & Associates, Inc., (RJA) alleges in its complaint that the defendants breached their contracts with the debtor in connection with five condominium construction projects: (1) River Park Meadows Building 1; (2) River Park Meadows Buildings 11 and 12; (3) Fox Creek Watertown Buildings 5-8; (4) Fox Creek Briarwood (Lake Mills) Building C; and (5) Hampden Pines and Victoria Place. Various entities were formed to accomplish these purposes; but Timothy Zignego was the primary moving force in the development of River Park Meadows Buildings 11 and 12, and the balance were overseen by Paul Bouraxis. The general concept of each project was for a limited partnership to develop unimproved land by selling building pads as condominium units to investors, who would then construct buildings according to set plans and sell individual condominium units in the buildings to the ultimate consumers. The limited partnerships would continue to hold and to manage common areas.

The River Park Meadows Condominiums is a development of nine eight-unit and three sixteen-unit condominium buildings in Pewaukee, Wisconsin. This project was conceived by defendants Paul Bouraxis, Randy Greil and Timothy Zignego for land owned by Zignego. Randy Greil established a limited partnership called River Park Meadows Limited Partnership to purchase the land, to act as the general contractor for most of the buildings and to develop the common areas. River Park's sole general partner was Rudy-Janice Development Corporation, which was owned and operated by Randy Greil's parents, Janice and Rudy. Rudy Greil is now deceased. Janice Greil was the sole limited partner of River Park.

As the building pads were sold, River Park entered into contracts to act as general construction contractor with the new owners of nine of the properties. River Park hired RJA to perform its duties as general contractor. One of the contracts with owner Paul Bouraxis was terminated, and the latter entered into a contract directly with RJA to construct Building 1. Two of the properties, Buildings 11 and 12 of the project, were developed by Zignego Brothers and Tim Zignego, respectively.

River Park, Tim Zignego and Zignego Brothers, as general contractors of their projects, hired RJA as their subcontractor to assist with the construction of their nine buildings. One of the buildings contracted by River Park, Building 7, was also owned by River Park. RJA completed the construction of Building 7 without receiving full payment from River Park. Randy Greil requested, and RJA and other subcontractors consented, to deferred payments on Building 7. In exchange, Mr. Greil awarded additional building contracts to RJA. Mr. Greil was to pay the contractors once the condominium units of Building 7 were sold. Instead, Randy Greil borrowed $200,000 from Tim Zignego to pay Greil's obligation to Fox Creek Limited

Partnership and granted a mortgage for $260,000[2] on Building 7 to secure the loan. RJA alleges that the undercapitalization of Building 7, in turn, led RJA to be low on cash during construction of the other buildings, which caused many of the problems on the Zignego projects and that eventually resulted in RJA's removal from the Bouraxis projects.

Fox Creek is a limited partnership, and Janice Greil and Paul Bouraxis are its general partners. Fox Creek Condominiums is a development of seven eight-unit apartment buildings and eight four-unit condominium buildings in Watertown, Wisconsin. Defendant Fox Creek Limited Partnership entered into a contract with RJA to build the buildings. Buildings 5-8 are at issue in this action. Fox Creek also entered into a contract with RJA to build the buildings at Briarwood, a development of two eight-unit condominium buildings and one sixteen-unit apartment building in Lake Mills, Wisconsin. Building C, the sixteen-unit building, is at issue here.

At the time of this cause of action, Hampden Pines was to be a development of ten eight-unit buildings and Victoria Place was to be a development of five eight-unit buildings in Pewaukee, Wisconsin. Pinecrest Bay, LLC, Paul Bouraxis and Randy Greil were planning the Hampden Pines project and were engaging RJA in various stages of the development when the relationship between the parties deteriorated. Pinecrest is a limited liability company, and Paul Bouraxis and Freida Bouraxis are its members. Bouraxis Properties, LLC, Paul Bouraxis and Randy Greil were also planning the Victoria Place project at the same time. Bouraxis Properties is a limited liability company, and Paul Bouraxis is its member.

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[2]Mr. Zignego did not require the entire $60,000 interest to release the mortgage, but the mortgage was written this way, he explained, to give him maximum protection.

RJA believes that the underfunding of River Park Meadows Building 7 caused numerous subcontractors who were involved in construction throughout the various projects to refuse to perform unless paid. The subcontractors eventually resorted to filing liens against the properties, and RJA was terminated from all of the Bouraxis projects. Timothy Zignego took over payment of bills and much of the supervision of his projects, although RJA was not officially terminated. The alleged damages and counterclaims for each project are set forth more fully below.

ALLEGATIONS & ARGUMENTS

River Park Meadows Building 1

The parties do not dispute that a contract existed between Paul Bouraxis and RJA, in the amount of $451,726.46, for the construction of Building 1 at the River Park Meadows development. (Exh. 1: AIA Document A101,[3] Standard Form of Agreement Between Owner and Contractor.) The parties also agree that Mr. Bouraxis approved change orders on the project that totaled $7,704. The parties dispute who breached the contract and further dispute who terminated the contract. The Bouraxis defendants contend that they only stopped paying RJA when the costs exceeded the contract amount. The building was 95% complete when RJA was terminated.

RJA believes it is owed the following amounts related to the alleged breach: anticipated profit of $22,971.50; general conditions (general contracting fee) of $3,000; unreimbursed direct

[3]All AIA contracts in this case incorporate the 1987 edition of AIA Document A201, General Conditions of the Contract for Construction.

costs of $6,560.94; unreimbursed subcontractor costs of $12,964.56; and interest[4] of $6,138.30. Paul Bouraxis believes he has set-off claims of $5,000 for construction completion supervision; $2,500 for roof repairs; and $3,500 for extra cedar siding purchased to complete the building.

Prior to termination of the contract, the sum of $307,422.59 was disbursed from escrow to RJA or subcontractors retained by RJA.

Fox Creek Watertown Development Buildings 5 - 8

The parties agree that a contract exists between RJA and Fox Creek Limited Partnership for the construction of Buildings 5 through 8 at the Fox Creek development project. (Exh. 42: AIA Document A101, Standard Form of Agreement Between Owner and Contractor.) The amount of the contract between Fox Creek and RJA for construction of Buildings 5 through 8 is $944,000 for the four buildings, although the breakdown sheets show a total cost of $952,000. The parties dispute who breached the contract and further dispute who terminated the contract.

RJA believes it is owed the following amounts due to the alleged breach: $47,200 anticipated profit; $11,500 general conditions; $4,269.18 unreimbursed direct costs; $56,651.48 unreimbursed subcontractor costs; and $16,772.10 interest. Fox Creek believes it has set-off

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[4]RJA claims that interest should be calculated pursuant to Article 13.6 of the general conditions of the contract at the local legal prevailing rate of 8.5%. That article provides:

> Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Exh. 38: AIA Document A201, General Conditions of the Contract for Construction, Article 13.6.1). The defendants argue that the legal interest rate is at most 5%. Wis. Stat. § 138.04.

claims totaling $77,094.61. The draw sheets for the four buildings show that $803,090.24 was disbursed from escrow to RJA or to subcontractors retained by RJA.

Fox Creek Briarwood Development Building C

It is undisputed that a contract existed between RJA and Fox Creek Limited Partnership for the construction of Building C at the Briarwood development project. (Exh. 46: AIA Document A101, Standard Form of Agreement Between Owner and Contractor.) The amount stated in the contract was $850,000, although the breakdown attached to the contract shows a total cost of $1,062,500. The latter amount includes items paid for before the contract was entered into, such as the cost of the lot and real estate commission. The breakdown of items to be completed by RJA is actually $857,750, not $850,000, but the breakdown is the more reliable indicator of the agreement between the parties. The parties dispute who terminated the contract.

RJA believes it is owed the following due to the alleged termination of contract: anticipated profit of $42,500; general conditions of $5,000; unreimbursed direct costs of $2,447.71; unreimbursed subcontractor costs of $16,144; and interest in the amount of $8,541.45. Fox Creek claims that it has set-off claims of $34,280.

Hampden Pines and Victoria Place Development Building Projects

The existence of enforceable contracts for the construction of buildings at Hampden Pines and Victoria Place is in dispute. The parties agree that RJA and Bouraxis Properties LLC exchanged draft contracts; however, a final contract was never executed. Mr. Bouraxis did, nonetheless, pay RJA a $5,000 construction management fee for Building 1 at Hampden Pines.

RJA asserts that the essential elements of a contract were present, and it is owed the following by Bouraxis Properties LLC for the alleged breach of contract: $34,060 anticipated profit; $61,463.58 for unreimbursed direct costs; $10,366.53 for unreimbursed subcontractor costs; $20,000 in unpaid general contracting fees on Building 1 at Hampden Pines; and $16,270.87 in interest. Bouraxis Properties claims set-off amounts totaling $21,952.50.

RJA argues that it is entitled to additional compensation given the various efforts it expended in the marketing of the properties in reliance on the promise of future compensation. Bouraxis opposes RJA's position and claims that the parties never agreed on RJA's compensation, if any, for marketing the properties.

River Park Meadows Building 11

The parties do not dispute that a contract was entered into between Zignego Brothers and RJA for the construction of Building 11 at the River Park Meadows development project. (Exh. 28: AIA Document A101, Standard Form of Agreement Between Owner and Contractor.) The contract price originally stated in the written agreements was $1,240,000, of which amount Zignego Brothers had paid $652,843, as of February 15, 1998. The parties further do not dispute that Zignego Brothers executed two change orders totaling $2,805.42.

The parties dispute who breached the contract. Zignego Brothers believes RJA breached its obligations under the contract by failing to provide labor and materials for the construction of Building 11, by failing to complete construction of Building 11, and by improperly performing some portions of the construction. RJA contends that Tim Zignego controlled the disbursements

such that RJA was no longer able to control the costs of the subcontracts, nor to demand compliance with the subcontractors' guarantees.

RJA believes it is owed the following amounts due to the alleged breach by Zignego Brothers: $62,000 for anticipated profit; $8,291.65 for general conditions; $2,738.47 for unreimbursed direct costs; $4,408.84 for unreimbursed subcontractor costs; and $9,062.64 in interest. Zignego Brothers believes that it has suffered damages due to RJA's breaches of its obligations under the contract in the amount of $84,073.39.

The parties do not dispute that Zignego Brothers controlled the disbursements of funds to subcontractors from the beginning of construction of Building 11.

River Park Meadows Building 12

It is undisputed that RJA and Timothy Zignego entered into a contract for the construction of Building 12 at the River Park Meadows development project. (Exh. 29: AIA Document A101, Standard Form of Agreement Between Owner and Contractor.) The contract price originally stated in the agreement was $1,240,000, of which amount Mr. Zignego had paid $472,843, as of February 15, 1998. The parties do not dispute that Tim Zignego executed two change orders totaling $2,805.42. The parties dispute who breached the contract.

RJA asserts that it is owed the following in relation to the alleged breach of Tim Zignego: anticipated profits of $62,562.76; general condition payments of $5,000; unreimbursed direct costs of $1,455.22; unreimbursed subcontractor costs of $11,643.78; and interest of $9,835.08. Tim Zignego believes that he has suffered damages due to RJA's breaches of its obligations under the contract in the amount of $84,553.42.

The parties do not dispute that Tim Zignego made direct disbursements to subcontractors after draw number three, when Chicago Title was no longer involved.

DISCUSSION

The trial record is comprised of over 800 exhibits, many of which cover multiple issues relating to particular projects. An explanation as to each and every line item of each project would require an oppressive amount of largely redundant narrative. Several issues are common to RJA's dispute with both sets of defendants, and some relate to only the Bouraxis or Zignego defendants. A number of items of damages or claims require explanation for allowance or disallowance. These will be addressed before the particulars of each contract are addressed at the end of this decision. Costs for specific line items will be allocated to the various parties consistent with the findings or principles discussed in this section.

Breaches and Terminations of the Construction Contracts

It is well established that a material breach by one party to a contract may excuse subsequent performance by the other. *Metropolitan Sewerage Comm'n v. R.W. Constr., Inc.*, 72 Wis. 2d 365, 387, 241 N.W.2d 371, 383 (1976). However, a party is not automatically excused from future performance of contract obligations every time the other party breaches. If the breach is relatively minor and not 'of the essence,' the plaintiff is still bound by the contract; he cannot abandon performance and recover damages for a 'total' breach. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis.2d 158, 183, 557 N.W.2d 67, 77 (1996).

Each party to each construction contract at issue in this action alleges that the other breached first, most, and worst. Without question, everyone breached at one time or another. On the Bouraxis projects, RJA breached by failing to pay subcontractors, and Bouraxis breached by allowing insurance to lapse on the Watertown project and by terminating RJA on all projects after RJA exercised its right to demand assurance of payment on Watertown. Whatever else had gone before, Paul Bouraxis had no cause to terminate RJA for exercising its contract rights with respect to the Fox Creek-Watertown project, and questioning Fox Creek's financial wherewithal certainly was not cause to terminate RJA on all of the other Bouraxis projects. On the Zignego projects, RJA breached by failing to pay subcontractors and completing the projects timely, and Zignego breached by bypassing RJA and paying subcontractors directly. RJA would like to blame Zignego for the shortfall on River Park Building 7 and the domino effect of failure to pay subcontractors timely on that project, but this is not where the blame lies. The Greils borrowed the money and mortgaged the property; it was not forced on them. Mr. Zignego had a right to be paid on his mortgage, and he had a right to expect that his construction projects would be completed as agreed.

There were numerous construction problems and changes, many of which were dealt with orally, contrary to the contracts, by RJA and the architect, who had offices in the same building. Technical requirements, such as a certificate of substantial completion by the architect, were frequently bypassed in the course of the parties' familiarity in dealing with each other. Some changes to the original plans appear to have been made before the contracts were entered into. Throughout most of the process, indeed until the end, all parties were trying to salvage what they could of these projects and to get the buildings built and sold. A good example of this effort is

the numerous loans made by RJA to Janice Greil to ward off foreclosure of one project or another.[5] Therefore, the court must reach a fair result, notwithstanding technical breaches from time to time. The question for each of the alleged defects and costs is, "Who should bear the cost for *this* problem?"

The court is satisfied that all parties acted in good faith, at least until Paul Bouraxis terminated RJA's involvement in all projects. "'Every contract implies good faith and fair dealing between the parties to it.' [Thus,] 'compliance in form, not in substance' breaches that covenant of good faith." *Bozzacchi v. O'Malley*, 211 Wis.2d 622, 626, 566 N.W.2d 494, 495 (Ct. App. 1997) (citations omitted). The way parties act under a contract helps set the parameters of their agreement. *See Jorgenson v. Northern States Power Co.*, 60 Wis.2d 29, 34-35, 208 N.W.2d 323, 325-26 (1973). Thus, this court is not limited solely to the four corners of the contracts, especially since each party has introduced a great deal of evidence beyond the 'four corners' of the contracts. The court will consider the written contracts as a starting point in discerning the parties' agreements, with modifications consistent with their conduct.

Applicability of AIA Document A101[6]

RJA contends that the contracts utilized by the parties in this case, AIA Document A101, were not guaranteed maximum price contracts. The document is entitled "Standard Form of

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[5]Exhibit #484 shows that RJA transferred about $175,000 to Janice Greil over the course of their relationship to help Mrs. Greil meet her obligations for various projects, and it was still owed almost $80,000 at the time of filing.

[6]The primary standard form contract in the construction industry is developed by the American Institute of Architects (AIA). *See generally*, Sweet, *The American Institute of Architects: Dominant Actor in the Construction Documents Market*, 1991 WIS. L. REV. 317.

Agreement Between Owner and Contractor, where the basis of payment is a Stipulated Sum."[7] RJA points out that the AIA does produce a guaranteed maximum price contract which has been designated AIA Form A111 entitled "Standard Form Agreement Between Owner and Contractor, where the basis of payment is the Cost of the Work Plus a Fee with or without a Guaranteed Maximum Price." (Exh. A - RJA Post Trial Brief.)

Article 4.1 of Document A101, the contract used by the parties, provides "[t]he Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract Sum of ($____), subject to additions and deductions as provided in the Contract Documents."[8] Changes to the scope of the work are accomplished either through a "change order" executed by the contractor or by a "construction change directive" from the owner.[9]

RJA solicited bids from the subcontractors directly. Bids were listed on a breakdown sheet attached to the form contract, and the total of the bids was the total price to be paid by the owner. Each breakdown sheet stated, with insignificant variations, "These figures are the best

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[7]1987 Edition

[8]Article 5.1 of A111, on the other hand, provides that "[t]he Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum consisting of the Cost of the Work as defined in Article 7 and the Contractor's Fee...." RJA argues that any cost savings realized by the general contractor pursuant to an A111 contract accrues to the benefit of the owner as it reduces the amount of costs that he must reimburse the general contractor.

[9]Article 7.1.1 of the general conditions provides:

> Changes in the work may be accomplished after execution of the Contract, and without invalidating the Contract by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

(Exh. 38: AIA Document A201, General Conditions of the Contract for Construction, Article 7.1.1).

estimates to date, although the total contract will not change with out [sic] owner authorization, some of these line items will change due to circumstances beyond our control." (*See, e.g.*, Exh. 42.) RJA then entered into contracts directly with the subcontractors. RJA thus contends that it was to be paid the amounts listed on the breakdown sheets and any realized cost savings – which it might obtain by convincing a subcontractor to lower its bid or by finding a substitute subcontractor to perform the same work for a lower price – were for RJA's own benefit.

The defendants claim that RJA failed to introduce any evidence that either it (1) followed the price adjustment procedure prescribed by the contract documents or (2) obtained the defendants' agreement to increase the contract price for cost overruns or repairs for damage done during construction, except for those changes explicitly agreed to by the defendants. Timothy Zignego testified that he felt the breakdown was a maximum price, and any savings on a particular subcontract should be passed on to him. Nevertheless, the court is satisfied that the parties intended that the owner would pay the total price on the breakdown sheet, which is also generally the total price in the body of the contract. This interpretation of the form language in AIA Document A101, ¶ 4.1, and the added language on the breakdown sheets is consistent with RJA's contention that it was entitled to profit if it could save on the cost of particular line items. Furthermore, this is how RJA realized a profit on other buildings constructed in the same projects. If there had been any markup, and there was scant evidence that there was, it would accrue to RJA. Consequently, the distinction is not significant in light of the evidence presented.

Bid-chopping, Bid-shopping and *Lost Anticipated Profits*

RJA's past practice was to engage in bid shopping or bid chopping. Bid shopping is the practice of a general contractor's revealing to a favored subcontractor, either before or after entering into a contract with the owner, the amount of another subcontractor's low bid and inviting the favored subcontractor to lower his price to meet it. Bid chopping is the practice of a general contractor's coaxing a subcontractor to reduce his bid price without offering corresponding reductions in the work required. RJA claims that the practice of negotiating with subcontractors to obtain a mark-up on the subcontracts after the contract has been awarded, although criticized, is widely practiced and legal in Wisconsin.

RJA claims that it reasonably anticipated a 5% profit from the mark-up on the projects at issue in this case. Dan Russ testified that RJA realized a mark-up on Buildings 1 through 4 and 9 through 15 at Watertown and Buildings A and B at Briarwood of 8.17% and 3.79%, respectively. These projects involved the same group of owners, subcontractors and suppliers as the projects in dispute. RJA asserts that the actions of the defendants prevented it from realizing its anticipated profit.

The defendants claim that the issue of bid shopping is irrelevant in this case since there is no evidence that RJA was in a position to bid shop or bid chop. Additionally, the defendants point out that RJA offered no evidence showing that any subcontractors were willing to renegotiate their bids. Indeed, numerous subcontracts were offered into evidence, and all except one[10] conformed to the breakdown sheet. It would be poor policy to award damages based on the

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[10]Exh. 632 is the subcontract between RJA and Advanced Communication Services, Inc. for, among others, the two Zignego buildings, Buildings 11 and 12 at River Park Meadows, for (continued...)

debtor's hypothetical ability to break its existing contracts. Furthermore, RJA calculated its anticipated profit on such line items as the purchase of land, municipal charges, and work done before the Zignego contracts were entered into.

Generally, one who contracts with the owner of property to construct improvements and who is then prevented from finishing the project by the owner's breach can recover the profits lost as a result of the breach. In Wisconsin, recovery of lost profits for a breach of contract requires three determinations: (1) the defendant's breach of contract must be the proximate cause of the alleged damages; (2) the damages should have been reasonably foreseeable, or within the actual contemplation of the parties at the time they entered into the contract, with the understanding between the parties that the breach of the contract would cause the type of lost profit damages being alleged; and (3) any future profits must be proven with "reasonable certainty." *See* 2 THE LAW OF DAMAGES IN WISCONSIN § 26.4 at 26-6 (Russell M. Ware ed., 2d ed. 1995). Reasonable certainty "does not mean that a plaintiff must prove damages with mathematical precision; rather, evidence of damages is sufficient if it enables the [fact finder] to make a fair and reasonable approximation." *Management Computer Servs.*, 206 Wis.2d at 188; 557 N.W.2d at 80.

Here, RJA's claim for profits, other than its fee as a general contractor, is too speculative and is actually contrary to the evidence. With the minor exception noted, the "profits" portion of RJA's alleged damages will be denied.

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[10](...continued)
the installation of intercom systems at $4,000 per building. The breakdown sheet for Building 12 shows $4,190 for this item. Therefore, RJA is entitled to $190 profit for Building 12.

Change Orders and Construction Change Directives

Dan Russ testified that numerous changes were mandated by the defendants and RJA subsequently incurred increased costs. A change order clause is contained in AIA Document A201 which provides:

> 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:
> .1 a change in the Work;
> .2 the amount of the adjustment in the Contract Sum, if any; and
> .3 the extent of the adjustment in the Contract Time, if any.

(Exh. 38: AIA Document A201, General Conditions of the Contract for Construction, Article 7.2.) A construction change directive clause in AIA Document A201 also provides for changes in the original construction agreement.[11]

Naturally, the purpose for the requirement that extra or changed work not proceed without a written order is to avoid later disputes when the owner claims that the alleged extra work was part of the original undertaking assumed by the contractor by his original fixed price. And had the owner known that the contractor believed otherwise, the owner would have never ordered the performance of the alleged change, or would have ordered that the work be performed in a different or less expensive manner. However, according to the testimony of Dan Russ, it was not

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[11]AIA Document A201 reads as follows:

> 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work and stating a proposed basis for adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.
> 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of the Change Order. . . .

(Exh. 38: AIA Document A201, General Conditions of the Contract for Construction, Article 7.3.)

uncommon for the owners or their representatives to tell him to perform work without a written change order, and that he would be paid after the paper work was completed. Also many of the deviations from the plans were made orally before the contracts were executed. The defendants disagree and claim that RJA presented no tangible evidence that they agreed to waive or modify the change order requirements specified in the General Conditions.

The court finds Mr. Russ' testimony in this regard credible. It is a fact of construction life that if a contractor refuses to proceed with modifications until a complete written change order was processed or changes to the specifications were made, critical delays in completion of the project might ensue.

Various courts have concluded that parties to a construction contract may modify, add new terms or waive their rights in the same manner as may be done under any other type of contract. *See S & M Rotogravure Serv., Inc. v. Baer*, 77 Wis.2d 454, 469, 252 N.W.2d 913, 920 (1977) ("In a number of cases, this court has recognized that a provision in construction contracts requiring written change orders may be avoided where the parties evidence by their words or conduct an intent to waive or modify such a provision."). A balance is sought between the issue of the owner obtaining a windfall in the nature of an unjust enrichment against the unfairness of an owner having to pay for work which it would not have ordered if it knew that the cost would be an extra.

Additionally, clauses of the Construction Change Directives state in the event of a dispute between the owner and contractors the dispute is referred to architect or engineer. (Exh. 38: AIA Document A201, Article 7.3.6 - 7.3.8.) It is most unlikely that the engineer, in this case Mr. Williams, would decide such a dispute against his employer, thus biting the proverbial hand that

feeds him. More importantly, a significant subject of disputes in this case involved the engineer's work, as specifications appeared to be ambiguous, incomplete or missing in some instances.

The court was persuaded that some items were changed informally from those shown on the plans, even before the subcontracts were bid, and even though the specifications were not changed. These included counter tops, bathroom tile, garage insulation, and ventilation in the Zignego buildings, and Mr. Zignego now wishes to recover the cost of the more expensive versions of these items shown in the plans. Mr. Zignego was regularly on site and did not object to these variances, nor did the architect, and there is no evidence of a diminution in value of the finished condominium units attributable to the changes.

The change orders, construction change directives and variances from the plans for which the defendants or RJA shall bear the costs are set forth in the detail at the end of this decision.

Promissory Estoppel & Unjust Enrichment: Hampden Pines & Victoria Place Projects

RJA claims that the court should enforce Paul Bouraxis, Bouraxis Properties LLC and Pinecrest Bay LLC's alleged promises to it under the equitable doctrines of promissory estoppel and unjust enrichment. There was no formal agreement between RJA and Bouraxis Properties regarding construction or marketing of condominiums at either the Hampden Pines or Victoria Place projects. The parties had numerous discussions regarding their working relationship, but whether any agreements between them were ever reached is disputed.

RJA claims that the parties discussed retention of RJA to construct all of the buildings at both sites for a general contracting fee of $25,000 per building plus a percentage of the profit on

sale of the sites. RJA also discussed with the owners of the sites and their agents an arrangement whereby RJA would be paid five percent of the sale price of the condominium units.

RJA also seeks compensation for various pre-construction work it completed. At trial, Dan Russ testified that RJA prepared the necessary plans and engineering documents and attended public hearings before the city planning commission and town board to obtain municipal approval for both projects. RJA met with a city engineer and submitted engineering plans to the municipalities in order to obtain sewer and water approvals. RJA took bids, retained contractors, and supervised site grading, installation of sewer and water, and road construction for the projects. RJA obtained the approval from the City of Franklin to remove the top soil at the Victoria Place Development and obtained free fill for the projects. The company also leased an earth moving machine and hired a person to run it. Additionally, RJA solicited bids for construction of all buildings at Hampden Pines, retained contractors, completed the supporting paperwork and supervised construction of Building 1 at Hampden Pines.

RJA hired Parker Milewski, a real estate broker, as well as New Paradigm, a marketing consultant, to develop a marketing program for the projects. RJA set up a sales office at River Park Meadows for both projects and hired two people to run the office. Furthermore, RJA put up signs and printed brochures, letterhead and folders to use in its sales efforts. RJA also supervised showings of a completed unit and drove interested parties to the building site.

Paul Bouraxis, and his agent Robert Williams, maintain that the parties never reached an agreement pertaining to RJA's marketing or sale of the projects.

The Wisconsin Supreme Court has held that manifestations of intention during negotiations constitute enforceable promises. *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683,

133 N.W.2d 267 (1965). To prevail on a theory of promissory estoppel a plaintiff must show (1) that the promise was one that the promisor reasonably should have expected would induce action or forbearance of a definite and substantial character on the part of the promisee; (2) that the promise did induce the required action or forbearance; and (3) that injustice can be avoided only by enforcing the promise. *Id.* at 698, 133 N.W.2d at 275.

The first inquiry is whether there was a promise, one which Bouraxis reasonably should have expected would induce RJA to take action or forbear from doing so. A promise is a manifestation of intent by the promisor to be bound, and is to be judged by an objective standard. RESTATEMENT (SECOND) OF CONTRACTS § 2, cmt. b (1981 rev. ed.). The *Hoffman* court further emphasized the importance of good faith in negotiations and of protecting the reliance interest even in the face of limited commitment.

The court is not satisfied there was ever a promise by Paul Bouraxis that resulted in reasonable expectation of payment regarding the marketing or sale of the Hampden Pines or Victoria Place projects. The damages claimed by RJA are comprised of three principal elements: (1) construction of a sales office at River Park Meadows and the expenses of running that office; (2) cost of hiring a consultant, New Paradigm; and (3) percentage of ultimate sales. Details of these expenses are at the end of this decision. While Messrs. Bouraxis and Williams may have known about and visited the sales office, and the parties may have intended to finalize an agreement at a later date, neither Dan Russ nor Parker Milewski were able to pinpoint adequately a specific promise that Mr. Bouraxis would pay for the preliminary steps of setting up an office and hiring a consultant. They believed that he would pay, which he denied, but the manifestation of such an intention was too vague to support a finding of promissory estoppel in RJA's behalf.

The more plausible explanation, tendered on Mr. Bouraxis' behalf, is that RJA was preparing itself to enter into a new enterprise and attempting to impress Mr. Bouraxis that it was up to the task. It made an investment in a bid for business that never panned out, but the evidence is simply insufficient to show that Paul Bouraxis should pay for its having done so.

RJA has also sought recovery under the theory of unjust enrichment. In Wisconsin, recovery under unjust enrichment requires (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention of the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. *Gebhardt Bros., Inc. v. Brimmel*, 31 Wis.2d 581, 584, 143 N.W.2d 479, 481 (1966). "[A]n action for recovery based upon unjust enrichment is grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust." *Watts v. Watts*, 137 Wis.2d 506, 530, 405 N.W.2d 303 (1987). Accordingly, unjust enrichment is based on equitable principles, with damages being measured by the benefit conferred upon the defendant, not the plaintiff's loss. *See Ramsey v. Ellis*, 168 Wis.2d 779, 785, 484 N.W.2d 331, 333 (1992).

Here, the creation of a sales office to pre-sell Hampden Pines and Victoria Place condominium units conferred no benefit to Paul Bouraxis or his entities. No units were sold, as construction was behind, and there was nothing for RJA to sell. Bouraxis eventually engaged Equitable-Stefaniak to sell the units, so RJA was not able to follow through on the selling enterprise it had hoped for.

On the other hand, Bouraxis did receive a benefit from the building of Building 1 at Hampden Pines, and equity requires that the benefit be paid for. This is addressed in the next section.

Hampden Pines & Victoria Place: 5% Sales Commission, Percentage of Profits, Construction

The defendants, Pinecrest Bay LLC, Bouraxis Properties LLC and Paul Bouraxis, have asserted that RJA cannot receive commissions from the sale at the condominium units at Hampden Pines and Victoria Place because such a claim is barred by the Wisconsin Statute of Frauds, Chapter 241, Stats.,[12] and the Wisconsin Broker Statute, Chapter 452, Stats.

[12]This court previously granted summary judgment dismissing Count 15 as to RJA's claim for recovery of a 5 % commission for being in violation of the Statute of Frauds relating to sale of real estate. Since the Statute of Frauds only addresses an agreement for payment of commissions, this court ruled that RJA's claims for recovery of out-of-pocket marketing expenses could be pursued under Counts 16 and 17.

RJA admits that it was not a broker as defined in Wis. Stat. § 452.01(2),[13] and it did not hold itself out to be a broker in violation of Wis. Stat. § 452.03.[14] According to RJA, it never offered, negotiated or attempted to negotiate the sale of the properties in question as there were no properties to sell. The marketing staff employed by RJA could and did provide information to interested parties regarding the projects, but could not sell or even attempt to sell the unit. The

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[13]A "broker" means any person who:

(a) For another, and for commission, money or other thing of value, negotiates or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate;

(b) Is engaged wholly or in part in the business of selling real estate to the extent that a pattern of real estate sales is established, whether or not such real estate is owned by such person;

(d) For another and for commission, money or other thing of value, negotiates or offers or attempts to negotiate a sale, exchange, purchase or rental of any business, its goodwill, inventory, fixtures or an interest therein; or

(e) Is engaged wholly or in part in the business of selling business opportunities or goodwill of an existing business or is engaged wholly or in part in the business of buying and selling, exchanging or renting of any business, its goodwill, inventory, fixtures or an interest therein.

(f) For another, and for commission, money or other thing of value, negotiates or offers or attempts to negotiate a sale, exchange or purchase of a time share.

(g) Is engaged wholly or in part in the business of selling time shares to the extent that a pattern of sales is established, whether or not the time shares are owned by such person.

Wis. Stats. § 452.01(2).

[14] Wisconsin statutes prohibit anyone from acting as a broker without a valid license:

> No person may engage in or follow the business or occupation of, or advertise or hold himself or herself out as, or act temporarily or otherwise as a broker or salesperson without a license. Licenses shall be granted only to persons who are competent to transact such businesses in a manner which safeguards the interests of the public, and only after satisfactory proof of the person's competence has been presented to the department.

Wis. Stat. § 452.03.

defendants disagree with RJA's characterization of their marketing efforts; all of RJA's actions were part of an effort to pre-sell the condominium units.

In addition, Parker Milewski, a licensed real estate broker, was employed by RJA to serve as project manager. RJA further argues that it was eligible for a license and had begun to get a license at the time it was terminated. Section 452.12(2)(a), Wis. Stats., sets forth the standard by which corporations may obtain real estate broker licenses:

> A license may be issued to a business entity if the business entity has at least one business representative licensed as a broker. The license issued to the business entity entitles each business representative of the business entity who is a licensed broker to act as a broker on behalf of the business entity.

Wis. Stat. § 452.12(2)(a). RJA claims that prior to executing a listing contract for the sale of any of the units, it contemplated taking the steps necessary to ensure that it was properly licensed. While it may have intended to enter the sales arena, it did not do so, hence the denial of commissions on summary judgment.

RJA claims that the parties' agreement to pay RJA an amount equal to 5% of the sales price of the condominium units is not a commission agreement within the meaning of § 240.10(1), but rather a bonus for work done on the entire project. Since there was nothing to sell, RJA asserts that it was under no obligation to close sales or list the properties. The percentage payment was instead primarily for all the other services which were performed before the sales. In any event, RJA asserts that the defendants are estopped from asserting the Statute of Frauds defense because they have admitted under oath the essential terms of the contract, i.e., that RJA would be paid a percentage of the ultimate sales prices of the condominiums.[15]

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[15]RJA points out that § 240.10 is a codification and extension of the Statute of Frauds to (continued...)

Equitable-Stefaniak was eventually hired to market the condominiums. If RJA receives a percentage of sales as a "bonus" for constructing condominiums, this would avoid the effect of the statute restricting commissions to qualifying brokers. It would also mean that Mr. Bouraxis would bear the cost of double commissions, plus the cost of a marketing consultant and setting up a sales office, which was not necessary with Equitable-Stefaniak. Dan Russ testified to a confusing mix of discussions, relating to various possible percentages of sales for compensation, a marketing component independent of sales, and sales commissions, the total of which would be substantially in excess of that which would be paid to a broker. The compensation package claimed by RJA is too vague, any agreement by Paul Bouraxis is denied, and the court is satisfied

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[15](...continued)
real estate brokers contracts. *Hale v. Kreisel*, 194 Wis. 271, 272, 215 N.W. 227, 228 (1927).

> Every contract to pay a commission to a real estate agent or broker or to any other person for selling or buying real estate shall be void unless such contract or note or memorandum thereof describes that real estate; expresses the price for which the same may be sold or purchased, the commission to be paid and the period during which the agent or broker shall procure a buyer or seller; is in writing; and is subscribed by the person agreeing to pay such commission, except that a contract to pay a commission to a person for locating a type of property need not describe the property.

Wis. Stat. § 240.10(1). The underlying policy of the Statute of Frauds is to prevent fraud from being committed by brokers against sellers based upon oral representations made by the broker and from misunderstandings of the terms of the agreements. *Id.* RJA argues that this purpose is not served in this instance where the defendants have substantially admitted to the contract on the record. (Deposition of Robert Williams, 3/4/98, pp. 48-49); *see also Dairyland Financial Corp. v. FILB of St. Paul*, 852 F.2d 242, 246 (7th Cir. 1988) (holding that Wis. Stat. § 401.206(3) Statute of Frauds exception applies where the existence of a contract is admitted or where there are admissions to circumstances from which a contract can be implied). The court previously ruled that the specific statute relating to real estate brokers supercedes the general statute of frauds, and nonbroker RJA can make no claim to commissions or to damages for lost commissions.

there was no meeting of the minds forming an agreement for payment of any percentage of sales. Therefore, RJA's claim to a percentage of sales as a bonus must fail.

Finally, RJA wishes to be compensated for the work it did on Building 1, notwithstanding the lack of a written contract. Whether the Statute of Frauds applies to construction contracts is a question which has generated considerable disagreement. *See* Marshall, *The Applicability of the Uniform Commercial Code to Construction Contracts*, 28 EMORY L.J. 335, 336 (1979). The issue is difficult because the Statute of Frauds applies to sales of goods, but not to sales of services, and construction contracts typically include both sales of goods and the services required to install those goods within the project. Notwithstanding, the Uniform Commercial Code specifically provides that, despite its provisions, estoppel remains viable. Section 1-103 provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including . . . estoppel . . . shall supplement its provisions." U.C.C. § 1-103. Here, RJA completed a portion of Building 1 ($5,000 was paid to another contractor to finish the building after RJA was dismissed from all projects), which conferred a benefit on the owner, and it should be paid for the services it performed. Consequently, the Statute of Frauds defense will not be applied to its services as a general contractor. As it was generally agreed that the construction management fee would be $25,000 per building, and $5,000 was paid to another contractor for its portion of the work, RJA is due $20,000 for the work it completed.

No construction was done by RJA at Victoria Place. Since it cannot recover a percentage of the condominium sales prices for the same reason it cannot recover for a percentage of sales at Hampden Pines, no recovery for Victoria Place will be allowed.

River Park Meadows Road Grading

Before the Zignego buildings were built, River Park Meadows, through RJA, contracted to have rough grading done and gravel roads put in so equipment could get to the building pads to erect the buildings. This was done well before December 22, 1996, the date the Zignego contracts were entered into. In fact, the building foundations were done by Mr. Zignego's contractors before these two contracts were signed, so the cost breakdowns attached to the contracts included some items already complete or underway when RJA officially took over as general contractor. Apparently, some of these precontract subcontracts had been arranged for by RJA on Mr. Zignego's behalf.

Unfortunately, the rough grading was not done correctly. The grade was too high, which meant that Mr. Zignego had flooded garages, and the handicap ramp, as designed, would be too steep and had to be redesigned. Mr. Zignego would like for RJA to bear the cost of this redesigned ramp, and the cost of catch basins and sump pumps needed to take care of excess drainage. He testified that RJA should have checked the grade in the common area and fixed it. The court holds that this is beyond the scope of the contracts relating to the buildings themselves. The builder of each building is not responsible for the surrounding area, nor is it reasonable to expect the general contractor to guarantee or fix that work. Mr. Zignego must look to River Park Meadows Limited Partnership if work in the common areas resulted in extra cost to him.

Similarly, RJA is not responsible for the wrong pipe being installed before the basement foundation was laid, also before the contract was entered into. The plans called for a four inch pipe, rather than the six inch pipe that was installed. The extra water capacity called for substantially higher assessments by the city, and Mr. Zignego opted to replace the pipe. Again,

the contractor cannot be expected to guarantee work done by someone else before the contractor took the job. In fact, TDI acknowledged that it or the installer were at fault. (Exh. 623.) If the difficulties that might be encountered are reasonably foreseeable, the general contractor might be responsible; however, if the owner has undertaken work, is apparently satisfied with it, and hands the product to the general contractor to finish, that defect is the owner's problem, not the general contractor's.

Roof Construction and Design

One of the claims by both defendants was for roof repairs at River Park Meadows. The roofs were built so water running down the intersection of two planes ran into a steeper pitched plane, which acted like a dam and eventually caused leaks. The owners blamed RJA. Dan Russ testified that the roofs were constructed as designed, so he blamed the architect. The original roofers testified that they spoke to either Dan Russ or Doug Dominick of RJA about a potential problem, but they were told that "ice and water shield," a membrane that would help prevent leaks at the intersection, was not in the budget. One roofer put ice and water shield at his own expense on the eight-family roofs, but this was not done for the sixteen-family roofs. Apparently the problem was only likely, not inevitable.

The roofers could only put roofs where the carpenters had put framing, and there was no evidence that either the roofing or carpentry were done other than according to the plans. Indeed, it is unlikely that everyone working on these buildings would have gotten it wrong in about eighteen different places. The architectural engineer, Robert Williams, testified that the plans did not call for an intersection that caused an ice and water build-up, but no one from his firm ever

objected to the construction, even after it was complete. Mr. Williams also said that ice and water shield was in the specifications, but this was denied by Dan Russ, and clearly this was not communicated to the roofers who were submitting bids. Consequently, the court is satisfied that leakage problems and associated repairs were a result of roof design and specifications, not construction, and RJA should not bear the cost of these problems.

Miscellaneous

The parties have thrown every possible claim against each other, even those for which there was no notice to the other side before this action was filed, as was required for either party to recover under the contracts. One consideration in allocating the cost of a particular item is whether RJA was on the job when the cost was incurred. If the problem might have been fixed without cost to the owner by enforcing the subcontractor's guarantee or by making other arrangements, such as punch list items, RJA should not be charged. This is primarily applicable to the Bouraxis projects, where RJA was summarily dismissed from all projects (not that it was in compliance with all contracts at that point) upon asking for proof of insurance coverage on one. On the other hand, if a problem was caused by lack of supervision, and the court was satisfied that the gap caused by the departure of Darsi Mateicka from River Park Meadows' employ was not adequately filled by Dan Russ, then RJA should bear the cost. Even though Tim Zignego was paying the bills and overseeing much of what was happening, this should not have prevented RJA from making sure work was done properly, in the right order, and guarantees were honored.

RJA's claim for "general conditions" on each project is primarily for its fees as a general contractor. This is for things like obtaining the subcontractors, supervising them, getting permits, and generally seeing that the project was built. RJA did not have an opportunity to complete the Bouraxis projects. Even though there were deficiencies on both sides, RJA was deprived of completing the projects and earning its general conditions fees for reasons that were inadequate under the circumstances. Therefore, it is entitled to unpaid general conditions on the Bouraxis projects.

RJA completed the Zignego projects, but not on time, and it did not fulfill all the duties of a general contractor, such as paying and adequately supervising subcontractors. Mr. Zignego testified, however, that he used the services of the subcontractors hired by RJA, unless there was a compelling reason not to do so. There should be a reduction of its general conditions claim based on its reduced services. To date RJA received over half of its fee for Building 11 and three quarters of its fee for Building 12. In light of its inability to perform many of the duties it should have, that is enough.

RJA has asked for "Unreimbursed Direct Expenses" incident to performance of its duties as a general contractor, such as dumpsters and portable toilets. These are not on the breakdown sheets of items to be paid for by the owners. Therefore, these are RJA's cost of doing business and cannot be charged to the owners.

Timothy Zignego has requested interest for extra financing costs during the period his projects were delayed. This is not provided for by the General Conditions of AIA Document A201. RJA also wishes to charge interest pursuant to ¶ 13.6.1 of the General Conditions for failure to make prompt payment. However, in light of RJA's deficiencies, and the justifiable

challenges that the owners brought with respect to RJA's performance, it is not entitled to interest either.

In the section that follows, costs are allowed to RJA if a defendant should be responsible for those costs, or they are allowed to a defendant if RJA should be responsible for the cost. This is not to say that a party who is charged with an item is the proper entity to bear the burden of cost. Recovery may be sought or might have been recovered from a third party. An example is the catch basins, sump pump, and ADA ramps on the Zignego buildings, for which Mr. Zignego might have a right of recovery against the grading contractor or River Park Meadows, but not RJA. Even if RJA is charged with an item, a claim by the subcontractor may be disallowed. Such a cost cannot be recovered from, or allowed against, the adverse party in this action.

Claims and Set-Offs - Zignego Entities

River Park Meadows Building 11	Requested Amount	Amount Allowed
Claims of RJA		
Profit	$62,000.00	$0
General Conditions	$8,291.65	$0
Unreimbursed Direct Expenses		
Wisconsin Electric Co. - gas	$1,136.16	$0
Wisconsin Electric Co. - electric	$589.34	$0
Cotton Disposal	$377.58	$0 (Release)
DF Tomasini	$640.61	$0 (Release)
Jahnke & Jahnke	$426.21	$0 (Release)
Satellite Shelters	$12.97	$0
RJA (miscellaneous)	$1,000.00	$0
Unreimbursed Subcontractor Expenses		
Etch Coat & Glaze	$117.19	$0
Priority One Millwork[16]	$4,291.65	$4,291.65

[16]This cost is the difference between vinyl and oak trim. The original bid was for vinyl, and the owners demanded oak. The reason for the original bid was disputed, but since Mr. Zignego's buildings received the value of what was installed, and what should have been bid in

(continued...)

Contract Interest	$9,062.64	$0
Total		$4,291.65

Set-Off Claims of Zignego Brothers

Cost overruns[17]	$42,364.39	$27,054.47
Bar type countertops	$16,160.00	$0
K-13 sprayed insulation	$17,689.00	$0
Motor operated dampers	$640.00	$0
Carbon monoxide detection equipment	$2,400.00	$0
Ceramic tile not installed	$1,520.00	$0
Thermostatically controlled heaters	$3,300.00	$0
Total		$27,054.47

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[16](...continued)
the first place, they should bear the cost.

[17]The following costs are allocated to RJA:

Trapp & Hartman	$1,016.03
Navan Construction	97.51
Lift Truck Specialists	131.21
All-Ways Construction	6,876.00
General Fire Equip.	612.48
S.D.C. Drywall	800.00
Parking Lines	100.00
Sussex Do-It	243.31
Cotton Disposal	300.00
Chicago Title	2,720.00
Parking Lines	80.00
Roto Rooter	105.00
Parking Lines	184.00
Halquist	2,409.18
Cotton Disposal	650.00
Lake Mills Blacktop	3,442.00
ZRM	1,322.86
Lieds	180.39
S.D.C. Drywall	137.50
Navan Construction	1,580.00
Affordable Painting	730.00
Grade A Construction	60.00
Merit Asphalt	3,012.00
Reginal Insurance	265.00
TOTAL	$27,054.47

River Park Meadows Building 12	Requested Amount	Amount Allowed
Claims of RJA		
Profit	$62,562.76	$190.00
General Conditions	$5,000.00	$0
Unreimbursed Direct Expenses		
Wisconsin Electric Co. - gas	$121.22	$0
Wisconsin Electric Co. - electric	$321.03	$0
Cotton Disposal	$688.78	$0 (Release)
DF Tomasini	$610.60	$0 (Release)
Jahnke & Jahnke	$426.20	$0 (Release)
Satellite Shelters	$12.97	$0
RJA (miscellaneous)	$1,000.00	$0
Unreimbursed Subcontractor Expenses		
RJA for Trapp & Hartman SC	$3,000.00	$0 (Release)
RJA for contingency account	$6,436.64	$0
Priority One Millwork	$2,207.14	$0
Horner Plumbing	$3,440.00	$0 (Release)
Contract Interest	$9,835.08	$0
Total		$190.00
Set-Off Claims of Timothy Zignego		
Cost overruns	$30,568.49[18]	$4,785.86[19]
Extra interest paid due to delay	$12,275.93	$0

[18]The Zignego brief states that overpayments were $28,378.49, but Exhs. 623 & 665 (Tab N) show $30,568.49. As the court cannot reconcile the difference, the amount shown in the exhibits is used.

[19]The following costs are allocated to RJA:

TDI Associates	$393.04
Chicago Title	906.67
Parking Lines	95.00
S.D.C. Drywall	137.50
Badgerland	9.93
Grade A Construction	1,200.00
Regional Insurance	291.00
Brinkman Construction	65.00
Merit Asphalt	896.00
Brinkman Construction	65.00
Dunne-Rite	227.72
Regional Insurance	499.00
TOTAL	$4,785.86

Bar type countertops	$16,160.00	$0
K-13 sprayed insulation	$17,689.00	$0
Motor operated damper tops	$640.00	$0
Carbon monoxide detection equipment	$2,400.00	$0
Ceramic tile not installed	$1,520.00	$0
Thermostatically controlled heaters	$3,300.00	$0
Total		$4,785.86

Claims and Set-Offs - Bouraxis Entities

River Park Meadow Building 1	Requested Amount	Amount Allowed
Claims of RJA		
Profit	$22,971.50	$0
General Conditions	$3,000.00	$3,000.00
Unreimbursed Direct Expenses		
A.J. Anich	$1,240.82	$0
Chicago Title Company	$935.00[20]	$935.00
Cotton Disposal	$699.80	$0
Halquist Stone Company	$243.89	$0
Wisconsin Electric Co. - electric	$225.67	$0
Wisconsin Electric Co. - gas	$295.75	$0
Clark Services	$595.00	$0
D.F. Tomasini	$430.39	$0
Halquist Stone Company	$116.50	$0
Jahnke & Jahnke	$213.84	$0
Satellite Shelters	$12.96	$0
TDI	$662.26	$0
Cotton Disposal	$889.06	$0
Unreimbursed Subcontractor Expenses		
Geis Building Supply	$4,200.00	$0
Hoida Lumber	$199.84	$0
Lighting Gallery	$2,907.18	$2051.76
Priority One Millwork	$590.01	$0
Stock Lumber	$5,067.53	$0
Contract Interest	$6,138.30	$0
Total		$5,986.76
Set-Off Claims of Paul Bouraxis		
Construction completion and supervision	$5,000.00	$0

[20]It is not clear why this was billed to RJA as it is for an owner's policy.

Roof repairs[21]	$2,500.00	$0
Extra cedar siding to complete building[22]	$3,500.00	$3,500.00
Total		$3,500.00

Fox Creek Watertown Buildings 5 - 8	Requested Amount	Amount Allowed
Claims of RJA		
Profit	$47,200.00	$0
General Conditions	$11,500.00	
Unreimbursed Direct Expenses		
Port-A-John	$237.40	$0
Satellite Shelters	$316.48	$0
Sanifill	$50.00	$0
Earth Dimensions	$1,285.30	$0
Briarwood Associates	$2,380.00	$0
Unreimbursed Subcontractor Expenses[23]		
Hoida Lumber	$285.00	$0
Alpine Insulation	$7,280.00	$0
Horner Plumbing	$12,503.00	$11,000.00
Ken Sandberg	$10,460.00	$1,000.00
Williams Heating	$15,200.00	$8,600.00
RJA (clean-up reimbursement)	$802.48	$683.76
Gypsum Floors	$1,385.00	$1,150.00
Lifetime Door Co.	$2,792.00	$0
JSE Electric	$5,944.00	$5,944.00
Contract Interest	$16,772.10	$0
Total		$28,377.76
Set-Off Claims of Fox Creek Limited Partnership		
Payment to DG Ltd. Design Services	$17,679.85	$0
Anticipated cost to repair retaining walls[24]	$3,000.00	$0
Anticipated costs to repair drainage	$3,500.00	$0
Anticipated cost to repair asphalt	$1,000.00	$0

[21]Repair of problem caused by architect, TDI.

[22]RJA conceded that it owed this set-off claim.

[23]Exhs. 66, 81, 96, & 109 indicate that most of these were paid from draws.

[24]Retaining walls on Hwy. 26 are the responsibility of the developer, not the contractor for a nearby building pad.

Anticipated cost to repair landscaping	$2,000.00	$0
Anticipated cost for misc. punch list items	$2,500.00	$0
Overpayment for project	$47,414.76	$0
Total		$0

Fox Creek Briarwood Building C	Requested Amount	Amount Allowed
Claims of RJA		
Profit	$42,500.00	$0
General Conditions	$5,000.00	$1,000.00
Unreimbursed Direct Expenses		
Sanifill	$2,156.16	$0
World Wide Refinishing Systems	$195.18	$0
GTE	$96.37	$0
Unreimbursed Subcontractor Expenses		
Berg Construction	$4,555.50	$0
Briarwood Associates[25]	$9,270.00	$0
Navan Construction	$600.00	$0
RJA (management fees)	$1,718.50	$0
Contract Interest	$8,541.45	$0
Total		$1,000.00

Set-Off Claims of Fox Creek Limited Partnership		
Overpayment	$16,000.00	$0
Payments to DG Ltd. Design & Construction	$8,680.00	$0
Anticipated cost to repair landscaping	$2,600.00	$0
Anticipated repair of electrical problems	$1,800.00	$0
Anticipated repair of plumbing problems	$1,200.00	$0
Anticipated cost for misc. punch list items	$4,000.00	$0
Total		$0

Hampden Pines	Requested Amount	Amount Allowed
Claims of RJA		
Profit	$34,060.00	$0
General Conditions	$20,000.00	$20,000.00
Unreimbursed Direct Expenses		

[25]This charge is apparently for landscaping that was not done because funds were used to pay an unexpected charge by Banaszak Plumbing. Nevertheless, RJA contracted to complete both sewer and water hookup and landscaping.

RJA	$3,330.28	$0
Deboth & Borkowski	$3,449.00	$0
Wisconsin Electric (line set-up)	$94.59	$0
Ameritech (fax set-up)	$236.17	$0
Ameritech (set-up)	$216.09	$0
Ameritech direct sales no.	$103.74	$0
New Paradigm	$43,216.90	$0
Heritage Printing	$43.49	$0
Shu Signs	$113.51	$0
DH Graphics	$212.68	$0
Dawn Deaton (expense reimb.)	$494.64	$0
Shawn Stark (expense reimb.)	$11.70	$0
Dawn Deaton (payroll)	$2,826.09	$0
Lorra Lee Reinhaus (payroll)	$7,114.57	$0
Unreimbursed Subcontractor Expenses		
Allied Building Products	$8,058.75	$8,058.75
Horner Plumbing	$160.00	$160.00
Port-A-John	$156.64	$156.64
Trapp & Hartman SC	$985.00	$985.00
Waste Management	$531.14	$531.14
West & Associates	$475.00	$475.00
Contract Interest	$16,270.87	$0
Total		$30,366.53
Set-Off Claims of Bouraxis Properties LLC[26]		
Excess amounts paid for lumber	$15,591.50	$0
Excess amounts paid for stone	$3,378.00	$0
Excess amounts paid for excavation	($1,598.00)	$0
Excess amounts paid for rough carpentry	$4,581.00	$0
Total		$0
Victoria Place		$0

[26]There was insufficient justification for excess cost. *See* Exh. 404. Because RJA was improperly terminated from all Bouraxis projects, RJA was denied the opportunity to keep its subcontractors within budget. Similarly, there was insufficient proof that RJA's subcontractor expenses were paid by the subsequent general contractor.

CONCLUSION

For the reasons set forth above, defendant Zignego Brothers shall have a claim against RJA for $22,762.82, and defendant Tim Zignego shall have a claim against RJA for $4,595.86, both of which are allowed in the bankruptcy case. RJA shall have judgment against Paul Bouraxis for $2,486.76, judgment against Fox Creek Limited Partnership for $29,377.76, and judgment against Bouraxis Properties LLC for $30,366.53.

A separate order consistent with this decision will be entered.

Dated at Milwaukee, Wisconsin, March 3, 1999.

BY THE COURT

Honorable Margaret Dee McGarity
United States Bankruptcy Judge