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Case No.: _____

**IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA**

**UNITED RIGGERS & ERECTORS, INC.,
Plaintiff and Respondent,**

vs.

**COAST IRON & STEEL CO.,
Defendant and Appellant.**

**SUPREME COURT
FILED**

JAN 20 2016

Frank A. McGuire Clerk

Deputy

After a Decision By the Court of Appeal,
Second Appellate District, Division One
Case No. B258860

PETITION FOR REVIEW

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**TO THE HONORABLE CHIEF JUSTICE AND HONORABLE
ASSOCIATE JUSTICES OF THE SUPREME COURT OF
CALIFORNIA:**

Petitioner Coast Iron & Steel Co. (“Coast”) seeks review of the published opinion by the Court of Appeal, Second Appellate District, Division One, filed November 23, 2015, and modified on December 3, 2015 (Exhibit “A”). Order for publication on December 18, 2015. No rehearing was requested.

QUESTION PRESENTED FOR REVIEW

This case presents the following questions for review:

Issue One - the meaning of *Civil Code* §§ 8814 and 8818.

The Court of Appeal below identified the issue as follows: “at issue is whether a contractor may withhold the retention when there is a good faith dispute of any kind between the contractor and a subcontractor, or only when the dispute relates to the retention itself.”

Issue Two - determination of attorneys fees.

Where a plaintiff sues for retention under *Civil Code* §8814 and late payments under *Business and Professions Code* §7108.5 and prevails on the retention issues but the defendant prevails on the late payment issues, how are attorneys fees determined?

WHY REVIEW SHOULD BE GRANTED

California intermediate courts are in conflict with regard to the progress payment and retention payment statutes of the State. Contractors and governmental authorities need guidance as to how to conduct themselves in the thousands of construction disputes that occur every year in California.

There is a statutory scheme in California with regard to payment of retention and progress payments both with regard to public works and private construction projects. (*Public Contract Code* §7107, *Business and Professions Code* §7108.5, and *Civil Code* §8800 et seq.). These statutes are functional equivalents. There are no published decisions discussing *Business and Professions Code* §7108.5 or *Civil Code* §8800 et seq. There are two published opinions that address *Public Contract Code* §7107. The Trial Court in this case relied upon *Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.* (2009) 179 Cal.App.4th 1401 (“*Martin Brothers*”) for guidance. During the pendency of the appeal, a panel in the Second District issued its opinion in the *East West Bank v. Rio School District* (2015) 235 Cal.App.4th 742 (“*East West Bank*”) case which was completely contrary to the *Martin Brothers* opinion. The panel in this case followed the *East West Bank* opinion, but ignored *Business and Professions Code* §7108.5 and the fact that under any circumstance, Defendant prevailed under that statute.

This Court's guidance in this case will provide the entire construction industry in California with insight into the statutory payment and retention rules for both public and private projects.

The appellant subcontractor in *Martin Brothers* argued that section 7107(e) "cannot be applied to allow withholding of undisputed retentions." *Martin Brothers, supra*, at 1411. The court there rejected the argument that section 7107(e) only allowed withholding where there is a dispute over retention, as opposed to a dispute over other matters such as claims for extra work. Justice Cantil-Sakauye explained:

The statute contains no language restricting the word "dispute" to any particular kind of dispute other than it must be "bona fide." The ordinary meaning of "dispute" is a "verbal controversy," a "debate," or "quarrel." (Merriam-Webster's Collegiate Dict. (11th ed.2006) p. 362, col. 1.) A controversy, debate or quarrel, i.e., a dispute, does not change its character depending on its subject. The subject is immaterial to its nature as a dispute. Indeed, in the context of construction litigation, a dispute may arise between a general contractor and a subcontractor concerning any number of subjects, including, but not limited to, nonperformance, improper or substandard performance, the timing of performance, or additional performance of work.

Martin Brothers, supra, at 1412.

In its opinion, the Court in the instant case stated:

The *Martin Brothers* court affirmed the trial court's judgment denying the subcontractor relief. (*Martin Brothers, supra*, 179 Cal.App.4th at pp. 1417-1418.) The court rejected the subcontractor's argument that, because the statute was

intended to protect subcontractors, contractors were entitled to withhold retention payments only if there was a dispute over the amount of retention owed. (*Id.* at p. 1411.) It concluded that the statute was not ambiguous: "The statute contains no language restricting the word 'dispute' to any particular kind of dispute other than it must be 'bona fide.'" (*Id.* at p. 1412.)

In reaching that conclusion, the court in *Martin Brothers* failed to pay sufficient heed to our Supreme Court's instruction that, when interpreting the plain meaning of a statute, "[w]e do not examine [its] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) As the *Martin Brothers* court acknowledged, the remedial purpose of the prompt payment statutes is "to encourage general contractors to pay timely their subcontractors and to provide the subcontractor with a remedy in the event that the contractor violates the statute." (*Martin Brothers, supra*, 179 Cal.App.4th at p. 1410, quoting *Morton Engineering & Construction, Inc. v. Patscheck* (2001) 87 Cal.App.4th 712, 720.) Yet its interpretation of "dispute" promoted the opposite result."

The court then adopted the *East West Bank* analysis but assumed there was no *Business and Professions Code* §7108.5 issue.

Second, if this Court adopts the analysis of the *East West Bank* Court, which it should not, an additional issue is raised. In this case, plaintiff pled a cause of action for recovery of retention (*Civil Code* §8814) and also for delayed payment (*Business and Professions Code* §7108.5). The Trial Court ruled that Coast prevailed on both issues. The Court of Appeals below held that Coast prevailed on the delayed payment issue but that United Riggers

prevailed on the retention issues. If United Riggers prevailed on the retention issue, and Coast prevailed on the delayed payment issue, how should the trial court, on remand, determine the attorney fee award?

SUMMARY OF THE CASE

Coast is a licensed contractor and steel fabricator. United Riggers is a licensed contractor and erector. Both Coast and United Riggers submitted competing bids for a project at Universal Studios known as Project Dervish. Universal, the owner of the project, accepted Coast's bid, and on October 18, 2010, entered into a contract (the "Construction Contract") with Coast to provide Miscellaneous Metals Work for the project. (Volume 1 of Clerk's Transcript "CT" pages 26-128). Coast then hired United Riggers as a subcontractor on or about May 31, 2011 for the project by way of a purchase order. (1 CT 129). The parties entered into the lump sum purchase order in which Coast agreed to pay United Riggers \$722,742.00 for its work.

Under the purchase order between Coast and United Riggers, United Riggers agreed to "furnish all labor, supervision, equipment, supplies, tools, scaffolding, hoisting, layout, unloading and handling, incidentals, permits, licenses, taxes and everything else required to perform and complete the work required to install all Miscellaneous Steel per the Subcontract Agreement between Coast Iron & Steel Co. and Universal City Studios LLLP dated

10-18-10 (USH-10-6313-AMJ), which is attached and made a part of this agreement. All work is to be performed in accordance with the General Contract and the Contract Documents referred to in the General Contract. . . .All work is to be performed per the project schedule which is subject to change." (1 CT 129) (emphasis added).

The purchase order also states that United Riggers "agrees to be bound to Coast Iron & Steel Co. as Coast Iron & Steel Co. is bound to the Contractor and as the Contractor is bound to the Owner." (1 CT 129).

There were several issues that affected the project at Universal Studios; Both parties were well aware of these potential exigencies which were detailed in the Construction Contract. (1 CT 37: 1.4) First, the project could be shut down on a moment's notice due to filming, as Universal Studios is a functioning film studio. (Volume 4 of Reporter's Transcript "RT" page 1527, lines 23-26). Parking and storage at the job site was extremely limited since the project was located in a functional film studio and amusement park. Each contractor was limited to one parking pass. (4 RT 1526:26-1527:20).

The original lump sum purchase order called for Coast to pay United Riggers \$722,742.00. However, through a series of change orders, Coast paid an additional \$773,237.50 to United Riggers. (3 CT 922:1-4). *See also*, Trial Court's Statement of Decision page 2, lines 18-21, Exhibit 1 to Appellant's

Motion to Augment the Record "MA"). This additional amount more than doubled the purchase order price to a total of \$1,495,979.50 that was paid to United Riggers. The additional amount was paid through a series of change orders authorized by the Construction Contract. (Paragraph 12.2 of the Construction Contract, which is incorporated into the purchase order, covers "Claims for Increases in the Contract Sum" 2 CT 125.) That provision specifically requires that written notice of claims for extra compensation be given no "later than three (3) days after the occurrence of the event giving rise to the claim..." (Id.)

Throughout the duration of the project, United Riggers utilized the process of submitting change order requests when the scope of work changed. United Riggers was compensated accordingly when those change orders were approved by Universal, which represented the additional \$773, 237.50 paid to United Riggers.

Shortly after work was completed at Project Dervish, on or about March 27, 2012, United Riggers sent Coast a "claim" for payment for extra work. United Riggers demanded that Coast pay an additional \$352,542.40 by claiming that Coast lost parts, failed to communicate properly, made fabrication errors, caused delays, and failed to pay outstanding change orders. (Exhibit 3 to AOB). Coast disputed these claims. United Riggers filed its

complaint on January 24, 2013.

United Riggers sued Coast (in part) under *Civil Code* §§ 8814, 8818 (wrongful withholding of retention) and *Business and Professions Code* §7108.5 (delayed progress payments). See Complaint Third Cause of Action, (1 CT 19).

After a nine day bench trial between May 12 and 22, 2014, the Trial Court found that United Riggers' claims for money as set forth in its complaint were not submitted for approval via the change order process required by Paragraph 12.2 of the Construction Contract. (Exh. 1 to MA 2:22-27). Notably, United Riggers' own expert witness testified that any extra work by United Riggers was the "direct result of disruption caused by [Universal]'s scope changes" (4 RT 1232:21-25). The Trial Court entered its Statement of Decision on July 15, 2015 (Exh. 1 to MA). Coast then moved for its attorney fees on July 29, 2015 (2 CT 272-287), to which United Riggers filed an opposition on August 14, 2015 (2 CT 288-307), and Coast filed a reply on August 21, 2014 (2 CT 325-330). United Riggers filed a motion to strike or tax costs on August 15, 2014 (2 CT 312-324), to which Coast filed an opposition on August 28, 2014 (2 CT 338-351). After carefully considering written briefs and oral arguments, the Trial Court awarded Coast \$150,000 in attorney fees. United Riggers filed its notice of appeal on September 11, 2014.

DISCUSSION OF LEGAL PRINCIPALS

THE TRIAL COURT WAS CORRECT IN HOLDING THAT COAST DID NOT VIOLATE THE PROMPT PAYMENT STATUTES.

A. The Prompt Payment Statutes

"California has a series of so-called 'prompt payment' statutes that require general contractors to pay their subcontractors within specified, short time periods, and that impose monetary penalties for violations. *Business and Professions Code* section 7108.5 and *Public Contract Code* section 7107 are two of those statutes." *Martin Brothers. Const., Inc. v. Thompson Pacific Const., Inc.* (2009) 179 Cal.App.4th 1401, 1409 (quoting *Tesco Controls, Inc. v. Monterey Mechanical Co.* (2004) 124 Cal.App.4th 780, 800).

1. California Civil Code section 8814:

(a) If a direct contractor has withheld a retention from one or more subcontractors, the direct contractor shall, within 10 days after receiving all or part of a retention payment, pay to each subcontractor from whom retention has been withheld that subcontractor's share of the payment.

(b) If a retention received by the direct contractor is specifically designated for a particular subcontractor, the direct contractor shall pay the retention payment to the designated subcontractor, if consistent with the terms of the subcontract.

(c) If a *good faith dispute* exists between the direct contractor and a subcontractor, the direct contractor may withhold from the retention to the subcontractor an amount not in excess of 150 percent of the estimated value of the disputed amount.

Civil Code §8814 (emphasis added).

2. California Business and Professions Code section 7108.5

California Business and Professions Code section 7108.5 states in relevant part:

(a) A prime contractor or subcontractor shall pay to any subcontractor, not later than seven days after receipt of each progress payment, unless otherwise agreed to in writing, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest therein. In the event that there is a *good faith dispute* over all or any portion of the amount due on a progress payment from the prime contractor or subcontractor to a subcontractor, the prime contractor or subcontractor may withhold no more than 150 percent of the disputed amount.

(b) Any violation of this section shall constitute a cause for disciplinary action and shall subject the licensee to a penalty, payable to the subcontractor, of 2 percent of the amount due per month for every month that payment is not made.

(c) In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs.

Bus. & Prof. Code §7108.5 (emphasis added). United's third cause of action was based on this statute.

3. California Public Contract Code section 7107

California Public Contract Code section 7107 states in relevant part:

(c) Within 60 days after the date of completion of the work of improvement, the retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. For purposes of this subdivision, "completion" means any of the following:

[...]

(e) The original contractor may withhold from a subcontractor its portion of the retention proceeds if a *bona fide dispute* exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount.

(f) In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in *any action* for the collection of funds wrongfully withheld, the *prevailing party* shall be entitled to attorney's fees and costs.

Pub. Contract Code, §7107 (emphasis added).

B. The Prompt Payment Statutes Are Analogous to One Another

Business and Professions Code section 7108.5 and *Public Contract Code* section 7107 are functional equivalents of each other. More support for this interpretation can be found in *Tesco Controls, Inc, supra*, which stated that "[i]n the event there is a bona fide dispute over the amount owed, both statutes authorize the general contractor to withhold up to 150 percent of the disputed amount. (*Bus. & Prof.Code*, §7108.5; *Pub. Contract Code*, §7107, subd. (e).) Both statutes award attorneys fees and costs to the prevailing party in an action to collect amounts wrongfully withheld. (*Bus. & Prof.Code*, §7108.5; *Pub. Contract Code*, §7107, subd. (f)." *Tesco Controls, Inc.* at 767.

The prompt payment statutes' share the same intent. In essence, the statutes contain nearly identical provisions that permit the withholding of

retention payments in the event of a bona fide good faith dispute. Coast is unaware of, and United Riggers did not cite to, any authority that states the intent or interpretation of *Public Contract Code* section 7107(e) is different than that of *Bus. & Prof. Code* section 7108.5, or *Civil Code* sections 8814 and 8818. In interpreting analogous statutes, courts have interpreted "bona fide dispute" to mean "good faith dispute." See, e.g., *Taylor v. Van-Catlin Construction* (2005) 130 Cal.App.4th 1061, 1069 with respect to *Civil Code* section 3260(e). See also, *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1339 (stating that "good faith dispute" to mean "that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation" with respect to *Bus. & Prof. Code* section 7108.5.)

C. *Martin Brothers v. Thompson Pacific Const., Inc.* Sets Forth The Correct Interpretation of the Prompt Payment Statutes.

The concept of *East West Bank* case's limitation of the term "dispute" in section 7107(c) was expressly considered and rejected in *Martin Bros. Const., Inc. v. Thompson Pacific Const., Inc.* (2009) 179 Cal.App.4th 1401. The California Supreme Court denied petition for review of *Martin Brothers* on March 24, 2010. In that case, the subcontractor, Martin Brothers, submitted change order requests for compensation for extra work that it alleged the

contractor, Thompson Pacific directed or that were otherwise required. *Id.* at 1406. The dispute was about additional compensation that the subcontractor contended was owed over and above the agreed contract price for work that was allegedly outside the scope of the contract. The appellate court ruled that a general contractor could withhold retention without violating the prompt-payment statutes if there exists a good faith dispute between the parties. *Id.* at 1414.

The appellant subcontractor in *Martin Brothers* argued that section 7107(e) "cannot be applied to allow withholding of undisputed retentions." *Martin Brothers* at 1411. The court there rejected the argument that section 7107(e) only allowed withholding where there is a dispute over retention, as opposed to a dispute over other matters such as claims for extra work. Justice Cantil-Sakauye explained:

The statute contains no language restricting the word "dispute" to any particular kind of dispute other than it must be "bona fide." The ordinary meaning of "dispute" is a "verbal controversy," a "debate," or "quarrel." (Merriam-Webster's Collegiate Dict. (11th ed.2006) p. 362, col. 1.) A controversy, debate or quarrel, i.e., a dispute, does not change its character depending on its subject. The subject is immaterial to its nature as a dispute. Indeed, in the context of construction litigation, a dispute may arise between a general contractor and a subcontractor concerning any number of subjects, including, but not limited to, nonperformance, improper or substandard performance, the timing of performance, or additional performance of work. *Martin Brothers* at 1412.

The opinion in *Martin Brothers* confirmed the Legislature's intent was to make the test for liability under section 7107(c) whether there is a *bona fide dispute* between the parties, not whether there is a correct *type* of bona fide dispute.

The *Martin Brothers* court stated " [w]hen statutory language is clear and unambiguous there is no need for construction, and we will not indulge in it. We will not speculate that the Legislature meant something other than what it said. Nor will we rewrite a statute to posit an unexpressed intent.' " *Martin Brothers* at 1411 (internal citations omitted). See also, *People v. Gardeley* (1996) 14 Cal.4th 605, 621 (the words of the statute "generally provide the most reliable indicator of 'legislative intent' and when language of a statute is clear and unambiguous, there is no need for construction"); *People v. Connor* (2004) 115 Cal.App.4th 669, 678 (courts should give words in a statute their usual and ordinary meaning, and the plain meaning governs if there is no ambiguity.) A "bona fide dispute" means a "bona fide dispute," not a particular *type* of bona fide dispute. The term "dispute" is not ambiguous and not as limited as *United Riggers* would lead the Court to believe.

"When we 'scrutinize the actual words of the statute, giving them a plain and commonsense meaning', we conclude the exception of section 7107(e) applies to *any* good faith dispute between a general contractor and

subcontractor." *Martin Brothers* at 1414 (citation omitted; emphasis added). *Any* good faith dispute qualifies, not just certain types of disputes such as mechanics' liens. Accordingly, the Trial Court did not err in applying the analogous *Business & Professions Code* section 7108.5 when it held that there was a "good faith dispute" between the parties and that Coast did not violate the prompt payment statutes. The trial court correctly followed *Martin Brothers*.

D. *East West Bank's* Narrow Definition of "Dispute" Is Incorrect

The decision in *East West Bank v. Rio School District* (2015) 235 Cal.App.4th 742 cited by United Riggers ignores both established California law and the realities of the construction industry.

The court in *East West Bank* erroneously held that "a dispute over the contract price does not entitle a public entity to withhold funds due a contractor." (*East West Bank* at 745). The court there held that "dispute" as stated in section 7107 is limited to only mean "mechanic liens and deficiencies in the contractor's performance." (*Id* at 749). This narrow reading of "dispute" finds no basis in the legislative history of the statute and departs from the plain meaning of the statute. If the Legislature had wanted to limit disputes covered under the prompt payment statutes to only those two types of disputes, it would have done so, but did not. The court in *East West Bank* noted that the qualifier

"good faith" was added in *Civil Code* section 8812, subdivision (c), the analogous prompt payment statute for private works projects. (Id at 749). The recodification of *Civil Code* section 3260(c) into *Civil Code* section 8812 became operative in July, 2012 - three years *after* *Martin Bros. Const., Inc. v. Thompson Pacific Const., Inc.* (2009) 179 Cal.App.4th 1401 was decided. However, the Legislature did not amend section 7107 to add the term "good faith." Clearly, the Legislature reviewed the statutes and had every opportunity after the *Martin Brothers* decision to expressly limit the *type* of dispute to mechanic liens or contractor's performance, but declined to do so. The Legislature likewise could have added other limiting language to the term "dispute" but did not. It is evidently clear that the Legislature adopted the *Martin Brothers'* interpretation of the term "disputes" and decided not to disturb that ruling by revising the prompt payment statutes. "When the legislature has employed a term or phrase in one place and excluded it from another, it should not be implied where excluded." *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576.

More importantly, however, is the court's reasoning for declining to imply missing terms from the bench like the court in *East West Bank*: "[W]e will not imply terms where the legislature has excluded them in both statutes." *Alpha Mechanical* at 1340 citing to *People v. Gardeley* (1996) 14 Cal.4th 605,

622 ["When the Legislature has used a term or phrase in one part of a statute but excluded it from another, courts do not imply the missing term or phrase in the part of that statute from which the Legislature has excluded it"]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 725; *Citizens for Better Streets v. Board of Supervisors of San Francisco* (2004) 117 Cal.App.4th 1, 6 [court will not presume intention to legislate by implication]. The Court below adopted the *East West Bank* analysis and applied it to private works projects. In doing so, it declined to adopt the more sound analysis in *Martin Brothers*.

E. Coast Provided Compelling Evidence of the Disputes in United Riggers' Claims

Unlike the court in *East West Bank*, the court in *Martin Brothers* correctly understood the realities of construction litigation in that disputes may not be so easy to characterize:

[T]he precise nature of the dispute may be difficult to characterize. For example, what may be additional performance in the eyes of a subcontractor may be performance of the terms of the contract or correction of inadequate performance in the eyes of the general contractor. There may be questions over double billing, excessive billing, or allocation of billing. Thus, the nature or subject of a dispute in construction litigation is open to many possibilities. *Martin Brothers* at 1412.

The disputes between United Riggers and Coast are precise types of disputes that the *Martin Brothers* court contemplated in reaching its decision. United Riggers considered its work "additional performance" while Coast

successfully proved at trial that United Riggers' work was simply "the performance of the terms of the contract." There were also questions over double billing and excessive billing. Coast's witness Scott Sullivan testified at length about the dozens of change orders that United Riggers belatedly submitted. Mr. Sullivan testified to the satisfaction of the Trial Court that the change orders were for work already done or change orders already paid.

THE TRIAL COURT WAS CORRECT IN ITS AWARD OF REASONABLE ATTORNEYS FEES TO COAST

The Legislature added the 2% per month penalty provisions to the prompt payment statutes to give contractors an effective weapon against anyone who wrongfully withheld retention funds on a construction project. However, the Legislature also added that the *prevailing party shall* be entitled to reasonable attorney's fees and costs in any action for the collection of wrongfully withheld funds. The language and the purpose of the attorneys' fee provision is clear: A contractor or sub-contractor who misuses the powerful 2% per month penalty as a threat against an innocent defendant may be liable for attorney fees. This reciprocal attorney-fee provision is a disincentive against the coercive misuse of the prompt payment statutes. In this case, United Riggers asserted violations of *Civil Code* sections 8814, 8818 and *Business and Professions Code* section 7108.5 against Coast based on Coast's alleged wrongful withholding of the retention funds and late progress

payments. The Trial Court was correct in ruling that United Riggers did not prevail on its prompt payment claims. Because there was a good faith dispute between the parties that entitled Coast to withhold the retention. (Statement of Decision 5:1-2). United Riggers also did not prevail on its wrongful retention claims.

In *Martin Brothers*, the appellate court affirmed the trial court's conclusion that the defendant had not violated the applicable prompt payment statutes and was thus entitled to an award of \$150,000 in attorney fees. *Martin Brothers* at 1405. The Court of Appeal there noted that although section 7107 is a remedial statute designed to encourage timely payment of retention, section 7107 also contains the mandatory reciprocal attorney-fee provisions that "reflects the Legislature's balancing of the competing interests" of the parties to the construction contract. *Martin Brothers* at 1414. See also, *Hinerfeld-Ward, Inc. v. Lipian* (2010) 188 Cal.App.4th 86, 102 (holding that the legislative history of *Civil Code* 8814 and 8818 (formerly section 3260.1) demonstrates a legislative intent that both the monthly two percent charge and reasonable attorney fees are available to a party prevailing on an action under that statute.)

The intent of the Legislature is clear: any contractor that tries to misuse the penalty provisions as a means to coerce payment of retention funds will be

subject to paying an innocent defendant's attorney fees. "If the Legislature had intended only the successful demanding party to receive attorney fees, it would have so stated instead of permitting an award to the "prevailing party." There is simply no logical reason to punish the party who was not at fault—who *justifiably* retained payment in good faith—by denying that party attorney fees for successfully defending against the other party's action for payment." *Taylor v. Van-Catlin Const.* (2005) 130 Cal.App.4th 1061, 1069. (emphasis in original).

Here, the Trial Court correctly concluded that Coast is the prevailing party because it did not violate the prompt payment statutes, and properly awarded it attorney fees.

COAST WAS THE PREVAILING PARTY

Generally, a trial court's determination of a "prevailing party," within the meaning of an attorney-fee award statute, "should be affirmed on appeal absent an abuse of discretion." *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574.

When a prevailing-party attorney fee statute does not define the term "prevailing party," the courts apply a pragmatic test to determine if one party in fact prevailed. See, *Winick Corp. v. Safeco Insurance Co.* (1986) 187 Cal.App.3d 1502, 1508. ("undertaking a 'pragmatic inquiry' into whether the

defendant prevailed," within the meaning of an attorney-fee statute, and finding that obtaining a technical dismissal with prejudice in fact amounted to "prevailing"); *Heather Farms Homeowners Ass'n*, supra, at 1574 (interpreting a prevailing party attorney fee statute and determining which party prevailed "on a practical level" using a pragmatic test.)

In *Winick*, the plaintiff subcontractor brought a stop-notice action against the defendant surety company. The defendant successfully moved to dismiss the action because the plaintiff had not served the summons within the statutory period. *Winick* at 1506. The Court of Appeal there considered the following language in *Civil Code* section 3250 which governs stop-notice actions against payment bond sureties: "In any action [on the payment bond], the court shall award the prevailing party a reasonable attorney's fee..." The court then applied the "pragmatic test" to determine the prevailing party and found that the surety defendant "had achieved one hundred percent" of what it sought to achieve as a defendant, because "the most...a civil defendant...ordinarily can hope to achieve is to have the plaintiff's claims thrown out completely." *Winick* at 1508. Here, Coast unequivocally prevailed at trial. United Riggers failed to establish any liability on the part of Coast. Moreover, Coast's victory was not procedural like the surety's in *Winick*. Instead, Coast successfully defeated all of United Riggers' claims on the merits

after a nine-day trial. The Trial Court was well within its discretion to determine that Coast was the prevailing party as to the prompt payment statutes and as to the entire litigation. Rather, for the Trial Court to hold otherwise would be an abuse of discretion.

United Riggers' argument on appeal that it was the prevailing party because Coast paid the retention during trial has no merit. If there was nothing left to litigate regarding the retention, United Riggers could have withdrawn the claim before trial. However, United Riggers continued to litigate the retention claim thus requiring Coast to vigorously defend itself.

CONCLUSION

California's intermediate courts are in conflict with regard to the progress payment and retention payment statutes. Private works contractors, public works contractors, and governmental authorities need this Court's guidance as to how to conduct themselves in the thousands of construction disputes that occur every year in California.

Date: December 29, 2015

Respectfully submitted,

WESTRUP & ASSOCIATES

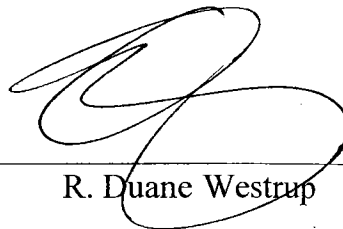
By: 

R. Duane Westrup
Attorneys for Defendant,
Respondent, and Petitioner Coast
Iron & Steel Co.

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1))

I, R. Duane Westrup, an attorney at law duly admitted to practice before all the courts of the State of California and principal of the law firm of Westrup & Associates, attorneys of record herein for defendant, respondent, and petitioner Coast Iron & Steel Co., hereby certify that this Petition For Review document (including the memorandum of points and authorities, headings, footnotes, and quotations, but excluding the tables of contents and authorities, and this certification) complies with the limitations of Rule of Court 8.504(d)(1) in that it is set in a proportionally-spaced 13-point typeface and contains 5,114 words as counted by the Corel Word Perfect version 10 word-processing program used to generate this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed December 29, 2015 in Long Beach, California.



R. Duane Westrup

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

UNITED RIGGERS & ERECTORS, INC.,

Plaintiff and Appellant,

v.

COAST IRON & STEEL CO. et al.,

Defendants and Respondents.

B258860

(Los Angeles County
Super. Ct. No. VC062679)

CERTIFICATION AND
ORDER FOR PUBLICATION

COURT OF APPEAL - SECOND DIST

FILED

DEC 18 2015

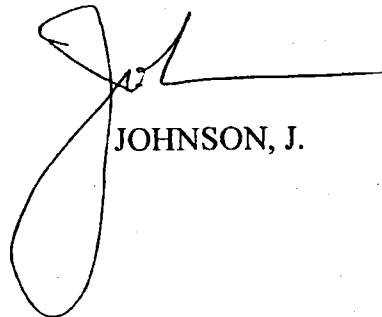
JOSEPH A. LANE

Clerk

Deputy Clerk

The opinion in the above-entitled matter filed November 23, 2015, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.


ROTHSCHILD, P. J.


JOHNSON, J.


LUI, J.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

UNITED RIGGERS & ERECTORS, INC.,

Plaintiff and Appellant,

v.

COAST IRON & STEEL CO. et al.,

Defendants and Respondents.

B258860

(Los Angeles County
Super. Ct. No. VC062679)

ORDER MODIFYING OPINION

[Change in the Judgment]

THE COURT:

It is ordered that the opinion filed herein on November 23, 2015, be modified in the following manner:

On page 11, the following sentence is added to the end of the disposition:

Each party to bear its own costs on appeal.

This modification constitutes a change in the judgment.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

JOHNSON, J.

LUI, J.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

UNITED RIGGERS & ERECTORS, INC.,

Plaintiff and Appellant,

v.

COAST IRON & STEEL CO. et al.,

Defendants and Respondents.

B258860

(Los Angeles County
Super. Ct. No. VC062679)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas I. McKnew, Jr., Judge. Reversed in part, affirmed in part.

Law Office of Dirk Bruinsma and Dirk Bruinsma for Plaintiff and Appellant.

Westrup & Associates, R. Duane Westrup and Ian Chuang for Defendants and Respondents.

This case arises out of a payment dispute between a contractor, Coast Iron & Steel Co. (Coast), and its subcontractor, United Riggers & Erectors, Inc. (United). After the work on a project was finished, United sent a demand to Coast to pay for change orders and for damages that United claimed Coast caused by mismanaging the project. Coast refused to pay, and also delayed forwarding United's share of retention payments Coast had received from the owner of the project.

After a bench trial, the court found in favor of Coast. United appeals, contending that the trial court erred in finding that Coast was not liable for the extra payments, as well as for failing to assess penalties and attorney's fees against Coast for its delay in forwarding the retention payments.

FACTS AND PROCEEDINGS BELOW

In October 2010, Universal City Studios LLLP (Universal) contracted with Coast to provide "miscellaneous metals" work in the construction of a new ride at Universal Studios Hollywood based on the "Transformers" movie series. United in turn signed a purchase order that served as a subcontracting agreement with Coast.

The subcontract initially called for United to be paid \$722,742, but the general contract between Universal and Coast, which was referenced in the subcontracting agreement, created a process by which Coast could appeal to Universal for change orders to increase its compensation when unexpected expenses arose. United submitted change orders to Coast by means of the same process, and Universal approved change orders that increased United's compensation. Coast paid United for change orders totaling an additional \$773,237.60 over the contract price. On a monthly basis, Universal paid Coast 90 percent of the amount provided under the contract and the approved change orders. Coast forwarded to United its share of the payments as it received them from Universal. In accordance with the terms of the contract, Universal retained the remaining 10 percent of all the payments as "retentions" pending final completion of the work. When work on the project was completed, Universal paid the 10 percent retentions to Coast. Coast owed

United \$149,602.52¹ as its share of the retention payments. In March, 2012, approximately two weeks after the work had been completed, Coast sent an email to United stating, “[p]lease have [a United employee] forward your final [change order] log along with any outstanding [change order requests] so we can review and coordinate to make sure everything has been submitted for you.” United responded by sending a letter demanding \$274,158.40 as compensation for “the mis[.]management and or delayed deliveries caused by Coast,” along with \$78,384 in outstanding change order requests. Coast replied with an email reading, “I will see you in court!!”

In January 2013, United filed suit against Coast, seeking \$446,857.42 in damages, plus attorney’s fees, interest, and costs. The suit claimed that Coast owed \$149,602.52 in retention payments and \$23,186.50 for unpaid change orders, as well as \$274,068.40 in damages it attributed to missing parts, lack of communication by Coast, fabrication errors, delays in installation of steel, and lack of transportation access. In its third cause of action, United alleged that Coast had violated Civil Code section 8814 (section 8814) and Civil Code section 8818 (section 8818), which require that contractors pay subcontractors their share of retention payments no more than 10 days after receipt by the contractor. The remaining causes of action alleged breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, and a claim on the contractor’s bond against defendant Arch Insurance Company.

Three weeks after the case was filed, Coast paid approximately two-thirds of the withheld retention payment. Ten months later, Coast paid the remaining \$42,887. Coast paid no interest along with its delayed payments. Nor did it pay any of the other damages United claimed in its lawsuit.

After a bench trial in May 2014, the trial court ruled in favor of the defendants, finding that United had failed to prove that Coast was responsible for the extra expenses United incurred, and that United had failed to follow the procedure specified in the contract when submitting its final change orders. The statement of decision, which Coast

¹ This figure was approximately 10 percent of the sum of the original contract price (\$722,742) and the approved change orders (\$773,237.60).

prepared and the trial court adopted, stated that “there was a good faith dispute between Coast and United . . . that entitled Coast to withhold the payment of retention.”

Coast as the prevailing party moved for an award of attorney’s fees pursuant to section 8818. The trial court granted Coast’s motion in the amount of \$150,000. The court also awarded Coast \$5,289.05 in costs as the prevailing party. This appeal followed.

DISCUSSION

On appeal, United argues that the trial court erred by ruling that Coast was entitled, because a good faith dispute existed between Coast and United, to withhold the retention payments. Likewise, United contends that, because it should have prevailed on the retention claim, the attorney’s fees awarded to Coast must be reversed. United also contends that the court erred by ruling against it on its other claims.

We agree with United regarding its retention claim and attorney’s fees, and accordingly we reverse that part of the trial court’s judgment. Otherwise we affirm.

I. *Retention Payments*

It is common in the construction industry for the owner of a project to pay contractors on a monthly basis for work as it is completed, but to retain a percentage of the amount owed as a guarantee of satisfactory performance. A series of “prompt payment” statutes govern the payment of retentions and other similar payments to contractors and subcontractors. (These statutes include Civ. Code, § 8800 et seq., Bus. & Prof. Code, § 7108.5, and Pub. Contract Code, § 7107, among others.) United’s entitlement to prompt payment of the withheld retention turns on the interpretation of those statutes. Most relevant here is section 8814, which provides that, “[i]f a direct contractor has withheld a retention from one or more subcontractors, the direct contractor shall, within 10 days after receiving all or part of a retention payment, pay to each subcontractor from whom retention has been withheld that subcontractor’s share of the payment.” (*Id.*, subd. (a).) There is an exception to this requirement, however: “If a good faith dispute exists between the direct contractor and a subcontractor, the direct

contractor may withhold from the retention to the subcontractor an amount not in excess of 150 percent of the estimated value of the disputed amount.” (*Id.*, subd. (c).)

At issue here is whether a contractor may withhold the retention when there is a dispute of any kind between the contractor and a subcontractor, or only when the dispute relates to the retention itself. If the provision applies to all disputes, then a contractor, acting in good faith, may retain the retention pending the resolution of the dispute even if the dispute relates to other matters. If, on the other hand, the provision limits the withholding of the retention to only those disputes related to the retention itself, then despite any other disputes, the contractor must forward the retention within 10 days. Failure to do so subjects the contractor to a monthly penalty of 2 percent of the unpaid amount and attorney’s fees. (§ 8818.)

Coast did not claim below or here that a dispute relating to the retention existed. Rather, the dispute was about change orders and other claimed damages. Nonetheless, the trial court found that Coast was justified in withholding the retention because it had a “good faith dispute” with United.

At the time the trial court made its decision there was no case directly on point, nor is there one now. But at the time of the decision there was case law interpreting Public Contract Code section 7107 (section 7107), which functions identically to section 8814 with respect to contracts with public entities. Just as section 8814, subdivision (c), allows a contractor to withhold retention payments from a subcontractor in case of a good faith dispute, section 7107, subdivision (e) provides that “[t]he original contractor may withhold from a subcontractor its portion of the retention proceeds if a bona fide dispute exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount.”

When the trial court decided this case, the prevailing authority on section 7107 was *Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.* (2009) 179 Cal.App.4th 1401 (*Martin Brothers*), which held that a contractor with a good faith dispute with a subcontractor could withhold the retention even if the dispute was not

about the retention. Since then a different court of appeal has taken the opposite view and held that withholding the retention is justified only if the dispute is about the retention itself. (*East West Bank v. Rio School Dist.* (2015) 235 Cal.App.4th 742 (*East West Bank*). We agree with *East West Bank*.

In *Martin Brothers*, a public school district contracted with the defendant to build a high school, and the defendant subcontracted with the plaintiff to do clearing, grading, and paving work. (*Martin Brothers, supra*, 179 Cal.App.4th at p. 1406.) Throughout the course of construction, the subcontractor did extra work above what was called for in the contract. (*Ibid.*) In some cases, change orders were approved to authorize the extra work, but in other cases, the contractor disputed the subcontractor's entitlement to extra payment. (*Ibid.*) The subcontractor eventually filed suit, seeking the withheld retention payments and compensation for unpaid extra work and change orders. (*Id.* at p. 1408.) The contractor ultimately paid virtually the full amount that the subcontractor demanded, but the subcontractor continued the suit in order to seek penalties and attorney's fees. (*Id.* at p. 1409.)

The *Martin Brothers* court affirmed the trial court's judgment denying the subcontractor relief. (*Martin Brothers, supra*, 179 Cal.App.4th at pp. 1417-1418.) The court rejected the subcontractor's argument that, because the statute was intended to protect subcontractors, contractors were entitled to withhold retention payments only if there was a dispute over the amount of retention owed. (*Id.* at p. 1411.) It concluded that the statute was not ambiguous: "The statute contains no language restricting the word 'dispute' to any particular kind of dispute other than it must be 'bona fide.'" (*Id.* at p. 1412.)

In reaching that conclusion, the court in *Martin Brothers* failed to pay sufficient heed to our Supreme Court's instruction that, when interpreting the plain meaning of a statute, "[w]e do not examine [its] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) As the *Martin Brothers* court

acknowledged, the remedial purpose of the prompt payment statutes is “to encourage general contractors to pay timely their subcontractors and to provide the subcontractor with a remedy in the event that the contractor violates the statute.” (*Martin Brothers, supra*, 179 Cal.App.4th at p. 1410, quoting *Morton Engineering & Construction, Inc. v. Patscheck* (2001) 87 Cal.App.4th 712, 720.) Yet its interpretation of “dispute” promoted the opposite result.

The *East West Bank* court found the proper balance between the broader remedial purpose of the prompt payment statutes and the right of contractors to insist on satisfactory performance from subcontractors prior to final payment. Like *Martin Brothers, supra*, *East West Bank* concerned the interpretation of section 7107.² In *East West Bank*, a school district contracted with a contractor to build a high school. (*East West Bank, supra*, 235 Cal.App.4th at p. 745.) The school district refused to pay for most of the contractor’s change orders, to release retention payments, or to pay other damages upon completion of the project. (*Id.* at p. 746.) The contractor sued, and after a bench trial, the trial court found in favor of the contractor, awarding damages that included statutory penalties pursuant to section 7107. (*Id.* at p. 747.)

The *East West Bank* court affirmed the trial court’s judgment, holding that because there was no dispute regarding the retention payments themselves, the district was required to pay the contractor within the time specified by statute, regardless of whether there was a bona fide dispute regarding duties not related to the retention amount. (*East West Bank, supra*, 235 Cal.App.4th at pp. 748-749.) The court reasoned that “[w]hen [a remedial statute’s] meaning is doubtful, it will be construed to suppress the mischief at which it is directed.” (*Id.* at p. 748.) According to the *East West Bank* court, “[s]ection 7107’s purpose of ensuring the prompt release of retention funds would not be served if any dispute justified retaining the funds. There is no reason to allow a public entity to retain the funds once their purpose of providing security against

² Because this case involved a dispute between an owner and a direct contractor, the relevant provision was section 7107, subdivision (c), which requires public entities to pay retentions within 60 days unless there is a dispute.

mechanics liens and deficiencies in the contractor's performance has been served. Unless the dispute relates to one of those purposes, the public entity will not be protected from the statutory penalty." (*Id.* at pp. 748-749.)

The *East West Bank* court's interpretation allows primary contractors to withhold retention payments to protect themselves from substandard or inadequate work by subcontractors. The additional 50 percent of the 150 percent withholding provision allows some margin for error, so that general contractors are protected even if it turns out that the estimated amount is inadequate to correct for substandard work. At the same time, subcontractors receive prompt payment of money that they are undisputedly owed. In this case, Coast did not deny that it owed United the full \$149,602.52 retention that it withheld. The only dispute was over whether United was also entitled to other payments it claimed. To excuse Coast in this case from paying United the retention payments would unduly increase the leverage of owners and primary contractors over smaller contractors and subcontractors by discouraging subcontractors from making legitimate claims for fear of delaying the retention payment.

We thus hold that, pursuant to section 8814, subdivision (c), a contractor is entitled to withhold a retention payment only when there is a good faith dispute regarding whether the subcontractor is entitled to the full amount of the retention payment. Accordingly, we reverse the judgment of the trial court as to this issue. On remand, the trial court is directed, pursuant to section 8818, to award United penalties and, as discussed below, attorney's fees for the delayed retention payment claim.

II. *Attorney's Fees*

The trial court granted Coast \$150,000 in attorney's fees as the prevailing party in the litigation. Section 8818 provides that "[i]f an owner or direct contractor does not make a retention payment within the time required by this article . . . (b) [i]n an action for collection of the amount wrongfully withheld, the prevailing party is entitled to costs and

reasonable attorney's fees."³ Because we have reversed the trial court's judgment in favor of Coast under this section, it is not the prevailing party with respect to the retention payments. The trial court's judgment relating to attorney's fees is therefore reversed. The court on remand shall determine and award attorney's fees to United, including attorney's fees for this appeal as it relates to the retention claim.

III. *Breach of Contract Claims*

In addition to its claim for unpaid retentions, United also sought \$297,254.90 in damages for breach of contract, including for unpaid change orders and for additional costs that United claimed Coast caused it to incur. The trial court ruled in favor of Coast on these claims, finding that United had not followed the contractual procedure for seeking additional compensation, and that, in any case, United had not proved its damages. United challenges the court's decision, contending that the court erred in its ruling on the contractual requirements, and that this error tainted the court's conclusion on damages. We disagree and affirm the trial court as to these issues.

The contract between Universal and Coast created a method by which Coast could claim additional compensation beyond the amount the original contract called for. Coast

³ In addition to awarding Coast attorney's fees under section 8818, the trial court stated that Coast was entitled to attorney's fees pursuant to section 7107, subdivision (f), and Business and Professions Code section 7108.5 (section 7108.5), subdivision (c). Neither provision applies to this case. Section 7107 applies to the construction of public works, not private construction contracts like those at issue here. Section 7108.5 governs progress payments on ongoing work, not the repayment of retention payments. At oral argument, Coast contended that even if we were to reverse the trial court's decision with respect to retention payments, Coast would still be entitled to attorney's fees because it prevailed with respect to United's contract claims, and United cited section 7108.5 in its complaint in support of those contract claims. In fact, both Coast and United consistently and mistakenly believed throughout the course of this case that section 7108.5 governed retention payments. As late as its brief on appeal, Coast wrote that "[t]he attorney fee provisions of section 7108.5 [subdivision] (c) warn contractors and subcontractors not to assert meritless retention claims." The subject that section 7108.5 covers, the timely payment of *progress* payments, was simply not part of this case, and United's contract claims cannot be understood as allegations of withheld progress payments. Coast may not recover attorney's fees under section 7108.5, subdivision (c) simply because United cited that section in its complaint.

was required to “give Universal written notice of any claim [for increased payment] not later than three (3) days after the occurrence of the event giving rise to the claim, but (except in the event of emergencies) prior to the incurring of any expenses by [Coast]. [Coast] expressly waives its right to an increase in the Contract Sum unless it complies with the notice provisions of this paragraph.” Coast issued a purchase order to United that constituted the subcontract between the parties. That purchase order stated that “[a]ll work is to be performed in accordance with the General Contract and the Contract Documents referred to in the General Contract [¶] [United] agrees to be bound to Coast Iron & Steel Co. as Coast Iron & Steel Co. is bound to [Universal].”

United contends that it was not bound to follow the terms of the general contract regarding additional costs because “the subcontract was not the same as the prime contract; it merely incorporated provisions of the prime contract for the purposes of effectuating the subcontract.” United further argues that the parties did not follow the timing provisions of the contract, and that industry standards did not require strict compliance with these timelines but allowed for United to wait as long as a month after work was completed to submit change orders.

We need not reach the merits of United’s claims because United has failed to show that the trial court erred in its determination that United failed to prove damages. On appeal, United challenges the trial court’s ruling on damages in only one respect: It contends that the court’s misinterpretation of the parties’ responsibilities in submitting change orders “tainted its application of the modified total cost theory.” Nothing in the record supports such a conclusion. The court found that United failed to meet the requirements of the modified total cost theory on several bases independent of the change order requirements of the contract.

Under this method, damages are the amount of the total cost of performance reduced by the amount required to be paid under the contract. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 243.) To prevail on this damage theory, a plaintiff must demonstrate the following: “(1) the impracticality of proving actual losses directly; (2) the plaintiff’s bid was reasonable; (3) its actual costs were reasonable; and

(4) it was not responsible for the added costs.” (*Ibid.*) “If some of the [sub]contractor’s costs were unreasonable or caused by its own errors or omissions, then those costs are subtracted from the damages to arrive at a modified total cost.” (*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1408.) The court found that United failed to meet the requirements of the modified total cost theory on several bases independent of the change order requirements of the contract: (1) United failed to demonstrate how the absence of Coast’s representative on the work site caused damages; (2) The lack of necessary parts did not add to United’s costs because United was always able to shift to other available work while waiting for parts to arrive; and (3) United’s expert failed to demonstrate that Coast was responsible for delays. These findings preclude recovery under any theory of damages.

DISPOSITION

The judgment of the court is reversed with respect to retention payments and attorney’s fees. The case is remanded to the trial court for further proceedings to determine penalties and attorney’s fees to which United is entitled, including fees for this appeal. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.

1 **PROOF OF SERVICE**

2 At the time of service I was over 18 years of age and not a party to this action. My
3 business address is 444 West Ocean Boulevard, Suite 1614, Long Beach, California
90802-4524.

4 On **December 29, 2015**, I served the following documents described as
5 **PETITION FOR REVIEW**. I served the documents on all interested parties, as follows:

6 Dirk Bruinsma
7 LAW OFFICE OF DIRK BRUINSMA
8 1181 Puerta Del Sol, Suite 120
9 San Clemente, California 92673
10 Email: dirk@bruinsmalaw.com
11 Tel: 949/443-9030
12 Fax: 949/433-9035

Attorney for United Rigger & Erectors,
Inc.

13 Clerk, Court of Appeal
14 Second Appellate District, Div. One
15 300 S. Spring Street
16 Fl. 2, N. Tower
17 Los Angeles, CA 90013-1213

Clerk, Los Angeles Superior Court
12720 Norwalk Blvd.
Norwalk, CA 90650-3188

18 I am employed in the office of a member of the bar of this Court at whose direction
19 the service was made. The documents were served by the following means (specify):

20 a. **By United States Mail**. I enclosed the documents in a sealed envelope or
21 package addressed to the persons at the addresses listed above. I placed the
22 envelope for collection and mailing, following our ordinary business practice. I am
23 readily familiar with this business's practice for collecting and processing
24 correspondence for mailing. On the same day that correspondence is placed for
25 collection and mailing, it is deposited in the ordinary course of business with the
26 United States Postal Service, in a sealed envelope with postage fully prepaid. I
27 am employed in the county where the mailing occurred. The envelope or package
28 was placed in the mail at Long Beach, California.

b. **By Overnight Delivery**. I enclosed the documents in an envelope or package
provided by an overnight delivery carrier and addressed to the persons at the
addresses listed above. I placed the envelope or package for collection and
overnight delivery at an office or a regularly utilized drop box of the overnight
delivery carrier.

I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

Date: **December 29, 2015**



JAMES VELOFF