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CONCRETE FLOTATION SYSTEMS, INC.,	:	SUPERIOR COURT OF NEW JERSEY
d/b/a BELLINGHAM MARINE,	:	MIDDLESEX COUNTY LAW DIVISION
	:	
Plaintiff,	:	COMPLAINT, RULE 4:5-1(B)(2)
	:	CERTIFICATION, JURY DEMAND, AND
	:	DESIGNATION OF TRIAL COUNSEL
	:	
Against	:	Index No.
	:	
TOMAR CONSTRUCTION LLC; BERKLEY	:	
INSURANCE COMPANY; THE BOROUGH OF	:	
CARTERET, MIDDLESEX COUNTY, NEW	:	
JERSEY,	:	
	:	
Defendants.	:	
	:	

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Plaintiff, Concrete Flotation Systems, Inc., d/b/a Bellingham Marine by and through its attorneys, Clark Hill PLC, as and for its Complaint against Tomar Construction LLC; Berkley Insurance Company; and The Borough of Carteret, Middlesex County, New Jersey, says:

THE PARTIES

1. Plaintiff Concrete Flotation Systems, Inc. d/b/a Bellingham Marine ("BMI") is a Connecticut corporation with its principal place of business at 225 Hanover Road, York, Commonwealth of Pennsylvania. BMI is a subcontractor and is in the business of designing,

fabricating, and erecting dock structures for commercial and public entity maritime construction projects and providing related services.

2. The Defendant Tomar Construction LLC ("Tomar") is, upon information and belief, either a New Jersey corporation or limited liability company with its principal place of business at 18 Connerty Court, East Brunswick, New Jersey 08816. Plaintiff reserves the right under Rule 4:26-1 to make any corrections to the name. Upon information and belief, Tomar provides services as a general contractor for construction projects.

3. The Defendant Berkley Insurance Company ("Berkley") is, upon information and belief, a surety company organized under the laws of Connecticut and authorized to transact business as a surety within the State of New Jersey, with its principal place of business at 475 Steamboat Road, Greenwich, Connecticut 06830. Berkley issued a Payment and Performance Bond No. 0205570 to Tomar, as principal, for a public marina project known as Municipal Marina at Carteret Waterfront Park, located in the Borough of Carteret (the "Bond"). Berkley is the Obligor under said Bond, and BMI is a beneficiary under said Bond.

4. The Defendant Borough of Carteret, Middlesex County, New Jersey (the "Borough") is a municipality in New Jersey and entered into a construction contract with Tomar for the construction of the Municipal Marina at Carteret Waterfront Park, a public marina located in Borough of Carteret and constructed for the benefit of the municipality ("the Project").

FACTS COMMON TO ALL COUNTS

5. Upon information and belief, the Borough awarded the general contract for the Project to Tomar, as the General Contractor (the "Prime Contract").

6. In conjunction with the Prime Contract between itself and the Borough for the Project, Tomar entered into a subcontract agreement with BMI wherein BMI agreed to design,

manufacture, and furnish Uniform Dock System (Specially Fabricated Materials) to Tomar for the Project in exchange for payment of \$2,890,000 by Tomar to BMI (the "Subcontract").

7. The Uniform Dock System was accepted, not rejected, and utilized by Tomar under its Prime Contract.

8. Upon information and belief, the Project was completed on April 1, 2019, and the Municipal Marina at Carteret Waterfront Park is currently operational and open for business.

FIRST CAUSE OF ACTION
(Breach of Contract – Against Tomar)

9. BMI incorporates the allegations in paragraphs 1-8 as if set forth herein.

10. The final shipment pursuant to the Subcontract occurred on or about December 14, 2018.

11. The maintenance manuals and warranty documents were again e-mailed to Tomar on March 11, 2019. Tomar has acknowledged its receipt but disputes the date thereof.

12. BMI has performed all conditions, covenants, and promises required by it on its part to be performed in accordance with the terms and conditions of the Subcontract.

13. Therefore, all final payments, including the balance of \$292,395.51, reflecting retainage, are presently due and owing.

14. There are no just set-offs or credits to Tomar against the sum due and owing.

15. BMI is entitled to recover the sum of \$292,395.51, which is unpaid and presently due.

16. This amount has been demanded by BMI from Tomar and, despite BMI's full performance, Tomar, without justification, has refused and continues to refuse to pay over monies rightfully due to BMI in accordance with its Subcontract.

WHEREFORE, BMI respectfully demands judgment against defendant Tomar:

(a) Awarding BMI money damages of no less than \$292,395.51;

- (b) Awarding attorneys' fees and costs;
- (c) Awarding it interest, including prejudgment interest as provided by law; and
- (d) Awarding it such other relief as the Court deems just.

SECOND CAUSE OF ACTION

(Municipal Mechanics' Lien Claim – Against Tomar, Borough, and Berkley)

17. BMI incorporates the allegations in paragraphs 1-16 as if set forth herein.

18. At all times mentioned herein, BMI was a subcontractor entitled to the benefits of a statutory municipal mechanics' lien on money due or to become due for the work performed by BMI on the Project. All services, labor, and materials provided by BMI were furnished to be used and were actually used at the Project.

19. Upon information and belief, Tomar received payment of public monies under the Prime Contract and has not used such funds for the payment of labor and materials supplied for and used on the Project, *i.e.*, funds received for payments to BMI.

20. As a result of Tomar's breach and non-payment, and after the above demands and notices went unheeded, BMI filed a Municipal Mechanics' Lien, pursuant to *N.J.S.A. 2A:44- 125 et seq.*, with the municipal clerk of the Borough (hereinafter, the "Borough Lien").

21. BMI properly and timely filed the Borough Lien claim with the Borough.

22. The amount of the lien claim at that time was \$292,395.51 for work and materials supplied by BMI for the Project.

23. To date, the Borough has not paid the Borough Lien claim or any part thereof.

24. BMI is entitled to payment in the amount of the lien under the Municipal Mechanics Lien Law *N.J.S.A. §2A:44-125, et seq.*

WHEREFORE, BMI, respectfully demands judgment declaring and adjudicating:

- (a) Determining the validity and priority of the Borough Lien pursuant to *N.J.S.A. 2A:44-140*;

(b) Determining the amount due or to grow due from the Borough to BMI under the Borough Lien pursuant to *N.J.S.A. 2A:44-140*;

(c) Awarding BMI such amounts and directing the Borough to pay to BMI from the monies being held under the Prime Contract;

(d) Awarding attorneys' fees and costs as provided by law;

(e) Awarding it interest, including prejudgment interest as provided by law;

(f) Awarding it such other relief as the Court deems just.

THIRD CAUSE OF ACTION

(Violation of Prompt Payment Act – Against Tomar and Berkley)

25. BMI incorporates the allegations in paragraphs 1-24 as if set forth herein.

26. Pursuant to *NJSA* § 2A:30A-2, Tomar is required to pay to BMI all monies received from the Borough for the Project for work and services provided by BMI within ten (10) days of receipt of same.

27. Pursuant to *NJSA* § 2A:30A-2, Tomar's failure to pay BMI monies due within ten (10) days of receipt of same from the Borough of the project subjects Tomar to liability to BMI in an amount not less than the amount of the money owed plus interest at a rate equal to the prime rate plus one percent (1%).

28. Upon information and belief, Tomar has received payment from the Borough for the Project for work performed by BMI but has wrongfully and improperly withheld said payment from BMI.

29. Berkley, as surety for Tomar, is directly liable to BMI as the beneficiary of the Bond and has wrongfully and improperly withheld payment from BMI.

30. By their actions and omissions, Tomar and Berkley have violated the terms of the Prompt Payment Act, thereby subjecting Tomar and Berkley to additional liability for prejudgment interest as set forth in *N.J.S.A. 2A:30A-1 et seq.* Berkley, in its capacity as surety for

Tomar, is jointly and severally liable for these sums lawfully due to BMI for labor and materials supplied to the Project under the Subcontract.

WHEREFORE, BMI respectfully demands judgment, jointly and severally, against defendant Tomar and Berkley:

- (a) Awarding it money damages of no less than \$292,395.51;
- (b) Determining the amount due or to grow due from Tomar and/or Berkley to BMI pursuant to *N.J.S.A.* § 2A:30A-2;
- (c) Awarding BMI such amount;
- (d) Awarding attorneys' fees and costs as provided by law;
- (e) Awarding it interest, including prejudgment interest as provided by law; and
- (f) Awarding it such other relief as the Court deems just.

FOURTH CAUSE OF ACTION
(Public Works Bond Claim – Against Berkley)

31. BMI incorporates the allegations in paragraphs 1-30 as if set forth herein.

32. Tomar, together with Berkley, duly executed and delivered to the Borough a public works performance bond and/or payment bond for the protection of all persons supplying labor and materials for the work provided for in the Prime Contract.

33. Upon information and belief, such bond or bonds were executed in accordance with the provisions of *N.J.S.A.* 2A:44-143, *et seq.*, as amended.

34. Berkley issued a Payment Bond for the Project wherein Tomar is the principal and Berkley, the obligor.

35. BMI is a beneficiary under the Bond.

36. On or about March 5, 2019, BMI served written notice upon Defendant Berkley of the BMI's claim for the amount owed to it for materials and labor furnished for the work provided for in the Subcontract with Tomar, notifying Berkley that Tomar owes BMI the \$292,395.51 and demanding payment under the Bond.

37. Berkley has acknowledged BMI's claim but has not satisfied said demand.

38. BMI has complied in all respects with the prerequisites of the Bond Act, N.J.S.A. 2A:44-143 *et seq.* for making a claim on the bond or bonds posted by Berkley on behalf of Tomar with respect to the Project.

39. Pursuant to *N.J.S.A. 2A:44-143 et seq.*, BMI is justly entitled to recover from Berkley, as surety, the sum of \$292,395.51, no part of which has been paid.

WHEREFORE, BMI. respectfully demands judgment against defendant Berkley declaring and adjudicating:

(a) BMI is a rightful beneficiary of the Bond under the Public Works Bond Act N.J.S.A. §2A:44-143 *et seq.*

(b) Awarding it money damages of no less than \$292,395.51;

(b) Awarding attorneys' fees and costs;

(c) Awarding it interest, including prejudgment interest as provided by law;

(d) That Defendants Tomar, the bondholder, and/or Berkley, the bond issuer, shall pay to BMI the balance of payment due and owing for materials supplied on the project plus interest together with attorney's fees and costs of suit; and

(e) Awarding it such other relief as the Court deems just

FIFTH CAUSE OF ACTION

(Unjust Enrichment – Against Tomar and the Borough)

40. BMI incorporates the allegations in paragraphs 1-39 as if set forth fully herein.

41. BMI has conferred benefits upon Defendants Borough and Tomar in an amount not less than \$292,395.51 plus interest for work and materials supplied by BMI for the Project.

42. Defendants have accepted and retained this work and supplies but have refused to pay BMI in full for this work.

43. By reason of the foregoing, the Borough and Tomar have been unjustly enriched in an amount not less than of \$292,395.51 plus interest which is due and owing to BMI.

WHEREFORE, BMI respectfully demands judgment, jointly and severally, against defendant Tomar and Borough:

- (a) Awarding it money damages of no less than \$292,395.51;
- (b) Determining the amount due or to grow due from Tomar and Borough to BMI;
- (c) Awarding BMI such amount;
- (d) Awarding attorneys' fees and costs as provided by law;
- (e) Awarding it interest, including prejudgment interest as provided by law; and
- (f) Awarding it such other relief as the Court deems just.

RULE 4:5-1 (B) (2) CERTIFICATION

I hereby certify that to the best of my knowledge, information, and belief, the matter in controversy is not the subject of any other Court proceeding or arbitration. No other party needs to be joined at this time, and that no other proceedings are contemplated except as set forth below, subject to what may be revealed in discovery. In accordance with the Rules of Court, should anything occur that would necessitate a change in this Certification, I shall promptly prepare and serve an amended certification.

In the event that Plaintiff is not made whole by the within action, Plaintiff reserves its rights, subject to the statute of limitations, to pursue an action against other persons or entities not related to the named Defendants.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: Princeton, New Jersey
May 29, 2019

Respectfully submitted,

CLARK HILL PLC

By: /s/Boris Brownstein

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d/b/a Bellingham Marine

JURY DEMAND

Plaintiff hereby demands a jury on all issues so triable.

Dated: Princeton, New Jersey
May 29, 2019

Respectfully submitted,

CLARK HILL PLC

By: /s/Boris Brownstein
Boris Brownstein, Esq

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, Boris Brownstein is hereby designated as trial counsel of this matter.

Dated: Princeton, New Jersey
May 29, 2019

Respectfully submitted,

CLARK HILL PLC

By: /s/Boris Brownstein
Boris Brownstein, Esq

RULE 1:38-7(B) CERTIFICATION

I certify that confidential personal identifiers have been redacted from the documents now submitted to the Court and will be redacted from all documents submitted to the Court in the future in accordance with Rule 1:38-7(b).

Dated: Princeton, New Jersey
May 29, 2019

Respectfully submitted,

CLARK HILL PLC

By: /s/Boris Brownstein
Boris Brownstein, Esq.