

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
BCD-CV-15-74; BCD-RE-15-06;
BCD-RE-15-11

FORTNEY & WEYGANDT, INC.,
Plaintiff/Counterclaim Defendant

v.

OAKLAND, DMEP IX, LLC. DOLLAR
TEXAS PROPERTIES, LLC, AND GBT
REALTY CORPORATION,
Defendants/Counterclaim Plaintiffs

FORTNEY & WEYGANDT, INC.,
Plaintiff/Counterclaim Defendant

v.

LEWISTON DMEP IX, LLC, et al
Defendants/Counterclaim Plaintiffs

**ORDER ON MOTION TO
DETERMINE AMOUNT OF
LIQUIDATED DAMAGES
WITHHELD IN GOOD FAITH**

FORTNEY & WEYGANDT, INC.,
Plaintiff/Counterclaim Defendant

v.

WEST PARIS, DMEP X, LLC, et al
Defendants/Counterclaim Plaintiffs

Before the Court is a motion brought by Plaintiff/Counterclaim Defendant Fortney & Weygandt after remand from the Law Court, asking this Court to determine the amount of liquidated damages withheld in good faith by Defendant GBT Realty Corporation. The Court has reviewed the Law Court decision dated December 30, 2019 [2019 ME 175], the Combined Judgment issued by this Court on August 9, 2018, and the filings of the parties, the last of which was received on March 23, 2020, and issues the following Order.

The issues before the Court require it to decide which party is correctly interpreting language in the Law Court decision, and what this Court is expected to do upon remand. As the parties know, the Law Court refers to the error committed by this Court as occurring within “one aspect of its analysis” regarding its determination of remedies to which Plaintiff was entitled to receive under Maine’s prompt payment statutes, 10 M.R.S. §§ 1111-1120. 2019 ME 175, ¶ 25.

Defendant GBT had framed its argument to the Law Court on this issue as follows:

GBT next argues that the trial court erred by awarding F & W any remedies pursuant to Maine’s prompt pay statutes . . . GBT also asserts more narrowly that the court erred by including the unpaid retainage invoice in the amount subject to prompt payment remedies and that, pursuant to section 1118(3), the court should have excluded from the calculation of those remedies at least the amount GBT withheld in good faith.

Id. ¶ 24.

The Law Court went on to hold that, while this court committed no error in determining that F & W was entitled generally to remedies under the statutes, it erred “because the court failed to consider the mitigating effect of its finding that GBT had, in good faith, withheld \$498,000 as liquidated damages that it claimed were contractually owed by F & W.” *Id.* ¶ 25.

GBT understandably reads this as the Law Court finding that this Court found that all of the \$498,000 was withheld in good faith. Plaintiff argues that this Court never specifically found that all of the \$498,000 was withheld in good faith, and in its Reply brief points to language in the Combined Judgment where this Court essentially avoided making such an explicit finding. Plaintiff states that “Such a determination (by this Court) was unnecessary because this court held that even if the entire amount was withheld in good faith, then that amount would not bear a ‘reasonable relation’ to the entire amount withheld by GBT.” [Reply brief, pg. 2]

The Court would note at the outset that because Plaintiff failed to ask the Law Court for clarification or reconsideration of this issue, this Court and the parties are constrained by, and must follow as best they can, the language in the Law Court decision.

The Court does recognize that it is possible to interpret the Law Court’s decision as stating on the one hand that this Court did not find that all of the \$498,000 liquidated damages claimed were withheld in good faith, while other language suggests that it was.

This leaves GBT’s assertion that the court erred by imposing prompt payment on the entire amount *when the court found that some of that amount* was withheld based on GBT’s good-faith belief that it was entitled to recover liquidated damages from F & W. More specifically, the court found that even though GBT was unsuccessful on the merits, *GBT withheld \$498,000 as liquidated damages in good faith*. Despite that finding, the court ultimately concluded that F & W was entitled to prompt payment remedies calculated the basis of *all* payments that GBT withheld – including the amount withheld in good faith – because the total “amount withheld far exceeded the value of GBT’s potential liquidated damages [claims].”

2019 ME 175, ¶ 30 (emphasis added).

The Law Court also held as follows:

Consequently, the trial court should have, in some way, *accounted for the of GBT’s liquidated* damages claims held in good faith when considering amount that is subject to prompt payment statute remedies available to F & W.

Id. ¶ 32.

And the Law Court further stated:

For these reasons, we vacate the portion of the judgment denying GBT any statutory accommodation based on the amount it withheld in good faith in the court’s determination of damages to which F & W is entitled pursuant to the prompt payment statutes, and “*we remand for the court to reconsider and recalculate that portion of the award.*”

Id. ¶ 33.

The Court has also reviewed its Combined Judgment of August 9, 2018. In that Judgment the Court found that the amount withheld by GBT actually came to \$1,445,959 if the amount of

retainage withheld is included, in addition the amount of liquidated damages withheld. The Law Court found no error in including either the liquidated damages amount of \$498,000 plus the retainage amount in the Court 's calculation of total amount of payments withheld. However, the Law Court found that this Court erred by not reducing the total amount of penalties downward in recognition of the liquidated damages that were withheld in good faith.

The Court has concluded that the Law Court's statement regarding this Court's finding that \$498,000 was withheld in good faith was not a mistake that could have been corrected if a timely motion to reconsider was filed. That is because in reviewing the analysis in the Combined Judgment, this Court did conclude that \$498,000 was the amount of liquidated damages that were withheld and that those damages were withheld in good faith. The disproportion found by this Court was that the *total amount withheld* was almost three times the amount of the liquidated damages withheld. The error was in concluding that this required penalties to be assessed on the total amount, with no adjustment for the liquidated damages which were withheld in good faith.

In sum, this Court agrees with Plaintiff that it avoided making an explicit finding as to whether all of the \$498,000 withheld as liquidated damages was held in good faith, or lesser amount. Because it viewed the total amount of money withheld by GBT to be unreasonably disproportionate to the total amount of liquidated withheld, the Court did not make any more particular finding regarding the \$498,000 figure. However, the Court cannot conceive of a reason not to have considered the full amount of \$498,000 of liquidated damages to have been the amount that was reasonably withheld. GBT has consistently claimed that it believed it had the right pursuant to the Master Contract to assess liquidated damages in this case, and given the language in the Master Contract and the way the projects progressed that position was not on its face an unreasonable one to take. Finally, the Court does not believe that any party actually

argued this point one way or another at the trial level, and no party asked this Court to make a more specific finding after the Combined Judgment was issued.

Therefore, the entry will be: The parties are bound by the finding on page 17 of the Law Court decision, and further finds that it is consistent with the analysis used by this Court in the Combined Judgment. The total amount of liquidated damages withheld in good faith was \$498,000.

The Clerk shall note this Order on the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

Dated: 4/22/2020

/S

M. MICHAELA MURPHY

SUPERIOR COURT JUSTICE