NOTIFY

COMMONWEALTH OF MASSACHUSETTS

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SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 19-00405

TOCCI BUILDING CORP.

vs.

IRIV PARTNERS, LLC; BOSTON HARBOR INDUSTRIAL DEVELOPMENT, LLC, AND HUDSON INSURANCE CO.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Tocci Building Corp. ("Tocci" or "Plaintiff") was the contractor on a construction project on a property owned by defendant Harbor Industrial Development, LLC ("BHID"). The construction project was managed by defendant IRIV Partners, LLC ("IRIV"). In the motion presently before the Court, Tocci moves for partial summary judgment on its breach of contract claim, alleging that with respect to seven applications for progress payments, it is entitled to judgment under the Massachusetts Prompt Payment Act, G.L. c. 149, § 29E ("the Act"). Defendants IRIV and BHID, as well defendant Hudson Insurance Co. (collectively, "Defendants") oppose.

Preliminarily, the Defendants move to strike certain parts of the affidavit of VJ Tocci submitted in support of Tocci's motion. As the Court relies on none of the statements challenged by the Defendants, that motion is **DENIED AS MOOT**. And while Defendants discuss but did not expressly move for relief under Rule 56(f), the Court does not believe any further discovery is necessary to resolve the specific dispute before the Court, as further discovery could not change the undisputed facts that determine its outcome. See The Alphas Co. v. Kilduff, 72 Mass. App. Ct. 104, 110-111 (2008).

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This case boils down to a simple question – what is the impact on the contractual relationship between the parties of a statute that requires certain procedures be followed in handling progress payments construction cases? The Plaintiff argues that the statute controls under the facts here, while the Defendants argue it does not.

The Defendants are in error. Accordingly, in consideration of the parties' statements of undisputed fact, their memoranda of law and oral arguments, and for the reasons that follow, Plaintiff's motion for partial summary judgment is **ALLOWED**. Tocci also effectively argues for a final and separate judgment be issued on the specific claims raised here claims under Rule 54(b), Mass. R. Civ. P. While recognizing the rarity of such relief, and for reasons discussed below, that request is **ALLOWED**.

LEGAL BACKGROUND

The Act applies to all private projects with prime contracts entered into on or after November 8, 2010 where the prime contracts have original values of $3 million or more, with some exceptions not applicable here. G.L. c. 149, § 29E (a). The Act also applies to any party who would be entitled to a Massachusetts mechanic's lien, which includes prime contractors and first and second tier subcontractors. Id. The parties agree the Act applies in this case.

As its title suggests, the Act imposes mandatory requirements that have the net effect of ensuring prompt review and payment of periodic payment requisitions submitted by contractors on construction projects within the scope of the Act, and requiring written statements of reasons for any rejection or reduction of requisitions. G.L. c. 149, § 29E (c). If there is a rejection of a payment application, the Act authorizes the contractor to begin the contractual dispute resolution procedure within 60 days after the rejection. G.L. c. 149, § 29E (d). The provisions of the Act are mandatory; indeed, the Act expressly states that "[a] provision in a contract for construction

which purports to waive or limit any provisions of this section shall be void and unenforceable." G.L. c. 149, § 29E (g).

The subsection of the Act relevant here, subsection (c), sets time limits for the submission and approval (or not) of applications for progress payments and imposes requirements for the form and substance of any rejection. If the recipient fails to object to the application in the time and manner prescribed by the Act, the application is deemed approved. Specifically, subsection (c) states (with emphasis added):

> Every contract for construction shall provide reasonable time periods within which: (i) a person seeking payment under the contract shall submit written applications for periodic progress payments; (ii) the person receiving the application shall approve or reject the application, whether in whole or in part; and (iii) the person approving the application shall pay the amount approved. The time periods for each application for a periodic progress payment shall not exceed: ... (ii) **for approval or rejection, 15 days after submission**; provided, however, that the time period, as applicable to approval or rejection by the person at each tier of contract below the owner of the project, may be extended by 7 days more than the time period applicable to the person at the tier of contract above the person; and (iii) **for payment, 45 days after approval**, unless the payment is subject to the condition of receipt of payment by a third person but only to the extent enforceable under subsection (e). **An application for a periodic progress payment which is neither approved nor rejected within the time period shall be deemed to be approved unless it is rejected before the date payment is due. A rejection of an application for a periodic progress payment, whether in whole or in part, shall be made in writing and shall include an explanation of the factual and contractual basis for the rejection and shall be certified as made in good faith.** A rejection of an application for a periodic progress payment shall be subject to the applicable dispute resolution procedure. ...

Thus, under subsection (c) of the Act, a payment application must be either approved or rejected within 15 days of submission (unless extended by seven days for each tier below the prime contract, which is not the case here). There is one extension to this deadline built into the Act – the recipient of a payment application who misses the 15-day deadline to reject a payment application can reverse the "deemed approval" of the payment application mandated under the

Act if, before the 45 day period to make payment expires, the recipient provides the rejection required under the Act.

In summary, then, a recipient of a payment requisition – typically a project owner or manager – has a total of 60 days after submission of a payment requisition to object to it, and any rejection must comply with three requirements under the Act: it must (1) be in writing; (2) include an explanation of the factual and contractual basis for the rejection; and (3) be certified to have been made in good faith.

FINDINGS OF FACT

The following relevant facts are either undisputed or presented in the light most favorable to the Defendants, the non-moving parties, in accordance with Mass. R. Civ. P. 56.

Tocci entered into a written contract with IRIV dated October 31, 2016 (the "Contract") to provide construction services and materials necessary to construct a building and additional improvements at 645 Summer Street, Boston, Massachusetts (the "Project"). Boston Harbor Industrial Development, LLC ("BHID") was the owner of the Project. The original Contract price was $3,768,845.00.[1] The Contract thus was within the scope of the Act.

The Contract described the "Owner" as IRIV, the "Manager" for the "Property Owner," BHID, and the "Constructor" as Tocci. Contract, Art. 1. In relevant part, the Contract provided for Progress Payments as follows:

> Constructor's applications for payment shall be itemized and supported by the Constructor's schedule of values and any other substantiating data as required by the Agreement. Applications for payment shall include payment requests on account of properly authorized Change Orders or Interim Directed Changes. The Owner shall pay the amount otherwise due on any payment application, as certified by the [architect], no later than 30 Days after the Constructor has submitted a complete and accurate payment application, or such shorter time as required by applicable state statute. The Owner may

[1] While Tocci alleged in its First Amended Complaint that there were change orders proposed after the original contract was executed, those facts are not before the Court for purposes of deciding the motion currently before it.

> deduct from any progress payment amounts that may be retained pursuant to [the Contract].[2]

Contract, Art. 9.2.1. The Contract also purported to authorize the Owner to reject progress payment applications, stating, in part:

> No later than fourteen (14) Days after receipt of an application for payment, the Owner shall give written notice to the Contractor, at the time of disapproving or nullifying all or part of an application for payment, stating its specific reasons for such disapproval or nullification, and the remedial actions to be taken by the Constructor in order to receive payment.

Contract, Art. 9.3

Tocci submitted monthly applications for payment to IRIV, which included a line denoted as "current payment due." Tocci calculated the "current payment due" by subtracting contractually-authorized "retainage" from the total amount of the payment application (the total amount of the payment applications, which represent the payment amount owed prior to subtracting retainage, is referred to hereinafter as the "gross amount"). IRIV had the opportunity to either approve or reject all of Tocci's payment applications.

Seven payment applications (collectively, "the Requisitions") are in dispute. The Contract provides for shorter deadlines for response and payment of the Requisitions than does the Act – 14 days for rejections rather than 15 days, and 30 days after submission for payment rather than 45 days after approval. Applying the more defendant-friendly deadlines contained in the Act, IRIV failed to approve or reject the Requisitions within 15 days after submission,[3] or within the following 45 days, when payment was due – and, since that was so, IRIV did not

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[2] Retainage was defined as "Five percent (5%) of the amount otherwise due after deduction of any amounts as provided" elsewhere in the Contract.], and in no event shall such percentage exceed any applicable statutory requirements." Contract, Art. 9.2.4.

[3] There is no basis to conclude that any other "tier" of approval below the owner of the project existed that would have extended the time to respond to the Requisitions.

provide a written rejection which included an explanation of the factual and contractual basis for the rejection that was certified as made in good faith.

Specifically the facts regarding the Requisitions are as follows:

Requisition No. 20

On June 21, 2018, Tocci submitted an application for a periodic progress payment for the period ending May 31, 2018 in the gross amount of $1,065,849.20 ("Requisition No. 20"). IRIV did not provide a written rejection of Requisition No. 20 that included an explanation of the factual and contractual basis for the rejection that was certified to have been made in good faith within 15 days of the submission of Requisition No. 20 or within the following 45 days, ending August 20, 2018.

By an email dated August 7, 2018, IRIV withheld from its payment on Requisition 20 funds reflecting the line item for "General Conditions and General Requirements," and in an email dated August 18, 2018, IRIV informed Tocci that it refused to "pay[] anyone" until further information was received from Tocci. In neither case did IRIV provide an explanation of the factual and contractual basis for the partial rejection of Requisition 20 or a certification that the rejection was made in good faith, as required under the Act.

Of the amount sought pursuant to Requisition No. 20, IRIV has not paid $136,189 as well as $53,292.47 in retainage.[4]

Requisition No. 21

On August 24, 2018, Tocci submitted an application for a periodic progress payment for the period ending June 30, 2018 in the gross amount of $1,057,293.76 ("Requisition No. 21").

[4] Tocci does not seek release of retainage in its motion.

By email dated August 28, 2018, IRIV withheld a total of $143,251.98 from Requisition No. 21, but did not provide an explanation of the factual and contractual basis for the rejection that was certified to have been made in good faith, and did not do so by the final day for payment, October 23, 2018.

Of the amount sought pursuant to Requisition No. 21, IRIV has not paid $143,251.98 as well as $52,864.68 in retainage.

Requisition No. 22

On September 5, 2018, Tocci submitted an application for a periodic progress payment for the period ending July 31, 2018 in the gross amount of $1,425,388.22 ("Requisition No. 22"). IRIV did not provide a written rejection of Requisition No. 22 that included an explanation of the factual and contractual basis for the rejection that was certified to have been made in good faith within 15 days of the submission of Requisition No. 22 or within the following 45 days, ending November 4, 2018. Of the amount sought pursuant to Requisition No. 20, IRIV has not paid $1,354,118.81 as well as $71,269.41 in retainage.

Requisition No. 23

On September 18, 2018, Tocci submitted an application for a periodic progress payment for the period ending August 31, 2018 in the gross amount of $1,013,562.56 ("Requisition No. 23"). IRIV did not provide a written rejection of Requisition No. 23 that included an explanation of the factual and contractual basis for the rejection that was certified to have been made in good faith within 15 days of the submission of Requisition No. 23 or within the following 45 days, ending November 17, 2018.

By letter dated November 8, 2018, counsel for IRIV informed Tocci that it was withholding a total of $3,186,200.51 from unidentified payment requisitions. The November 8,

2018 correspondence did not identify the payment requisitions in dispute, include an explanation of the factual and contractual basis for the partial or complete rejection of any of them, or include a certification that the rejection was made in good faith, all as required under the Act

Of the amount sought pursuant to Requisition No. 23, IRIV has not paid $962,884.43 as well as $50,678.13 in retainage.

Requisition No. 24

On October 5, 2018, Tocci submitted an application for a periodic progress payment for the period ending September 30, 2018 in the gross amount of $620,796.10 ("Requisition No. 24").

By email dated October 11, 2018, IRIV informed Tocci that it wanted "an analysis of the cost to date versus the budget," but did not provide a written rejection of Requisition No. 24 that included an explanation of the factual and contractual basis for the rejection that was certified to have been made in good faith then, within 15 days of the submission of Requisition No. 24, or within the following 45 days, ending December 4, 2018.

Of the amount sought pursuant to Requisition No. 24, IRIV has not paid $589,756.29 as well as $31,039.81 in retainage.

Requisition No. 25

On November 15, 2018, Tocci submitted an application for a periodic progress payment for the period ending October 31, 2018 in the gross amount of $639,329.28 ("Requisition No. 25"). IRIV did not provide a written rejection of Requisition No. 25 that included an explanation of the factual and contractual basis for the rejection that was certified to have been made in good faith within 15 days of the submission of Requisition No. 25 or within the following 45 days,

ending January 14, 2019. Of the amount sought pursuant to Requisition No. 25, IRIV has not paid $607,362.82 as well as $31,966.46 in retainage.

Requisition No. 26

On December 3, 2018, Tocci submitted an application for a periodic progress payment for the period ending November 30, 2018 in the gross amount of $848,995.67 ("Requisition 26").

By email dated December 7, 2018, IRIV requested "back up" for the claim, but did not provide a written rejection of Requisition No. 26 that included an explanation of the factual and contractual basis for the rejection that was certified to have been made in good faith then, within 15 days of the submission of Requisition No. 26, or within the following 45 days, ending February 1, 2019.

Of the amount sought pursuant to Requisition No. 26, IRIV has not paid $806,545.91 as well as $42,449.76 in retainage.

Defendants' Counterclaims

In their Answer and Counterclaim, IRIV and/or BHID allege claims against Tocci for breach of contract (directly or as a third-party beneficiary), breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, fraud, negligence, violation of Chapter 93A, and breach of express warranty. Those claims are not addressed in the motions presently before the Court.

DISCUSSION

Summary judgment is appropriate when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c); see DuPont v. Commissioner of Corr., 448 Mass. 389, 397 (2007). The moving party bears the initial burden of demonstrating that there is no triable issue and that he or

she is entitled to judgment. Ng Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 644 (2002), citing Pederson v. Time, Inc., 404 Mass. 14, 17 (1989); see Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 716 (1991). In reviewing a motion for summary judgment, the Court views the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in his or her favor. Jupin v. Kask, 447 Mass. 141, 143 (2006), citing Coveney v. President & Trs. of the Coll. of the Holy Cross, 388 Mass. 16, 17 (1983); see also Simplex Techs., Inc. v. Liberty Mut. Ins. Co., 429 Mass. 196, 197 (1999).

The legal question in this case is whether the Act's provisions governing progress payments control, or whether the Contract does. In answering this question, the Court starts with the plain language of the Act. "Like all statutory provisions, [the Act] 'must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.' 'In interpreting the meaning of a statute, we look first to the plain statutory language.'" DiCarlo v. Suffolk Const. Co., 473 Mass. 624, 628–629 (2016) (citations omitted). Here, the Act is clear – it controls in cases like this. That the Legislature intended this result is plainly shown by subsection (g), which declares that "[a] provision in a contract for construction which purports to waive or limit any provisions of this section shall be void and unenforceable." Cf. Katz, Nannis & Solomon, P.C. v. Levine, 473 Mass. 784, 794 & n. 13 (2016) (declining to allowing parties to define alternative grounds for

standards of judicial review of an award because doing so would contravene the Massachusetts Uniform Arbitration Act for Commercial Disputes, G.L. c. 251).[5]

Tocci's claim is one under Count I of the First Amended Complaint, that IRIV and BHID breached the contract between the parties. The Defendants complain that Count I did not cite to the Act, but that makes no difference. Tocci's failure to have cited the Act cannot change the legal conclusion that the Act, by operation of law, supplemented the Contract, trumped any contrary provisions within it, and applies in this case through common law contract principles. See Loffredo v. Ctr. for Addictive Behaviors, 426 Mass. 541, 544 (1998) (violation of a statute can "figure as an element in an otherwise available cause of action").

Because the Act's provisions control regarding the timing and processing of progress payment applications, IRIV had a limited period prescribed under the Act to lodge specific objections, requirements that were both more generous and more exacting than those contained in the Contract. Specifically, under subsection (c) (ii), IRIV had "for approval or rejection, 15 days after submission," and under subsection (c) (iii), IRIV had 45 days after the date of constructive approval, when payment was due, and IRIV was required to object in a specific form: "in writing [with] ... an explanation of the factual and contractual basis for the rejection and shall be certified as made in good faith." In light of the undisputed facts, IRIV did not reject the Requisitions in the time or manner prescribed by the Act. Because that is so, the consequence specified under subsection (c) applies: the Requisitions are "deemed to be approved."

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[5] While unnecessary to have done so, the Contract expressly recognized that state law could override its procedure for addressing progress payments, as it noted that "[t]he Owner shall pay the amount otherwise due on any payment application, as certified by the [architect], no later than 30 Days after the Constructor has submitted a complete and accurate payment application, **or such shorter time as required by applicable state statute.**" Contract, 9.2.1 (emphasis added).

The emails IRIV sent to Tocci on August 7, 18, and 28, 2018, October 11, 2019, and December 7, 2018, and the letter it sent to Tocci on dated November 8, 2018, did not suffice under the Act as a rejection of any of the Requisitions. While they may have been timely in rejecting some of the Requisitions, they did not specifically reject a Requisition in dispute, did not include an explanation of the factual and contractual basis for the rejection, and did not include a certification that the rejection was made in good faith. IRIV's complaint that these are merely technical errors is simply erroneous. So is its argument that Tocci "waived" the provisions of the Act by not requesting certification in good faith. The Act's provisions are mandatory and applicable to IRIV, and reflect a public policy to ensure that contractors receive prompt payment, or prompt and complete notice of objections to payment requests, in large construction projects. Nothing supports IRIV's argument that Tocci could subvert the Legislature's direction through waiver. See Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 377 (1990) ("A statutory right or remedy may be waived when the waiver would not frustrate the public policies of the statute"); see also Thomas v. Dep't of State Police, 61 Mass. App. Ct. 747, 753 (2004) (courts interpret language of statute and do not add words Legislature did not include).

IRIV's broader claim that if the Act provides a basis upon which to find a breach of contract, then all available defenses under this Contract apply is meritless under the circumstances here. The Act required IRIV to state "the factual and contractual basis for the rejection ... certified as made in good faith" within the time limits set by it. Consistent with the Act, IRIV was free to raise any factual or contractual basis for rejecting the Requisitions in whole or in part, but failed to do so in compliance with it. Because that is so, whatever objections IRIV may have had under the Contract to the Requisitions were waived.

Accordingly, under the Act, the Requisitions must be treated as approved. Tocci is thus entitled to judgment on its contract claims for the payments demanded, less retainage,[6] on each of the Requisitions.

In its motion, Tocci essentially seeks a final and separate judgment on its contract claims under Rule 54(b) – and in its reply, expressly argues for this relief. Tocci contends that failing to provide prompt judgment on these claims would frustrate the purposes of the Act.

Rule 54(b) allows issuance of a partial judgment under very limited circumstances – only where the Court makes an "express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Thus, a separate and final judgment on only some of the pending claims "is proper where (1) an action involves multiple claims or multiple parties; (2) there has been a final adjudication as to at least one but fewer than all of the claims; (3) there is an express finding that there is no just reason for delaying an appeal until the remainder of the case is resolved; and (4) the entry of judgment is expressly directed." O. Ahlborg & Sons, Inc. v. Massachusetts Heavy Indus., Inc., 65 Mass. App. Ct. 385, 392 (2006). It is a remedial device that should be considered a "special dispensation" to be used "sparingly." Id., quoting Long v. Wickett, 50 Mass. App. Ct. 380, 387, 389 (2000). "Whether multiple claims exist and whether

[6] To the extent there is any dispute about retainage, it is not presently before the Court, as Tocci does not seek release of retainage in its motion.

there has been a final adjudication as to any claim are questions of law upon which [appellate] review of the [trial] judge's decision is de novo. On the other hand, review of '[t]he determination of the presence or absence of a just reason for delay ... is left to the sound discretion of the trial judge and is subject to reversal only for an abuse of that discretion.'" Id. (citations omitted).

One the one hand, the showing necessary under Rule 54(b) is high because issuing a separate judgment on only some claims can create confusion and complication on appeal. Indeed, the Appeals Court has expressed its "traditional abhorrence of piecemeal appellate review," noting that "fragmentation of [a] case [for appellate purposes] is to be avoided except in unusual and compelling circumstances." Long, 50 Mass. App. Ct. at 387, 389 (internal quotation marks and citations omitted). Thus, entry of separate judgment under Rule 54(b) is "inappropriate ... in a case where the facts underlying the adjudicated portion of the case are largely the same as or substantially overlap those forming the basis for the unadjudicated issues." Long, 50 Mass. App. Ct. at 392.

On the other hand, however, the Act reflects a policy decision made by the Legislature that progress payments in construction cases like this are to be made promptly, and failing to issue a separate and final judgment as to the Requisitions in dispute would frustrate that legislative choice. Indeed, in O. Ahlborg & Sons, Inc., the Appeals Court upheld a Superior Court's decision to award separate and final judgment based on what was effectively an arbitrator's award to a contractor (Ahlborg) against a counterparty (MHI) that resolved only some of the issues between them in a construction project because the judgment as to the payment issue was sufficiently separate from the remaining disputes. O. Ahlborg & Sons, Inc., 65 Mass. App. Ct. at 392–393 (citations omitted) ("To be sure, the pleadings filed by Ahlborg

and MHI show the existence of multiple claims. However, based on the materials in the record appendix before us ... as well as MHI's failure to raise timely any grounds set out in G.L. c. 251, § 12(*a*) [to effectively object to an arbitrator's award], we conclude that the order confirming [the arbitrator's award] in respect to Ahlborg's requisition number 12 was a final adjudication on a claim separate from and independent of the remaining counts raised by the parties' pleadings. ... we conclude that the judge did not abuse his discretion in concluding that there was no 'just reason for delay,' see rule 54(b), in directing that judgment enter on Ahlborg's claim for payment on requisition number 12").

Under these principles, there is no just reason for delay in issuing a separate and final judgment on the Requisitions. The Act demands prompt payment, absent a timely and adequate objection, and as IRIV did not comply with the Act's requirements, the Act directs that prompt payment be made. While the remaining claims will have to be separately adjudicated, the payment requisitions covered under the Act are legally distinct from them and can and should be resolved separately and promptly to comport with the Legislature's will.

The Court thus awards the amounts claimed by Tocci, but not the retainage, which totals almost $281,000 and which will continue to be held by IRIV until this matter is finally resolved. Specifically, the Court awards the following amounts as per the specified Requisition: **20** - $136,189; **21** - $143,251.98; **22** - $1,354,118.81; **23** -$962,884.43; **24** - $589,756.29; **25** - $607,362.82; and **26**- $806,545.91. Those total $4,600,109.24.

ORDER

For the foregoing reasons, plaintiff's motion for summary judgment is **ALLOWED**. A separate and final judgment shall immediately issue as to Tocci's contract claims for

Requisitions 20 through 26 under the Act in the total amount of $4,600,109.24. Consistent with the Act, payment of that amount shall be made within 45 days of the date of this Order.

MICHAEL D. RICCIUTI
Justice of the Superior Court

Dated: November 19, 2020