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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

INTERNATIONAL EXTERIOR FABRICATORS, LLC,

Plaintiff,

INDEX NO.: 016809/2008

- against -

NON-JURY TRIAL DECISION

DECOPLAST, INC., EAST COAST WALL, LTD.,
FRANKLIN STUCCO SUPPLY, INC., JOHN
DI STEFANO, JR., FRANK DI STEFANO, and
DANIELLE DE STADIO, formerly known as
DANIELLE FEDOR,

Defendants.

This matter was tried before the Court, sitting without a jury on April 4 — 8, 11 — 13, 18 — 21, 25, 27, 28, and May 2 and 3, 2011. The Court has available to it the minutes of trial, Plaintiff's Post-Trial Memorandum of Law, Defendants' Initial Post-Trial Submission, Defendants' Post-Trial Reply Submission and Plaintiff's Reply Brief.

International Exterior Fabricators, LLC ("IEF") is an experienced company in the installation of Exterior Insulation and Finish Systems ("EIFIS"). It specializes in the fabrication and installation of panelized, unitized exterior wall systems for large commercial projects. On or about October 30, 2007, IEF contracted with Deer Park Enterprises, LLC ("Deer Park"), the owner and developer of what was to become Tanger Outlets at the Arches ("the Arches Project"). The owner's representatives included Aurora Contractors, Inc., the construction manager ("CM" or "Aurora") and Adams & Associates Architecture ("Architect"), which are jointly referred to as "Owner's Representatives".

Under the terms of the contract, known as the Trade Agreement, IEF was to install a unitized facade system for the new Arches outlet mall in Deer Park, which system included prefabricated and field applied panelized exterior insulated and finish systems. The contract specified that one of two alternative systems was to be chosen. The first choice was Dryvit Limestone ("DL") standard PB; while the second was Decoplast with applied Venetian Plaster

finish system. ("VP"). The original contract price for IEF's services was \$27,720,576.

Decoplast is a manufacturer of exterior wall systems and stucco finishes. Franklin Stucco is a distributor of exterior walls and stucco supplies and, until 2005, was an exclusive distributor of Fresco products. Fresco S.r.l. is a well-known Italian firm which manufactures a Marble stone product. East Coast Wall, Ltd. is a contracting company that installs exterior walls and decorative coatings. John DiStefano and Frank DiStefano are the principle owners of each of the foregoing companies.

The term "unitized panel construction" refers to a process involving fabrication of the exterior wall components in a shop and the installation of these components on-site. In this instance, IEF utilized former airplane hangars in Calverton, New York for the off-site fabrication. This process is beneficial because it permits the fabrication under controlled conditions, requires less manpower, and provides safer working conditions. The unitized panels are designed to be hung on steel framing, and to be exposed to outdoor elements. They do not require protection from the elements after they are installed.

Before entering into the Trade Agreement, IEF determined that they would use the wall system and finishes recommended and submitted for approval by defendants. This product included a panelized wall system known as the Deco-Thermal system ("DTS") along with a Deco plastic acrylic simulated limestone finish, known as Calcare Revestimenti ("Calcare") and a lime-based Italian Venetian plaster product known as Marblestone. The latter product was represented by defendants to be manufactured by Fresco. They further represented that pursuant to a business arrangement with Fresco, Decoplast was authorized to distribute Fresco Marblestone as part of their private label entitled "The Stucco Veneziano Collection", using the name "Pietra".

Defendants presented a submittal package to IEF, containing specifications of the products that would be used on Decoplast standard exterior wall system, DTS. The package included technical data sheets for the Calcare acrylic finish coat and the Marblestone Venetian plaster finish coat, both of which defendants recommended and agreed to supply for the Arches Project. The package also included a technical data sheet for Parapiera, ACL a product manufactured by Fresco. Danielle DeStadio compiled the material contained in the submittal package.

The technical data sheet for SVC Marblestone was prepared by Danielle DeStadio, and was copied by her from data sheets that had been prepared by Fresco for its Marblestone product. It included representations that the finish system contained acrylic additives which enhanced the adhesive and rheological properties. She, along with John DiStefano prepared technical data sheets for Decoplast's SVC Pietra product, which contains virtually identical language as the Fresco Marblestone Data Sheet. The sheets were developed for the purpose of marketing and selling Decoplast's SVC Pietra products.

As it developed during the course of the trial, defendants acknowledged that they did not actually know the contents or composition of the Pietra material and they had never seen the document which specified the contents or formulation for Pietra products. It was ultimately determined that the Pietra products do not contain acrylic additives which enhanced the ability of the product to bind to the surface. Plaintiff contends that prior to the application of the Pietra product, defendants John DiStefano and Danielle DeStadio actively misrepresented their relationship to Fresco and asserted that the Pietra finish contained the acrylic additives which permitted it to be applied for exterior use. They further asserted that it was part of their arrangement with fresco which enabled them to market the Fresco Marblestone product as part of their private SVC label.

In response to plaintiffs submission to the defendants that the Arches Project was on a fast track, defendants assured them that, because of their relationship with Fresco, they were permitted to color untainted Marblestone base at their local plant and that they would be in a position to procure large batches of the Marblestone material and provide whatever colors when needed for the Arches Project.

Defendant Danielle DeStadio also produced a Testing Submittal Sheet which contained the standardized testing results for the Decoplast wall and finish systems which were being submitted for approval. According to the Testing Submittal Sheet, the Decoplast Venetian plaster finishes had not shown any evidence of "cracking, crazing, erosion or defects" after 10 cycles of freeze - thaw. Defendants repeatedly stated that the results of the tests indicated that the product was suitable for the exterior at the Arches Project.

As part of the approval process for the system and finishes, defendants created a mock - up of the products which they proposed to furnish for the Project. The instructions for the mock-

up called for the application of Calcare and Marblestone finishes, samples of which they supplied. The mock-up was exposed to outdoor weather conditions, and proved satisfactory to the Owner, who approved its use. The material which was supplied for the mock-up was actual Fresco Marblestone and not the SVC Pietra finish which Decoplast ultimately supplied for use at the Project.

What defendants subsequently supplied was manufactured by a newly opened company known as General Future Products ("GFP"). This company was formed by Athos Perin, formerly a chemist working for Fresco. Mr. Perin testified on behalf of the defendants, but was not permitted to elaborate on the contents of the Pietra product which he supplied to them through

GFP. This ruling by the Court was based upon the fact that defendants had never supplied a material data sheet for Pietra products in response to demands by plaintiff. He confirmed that he supplied uncolored Pietra products for use by defendants in supplying the Arches Project.

Plaintiff lays out its claims against the named defendants in its post-trial memorandum of law as follows:

a) they falsely represented that Decoplast was a distributor of a lime-based Venetian plaster product known as Marblestone which was manufactured by Fresco, and that they were authorized by Fresco to add coloring to the un-tinted product, and then resell it under the name "Pietra", as a part of a private label, the Stucco Veneziano Collection ("SVC");

b) they falsely represented that they had tested the Pietra Venetian plaster to meet the strict standards for the use of such material as an exterior wall finish;

c) they falsely represented that the Pietra material contained acrylic additives which enhanced its "rheological and adhesive properties" and enabled it to be used on exterior walls;

d) they falsely stated that the Pietra finish had been successfully used on other exterior wall systems.

Plaintiff also asserts that during the course of the project, when defendants were confronted with widespread failure of the material, and the fact that they were not supplying Fresco Marblestone for the project, the individual defendants made additional representations that the Pietra was the same product as Fresco Marblestone, that it had been tested, and had been previously used for a successful exterior finish coat. Plaintiff claims that the overwhelming

evidence was that these representations were false when made and that the defendants then knew that they were false, or had no basis for making such claims. Further, there is no issue but that defendants did not have a business relationship with Fresco; did not have an available supply of Fresco Marblestone for the Arches Project; and as the defendants have now conceded, they actually supplied an inadequate and ineffective stucco material which was not produced by Fresco. Defendants further admit that they did not see any testing for the Pietra product, and that they never actually knew the ingredients or composition of the Pietra material. Lastly, defendants concede that wherever the Decoplast Pietra material was used, it failed when exposed to moisture and outdoor weather conditions, and also failed every test to which it was subjected.

Plaintiffs claim that as a result of defendant's false statements and fraudulent schemes, they have sustained damages and additional costs calculated as follows:

- Remove and Replace Defective Finishes \$121,265.57
- Additional Cost for Shop Finish performed in field \$185,918.00
- Overtime Costs incurred to complete project \$436,862.00
- Credit to Owner for not providing VP panels \$431,116.00
- Loss of Final Completion Incentive Payment \$325,000.00

Decoplast asserted counterclaims to recover for the value of unpaid materials and products it allegedly supplied to IEF as well as for unpaid labor and materials allegedly furnished to IEF. Plaintiff's reply that the payments which Decoplast seeks in its counterclaim were in fact paid by plaintiff to Blue Tarp Financial ("BTF"), a credit finance company utilized by Decoplast to serve as a credit finance company. BTF was authorized to recover payments on behalf of Decoplast. Plaintiff claims that if there is any dispute with respect to the amount received, the dispute is with Blue Tarp, not plaintiff. In fact, BTF commenced action against IEF, and the latter was required to pay the full outstanding balance due on its revolving credit account with BTF.

Plaintiff also claims that it is entitled to offsets and credits for defective and inadequate goods which it properly rejected. With respect to the labor and materials charges expended by East Coast to supervise and monitor the application of the defective Pietra material, and to repair and correct the Pietra failures, this work was performed pursuant to Decoplast's contractual

responsibility to remediate the defective material, and that the services performed by East Coast were themselves defective. East Coast was unable to successfully apply or correct any of the defective Pietra finished material. Consequently, the material applied by East Coast was required to be removed and replaced by IEF.

IEF commenced work on the Arches Project in January, 2008 . They began to assemble and fabricate the wall systems and finishes at the plant in Calverton. By letter dated July 2007, John DeStefano advised IEF that a Deco Plast was providing a fully insured 10-year material and labor warranty on the Arches Project, and indicated that the project would be subject to regularly scheduled inspections throughout the stages of work. After one such inspection, on January 22, 2007, Danielle DiStadio reported that the progress of the panels was acceptable and that the Decoplast Thermal System had been installed correctly on each visit. In the latter part of January, 2008, IEF installed the finish wall panels on the steel framing at the project site. Soon thereafter, failures, particularly in the lighter color Venetian plaster panels, occurred.

These failures were noted by Danielle DiStadio in letters dated February 4, 2008 and February 14, 2008, in which she noted that the lighter color finishes were delaminating “between base coat of Pietra and finish coat of Calcare with the exterior Deco – seal”, and that the material was “falling off in sheets”. It was later determined that the dark Venetian plaster material was from the older stock of Fresco Marblestone , while the lighter was found to be GFP Pietra.

As a result of the failures of the Pietra material, Decoplast requested Charles J. Campisi, of Thermal Consulting Inspection, Ltd., to inspect the Venetian plaster on the site. Mr. Campisi testified that, based on his investigation, which included the performance of a freeze - thaw test, he determined that the Venetian plaster material was unsuitable as an exterior finish. He performed a bench test on two samples of the failed material in a shop in which he mimicked the freeze-thaw cycle that the material was encountering in the field and found that it experienced some disintegration after one cycle, and totally disintegrated after the second one. IEF retained its own testing expert, T. Willems, who concluded that the Pietra material disintegrated and re-emulsified after 10 minutes of being in water, and was unsuitable for exterior wall finishing. Defendants challenged the qualifications and testing procedures of both of these parties.

One of the determinations made by Mr. Willems was that the GFP Pietra (“Veneziano”) material is comprised of an organic component which is primarily a polyvinyl acetate (“PVA “),

which is not suitable for an exterior wall application. He testified that in the test performed by him, the product re-emulsified and "turned very soft" after 10 min. of exposure to the water.

In response to the failure of the plaster coatings at the project, defendants opined that it was the extreme weather conditions and poor workmanship by IEF which were the cause of the problems. They also issued revised guidelines for the fabrication of finish coat materials. Upon receiving the revised guidelines, Mr. Ed Harms, of IEF, prepared control samples of the Deco plaster wall panels and Pietra finishes under ideal conditions in the warehouse. These controlled samples yielded the same failures that had been experienced in the field. When presented with the failed samples at a project meeting on March 10, 2008, defendant stated that they had achieved successful application of the Pietra material and they also asserted that dark colors had apparently been successfully applied on the wall panels, thereby demonstrating that the Pietra material could be successfully applied when done properly. As previously noted, however, the dark colors were not in fact Pietra, but were Fresco Marblestone which had been provided by Franklin Stucco Supply from their remaining inventory of Fresco products.

After the March 10, 2008 meeting, defendants continued to maintain that the product which they said had supplied was Pietra Marblestone. Upon investigation, Mr. Harms determined that Franklin Stucco was supplying different pails of Venetian plaster in Fresco and SVC pails and that Franklin Stucco had re-labeled the Fresco pails to indicate that they contained Pietra material. Mr. Harms and Tim Stevens, president of IEF recorded a March 10, 2008 telephone conversation with Danielle DiStadio, wherein they inquired as to why IEF was receiving different pails of the Venetian plaster. Ms. DiStadio reiterated her prior representations that the Marblestone Pietra was, in fact, Fresco Marblestone under a different label; that the material in both pails was "literally identical material"; and that the material had been manufactured and batched in September 2008 by Decoplast's associates in Italy. She further stated that Fresco Marblestone was now to be distributed by Decoplast under the new name of Pietra, as part of Decoplast's SVC label.

In a second telephone conversation, also recorded, Frank DiStefano, John DiStefano and Danielle DeStadio made statements that Decoplast had received copies of the Venetian plaster test results which they had previously promised to provide to the Owner and IEF, but they were in Italian and were being interpreted; that the Fresco and the Pietra material came from the same

plant; that there is no difference in the base materials for Fresco and SVC venetian plaster; and that Decoplast had only gotten permission from Fresco to sell Marblestone venetian plaster under the Decoplast SVC private label. Only the pail was changed, with the same product being placed in both the Fresco and SVC pails.

In a subsequent telephone conversation on the same day, defendants were advised that IEF had spoken to Fresco, and discovered that the previous statements made by the defendants were untrue. It was only at that time that Frank DiStefano admitted that the SVC Pietra material was not produced by Fresco, or in a Fresco plant, but was being manufactured by a new company which had been formed by Athos Perin, a former chemist at Fresco.

Defendants continued to represent to IEF and the Owner of the Arches Project that the SVC Pietra product, manufactured by GFP, was the same product as the Fresco Marblestone venetian plaster. They also claimed to have testing results which confirmed that the Pietra product had been successfully used on exterior walls on similar projects in the New York area. During the course of the trial, defendants acknowledged that in fact, they had not conducted any testing on the Pietra product, nor had they ever seen testing results for that material.

Defendants persisted in their claims that if the material were properly applied, it would be successful. They opposed requests by plaintiff to the Owner that they be permitted to replace the Decoplast with another finish. They represented that Athos Perin had tested the product, and that the results validated its continued use. They promised to produce the testing results which validated the continued use of the Pietra products, and they represented that they had used the same materials on other exterior wall projects without problems as encountered at The Arches. The end result was that the Owner authorized the continued use of Decoplast Pietra, and asked IEF to apply the Decoplast product under the direct supervision of Decoplast. IEF agreed to proceed under these conditions. By letter dated April 8, 2008, Ed Harms advised the parties at Decoplast that they were proceeding with the application of the Pietra material "only on the basis that you have guaranteed and assured us that the finish material as it is currently being applied will without question be a successful application". IEF takes the position that if they required Decoplast's technical support and services, Decoplast was entitled to be paid, but such payment was contingent upon successful application of the product. They further contend that the intervention of Decoplast, and their affiliated company, East Coast, did not result in any better

results than had previously been experienced, and whatever work East Coast performed, had to be removed by IEF and replaced with an acrylic finish.

On or about March 14, 2008 the CM for the project advised IEF and Decoplast that a layer of titanium was detected in the finish coats. Defendants asserted that this was not a component of the Decoplast venetian plaster, and that its presence would cause a failure of adhesion of the finish coat. IEF denied that its process in any way involved titanium, and provided an analytic report of Travelers Group which determined that titanium was present in Decoplast's finished products, including both the Fresco Marblestone and SVC Pietra finishes. There does not appear to be any substance to the contention that titanium was in any way responsible for the Pietra failures.

Despite the supervision of Decoplast, and the application of Pietra by East Coast, the venetian plaster continued to fail.

Defendants asserted in a March 14, 2008 telephone conversation with Ed Harms and Ted Stevens that they had received the test results from Italy, which they produced at a March 17 project meeting. In fact, the documents were simply safety data sheets and other documents, none of which related to testing of Pietra. Defendants then claimed that they were proceeding with ASTM (previously known as American Society for Testing and Materials) tests, and that they would make the test results available when received. Defendants acknowledged at trial they never submitted the material for testing by ASTM.

In the face of continued failure of the Pietra product, defendants ultimately acknowledged that they were not attributable to any of the causes which they had previously posited; rather, the failure to adhere to the exterior walls was simply caused by defective material. At the end of March defendants asserted that it was a failure of the Decoplast sealer, and they then directed the use of Fresco Parapiera sealer as a substitute. By letter dated April 14, 2008, Ed Harms advised that work performed by Decoplast personnel, using Fresco Parapiera, failed within minutes of applying water to the sample. The material began to re-emulsify and could be rubbed off with one's fingertips. Acknowledging the failure, defendants then stated that the cause of the failure of the finish coat was a "defective accelerator" in the Pietra material. Decoplast personnel then applied a modified form of Pietra on Buildings 7 and 12 panes, which also failed.

Between March 2008 and July 1, 2008, Decoplast sought to remedy the failed Pietra finish

coats; but the plaster repairs and remedial work also failed, and was rejected by IEF. Decoplast denied responsibility to correct the unsatisfactory work, requiring IEF to remedy the defective application to Buildings 7, 12, 14 and 15, including the removal of all delaminated and faulty finish. Among the problems were that panels were mismatched because of the introduction of new sealer or bonding agent by Decoplast and East Coast. Plaintiff employed a power wash company to remove the defective venetian plaster finish at a cost of \$38,292, and incurred additional labor costs of \$82,968 to repair and refinish the walls on Buildings 7, 12, 14, and 15.

Plaintiff claims damages as a result of the material delays occasioned by defendants' continued insistence that there was no material difference between the Fresco and Pietra products, and that the fault lay with the application of the product by IEF. They claim that as a result of a variety of interferences and impediments to a resolution of the adherence problem with the product, they were required to perform acrylic finish work on site, which should have been done for less cost in the shop. They claim that 20% of the field labor costs are attributable to the work having to be performed on already installed panels. Plaintiffs claim damages in the amount of \$185,918 for these delays.

IEF also claims to have incurred additional overtime and premium time wages during the period March 25, 2008 through August 6, 2008, and that these were necessary to mitigate the scheduling delays it encountered by reason of the defective Pietra product and Decoplast's and East Coast's failure to remediate the situation. They claim to have paid \$436,862 in overtime and double time wages during the foregoing period. These included shop wages necessitated by restrictions on the production imposed by Decoplast, and the requirement of overtime field work, when shop delays required a compression of time within which to complete work on site.

Because of the failure of the Pietra venetian plaster, the finish called for in the Trade Agreement, IEF was required to replace the product with a less costly acrylic simulated limestone DL finish. IEF was forced to extend a \$7.00 per square foot credit to the Owner for 61,588 square feet of coverage, thereby reducing their fee by \$431,116. They claim that there was no difference in the acquisition costs of the two products. The Pietra had a premium value, which would have resulted in IEF earning an additional \$431,116.

In an effort to expedite completion, the Owner made an incentive offering, which IEF accepted on May 20, 2008. Because of the delays occasioned by the defective Pietra product, IEF

claims that it was unable to meet the finish completion dates, and the Owner refused to pay the \$325,000 incentive.

Defendants contend that it is insufficient for plaintiff to merely establish that the product they obtained from defendants failed; they must meet their burden of proof by establishing each and every element of their claims. There is no requirement under the terms of the contract that plaintiff utilize only Fresco products. Nor is there any evidence that Decoplast ever committed to IEF to supply only Fresco products. They assert that it was plaintiff's obligation to provide the Owner with a subjectively acceptable finish. Despite the intention of Mr. Harms to utilize Dryvit products on the project, the inability of Dryvit to produce an acceptable product to the satisfaction of the Owner, bound them to Decoplast.

Despite plaintiff's contentions, defendants assert that the first delamination product failure were caused by IEF's introduction of a foreign substance into the finish coats. They point to the Construction Materials Consultants' Report obtained by Aurora and the Owner (Exh. E, 88), coupled with the fact that up to that point, only IEF was applying the finishing coats to the panels.

They also challenge the use of Charles Campisi as an expert. Defendants point out that he is a high school graduate with no degrees, who described a "wet freeze/thaw test which does not exist as an industry standard. His test consisted of soaking the product in water for two hours, then placing it in an 18 degree freezer. These were not conditions that would be encountered in the field, and are not recognized as a standard recognized test.

Defendants also take umbrage with the testimony of Mr. Terry Willems, of CTL Engineering. He testified of tests performed on unmixed Fresco Marblestone AD and Decoplast Stucco Veneziano (Pietra Fina), neither of which were used on the Arches Product. Plaintiff has failed to offer proof that Marblestone AD is the same as Marblestone or that Pietra Fina is the same as Pietra. They claim that the Court should disregard the lay testimony of Frank or John DiStefano to the effect that the difference between Marblestone AD and Marblestone, and Pietra Fina and Pietra is limited to the size of the granules. To conclude that this is the sole difference would, in their opinion, constitute "rank speculation".

They further note that the Court precluded Athos Perin, the formulator of Pietra, from testifying to its ingredients, there is no basis for any conclusion that the sole difference between the applied products, and the tested products was the granular size. It must be noted, however,

that it was the failure or refusal of defendants to comply with discovery demands for a material data sheets showing the contents of the Pietra product which resulted in the testimony preclusion.

Defendants challenge the validity of the ASTM tests performed by Mr. Willems as part of his product analysis. Willems was unfamiliar with any ASTM testing standard referred to by Mr. Campisi as "wet freeze/thaw", and described the test he did perform as one for "hardened masonry mortar". He acknowledged, however, that neither Fresco nor Pietra were hardened concrete products. Therefore, they contend, neither of the two tests which he performed were valid tests of the actual products used at the site.

During the course of his testing, Willems concluded that the organic component of the Pietra ("Veneziano") consisted primarily of polyvinyl acetate ("PVA"), making the product unsuitable for exterior use. Defendants point to the cross-examination that the mere presence of PVA does not render the product unsuitable; rather, it depends upon the formula.

Defendants challenge the quantity of the allegedly defective product it purchased and used. According to their Eastern Materials purchase summary, (Exh. "47"), a total of 857 pails of both Marblestone and Pietra were purchased from Decoplast, but a May 12, 2008 credit memo issued by Decoplast for 467 returned pails, leaves a net purchase of Decoplast product of 390 pails.

The point of defendants' calculation is that plaintiff purchased only \$51,597 worth of both Marblestone and Pietra products ($390 \times \$132.30 = \$51,597$), and given the coverage ratio of 300 square feet per 5-gallon pail, at most a total of 117,000 square feet of exterior wall could have had Marblestone or Pietra applied to it. By contrast, the Calcare product, with coverage of 200 square feet per 5-gallon pail, of which 3,537 buckets were purchased, provided coverage for 707,400 square feet of wall area. They contend that the alleged damages occasioned by the application of a relatively small percentage of the overall coverage could not account for the damages attributed to it in the testimony of Mr. Harms.

They contend that the late January and early February 2008 failures were caused by IEF, and defendants are not in any way responsible for any losses occasioned thereby. Nor can the delay resulting from the correction of IEF work be laid at the feet of defendants. In addition, plaintiff's failure to make timely payment for goods delivered was a cause of delay in future shipments. Defendants contend that the loss of incentive bonuses because of the inability of

plaintiff to meet targeted completion dates is an unsustainable claim, since plaintiffs were already far behind schedule when the May 2008 incentives were negotiated.

Defendants propound that the owner and construction manager, after receipt of the results from Construction Materials Consultants ("CMC"), continued to insist that plaintiff utilize the Decoplast product. According to defendants, the CMC report placed the blame for the delamination failures upon IEF and not the Decoplast products.

They also challenge plaintiff's claim that they lost the benefit of a higher unit price by having to issue a \$7.00 per square foot credit, amounting to \$412,116. Defendants point out that the cost of the products were virtually identical, and that if the \$7.00 difference represented increased labor costs for the application of the VP product, as opposed to the acrylic finish product, this resulted in a saving to plaintiff, and they are not entitled to the additional \$7.00 per square foot, since they did not incur the additional labor costs.

Defendants also contend that plaintiff has failed to establish that they applied the Decoplast products in accordance with the specifications in the submittal sheet for Deco Prep adhesive primer, which provides that "the surface and air temperature will be at a minimum of 45° F during and at least 24 hours after the application". The sheet for the Base Coat has the same temperature restrictions. The exterior finishes also contain the same restrictions as to temperature and, in addition, state that the drying times are based on optimum weather conditions of 70° F and 55 percent relative humidity. They challenge the plaintiff's assertions that the appropriate conditions were maintained in the former airplane hangars at Calverton as unsupported by any empirical evidence, and assert that Mr. Harms testimony that conditions were maintained in the winter by the use of radiant heat, propane fueled heat blowers and other non-permanent heating applications is suspect. The former hangars are said to contain "hundreds of thousands" of cubic feet, with high ceilings, which would militate against the maintenance of consistent temperatures.

With respect to the fraud claims, defendants assert that the individuals were at all times proceeding on a reasonable basis in light of their prior experience with Fresco products. They were advised by Perin that Pietra was a limestone-based product used for exterior walls. Perin testified that he used the same materials in the production of Pietra as he had in the manufacture of Fresco.

Other than the major delamination which occurred in late January and February, 2008, which defendants attribute to errors of IEF, they claim that the defects shown in plaintiff's photographs were only "minor, insignificant or inconsequential 'defects' in the finished panel appearance".

As to their counterclaims, defendants contend that they are entitled to payment in full for the products supplied and not returned. They note that there is no evidence of the amount which Blue Tarp sued for, or whether the matter was settled for the amount claimed. Plaintiff has not established what amount they paid as a result of the action brought against them by Blue Tarp. Having not established the amount, if any, paid to Blue Tarp, plaintiffs should not be permitted to claim that the dispute as to the claimed lack of payment is between Decoplast and Blue Tarp.

They also claim that the East Coast's counterclaim for work performed is valid. While Mr. Harms says that they were to be paid only if the supervision and monitoring produced favorable results, he is not the person who negotiated the agreement with East Coast for monitoring and supervision. According to Frank DiStefano, the agreement with East Coast was negotiated on behalf of IEF by Tim Stevens. To the contrary, the only restriction in Mr. Harms letter (Exh. "24") with respect to East Coast's involvement was "so long as the costs are deemed reasonable and acceptable by IEF".

Defendants claim that Decoplast is owed \$422,020.81 and that East Coast Wall is entitled to \$114,795.

FINDINGS OF FACT

Plaintiff has established the following facts by clear and convincing evidence:

On or about October 30, 2007, IEF contracted with Deer Park Enterprises, LLC, the owner and developer of what became Tanger Outlet at the Arches, the Arches Project;

The contract, known as the Trade Agreement, called for IEF to install a unitized facade system for the Arches Project;

Of the two alternative systems, Dryvit Limestone, and Decoplast with applied Venetian Plaster, the latter was chosen;

Before entering into the Trade Agreement, IEF determined that it would use the product recommended by Decoplast and submitted by them to the owner for approval. The product included a panelized wall system known as Deco-Thermal System (DTS), with a Decoplast acrylic simulated limestone, known as Calcare Revestimenti (Calcare) and a lime-based Italian Venetian Plaster known as Marblestone;

The mock-up prepared by Decoplast to demonstrate the wall system to IEF and the owners utilized actual Fresco product;

Defendants initially supplied Fresco stucco for application to the exterior wall system at the Arches Project;

The Fresco product proved satisfactory for the intended purpose of an exterior wall coating;

As of October 2007, Decoplast was not a distributor of Fresco products;

The Fresco products which they initially supplied to IEF were obtained from inventory which was approximately two years old;

Defendants represented to IEF that they had a relationship with Fresco which enabled them to package the Fresco Marblestone as part of their private label entitled "The Stucco Veneziano Collection" (SVC), using the name "Pietra";

This representation was false. In fact, SVC was manufactured in Italy, not by Fresco, but by Generation Future Paints (GFP), a company formed by Athos Perin, formerly a chemist for Fresco;

The Pietra product, as supplied, failed to perform in accordance with its intended purpose, that is, the exterior coating for the panelized wall system affixed to The Arches Product;

As early as February 2008, Danielle DiStadio noted in correspondence that the lighter color finishes were delaminating and that the material was “falling off in sheets”;

The lighter color finishes were Pietra, while the darker colors were Fresco;

Whenever and wherever applied, whether in the Calverton indoor site, or at the project, the Pietra product failed to adequately adhere;

The only reason why the Pietra system failed was the fact that while the Fresco product had an organic component which was primarily acrylic polymer base, the Pietra was primarily composed of an organic component which was poly vinyl acetate based;

The conclusion that the Pietra product failed to adhere when used as an exterior coating was not solely based upon tests performed on behalf of plaintiff by Messrs. Campisi and Willems. Rather, the proof of the pudding is in the tasting - Pietra did not perform under the actual conditions in which it was tried.

The Court further finds by clear and convincing evidence, that the Defendants Decoplast, John DiStefano, Jr., Frank DiStefano, and Danielle DeStadio affirmatively misrepresented the source and components of the Pietra product as follows:

- they fabricated a relationship with Fresco, an established manufacturer of stucco products, misrepresenting that the product which they marketed as Pietra was manufactured by Fresco;
- Danielle DeStadio created a material data sheet which she copied from the Fresco Marblestone product;
- She had no knowledge, nor did she have reasonable grounds to believe that the product received from GFP was identical to the Fresco product;
- defendants Decoplast, John DiStefano, Frank DiStefano and Danielle DeStadio falsely represented that they had tested the Pietra product and found it satisfactory for exterior application;
- defendants Decoplast, John DiStefano, Jr., Frank DiStefano and Danielle DeStadio falsely represented that they had successfully used the Pietra product on other projects.

The foregoing statements were false, and none of the defendants had any rational basis upon which to conclude that the representations were true.

When confronted with the abject failure of the Pietra to perform, the defendants further delayed the resolution of the problem by continuing to insist that the products were identical, convincing the owners that their affiliate, East Coast, should supervise the work of IEF, and when this failed, attributing blame to causes such as the existence of titanium between layers, and the use of a faulty accelerator in the Pietra material, neither of which proved to be accurate. The representations as to the identity of the Fresco and Pietra products continued between February and August 2008.

PLAINTIFF'S CLAIMED DAMAGES

Plaintiff claims that it is entitled to recover from defendants the full amount of damages incurred as a result of their reliance upon defendants' false representations, including all incidental and consequential losses that it incurred in the course of completing the work contracted for at the Arches Project. They claim that under UCC Art. 2-715, recoverable incidental damages include all reasonable expenses incident to the fraud of defendants.

Between March and July 2008, defendants unsuccessfully attempted to repair the damage resulting from the failed Pietra. IEF thereafter removed and replaced the defective finishes at a total cost of \$121,265.57, including \$38,297.87 for power washing and \$82,967.70 in wages to remove and refinish the defective finishes furnished by defendants.

During the almost four-month period between March 25 through July 18, 2008, IEF followed defendants directives and worked under their supervision to produce an acceptable venetian plaster finish. They claim that during this period they incurred overtime and double time wages in the amount of \$436,862, which they would not have otherwise incurred were it not for the fraudulent misrepresentations by defendants.

Plaintiffs also claim to have incurred an additional cost of \$185,918 for the application of acrylic finish in the field, as opposed to what it would have cost to apply the product in the shop. Plaintiffs contend that it is, on average, 20% more costly to perform work on site.

Pietra was billed to the Owner as a premium product, despite the fact that it was not appreciably more expensive than the product with which it was replaced. They claim to have lost the opportunity to collect \$7 more per square foot, for a claimed lost profit of \$431,116.

IEF accepted the promise of a proposed bonus if they completed work by a designated date. They claim that, because of the failure of defendants to provide a product suitable for the

purpose for which it was intended, and the ensuing delays, they failed to achieve completion of the project as of the target date, despite the hiring of additional staff, and were not paid the agreed upon incentive payment of \$325,000.

East Coast has counterclaimed for \$114,795, for the supervision and repair work it alleges to have supplied during the period from March 25 through July 18, 2008. IEF claims that East Coast did not achieve any beneficial results from the application of the material, and it was their work which IEF was required to remove and replace. They deny that East Coast is entitled to payment for any of the supervision or repair work which they provided.

To the contrary, IEF claims that East Coast is liable to them for their application of defective products at the behest of their principals, John and Frank DiStefano, who knew or should have known that the product East Coast was applying was defective. IEF claims that East Coast is liable to them for the following amounts:

- \$121,265.57 for the removal and refinishing of the rejected venetian plaster panels;
- \$436,862 in additional overtime and double time wages paid by IEF during the period from March 25 through August 6, 2008;
- \$325,000 representing the lost incentive payment for final completion.

Decoplast claims entitlement to payment of \$422,020.81 as the unpaid balance for product supplied by them to IEF and not returned or credited. IEF asserts that whatever amount that IEF may have owed for the material was paid by them in connection with the claim made by BTF. IEF was obligated to make payments to BTF, who in turn would remit the amount due from them to Decoplast. IEF claims that they have already paid whatever was determined to be owed for the material, and Decoplast's dispute, if any, is with BTF.

CONCLUSIONS OF LAW

Plaintiff seeks to recover from all named defendants for the damages it claims to have sustained as a result of the sale by Decoplast, and its affiliate, Franklin Stucco Supply, Inc., of defective material which failed to perform the purpose for which it was intended. They seek to recover damages from East Coast Wall, Ltd. for their work at the Arches Project, which was unsatisfactory, and was required to be removed and replaced by plaintiff. They claim that the individual defendants, John DiStefano, Jr., Frank DiStefano and Danielle A. DeStadio are

personally liable for the damages because of their fraudulent misrepresentations as to the source, components, and effectiveness of the material provided when the either knew that the product was not as represented or recklessly made such representations without any basis for them.

Defendant Decoplast sold plaintiff a product which breached the warranty of merchantability and fitness for a particular purpose. UCC § 2-714 (2) provides that “(t)he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.” The measure of damages for fraud is the actual pecuniary loss sustained as a result thereof. (*Lama Holding Co. V. Smith Barney Inc.*, 88 N.Y.2d 413 [1996]). The Court of Appeals summarized the measure of damages in an action for fraud as follows:

In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (see, *Chanel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318). “The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong” or what is known as the “out-of-pocket” rule (*Reno v Bull*, 226 NY 546, 553; *Hanlon v MacFadden Publ.*, 302 NY 502). Under this rule, the loss is computed by ascertaining the “difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain” (*Sager v Friedman*, 270 NY 472, 481). Damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained (see, *Cayuga Harvester v Allis-Chalmers Corp.*, 95 AD2d 5). Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud (*Foster v Di Paolo*, 236 NY 132; *AFA Protective Sys. v American Tel. & Tel. Co.*, 57 NY2d 912).

The Court finds, by clear and convincing evidence, that the defendants Decoplast, John DiStefano, Jr., Frank DiStefano, and Danielle DeStadio committed fraudulent acts which led to consequential out-of-pocket damages sustained by plaintiff. Plaintiff is not entitled to recover for profits which might have been realized in the absence of fraud. *Id.* For this reason, the claim for lost profit of \$431,116 by virtue of crediting the Owner for not providing the premium-priced Pietra is not recoverable. Similarly, the loss of the claim for the lost incentive bonus of \$325,000 for early completion does not represent an out-of-pocket loss, and is not compensable.

Both corporate officers and employees of corporations may be held personally responsible for misrepresentations made to plaintiff on behalf of their corporations. (*Marine Midland Bank v. Russo Produce Co.*, 50 N.Y.2d 31 [1980]; *Bailey v. Diamond Int'l Corp.*, 47 A.D.2d 363 [3d Dept.1975]). “The sense of *scienter* includes a ‘reckless indifference to error’, a ‘pretense of exact knowledge (*Smith v. Hedges*, 223 N.Y. 176, 184) and the assertion of a false material fact ‘susceptible of accurate knowledge’, but stated to be true on the personal knowledge of the representer”. (*Skrine v. Staiman*, 30 A.D.2d 707 [2d Dept. 1968]) (internal citations omitted). This was precisely the conduct of John DeStefano, Jr., Frank DeStefano, and Danielle DiStadio. The latter simply fabricated a material data sheet by copying the Fresco Marblestone sheet, without any knowledge of the accuracy of the representation. Her fabrications were resolutely adopted by the other individuals, and this misconduct is imputed to Decoplast.

There is no doubt but that the individuals were acting within the scope of their duties; nor is there evidence that any of them were acting adverse to the interest of their principal. A principal is liable for the fraudulent acts of their agent if the agent was acting within the scope of their apparent authority. (*Chubb & Son Inc. v. Consoli*, 283 A.D.2d 297, 298 [1st Dept.2001; 2A N.Y. Jur.2d, Agency, §§ 290, 291]).

Plaintiff has established that as a result of the delays occasioned by defendants’ misrepresentations, they incurred additional costs to remove and refinish the rejected venetian plaster in the amount of \$121,265.57; and additional costs sustained because of the need to perform work in the field, as opposed to in the shop, amounting to \$185,917.76. Plaintiff has also established entitlement to recover for overtime costs between March 25, 2008 and August 6, 2008 in the amount of \$436,862.

Defendant Decoplast seek damages of \$422,020.81 on their counterclaim for material

supplied to IEF which was not returned. This is the same amount as appeared as the outstanding balance on IEF's revolving credit account with BTF, Decoplast's agent for billing and recovery, as well as on the mechanic's lien filed with the Suffolk County Clerk. Plaintiff asserts payment of \$230,000 to BTF, Decoplast's agent for billing and collection, in full settlement of a lawsuit filed by BTF on behalf of Decoplast. There was also evidence with respect to an approximately \$61,000 credit memo for material returned by IEF to Decoplast.

Based upon the credible evidence, the specifics of which were unchallenged, the Court concludes that Decoplast is not entitled to recover on its counterclaim in the amount of \$422,020.81, and this counterclaim is dismissed.

East Coast Wall counterclaims for \$121,265.57 for services rendered to IEF during the period beginning in March and ending in August, 2008. During this time East Coast provided supervisory services and actually applied the Pietra product to the buildings. Their efforts to achieve a satisfactory result were fruitless, and ultimately, all of their work had to be removed and replaced by IEF. There is no doubt but that they performed the work for which they billed. The only controversy is whether they were to be paid, as long as their bills were reasonable, or only if their efforts proved successful.

Based upon a preponderance of the credible evidence, the Court concludes that East Coast Wall is entitled to payment from plaintiff in the amount of \$114,795.

CONCLUSION

Plaintiff IEF is entitled to judgment against Decoplast, John DiStefano, Jr., Frank DiStefano, and Danielle DeStadion in the amounts of \$121,265.57 for removal and replacement of defective finishes; \$436,862.00 for overtime wages incurred as a result of the misrepresentations by the aforementioned defendants; and \$185,918 for additional costs for the application of the acrylic finish on site as opposed to in the shop, together with costs and interest from the 28th day of September 2008. Plaintiffs are not entitled to lost profits in the amount of \$431,116 representing the loss of the premium charge for Pietra, or \$325,000, the claim for loss of an incentive bonus, as these do not constitute "out-of-pocket" losses. Plaintiff is not entitled to recover against defendants East Coast Wall, Ltd., Franklin Stucco Supply, Inc., or John DiStefano, Sr., and the complaint is dismissed as against them.

Defendant Decoplast is not entitled to recover against plaintiff on their counterclaim in the

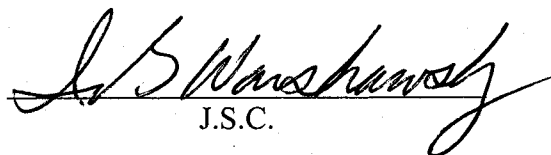
amount of \$422,020.81 and the counterclaim is dismissed.

East Coast Wall, Ltd. is entitled to recover judgment against plaintiff for work performed in the amount of \$114,795, together with costs and interest from September 28, 2008.

This constitutes the Decision and Order of the Court.

Submit Judgment on Notice.

Dated: October 25, 2011


J.S.C.

ENTERED
NOV 01 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE