

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, SS

SUPERIOR COURT
DOCKET NO. 2080CV00087

FIVE STAR BUILDING CORPORATION,

Plaintiff

v.

TOWN OF SHERBORN,

Defendant/Plaintiff-in-Counterclaim

and

TOWN OF SHERBORN,

Third Party Plaintiff

v.

TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA,

Third Party Defendant

FILED
IN THE OFFICE OF THE
CLERK OF COURTS
FOR THE COUNTY OF MIDDLESEX

OCT 30 2020


CLERKTHIRD PARTY COMPLAINT

HAMPSHIRE SUPERIOR COURT

OCT 19 2020

HARRY JEKANOWSKI, JR.
CLERK/MAGISTRATEPARTIES

1. The Town of Sherborn is a Massachusetts municipal corporation with an address of 19 Washington Street, Sherborn, MA 01770.
2. Travelers Casualty and Surety Company of America (“Travelers”) is a corporation or other legal entity with an address of One Tower Square, Hartford, CT 06183, and does business in Massachusetts.

FACTS

3. The Sherborn Public Library is a municipal public library.
4. The Sherborn Public Library was opened *circa* 1858 and has been housed at its current location at 4 Sanger Street, Sherborn, since 1971. It serves residents and others from Sherborn and surrounding communities. The library also acts as a community center where the public gather to explore, interact and imagine.
5. The library building was a gift to the Town in 1971 from Richard and Mary B. Saltonstall, residents of Sherborn for more than 50 years. It was designed not only to serve as a municipal public library, but also to represent a piece of art, with close attention paid to aesthetic detail.
6. The library building is specialized in character and is a special purpose property.
7. In 2016, the Town solicited sealed bids pursuant to G.L. c. 149, § 44A, for the construction of renovations and additions to the Sherborn Public Library (the “Project”).
8. The intent of the Project design was to renovate and expand the library building while being faithful to, and thus blending the new work with, the artistic design of the original building.
9. Five Star Building Corporation (“FSBC”) submitted a bid in response to the Town’s solicitation of bids, and the Town awarded FSBC the construction contract for the Project.
10. On December 28, 2016, the Town and FSBC entered into a construction contract (the “Contract”) for the Project.

11. The Contract included, among other documents, design plans and specifications prepared by the Town's Project architect, Beacon Architectural Associates ("BAA"), and certain General Conditions, as amended.

12. Travelers issued a performance bond for the Project (the "Bond"). The Town and FSBC are listed on the Bond, respectively, as "obligee" and "principal."

13. The Bond incorporates the Contract by reference.

14. Under the Bond, Travelers is, together with FSBC, jointly and severally obligated for the performance of the Contract.

15. Performance of the Contract includes, but is not limited to, indemnification of the Town's damages and attorneys' fees arising from FSBC's performance of the Project work, including, but not limited to, pursuant to section 13.9.3 of the General Conditions of the Contract.

16. In undertaking the Project, the Town was performing a governmental function.

17. Pursuant to the Contract, FSBC was required to, among other things, perform all work that was required by and reasonably inferable from the Contract, including the design plans and specifications prepared by BAA.

18. Pursuant to the Contract, FSBC was required to substantially complete all Project work within 365 calendar days of December 9, 2016, subject to any adjustments allowed under the Contract.

19. FSBC did not substantially complete the Project before the Contract was terminated by the Town in January 2020.

20. FSBC failed to comply with its scheduling, staffing and supervisory obligations under the Contract.

21. Pursuant to the Contract, FSBC was required to prepare a construction schedule and to update the schedule every month, and to provide “Recovery Schedules” if delays in the Project work were anticipated.

22. FSBC failed to update its construction schedule every month, failed to provide Recovery Schedules in all instances when such schedules were required, and failed to submit its schedules and schedule updates in a timely fashion.

23. Pursuant to section 3.10 of the General Conditions of the Contract, FSBC was required to, among other things, “monitor the progress of the Work for conformance with the requirements of the construction schedule and shall promptly advise the Owner of any delays or potential delays.”

24. FSBC failed to continuously and/or consistently monitor the progress of the work, and failed to promptly advise the Town of all delays and potential delays in the progress of the Project work.

25. Pursuant to the Contract, FSBC was required to staff the Project with a project manager, superintendent and assistant project superintendent having the minimum years of experience set forth in the Contract.

26. FSBC failed to continuously staff the Project with a project manager, superintendent and assistant superintendent having the minimum years of experience required by the Contract.

27. For significant periods of time during the Project, FSBC failed to staff the Project with an assistant superintendent.

28. FSBC changed its project manager for the Project no less than four times.

29. FSBC changed its superintendent for the Project no less than four times.

30. FSBC terminated one or more of its site-work subcontractors for failing to properly perform subcontract work.
31. FSBC terminated one or more of its concrete subcontractors for failing to properly perform subcontract work.
32. FSBC failed to construct portions of the Project within required dimensional tolerances.
33. FSBC's failure to construct the Project within required dimensional tolerances had material, adverse ramifications throughout the new construction including, without limitation, window installation and masonry work.
34. FSBC's installation of the Project foundations did not comply with the Contract plans and specifications and was, therefore, defective.
35. FSBC was required to remove and reinstall the defective Project foundations.
36. FSBC failed to reinstall the Project foundations within required dimensional tolerances.
37. FSBC failed to properly install granite curbs and was required to re-perform the work.
38. FSBC installed parking lot grading at the wrong elevation.
39. For a period of at least one year, FSBC withheld from the Town knowledge that it had installed parking lot grading at the wrong elevation.
40. FSBC's withholding from the Town knowledge that FSBC had installed the parking lot grading at the wrong elevation was a breach of contract, breach of the implied covenant of good faith and fair dealing, and a willful and knowing unfair and deceptive act or practice in violation of G.L. c. 93A.

41. FSBC improperly fabricated windows for the new library building addition.
42. FSBC improperly installed windows for the new library building addition.
43. FSBC failed to install its masonry work in accordance with the Contract requirements.
44. FSBC failed to (1) level and plumb its brickwork; (2) properly align and space brick piers; (3) submit required shop drawings before installing brick veneer masonry; (4) complete and correct mockup(s) for final review before masonry installation; (5) provide the required cold-weather protection during masonry installation; (6) consistently install rigid insulation on the outside face of the foundation walls within the masonry cavity, as required by the Contract and/or building code; (7) arrange for inspections of the rigid insulation system and reinforced masonry, as required by the Contract and/or building code; (8) consistently and correctly install mortar for the masonry work; and (9) install mortar netting at the base of the masonry cavity.
45. FSBC failed and refused to correct its defective masonry work.
46. Before and/or during performance of its masonry work, FBSC became aware that its foundation and masonry work were not in compliance with Contract plans and specifications, and that, therefore, the new library building addition had not been installed within required dimensional tolerances.
47. Despite knowing that its work was defective, FSBC knowingly and wrongfully continued to perform the defective work without disclosing its knowledge of the defective condition to the Town.

48. FSBC's knowing performance of defective work was a breach of contract, breach of the implied covenant of good faith and fair dealing, and a willful and knowing unfair and deceptive act or practice in violation of G.L. c. 93A.

49. FSBC removed all installed masonry work in November 2019.

50. The Town, through BAA, directed FSBC to prepare a surveyed plan of the installed condition of certain Project work.

51. A surveyed plan of the installed condition of FSBC's work was necessary to determine the extent of dimensional nonconformities and defective installation of the work, and to identify possible corrective measures.

52. FSBC refused to prepare a surveyed plan of the installed condition of its work on grounds that it was not required by its Contract to prepare as-built plans.

53. FSBC refused to prepare a surveyed plan despite knowing that a surveyed plan was necessary to determine the extent of the dimensional nonconformities and defective installation of its work.

54. FSBC's grounds for refusing to prepare a surveyed plan was a pretext, and was intended to compel the Town to cause such a plan to be prepared at the Town's cost, and so that FSBC could later dispute the results of that plan and blame the Town for any Project delays arising therefrom.

55. FSBC's refusal to prepare a surveyed plan as aforesaid was a breach of contract, breach of the implied covenant of good faith and fair dealing, and a willful and knowing unfair and deceptive act or practice in violation of G.L. c. 93A.

56. During construction, FSBC failed to install adequate weather protection for the library building, including the new library building addition.

57. FSBC proceeded with building interior work before installing adequate weather protection for the building despite knowing that doing so would subject the work to weather damage.

58. As a result of FSBC's failure to install adequate weather protection, significant quantities of rainwater infiltrated the building interior on more than one occasion, causing significant water and mold damage to the building interior, and exposing existing lighting fixtures and newly installed mechanical equipment to damage due to water infiltration and freezing.

59. FSBC improperly installed interior finishes before adequate temporary protection for such finished had been installed, and was required to remove and reinstall those interior finishes.

60. As a direct result of FSBC's failure to protect the library building from weather during construction, existing specialty wood finishes in the existing building were damaged during weather events.

61. As a direct result of FSBC's failure to protect the library building from weather during construction, electrical equipment and the library building elevator had to be tested or retested.

62. FSBC failed to properly install flashing at the skylight-chimney interface, resulting in water damage to the building interior.

63. FSBC improperly installed the roofing system at the so-called main roof and connector roof, resulting in water infiltration and damage to the underlying insulation system and substrate.

64. In or about April 2019, FSBC retained the firm of Thompson & Lichtner to inspect and test a portion of the roofing system in order to ascertain whether water was present within the roofing system.

65. Thompson & Lichtner prepared an April 17, 2019 letter following its testing and inspection of the roof work.

66. Following its testing and inspection of the roof work, Thompson & Lichtner concluded, among other things, that water was present within the roofing system.

67. FSBC improperly installed roof decking and roofing on the main building roof over the main building entry, and the work had to be reinstalled in order to correct the defects in the roof work.

68. FSBC improperly fabricated and installed piers and window frames along the so-called Sanger Street elevation of the new library building addition.

69. FSBC improperly installed fire protection and water lines, and failed to allow for inspections of that work before backfilling the utility trench.

70. FSBC improperly installed the foundation for the new library building addition and, as a result, had to re-perform the work.

71. FSBC improperly re-installed the foundation for the new library building addition, and as re-installed the foundation is not within required dimensional tolerances.

72. FSBC failed to comply with its obligation to procure and maintain property insurance under the Contract.

73. FSBC's failure to keep the building weather tight and maintain and enforce a no-smoking ban at the project site, among other things, made it impossible for the Town to procure

and continuously maintain adequate property insurance for the library building and work before termination of the Contract.

74. FSBC was required to install waterproofing and vapor barrier systems on the exterior of the foundation and the building sheathing.

75. FSBC was also required to protect the waterproofing and vapor barrier systems from exposure to ultraviolet light and from damage caused by construction activity.

76. The waterproofing and vapor barrier systems were manufactured by GCP Applied Technologies (“GCP”) and installed by FSBC subcontractor Debrino Caulking Associates, Inc. (“Debrino”).

77. FSBC failed to protect the waterproofing and vapor barrier systems from exposure to ultraviolet light and from damage caused by construction activity, and as a result, such systems were irreparably damaged.

78. In November 2019, representatives of FSBC, Debrino and GCP inspected the waterproofing and vapor barrier systems installed at the library building.

79. During the inspection of the waterproofing and vapor barrier systems, representatives of FSBC and/or Debrino informed the GCP representative that the waterproofing and vapor barrier systems had been left exposed to ultraviolet light from February 2019 and May 2019 to the date of the inspection.

80. Following the inspection, GCP provided FSBC with a Field Observation Report dated November 25, 2019.

81. In the Field Observation Report, GCP indicated that the waterproofing and vapor barrier systems had been over-exposed to ultraviolet light and were damaged and that the systems’ seams were compromised in multiple areas.

82. In the Field Observation Report, GCP indicated that the waterproofing and vapor barrier systems could not be warranted by GCP unless and until the deficiencies noted in the report were remedied.

83. FSBC never informed the Town of the results of GCP's November 2019 inspection of the waterproofing and vapor barrier systems.

84. FSBC never provided the Town with a copy of GCP's November 2019 Field Observation Report.

85. FSBC wrongfully withheld GCP's November 2019 Field Observation Report from the Town.

86. FSBC's withholding of GCP's Field Observation Report was a breach of contract, breach of the implied covenant of good faith and fair dealing, and a willful and knowing unfair and deceptive act or practice in violation of G.L. c. 93A.

87. FSBC's conduct on the Project also rose to the level of gross negligence and willful misconduct.

88. By letter dated October 22, 2018, the Town notified Travelers that the Town was considering declaring FSBC in default of the Contract.

89. Following Travelers' receipt of the Town's October 22, 2018 notice, representatives of the Town, Travelers and FSBC participated in a conference pursuant to paragraph 3 of the Bond.

90. During the period between October 22, 2018 and the date the Town terminated FSBC's contract by notice dated January 16, 2020, Travelers actively participated in communications and meetings with representatives of the Town and FSBC concerning the

Town's allegations that FSBC was not performing the Project work in accordance with the terms of the Contract.

91. Notwithstanding any contrary terms of the Bond, by virtue of its affirmative acts during the period between October 22, 2018 and the date the Town terminated FSBC's contract by notice dated January 16, 2020, Travelers is as responsible as FSBC for the latter's defaults of the Contract during that period.

92. The Town terminated the Contract and made a claim on the Bond by notice to FSBC and Travelers dated January 16, 2020.

93. The Town satisfied the conditions precedent in paragraph 3 of the Bond.

94. In response to the Town's January 16, 2020 claim on the Bond, Travelers elected and agreed to undertake completion of the Project through its agents and independent contractors pursuant to paragraph 5.2 of the Bond.

95. Under the Bond, Travelers is, together with FSBC, jointly and severally liable to the Town for all damages suffered by the Town as a result of any and all of FSBC's breaches of the Contract.

96. The Town and Travelers entered into a Takeover Agreement dated June 15, 2020.

97. In the Takeover Agreement, Travelers agreed that the Town satisfied the conditions precedent in paragraph 3 of the Bond.

98. In the Takeover Agreement, Travelers agreed that the library building foundation had not been installed by FSBC within required dimensional tolerances and that, as a result, the new library addition was out of alignment.

99. In the Takeover Agreement, Travelers agreed that additional work would be necessary to correct and address the effects of the misaligned condition of the new library building addition.

100. In 2019, the Massachusetts Division of Capital Asset Management and Maintenance (“DCAMM”) denied FSBC’s application for certification pursuant to G.L. c. 149, § 44D(4) and 810 CMR 4.

101. DCAMM’s denial of FSBC’s application was based on FSBC having received three or more failing project ratings on three or more separate projects in the five years preceding application.

102. On January 30, 2020, the Office of Attorney General denied FSBC’s appeal of DCAMM’s denial of FSBC’s application for certification.

103. As a result of DCAMM’s denial, FSBC is not eligible to submit bids for public construction contracts under G.L. c. 149, § 44A.

104. By letter dated October 5, 2020, the Town sent written notice to Travelers about FSBC’s violations of G.L. c. 93A, and demanded relief. By letter dated October 15, 2020, Travelers denied the Town’s request for relief.

COUNT I
Breach of Contract (Bond)

105. The preceding paragraphs of this Third-Party Complaint are incorporated herein by reference.

106. Under the Bond, Travelers is obligated to the Town for the responsibilities of FSBC for correction of defective work and completion of all Contract work; additional legal, design professional and delay costs resulting from FSBC’s Contract default and from the actions or failure to act of Travelers under section 5 of the Bond; and liquidated damages, or if no

liquidated damages are specified in the Contract, actual damages caused by FSBC's delayed performance or nonperformance.

107. Travelers has refused to pay the Town for all the additional legal, design professional and delay costs resulting from FSBC's Contract default and from the actions or failures to act of Travelers under section 5 of the Bond, and for liquidated/delay damages caused by FSBC's delayed performance and nonperformance, and the Town reserved its right under the Takeover Agreement to pursue those additional costs/damages.

108. By so refusing, Travelers has materially breached the Bond.

109. As a result of Travelers' breach of the Bond, the Town has suffered damages.

WHEREFORE, the Town hereby demands judgment against Travelers for the Town's damages, plus interest, attorneys' fees, costs of suit, and such other relief as the Court may deem appropriate.

COUNT II
Breach of Contract (Takeover Agreement)

110. The preceding paragraphs of this Third-Party Complaint are incorporated herein by reference.

111. In Section 19 of the Takeover Agreement, Travelers agreed to reimburse the Town within 30 days of execution of the Takeover Agreement for the cost of certain property insurance maintained by the Town.

112. Travelers failed to reimburse the Town for the cost of such insurance as of the date of this Third Party Complaint.

113. Upon request by the Town, through its Town Counsel, that Travelers reimburse the Town for such cost, Travelers refused to do so.

114. Travelers' failure and refusal to reimburse the Town for such cost constitute a material breach of the Takeover Agreement.

115. As a result of Travelers's breach of the Takeover Agreement, the Town has suffered damages.

WHEREFORE, the Town hereby demands judgment against Travelers for the Town's damages, plus interest, attorneys' fees, costs of suit, and such other relief as the Court may deem appropriate.

COUNT III
Breach of Contract (Joint and Several Liability)

116. As set forth in the preceding paragraphs of this Third-Party Complaint, FSBC failed to comply with material obligations of its Contract, including, without limitation, by knowingly performing defective work; failing and refusing to correct defective work; and wrongfully withholding material information from the Town regarding the defective conditions of FSBC's work.

117. FSBC's conduct, as set out in this Third-Party Complaint, constitutes a material breach of the Contract.

118. As a direct and proximate result of FSBC's breach of the Contract, the Town has suffered and continues to suffer significant damages.

119. Under the Bond Travelers is, together with FSBC, jointly and severally liable to the Town for the damages sustained by the Town.

WHEREFORE, the Town hereby demands judgment against Travelers for the Town's damages, plus interest, attorneys' fees, costs of suit, and such other relief as the Court may deem appropriate.

COUNT IV
Breach of Warranty (Joint and Several Liability)

120. The preceding paragraphs of this Third-Party Complaint are incorporated herein by reference.

121. In section 3.5 of the General Conditions of the Contract, FSBC warranted “that the [Project] Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective.”

122. FSBC’s failure and refusal to properly perform the Project work and its failure and refusal to correct its defective work, including its refusal to prepare a surveyed plan of the defective conditions of the work, all as set out in this Third-Party Complaint, constitute a breach of warranty.

123. As a direct and proximate result of FSBC’s breach of warranty, the Town has suffered and continues to suffer significant damages.

124. Under the Bond Travelers is, together with FSBC, jointly and severally liable to the Town for the damages sustained by the Town.

WHEREFORE, the Town hereby demands judgment against Travelers for the Town’s damages, plus interest, attorneys’ fees, costs of suit, and such other relief as the Court may deem appropriate.

COUNT V
Liquidated/Actual Delay Damages (Joint and Several Liability)

125. The preceding paragraphs of this Third-Party Complaint are incorporated herein by reference.

126. FSBC failed to substantially complete all Project work within 365 calendar days of December 9, 2016.

127. As of the date the Town terminated the Contract, the Project had not been substantially complete.

128. FSBC caused delays in the progress of the Project work.

129. As a result of FSBC-caused delays, FSBC did not and could not substantially complete the Project within the time set forth in the Contract.

130. Paragraph 8.4.1 of the General Conditions of the Contract provides as follows:

It is expressly understood and agreed, by and between the Contractor and Owner, that the time for the completion of the Work described herein is a reasonable time for the completion of same. . . . If the said Contractor shall neglect, fail or refuse to complete the Work within the times herein specified, or any proper extension thereof granted by the Owner, then the Contractor does hereby agree . . . to pay to the Owner \$1,000.00 . . . as liquidated damages for such breach of contract, for each and every calendar day that the Contractor shall be in default after the time stipulated for completing the Work. . . . It is further agreed that if the Owner for any reason is not eligible to recover the liquidated damages set forth above, Owner shall be entitled to seek recovery of its actual damages on account of any such neglect, failure or refusal of contractor.

131. By letter dated December 18, 2019, the Town notified FSBC that the Town was assessing liquidated damages for each day of delay in completion of the Project caused by FSBC.

132. For each day of delay caused by FSBC, FSBC owes the Town liquidated damages in the amount of \$1,000/day or, in the event the Town is not entitled to recover liquidated damages, the Town's actual damages, pursuant to paragraph 8.4.1 of the General Conditions of the Contract.

133. Under the Bond Travelers is, together with FSBC, jointly and severally liable to the Town for the damages sustained by the Town.

WHEREFORE, the Town hereby demands judgment against Travelers for the Town's liquidated/delay damages, plus interest, attorneys' fees, costs of suit, and such other relief as the Court may deem appropriate.

COUNT VI
Contractual Indemnification (Joint and Several)

134. The preceding paragraphs of this Third-Party Complaint are incorporated herein by reference.

135. Section 3.18.1 of the General Conditions of the Contract requires FSBC to "indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, including claims, damage, loss or expense attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the Work, caused in whole or in part by the negligent or wrongful acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 3.18."

136. Section 13.9.3 of the General Conditions also requires FSBC to "indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses, and expenses including attorneys' fees arising out of or resulting from the performance of the work."

137. FSBC's obligation to perform the Contract includes, but is not limited to, the obligation to indemnify and hold harmless the Town under the foregoing Contract provisions.

138. As set forth in this Third-Party Complaint, the Town has suffered and continues to suffer significant damages arising out of and resulting from FSBC's performance of work.

139. For the reasons set forth in this Third-Party Complaint, FSBC failed to exercise reasonable care and was grossly negligent in the performance of its work.

140. For the reasons set forth in this Third-Party Complaint, including but not limited to Count IV and Count V, FSBC committed wrongful acts and omissions.

141. As a result of FSBC's wrongful acts and omissions and gross negligence, the Town has suffered and continues to suffer significant damages.

142. FSBC must indemnify the Town from any and all damages regardless of whether the Town or BAA allegedly caused, in part, any such damages, as set forth in the foregoing Contract indemnification provisions.

143. FSBC must also indemnify the Town for all attorneys' fees incurred by the Town in connection with FSBC's failure to properly perform the Project work, including all attorneys' fees incurred by the Town in this litigation.

144. Under the Bond Travelers is, together with FSBC, jointly and severally liable to the Town for the damages sustained by the Town, and therefore, Travelers is required to indemnify the Town for all damages to the same extent as FSBC is required to do so under the Contract, including, without limitation, all damages sought by the Town from FSBC in all counts asserted in the Town's Counterclaim against FSBC in this action irrespective of whether such counts are duplicated in this Third Party Complaint, all of which damages arise out of FSBC's obligations under the Contract.

WHEREFORE, the Town hereby demands judgment against Travelers for the Town's damages, plus interest, attorneys' fees, costs of suit, and such other relief as the Court may deem appropriate.

JURY DEMAND

The Town requests a trial by jury on all claims so triable.

THIRD PARTY PLAINTIFF,
TOWN OF SHERBORN

By its attorneys,

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