

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 2017-026997-CA-01

ADF INTERNATIONAL, INC., a foreign
corporation,

Plaintiff,

v.

SUFFOLK CONSTRUCTION COMPANY,
INC., a foreign corporation, FEDERAL
INSURANCE COMPANY, a foreign
corporation, FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, a foreign
corporation, LIBERTY MUTUAL
INSURANCE COMPANY, a foreign
corporation, ZURICH AMERICAN
INSURANCE COMPANY, a foreign
corporation, SKIDMORE, OWINGS &
MERRILL, LLP, a foreign limited liability
partnership, and SKIDMORE, OWINGS,
MERRILL FLORIDA LLC, a foreign limited
liability company,

Defendants.

SECOND AMENDED COMPLAINT

ADF International, Inc. (“ADF”) through counsel, sues Suffolk Construction Company, Inc. (“Suffolk”), Federal Insurance Company (“Federal”), Fidelity Deposit Company of Maryland (“Fidelity”), Liberty Mutual Insurance Company (“Liberty”) and Zurich American Insurance Company (“Zurich”) (Federal, Fidelity, Liberty and Zurich are hereinafter collectively “Sureties”), Skidmore, Owings & Merrill, LLP (“SOM, LLP”) and Skidmore, Owings and

Merrill Florida, LLC (“SOM”) *amending* its original Complaint to include *a more definite statement* as to Suffolk and Sureties, in accordance with the Court’s April 24, 2018 Omnibus Order on Matters Heard on April 17, 2018, as follows:

Parties, Jurisdiction and Venue

1. This is an action for damages in excess of \$15,000.00, exclusive of interest, attorney fees and costs and is otherwise within the jurisdiction of this Court.
2. ADF is a foreign corporation authorized to conduct business in Miami-Dade County, Florida.
3. Suffolk is a foreign corporation, conducting business in Miami-Dade County, Florida.
4. Federal is a foreign corporation conducting business in Miami-Dade County, Florida.
5. Fidelity is a foreign corporation conducting business in Miami-Dade County, Florida.
6. Liberty is a foreign corporation conducting business in Miami-Dade County, Florida.
7. Zurich is a foreign corporation authorized to conduct business in Miami-Dade County, Florida.
8. SOM, LLP is a foreign limited liability company, doing business in Miami-Dade County, Florida.
9. SOM is a foreign limited liability company authorized to conduct business in Miami-Dade County, Florida.

10. Venue is proper in this Court as the actions or omissions giving rise to this action occurred or were to occur in Miami-Dade County, Florida.

11. ADF has retained the undersigned counsel, and will be required to pay a reasonable fee for services rendered.

12. All conditions precedent to the institution of this action have been performed, have been waived or would have proven futile if attempted.

Miami Terminal

13. Non-party, All Aboard Florida – Operations, LLC (“AAF”) is the owner of the All Aboard Florida – Miami Terminal, (“Terminal Project”) located at 600 Northwest 1st Avenue, Miami, Florida 33030 (“Terminal Property”).

14. On a date unknown to ADF, Suffolk contracted with AAF for the construction of the All Aboard Florida – Miami Terminal Project (“Terminal Project”) at the Terminal Property.

15. AAF retained SOM, LLP to serve as the architect and structural engineer for the Terminal Project.

16. Suffolk as Principal and Sureties, as sureties, issued a payment and performance bond (“Terminal Bond”), guaranteeing Suffolk’s payment and performance obligations pertaining to the Terminal Project. A genuine copy of the Terminal Bond is attached as Exhibit 1.

17. Suffolk subcontracted the steel fabrication and erection work to ADF pursuant to a subcontract dated June 22, 2016 (“Terminal Subcontract”). A genuine copy of the Terminal Subcontract is attached as Exhibit 2. As such, ADF is a claimant under the Terminal Bond.

18. ADF substantially performed its obligations under the Terminal Subcontract.

19. Despite ADF substantially completing its work, Suffolk has failed to pay ADF, in full, for its base Terminal Subcontract amounts, additional sums rightfully owed for extra work and amounts due for ADF's extended time on the Terminal Project.

OB1

20. Non-party, DTS 2MC Office, LLC ("DTS"), is the owner of the 2 Miami Central office building, ("OB1") located at 650 Northwest 1st Avenue, Miami, Florida 33030 ("OB1 Property").

21. On a date unknown to ADF, Suffolk contracted with DTS for the construction of the 2 Miami Central office building ("OB1 Project") at the OB1 Property.

22. DTS retained SOM to serve as the architect and structural engineer for the OB1 Project.

23. Suffolk as Principal and Sureties, as sureties, issued a payment and performance bond ("OB1 Bond"), guaranteeing Suffolk's payment and performance obligations pertaining to the OB1 Project. A genuine copy of the OB1 Bond is attached as Exhibit 3.

24. Suffolk subcontracted the structural steel and miscellaneous metals fabrication and erection to ADF pursuant to a subcontract dated September 12, 2016 ("OB1 Subcontract"). A genuine copy of the OB1 Subcontract is attached as Exhibit 4. As such, ADF is a claimant under the OB1 Bond

25. ADF substantially performed its obligations under the OB1 Subcontract, although its work is presently on-going.

26. Suffolk failed to pay ADF, in full, for work performed on the OB1 Project.

Allegations Common to Both the Terminal Project and OB1 Project

27. ADF's scope of work and time for performance on both the Terminal Project and OB1 Project (hereinafter collectively "Projects") were increased by virtue of errors, omissions, conflicts and changes to the plans and specifications, directed changes to the manner, means and methods by which ADF would perform its work, additions and delays to ADF's performance caused by preceding trade contractors, for which Suffolk and SOM are responsible.

28. From time to time, during the performance of its work on both the Station Project and OB1 Project, ADF would bring changes, errors, omissions, conflicts and other issues to the attention of Suffolk through submission of Requests for Information ("RFI"), shop drawings, erection drawings and other submissions. As appropriate, Suffolk was obligated to pass ADF's submissions "up the chain" to AAF or DTS (AAF for the Terminal Project and DTS for the OB1 Project).

29. In the ordinary course of construction, ADF's submissions required responses, whether through bulletins, updated drawings, sketches or the like or other documents to be issued by SOM, LLP or SOM, as appropriate, to the respective project owner and "down the chain" to Suffolk and ultimately to ADF.

30. ADF would be able to utilize the responses to their inquiries to price the changes and extra work addressed through this submission review process, receive change orders from Suffolk for the changed or additional work, proceed with the changed work and bill and be paid for the additional or changed work.

31. However, in many instances, on both projects, ADF would provide its submittals, but the submittals would be ignored entirely or would receive untimely, incomplete or inaccurate

responses. Nevertheless, ADF was expected (and directed by Suffolk) to proceed with the work, even in the absence of an appropriate change order.

32. Despite the failure of Suffolk to appropriately and timely address the submissions, ADF would either be directed to proceed with the changed or extra work or would be obligated to proceed in the absence of instruction, so as not to interfere with the progress of the two projects while waiting for responses to the submissions, where such additional or changed work necessarily preceded work required by the contractual scopes.

33. Suffolk also repeatedly failed to make the sites available to ADF, by having preceding trades in the way of ADF's work, by failing to coordinate the work of other trades, by failing to complete work which had to precede ADF's work, by failing to control the Metromover light rail and Metrorail trains during times when ADF was required to erect steel over the tracks for these transportation modes, by failing to have the tower cranes available to ADF at pre-arranged times and other interferences.

34. By virtue of this mishandling of the submittal process, the failure to make the sites available unimpeded by site constraints, preceding trades or other interferences, the interference with ADF's preferred means and methods and other active interferences with ADF's performance by Suffolk, ADF incurred additional time and costs in accomplishing its expanded and altered scope of work on both the Terminal Project and OB1 Project.

35. Moreover, ADF's work was impacted, interrupted and delayed due to interferences and other forces beyond its control, for which Suffolk is responsible.

36. In the absence of meaningful responses to ADF's earlier submittals, ADF submit to Suffolk Potential Change Items ("PCI's") in order to notify, track and quantify price and time

impacts to ADF resulting from the changes, errors, omissions, conflicts and other issues visited upon ADF on both Projects.

37. The PCIs were submitted by ADF in batches to Suffolk. For both the Terminal and OB1, summaries of the PCIs submitted by ADF to Suffolk, by batch, providing a description, and, for PCIs that remain open, the date submitted by ADF to Suffolk, the amount due for each and, where appropriate, comments on the treatment of the PCI as well as ADF's preliminary evaluation whether the PCI is the responsibility of Suffolk and, in some cases SOM is responsible is attached to this Amended Complaint as Exhibits 5 and 6, respectively. Between May and August, 2017, ADF also provided Suffolk with executive summaries of the outstanding PCIs.

38. As with ADF's other submittals, Suffolk either ignored entirely, wrongly rejected or failed to timely, correctly, completely or adequately respond to ADF's PCIs which accurately reflect monies that ADF is due for its extra, accelerated, expanded or changed work on both Projects.

39. The amount due ADF on each of the two projects (Terminal and OB1) are further summarized in Exhibit 7 to this Amended Complaint.

40. As shown on Exhibit 7, for the Terminal, a total of \$22,470,591.63 is due ADF. This amount consists of \$4,378,678.15 on approved, but unpaid pay requisitions for scope work, \$3,123,531.08 for additional work as allocated on Exhibit 5 and \$8,030,056 for interferences with ADF's performance, described in the listed PCIs. There is also \$8,017,707.65 due to ADF for additional work which, by ADF's preliminary allocation on Exhibit 5 should be the responsibility of AAF and SOM. Finally, ADF has recognized credits to Suffolk, AAF and

SOM, including a credit for scope work which ADF was precluded from accomplishing due to site interferences or the failure of Suffolk to have the site available to accept ADF's work. Based on the lack of site availability for ADF to accomplish the last items of its scope work, ADF provided the credit to Suffolk and demobilized from the site.

41. As shown on Exhibit 7, for OB1, a total of \$1,680,120.89 is due ADF. This amount consists of \$737,005.895 on approved, but unpaid pay requisitions for scope work, \$362,082 for additional work as allocated on Exhibit 6 and \$428,669 for interferences with ADF's performance, described in the listed PCIs. There is also \$182,139 due to ADF for additional work which, by ADF's preliminary allocation on Exhibit 6 should be the responsibility of DTS2 and SOM. Finally, ADF has recognized credits to Suffolk and SOM, LLP including a credit for scope work which ADF was precluded from accomplishing due to site interferences or the failure of Suffolk to have the site available to accept ADF's work. Based on the lack of site availability for ADF to accomplish the last items of its scope work, ADF provided the credit to Suffolk and demobilized from the site.

42. The money due to ADF for accomplishing the scope work despite having to overcome interferences by Suffolk are such as to avoid the "no damage for delay" provisions in the Subcontracts, as recognized in *Harry Pepper & Assoc. v. Hardrives Co., Inc.*, 528 So.2d 72 (Fla. 4th DCA 1988); *Triple R Paving, Inc. v. Broward County*, 774 SO.2d 50 (Fla. 4th DCA 2000) and *Newberry Square Dev. Co. v. Southern Landmark, Inc.*, 578 So.2d 750 (Fla. 1st DCA 1991).

43. The amounts allocated by ADF on both the Terminal and OB1 Projects to SOM, LLP and to SOM, respectively, are based on ADF's limited perspective and, even if the

responsibility of SOM, LLP or SOM, Suffolk and its Sureties are also responsible to ADF because the amounts due result from work performed by ADF at the behest and direction of Suffolk.

44. Exhibits 8 and 9 to this Amended Complaint summarize, by pay requisitions issued by ADF to Suffolk, the amounts due on the Terminal and OB1 Projects, respectively.

Count I – Breach of Contract Against Suffolk (Terminal Project)

ADF realleges paragraphs 1 through 44 as if fully set forth herein.

45. Suffolk breached the Terminal Subcontract by:

- a. failing to pay ADF for sums due under the Terminal Subcontract;
- b. failing to properly manage the submittal process;
- c. failing to properly or timely address ADF's Submittals;
- d. failing to coordinate the work;
- e. failing to make the job site or necessary equipment available so that ADF could perform its work;
- f. failing to consider or approve PCI's;
- g. failing to fund PCI's;
- h. failing to issue appropriate Change Orders; or
- i. failing to update the Terminal Subcontract with bulletins properly adjusting the Terminal Subcontract scope and time.

46. In addition, Suffolk repeatedly interfered with ADF's preferred means and methods of accomplishing its scope work on both Projects, including requiring ADF to utilize Suffolk's tower cranes, instead of ADF's preferred "crawler cranes". This mandated change

required ADF to incur additional material handling expenses, especially in light of site interferences and the inadequate reach of Suffolk's tower cranes.

47. ADF has been damaged as a result of Suffolk's breach in the principal amount of \$22,470,591.96.

WHEREFORE, ADF demands judgment in its favor and against Suffolk for the principal sum found to be due, plus interest, costs, attorney fees, which are recoverable pursuant to paragraph 8.16 of the Terminal Subcontract, and for such further relief deemed just and proper.

Count II – Action against Sureties on Terminal Bond (Terminal Project)

ADF realleges paragraphs 1 - 47 as if fully set forth herein.

48. ADF has perfected its claim against the Terminal Bond by serving an Updated Notice of Non-Payment dated October 25, 2017. A genuine copy of the Updated Notice of Non-Payment is attached as Exhibit 5.

49. Sureties have not paid ADF, despite its demand.

50. ADF is currently due \$22,470,591.96.

WHEREFORE, ADF demands judgment in its favor, and against Sureties for the principal sum due of \$22,470,591.96 plus interest, costs, attorney fees, which are recoverable pursuant to Section 713.29 Florida Statutes, and for such further relief deemed just and proper.

Count III – Negligence against SOM (Terminal Project)

ADF realleges paragraphs 1 - 44 as if fully set forth herein.

51. SOM, LLP knew or should have known that ADF was to be the steel fabricator and erector for the Terminal Project and, therefore, would reasonably rely (and did, in fact, reasonably rely) on SOM, LLP's performance. SOM, LLP expected or intended that ADF would

rely upon the professional architectural and engineering services SOM, LLP was providing to the Project.

52. ADF was within the foreseeable zone of risk of parties who would be damaged by SOM LLP's negligent performance of its professional architectural and engineering responsibilities to the Project.

53. As such, SOM, LLP owed a duty to ADF to provide its professional architectural and engineering services up to the standard of care for similar professionals under similar circumstances.

54. SOM, LLP failed to use that degree of care which reasonably careful architects and engineers of record would use under like circumstances. SOM, LLP's performance on the Project fell below the standard of care for similar professionals under similar circumstances in one or more of the following respects:

- a. providing plans and specifications to ADF which were not constructible;
- b. providing plans and specifications to ADF which violated the Florida Building Code;
- c. providing plans and specifications to ADF which violated the American Institute of Steel Construction's Code of Standard Practice ("CoSP"), which was incorporated into the Contract Documents;
- d. providing plans and specifications to ADF which were untimely, incomplete, uncoordinated, conflicting, inaccurate or misleading;
- e. failing to respond to RFI's or responding to RFI's in an untimely, inaccurate or incomplete manner;

- f. failing to properly administer or participate in the submittal process; or
- g. failing to update its construction drawings and specifications to reflect conditions, conflicts or discovered errors or omissions.

55. By virtue of SOM, LLP's professional negligence, ADF has suffered damage including increased costs of performance and additional time on the Project.

WHEREFORE, ADF demands judgment against SOM, LLP for damages, costs and such other relief as the Court deems appropriate.

Count IV – Breach of Contract Against Suffolk (OB1 Project)

ADF realleges paragraphs 1 - 44 as if fully set forth herein.

56. Suffolk breached the OB1 Subcontract by:
- a. failing to pay ADF for sums due under the OB1 Subcontract;
 - b. failing to properly manage the submittal process;
 - c. failing to properly or timely address ADF's Submittals;
 - d. failing to coordinate the work;
 - e. failing to make the job site or necessary equipment available so that ADF could perform its work;
 - f. failing to consider or approve PCI's;
 - g. failing to fund PCI's;
 - h. failing to issue appropriate Change Orders; or
 - i. failing to update the OB1 Subcontract with bulletins properly adjusting the OB1 Subcontract scope and time.

57. In addition, Suffolk repeatedly interfered with ADF's preferred means and methods of accomplishing its scope work on both Projects, including requiring ADF to utilize Suffolk's tower cranes, instead of ADF's preferred "crawler cranes". This mandated change required ADF to incur additional material handling expenses, especially in light of site interferences and the inadequate reach of Suffolk's tower cranes.

58. ADF has been damaged as a result of Suffolk's breach in the amount of \$1,680,120.89.

WHEREFORE, ADF demands judgment in its favor and against Suffolk for the principal sum due, plus interest, costs, attorney fees, which are recoverable pursuant to Section 8.16 of the OB1 Subcontract and for such further relief deemed just and proper.

Count V – Action against Sureties on Payment Bond (OB1 Project)

ADF realleges paragraphs 1 – 44 and 56 – 58 as if fully set forth herein.

59. ADF has perfected its claim against the OB1 Bond by serving a Notice of Non-Payment dated November 13, 2017. A genuine copy of the Notice of Non-Payment is attached as Exhibit 6.

60. Sureties have not paid ADF, despite its demand.

61. ADF is currently due \$1,680,120.89.

WHEREFORE, ADF demands judgment in its favor and against Sureties for the principal sum due of \$1,680,120.89, plus interest, costs, attorney fees, which are recoverable pursuant to Section 713.29 Florida Statutes, and for such further relief deemed just and proper.

Count VI – Negligence against SOM (OB1 Project)

ADF realleges paragraphs 1 - 44 as if fully set forth herein.

62. SOM knew or should have known that ADF was to be the steel fabricator and erector for the OB1 Project and, therefore, would reasonably rely (and did, in fact, reasonably rely) on SOM's performance. SOM expected or intended that ADF would rely upon the professional architectural and engineering services SOM was providing to the Project.

63. ADF was within the foreseeable zone of risk of parties who would be damaged by SOM's negligent performance of its professional architectural and engineering responsibilities to the Project.

64. As such, SOM owed a duty to ADF to provide its professional architectural and engineering services up to the standard of care for similar professionals under similar circumstances.

65. SOM failed to use that degree of care which reasonably careful architects and engineers of record would use under like circumstances. SOM's performance on the Project fell below the standard of care for similar professionals in similar circumstances in one or more of the following respects:

- a. providing plans and specifications to ADF which were not constructible;
- b. providing plans and specifications to ADF which violated the Florida Building Code;
- c. providing plans and specifications to ADF which violated the American Institute of Steel Construction's Code of Standard Practice ("CoSP"), which was incorporated into the Contract Documents;
- d. providing plans and specifications to ADF which were untimely, incomplete, uncoordinated, conflicting, inaccurate or misleading;

- e. failing to respond to RFI's or responding to RFI's in an untimely, inaccurate or incomplete manner;
 - f. failing to properly administer or participate in the submittal process; or
 - g. failing to update its construction drawings and specifications to reflect conditions, conflicts or discovered errors or omissions.
66. By virtue of SOM's professional negligence, ADF has suffered damage including increased costs of performance and additional time on the Project.

WHEREFORE, ADF demands judgment against SOM for damages, costs and such other relief as the Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by email this 22nd day of June, 2018 to the attached service list.

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