

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DSL HOSPITALITY, LLC)	
)	Case No. CI 19-8449
Plaintiff,)	
)	
vs.)	ANSWER, AFFIRMATIVE
)	DEFENSES, COUNTERCLAIM
RONCO CONSTRUCTION CO., INC.)	and THIRD PARTY COMPLAINT
)	
Defendant and)	
Third Party Plaintiff,)	
)	
vs.)	
)	
FOREST CITY GROUP LLC d/b/a)	
HURST MASONRY,)	
)	
Third Party Defendant.)	
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COMES NOW, Ronco Construction Co., Inc., (“Ronco”) and as and for its answer to the complaint of DSL Hospitality, LLC (“DSL”) states and alleges as follows:

1. Ronco admits the allegations contained in paragraph 1 of DSL’s complaint.
2. Ronco admits the allegations contained in paragraph 2 of DSL’s complaint.
3. Ronco admits the allegations contained in paragraph 3 of DSL’s complaint.
4. Ronco admits the allegations contained in paragraph 4 of DSL’s complaint.
5. Ronco admits the allegations contained in paragraph 5 of DSL’s complaint that Ronco and DSL entered into a contract on July 2, 2018 (“Contract”) for the construction of the Home2Suites Hotel at 4440 Douglas Street, Omaha, NE 68131 (“Project”) and that work started shortly thereafter. Ronco admits that the original completion date was 310 days from commencement of the wall framing. Ronco admits the contract was not completed on time but affirmatively alleges there were reasons for the delayed completion. Ronco denies the allegations contained in paragraph 5 of DSL’s complaint that DSL ceased payment to Ronco

because the project was not completed on time or because of defective work. Rather, DSL ceased payment in March of 2019, long before the deadline for construction and before the allegedly defective work was performed. Ronco admits the allegations contained in paragraph 5 of DSL's complaint that Ronco sent a written notice to DSL that Ronco was suspending work on the project as of September 26, 2019 as a result of DSL's non-payment and that DSL terminated its contract with Ronco on September 30, 2019.

6. Ronco admits the allegations contained in paragraph 6 of DSL's complaint that on September 30, 2019 after DSL terminated Ronco's contract, Ronco filed the Construction Lien in the amount of \$3,235,780.29 with the Douglas County Register of Deeds.¹

7. Ronco admits the allegations contained in paragraph 7 of DSL's complaint that on August 31, 2019 Ronco submitted a Fee Application requesting payment of \$660,050.10. Ronco denies that the original Contract amount was \$7,912,651.00 because the project was done on a cost plus basis and not for a fixed sum. Ronco denies that the amount of \$660,050.10 was the only amount due and owing to Ronco on August 31, 2019.

8. Ronco denies the allegations contained in paragraph 8 of DSL's complaint.

9. Ronco admits that the Project had not achieved substantial completion as of September 30, 2019.

10. The allegations contained in paragraph 10 of DSL's complaint require no response.

11. Ronco denies the allegations contained in paragraph 11 of DSL's complaint that Ronco's Construction Lien did not show the amount due to Ronco in the Construction lien and

¹ Ronco also filed a Construction Lien on the same property in the amount of \$58,014.82 for construction of a garage in conjunction with the hotel but the parties' primary dispute relates to the Construction Lien on the hotel portion of the Project.

affirmatively alleges that Ronco's Construction Lien provided ample information for DSL to have deposited 115% of the amount of the lien to transfer the Construction Lien off of the real estate and onto the cash deposit pursuant to Neb. Rev. Stat. § 52-142(2). Ronco denies that the final project amount was to be \$7,912,651.00 as this was a cost plus and not fixed cost project.

12. The allegations contained in paragraph 12 of DSL's complaint constitute a legal conclusion to which no response is required. Ronco affirmatively alleges that the allegations contained in paragraph 12 are a misstatement of the law and a project does not have to be substantially completed before a contractor is entitled to payment for work done and expenses paid.

13. The allegations contained in paragraph 13 of DSL's complaint constitute a legal conclusion to which no response is required and Ronco affirmatively alleges that its Construction Lien seeks the amounts due and owing for work that has already been completed and supplies that have been purchased or contracted for.

14. Ronco denies the allegations contained in paragraph 14 of DSL's complaint.

15. Ronco denies the allegations contained in paragraph 15 of DSL's complaint that DSL is entitled to credits resulting from secured lien waivers from subcontractors because the lien waivers obtained by DSL do not release Ronco from its obligations. Ronco also denies the allegation that the only money remaining due to Ronco is \$660,050.10.

16. Ronco admits the allegations contained in paragraph 16 of DSL's complaint and affirmatively alleges that a substantial amount of money owed to Ronco is for work and equipment supplied directly by Ronco.

17. The allegations contained in paragraph 17 of DSL's complaint contain a legal conclusion to which no response is required but Ronco denies the conclusion that DSL's direct

payments to subcontractors relieved Ronco's obligation for payments because, on information and belief, the lien waivers did not relieve Ronco of its obligations to subcontractors and Ronco has no received proof that any subcontractors were actually paid.

18. Ronco denies the allegations contained in paragraph 18 of DSL's complaint because the lien waivers do not release Ronco and Ronco also denies that the only amount remaining due to Ronco is \$660,050.10.

19. Ronco denies the allegations contained in paragraph 19 of DSL's complaint that (i) Ronco's Construction lien is defective, (ii) that the full amount owed to Ronco is represented by the single application for \$660,050.10 and that the application for \$660,050.10 is the last application submitted by Ronco and that (iii) the most that could be due and owing to Ronco on its Construction Lien is \$212,209.41 and affirmatively states that to transfer the Construction Lien off the property and onto security DSL must deposit 115% of the full amount of Ronco's Construction Lien.

20. Ronco denies the allegations contained in paragraph 20 of DSL's complaint.

21. Ronco denies the allegations contained in paragraph 21 of DSL's complaint that the lien waivers allegedly obtained by DSL release any obligation to Ronco and that all amounts claimed by subcontractors who may have been paid by DSL are contained in the application for payment in the amount of \$660,050.10.

22. Ronco is without sufficient information to admit or deny the allegations contained in paragraph 22 of DSL's complaint and, therefore, denies the same.

23. Ronco denies the allegations contained in paragraph 23 of DSL's complaint.

24. Ronco denies the allegations contained in paragraph 24 of DSL's complaint.

25. The allegations contained in paragraph 25 constitute a legal conclusion to which no response is required and Ronco denies the statements made in support of the remedy DSL seeks under its First Claim for Relief.

26. The allegations contained in paragraph 26 of DSL's complaint require no response.

27. The allegations contained in paragraph 27 of DSL's complaint constitute a legal conclusion to which no response is required and Ronco denies the statements made in support of the remedy DSL seeks under its Second Claim for Relief.

AFFIRMATIVE DEFENSES

28. DSL's complaint fails to state a claim upon which relief can be granted.

29. DSL committed an anticipatory breach of the contract by failing to pay sums owed beginning in March, 2019.

30. Change orders delayed the completion of the project with the knowledge and consent of DSL.

31. DSL has failed to mitigate its damages.

32. There is no procedure through which DSL can seek a preliminary reduction of its Construction Lien.

33. DSL failed to demand that Ronco commence an action to foreclose its Construction Lien within 30 days of the date the Construction Lien was filed.

34. DSL ratified a delayed date for completion of the construction.

35. DSL's failure to make payments in accordance with the Contract and Nebraska State law prevented Ronco's complete performance of the Contract.

36. DSL's failure to make payments in accordance with the Contract and Nebraska State law excused Ronco's refusal to continue work on the Project.

COUNTERCLAIM and THIRD PARTY COMPLAINT

FIRST CAUSE OF ACTION

Breach of Contract (Against DSL)

37. Section 12.1.3 of the contract for construction of the Suites 2 Hotel ("Hotel") requires that applications for payment received by the Architect no later than the 5th day of the month shall be paid by DSL no later than the 30th day of the month. Any applications for payment received later than the 5th day of the month shall be paid not later than 30 days after the date the architect receives the application for payment.

38. The initial date for project completion was 310 days after commencement of the project. Prior to change orders, the completion date would have been in or around August, 2019.

39. Each application for payment submitted by Ronco included all information and supporting documentation required by the Contract.

40. Beginning in March of 2019, approximately 5 months prior to the initial completion date, DSL failed to comply with the terms of the Contract requiring payment of each application for payment within 30 days. Pursuant to the Contract, interest accrues on all overdue payments to Ronco at the rate of 1.5% per month. As of September 29, 2019, Ronco was owed \$99,851.05 in interest for late payments in addition to the amount due on the Construction Lien.

41. Ronco communicated with DSL on multiple occasions informing DSL that its payments were delinquent. DSL failed to respond to these communications and failed to make past due payments.

42. DSL failed to make payments long before the initial completion date.

43. DSL has never informed Ronco in writing that it was withholding payment because of allegedly defective work.

44. After DSL failed to make payments for several months Ronco gave notice to DSL that it would have to withdraw from the job site until payments were brought current.

45. DSL made no effort to contact Ronco or make payment arrangements prior to the date Ronco ceased work for non-payment.

46. DSL unilaterally terminated the contract on or about September 30, 2019.

47. Ronco did not file any lien until after DSL terminated the Contract. When Ronco was terminated as general contractor, Ronco filed a Construction Lien.

SECOND CAUSE OF ACTION
Foreclosure of Construction Lien
(against DSL and Forest City Group LLC)

48. Ronco incorporates the allegations contained in each of the foregoing paragraphs as if set forth in full herein.

49. Forest City Group LLC is a Nebraska limited liability organization with its principal place of doing business in Sarpy County, Nebraska. Forest City Group does business under the name of Hurst Masonry and was a subcontractor on the projects which are the subject of this action. Forest City Group LLC d/b/a Hurst Masonry is a subcontractor claiming through the General Contractor, Ronco.

50. On September 30, 2019, Ronco filed Construction Liens on the project property identified as 4440 Douglas Street, Omaha, NE 68131 (Saddle Creek Midtown Lot 1 Bock 0 LT 1 0.88 acres AC – Excess Value) in the amount of \$3,235,780.29 for construction of a hotel and \$58,014.82 for construction of a parking garage for the hotel.

51. On October 2, 2019, Forest City Group LLC d/b/a Hurst Masonry filed a Construction Lien on the same property in the amount of \$85,925.79.

52. DSL asked this Court to reduce Ronco's Construction Lien through a summary procedure. The Court declined to reduce the lien in a summary proceeding. The Court did note for advisory purposes to the Clerk of the Court that Neb. Rev. Stat. § 52-136(3) requires a contractor's lien to be reduced by the amount of liens filed by subcontractors claiming through the general contractor. A lien meeting the requirements of Neb. Rev. Stat. § 52-136(3) was filed in the amount of \$85,925.79 by Forest City Group LLC.

53. If Ronco's Construction Lien is reduced by the amount of that subcontractor's lien, Ronco's lien exists in the amount of \$3,149,854.50. To release Ronco's lien from the hotel property DSL must deposit 115% of that amount (\$3,622,332.67) with the Clerk of the Court.

54. DSL has failed to make any payments to Ronco to reduce the size of the Construction Lien and has failed to remove the Construction Lien by depositing 115% of the amount of the Construction Lien with the Clerk of the Court.

55. Ronco is entitled to foreclose on its lien pursuant to Neb. Rev. Stat. § 52-155 and to obtain a declaration of priority of liens from the Court.

THIRD CAUSE OF ACTION Breach of Nebraska Construction Prompt Payment Act

56. Ronco incorporates the allegations contained in each of the foregoing paragraphs as if set forth in full herein.

57. Pursuant to the definitions set forth in Neb. Rev. Stat. § 45-1202, Ronco is a Contractor and DSL is an Owner.

58. The Nebraska Construction Prompt Payment Act ("Prompt Payment Act") requires that "[w]hen a contractor has performed work in accordance with the provisions of a

contract with an owner, the owner shall pay the contractor within thirty days after receipt by the owner or the owner's representative of a payment request made pursuant to the contract.” Neb. Rev. Stat. § 45-1203.

59. Ronco performed work in accordance with the provisions of its contract with DSL.

60. DSL has failed to pay Ronco for work done in accordance with the contract for more than thirty days.

61. None of the exceptions to the Prompt Payment Act set out in Neb. Rev. Stat. § 45-1204(2) exist.

62. Because DSL has failed to comply with the Prompt Payment Act, Ronco is entitled to additional interest on the amounts outstanding and unpaid at the rate of 1% per month pursuant to Neb. Rev. Stat. § 45-1205.

63. If a contractor has to bring suit to enforce its rights under the Prompt Payment Act, the contractor is allowed to seek its attorneys fees pursuant to Neb. Rev. Stat. § 45-1211.

WHEREFORE, Ronco requests relief as follows:

- A. A money judgment in the amount of its Construction Liens, \$3,680,347.49;²
- B. A money judgment for interest accrued under the Contract at the rate of 1.5% per month on all amounts remaining unpaid;
- C. A money judgment for additional interest of 1% per month pursuant to the Nebraska Construction Prompt Payment Act;

² This is the total amount of Ronco’s liens less the amount of the lien filed by Forest City Group LLC d/b/a Hurst Masonry.

- D. A money judgment for its reasonable attorneys fees pursuant to the Nebraska Construction Prompt Payment Act;
- E. A determination of the priority of the liens filed on the property commonly known as 4440 Douglas Street, Omaha, Nebraska and a judgment of foreclosure on the property; and
- F. Such other and further relief that may be appropriate under the circumstances.

Dated this 27th day of November, 2019.

RONCO CONSTRUCTION CO., INC.

By: /s/ Diana J. Vogt
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed on this 27th day of November, 2019, through the Nebraska Supreme Court's electronic filing system which will serve a copy on DSL and that Ronco will undertake proper service of the Third Party Complaint on the Third Party Defendant.

/s/ Diana J. Vogt
Diana J. Vogt

Certificate of Service

I hereby certify that on Monday, December 02, 2019 I provided a true and correct copy of the Answer & Counterclaim to the following:

DSL Hospitality, LLC represented by Scaglione,Greg, (Bar Number: 19368) service method: Electronic Service to greg.scaglione@koleyjessen.com

DSL Hospitality, LLC represented by Brady H Godbout (Bar Number: 26753) service method: Email

Signature: /s/ Vogt,Diana,J (Bar Number: 19387)