

FILED IN 12-070  
CIVIL ACTION NO. 12-C-475-2

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**IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA  
(BUSINESS COURT DIVISION)**

**ASSOCIATED SPECIALISTS, INC.,**

**Plaintiff,**

**v.**

**CIVIL ACTION NO. 12-C-475-2  
(Judge Thomas C. Evans, III)**

**GRANT ARCHITECTS, P.C., INC., and  
CENTURY ENGINEERING, INC.,**

**Defendants.**

**ORDER GRANTING GRANT ARCHITECTS' MOTION FOR SUMMARY JUDGMENT  
ON ITS COUNTERCLAIM AGAINST ASSOCIATED SPECIALISTS AND  
WITHDRAWING CASE FROM THE COURT'S DOCKET**

On February 2, 2015, this matter came before the Court for a hearing on "Grant Architects' Motion for Summary Judgment on its Counterclaim Against Associated Specialists and Supporting Memorandum of Law" ("Motion for Summary Judgment"). On the consent of counsel for all parties, the hearing was held telephonically and all parties appeared by counsel. Upon calling the case, the Court inquired of counsel for the parties whether they had additional evidence to present before the Court considered the Motion for Summary Judgment. All counsel indicated that they had no additional evidence to present so the Court proceeded to hear oral argument from counsel.

The Court has considered the Motion for Summary Judgment, including all documentary evidence attached thereto, the pleadings filed herein, the relevant legal authorities, and the complete record in this case and finds as follows:

**FINDINGS OF FACT**

1. Grant Architects filed its Counterclaim against Associated Specialists on July 25,

2014.

2. Grant Architects filed its Motion for Summary Judgment on January 8, 2015, six (6) days prior to the January 14, 2015, deadline on dispositive motions.

3. Grant Architects, by counsel, argued as follows:

a. On November 21, 2006, Grant Architects, entered into the “Abbreviated Standard Form of Agreement Between Owner and Architect” (“Contract”) with Associated Specialists, whereby Grant Architects agreed to perform architectural design services for a medical office building that was to be attached to United Hospital Center.

b. Grant Architects performed all work required of it pursuant to the terms and conditions of its Contract with Associated Specialists.

c. Section 11.2.2 of the Contract between Grant Architects and Associated Specialists provided that Grant Architects was to receive 3.5% of the total cost of the A/E Shell Services (i.e. A. Project Initiation, B. Programming, C. Master Site Plan, D, E, F, G Building) and 5.0% of the Tenant Improvement costs.

d. On the date of the Contract, November 14, 2006, the following estimates were used:

Compensation for these design and engineering services based upon a 100,000 gross square foot building with a base building cost of \$105.00 per square foot and a Tenant allowance of \$45.00 per square foot would be billed as outlined on the following schedule:

Worktask A. Project Initiation, B. Programming, C. Master Site Plan, D, E, F, G Building A/E. Services	\$367,500.00	(3.5%)
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Worktask H. Tenant Improvement A/E	\$229,500.00	(5%)
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Total Project Costs plus Expenses	\$597,000.00	
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e. At the time of its execution, the Contract estimated the total cost of the project to be \$15,000,000.

f. With the estimated total cost of the project as \$15,000,000, the estimated compensation figures set forth in §11.2.2 of the Contract indicate that the total Architectural and Engineering (“A/E”) services for the shell of the building would be 70% of the total cost and that the total Tenant Improvement (“TI”) services would be 30% of the total cost.

g. Grant Architects has been paid a total of \$610,322.11, plus \$21,437.09 in expenses.

h. In its Counterclaim against Associated Specialists, Grant Architects alleged that, should evidence reveal that the actual cost of the project was more than the estimated \$15,000,000, Associated Specialists would owe Grant Architects the difference between the \$610,322.11 that it was actually paid and the contractually agreed upon compensation of 3.5% of the total A/E costs for the shell of the building (i.e. 70% of the total cost) and 5.0% of the total TI costs for the project (i.e. 30% of the total cost).

i. All applications for payment that were submitted for the construction of the project by Dr. Saad Mossallati on behalf of the contractor, Crescent Construction, LLC,<sup>1</sup> listed \$18,000,000 as the “Original Contract Sum”<sup>2</sup> rather than the \$15,000,000 estimated in the Contract.

j. Dr. Saad Mossallati is the same person who signed the Contract on behalf of Associated Specialists.

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<sup>1</sup> The contractor for this project was Crescent Construction, LLC, which, upon information and belief, was owned and operated by Saad Mossallati, MD during all relevant times.

<sup>2</sup> The contract referenced in this document is the contract between the owner and the contractor.

k. Since the applications for payment establish that the total building cost was \$18,000,000, Grant Architects' fee for the shell of the building should have been \$441,000 (3.5% of 70% of the total cost) and its fee for the total Tenant Improvement costs should have been \$270,000 (5.0% of 30% of the total cost) which adds up to total project costs of \$711,000. This means that Associated Specialists still owes Grant Architects a total of \$100,677.89 pursuant to §11.2.2 of the Contract.

l. Pursuant to §11.2.2 of the Contract, Grant Architects was to be paid the total project costs plus expenses (emphasis added).

m. In addition to the total project costs, Grant Architects incurred \$24,593.33 in approved and reimbursable expenses which remain unpaid by Associated Specialists.

4. On October 27, 2014, pursuant to Rule 36 of the West Virginia Rules of Civil Procedure, Grant Architects served Requests for Admissions on Associated Specialists.

5. The responses to the Requests for Admission were due on November 26, 2014, but no response was received and no request for an extension of time was made at any time prior to February 2, 2015.

6. On February 2, 2015, on the morning of the date of the hearing on Grant Architects' Motion for Summary Judgment, the Plaintiff submitted its "Response to Grant Architects' Motion for Summary Judgment and Motion to Continue" ("Plaintiff's Response").

7. Therein, Plaintiff alleged "[t]hat the Plaintiff has been unable to respond to Discovery Request [sic] as the same are in possession of Dr. Saad Mossallati who has been in the Country of Syria and unable to return to the United States of America due to the ongoing Civil War."

8. Plaintiff further stated that "Counsel for the Plaintiff believes that Dr. Saad

Mossallati will be able to return to the United States in the very near future and accordingly it would appropriate to grant a continuance of this Motion as well as an extension of time to allow the Plaintiff to produce the requested discovery.”

9. In its Response, Plaintiff did not request that the Court not consider the admissions made pursuant to Rule 37 of the West Virginia Rules of Civil Procedure.

10. Counsel for Plaintiff did not submit an affidavit pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, demonstrating that a genuine issue as to any material fact existed.

11. The Court did not hear any argument with a basis in law to allow for the subsequent production of discovery responses by Plaintiff.

12. In particular, the Court notes that the case was originally filed on November 8, 2012, that Dr. Mossallati has participated in at least one telephonic hearing in this case via telephone from Syria, and that the above styled matter had been scheduled for a March 24, 2015, trial date and that.

### **CONCLUSIONS OF LAW**

1. Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, a motion for summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

2. Summary judgment is a device “designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if there essentially is no real dispute as to salient facts or if it only involves a question of law.” Williams v. Precision Coil, Inc., 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995) (internal quotations omitted).

3. “Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986)).

4. Pursuant to Rule 36 of the West Virginia Rules of Civil Procedure, a matter of which an admission is requested,

is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him.

5. “The general and prevailing rule is that the failure to respond is deemed to be an admission of the matters set forth in the request. By failing to respond, a party admits the truth of the matters contained therein. Dingess-Rum Coal Co. v. Lewis, 170 W. Va. 534, 536-37, 295 S.E.2d 25, 27 (1982) (citing Luick v. Graybar Electric Co., Inc., 473 F.2d 1360 (8th Cir. 1973); Chess Music, Inc. v. Bowman, 474 F.Supp. 184 (D. Neb. 1979); Kirkland v. Cooper, 438 F.Supp. 808 (D.S.C. 1977); Weva Oil Corp. v. Belco Petroleum Corp., 68 F.R.D. 663 (N.D.W. Va. 1975)).

6. The Plaintiff has not responded to the requests for admission submitted by Grant Architects, and therefore, pursuant to Rule 36 of the West Virginia Rules of Civil Procedure, the following facts are deemed admitted and conclusively established in this case:

1. The Contract between Associated Specialists and Grant Architects is valid and enforceable.

2. Associated Specialists accepted the services provided by Grant Architects.
3. At the time of the execution of the Contract, Associated Specialists represented to Grant Architects that the total cost of the project would be \$15,000,000.
4. The Contract provided that compensation for Grant Architects' design and engineering services was based upon a 100,000 gross square foot building with a base building cost of \$105.00 per square foot and a Tenant allowance of \$45.00 per square foot.
5. The compensation was based on the total estimated cost of the project of \$15,000,000.
6. Those estimated compensation figures set forth in the Contract were based on compensation of 3.5% of the total Architectural and Engineering services for the shell of the building (i.e. 70% of the total cost) and 5.0% of the total Tenant Improvement costs (i.e. 30% of the total cost).
7. Grant Architects was paid a total of \$610,322.11, plus \$21,437.09 in expenses for its work on the Project.
8. Associated Specialists reported to United Hospital Center and/or others that the total cost of the Project was more than \$15,000,000.
9. If the total cost of the Project exceeded \$15,000,000, Grant Architects is owed more money pursuant to the terms of the Agreement.
10. Associated Specialists owes Grant Architects the difference between the \$610,322.11 that it was paid and the contractually agreed upon percentage set forth in the Contract and quoted in Paragraph 6, above.
11. [Withdrawn by Grant Architects].<sup>3</sup>
12. Associated Specialists, POB, Dr. Mossallati, or Associated Specialists' agent approved Change Order #13.
13. Associated Specialists has not paid Grant Architects for Change Order #13.
14. Grant Architects has fulfilled its duties to Associated Specialists under the terms of the Agreement.
15. Associated Specialists is owed no offsets for payments due to Grant

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<sup>3</sup> While preparing its Motion for Summary Judgment, counsel for Grant Architects found an error in Request for Admission No. 11. Change Order #13 was approved for the total of \$15,000, not for the total of \$24,593.33. As set forth in paragraph 10 of the "Counterclaim of Grant Architects P.C., Inc. Against Associated Specialists, Inc.," the total expenses remaining due to Grant Architect is \$24,593.33, which includes Change Order #13. Thus, Grant Architects withdrew the request because it was factually inaccurate, as stated. Evidence establishing the total expenses remaining owed to Grant Architects was set forth in Section C.2 of Grant Architects' Motion for Summary Judgment and the invoices attached as Exhibit B thereto.

Architects.

16. Associated Specialists has not paid to Grant Architects all amounts due under the Agreement, in whole or in part, because of the delay created by the failures of the West Virginia State Fire Marshal's smoke evacuation testing.

7. The Court finds that the pleadings and discovery admissions in this action conclusively establish that Associated Specialists is in breach of its contractual obligations to Grant Architects.

8. Through its failure to deny the above Requests for Admissions, Associated Specialists has admitted and the Court finds that:

- a. Grant Architects performed its duties under the Contract;
- b. Pursuant to the terms of the Contract, Grant Architects' compensation for its services in designing the subject building was calculated as 3.5% of the total Architectural and Engineering services for the shell of the building (i.e. 70% of the total cost) and 5.0% of the total Tenant Improvement costs (i.e. 30% of the total cost); and
- c. Associated Specialists' initial payment of \$610,322.11 to Grant Architects was based upon an estimated total construction cost of \$15,000,000, but that the total cost of the project was more than \$15,000,000.

9. Because the total project cost was higher than initially estimated at the time the \$610,322.11 payment was calculated, Grant Architects has established that it is owed the calculated difference between the compensation received based upon the inaccurate \$15,000,000 estimate and the actual total cost of the project.

10. Grant Architects produced the contractor's applications for payment as exhibits to its Motion for Summary Judgment, which all list the total cost as \$18,000,000.

11. Associated Specialists has not provided any evidence disputing this figure, and, in fact, Associated Specialists' agent who signed the Contract with Grant Architects, Dr. Saad



Mossallati, is the same person who submitted the applications for payment with \$18,000,000 listed as the total cost.

12. Based upon the evidence presented, the Court finds that the applications for payment establish that the total building cost was \$18,000,000.

13. The Court further finds that, with the total building cost of \$18,000,000, Grant Architects' fee for the shell of the building should have been \$441,000 (3.5% of 70% of the total cost) and its fee for the total Tenant Improvement costs should have been \$270,000 (5.0% of 30% of the total cost) which adds up to total project costs of \$711,000. The difference between the \$711,000 fee that Grant Architects was contractually entitled to receive and the \$610,322.11 that it was previously paid, is \$100,677.89. Thus, this Court concludes that Associated Specialists has breached the terms of its Contract with Grant Architects because it still owes Grant Architects a total of \$100,677.89, pursuant to §11.2.2 of the Contract.

14. In addition to the total project costs, Grant Architects is contractually entitled to receive reimbursement for its expenses incurred during the project at issue.

15. The terms of the Contract and Associated Specialists' admissions of Requests 12 and 13 establish that Grant Architects incurred expenses totaling \$24,593.33, which expenses are due to Grant Architects in addition to the contractually agreed upon fee as set forth above.

16. In its Motion for Summary Judgment and during the February 2, 2015 hearing on the matter, Counsel for Grant Architects proffered that the majority of these additional expenses (a total of \$21,036.35) were incurred by Grant Architects pursuant to Change Order #10 and Change Order #13, both of which were signed by Dr. Mossallati. The other expenses (totaling \$3,556.98) remaining owed to Grant Architects are set forth on the Customer Open Balance sheet and invoices attached as part of Exhibit B to its Motion for Summary Judgment.

17. Grant Architects produced unrefuted evidence that it incurred \$24,593.33 in reimbursable expenses which remain unpaid by Associated Specialists. Thus, this Court concludes that Associated Specialists has breached the terms of its Contract with Grant Architects because it still owes Grant Architects a total of \$24,593.33 in expenses.

18. The Plaintiff has provided no responses to Grant Architects' October 24, 2014, discovery requests from Dr. Mossallati or any other representative of Associated Specialists.

19. Furthermore, the Plaintiff has provided no definitive evidence regarding Dr. Saad Mossallati's return to the United States, despite the fact that the trial of this case is scheduled to begin on March 24, 2015.

20. The Court concludes that Associated Specialists' admissions of the matters set forth above, together with the unrefuted documentary evidence produced by Grant Architects, there are no issues of material fact for a jury to establish in this matter and that Grant Architects is entitled to judgment as a matter of law.

**WHEREFORE**, based on the foregoing Findings of Fact and Conclusions of Law, the Court **GRANTS** Defendant Grant Architects' Motion for Summary Judgment on its Counterclaim Against Associated Specialists for the reasons assigned above and **ORDERS** as follows:

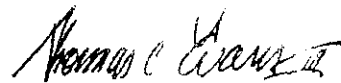
- A. Associated Specialists breached its Contract with Grant Architects by failure to pay all amounts due under the terms of the Contract.
- B. Within 30 days of the date of the entry of this Order, Associated Specialists shall pay to Grant Architects a total of \$125,271.22, which sum is comprised of the \$100,677.89 Contract fee plus the \$24,593.33 in approved and incurred expenses.
- C. This case is now complete and shall be withdrawn from the active docket of this Court because all other claims have been dismissed as follows:

- a. Any and all claims of Associated Specialists, Inc. and/or POB, LLC against Century Engineering, Inc. were previously dismissed, with prejudice, pursuant to the "Order Granting Defendants' Motions to Dismiss [Second] Amended Complaint" entered on April 7, 2014, and the "Order (Re: "Defendant Century Engineering, Inc.'s Rule 59 Motion to Alter or Amend Judgment")" entered on July 2, 2014.
  - b. All claims by and against Century Engineering, Inc., have been dismissed pursuant to the "Agreed Order Dismissing Claims By and Against Century Engineering, Inc.," entered on \_\_\_\_\_.
- D. This Order is a final judgment pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure such that the time period for any appeal of this Order shall begin on the date of the entry of this Order.

The Plaintiff's objections and exceptions to this Order are hereby noted and preserved.

The Court further **ORDERS** that the Circuit Clerk send certified copies of this Order to all counsel of record.

ENTER: \_\_\_\_\_



HONORABLE THOMAS C. EVANS, III

*Prepared and presented pursuant to W. Va. Trial Court Rule 24.01(c) by:*

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