JAMS COMPREHENSIVE ARBITRATION
NEW YORK, NEW YORK

PAULA COOPER and JACK MACRAE,

Claimants,

and

JAMS Ref. No.
1425023319

IAIN CAMPBELL DESIGN, LTD.,

Respondent.

SECOND PARTIAL FINAL AWARD

The undersigned Arbitrator, having been designated pursuant to Paragraph 11 of a Termination Agreement dated December 21, 2016, between the Claimants and the Respondent, and having heard the proofs and allegations of both the Claimants and the Respondent, does hereby find and AWARD as follows:

BACKGROUND

The Claimants are shareholders in a cooperative apartment building known as the London Terrace Towers located at 465 West 23rd Street in New York. The Claimants own the shares allocated to Penthouses A and B, which, in 2015, they decided to renovate and combine into one unit. They purchased the shares allocated to Apartment 19B/C, where they planned to reside during the penthouse renovations. The Claimants hired the Respondent to perform approximately $100,000 worth of renovation work in Apartment

19B/C. The work consisted of demolishing one wall and extending another, renovating the kitchen in a minor way, and making handicap accessible a bathroom for Claimant Jack Macrae, who is confined to a wheelchair. The Claimants were satisfied with the work Respondent performed in Apartment 19B/C.

For the penthouse renovations, the Claimants hired architect Pietro Cicognani with the firm Cicognani Kalla Architect PLLC (hereinafter CKA), and the engineering firm Pavane & Kwalbrun Consulting Engineers (hereinafter Pavane) for the mechanical, electrical and plumbing. Construction plans and architectural drawings first were submitted to the cooperative board of London Terrace Towers for its review and approval. The board required certain changes, and the plans eventually were approved. The plans were submitted to the New York City Department of Buildings (hereinafter DOB) in approximately February 2016.

In early March 2016, the Claimants became frustrated with the length of the permitting process and the lack of final plans for many design aspects of the renovation. Claimant Cooper expressed her frustration to Iain Campbell, principal of the Respondent who had been working on Apartment 19B/C. She asked if he would like to become involved in the penthouse project. Campbell advised Claimant Cooper that he could perform the work and obtain building approvals relatively quickly.

Before the DOB approved the plans and issued permits, the Claimants fired CKA. Claimant Cooper entered into a Design Services Agreement with the Respondent on March 12, 2016. Although the parties disagree on the exact date the Claimants advised the Respondent that they had fired CKA, it is undisputed that the Respondent recommended BCC Architects (hereinafter BCC), and the Claimants entered into a contract with BCC on March 30, 2016 (hereinafter the BCC contract) [Exh. 185]. The BCC contract excluded construction administration services [id.]. On April 12, 2016, the Respondent signed an Agreement for Construction Services (hereinafter the Construction Contract); Claimant Cooper signed it on April 18, 2016, and made the required down payment that same date. The Construction Contract contained a "time is of the essence" clause with substantial completion to be no later than November 30, 2016.

Meanwhile, on or about March 15, 2016, the DOB approved the CKA drawings and plans. The Respondent obtained the construction permit almost two months later, on June 8, 2016.[1] The Respondent commenced work in the penthouse shortly thereafter, but by late November 2016, it still was incomplete. It was around this time that the Claimants hired Elizabeth Rexrode of Rexrode Chirigos

[1] The parties dispute the cause of the delay and whether the permit could have been obtained earlier. The Arbitrator need not resolve this particular issue.

Architects (hereinafter RCA) to get the project on track. Rexrode found that the renovation not only was incomplete, but much of the work that had been performed was defective.

The Claimants terminated the Respondent's services on December 13, 2016. The parties entered into a Termination Agreement dated December 21, 2016, which called for arbitration of their disputes [Exh. 15]. At the time of the termination, the Claimants had paid the Respondent and its vendors $953,966.00 of the $1,345,735.00 due under the Design Services Agreement, the Construction Contract, and Change Orders.

RCA continued as the architect for the project, and the Claimants hired Eurostruct to take over the construction. The Claimants paid Eurostruct $1,109,850.68 to complete the renovation and correct the defective work. The renovation was completed in September 2017. The Claimants resided in Apartment 19B/C until they sold it in June 2017. Claimant Cooper relocated part-time to the High Line Hotel, and Claimant Macrae relocated to the Claimants' home in Long Island, until completion of the penthouse renovation.[2]

[2] Claimant Cooper owns an art gallery in New York City, necessitating her stay at the High Line Hotel several nights per week.

CLAIMS and AFFIRMATIVE DEFENSES

The Claimants filed a Demand for Arbitration and Statement of Claim dated March 14, 2017. The Demand asserts a claim to recover damages for breach of contract.[3] The Claimants also seek attorneys' fees, costs and disbursements. The Respondent filed a Denial of Statement of Claim with Affirmative Defenses dated July 14, 2017. The affirmative defenses include failure to state a claim and failure to mitigate damages. The Respondent also seeks costs and disbursements.

PRE-HEARING MOTION PRACTICE

The Arbitrator issued numerous orders during discovery in this arbitration demonstrating that the Respondent was derelict in its duty of complying with discovery directives. Order No. 2 dated August 4, 2017, directed the Respondent to comply with all of the dates and steps contained in Order No. 1, or the Respondent would be sanctioned with any of the available remedies under Rule 29 of the JAMS Comprehensive Rules and Procedures (hereinafter JAMS Rules),[4] including the striking of its "Denial of Statement of Claim with Affirmative Defenses." [Order No. 2, p4]. In Order No.

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[3] In a PARTIAL FINAL AWARD dated May 18, 2018, the Arbitrator dismissed the only other claim asserted by the Claimants, which was to recover damages under the quasi-contractual theory of unjust enrichment.

[4] Pursuant to paragraph 5 of Procedural Order No. 1 dated June 27, 2017, the JAMS Comprehensive Rules are applicable to this arbitration.

4 dated October 20, 2017, the Arbitrator granted the Claimants' motion to compel document production on or before November 3, 2017, failing which the Claimants would be permitted to move for relief under JAMS Rule 29. The parties then became embroiled in a dispute as to whether the Respondent properly complied with Order No. 4. The Claimants asserted that the Respondent's production was deficient because the metadata was compromised. Rather than parse through the Respondent's production, the Arbitrator issued Order No. 7 dated November 28, 2017, permitting the Claimants at the hearing "to request an inference be drawn that a document with insufficient native formatting was created after the fact, or on a date after the date it bears" [Order No.7, p3].

THE HEARING

The parties simultaneously filed Rule 20(b) submissions. The hearing was held on the following dates in 2018: March 1, 2, 5, 6, 8 and 9, May 30 and 31, June 4 and 5, July 30 and 31, August 22, 23 and 24, and September 25, 26, 27 and 28. Testifying for the Claimants were Debi Martini, Pietro Cicognani of CKA, Mufeed Lahham of Pavane, Elizabeth Rexrode of RCA, the Claimant Paula Cooper, Jimmy Tuohy an owner of Eurostruct, and the Claimant Jack Macrae via stipulation and limited cross-examination. Stephanie Nussbaum and Christopher Sheridan, both of Thornton Tomasetti, and the Respondent's principal Iain Campbell, testified on behalf of the

Respondent. The Claimants called as rebuttal witnesses Stephen B. Jacobs, president of Stephen B. Jacobs Group Architects, and Elizabeth Rexrode. The Respondent called Iain Campbell as its rebuttal witness.

The Claimants filed a Post-Hearing Brief on November 15, 2018. The Respondent filed its Opposition Post-Hearing Brief on February 4, 2019. The Claimants filed their Post-Hearing Reply Brief on February 27, 2019, when the record closed. The parties extended to May 14, 2019, the Arbitrator's time to render the award.

PARTIAL FINAL AWARD

At the close of the Claimants' direct case, the Respondent moved pursuant to JAMS Rule 18 for summary disposition of the claim to recover damages under the quasi-contract theory of unjust enrichment, and for summary dismissal or a "directed verdict" on the claim to recover damages for breach of contract. In a PARTIAL FINAL AWARD dated May 18, 2018, the Arbitrator granted that branch of the motion which was for dismissal of the unjust enrichment claim and denied that branch of the motion which was for dismissal or a "directed verdict" on the breach of contract claim.

On May 30, 2018, the Respondent reserved its right, on the record, to reargue so much of the PARTIAL FINAL AWARD as denied that branch of its motion for dismissal or a "directed verdict" on the breach of contract claim on the ground that the Arbitrator

misapprehended the case law [TR 5/30/18 pp2031-2032]. The Arbitrator reserved to the post-hearing brief the Respondent's right to reargue that part of the PARTIAL FINAL AWARD [id. p2033]. Nevertheless, the Respondent submitted a letter dated September 17, 2018, seeking reargument of this very same issue. The Respondent's application was denied in Order No. 9 dated September 24, 2018, without prejudice to its right to raise in the post-hearing brief the arguments contained in the letter application. In its post-hearing brief, the Respondent seeks reargument consistent with its request on the record of May 30th and its September 17th letter application.

DECISION

(1) Reargument of Partial Final Award

The Partial Final Award states, in pertinent part:

> The Respondent is incorrect in asserting that the Claimants must parse the costs of corrective work and the costs of work performed to complete the project. When a breach of contract involves defective or incomplete construction, the proper measure of damages is the cost to repair or correct the defects or to complete the construction [see Brushton-Moira Cent. School Dist. v Thomas Assoc., 91 NY2d 256, 262 (1998); Home Constr. Corp. v Beaury, 149 AD3d 69, 702 (2d Dept 2017)(measure of damages is fair and reasonable market price for correcting defective work and completing construction); Lewin v Levine, 146 AD3d 768, 769 (2d Dept 2017)(proper measure of damages is cost of completion of work and correction of defects); Metropolitan Switch Bd. Mfg. Co., Inc. v B&G Elec. Contractors, Div. Of B&G Industries, Inc., 96 AD3d 725, 726 (2d Dept 2012) (defendant entitled to recover costs of completing work that was subject of contract and

> correcting defects in work)]. Here, the Claimants contend that both corrective work and completion of the project were required in order to place them in the same position as if there had been no breach. These costs are not susceptible to the surgical separation the Respondent seeks, and the Respondent has not pointed to any case that requires it.

The Respondent takes issue with this portion of the PARTIAL FINAL AWARD arguing that the Arbitrator misapprehended the case law, particularly the cases of Lewin v Levine (supra) and Home Constr. Corp. v Beaury (supra). It contends that the Arbitrator improperly attributed to these cases the use of the word "and" (which the Respondent insists is not used) instead of the word "or" (which Respondent contends is the word used in these cases). To drive home its point, the Respondent quotes certain portions of the decisions in both Lewin and Home Constr. Corp. which, it argues, establish the error in the Arbitrator's decision. Not only do these quotes fail to support its argument, they actually prove that the Arbitrator did not misapprehend the case law.

A simple reading of the case law on the measure of damages for breach of contract based upon incomplete or defective performance reveals that most, if not all of them, use the words "and" and "or" interchangeably. The Respondent ignores the fact that in the very passage of the PARTIAL FINAL AWARD that it criticizes, the Arbitrator also used both "and" and "or" in discussing the case law. Lest there be any doubt, the appellate

court in Lewin stated, in pertinent part:

> The proper measure of the plaintiffs' damages was the cost of completion of the construction work ***and*** the correction of defects in the defendants' work [see Metropolitan Switch Bd. Mfg. Co., Inc. v B&G Elect. Contrs., Div. Of B&G Indus., Inc., 96 AD3d 725, 726 (2012)[5]; Marino v Lewis, 17 AD3d 325, 325-326 (2005); Ferreira v Saccento, 286 AD2d 366 (2001); Kaufman v Le Curt Constr. Corp., 196 AD2d 577, 578 (1993); Lukoff v Sussex Downs, 131 AD2d 442, 443 (1987)].

146 AD3d at 770 (emphasis supplied). The Lewin plaintiffs ultimately were denied relief because they sought to recover the entire sum they had paid the defendant under the contract, without proof of the portion of that sum that was attributable to "(1)

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[5] The Respondent also takes issue with the Arbitrator's citation in the PARTIAL FINAL AWARD to the Metropolitan Switch Bd. case on the ground that it is factually distinguishable and, therefore, inapplicable. The Respondent's argument is meritless. As evidenced by its citation by the Appellate Division in Lewin v Levine, the Metropolitan Switch Bd. case does in fact constitute valid authority for the rule of law that the proper measure of damages for *breach of contract on the basis of defective or incomplete work* is the cost of correction of the defective work and the cost of completion. Although the facts in Metropolitan Switch Bd. may be distinguishable, it is a distinction without a difference [see *e.g.* Lewin v Levine, supra; see 28A NY Prac., Contract Law, Part VII Damages, Ch. 22 General Principles Applicable to Determining Breach of Contract Damages, I. Particular Situations, §22:34 Incomplete or defective performance (2018)("When the portion of the work that had been completed is defective, plaintiff can recover both the cost of completing the work and the cost of remedying the defective performance"); 22 Am Jur 2d Damages, III. Compensatory Damages, C(3)(b)(2) Defective Construction, §81 Generally (2019) (same)]. The Arbitrator also notes that the appellate court in Metropolitan Switch Bd. relied on breach of construction contract cases to support its decision.

work that was never done, ***and/or*** (2) defective work" (146 AD3d at 770) (emphasis supplied).[6]

The Respondent's reliance on the following quote from Home Constr Corp. v Beaury also does not support its reargument. The appellate court uses the word "and" in the first sentence and "or" in the second sentence, but the Respondent, without explanation, chooses only to focus on the latter:

> The Supreme Court properly concluded that the defendants were entitled to be compensated for the cost of completion of the construction work ***and*** the correction of defects in Home Construction's work, and the proper measure of damages is the fair and reasonable market price for correcting the defective installation ***or*** completing the construction.

149 AD3d at 702 (citations omitted) (emphasis supplied). Home Constr Corp. v Beaury represents yet another example of the court using "and" and "or" interchangeably [see n6 supra].

The Respondent relies on the New York Pattern Jury Instructions (hereinafter PJI)[7] and a so-called "Brushton standard" to support its argument that the Claimants are entitled to either the cost of completion or the cost of correction but not

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[6] "And/or" is defined as "a function word to indicate that two words or expressions are to be taken together or individually" [www.meriam-webster.com; see NY Times, Feb. 20, 2019, pA2 "The Georgia House of Representatives unanimously passed a bill on February 20, 1953, to create the word 'andor.' The word was defined as meaning 'either,' 'or,' 'both,' 'and,' 'and or or,' and 'and and or'"].

[7] This Arbitrator has been a member of the Pattern Jury Instruction Committee that drafts the PJI.

both. First, decisional law is accorded primary authority and the PJI cannot trump the principles espoused in the case law [see Acerra v Trippardella, 34 AD2d 927 (1st Dept 1970) *app dismissed* 29 NY2d 665 (1971); 8A Carmody-Wait 2d Ch 57 Charge to Jury, §57:1 Generally (2019)]. Second, there is no "Brushton standard" articulated in the case law. Moreover, the Brushton case is factually distinguishable. The plaintiffs in Brushton-Moira Cent. School Dist. v Fred H. Thomas Assocs., P.C. (91 NY2d 256 (1998)), sued only to recover damages for defective work; there was no claim to recover damages for incomplete work. Finally, the real crux of the Brushton-Moira case was not the measure of damages to be awarded but "the proper date from which breach of contract damages should be measured and whether prejudgment interest was properly awarded from the date of the accrual of plaintiff's cause of action" (91 NY2d at 259).

The fallacy of the Respondent's position is highlighted when analyzing the facts of the case under consideration. According to the Respondent's argument, even if the Claimants prove that the Respondent breached the contract by failing to complete the work within the time constraints of the contract and also prove that some of its work was defective, they may only recover damages for either completion of the work or correction of the defective work, but not both. There is no case that limits recovery in this

manner. Moreover, to limit the measure of damages in this way would not "place the [Claimants] in the same position as if there had been no breach" [Brushton-Moira Cent. School Dist. v Fred H. Thomas Assocs. P.C., supra 91 NY2d at 262].

Accordingly, the Respondent's request to reargue so much of the PARTIAL FINAL AWARD as denied that branch of its motion which was for dismissal or "directed verdict" on the breach of contract claim on the ground that the Arbitrator misapprehended the case law is denied.

(2) Breach of Contract Claim

(a) The Contracts

In the Design Services Agreement, the Respondent agreed to provide interior design services, including Schematic Design and Design Development [Exh. 2, [unnumbered] p1, §1A and B]. The Respondent was to use Claimants' architect's plans[8], measure the apartment and produce a CAD drawing for the Schematic Design [id. §1A]. The Design Services Agreement further required the Respondent to "continue to develop the project by refining the Schematic Design through meetings, drawings and samples, to create final specifications for the following: Lighting, Hardware, Plumbing Fixtures, Appliances, Paint and Finishes, Flooring,

[8] This would be a reference to CKA since the contract with BCC had not been executed as of the date the parties' signed the Design Services Agreement.

Baseboards, Doors and Trim, Materials, Cabinetry, and Millwork" [id. §1B].

The Construction Contract was "modeled in significant part after the AIA Standard Form of Agreement Between Owner and Contractor" and all work under the contract was to be "completed in a workmanlike manner, in accordance with standard (AIA accepted) practices" [Exh. 10 p1, Art. 1]. The sum for the services to be performed under the Construction Contract was $1,309,999 [id. p2, Art. 3]. Claimants were required to make a down payment of $327,500 (25%), one monthly "progress" payment of $196,500 (15%) on May 15th, and five additional "progress" payments of $131,000 on the 15th of each month beginning in June [id.]. A final payment in the sum of $130,999 (10%) was to be made within five business days after the work was completed [id. p3].

The Respondent was to begin work at the premises upon receipt of the DOB permits with substantial completion no later than November 30, 2016 [id. p2, Art. 2].[9] The substantial completion date was contingent on the down payment being made by April 15, 2016, and all permits being obtained by April 22, 2016 [id.].[10]

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[9] This date was extended by one week by Change Order One [Exh. 11].

[10] The Construction Contract was not signed by Claimant Cooper until April 18, 2016, the same date on which she made the required down payment [Exh. 10; TR 3/6/18 pp1349-1350], and the permit was not obtained until June 8, 2016. The parties did not

The Construction Contract contained a "time is of the essence" clause [id.], and the Claimants had the right to terminate the Construction Contract at any time [id. p5, Art. 9].

Changes in work were permitted by a Change Order. The Construction Contract provided that "[a] Change Order shall be based upon written agreement among the [Claimants], [Respondent] and Architect" [id. p3, Art. 4]. Aside from recording the change in work, Change Orders were to include any adjustment to the cost of the construction services and any resultant schedule changes [id.]. Payment of the costs for the Change Orders was required "at the time of approval" [id.].

The Termination Agreement dated December 21, 2016, terminated both the Design Services Agreement and the Construction Contract [Exh. 15 (unnumbered) p1, ¶2]. The Respondent was to deliver to Rexrode the project files and materials in electronic format within 5 business days of the date the agreement was signed [id. p2, ¶5]. The parties agreed that work to be corrected was to be deducted from the cost of work the Respondent was to provide to the Claimants [id. p2, ¶7]. Unresolved disputes regarding required corrections were to be resolved in arbitration [id.]. Paragraph 11 of the Termination Agreement provides for arbitration of all

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amend the substantial completion date after either of these delays.

disputes arising between the parties, including disputes arising under the Termination Agreement [id. p3, ¶11].

(b) The Breaches

The Claimants assert that the Respondent breached almost every aspect of the Construction Contract and the provisions of the Design Services Agreement. These breaches include the failure to create final design specifications for any of the open items enumerated in the Design Services Agreement, elimination of all oversight of the work, failure to work with the project engineers, improper changes to the work without prior approval from the cooperative board or the Claimants, failure to provide a schedule of work, and lack of honesty about the state of the project. The Claimants also contend that there was no full-time supervisor on the job site and the project never was properly staffed. All of these failures, the Claimants argue, resulted in the Respondent's inability timely to complete the project in accordance with the Construction Contract. Finally, the Claimants allege, much of the work performed was defective and had to be corrected.

The Respondent argues that the Claimants are to blame for each and every delay in the renovation. It contends that the project underwent significant delay when the Claimants fired CKA. It also asserts that the Claimants were slow to make decisions, if they made them at all, repeatedly changed their minds about design

decisions, declined to pay for work needed to be done prior to demolition, removed from the scope of work a necessary electrical upgrade, and reneged on a deal with the cooperative regarding the location of the HVAC unit.

The elements of a claim to recover damages for breach of contract are the existence of a contract, the Claimants' performance under the contract, the Respondent's breach of the contract, and resulting damages [see 143 Bergen Street, LLC v Ruderman, 144 AD3d 1002, 1003 (2d Dept 2016); PFM Packaging Machinery Corp. v ZMY Food Packing, Inc., 131 AD3d 1029, 1030 (2d Dept 2015)].

(i) Summary of Breaches of Contract

The findings of fact that follow detail the many breaches of the Design Services Agreement and the Construction Contract that the Respondent committed. These consisted of the Respondent's failure to create final specifications or schematic drawings for most of the design of the renovation. This misstep was followed by the commencement of construction before necessary design decisions had been made. Thus, the Respondent breached the contracts as follows: (1) it commenced demolition without a completed design plan, (2) it furnished no construction schedule before beginning construction work, (3) in October, 2016, it supplied a construction schedule that was unworkable, (4) it

refused to implement many of the Claimants' construction and design decisions, (5) it failed to advise the Claimants of the need for a supervising architect, (6) it failed to coordinate at all with the engineer of record, (7) the project was never properly staffed, (8) it failed to place orders in a timely manner and failed to complete the project in the time promised, and (9) the work performed was defective in numerous ways.

These are categories of breach of both contracts. There follow the detailed findings of fact substantiating this list (and more) and dealing with the Respondent's arguments and excuses about the causes of these breaches. These findings are supported by the credible testimony of the Claimants and their witnesses, including Rexrode and Jacobs. The testimony of Respondent's witness, Nussbaum, though credible, hinged on unreliable evidence including meeting minutes and sketches the Respondent failed to prove were provided to the Claimants. Her testimony about defective work was unpersuasive because she determined defectiveness based upon the very low threshold of whether the work complied with the building code. Respondent's witness Sheridan gave credible testimony and he agreed with much of the testimony of the Claimants' witnesses regarding defective work. The testimony of Respondent's witness Campbell, was not entirely credible.

(ii) Testimony, Evidence and Findings

The testimony and evidence presented at the hearing overwhelmingly establish the Respondent's multiple breaches of both the Design Services Agreement and the Construction Contract. Almost all of the problems with the renovation emanated from the Respondent's initial breach of the Design Services Agreement. Despite Campbell's testimony to the contrary, the evidence revealed that he failed to create final specifications for just about every aspect of the renovation. Both Rexrode and Jacobs reviewed the items contained within the project file that the Respondent belatedly gave to Rexrode. These witnesses testified that the file contained, among other things, various sketches without dates or measurements, or any indication that they had been shown to the Claimants or further developed for use during the construction [Rexrode, TR 3/5/18 p830; Jacobs, TR 9/27/18 p5408]. Many of the sketches were simply different versions of the same room or area of the penthouse, and they each contained conflicting information [id.]. Rexrode found no final specifications in the project file, and the only shop drawings were for the Brombal doors [Rexrode, TR 3/5/18 pp827-828, 830].[11] As the very credible witness Jacobs testified, "[o]ne hundred

[11] The Respondent's witness Nussbaum also testified that there were many drawings in the file and it was difficult to determine which were final [Nussbaum, TR 5/30/18 pp2519-2520].

percent of the problems that occurred in this project was a result of the fact that construction commenced with a major portion of the design decisions not planned" [TR 9/27/18 pp5310-5311].[12]

The Respondent claims, and Nussbaum opined, that the Claimants' termination of CKA was a major cause of the renovation delay [Nussbaum, TR 5/31/18 p2100]. The evidence simply does not support this argument. When the Claimants fired CKA, there were no final specifications for many of the design aspects of the renovation. The Respondent was fully aware of this prior to signing the Design Services Agreement. In fact, Campbell testified that, before he entered into the Design Services Agreement with Claimant Cooper, she complained to him of the lack of final specifications for tile, lighting, and plumbing [Campbell, TR 8/22/19 p4020]. Campbell entered into the Design Services Agreement with Claimant Cooper "so she and I could begin that process right away while I obtained bids from subcontractors to be her general contractor" [id.]. However, Campbell did not begin the process right away. During the more than two-month delay between the signing of the Design Services Agreement and the DOB issuing the building permit, there is no evidence that Respondent

[12] Nussbaum agreed that open questions are a problem for coordination [Nussbaum, TR 5/30/18 p2113], and that it was part of the Respondent's responsibility under the Design Services Agreement to fill in all of the omissions in the CKA drawings [id. p2510-2511].

produced any schematic designs, design documents or final specifications, and the open details persisted when the renovation commenced.

Although the parties dispute when the Respondent learned that the Claimants had fired CKA, it is irrelevant. The Respondent entered into both the Design Services Agreement and the Construction Contract fully aware that the design phase of the project was not complete [Campbell, TR 9/28/18 p5727].[13] The Respondent certainly knew of CKA's termination before March 30, 2016, when the Claimants signed the contract with the Respondent's recommended architect, BCC. The Respondent was, therefore, well aware of CKA's termination when it entered into the Construction Contract in April 2016. It drafted the Construction Contract. It agreed to the date for substantial completion and the "time is of the essence" clause fully knowing of all the open questions on the CKA plans and drawings. And, the Respondent was also well aware by then of BCC's role as architect of record with no obligation to provide contract administration services.

Once the DOB issued the permits, the Respondent commenced demolition without a completed design plan in place and without a construction schedule. The Claimants continually pestered the

[13] Nussbaum testified that the Respondent had time to review the plans before entering into both the Design Services Agreement and the Construction Contract [TR 5/30/18 p2303].

Respondent for a construction schedule which Campbell promised but admittedly failed to deliver until October 2016, some seven months after signing the Design Services Agreement and six months after signing the Construction Contract [Martini, TR 3/1/18 pp232-233]. According to both Rexrode and Jacobs, however, the schedule made no sense and was unworkable [Rexrode, TR 3/5/18 p824; Jacobs, TR 9/27/18 p5438].

The Respondent blames the delay in progress and timely completion of the project on Claimant Cooper's inability to make decisions, or a pattern of changing her mind once decisions were made. The blame lies with the Respondent, however, because it did not fulfill its obligations under the Design Services Agreement in the first instance. Moreover, even if the Claimants were indecisive, the evidence does not establish that they were solely to blame for the indecision. Both Martini and Claimant Cooper testified that Campbell engaged in a pattern of continually questioning decisions with which he did not agree [Martini, TR 3/1/18 p230; Cooper, TR 3/8/18 pp1675-1678, 1850].

For example, the tile work in both bathrooms was not coordinated and not centered. The Respondent argues that the tile coursing was off because the tile had not been chosen when the plumbing fixtures were put in, and Claimant Cooper changed her mind not only on the size of the tile [Campbell, TR 6/5/18 pp3588-

3589, 3605, 3676], but where the tile should stop on the wall [Martini, TR 3/6/18 p1201].[14] Claimant Cooper testified that she did, in fact, choose tile early on in the project and had decided that she wanted to tile all the way to the ceiling in Claimant Macrae's bathroom [Cooper, TR 3/8/18 p1678]. Campbell suggested that the tile not go all the way to the ceiling [Martini, TR 3/6/18 p1261]. Claimant Cooper changed her mind after Campbell's continued questioning because she just wanted the job done [Cooper, TR 3/8/18 p1678]. She then changed her mind back to her original decision [Martini, TR 3/6/18 p1202]. Campbell himself admitted that he attempted to change Claimant Cooper's mind when he did not agree with her choices [TR 8/22/18 pp4055-4056]. The Respondent is responsible not only for delays caused by a lack of decision, but for any delay or indecision that ensued as a result of Campbell's attempt to persuade the Claimants to change their minds on already decided items.

A similar scenario occurred with the floors which also were incomplete in November, 2016. Claimant Macrae had chosen specific wood flooring from Horigan. He advised Campbell in June, July and August of the floor he wanted [Martini, TR 3/1/18 pp254-255; Macrae Stip., TR 3/9/18 p2013; Cooper, TR 3/8/18 pp1672-1674]. Campbell

[14] Even if these facts are true, these issues stem from the Respondent's breach of the Design Services Agreement in the first instance, discussed supra.

thought the Horigan flooring was too expensive, and he pressed the Claimants for months to choose different flooring. When asked about the flooring in August 2016, Campbell provided a quote from his vendor and compared it to the price for the Horigan floors [Martini, TR 3/1/18 p256]. Even after the Claimants insisted that they wanted Horigan floors, the Respondent never ordered them [id. pp336-337], and Campbell continued to press the Claimants to choose different flooring [id. pp340-341]. By November, 2016, the floor had not been ordered, and the floor that Claimant Macrae wanted was no longer available [id. pp344-345, 372].[15]

The Respondent also asserts that the Claimants' rejection of its millworker caused another delay in work [Campbell, TR 9/28/18 p5689]. Martini testified, however, that the Respondent paid a deposit to its millworker without providing a sample or a submittal of its work, and without Claimants' approval [Martini, TR 3/1/18 p292]. The Claimants only learned the name of the millworker in October or November, 2016, and they rejected the millworker after

[15] Campbell also testified that he was not at fault with respect to the flooring because the Claimants were supposed to order it themselves [TR 6/5/18 pp3681-3684, 4023, 4041, 4051]. This contradicted Campbell's transcribed meeting minutes from November 29, 2016, where he stated that he did not have written authorization to order the flooring, otherwise he would have done so [Campbell, TR 8/22/18 p4051]. Claimant Cooper was never asked for written approval [Cooper, TR 3/8/18 pp1719-1720], and Campbell admitted that he never sent the Claimants a writing asking for authorization to purchase the wood flooring [Campbell, TR 8/22/18 p4054].

visiting its shop and seeing its work [Martini, TR 3/1/18 p291].

In any event, if Claimant Cooper was, in fact, indecisive, the Respondent had recourse contained within its own contract. Article 2 of the Construction Contract provides, in pertinent part:

> If the Contractor is delayed at any time in the progress of the Work by changes ordered in the Work, . . . [or] causes beyond the Contractor's control . . . then the Agreement schedule shall be modified by Change Order to provide for a reasonable extension of times [sic] as the Architect may determine.

Jacobs also testified that the Respondent could have stopped the job and put in a delay claim [TR 9/27/18 pp5323-5324].[16] The Respondent never invoked its contractual remedy.[17]

The Respondent also failed to advise the Claimants that the Construction Contract required the oversight of an architect, and that, because BCC's contract excluded construction administration services, the Claimants needed to hire a supervising architect [Jacobs, TR 9/27/18 p5345]. According to Jacobs, it is imperative to have an architect on site so that decisions can be made and construction can continue to move forward [id. p5340]. The

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[16] Both Rexrode and Tuohy testified that there are always changes on any job [Rexrode, TR 3/5/18 p1018-1019; Tuohy TR 3/8/18 p1477, 1563], and Jacobs stated that 10 change orders is not unusual [Jacobs, TR 9/28/19 p5549-5550]. According to Tuohy, the Claimants changed their mind during his time on the project, but there was not an excessive number of changes [TR 3/8/18 1563].

[17] Moreover, if the Claimants refused to sign Change Orders, as Campbell testified, the Respondent should have refused to do the work [Jacobs, TR 9/27/18 p5497].

Respondent could have put in a delay claim until an architect was hired [id. p5343]. Furthermore, the Respondent never reached out to Pavane during the entirety of the project. Although Campbell believed the engineer was fired along with CKA [TR 6/5/18 p3536], he took no steps to verify this supposition. He neither contacted Pavane nor asked the Claimants if there was an engineer of record. Jacobs testified that the oversight of an engineer is required [TR 9/27/18 p5378]. The Respondent could have sent a request for information to Pavane regarding its status on the project, along with the open questions it had [Jacobs, TR 9/27/18 p5381]. The Respondent's own witness testified that the lack of supervision by an architect or engineer did not relieve the Respondent of its responsibility to provide solutions for the Claimants and to move the project forward [Nussbaum, TR 6/5/18 p3524].

When the Claimants terminated the Respondent's services in December 2016, the project was incomplete and much of the work performed was defective. The Respondent agrees that (1) it failed to place blocking in the walls of Claimant Macrae's bathroom [Campbell, TR 7/31/18 p3575], (2) refrigerant lines were improperly run through duct work [id. p3672, 3778; Sheridan, TR 5/31/18 p2655],[18] (3) the stacked fan coil units were not code

[18] The Pavane drawings failed to specify a route for the refrigerant lines. Lahham testified that, in this circumstance,

compliant [Campbell, TR 7/31/18 p3768; Sheridan TR 5/31/18 p2625], (4) refrigerant lines and steam lines should not have been in contact [Campbell, TR 7/31/18 p3770; Sheridan TR 5/31/18 p2643], and (5) condensate pumps should not have been connected to the electrical board of the fan coil units [Campbell, TR 7/31/18 p3774; Sheridan, TR 5/31/18 p2645, 2708]. The condensate drain lines violated code because they were too small [Sheridan, TR 5/31/18 p2647].

Campbell also admitted that he was not honest with the Claimants regarding his failure timely to order the Brombal doors [Campbell, TR 7/31/18 p3630, 3744]. Although the Respondent argues that this resulted in no delay in the completion of the project, the evidence establishes otherwise. The opening for the doors was created in the fall of 2016, and the Brombal doors did not arrive until April 2017. The opening was covered with plywood and a tarp, but it was not airtight; the penthouse is located on the 20th floor of London Terrace Towers and the opening faced the river. The delay in receiving the doors delayed the completion of the living room [Rexrode, TR 3/5/18 p1049], and, thus, the entire project.

In addition to the defects to which the Respondent admitted,

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it is the contractor's responsibility to contact the engineer to correct the drawings [TR 3/2/18 p718-719]. The Respondent's witness testified similarly [Sheridan, TR 6/4/18 p2979-2980, 3013]

the Claimants and their witnesses testified regarding numerous other errors which they proved, by a preponderance of the evidence, constituted breaches of the Construction Contract. These include the improper placement of the HVAC unit,[19] the 1 3/4 inch height differential between the floor of Claimant Macrae's bathroom and his bedroom floor [Rexrode, TR 3/5/18 p858], the conversion of a window to a door that was 19 ½ inches above the floor inside the apartment and 6 inches above the terrace floor, rendering it inaccessible by Claimant Macrae [Rexrode, TR 3/5/18 pp 894, 896],[20]

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[19] Not only did the placement not conform to the plans, but it was not approved by the architect for London Terrace Towers or its cooperative board [Rexrode, TR3/5/18 p836; Campbell TR 9/28/18 pp5739-5740]. The Respondent asserts that it had approval from Mark Stroud, the building superintendent, to place the HVAC unit on the south terrace [Campbell, TR 6/5/18 p3729; 9/28/18 p5741]. Mark Stroud was not authorized to make this decision, and the Respondent knew that the London Terrace Towers alteration agreement required that any changes in plans had to be approved by the cooperative in writing [Campbell, TR 9/28/18 p5743]. Moreover, the equipment used by the Respondent differed from the equipment specified in Pavane's drawings. The Respondent never received Claimants' approval for the change in equipment, and never provided a submittal to Pavane [Campbell, TR 6/5/18 pp3766-3767; 9/28/18 p5740; Lahham TR 3/8/18 p579; Sheridan, TR 5/31/18 p2935].

[20] Campbell admitted that this change was made to the plans at his suggestion [Cambell, TR 6/5/18 p3597]. Rexrode found no corresponding Change Order signed by BCC or the Claimants [Rexrode, TR 3/5/18 p902], and she considered it to be an unnecessary expense [Rexrode, TR 9/28/18 p5604]. The Arbitrator rejects Nussbaum's testimony that this was not a defect because the design proposal was accepted by the Claimants; Nussbaum did not know if Campbell advised the Claimants that the door would be unuseable by Claimant Macrae [Nussbaum, TR 5/30/18 p2380]. Moreover, the design proposal

location of shower controls in conflict with grab bars in Claimant Macrae's bathroom [Rexrode, TR 3/5/18 p863-864], and the use of vinyl pans in both bathrooms instead of lead pans as required by the cooperative and as called for by Pavane's plans [Rexrode, TR 3/5/18 p887].[21] The Respondent closed up walls without fire-rating inspections [Rexrode, TR 3/5/18 pp942-943, TR 9/28/18 pp5631-5632], and, even though both the CKA and Pavane plans called for inspections after certain work was done, the Respondent never notified either BCC or Pavane to perform the required inspections [Campbell, TR 8/22/18 pp4202-4203; Lahham TR 3/8/18 p632]. The Respondent also used duct tape to seal the duct work; the Pavane drawings called for duct sealant and the Respondent did not get Pavane's approval for this substitution [Sheridan, TR 6/4/18 p2964].[22]

The Respondent also breached the provision in the

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showed a ramp, indicating that the purpose of the door was to provide access for Claimant Macrae to the terrace. The ramp could not be built because, to be code compliant, it would have had to be 19 ½ feet long, which is longer than the room containing the door [Rexrode, TR 9/28/18 5602-5603].

[21] Claimant Macrae's bathroom was not built in accordance with the plans [Rexrode, TR 3/5/18 p884]. Rexrode found no record of the Claimants, BCC, or the cooperative board approving the changes [id. p884-885].

[22] Sheridan also testified that the Pavane drawings required submittals and the Respondent never prepared submittals [TR 6/4/18 p2820]. Lahham confirmed that he did not receive any submittals until the end of 2016 when RCA took over the renovation [TR 3/8/18 p570].

Construction Contract that required it to properly staff the project. The Construction Contract recited that it "include[d] all labor, materials and services necessary for proper execution and completion of the Work. . . ." [Exh. 10 (unnumbered) p1]. Martini testified that she visited the site almost daily in June, July, August, September, November, and December 2016, and there were one or two people working on any given day, and sometimes no one was there [TR 3/1/18 pp250, 268-269, 345-346, 367]. Claimant Cooper testified similarly [Cooper, TR 3/8/18 pp1646-1647, 1679, 1690]. Although the Respondent disputed this testimony, it provided no records from its subcontractors to establish otherwise, despite having belatedly obtained some of those records during the hearing.

In addition to defective work, the Respondent breached the Construction Contract by failing timely to substantially complete the renovation, as extended by Change Order One. At the time of its termination, flooring, millwork, tiling, duct work, plumbing, and lighting all were incomplete [Rexrode, TR 3/5/18 pp1044-1045]. Walls and ceilings had been sheet-rocked, and some were painted, but there were no rough-ins for lighting [Rexrode, TR 3/5/18 p930].

Finally, the Claimants contend that the Respondent breached the Termination Agreement because it failed to turn over the project file as required by paragraph 5, resulting in further delay

of the project. The Respondent asserts that its alleged failure to turn over the project file did not cause any delay. The Claimants did not allege a breach of the Termination Agreement in the Statement of Claim. Even if it were alleged, the Claimants failed to prove that they suffered any additional damage as a result of this breach.

Accordingly, the Claimants have established by a preponderance of the credible evidence that the Respondent breached both the Design Services Agreement and the Construction Contract.

(3) Breach of Contract Damages

(a) General Damages

The Respondent contends that the Claimants are not entitled to damages for either cost of correction or cost of completion. First, it argues that the Termination Agreement provides only for cost of correction of work, not cost of completion, and the Claimants failed to present evidence of their cost of correction damages. Moreover, although paragraph 11 of the Termination Agreement recites the Claimants overpaid the Respondent, the Respondent argues that they failed to prove this allegation. Yet, the Respondent acknowledges that its expert, Thornton Tomasetti, found that the Claimants overpaid the sum of $79,638.03, and that certain HVAC work was deficient and would cost $36,794.10 to

correct.

There is no merit to the Respondent's contention that the Termination Agreement limits the Claimants to damages for the cost of correction of defective work. Paragraph 7, titled "Correction of Work," provides that "work relating to corrections shall be deducted from the cost of work provided by [Respondent] to [Claimants]" [Exh. 15, p2 ¶7]. It further provides that any unresolved dispute "concerning required corrections which is not resolved by the Parties" shall be resolved in arbitration as set forth in Paragraph 11 [id.]. Paragraph 11 provides, in pertinent part:

> Arbitration of All Disputes. [Claimants] assert[] that they overpaid [Respondent] and that [Respondent] breached the Contract. [Respondent] disputes such claims. [Respondent] asserts that there are outstanding fees owed by [Claimants] to it. [Claimants] dispute[] such claims. The Parties agree that all disputes that may arise between the Parties, including disputes arising under this Agreement, shall survive the termination of the Contract and shall be submitted to binding arbitration before a single arbitrator at JAMS in accordance with its commercial arbitration rules. * * *

This paragraph is far broader than Paragraph 7, providing for arbitration of *"all disputes that may arise."* In fact, reading Paragraphs 7 and 11 together establishes that any cost of correction disputes emanating from Paragraph 7 fall under the larger umbrella of the disputes to be arbitrated in accordance with Paragraph 11. Paragraph 7, however, does not limit the

disputes to be arbitrated under Paragraph 11. Therefore, the Claimants are not limited in their recovery to damages for cost of correction of defective work.

Also without merit is the Respondent's assertion that the Claimants stipulated during the hearing to a maximum damages figure of $400,000. Claimants' counsel stipulated only to the fact that they were not "double-dipping," that is, they were not seeking the sums paid to the Respondent under the Construction Contract and the sums paid to Eurostruct [TR 8/22/18 pp3897-3898]. This stipulation was made in response to Respondent's counsel's mischaracterization of the damages claim, and the figures mentioned were used for demonstrative purposes only [id.].

The Claimants are entitled to an award of the reasonable costs to complete the unfinished work and to correct the defective work, less the amount that remained to be paid under the Construction Contract [see Home Const. Corp. v Beaury, 149 AD3d 699, 702 (2d Dept 2017); Metropolitan Switch Bd. Mfg. Co., Inc. v B&G Elec. Contractors, 96 AD3d 725, 726 (2d Dept 2012); Caggianelli v Sontheimer, 46 AD3d 1206, 1207 (3d Dept 2007); Kaufman v Le Curt Const. Corp., 196 AD2d 577, 578 (2d Dept 1993)].

The parties each submitted evidence of the extent to which the renovation was complete and the measure of damages. The Respondent's estimate of completion is inaccurate because it takes

into account only a portion of the defective work that needed to be redone. The Thornton Tomasetti report falls short of establishing the full measure of damages sustained by the Claimants. Nussbaum and Sheridan compared the sums contained in the subcontractor contracts with the subcontractor paid invoices to determine the percent of work that was completed [Nussbaum, TR 5/30/18 p2530; Sheridan, TR 6/4/18 pp2772, 2787]. Thornton Tomasetti determined that the Respondent was overpaid the sum of $79,638.03 [Nussbaum, TR 5/30/18 p2534; Sheridan, TR 6/4/18 p2795]. The Thornton Tomasetti report does not review or analyze the work performed by Eurostruct for either correction or completion of the renovation [Nussbaum, TR 5/30/18 p2524-2525; Sheridan, TR 6/4/18 p2955].[23] In addition, Sheridan admitted the unreliability of the Thornton Tomasetti cost-analysis when he testified on cross-examination that the report focused only on the cost of the work performed, not the cost to complete the renovation [TR 6/4/18 pp2955-2956], nor the possibility that the work had not actually been performed even though an invoice was paid [Sheridan,

[23] Sheridan estimated that the remedial HVAC work would cost approximately $36,000 [TR 5/31/18 p2613]. However, this estimate did not include the cost of relocating the condensing unit [Sheridan, TR 6/4/18 p2942]. Moreover, the Claimants replaced the HVAC unit installed by the Respondent because it was not the make and model specified in the Pavane plans. Eurostruct installed the two units specified in the Pavane plans.

TR 6/4/18 p2804]. Finally, other than the remedial cost for the HVAC, the Thornton Tomasetti report did not account for the cost of correcting Respondent's defective work, despite Sheridan's testimony that the party who performed the defective work bears the cost of correcting it [Sheridan, TR 6/4/18 pp2790, 3044-3045].

The Claimants, through RCA and Pavane, provided the only evidence that evaluated the percent of completion of the project based upon both defective work and incomplete work [Exh. 8, 16, 184]. Rexrode testified that the scope of work Eurostruct performed was the same scope as the Respondent was to have performed. Eurostruct relied on the very same BCC and Pavane plans to complete the renovation as were supposed to be relied upon by the Respondent [Rexrode, TR 3/5/18 p985]. Further, none of the Eurostruct change orders changed the scope of work because the Claimants neither deviated from, nor added to, the BCC or Pavane plans [id. p986].

The Claimants paid Eurostruct a total of $1,109,850.68 to correct defective work and to complete the renovation [Exh. 104-107, 116-125, 146-147, 209, and 224]. Tuohy testified that Eurostruct charged market rates, and Sheridan confirmed that its numbers appeared to be reasonable [Tuohy, TR 3/8/18 p1496; Sheridan, TR 6/4/18 p2775]. The Respondent was given credit for the value of any work that was reused, and the Claimants mitigated

their damages wherever possible [Rexrode, TR 3/5/18 pp998, 1046]. For example, although Rexrode found the tile coursing to be defective in Claimant Macrae's bathroom, it was left on the walls and fixed, rather than removed and redone [Rexrode, 2/5/18 p1046]. The Respondent redesigned the air supply, without a submittal or approval, but the Claimants allowed it to remain, with corrections where necessary [Lahham, TR 3/8/18 p595-600].

The cost of the renovation under the Respondent's contract was $1,309,999.00, plus Change Orders 1-9[24] in the sum of $35,736.00,[25] for a gross price of $1,345,735.00 [Exh. 2, 10, 11, 126-127]. The Claimants paid the Respondent and its vendors the sum of $953,966.00 [Exh. 85-96, 100, 103], leaving a shortfall of $391,769.00. Deducting the $391,769.00 from the Eurostruct contract sum of $1,109,850.68, results in an award of general damages to the Claimants in the sum of $718,081.68 for the Respondent's breaches of contract.

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[24] Change Orders 3-9 were not signed by the Claimants or the Respondent, and none was signed by BCC. In addition, the Claimants never saw most of the Change Orders. Nevertheless, the Claimants paid them. The Claimants' rebuttal witness and the Respondent's witness both testified that approval of the Change Orders could be assumed by the Claimants' payment of them [Jacobs TR 9/27/18 p5498; Nussbaum TR 5/30/18 p2481]. The Arbitrator observes that the Claimants are not making a separate claim for recovery of the sums paid for Change Order 9 on the basis that their payment of it was unwitting [see n20].

[25] Although not accurate, the parties rely on this figure recited in Exh. 126 for the cost of the Change Orders.

Accordingly, the Claimants are entitled to the sum of $718,081.68, plus interest at the rate of 9% per annum from March 14, 2017,[26] through the date the award is paid [CPLR 5001(a), 5004].

(b) Consequential Damages

The Claimants assert that they are entitled to consequential damages in the sum of $34,430.64, consisting of maintenance fees for Apartment 19B/C for the period February to June 2017, and hotel charges for the period beginning the second week of July to the first week of September 2017. The Claimants assert that these damages were reasonably foreseeable because the Respondent knew that if the renovation were not completed timely, the Claimants would have to pay to live elsewhere. The Respondent argues that the Claimants are not entitled to consequential damages because they were neither foreseeable nor proximately caused by the alleged breach of contract.

Consequential damages for breach of contract may be recovered for risks that were "foreseen or which should have been foreseen at the time the contract was made," and were proximately caused by the breach of contract [Bi-Economy Market, Inc. v Harleysville Ins. Co. Of New York, 10 NY3d 187, 192-193 (2008) *quoting* Ashland

[26] Although this is not the date of the breach (see CPLR 5001), this a later date chosen by the Claimants from which interest shall run [see Claimants' Post Hearing Reply Brief p35-36 & n13].

Mgt., Inc. v Janien, 82 NY2d 395, 403 (1993); see Hadley v Baxendale, 9 Exch. 341 (1854)]. The damages must be capable of proof with reasonable certainty [see Ashland Mgt., Inc. v Janien, supra].

The Claimants have failed to establish their entitlement to reimbursement of the maintenance fees for Apartment 19B/C for the period February to June 2017.[27] The delay in completion of the penthouse renovation past November 30, 2016, was not the cause of the Claimants' incurring these maintenance fees. The fees would have been incurred by the Claimants, whether they lived in Apartment 19B/C or not, from February 2017 until Apartment 19B/C was sold. Although the Claimants assert in the Statement of Claim that the delay in completion of the penthouse renovation delayed the sale of Apartment 19B/C, they did not present evidence to prove this allegation. In fact, Claimant Cooper testified that they sold Apartment 19B/C in early 2017 to the purchaser of Apartment 19A, after being approached by that purchaser to see if they had any interest in selling Apartment 19B/C [TR 3/9/18 pp1941-1942]. Thus, the Claimants have failed to establish proximate cause with respect to the maintenance fees for Apartment 19B/C for the period

[27] Claimants' counsel stated on the record that the Claimants are not seeking to recover the maintenance paid for Apartment 19B/C for the month of January 2017 [TR3/9/18 pp1986-1987].

February to June 2017.

The Claimants are entitled, however, to recover the sums incurred for Claimant Cooper's stay at the High Line Hotel for the period July to September 2017. The Respondent knew, at the time it entered into the Construction Contract, that Apartment 19B/C was a temporary residence for the Claimants while the penthouse was being renovated. It was entirely foreseeable that the Claimants would sell Apartment 19B/C after the scheduled completion date and, if the renovation were not completed, they would have to find an alternate place to live. The Respondent's failure timely to complete the renovation was the proximate cause of the expenses incurred by Claimant Cooper having to reside temporarily at the High Line Hotel. These damages have been proven with reasonable certainty through the submission of statements from the hotel showing the room charges, taxes, and fees, and the Claimants' payment of those charges, taxes, and fees [Exh. 136-143]. The Claimants are entitled to the sum of $8,945.22 as consequential damages,[28] plus interest of 9% per annum from August 1, 2017,[29] through the date of payment [see CPLR 5001(a), 5004].

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[28] The Arbitrator has excluded from these charges any sums paid as a donation to the Friends of the High Line Park non-profit, as well as mini-bar charges for water and a snack [Exh. 136-143].

[29] The Arbitrator chose August 1st as an intermediate date between July and September when the charges were incurred [CPLR 5001(b)].

(4) Attorneys' Fees

Both the Claimant and the Respondent seek reimbursement for their attorneys' fees, costs and expenses. JAMS Rule 24(g) provides that the Arbitrator may allocate attorneys' fees and expenses if provided by the parties' agreement or allowed by applicable law. The Termination Agreement vests the Arbitrator with the "right to award the prevailing party . . . its expenses, attorney's fees, and arbitration fees" [p3 ¶11]. Case law defines a prevailing party as one who is successful with respect to the central relief sought [see Nestor v McDowell, 81 NY2d 410, 415-416 (1993) *rearg den* 82 NY2d 750 (1993); Village of Hempstead v Taliercio, 8 AD3d 476 (2d Dept 2004); 25 East 83 Corp. v 83rd St. Assocs., 213 AD2d 269 (1st Dept 1995)].

The Claimants are the prevailing parties and are entitled to recover their reasonable attorneys' fees, costs and expenses incurred in this arbitration. The Claimants must justify the reasonableness of the attorneys' fees requested. This requires the submission of biographies of the attorneys that worked on this matter, as well as invoices[30] for the time billed and the rates charged. The Claimants also must show that the rates are

[30] Claimants may redact from the invoices that portion of any description of services that contains information falling within the attorney/client privilege. The Claimants shall submit a copy of the unredacted invoices to the Arbitrator.

reasonable both in the firm and its locale. Thus, within thirty days of the date hereof, the Claimants shall submit their requested attorneys' fees and justify their reasonableness, and include itemization of the costs and expenses sought to be recovered. The Respondent is afforded fourteen days after this submission to object to the reasonableness of Claimants' attorneys' fees or any part thereof, and the Claimants shall have seven days thereafter to reply. The Respondent shall also reimburse the Claimants for their share of the Arbitration fees and Arbitrator compensation and expenses to be fixed in the FINAL AWARD.

The Respondent's request for an award of attorneys' fees, costs and expenses in its favor is denied.

(5) Discovery Sanctions

The Claimants seek sanctions pursuant to JAMS Rule 29 for the Respondent's repeated failures to comply with its discovery obligations. In view of the determination on the merits of the Claimants' claim, as well as the fee-shifting decision to shift fees in accordance with the parties' Termination Agreement, the request for discovery sanctions is denied as academic.

CONCLUSION

Any argument not addressed in this SECOND PARTIAL FINAL AWARD was found to be unavailing, without merit, academic or unnecessary

to reach.

The Arbitrator concludes and AWARDS as follows:

1. The Respondent's request to reargue so much of the PARTIAL FINAL AWARD as denied that branch of its motion which was for dismissal or "directed verdict" on the breach of contract claim on the ground that the Arbitrator misapprehended the case law is denied.

2. The Claimants' claim to recover damages for breach of contract is granted, and the Claimants are awarded the sum of $718,081.68, plus interest at the rate of 9% per annum from March 14, 2017, through the date of payment. The Claimants are awarded the sum of $8,945.22 for consequential damages, plus interest at the rate of 9% per annum from August 1, 2017, through the date of payment.

3. The Claimants' request for an award of attorneys' fees, costs and expenses incurred in this arbitration as the prevailing party, is granted. The Claimants shall, within thirty days of the date hereof, submit their requested attorneys' fees, costs, and expenses and justify their reasonableness. The Respondent is afforded fourteen days after this submission to object to the reasonableness of the Claimants' attorneys' fees or any part thereof, and the Claimants shall have seven days thereafter to

reply.

4. The Respondent shall reimburse the Claimants for their share of the Arbitration fees and Arbitrator compensation and expenses to be fixed in the FINAL AWARD.

5. The Claimants' request for discovery sanctions is denied as academic.

6. The Respondent's request for an award of attorneys' fees, costs and disbursements is denied.

Stephen G. Crane
Stephen G. Crane, Arbitrator

State of New York)
: ss:
County of New York)

I, Stephen G. Crane, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my SECOND PARTIAL FINAL AWARD.

APRIL 27, 2019
Date

Stephen G. Crane
Stephen G. Crane

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Cooper, Paula vs. Iain Campbell Design, Ltd.
Reference No. 1425023319

I, Patrick Mullarkey, not a party to the within action, hereby declare that on April 29, 2019, I served the attached Second Partial Final Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at New York, NEW YORK, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at New York, NEW YORK on April 29, 2019.

Patrick Mullarkey
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