

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

09CV000929

RESORT MISSOURI, LLC
100 East Wisconsin Avenue
Suite 1900
Milwaukee, Wisconsin 53202

and

MARCUS HOTELS, INC.
100 East Wisconsin Avenue
Suite 1900
Milwaukee, Wisconsin 53202

Plaintiffs,

v.

WALTON CONSTRUCTION COMPANY, INC.
3252 Roanoke
Kansas City, Missouri 64111

and

ABC INSURANCE COMPANY,

Defendants.

Case No. _____

Case Code: 30303, 30201
Other Contracts

FILED

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JOHN BARRETT
Clerk of Circuit Court

COMPLAINT

Plaintiffs, Resort Missouri, LLC and Marcus Hotels, Inc. (collectively, "Marcus"), by and through their attorneys, Davis & Kuelthau, s.c., complain against the Defendants, Walton Construction Company, Inc. ("Walton") and its insurer, ABC Insurance Company, as follows:

The Parties

1. Resort Missouri, LLC is a limited liability company organized and existing under the laws of the State of Delaware. Its principal place of business is located at 100 East Wisconsin Avenue, Suite 1900, Milwaukee, WI 53202. Resort Missouri, LLC is authorized to

and conducts business in the State of Missouri. It owns and operates the Hotel Phillips (the “Hotel”) in Kansas City, Missouri.

2. Marcus Hotels, Inc., managing member of Resort Missouri, LLC, is a company incorporated and existing under the laws of the State of Wisconsin. Its principal place of business is located at 100 East Wisconsin Avenue, Suite 1900, Milwaukee, WI 53202. Marcus Hotels, Inc. is authorized to and conducts business in the State of Wisconsin.

3. Upon information and belief, defendant Walton is a company incorporated and existing under the laws of the State of Kansas. Upon information and belief, its principal place of business is located at 3252 Roanoke, Kansas City, Missouri 64111.

4. Upon information and belief, ABC Insurance Company issued a policy of liability insurance to Walton Construction Company, providing coverage at all relevant times for some or all of the claims alleged by plaintiffs.

Jurisdiction, Venue and Governing Law

5. This Court has jurisdiction over the subject matter of this lawsuit and venue is proper in Milwaukee County because Marcus and Walton contractually agreed that any litigation between them regarding the subject matters contained herein would take place in Milwaukee County Circuit Court.

6. Missouri law governs the dispute because Marcus and Walton contractually agreed to same.

Facts

7. Marcus, the Owner, and Walton, the Contractor, entered into a contract on June 30, 2000 (the “Contract”) wherein Walton agreed to act as an “at risk” construction manager during the renovation of the Hotel in exchange for payment from Marcus.

8. The Contract includes the Prime Contract, which is a modified American Institute of the Architects (“AIA”) 121 document (“AIA 121”), and the General Conditions, which is an AIA 201 document (“AIA 201”), modified by a separate Rider to General Conditions (“Rider”). A true and correct copy of the Contract is attached hereto as Exhibit A and incorporated by reference herein.

9. Under the Contract, Walton was obligated to “furnish construction administrative and management services and use [its] best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Owner.” (Ex. A, AIA 121, § 1.1.)

10. The Contract specifically required, among other things, that:

- a. “[Walton] shall supervise and direct the Work, using [its] best skill and attention. [Walton] shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract.” (Ex. A, AIA 201, § 3.3.1.)
- b. “[Walton] shall be responsible to the Owner for acts and omissions of [Walton’s] employees, Subcontractors and their agents and employees, and other persons performing a portion of the Work under a contract with [Walton].” (Ex. A, AIA 201, § 3.3.2.)
- c. “[W]alton shall be responsible for inspection of portions of Work already performed under this Contract to determine that such portions are in proper condition to receive subsequent work. (Ex. A, AIA 201, § 3.3.4.)
- d. “[Walton] shall enforce strict discipline and good order among [Walton’s] employees and other persons carrying out the Contract.” (Ex. A, AIA 201, § 3.4.2.)

11. Walton also provided a “Quality Control Assurance” program, which was incorporated into the Contract by reference and was relied upon by Marcus. Among other things, this program provided and warranted that Walton would provide a “high quality, first class project” with “zero defects.” (Ex. A, AIA 121, § 11 (Exhibit C. 2).)

12. During the course of construction, Walton or its subcontractors used permanent “Sharpie” or “magic” type markers to mark measurements, room numbers, and locations for plumbing tie-ins, sprinklers, smoke detectors and other fixtures on the unfinished sheetrock walls.

13. In addition to work-related markings, unidentified Walton employees or subcontractors penned personal comments, football plays, caricatures of male genitalia, and at least one nude female.

14. Ultimately, these sheetrock walls were to be covered with vinyl wall covering (“VWC”) product. Each roll of the product came with instructions that clearly warned that pre-treatment of chemical stains would be required to prevent damage or “bleed through” of the stains.

15. Walton’s subcontractor, Rogers Painting Co., applied the VWC to the walls without any attempt to remove or pre-treat the permanent marker stains.

16. The Hotel opened in the fall of 2001.

17. Over a period of years following completion of the project, the markings, including the drawings of male genitalia and the nude female, have bled through the VWC in various locations and rooms throughout the Hotel.

18. The graphic markings are inconsistent with the reputation and quality of the Hotel and have resulted in a number of customer complaints.

19. As a result of the defective work at issue, Marcus has been forced to incur significant expense to address and remedy the most significant problems as they have arisen.

20. Marcus has received bids for remediation of the remainder of the problems with the VWC. The lowest of those bids was well in excess of \$200,000—and it was from a contractor now out of business.

21. The defective construction work, due to the sexually explicit nature of the defect, has also caused significant damage to the Hotel's reputation and status in the community and industry.

Count I – Negligence

22. Marcus realleges and incorporates by reference paragraphs 1 through 21 above as though fully set forth herein.

23. Walton was negligent in the performance of its work on the Project, including but not limited to construction administrative and management services and its Quality Control Assurance program.

24. Walton's negligence proximately and directly caused damage to Marcus.

25. ABC Insurance Company is directly liable to plaintiffs for damages negligently caused by its insured, Walton.

Count II - Breach of Contract and Express Warranty

26. Marcus realleges and incorporates by reference paragraphs 1 through 25 above as though fully set forth herein.

27. At all relevant times, a valid contract existed between Marcus and Walton wherein Walton expressly agreed and warranted to construct and deliver a defect-free project.

28. Walton had a contractual duty to ensure that all parts of its work were in proper condition to receive subsequent work and to follow manufacturers' instructions on materials to be incorporated into the work. (Ex. A, Rider § 3.4.3.)

29. Walton contracted to serve as an at-risk construction manager, making Walton responsible for any defective performance—including but not limited to latent defects, unworkmanlike construction, and intentional property damage—by its employees or its subcontractors.

30. Walton and its subcontractors were on notice, by virtue of the warning included with the VWC product, that pre-treatment of stains would be required to prevent bleed-through.

31. Walton breached the Contract and the express warranty incorporated therein by failing to deliver a defect-free project, failing to prohibit the damaging marks on the sheetrock throughout the facility, and failing to ensure that such markings were properly treated prior to the installation of the VWC.

32. As a direct and proximate result of Walton's breaches, Marcus has incurred substantial monetary damages in an amount to be determined at trial.

Attorneys' Fees

33. Regardless of the ultimate measure of damages awarded in this case, if it is determined that Walton breached any of its contractual or other legal duties to Marcus, and that Marcus has suffered some degree of damage as a result thereof, Marcus is entitled to recover all of its costs and reasonable attorneys' fees incurred in conjunction with these claims. (Ex. A, Rider, § 4.5.8.)

WHEREFORE, the plaintiffs, Resort Missouri, LLC and Marcus Hotels, Inc., demand judgment as follows:

(a) In favor of the plaintiffs, Resort Missouri, LLC and Marcus Hotels, Inc., against the defendants Walton and ABC Insurance Company for compensatory damages in an amount to be determined at trial;

- (b) For actual costs and attorneys' fees pursuant to the Agreement;
- (c) For their taxable costs and disbursements as allowed by law;
- (d) For such other and further relief as the Court may deem just and equitable.

Dated this 19th day of January, 2009.

DAVIS & KUELTHAU, S.C.
Attorneys for Plaintiffs
RESORT MISSOURI, LLC and
MARCUS HOTELS, INC.

By:



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