IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

FLATS 8300 OWNER, LLC, et al. Plaintiffs, v. **THE DONOHOE COMPANIES, INC., d/b/a DONOHOE CONSTRUCTION COMPANY, et al.** Defendants.	**Case No. 482617V**
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THE DONOHOE COMPANIES, INC., d/b/a DONOHOE CONSTRUCTION COMPANY Defendant/Third Party Plaintiffs, v. **UNITED STATES SURETY COMPANY** and **U.S. SPECIALTY INSURANCE COMPANY** Third Party Defendants.	
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UNITED STATES SURETY COMPANY, et al. Fourth Party Plaintiffs, v. **HAVTECH, LLC** and **HAVTECH SOLUTIONS, LLC** Fourth Party Defendants.	

MEMORANDUM ORDER AND OPINION

This matter came before the court remotely on August 30, 2021 for a motions hearing on Defendant Donohoe's Motion for Summary Judgment on Statute of Limitations at **Docket Entry No. 202** (filed July 1, 2021) ("Donohoe's Motion"), Plaintiff Flats 8300's Cross-Motion for Summary Judgment on Statute of Limitations at **Docket Entry No. 222** (filed July 30, 2021) ("Flats 8300's Cross-Motion"), and Plaintiff Flats 8300's Motion for Partial Summary Judgment and Rulings in Limine at **Docket Entry No. 203** (filed July 15, 2021) ("Flats 8300's Motion"), together with the parties' opposition and reply memoranda, and exhibits. The court heard oral arguments and took the matter under advisement. For the reasons below, the court will DENY these motions.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In 2013, a Maryland statutory trust, operated by Stonebridge Associates, Inc. ("Stonebridge"), contracted with Donohoe Companies, Inc. ("Donohoe"), a Maryland corporation having a principal place of business in Bethesda, Maryland, as general contractor, for the construction of a residential apartment complex located at 8300 Wisconsin Avenue in Bethesda, Maryland (the "Building"). The relevant contracts included, but were not limited to, the A102 Contract, and the A201 Contract. WDG Architecture, PLLC ("WDG"), a Virginia limited liability company having a principal place of business in Washington, D.C., was the architect for the Building, and Jordan & Skala Engineers, Inc. ("JSE"), a Georgia corporation

[1] This background is based on what appears to be admitted allegations in the parties' pleadings.

having a principal place of business in Norcross, Georgia, provided engineering assistance to WDG.

For the Building's heating, ventilation, and air-conditioning ("HVAC System"), Stonebridge purchased a Daikin Variable Refrigerant Volume System ("VRV System"). Donohoe subcontracted the responsibility for the purchase and installation of the Daikin VRV System to MAAMECH Mid-Atlantic Air, Inc. ("MAA"), a Maryland corporation having a principal place of business in Hunt Valley, Maryland. United States Surety Company, a corporation organized and existing under the laws of Maryland, with its principal place of business in Timonium, Maryland, and U.S. Specialty Insurance Company, a corporation organized and existing under the laws of Texas, with its principal place of business in Houston, Texas (collectively "Sureties"), executed a performance bond on behalf of MAA, as principal, and in favor of Donohoe, as obligee. MAA then subcontracted with fourth-party defendants, Havtech, LLC ("Havtech"), a corporation organized and existing under the laws of Maryland, with its principal place of business in Columbia, Maryland, and Havtech Solutions, LLC ("Havtech Solutions"), a limited liability company organized and existing under the laws of Maryland, with its principal place of business in Columbia, Maryland, to provide equipment and services for the Daikin VRV System.[2] MAA's installation work on the Daikin VRV System occurred between May 2015 and June 2016.

On March 31, 2016, Stonebridge entered into a Purchase Agreement to sell the Building to Invesco Advisors, Inc. ("Invesco" or "Flats 8300"), a Delaware limited liability company having a principal place of business in Dallas, Texas. Nevertheless, Stonebridge retained

[2] Fourth-party Defendants Havtech, Havtech Solutions, and non-party Havtech Service Division, LLC, are related entities with a common ownership and facilities.

responsibility for supervising completion of the Building. On July 27, 2017, Stonebridge sent a letter to Donohoe explaining that the HVAC System was not functioning properly and demanding an investigation into the issue. On March 19, 2018, Stonebridge sent a second letter to Donohoe noting that the problems with the HVAC System appeared to be caused by copper oxide being introduced into the refrigerant oil and piping system during construction.

On October 26, 2018, Stonebridge assigned to Flats 8300, as successor owner, all rights of Stonebridge as owner under the Building contracts. Over the following months, more compressors failed and the issues with the Building's HVAC System worsened, apparently.

On December 11, 2018, the Sureties filed suit in the Circuit Court for Howard County (C-13-CV-18-000863) against Havtech and Havtech Solutions. In essence, the Sureties alleged that Havtech and Havtech Solutions failed to provide a complete and functional HVAC System for the Building. Further, the Sureties alleged that to the extent that Havtech and Havtech Solutions' negligent performance of the work under the subcontract resulted in a loss to the Sureties, Havtech and Havtech Solutions should be responsible for indemnifying Plaintiffs for that loss.

On June 24, 2020, Flats 8300 filed this case against Donohoe, MAA, WDG, and JSE. In its Complaint, Flats 8300 asserted the following claims: (1) Breach of Contract against Donohoe, (2) Breach of Express Warranty against Donohoe, (3) Breach of Contract Against MAA, (4) Breach of Express Warranty against MAA (Subcontract Warranties), (5) Breach of Express Warranty against MAA (Direct to Flats 9300), (6) Breach of Express Warranty against WDG, (7) Breach of Contract against WDG, and (8) Breach of Contract against JSE. These claims all arise out of the same allegations facts regarding the deficient installation of the Daikin VRV System.

On November 4, 2020, the Circuit Court for Howard County transferred Case No. C-13-CV-18-000863 to this court, where it was assigned Case No. 483956V. On January 8, 2021, this court consolidated 483956V into this case. As a result, U.S. Specialty Insurance Company and United States Surety Company are listed as Fourth-Party Plaintiffs in this case.

On November 30, 2020, prior to consolidation, Flats 8300 filed a First Amended Complaint. On December 15, 2020, JSE filed a Motion to Dismiss Count VIII of the First Amended Complaint at **Docket Entry No. 106** and WDG filed a Motion to Dismiss Count VI and VII of the First Amended Complaint at **Docket Entry No. 107**. On February 24, 2021, the court granted both motions and dismissed Counts VI, VII, and VIII of Flats 8300's First Amended Complaint with prejudice. As such, WDG and JSE are no longer parties to this case.

On February 16, 2021, Donohoe filed a third-party Complaint against United States Surety Company and U.S. Specialty Insurance Company at **Docket Entry No. 135**. This Complaint made United States Surety Company and U.S. Specialty Insurance Company Third-Party Defendants, as well as Fourth-Party Plaintiffs, in this case.

On May 17, 2021, Havtech and Havtech Solutions each filed counterclaims for attorney's fees against the Sureties at **Docket Entry Nos. 181 and 183.** Both counterclaims allege that MAA's workers failed to perform nitrogen purging when brazing for the HVAC System, and that Havtech and Havtech Solutions were not responsible for monitoring MAA's workers to ensure that they were performing the brazing correctly. As such, Havtech and Havtech Solutions each request that the Sureties be ordered to pay the attorney's fees related to these proceedings under Maryland Rule 1-341.

Pursuant to the Third Amended Scheduling Order of August 16, 2021, there are several important dates to note. The discovery deadline is October 20, 2021. The deadline for filing of

dispositive motions is October 29, 2021. A dispositive motions hearing is scheduled for December 1, 2021 at 9:30am, with oral opinion scheduled for December 15, 2021 at 9:30am. The deadline for Joint Pre-Trial Statement is December 22, 2021. The Settlement/Pre-Trial Hearing is scheduled for January 3, 2022 at 9:30am. A bench trial is scheduled to begin on January 10, 2022 and conclude on February 7, 2022 (20 days).

THE PENDING MOTIONS

With its Motion for Summary Judgment on Statute of Limitations, Donohoe says that there is no genuine dispute that Flats 8300's claims against Donohoe (Counts I and II) accrued on July 31, 2015, the date Donohoe contends Flats 8300 knew or should have known of deficient construction practices related to the Daikin VRV System. Because July 31, 2015 is more than three years before June 24, 2020, the date Flats 8300 filed its claims against Donohoe, Flats 8300's claims are time-barred. Flats 8300's Cross-Motion for Summary Judgment on Statute of Limitations mirrors Donohoe's motion. Thus, Flats 8300 contends that there are no genuine disputes of fact about when the statute of limitations began to run, that its claims against Donohoe were timely filed, and that as a result, Flats 8300 is entitled to judgment as a matter of law regarding Donohoe's limitations defense.

With its Motion for Partial Summary Judgment and Rulings in Limine, Flats 8300 asks the court for six specific *in limine* rulings, and one summary ruling, clarifying what it must prove in order to prevail on various issues at trial.[3] These are (1) "under the construction contract between Flats and Donohoe, Donohoe and MAA warranted that the Work on the building's

[3] Flats 8300's eighth request for "[s]uch other and further relief as the court shall deem just and proper[]" will not be addressed separately.

HVAC System 'will strictly conform to the requirements of the Contract Documents;" (2) "to establish Donohoe's and MAA's breach of warranty, Flats bears the burden to prove by a preponderance of evidence that the HVAC System installation failed to strictly conform to the requirements of the Contract Documents;" (3) that Donohoe and MAA are barred " . . . from relying upon the doctrine of substantial performance to defend Flats' claim that the HVAC System installation failed to strictly conform to the requirements of the Contract Documents;" (4) "that upon proving Donohoe's and MAA's warranty breach, under the construction contract Flats is granted discretion and the option to replace the nonconforming construction Work;" (5) "Flats' discretion under the construction contract to opt to replace the nonconforming HVAC System will be upheld so long as exercised in objective good faith;" (6) "upon proving that it has opted to replace the HVAC System in objective good faith, Flats is entitled to recover the reasonable, non-speculative costs of replacing the nonconforming HVAC System, in accordance with the construction contract;" and (7) that Donohoe and MAA are barred "from relying upon the doctrine of economic waste to defend Flats' claim that, under the construction contract, it is entitled to recover the costs of replacing the nonconforming HVAC System and partial summary judgment dismissing Donohoe's Fifth Affirmative Defense to the extent based upon the doctrine." See Flats 8300's Motion at 30.[4]

Donohoe's and Flats 8300's motions all fail.

DISCUSSION

Summary Judgment Regarding Limitations

[4] In its Reply Memoranda in Further Support of Motion for Partial Summary Judgment and Rulings in Limine (Parts One and Two), Flats 8300 asks for 12 rulings in limine. A few of these requests appear to overlap those above. Given that Donohoe and MAA did not have a chance to address these additional requests in writing, the court declines to address them.

Under Maryland Rule 2-501, summary judgment is appropriate where there is " . . . no genuine dispute as to any material fact and . . . [the moving party] is a entitled to judgment as a matter of law." Rule 2-501(a). Motions for summary judgment "shall" be supported by affidavit where " . . . based on facts not contained in the record[,]" among other times. Rule 2-501(a). Responses "asserting the existence of a material fact or controverting any fact . . ." shall be similarly supported. Rule 2-501(b). Where an opponent provides an affidavit verifying that facts "essential to justify the opposition cannot be set forth" and why, the court may deny summary judgment, among other remedies. Rule 2-501(d). The court reviews the record in the light most favorable to the non-moving party and draws any reasonable inference from the undisputed facts against the movant. *Charles County Commissioners v. Johnson*, 393 Md. 248, 263 (2006).

Here, the parties agree that the applicable statute of limitations for Flats 8300's claims against Donohoe in Counts I and II is the general three-year period that appears in Section 5-101 of Maryland's Courts Article. Under this statute, ". . . a civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Maryland Courts Article, §5-101 (1973, 2013 Repl. Vol., 2020 Repl. Vol.).

Ordinarily, a breach of contract claim accrues, and the three-year statute of limitations begins to run, on the date of the breach, *Catholic Univ. of Am. V. Bragunier Masonry Contractors, Inc.*, 139 Md. App. 277, 298 (2001), or "when the claimant in fact knew or reasonably should have known of the wrong." *Poffenberger v. Risser*, 290 Md. 631, 636 (1981). Known as the "discovery rule," this latter milestone affords the claimant extra time to file when he did not know, or reasonably had no reason to know, of the breach when the breach actually

occurred. From the date the claimant reasonably should have known of the wrong, " . . . 'she is charged with knowledge of facts that should have been discovered by a reasonably diligent investigation.'" *Id.* at 445 (quoting *O'Hara v. Kovens*, 305 Md. 280, 289 (1986)).[5]

In construction cases such as these, knowledge of some construction defect is sufficient to start the limitations running. *See, e.g., Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 448-49 (2000); *Sisters of Mercy of Union in the United States of Am., v. Gaudreau, Inc.*, 47 Md. App. 372, 379 (1980).

Whether a claimant knows enough such that his claim has accrued and the limitations starts to run against him is a question ordinarily resolved by the trier of fact. See, e.g., *Frederick Rd. Ltd. Pship v. Brown & Sturm*, 360 Md. 76, 95-96 (2000). But when there is no genuine dispute about accrual, or the running of the statute, summary judgment on limitations grounds is appropriate. *See, e.g., Lumsden v. Design Tech Builders, Inc.*, 358 Md. at 448-49.

In its Amended Complaint, Flats 8300 includes allegations suggesting that its claims against Donohoe are timely. Specifically, Flats 8300 alleges that Stonebridge had reason to know of defects in the HVAC System on July 27, 2017. On that day, Stonebridge sent a letter to Donohoe " . . . noting certain defects throughout the HVAC System and demanding immediate investigation and correction of the same . . . " See Flats 8300 Am. Comp. at ¶ 30. Flats 8300 adds that "[a]t that time, Stonebridge did not know what was causing the problems with the HVAC System; instead, Stonebridge only recognized that the system was not functioning properly." *Id.* If these allegations are true, Flats 8300's claims against Donohoe appear to have

[5] Concealment of the wrong by the defendant such that the " . . . plaintiff was unable to discover [the wrong] by exercise of due diligence . . . " is another basis for concluding that the three-year filing period has not started to run. *O'Hara v. Kovens*, 305 Md. 280, 294-295 (1986). Flats 8300 makes no such contention against Donohoe here.

accrued on July 27, 2017, and Flats 8300's filing of claims on June 24, 2020 timely tolled the statute.

But Donohoe points to evidence that Stonebridge's claims actually accrued on July 31, 2015, when Stonebridge received a memo from a Havtech representative alerting Stonebridge to what Donohoe describes as "concerns" about how the piping for the HVAC System was being installed. These include that 1) "the Mechanical contractor does not have sufficient management on site to administer their subs;" 2) "Piping subcontractor attended our training but does not understand the Daikin rules;" 3) "General contractor MEP coordinator doesn't understand the necessity of our piping 'rules' and the ramifications of improper installation. Pipe is not run straight at even elevation, pipe ends not sealed after installation – risk of dust, dirt, debris, and foreign matter getting into pipes." See July 31, 2015 Email from Norm Long, which includes Havtech's "Concerns Memo" as an attachment (attached as Exhibit B-6 to Donohoe's Motion).

According to Donohoe, Stonebridge understood the import of the memo as soon as August 4, 2015 when Stonebridge forwarded it to Donohoe. Regarding the memo, Stonebridge described the contents as pertaining to "a list of concerns provided to the Owner by HAVTECH, one of MAA's equipment suppliers, regarding the refrigerant piping installation on the Project[,]" and added "[i]f true, these assertions constitute a serious failure on the part of the mechanical subcontractor." See August 4, 2015 Email from Kevin Cosimano, which includes Havtech's "Concerns Memo" (attached as Exhibit B-7 to Donohoe's Motion).

Donohoe also points to the opinion of Flats 8300's designated expert, Chris Sheridan, to suggest that had Flats 8300 promptly investigated the concerns raised on July 31, 2015, that investigation would have revealed the defects about which Flats 8300 now complains.

Specifically, Donohoe points out that as of July 31, 2015, the refrigerant piping had been installed on Floors 2 and 3 (Units 2.1, 3.2, 3.3. and 3.4) of the Building. Nelson Forensics looked inside these pipes in 2018 and found "black material" or stain indicative of copper oxide contamination of the kind that results from failure to nitrogen braze during installation of the refrigerant piping. Donohoe points to Mr. Sheridan's report as showing what a reasonably diligent investigation would have revealed in 2015 and what facts Flats 8300 was charged with knowing had Stonebridge conducted such an investigation then.

Having reviewed the record as a whole, the court is not persuaded at this time that there exists no genuine dispute about what Stonebridge knew or should have known in July, 2015. Some of what drives this dispute is as follows. Kevin Cosimano, development partner with Stonebridge, asserts in his affidavit that Stonebridge knew nothing about the nitrogen brazing issues in 2015. As to the July 31, 2015 memo from Havtech, Mr. Cosimano asserts that it did not specifically mention any defects related to the failure to perform the nitrogen purging prior to brazing the joints of the copper pipes. See Declaration of Kevin S. Cosimano at ¶ 8 (attached as first Exhibit 5 to Flats 8300's Cross-Motion). The court must credit Stonebridge's denial at this juncture.

Reasonable inferences from the deposition testimony of Christopher Martin Rouzer, an MAA employee, also suggest that Stonebridge did not learn of improper brazing from the July 31, 2015 email and memo. Mr. Rouzer testified that he was called to the Building site when "most of the building was drywalled in" or 75% of MAA's work was complete. See January 24, 2020 Deposition of Christopher Martin Rouzer at p. 54, lines 1-5 (attached as first Exhibit 4 to Flats 8300's Cross-Motion). When asked whether the "the brazing issue" was "one of the concerns as expressed by Havtech that resulted in your being called to the site [,]" Mr. Rouzer

said "No, sir." Id. at pp. 70-71, lines nos. 20-22 and 1. If Mr. Rouzer did not know of the "brazing issue," one can reasonably infer that improper brazing was not an issue then, or if it was, Havtech did not know about it, and Havtech did not tell Stonebridge about it.

Donohoe's own averments do not help its position here, either. Having received the August 4, 2015 email from Stonebridge's Kevin Cosimano, as well as the July 31, 2015 Havtech memo, see Email from Kevin Cosimano, which includes Havtech's "Concerns Memo" (attached as Exhibit B-7 to Donohoe's Motion), Donohoe nonetheless avers that it did not have notice "of any alleged problems with the Daikin VRV System" until March 19, 2018. See Donohoe's Answer to Flats 8300's Complaint at ¶ 34. But, if the August 4, 2015 email and July 31, 2015 memo were not enough to put Donohoe – the general contractor -- on notice of the problems with the Daikin VRV System, one can reasonably infer that the Havtech memo was similarly ineffective to give such notice to Stonebridge.

Finally, discovery has not concluded. As of August 27, 2021, Flats 8300 had not yet deposed Kevin Cosimano, or Doug Bissanti, Senior Development Manager at Stonebridge. See Declaration of Timothy C. Bass at ¶ 4 (attached as Exhibit 14 to Flats 8300's Cross-Motion). In fairness, Flats 8300 ought to be able to conduct these depositions before the court receives, and weighs, evidence tending to corroborate or undermine the statements in Mr. Cosimano's affidavit.

Just as the court is not convinced that there exists no genuine dispute of fact as to what Stonebridge knew or should have known on July 31, 2015 or August 4, 2015, the court cannot conclude that Flats 8300's claims are timely as a matter of law, and that Donohoe's limitations defense is without effect. Viewed in a light most favorable to Donohoe, the non-moving party as to Flats 8300's Cross-Motion, the July 31, 2015 Havtech memo and the August 4, 2015 email

from Stonebridge to Donohoe, and Mr. Sheridan's opinion, together evidence that, as of then, Stonebridge knew or should have known of construction defects in the refrigerant piping installation. This evidence places the accrual date for Flats 8300's claims well before the three years leading up to Flats 8300's June 24, 2020 filing. Under these circumstances, Flats 8300's Cross-Motion will also be denied.

Flats 8300's Motions in Limine

In common practice, a motion in limine is a method by which litigants attempt to secure rulings on whether evidence will, or will not, be admitted. *Medical Mutual Liability Ins. Soc. of Maryland v. Evans*, 330 Md. 1, 24 (1993). Rulings on motions in limine prevent " . . . wast[ing] the investment of parties, witnesses, counsel, jurors, and the trial court by having proceedings result in a mistrial." *Id.*

For the most part, Flats 8300's motions in limine do not identify pieces of evidence – testimony, documents, physical evidence – that it wishes the court to admit or exclude. Flats 8300 does not deny this. Indeed, at the August 30, 2021 hearing, Flats 8300 indicated that the purpose of its "motions in limine" was to seek "clarification" as to what it would have to prove at trial in order to prevail, all for the purpose of "streamlining" the trial. In substance, what Flats 8300 appears to want are rulings that certain "issues" are not in dispute. Where such rulings are based on an absence of genuine dispute as to any material fact, and correct as a matter of law, Rules 2-501(g) permits them.

Flats 8300's first and second requested rulings appear to relate to language of the governing contracts. While there seems to be little dispute about what documents constitute the governing contracts – the contracts define and enumerate them – Flats 8300's requested rulings

do not precisely track the contract language. As to warranties, for example, Flats 8300 concedes that § 3.5.1 of the A201 contract includes three warranties, not one. Because these requested rulings appear to collapse Donohoe's three warranties into one, these requests fail.

With regard to Flats 8300's third requested ruling, substantial performance of contractual obligations is something a plaintiff ordinarily pleads and proves as a condition precedent to recovering from a non-paying defendant. See, e.g., *Cambridge Tech. v. Argyle*, 146 Md. App. 415 (2002)(defendant not liable for failure to pay where contract required strict performance and plaintiff only proved it substantially performed); *Della Ratta, Inc. v. American Better Community Developers, Inc.*, 38 Md. App. 119, 134 (1977)(substantial performance is a constructive condition precedent to recovery). Here, neither Donohoe nor MAA appear to have raised an affirmative defense of "substantial performance" in their operative answers to Flats 8300's Amended Complaint. But Donohoe and MAA have raised other affirmative defenses. Under these circumstances, a ruling that Donohoe and MAA may not rely on an affirmative defense they have not raised is advisory and if implemented, could exclude evidence relevant to the affirmative defenses Donohoe and MAA have raised. This risk is made worse by Flats 8300's failure to identify the specific evidence with which it takes issue.

Flats 8300's fourth, fifth, and sixth requested rulings fail because they overlook basic proof requirements of a plaintiff's case as well as the viability of Donohoe's and MAA's affirmative defenses. Specifically, whether the cause of action is breach of contract or breach of warranty, plaintiff must prove that defendant's breach caused plaintiff's damage, among other things. See *Parlette v. Parlette*, 88 Md. App. 628, 640 (1991); *Taylor v. NationsBank*, N.A., 365 Md. 166, 175 (2001); *Schley v. Zalis*, 172 Md. 336 (1937); *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 526-527 (2014). Beyond these basic requirements, the parties here agreed that

Donohoe's warranty " . . . excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by [Donohoe], improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. . . ." A201 Contract at § 3.5.1. At this juncture, because Flats 8300 has not shown an absence of genuine dispute that (1) Donohoe's and MAA's breaches caused the damage Flats 8300 alleges and (2) Donohoe's and MAA's affirmative defenses fail, any ruling that would allow Flats 8300 to march ahead to replacement of non-conforming work or damages upon proof of a breach only is premature.

Flats 8300's seventh request overlooks plain language in the governing contracts that appears to preserve Donohoe's and MAA's right to rely on the economic waste doctrine and limits what Flats 8300 may recover. With regard to economic waste, Section 13.4.1 provides that "[d]uties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law." Given that economic waste (or the obligation to avoid cures that amount to economic waste) remains a recognized doctrine under Maryland law, see *Andrulis v. Levin Construction*, 331 Md. 354 (1993), Section 13.4.1 prevents the conclusion, as a matter of law, that Donohoe and MAA cannot rely on the doctrine even if they have evidence to prove it.

Beyond Section 13.4.1, the plain language of Section 2.4 of the A201 Contract places another (and perhaps related) limit – this grounded in "reasonableness" -- on what Flats 8300 can recover.[6] Specifically, Section 2.4 permits Flats 8300 to issue a Change Order " . . . deducting from payments then or thereafter due the Contractor *the reasonable cost* of correcting such

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[6] *See also Austin-Westshore Constr. Co. v. Federated Dep't Stores, Inc.*, 934 F.2d 1217, 1224 (11th Cir. 1991)("the qualification of reasonableness also underlies the economic waste measure of damages.")

deficiencies, including Owner's expense and compensation for the Architect's and other consultants' additional services made necessary by such default, neglect or failure. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner on demand." (emphasis added).

With regard to the sufficiency of Mr. Sherwood's and Mr. Leary's opinions to support a finding of economic waste or unreasonableness of Flats 8300's corrective measures, Donohoe and MAA (as the non-moving parties on this request for a Rule 2-501(g) finding) are entitled to have the court credit these opinions, to view them in a light most favorable to Donohoe and MAA, and for the court to draw all reasonable inferences from their testimony in favor of Donohoe and MAA. Mr. Sherwood opines that " . . . a brand-new HVAC System [] would clearly be unreasonable, economically inefficient, and grossly wasteful." See Samuel Sherwood's Report (attached as Exhibit 9 to Flats 8300's Motion). Mr. Leary opines that " . . . a complete system replacement is wasteful, disruptive, and not warranted." See Thomas Leary's Report (attached as Exhibit 6 to Flats 8300's Motion). Measured against the above standards, the court cannot conclude that Mr. Sherwood's and Mr. Leary's opinions are insufficient as a matter of law to support an economic waste finding or a finding or unreasonableness as to Flats 8300's corrective measures.

ORDER

For the foregoing reasons, it is this 15th day of September, 2021, by the Circuit Court for Montgomery County, Maryland, hereby

ORDERED, that Donohoe's Motion for Summary Judgment on Statute of Limitations (DE 202) be and is hereby DENIED; and it is further

ORDERED, that Flats 8300's Cross-Motion for Summary Judgment on Statute of Limitations (DE 222) be and is hereby DENIED; and it is further

ORDERED, that Flats 8300's Motion for Partial Summary Judgment and Rulings in Limine (DE 203) be and is hereby DENIED; and it is further

Anne K. Albright
Judge
Circuit Court for Montgomery County, Maryland