

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

7<sup>TH</sup> AVENUE NASHVILLE HOTEL )  
OWNER, LLC, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
W.G. YATES & SONS )  
CONSTRUCTION COMPANY, )  
 )  
Defendant. )

Case No. 22-1259-BC

**MEMORANDUM AND ORDER**

This matter came to be heard on January 17, 2023, upon a motion for partial summary judgment filed by Defendant W.G. Yates & Sons Construction Company (“Yates”), against Plaintiff 7<sup>th</sup> Avenue Nashville Hotel Owner, LLC (“7<sup>th</sup>” or “Owner”) pursuant to Tenn. R. Civ. P. 56. Yates seeks a judgment that it is entitled to be paid the retainage being held by 7<sup>th</sup> pursuant to the Tennessee Prompt Pay Act of 1991, Tenn. Code Ann. § 66-34-101, *et seq.* (the “TPPA”), and that it be certified as a final judgment pursuant to Tenn. R. Civ. P. 54.02. Yates’ motion seeks a judgment as to Count I of 7<sup>th</sup>’s Complaint for declaratory relief that 7<sup>th</sup> is entitled to hold retainage that is not in violation of the TPPA, as set out in paragraphs 126-129 of the Complaint, and Count IV of Yates’ Counter-Complaint asserting 7<sup>th</sup>’s failure to pay the retainage is a violation of the TPPA.

The Court, having reviewed the parties’ submissions, the relevant caselaw, and having heard argument, is ready to rule.

### **Findings of Undisputed Facts Material to Motion<sup>1</sup>**

GPIF Nashville GP, LLC (“Crescent GP”) is the operating general partner of the parent company, the Owner. A related company is Crescent Property Services, LLC (“Crescent”), which is the development manager of the construction project at issue, commonly known as the Embassy Suites and 1 Hotel Project located at 710 Demonbreun Street, Nashville, Tennessee (the “Project”). As the development manager, Crescent represents 7<sup>th</sup>’s interests in the Project and, among other things, directs, coordinates, monitors and supervises the performance of 7<sup>th</sup>’s contractors for the Project, including administering retainage from contractors and others providing labor and materials on the Project. (Pitchford Affid. I ¶¶ 1-4).<sup>2</sup> The Project generally consists of an eighteen (18) story tower for 1 Hotel (“1 Hotel Tower”), a thirty (30) story tower for Embassy Suites (“Embassy Suites”), a shared subgrade parking garage, a shared four (4) story podium, more than 700 total hotel units, amenities, restaurants, retail space, and over 26,000 square feet of meeting spaces. (*Id.* at ¶ 10).

On or about December 15, 2017, 7<sup>th</sup> and Yates entered a written construction contract (the “Contract”) for Yates to construct the Project in accordance with the Contract and associated contract documents identified therein (the “Contract Documents”). (Pitchford Affid. I ¶¶ 14, 16-17; Davis Affid. ¶ 4<sup>3</sup>). The Contract is a lengthy document that is attached to the Pitchford Affidavit I as Exhibit A. It contains terms regarding cost of work, the contractor’s fee, the contractor’s warranty, events of default, and anticipated time of completion. It also contains a liquidated damages clause that provides for an award of same to 7<sup>th</sup>, in certain circumstances, up

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<sup>1</sup> Both parties submitted affidavits in support and opposition of summary judgment. There are many, many disputed facts regarding the breach allegations specific to performance under the subject construction contract. The issue before the Court is a narrow one regarding the parties’ rights under the TPPA as affected, if at all, by their contract. The Court is limiting its findings to undisputed facts material to this issue only.

<sup>2</sup> Joseph Pitchford submitted two affidavits in support of 7<sup>th</sup>’s response in opposition of summary judgment, one dated September 23, 2022 (“Pitchford Affid. I”) and one dated January 10, 2023 (“Pitchford Affid. II”).

<sup>3</sup> Brad Davis submitted an affidavit dated December 9, 2022 in support of Yates’ motion.

to two times the contractor's fee, which may be deducted from amounts due to Yates. Those Contract terms speak for themselves and do not require an analysis or application to the Project at this time, except to recognize that 7<sup>th</sup>'s Complaint is based upon an asserted breach of the contract by Yates in performing its obligations thereunder.

Consistent with the Contract terms, 7<sup>th</sup> withheld five percent (5%) retainage from the amounts owed to Yates which is deposited in a separate, interest-bearing, escrow account (the "Retainage"). (Pitchford Affid. I ¶¶ 14, 41-42).

7<sup>th</sup> further asserts that it is rightfully withholding payment of the Retainage to Yates because of its pending claims. Yates asserts it has a right to the Retainage under the TPPA and that 7<sup>th</sup> cannot unilaterally decide, on the front end of the litigation, to hold the Retainage against alleged, but not proven or awarded, damages. That is the issue before the Court presented by Yates' motion.

The Metropolitan Nashville Davidson County Government (the "City") issued the following temporary use and occupancy permits or letters for the Project:

- May 10, 2022: Embassy Suites, levels B3-20
- May 13, 2022: Embassy Suites, floors B3-26
- June 9, 2022: Embassy Suites, floors B2-27
- June 15, 2022: Embassy Suites, B2-28 and 1 Hotel, floors 1-14
- August 9, 2022: Embassy Suites and 1 Hotel
- August 24, 2022: Embassy Suites and 1 Hotel other than 1 Hotel floors 17-18
- September 8, 2022: Embassy Suites and 1 Hotel other than 1 Hotel floor 19
- September 23, 2022: Embassy Suites and 1 Hotel other than 1 Hotel floor 19
- October 3, 2022: 1 Hotel including floor 19

(Davis Affid. ¶ 9-12, 15-16, 21-23, 27-28, Exh. 1-6 and 8-11).

7<sup>th</sup> opened Embassy Suites on June 9, 2022 and began renting rooms. (Davis Affid. ¶¶ 13-14). 7<sup>th</sup> opened 1 Hotel in early July of 2022 and began renting rooms. (*Id.* at ¶¶ 18-20). The Court finds, based upon the undisputed evidence, that the Project was available for use, at the

latest, on October 3, 2022. That date could be earlier, and as early as May 10, 2022, when the first temporary use and occupancy permit was issued. The actual date of receipt of a use and occupancy permit as contemplated in the TPPA, substantial completion, or use or ability to use the Property is disputed and cannot be determined on the current record without additional information, but this determination is not necessary for purposes of this motion, as ninety (90) days has elapsed from any of these dates. *See* Tenn. Code Ann. § 66-34-204.

7<sup>th</sup> Hires New Contractor and Fires Yates

Starting in May of 2022, 7<sup>th</sup> hired supplemental contractors, including First Finish and DPR Construction, to complete the guestrooms of the hotels in the Project because, it asserts, Yates failed and refused to complete its work. The Project would not have been allowed to open had 7<sup>th</sup> not hired supplemental contractors to complete Yates' work. 7<sup>th</sup> asserts that expenses to address Yates' defective work is ongoing and twenty-seven (27) of the 721 total hotel units, amenities, restaurants, retail space rooms cannot be rented as a result. (Pitchford Affid. II ¶¶ 8-9, 13; Pitchford Affid. I ¶¶ 10, 46, 119).

7<sup>th</sup> fired Yates on or about September 22, 2022, ejecting it from the Project. 7<sup>th</sup> filed this action on September 23, 2022, suing Yates for breach of contract and a declaratory judgment that it could retain the Retainage without violation of the TPPA, and also filed its motion seeking to deposit the Retainage into the Court.

Yates sent 7<sup>th</sup> a demand letter and notice of obligations as trustee pursuant to the TPPA on October 6, 2022.

## Conclusions of Law

### Summary Judgment Standard

Summary judgment should be granted “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Tenn. R. Civ. P. 56.04. However, “[i]f there is any uncertainty concerning a material fact, then summary judgment is not the appropriate disposition.” *Liput v. Grinder*, 405 S.W.3d 664, 669 (Tenn. Ct. App. 2013). The Tennessee Supreme Court has explained:

The summary judgment procedure was designed to provide a quick, inexpensive means of concluding cases, in whole or in part, upon issues as to which there is no dispute regarding the material facts. Where there does exist a dispute as to facts which are deemed material by the trial court, however, or where there is uncertainty as to whether there may be such a dispute, the duty of the trial court is clear. He [or she] is to overrule any motion for summary judgment in such cases, because summary judgment proceedings are not in any sense to be viewed as a substitute for a trial of disputed factual issues.

*Shacklett v. Rose*, No. M2017-01650-COA-R3-CV, 2018 WL 2074102, at \*2–3 (Tenn. Ct. App. May 2, 2018) (quoting *EVCO Corp. v. Ross*, 528 S.W.2d 20, 25 (Tenn. 1975)).

### TPPA

For the purposes of this motion, the Court focuses on the following provisions in the TPPA regarding owner obligations to release retainage to general contractors.

#### **Tenn. Code Ann. § 66-34-103: Retainages; payment default.**

- (a) All construction contracts on any project in this state, both public and private, may provide for the withholding of retainage; provided, however, that the retainage amount may not exceed five percent (5%) of the amount of the contract.
- (b) The owner, whether public or private, shall release and pay all retainages for work completed pursuant to the terms of any contract to the prime contractor within ninety (90) days after completion of the work or within ninety (90) days after substantial completion of the project for work completed, whichever

occurs first. As used in this subsection (b), “work completed” means the completion of the scope of the work and all terms and conditions covered by the contract under which the retainage is being held. The prime contractor shall pay all retainages due any remote contractor within ten (10) days after receipt of the retainages from the owner. Any remote contractor receiving the retainage from the prime contractor shall pay to any lower-tier remote contractor all retainages due the lower-tier remote contractor within ten (10) days after receipt of the retainages.

- (c) Any default in the making of the payments is subject to those remedies provided in this part.

**Tenn. Code Ann. § 66-34-104: Escrow; portion of contract price.**

- (a) Whenever, in any contract for the improvement of real property, a certain amount or percentage of the contract price is retained, that retained amount must be deposited in a separate, interest-bearing, escrow account with a third party which must be established upon the withholding of any retainage.
- (b) As of the time of the withholding of the retained funds, the funds become the sole and separate property of the prime contractor or remote contractor to whom they are owed, subject to the rights of the person withholding the retainage in the event the prime contractor or remote contractor otherwise entitled to the funds defaults on or does not complete its contract.
- (c) If the party withholding the retained funds fails to deposit the funds into an escrow account as provided in this section, then the party shall pay the owner of the retained funds an additional three hundred dollars (\$300) per day as damages, not as a penalty, for each and every day that the retained funds are not deposited into an escrow account. Damages accrue from the date retained funds were first withheld and continue to accrue until placed into a separate, interest-bearing escrow account or otherwise paid.
- (d) The party with the responsibility for depositing the retained amount in a separate, interest-bearing escrow account with a third party has the affirmative duty to provide written notice that the party has complied with this section to any prime contractor upon withholding the amount of retained funds from each and every application for payment, including:
  - (1) Identification of the name of the financial institution with which the escrow account has been established;
  - (2) Account number; and
  - (3) Amount of retained funds that are deposited in the escrow account with the third party.

- (e) Upon satisfactory completion of the contract, to be evidenced by a written release by the owner, prime contractor, or remote contractor owing the retainage, all funds accumulated in the escrow account together with all interest on the account must be paid immediately to the prime contractor or remote contractor to whom the funds and interest are owed.
- (f) If the owner, prime contractor, or remote contractor, as applicable, fails or refuses to execute the release provided for in subsection (e), then the prime contractor or remote contractor, as applicable, may seek equitable relief, including injunctive relief, as provided in § 66-34-602, against the owner, prime contractor, or remote contractor. . . .

**Tenn. Code Ann. § 66-34-204: Retainage payment.**

When an owner:

- (1) Has received a use and/or occupancy permit for an improvement from a governmental agency lawfully issuing such permit;
- (2) Has received a certificate of substantial completion from an architect or engineer charged with supervision of the construction of an improvement; or
- (3) Begins to use or could have begun to use an improvement; the owner shall, after any such event and pursuant to the terms of the written contract, pay to the prime contractor all retainage the owner may have withheld pursuant to the written contract, except any sum which the owner may reasonably withhold in accordance with the written contract between the owner and the prime contractor; the retainage must be paid within ninety (90) days after the date of the occurrence of an event included in subdivision (1), (2) or (3).

The Court of Appeals' 2016 decision in *Beacon4, LLC v. I & L Investments, LLC*, 514 S.W.3d 153 (Tenn. Ct. App. 2016), is the most thorough treatment of the TPPA applicable to the circumstances of these parties. *Beacon4, LLC v. I & L Investments, LLC*, 514 S.W.3d 153, 195-200 (Tenn. Ct. App. 2016), *overruled in part on other grounds by In re Mattie L.*, 618 S.W.3d 335 (Tenn. 2021). In *Beacon4*, as here, an owner and a general contractor had a dispute regarding a construction project and alleged defects with the work. The owner withheld payment of the retainage at issue after having received a certificate of occupancy for the property and beginning to use it. *Id.* at 158. One of the issues before the trial court, and eventually the appellate court,

was whether the owner violated the TPPA by not paying the retainage after the certificate of occupancy was issued and the business was using the property. The trial court found that the owner had violated the TPPA by withholding the retainage beyond the permissible time set out in the TPPA at Tenn. Code Ann. § 66-34-103(b). *Id.* at 167. While the owner argued that it had the right to withhold the retainage pursuant to the terms of the parties' contract, the Court of Appeals affirmed the trial court, holding "that T.C.A. § 66-34-204(3) makes it clear that withholding the retainage beyond the ninety (90) days after the certificate of occupancy was issued is not permitted, regardless of the parties' contractual provisions or rights. The statute is clear that 'the retainage must be paid.'"<sup>4</sup> *Id.* at 197. Further, that offering to release retainage predicated upon a final lien release was also improper. *Id.* at 200.

Another Chancellor has cited *Beacon4* with approval in ordering the release of retainage, in *J&S Construction Co., Inc. v. Liberty Mut. Ins. Co., et al.*, 18-796-III (Davidson Co. Ch. Nov. 15, 2019). Although not binding on the Court, this opinion is persuasive.

7<sup>th</sup> attempts to distinguish *Beacon4* and *J&S Construction* by arguing that, in those cases, the contractor had completed its work pursuant to the relevant contract. Thus, 7<sup>th</sup> argues, there is a disputed issue of material fact whether Yates completed the scope of work under the Contract. In support of this argument, 7<sup>th</sup> asks the Court to apply the federal magistrate judge's ruling in *Twin K Construction, Inc. v. UMA, Geotechnical Construction, Inc.*, No. 3:21-CV-74-DCP, 2022 WL 880002 (E.D. Tenn. Mar. 23, 2022) to reach a different conclusion. That magistrate judge found that "A *prime contractor* is not prevented from reasonably withholding payment or a portion

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<sup>4</sup> The Court notes that Tenn. Code Ann. § 66-34-204 has been amended since the filing of *Beacon4*, effective as of July 1, 2020. Previously, the statute provided at § 66-34-204(3) as follows: "provided, however, that the retainage must be paid within ninety (90) days after the date of the occurrence of an event included in subdivision (1), (2), or (3)." The General Assembly removed "provided, however," in the amended statute. The Court does not find this changes the analysis, as the statute still mandatorily requires payment within ninety (90) days after one of the three triggering events.



thereof to the *remote contractor* as long as withholding the payment is in accordance with the parties' written contract." *Twin K Construction*, 2022 WL 880002, at \*6 (emphasis added). The Court finds this decision inapplicable to the present case, however, in part because it is based upon the TPPA at Tenn. Code Ann. § 66-34-303, which is a different provision and different relationship altogether. Further, the Court cannot disregard the mandatory requirements set forth in Tenn. Code Ann. § 66-34-204, which specifically sets forth the timeline for releasing retainage payments between an owner and prime contractor, and that the TPPA and the retainage laws have been held to be remedial statutes intended to protect the beneficiaries of the laws such as prime contractors like Yates. *Beacon4*, 514 S.W.3d at 212.

As set forth above in the Court's findings of fact, the Project status meets the requirements of Tenn. Code Ann. § 66-34-204 requiring release of the Retainage. 7<sup>th</sup> has received a use and occupancy permit, it is substantially complete, and 7<sup>th</sup> is using and has the ability to use the hotels.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Yates' motion for summary judgment is granted in part. The Court finds that at least as of October 3, 2022, an event set out in Tenn. Code Ann. § 66-34-204 had occurred to trigger 7<sup>th</sup>'s obligations pursuant to the TPPA. Count I for declaratory relief as it relates to the TPPA, in 7<sup>th</sup>'s Complaint, is therefore DISMISSED. Count IV of Yates' Counter-Complaint pursuant to the TPPA is GRANTED as to liability only, leaving for determination the date on which liability attaches and the associated remedies.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that under Rule 54.02, there is no just reason for delay in making this decision final, and the Court expressly directs the entry of judgment as to the issues discussed herein.

**IT IS SO ORDERED.**

*s/ Anne C. Martin*

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**ANNE C. MARTIN  
CHANCELLOR  
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