AMERICAN ARBITRATION ASSOCIATION

Construction Industry Arbitration Tribunal

In the Matter of the Arbitration between:

Case # 01-18-0001-8443

Ellen Zedeck Trust 2012

Claimant,

-vs-

SJB Interiors, Inc

Respondent.

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties and dated September 13, 2016, and having been duly sworn, and having duly heard and reviewed and considered the written documents submitted to me by Geordie du Pont, Esq., on behalf of Claimant, and Todd Shaw, Esq., on behalf of Respondent, and Claimant having made a motion to amend its claim and the arbitrator having considered same, do hereby, AWARD as follows:

A) Background

Claimant Ellen Zedeck Trust 2012 (the "Trust") was the former owner of Apartment 20A at 308 East 72nd Street, New York, New York. Through two separate conveyances, the current owners and occupants of the apartment are Bill Nelson and Lisa Lieberman-Nelson. Lisa Liebermann-Nelson is also trustee of the Trust. In or about 2016, the Trust began the process of renovating the apartment (the "Project").

On or about September 14, 2016, the Trust entered into a contract with respondent, SJB Interiors, Inc ("SJB") to serve as the general contractor of the Project for a lump sum price of $532,255.31. The Project scope was set forth in the design plans prepared by the Project architect Sarah Marsh. The scope included renovating the kitchen and bathrooms and installing a new wooden floor throughout the apartment. The scope was subsequently modified to include replacing six packaged terminal air conditioning ("PTAC") units that existed in the apartment and covering them with new millwork enclosures. The Project work was completed in or about July 2017.

Approximately eight months after the Project work was concluded, a dispute arose between the Trust and SJB regarding the installation of the cumaru hardwood floors. The Trust, Mr. Nelson and Ms. Lieberman-Nelson, for reasons that are not clear, decided they did not like the cumaru floor installed by SJB. The Trust's replacement architect[1] Greg Epstein of GNE Architecture PC ("GNE") determined that some of the floorboards were shorter than the 24" average length called

[1] The Trust terminated its agreement with Sarah Marsh.

for in the design documents, that the floor was not level and the floor contained unfilled dips. In May 2018, the Trust served a demand for mediation and arbitration consistent with the dispute resolution provisions of its contract with SJB.

At the mediation conducted in September 2018, the Trust and SJB reached a Settlement Agreement. The Settlement Agreement was signed by the parties in November 2018. Pursuant to the Settlement Agreement, SJB agreed, inter alia to "remove and dispose of all of the current cumaru wood flooring at the Apartment, as well as the subflooring to the extent determined by the Trust's Architect…and to install new subflooring (to the extent necessary) and flooring pursuant to the specifications attached as Exhibit A. SJB shall provide all labor, materials and equipment required to perform the Floor Replacement, with no costs to be charged to the Trust". The Settlement Agreement also required that "the Floor Replacement shall be performed under the review of the Trust's architect, GNE Architecture PC, pursuant to specifications prepared by GNE". The Settlement Agreement was drafted by the Trust's attorneys and the specifications were drafted by the Trust's architect.

Exhibit A to the Settlement Agreement contained the specifications for the replacement floor prepared by GNE. The specifications called for the installation of natural sapele wood in place of the existing cumaru wood, to be supplied by a vendor known as Virtu, and finished with clear hard wax oil by a finishing vendor known as Essex. Mr. Epstein selected the vendors reflected in Exhibit A. SJB had no prior dealings with either Virtu or Essex.

Like most natural woods, the sapele wood boards have variation in graining, color, texture and tone. In October 2018, before the Settlement Agreement was signed, Mr. Epstein provided to the Trust a single 6" sapele plank sample. That board (the "control sample") was not provided to SJB and was not mentioned or referenced in the specifications included within the Settlement Agreement. The Settlement Agreement also required that the replacement work be completed within six months – by May 15, 2019.

In the ensuing months, SJB provided approximately eight separate rounds of samples of sapele wood, all of which complied with the requirements of the specifications contained in Exhibit A of the Settlement Agreement. Notwithstanding that the samples satisfied the requirements of the Settlement Agreement, the Trust, (via Mr. Nelson and Ms. Lieberman-Nelson), rejected every sample as not comporting with their subjective taste and aesthetic.

At the urging of Mr. Epstein, and in an attempt to overcome the objections, in late January 2019, the Trust (via Mr. Nelson and Ms. Lieberman-Nelson), were shown a sapele floor installation at the I.J. Peiser ("Peiser") showroom, a high-end wood vendor located in the Decorator and Design ("D&D") building. The Trust liked the aesthetic of the floor model in the Peiser showroom but did not provide photos or a sample to SJB. The Trust encouraged SJB to visit the Peiser showroom. SJB declined to visit the showroom or otherwise have photos sent of the showroom flooring. SJB refused to visit the Peiser showroom because every lot of sapele wood is different and cannot be "matched" and because Peiser was not the vendor referenced in the Settlement Agreement. The specification in the Settlement Agreement did not refer to the October 2018 or any control sample, the Peiser floor model or provide for satisfying Mr. Nelson and Ms. Lieberman-Nelson's subjective aesthetic.

After Mr. Nelson and Ms. Lieberman-Nelson's visit to the Peiser showroom, SJB sent numerous sapele floorboard samples from Virtu/Essex. Although some of those samples were satisfactory to, accepted and recommended by Mr. Epstein, the Trust nevertheless rejected all of them. Mr. Nelson and Ms. Lieberman-Nelson originally indicated a preference for lighter boards rather than darker boards then subsequently changed their mind and expressed a preference for darker boards rather than lighter boards. In a continuing attempt to satisfy the Trust, the specifications contained in the Settlement Agreement was modified to allow staining of the sapele wood in lieu of the specified clear finish required by the original specifications. Numerous stained sapele wood samples with different finishes and sheens subsequently were sent to the Trust, all of which were rejected.

Despite having received approximately eight samples that complied with the terms of the Settlement Agreement and/or the modified specifications, on August 23, 2019, the Trust unilaterally terminated the Settlement Agreement and instituted this arbitration. After the Trust terminated the Settlement Agreement, it retained a litigation forensic expert, Howard L. Zimmerman Associates ("HLZA"). More than two years and two architects after completion of the project, HLZA opined that there existed construction defects in addition to the wooden floors. These alleged defects included installation and/or wiring issues with the six PTAC units, water damage from leaks in a child's bathroom, a missing front door saddle and others. These claims were not asserted when the Trust originally filed the arbitration and therefore, the Trust served an amended arbitration demand. The Trust also secured price quotes from Peiser for a new wood floor installation and from Scordio Construction to serve as a general contractor for any future work. To date, more than four years after completion and two years after recommencing this arbitration, the Trust has not made any of the repairs it contends are required, including those defects it claims are "safety issues".

B) <u>Analysis</u>

As a preliminary matter, whether or not SJB breached the 2016 construction contract in installing the flooring is moot and will not be addressed because this element of the dispute was resolved when the parties entered into the Settlement Agreement. SJB contends the Trust no longer has standing to assert damage claims in this arbitration because there were two transfers of title to the apartment before any repair costs were incurred by the Trust. However, because the Trust, rather than Mr. Nelson and Ms. Lieberman-Nelson, was a party to the Settlement Agreement, I find that the Trust has standing to assert claims that SJB breached the Settlement Agreement. In fact, the Settlement Agreement expressly states that "If the Trust transfers ownership of the Apartment prior to completion of the Floor Replacement, such transfer shall have no impact on SJB's obligations under this Agreement, and the Trust will continue to comply with its obligations under the Agreement".

The underlying issue in dispute in this arbitration is whether SJB materially breached the Settlement Agreement providing cause, in August 2019, for the Trust to terminate the Settlement Agreement and sue for monetary damages.

I find by a preponderance of the credible evidence that SJB did not materially breach the Settlement Agreement and that the Trust materially breached the Settlement Agreement, through the actions of Mr. Nelson and Ms. Lieberman-Nelson, by impeding SJB's ability to perform and by insisting upon conditions not contained in the Settlement Agreement drafted by the Trust's attorney. It is undisputed that SJB provided many floor samples which complied with the terms of the Settlement Agreement and with the specification that the Trust's architect prepared. The Trust, without justifiable cause, rejected all wood floor samples provided, even over the recommendation of the architect it engaged to author the specifications appended to the Settlement Agreement. GNE's acceptance of several samples establishes by a preponderance of the evidence that SJB complied with that portion of the Settlement Agreement.

The October 2018 control sample was not provided to SJB and was not referenced in or incorporated into the Settlement Agreement. Nevertheless, the Trust insisted that SJB "match" that control sample. Ms. Lieberman-Nelson candidly testified that she and her husband "want what we want". In light of the fact that the control sample a) was not provided to SJB when the Settlement Agreement was entered, b) is not referenced in the Settlement Agreement and c) is a six-inch board from a single plank, the Trust's demand that SJB provide flooring that "matches" the control sample was both unreasonable and inconsistent with SJB's and the Trust's obligations under the Settlement Agreement.

The Trust's requirement that the SJB procured flooring "match" the floor in the Peiser showroom is also unreasonable and inconsistent with the obligations in the Settlement Agreement. Peiser is a different wood vendor than Virtu, the vendor specified in the Settlement Agreement. In fact, the Trust's visit to the Peiser showroom occurred months after the Settlement Agreement was effective. The Trust nevertheless insisted that the replacement floor needed to "match" the floor in the Peiser showroom and seeks damages for the cost of replacing the existing cumaru floor with a Peiser sapele floor. Although listed on the Trust's witness list and material to the issues in the dispute, the Trust did not call a witness from Virtu, Essex or Mr. Nelson, who was effectively the decision-maker on behalf of the Trust.

The Trust is entitled to the benefit of its bargain—no more, no less. The Trust had no right to unilaterally modify the Settlement Agreement and impose different terms that satisfied its subjective opinions. Insisting upon a subjective "match" of the control sample and/or the Peiser showroom floor, rather than selecting from among the Virtu samples SJB provided, constituted a breach of the Settlement Agreement that prevented SJB from performing its obligations under the Settlement Agreement.

An owner has an obligation to facilitate the work of a contractor and to not do anything that would impede its contractor's work. The law implies a covenant that one party will not prevent the other party's performance. Prevention of performance of a contractual obligation constitutes a breach of the implied covenant of good faith and fair dealing. The implied covenant requires the promisor to reasonably facilitate occurrence of a condition precedent by refraining from conduct which would prevent the occurrence of the condition. "Prevention" includes the failure of a party to take an affirmative act required for the other party to perform its obligations. Clearly, the Trust prevented SJB from performing its obligations under the Settlement Agreement. I find by a clear preponderance of the evidence, that the Trust breached the terms of the Settlement Agreement and

that breach prevented SJB from performing. I further find by a clear preponderance of the evidence that because the trust prevented SJB from performing, SJB did not breach the Settlement Agreement.

The Trust also seeks to recover damages for alleged construction defects in connection with six PTAC units and grouting of the bathtub in a child's bathroom. The Trust first asserted these claims during the pendency of this arbitration after the Trust engaged HLZA as a forensic expert. As these claims were not included in the Settlement Agreement, they can only arise from an alleged breach of the 2016 construction contract. Title to the apartment was twice conveyed after the 2016 construction contract. The Trust does not presently own the apartment shares and therefore the Trust will not incur any additional costs in connection with future construction work, if ever undertaken. Thus, as a threshold matter, I find that the Trust does not have standing to pursue these claims.

Even if the Trust did have standing to pursue these claims, I find them to be substantively deficient for the following reasons: a) The PTAC units have been functioning properly through multiple heating and cooling cycles; b) SJB did not install the sleeves in which the PTAC's are set; c) SJB did not design the enclosures which may have impeded the volume of return air; d) the Trust's expert was not a graduate engineer or a licensed professional engineer, but rather was a lawyer (who's CV improperly referenced him as a PE) and e) there was no credible proof presented that the wrong coils were installed. The $1,000.00 claim arising from the child's bathroom was originally cast as a plumbing issue. However, when the facts did not support that theory, it morphed into a grouting issue. I also find that claim to be without merit.

SJB has asserted a counterclaim for costs of materials it purchased in preparation for the performance of the Settlement Agreement. Although SJB paid for sapele wood flooring that complied with the specifications, the Settlement Agreement required SJB to install a replacement floor "at no cost to the Trust". Thus, SJB was not damaged by the Trust's breach of the Settlement Agreement because SJB had agreed to pay for all labor, materials and equipment arising from the Floor Replacement work. The cost of the wood was to be incurred by SJB in performance of the Settlement Agreement. It was therefore not damaged by purchasing the sapele wood flooring, even though the flooring was not installed.

Further, Mr. Berman, SJB's principal, testified that the wood SJB purchased from Virtu was installed in his personal residence. Mr. Berman did not pay for the wood installed. He therefore received value from SJB for the wood supplied and, had SJB suffered a loss, it would be required to set off the value of the wood by the amount Mr. Berman should have paid for the wood. SJB failed to submit any evidence of the difference in value between what it paid for the wood and what Mr. Berman reasonably should have paid, nor would evidence of a difference in value likely be credible. I therefore find that SJB did not establish by the preponderance of the credible evidence that it suffered any damages.

C) Findings

The Trust obstructed and prevented SJB's ability to perform consistent with the terms of the Settlement Agreement. The Trust, by failing to approve one of the samples that complied with

the terms of the Settlement Agreement, prevented SJB from proceeding with the installation of a wood floor, effectively rendering its performance impossible. SJB was prepared to perform the work set forth in the Settlement Agreement but was prevented from doing so by the Trust. Thus, although the Trust has standing to pursue the claims arising from a breach of the Settlement Agreement (and therefore obviate the need to evaluate whether the Trust has standing to assert claims for a breach of the construction contract), I find by a preponderance of the credible evidence that the Trust, and not SJB, materially breached the terms of the Settlement Agreement thereby excusing SJB's performance. Because SJB was excused from performance under the Settlement Agreement, I need not address whether the damages the Trust seeks to recover for the replacement wood floor or other allegedly defective work, were reasonable or necessary.

As to the Trust's claims of other construction defects, I find that the Trust lacks standing to pursue those claims, and even if it had standing, I find by a preponderance of the credible evidence, that those claims are also without merit.

I further find that SJB is not entitled to monetary damages on its counterclaim for the cost of materials it purchased in anticipation of performing the Settlement Agreement. The preponderance of the credible evidence establishes that SJB was not damaged as a result of the purchase and that, even if it could be argued that SJB was damaged by the purchase, the damages were fully offset by delivery of the material to Mr. Berman without payment of consideration.

D) <u>Conclusion</u>

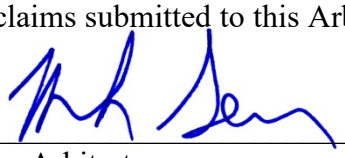
Amount awarded to the Trust on its Claim -	$0
Amount awarded to SJB on its Counterclaim -	$0

AAA Rule 48(d)(II) allows "an award of attorneys' fee if all parties have requested such an award or it is authorized by law or their arbitration agreement". Here, an award of attorneys' fees is not authorized by law or by the parties' arbitration agreement. Moreover, while Claimant "reserved its rights" to request an award of attorneys' fees, it ultimately declined to seek recovery of attorneys' fees. Accordingly, pursuant to AAA Rule 48(d)(ii), I decline to award either party attorneys' fees.

The administrative fees of the American Arbitration Association totaling $8,125.00 and the compensation of the arbitrators totaling $45,788.00 shall be borne as incurred and have been paid.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein, are hereby, denied.

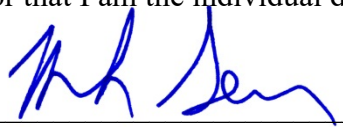
December 20, 2021



Date Mark Seiden, Arbitrator

I, Mark Seiden, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

December 20, 2021



Date Mark Seiden