Filed 12/19/12 Atlas Construction Supply v. American General Constructors CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| ATLAS CONSTRUCTION SUPPLY, INC.,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>AMERICAN GENERAL CONSTRUCTORS,<br><br>Defendant and Appellant. | B232368<br><br>(Los Angeles County Super. Ct. No. GC040792) |

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, C. Edward Simpson, Judge. Affirmed.

Law Office of Anthony Ditty and Anthony T. Ditty for Plaintiff and Appellant.

Kamine Phelps, Bernard S. Kamine, Daniel J. Phelps and Marcia Haber Kamine for Defendant and Appellant.

---

## INTRODUCTION

In the appeal by plaintiff Atlas Construction Supply, Inc. (Atlas), we find that Atlas's contract with American General Constructors (AGC) did not exclude or prohibit the award of damages to AGC caused by delay arising from Atlas's failure to deliver shoring equipment pursuant to the contract. We find that substantial evidence supports the trial court determination that the parties agreed on a delivery schedule for shoring equipment and that Atlas breached the contract thereafter by failing to deliver shoring equipment. Substantial evidence also supports the trial court's calculation of AGC's damages, and we conclude that Atlas has not shown that the trial court erroneously reduced the shoring equipment rental amount due Atlas. We affirm the judgment.

In AGC's cross-appeal, we conclude that the trial court correctly limited the analysis of Code of Civil Procedure section 998 to Atlas's complaint only, and correctly found that the amount awarded to Atlas on that complaint exceeded the amount of AGC's section 998 settlement offer. We therefore affirm the order denying AGC's motion to be determined the prevailing party.

## PROCEDURAL HISTORY

On May 8, 2008, Atlas filed a complaint for breach of contract, foreclosure of mechanic's lien, and quantum meruit against AGC and Cordova Property, LLC (subsequently dismissed). Atlas's complaint claimed that pursuant to an equipment rental agreement, AGC owed $100,916.08 plus interests and costs.

On July 9, 2009, AGC filed a cross-complaint against Atlas for breach of contract and for a common count.

Trial by the court occurred from July 30 to August 6, 2010. On February 14, 2011, the trial court filed a statement of decision and a judgment which determined that Atlas was entitled to recover $5,743.55. Atlas filed a timely notice of appeal from the judgment.

## FACTS

Atlas provides shoring equipment to building contractors. Shoring equipment supports poured concrete while it cures, stabilizes, and becomes able to support itself. AGC is a general contractor which entered into a 12-month contract with a property owner to build the Milan Lofts, a $14 million retail and residential building at Cordova Street and South Arroyo Parkway in Pasadena. One poured concrete slab, the ground floor or street level deck, was to be above an underground parking level; a second concrete slab, the "podium deck," was to be above ground floor retail spaces; four floors with 55 residential units would rise above the podium deck. Shoring equipment supported the poured concrete street level and podium decks, and the shoring system had to be completed before the concrete deck it supported could be poured. Four concrete pours were planned, two for each deck. Those concrete pours had to be completed before the upper residential floors could be built.

*The Shoring Equipment Contract*: In September 2006, Atlas provided a proposal to design the shoring system and to provide shoring equipment for the Milan Lofts. The podium deck area was 10 percent larger than the ground floor/street level deck area, and required significantly more shoring because it was higher above the ground level deck below it. Thus shoring equipment from the street level would not completely satisfy the shoring equipment required for the podium level. The contract assumed that horizontal shoring used for the ground floor level would be cycled upward and for use on the podium deck, leaving vertical shoring on the ground floor level and requiring delivery of replacement vertical shoring equipment for the podium deck.

The terms and conditions of the contract included the following: "Customer has made its own determination of the nature and type of equipment to be used on its projects. Customer [AGC] acknowledges Atlas has given no warranties, express or implied, concerning any of the equipment provided. Additionally, Atlas shall not be held liable for any special, indirect [or] consequential damages whatsoever, including but not limited to loss of profits, extra labor costs, delays or any other claims arising out of or resulting from the use, loss of use, breakdown or malfunctioning of the equipment." The

contract also stated: "In order that we may properly schedule the use of our equipment, this proposal is subject to acceptance within (30) days from date of this proposal. Material is subject to availability. Atlas Construction Supply excludes and will not accept any penalties, claims and/or liquidated damages."

When Atlas presented the rental agreement to AGC on September 13, 2006, it was estimated that it would take three weeks to set up forms from the delivery date to the date of the pour. AGC was to schedule two pours for each slab. Atlas was to do all designs needed for the shoring, and required AGC to advise as to the earliest delivery date. Atlas also stated that it had a four-to-six week backlog in design. At this time construction had not yet begun.

AGC accepted the proposal on November 14, 2006, and Atlas countersigned on November 21, 2006. Atlas represented that it had unusual delivery problems for this job, and the contract left delivery dates open. The proposal contemplated pouring the street level deck first, then reusing some shoring components from under that deck and adding more shoring equipment for the pouring of the podium deck.

Atlas determined how many pieces of Atlas equipment would be required for the shoring. On February 5, 2007, AGC asked Atlas for shoring design plans. On February 27, 2007, Atlas completed preliminary drawings for ground floor shoring and sent them to AGC.

*Shoring Equipment for Street Level Deck*: In March 2007 Atlas and AGC discussed a delivery date for the street level deck shoring equipment. They agreed on April 16, 2007 for delivery of the shoring for "increment 1," the first of the two pours for the street level deck. Atlas first delivered shoring equipment on April 17, 2007, but this delivery was significantly less than what AGC had ordered and Atlas had agreed to deliver. Because components of shoring equipment were missing, what was delivered was enough to complete only a small portion of the shoring required for increment 1. AGC repeatedly made demands for the rest of the shoring, and Atlas made 12 deliveries over 43 days, until May 30, 2007, to complete delivery of shoring needed for AGC's pour of increment 1 of the street level deck, which occurred after May 30, 2007. AGC

informed Atlas that the failure to make complete deliveries of shoring equipment was causing delays, that partial delivery of shoring equipment did not benefit AGC, and that AGC would not pay rent until delivery of all shoring was complete. Atlas offered a credit for equipment delivered on April 17, 2007, by starting the rental for that equipment 10 days later on April 27, a credit for equipment delivered on May 3, 2007, by starting the rental for that equipment on May 25, and a credit for equipment required because AGC's workers had installed the equipment incorrectly. AGC did not agree to accept these credits as compensation for delay because of Atlas's delivery failures.

A January 2007 construction plan had projected delivery of shoring equipment on April 6 and the first pour on May 16. In actuality the first shoring equipment arrived on April 17 and the first pour was June 5. Although Atlas's late deliveries caused delay, changes by the project owner and rain delays caused AGC to have finished the first pour sooner than the plan schedule. Thus there appear to have been no delay damages sought by AGC against Atlas for the street floor level.

*Shoring Equipment for Podium Deck:* Shoring for the second street level concrete pour—"increment 2"—was also delayed. Work could not proceed on the podium deck because AGC had not received shoring equipment for the podium deck.

The contract contemplated leaving vertical components of the street level deck shoring in place for 28 days, while that concrete cured; Atlas would deliver additional vertical components for the podium deck shoring; and AGC would remove horizontal shoring components from the street level deck for use with the newly delivered vertical shoring components on the podium deck. Despite the 28-day cure, work began on top of the street level deck two days after it was poured.

Atlas did not have shoring equipment to ship on June 18, 2007, the date AGC requested. In early June 2007, Atlas and AGC had discussed delivery of shoring equipment for the podium deck, and agreed on "intermittent deliveries over the course of a few weeks [after June 18, 2007] to complete the second [podium] level." AGC planned construction work based on a tentative June 18, 2007, delivery date. After that date, AGC planned work based on anticipated intermittent deliveries.

Shoring from the June 5, 2007, pour had to remain in place for 28 days for the concrete to cure. Because they were not receiving shoring, from July 3 to July 11, 2007, AGC removed usable shoring from the first pour of the street level deck and recycled it up for use as shoring for the podium deck. Because of the differing heights of the basement (under the street level deck) and the first floor (under the podium deck), not all shoring from the street level deck could be used for podium deck shoring.

*AGC Obtains a New Supplier of Shoring Equipment:* Despite AGC's repeated demands for podium deck shoring equipment from June 5 to July 17, 2007, Atlas made no intermittent shipments and never delivered that shoring. AGC was required to obtain shoring from another source. Had Atlas delivered shoring during the period from June 18 to July 30, AGC would have been able to use and erect the shoring.

Because they were not receiving shoring from Atlas, AGC began to look for other shoring suppliers on July 6, 2007. Atlas made no shipments of shoring for the podium deck, and on July 19, 2007, having confirmation from another shoring supplier, AGC notified Atlas it would not need any additional deliveries of shoring. AGC received podium deck shoring from its new shoring supplier on July 30, 2007.

*Testimony of AGC's Expert Witness*: Defendant's expert witness, George Ossman, testified that by June 18, 2007, the progress of the construction was controlled by having shoring to be able to start work on the podium deck. Every day the shoring did not arrive on the site from June 18 to July 30, 2007, was an extra day that the project would take after July 30. Atlas failed to deliver shoring equipment for 43 days from June 18 to July 30, 2007, when shoring from the new supplier arrived. AGC mitigated two of the 43 days by moving shoring from the street level deck to the podium deck. Thus Atlas's failure to deliver shoring delayed the project by 41 days. The podium deck had to be shored, poured, and completed before the four floors could be built above it. No owner delays occurred during the June 18 to July 30, 2007, period. Delay during this period was attributable to Atlas. Although Atlas was replaced on July 19, 2007, Ossman calculated the delay as extending to July 30, 2007, when shoring was delivered.

Ossman concluded that during the June 18 to July 30, 2007, period, there were no delays attributable to the owner, no logic errors in the construction schedule, and no delays attributable to the 28-day concrete cure requirement, to construction of columns, walls, and perimeter wall and block wall rebar, removal of the ramp to the basement, 5-day cure and stress of poured concrete, work on swells, catch basins, shore walls, stairwells, trash enclosure, CMU walls, or to work on other decks.

*AGC's Delay Damages*: In November 2007, AGC responded to the owner's request for information regarding delay attributable to the owner. The purpose was to obtain extensions of time from the owner. AGC had claimed delays caused by the owner's engineer regarding structural concrete on the podium deck, but did not pursue that claim against the owner because AGC management believed the owner was correct that lack of shoring equipment from Atlas caused the delay.

AGC's contract with the owner included "general conditions" costs for the construction project. General conditions costs are fixed costs which include supervision and temporary office and utility costs. General conditions costs accrue on a daily basis. The contract required the owner to pay AGC for general conditions costs for 12 months. The construction, however, took 20 months. The owner paid AGC $94,000 ($1,566.66 per day) for two months of additional general conditions in a settlement, and for an additional two weeks because of change orders, but there were months of delay to the project for which AGC had received no payment for its general conditions costs.

*Terms on Delivery Tickets and Invoices:* Delivery tickets ("shoring material shipping manifests") contained a block for the customer to sign and date to acknowledge delivery of shoring equipment from Atlas. An AGC employee signed delivery tickets. It was disputed, however, whether the AGC employee who signed had authority to do so. The AGC-Atlas contract stated: "Contractor to verify quantities received compared to shipping manifest and acknowledge quantities received via signed manifest." AGC contended that a subordinate employee of AGC was instructed to count every piece of shoring equipment delivered and to sign delivery tickets as an acknowledgement of quantities received, not as a written modification of the contract. Patrick Chraghchian,

the President of AGC, testified that the AGC employee who signed delivery tickets had no authority to enter into a modification of the AGC-Atlas contract. The contract stated that "[t]his agreement . . . may not be modified, except by both parties in writing."

Invoices from Atlas had additional terms and general conditions on their reverse side. AGC President Chraghchian did not see those terms and conditions on the back of invoices during the Milan Lofts project. No one from AGC signed those invoices.

*Atlas's Rental Claims:* With regard to Atlas's claim for rental of shoring equipment, Atlas began invoicing for shoring equipment for the first pour of the ground floor/street level deck on April 27, 2007. Delivery of shoring equipment for that pour, however, was not completed until May 30, 2007.

*Determination of Atlas's Rental Claim*: The trial court determined that rent for shoring equipment for the first pour of the ground floor/street level deck began when all ordered shoring was received for that pour. The minimum monthly rent for the first pour of the ground floor/street level deck commenced on May 29, 2007. The trial court made adjustments to Atlas's $85,929.02 rental claim by subtracting $8,450 for a commencement date adjustment, $2,311.15 for unexplained invoices, $7,276.78 as an adjustment for 19 useless days, $2,489.54 for the value of unreturned equipment, and $1,970.28 for rent after AGC's tender of money for unreturned equipment. The trial court therefore awarded Atlas recovery of $68,410.35.

*Determination of AGC's Delay Damages*: With regard to AGC's cross-complaint for damages because of delay caused by Atlas's late or non-delivery of shoring equipment, the trial court determined that AGC no longer claimed damages because of delayed delivery of shoring equipment for street level deck. The trial court determined that AGC's delay damages were based on continuation of its general conditions expenses for 40 days, at $1,566.67 per day, for a total of $62,666.80. Thus the judgment was in favor of Atlas for the difference of $5,743.55.

I. *Appeal by Atlas*

ISSUES

Atlas claims on appeal that:

1. The AGC-Atlas contract excluded any claim for consequential, special, and/or delay damages;

2. The trial court's findings that terms on the reverse side of invoices were not part of the contract and the exclusion of the credit application were reversible error.

3. The finding of an enforceable contract for delivery of shoring for the podium deck was reversible error;

4. The trial court's calculation of delay damages conflicted with the statement of decision, uncontroverted evidence, and admissions of AGC's counsel;

5. Because concurrent causation was pleaded, argued, and proved, failure to make findings on the issue was reversible error;

6. The trial court improperly interpreted the contract when arriving at the rent due Atlas.

DISCUSSION

1. *The AGC-Atlas Contract Did Not Exclude Delay Damages*

Atlas claims on appeal that two provisions of the contract with AGC excluded any claim for consequential, special, or delay damages. We disagree.

A. *The Warranty and Consequential Damages Provision Did Not Exclude or Prohibit Delay Damages*

In its "terms and general conditions," the contract stated: "Customer acknowledges Atlas has given no warranties, express or implied, concerning any of the equipment provided. Additionally, Atlas shall not be held liable for any special, indirect [or] consequential damages whatsoever, including but not limited to loss of profits, extra labor costs, delays or any other claims arising out of or resulting from the use, loss of use, breakdown or malfunctioning of the equipment." Atlas contends that this provision excluded any consequential, special, or delay damages.

A clause resulting in the imposition of a forfeiture will be strictly construed, especially where the contract was prepared by the party seeking to impose the forfeiture. (Civ. Code § 1442; *Hawley v. Orange County Flood Control Dist*. (1963) 211 Cal.App.2d 708, 713.) Forfeiture provisions are treated with disfavor and are construed strictly to avoid forfeiture. (*CQL Original Products, Inc. v. National Hockey League Players' Assn*. (1995) 39 Cal.App.4th 1347, 1356.) Additionally, any ambiguity of a contract is strictly construed against the party who prepared it. (Civ. Code, § 1654; *Yamanishi v. Bleily & Collishaw, Inc*. (1972) 29 Cal.App.3d 457, 463.)

This paragraph disclaims any warranties concerning "the *equipment provided*." The provision also states that Atlas shall not be held liable for special, indirect, or consequential damages "arising out of or resulting from the use, loss of use, breakdown or malfunctioning of *the equipment*." This limitation of liability similarly relates to the disclaimer of warranties of *equipment provided*. Failure to make timely delivery is not a breach of warranty. (*A. A. Baxter Corp. v. Colt Industries, Inc*. (1970) 10 Cal.App.3d 144, 153.) Damages were awarded to AGC not because of use, loss of use, breakdown or malfunctioning of *equipment provided* by Atlas, but because of delay caused by Atlas's failure to deliver shoring equipment pursuant to the contract. The contract did not exclude such delay damages.

Atlas argues that contract provisions limiting a party's liability are enforceable in California, citing *Pierce v. Southern Pac. Co*. (1898) 120 Cal. 156. *Pierce*, however, held that instead of the ordinary measure of damages for breach of a carrier's obligation to deliver freight (the value of goods at delivery), a special contract could make the measure of damages the invoice price at the point of shipment. (*Id*. at p. 159.) Besides the fact that Atlas is not a freight carrier and this contract did not involve freight carriage, *Pierce* did not hold that a contract provision that prohibited *all* damages was enforceable.

*Markborough California, Inc. v. Superior Court* (1991) 227 Cal.App.3d 705 (*Markborough California),* cited by Atlas, similarly held that a limitation of liability provision in a construction contract was valid under former Civil Code section 2782.5 if the parties had an opportunity to accept, reject or modify that provision. (*Markborough*

*California*, at pp. 708, 715.) Thus the contract in *Markborough California* limited an engineer's liability for professional errors and omissions to $67,640. It did not eliminate that liability altogether.

Atlas also cites Civil Code section 1671, subdivision (b) stating that "a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." The provision in the Atlas-ACS contract, however, is not a liquidated damage provision. It does not "liquidate" damages, i.e., fix a monetary measure of damages to be recovered for breach of the contract; instead it prohibits any damages for breach.

Atlas has not shown that the trial court erroneously interpreted this contract provision. The trial court correctly interpreted the contract provision as not excluding AGC's claim for delay damages.

B. *The Delivery Ticket Provision Excluding Penalties, Claims, and Liquidated Damages Was Not Part of the AGC-Atlas Contract and Did Not Modify That Contract*

The AGC-Atlas contract stated: "Contractor to verify quantities received compared to shipping manifest and acknowledge quantities received via signed manifest." An AGC employee signed the delivery tickets ("shoring material shipping manifests") to acknowledge delivery of shoring equipment from Atlas.

In a paragraph captioned "Limitation on Liabilities," text on the reverse side of delivery tickets stated: "Atlas shall not be responsible for any claims for damages beyond the cost of providing replacement equipment. In the event of any claim of breach by Atlas, customer shall provide Atlas 48 hours written notice to take responsible steps to cure any alleged breach. Providing Atlas such notice to cure is a condition precedent to the enforcement of any claim against Atlas which can only be pursued in the event Atlas fails to take responsible steps to cure. In no event will Atlas be responsible for any claims for damages caused by any delay on any job, or the delay in performance of any job, nor shall Atlas be responsible for any damages arising out of the fitness of the

equipment for the purposes intended, other than for the return of any rental or purchase payments made for such equipment."

This provision on delivery tickets was not part of the contract. The contract was formed in November 2006. Delivery tickets were not signed until months later, beginning on April 17, 2007. More importantly, the contract stated that "[t]his agreement . . . may not be modified, except by both parties in writing." AGC provided evidence that a subordinate employee of AGC, who had no authority to enter into a modification of the AGC-Atlas contract, was instructed to count every piece of shoring equipment delivered and to sign the delivery tickets as an acknowledgement of quantities received, not as a written modification of the contract. The provision on the reverse side of delivery tickets purporting to exclude penalties, claims and/or liquidated damages was not part of the AGC-Atlas contract, and was not a modification of or addition to that contract.

Atlas argues that Commercial Code section 2207[1] (section 2207) made the text on the reverse side of the delivery tickets part of the AGC-Atlas contract. Section 2207, however, does not apply to the Atlas delivery tickets. Section 2207 concerns the formation of contracts, and specifically states that acceptance or written confirmation of a contract operates as an acceptance even though stating terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional terms. Atlas sent, and an AGC employee signed, the delivery ticket long after formation of the AGC-Atlas contract. A separate section of the chapter

---

[1] Commercial Code section 2207 states, in relevant part: "(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

"(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

"(a) The offer expressly limits acceptance to the terms of the offer;

"(b) They materially alter it; or

"(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

dealing with contracts for the sale of goods states that "[a] signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded." (Com. Code, § 2209(2).) Section 2207, moreover, applies to contracts made by merchants, professional sellers of goods to a buyer. The AGC-Atlas contract was not a sales contract by or between merchants, but was instead a lease contract that was governed by Division 10 of the Commercial Code (sections 10101-10600) relating to personal property leases. Division 10 "applies to any transaction, regardless of form, that creates a lease." (Com. Code, § 10102.) A "lease" means "a transfer of the right to possession and use of goods for a term in return for consideration." (Com. Code, § 10103, subd. (a)(10).) "Goods" means "all things that are movable at the time of identification to the lease contract." (*Id*., subd. (a)(8).) Division 10, relating to personal property leases, contains no provision analogous to the modification-of-contract provision in Section 2207. Section 2207 does not apply to the AGC-Atlas contract.

We conclude that text on the reverse side of delivery tickets purporting to exclude penalties, claims, and liquidated damages were not part of the AGC-Atlas contract and did not modify that contract.

2. *The Parties Agreed on a Delivery Schedule for Shoring Equipment for the Podium Level, and Atlas Breached By Failing to Make Deliveries*

Atlas claims that there was no agreement on a date for delivery of shoring equipment for the podium deck, and because there was no agreement the failure to deliver shoring equipment was not a breach. We reject both parts of this argument.

AGC accepted the Atlas proposal on November 14, 2006. Atlas countersigned on November 21, 2006. Atlas represented that it had unusual delivery problems for this job, and the contract left delivery dates as an open term.[2] The parties began communicating about the shipment of shoring equipment for the podium deck on June 5, 2007, when

[2] The final paragraph of Atlas's "Terms and General Conditions" stated: "Please sign and return one copy of this letter to signify acceptance of its terms. Contract valid upon agreement of delivery and duration dates and authorized counter signature by Atlas."

AGC project manager Tecson wrote Atlas Executive Vice President Schoonover requesting that Schoonover advise on the availability of the next shipment. Schoonover responded giving a tentative delivery date of June 18. On June 14, 2007, Tecson again wrote to Schoonover stating that AGC needed second level podium deck shoring by June 18, 2007, and requested confirmation. On June 15, Schoonover replied that Atlas had issues of equipment availability and equipment would not be available by June 18, but would require intermittent deliveries over the course of a few weeks to complete the podium level shoring. Schoonover stated that in a conversation with Alec Abrahamian, AGC's coordinator for electrical and mechanical issues, Abrahamian was to contact Schoonover by June 13 if AGC had decided to obtain shoring equipment from another source. Schoonover stated that Abrahamian did not contact him, leading Schoonover to assume that the timetable Atlas offered was acceptable. Schoonover testified that at best, he offered to deliver shoring equipment to AGC over the course of several weeks with intermittent deliveries. On June 18, 2007, Tecson e-mailed Schoonover that Schoonover had mentioned that Atlas could supply intermittent deliveries and that Tecson understood that Atlas might be able to deliver that day, and asked Schoonover to advise how much and how soon Atlas could deliver. Tecson testified that in their communications, Schoonover did not say Atlas could not make deliveries on June 18, 2007, and Schoonover said he would try to make deliveries on that date and that he would make intermittent deliveries. Substantial evidence supports the trial court's finding that the parties agreed that Atlas would make intermittent deliveries of shoring equipment for the podium deck during the weeks after June 18, 2007.

The evidence showed that Atlas failed to make these intermittent deliveries. On June 25, 2007, Tecson wrote Schoonover that AGC had not heard from Atlas regarding the next delivery, that AGC was told Atlas would send shoring equipment as soon as it had anything, and that it had been a week since the agreed delivery date. On June 28, 2007, Tecson wrote Schoonover asking him to advise how soon Atlas could send shoring for the podium level, and requesting that Atlas send shoring equipment as soon as it could do so. On July 6, 2007, Tecson wrote Schoonover that AGC was installing shoring for

the podium deck using shoring from the ground level deck, but were significantly short of shoring to form the podium deck. Tecson again asked Schoonover to advise on when Atlas would supply the needed shoring. The same day Schoonover replied that he continued to press his San Diego counterparts for delivery dates for the shoring equipment AGC required but had not received a response and hoped to receive the information on July 9, 2007. On July 17, 2007, Tecson wrote Schoonover asking whether there was news about shoring for the podium deck, and stating that AGC needed at least 500 frames for that slab. At that time Tecson still expected to receive shoring from Atlas. Tecson testified, however, that Atlas never delivered any shoring for the podium deck. AGC ultimately went to another shoring supplier, and when AGC had confirmation from the other supplier it notified Atlas that their shoring was no long required. Substantial evidence supports the trial court's finding that Atlas breached the contract by failing to deliver shoring equipment for the podium level.

3. *Substantial Evidence Supports the Trial Court's Calculation of AGC's Damages*

Atlas claims that the trial court's calculation of delay damages conflicts with its statement of decision, uncontroverted evidence, and admissions of AGC's counsel. We disagree.

With regard to the number of days of delay attributable to Atlas's failure to deliver shoring equipment, we have determined that substantial evidence supports the trial court's finding that the parties agreed that Atlas would make intermittent deliveries of shoring equipment for the podium level deck during the weeks after June 18, 2007. If Atlas had made intermittent deliveries, there was evidence that AGC would have immediately erected that shoring as it was delivered, as it had done with intermittent shoring deliveries for the ground floor level between April 17 and May 30, 2007. Atlas, however, did not deliver any shoring, and AGC went to another shoring supplier, notified Atlas that AGC no longer required its shoring, and began receiving shoring from the alternate supplier on July 30, 2007. The trial court heard testimony from AGC's expert witness, George Ossman, that by June 18, 2007, the progress of the construction was

controlled by having shoring to be able to start work on the podium deck. Each day the shoring did not arrive from June 18 to July 30, 2007, was an extra day that the project would take after July 30. Atlas failed to deliver shoring equipment for 43 days from June 18 to July 30, 2007. AGC mitigated two of the 43 days by moving shoring from the street level deck to the podium deck. Thus Atlas's failure to deliver shoring delayed the project by 41 days. The podium deck had to be shored, poured, and completed before the four floors could be built above it. No owner delays occurred during the July 18 to July 30, 2007, period, and this delay was attributable to Atlas. Although Atlas was replaced on July 19, 2007, Ossman calculated the delay as extending to July 30, 2007, when shoring was delivered. Substantial evidence supported the trial court's factual finding that there were 40 days of delay, the number of days for which AGC sought delay damages.

With regard to the amount of damages AGC incurred each day that delay occurred, AGC's contract with the owner included "general conditions" costs. General conditions costs are fixed costs which include supervision, temporary office, and utilities, and accrue on a daily basis. The contract required the owner to pay AGC for general conditions costs for 12 months. Construction, however, took 20 months. The owner paid AGC $94,000 ($1,566.66 per day) for two months of additional general conditions because of a time extension attributable to the owner. The trial court adopted this as the daily amount of damages incurred by AGC due to delay. Where the fact of damages is clear, the trier of fact can determine the amount of damages by a reasonable approximation. (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 317.) That the amount of damage cannot be calculated or proved exactly does not bar recovery. (*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1407.) Substantial evidence supports the trial court's calculation of delay damages owed to AGC.

4. *The Concurrent Causation of Delay Defense Does Not Apply in This Case*

Atlas claims on appeal that it pleaded and proved that the owner delayed the project concurrently on every day it was claimed that Atlas delayed the project, and that the existence of concurrent causation of delay precludes Atlas's liability.

The concurrent causation of delay defense arises in the context of a contract which contains a suspension of work clause, allowing the contractor to be awarded compensation for government-caused delays of an unreasonable duration. "Any unreasonable delay directly caused by Government action will be considered a constructive suspension of work for purposes of the clause." (*Avedon Corp. v. U. S.* (1988) 15 Cl.Ct. 648, 652.) A contractor seeking to recover delay damages must show that the government was the sole proximate cause of the delay and that no concurrent cause would have equally delayed the contract regardless of the government's action or inaction. Where both parties contribute to the delay, neither can recover damages unless there is proof of a clear apportionment of the delay and expense attributable to each. Where delays are concurrent and the contractor has not established its delay apart from that attributable to the government, recovery will be denied. (*Id.* at p. 653; *PCL Const. Services, Inc. v. U. S.* (2000) 47 Fed. Cl. 745, 801; see also *Blinderman Const. Co., Inc. v. U.S.* (1997) 39 Fed.Cl. 529, 583.)

Thus the concurrent delay defense can arise (1) in a contract with the government (2) containing a suspension of work clause (3) in which the contractor and the government both contribute to the delay, and (4) there is no proof of a clear apportionment of the delay and expense attributable to each of the two contracting parties. In this case the contract was not between a contractor and the government. The AGC-Atlas contract did not contain a suspension of work clause. Most importantly, Atlas's claim of concurrent causation of delay is based not on delay caused by AGC, the other party to the contract, but instead on delay caused by the owner, who was not a party to the AGC-Atlas contract. We conclude that the concurrent causation of delay defense has no application to this case.

Atlas also claims that despite its request to make findings on concurrent delay caused by the owner or by some other entity, the trial court erroneously failed to make those findings. Atlas, however, did not make a timely request for a statement of decision. The trial court's September 8, 2010, tentative decision on preliminary issues identified two issues which remained to be resolved: the amount, if any, of Atlas's quantum meruit

recovery and of Atlas's delay damages. Atlas filed its request for a statement of decision on October 15, 2010, which contained a request for findings concerning concurrent delay caused by the owner or some other entity. Code of Civil Procedure section 632 required Atlas to request a statement of decision within 10 days after the court announced a tentative decision. Atlas's October 15, 2010, request for a statement of decision was more than 10 days after the September 8, 2010, statement of decision and was therefore untimely. Atlas is therefore deemed to have waived its right to request a statement of decision. (*University of San Francisco Faculty Assn. v. University of San Francisco* (1983) 142 Cal.App.3d 942, 946.) No error arose from the failure to issue a statement of decision when the request for that statement of decision was untimely. (*Staten v. Heale* (1997) 57 Cal.App.4th 1084, 1091; *In re Marriage of Gray* (2002) 103 Cal.App.4th 974, 980.)

5. *Atlas Has Not Shown That The Trial Court Erroneously Reduced Rental Amounts Due*

Atlas claims that the trial court improperly interpreted the contract when calculated the rent due Atlas by erroneously setting the date rent was to begin.

The contract stated, in relevant part: "Monthly rental will be billed at the time of incremental shipments. First month rent is a minimum charge; subsequent rental will be pro-rated on a daily basis. Rental is based on a (30) thirty-day month. Rental ceases upon return of rental equipment to Atlas designated yard. Rental does not cease for portions of equipment not returned."

In its statement of decision, the trial court observed that the parties took different positions on the date that the $8,454 first month minimum rent for the ground floor pour began to accrue. Atlas argued that this first month minimum rent began on the date of the first shipment of that increment. AGC did not disagree with the amount of the first month minimum rent, but did disagree that it began on the date of the first delivery, which was only enough to construct 10 percent of shoring required for the first pour of the street level deck.

The trial court determined that the first month's rent was a minimum, meaning that there would be no pro-rata reduction for early return of that equipment. Thus rent should not begin until all equipment was received. The trial court determined that by stating that "monthly rental will be billed at the time of incremental shipments," the contract meant that rent for the first pour of the street level deck began when all ordered shoring was received for that pour. Therefore the trial court found that the minimum monthly rent for the first pour of the ground floor commenced on May 29, 2007.

Atlas argues that the trial court's interpretation that rent would not begin until all shoring equipment necessary for the street level deck was delivered is contrary to the language of the contract, the parties' dealings, their contemporaneous writings, and to rules of contract interpretation.

On April 30, 2007, Atlas invoiced AGC for rental of $8,454 for the period April 27 to May 27, 2007. On April 23, 2007, AGC's Tecson wrote to Schoonover of Atlas that AGC had only one-third of the shoring material needed and the shipping manifest showed there was still a balance to be delivered. Tecson requested delivery of the remaining materials the next day. On April 24, 2007, Tecson wrote to Schoonover that Atlas's San Diego office had informed him there was no available shipping, that this delayed AGC unacceptably, and that AGC would not accept charges from Atlas for shoring already delivered, which was less than 20 percent of the shoring needed. Tecson stated that AGC would only start paying rent as soon as all shoring was delivered, and that partial delivery did not benefit AGC in any way. On April 30, 2007, Tecson wrote to Schoonover that AGC had received a second shipment of shoring but was "still short," and asked Schoonover to advise when the final shipment of shoring would arrive. The remaining shoring arrived in 10 additional shipments, with the final shipment being on May 30, 2007.

We agree with the trial court's interpretation that the minimum monthly rent for the first month should not begin until all equipment was delivered. To begin this minimum monthly rental at the time of the first, partial delivery would mean that rental was being charged for shoring equipment which had not yet been delivered, and when delivery of all shoring equipment was required before the first street level deck pour could proceed. To charge rent for equipment not yet delivered would be contrary to reasonable expectations of AGC in contracting for the equipment. The fact that the first month's rental was a minimum charge and would not be pro-rated on a daily basis also means that this minimum should not be charged until all shoring equipment necessary for the first street level deck pour was delivered. We find no error in the trial court's determination that the $8,454 minimum monthly rental should begin on May 29, 2007.

Atlas raises a second issue, which concerns the trial court's reduction of $7,276.78 rent owed by AGC for 19 useless days. This concerned shoring for the podium level deck. The contract contemplated leaving vertical components of the street level deck shoring in place for 28 days while the concrete cured, that Atlas would deliver additional vertical components for the podium deck shoring, and that AGC would remove horizontal shoring from the street level deck for use with newly delivered vertical shoring components on the podium deck. AGC planned construction work based on intermittent deliveries of shoring equipment after June 18, 2007, but Atlas made no deliveries from June 18 until July 19, when AGC informed it would not need additional shoring, having found another shoring supplier. AGC removed the last recycled shoring on July 11, 2007, 28 days after the pour of the street level deck. AGC, however, could not use this recycled shoring from July 11 to July 30 (the date the new shoring supplier delivered its shoring equipment), because Atlas made no deliveries. AGC did use Atlas's recycled shoring in the podium deck, along with shoring delivered by the new supplier, after July 30, and paid rent for the rental of that shoring equipment after that date. No error occurred because of the trial court's reduction of rent AGC owed Atlas for shoring equipment which was useless for the 19 days between July 11 and July 30, 2007.

II. *Cross-Appeal by AGC*

FACTUAL AND PROCEDURAL HISTORY

Atlas commenced its suit against AGC on May 8, 2008. Pursuant to Code of Civil Procedure section 998 (section 998), AGC served a section 998 settlement offer for $65,000 on Atlas on May 16, 2008, in exchange for a dismissal with prejudice and release of Atlas's mechanics lien. Atlas did not accept the offer, which expired 30 days later on June 15, 2008.

On February 14, 2011, judgment was entered in favor of Atlas for $5,743.55, plus costs.

On February 25, 2011, AGC filed a motion to be determined the prevailing party as a result of its section 998 offer.

On April 5, 2011, the trial court denied AGC's motion to be determined the prevailing party, stating that the cost-shifting penalties of section 998 were not triggered because plaintiff Atlas did not obtain a less favorable judgment, insofar as Atlas rejected AGC's offer to settle the complaint for $65,000 but Atlas obtained a more favorable judgment of $68,410.35 with respect to its complaint. AGC filed a timely notice of cross-appeal from this order.

ISSUE

AGC claims on cross-appeal that the trial court erroneously denied its motion to be determined the prevailing party, and that AGC was prevailing party under Code of Civil Procedure section 998.

DISCUSSION

AGC claims that the trial court's order denying its motion to be determined the prevailing party conflicts with the language and purposes of section 998.

Section 998, subdivision (c)(1) states, in relevant part: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment . . . the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding . . . the court . . . in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services

of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial . . . or during trial . . . of the case by the defendant."

Section 998, subdivision (e) states: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment . . . the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment . . . shall be entered accordingly."

AGC argues that because Atlas did not accept the section 998 offer of $65,000 and the judgment awarded Atlas $5,743.55, the judgment was less favorable than the section 998 offer, AGC was the prevailing party under section 998 and Atlas should have been denied costs and AGC should have been awarded costs. We disagree.

Code of Civil Procedure section 1032, subdivision (b) entitles the prevailing party to recover its costs "[e]xcept as otherwise expressly provided by statute." Section 998, subdivision (a) states that costs allowed under section 1032 "shall be withheld or augmented as provided in this section." Thus section 998 represents a departure from the general rule that the prevailing party recovers its costs by establishing a procedure to shift costs upon a party's refusal to settle. "If the party who prevailed at trial obtained a judgment less favorable than a pretrial settlement offer submitted by the other party, then the prevailing party may not recover its own postoffer costs and . . . must pay its opponent's postoffer costs." (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 798.)

The purpose of section 998 is to encourage settlement of lawsuits before trial. Section 998 achieves this aim by punishing a party who fails to accept the other party's reasonable offer and who does not achieve a better result in the judgment. In this circumstance section 998 also rewards the putative settler by awarding costs to the party whose reasonable settlement offer was refused. (*Westamerica Bank v. MBG Industries, Inc*. (2007) 158 Cal.App.4th 109, 129 (*Westamerica Bank*).)

A complaint and a cross-complaint are treated as independent actions for most purposes, and a cross-complaint is a separate action from that initiated by the complaint. (*Westamerica Bank, supra,* 158 Cal.App.4th at p. 134.) When AGC made its section 998 offer on May 16, 2008, AGC had not filed its cross complaint and would not do so until July 8, 2009. It was in this context that the language of AGC's section 998 offer becomes significant. That offer stated that "[p]ursuant to Code of Civil Procedure § 998, and in full settlement of *this action,* defendant American General Constructors hereby offers to pay plaintiff Atlas Construction Supply, Inc., the total sum of $65,000, in exchange for each of the following:

"1. Plaintiff Atlas Construction Supply, Inc., filing a Request for Dismissal of *the entire lawsuit*, with prejudice, with each party bearing its respective costs, expenses and attorney fees; and

"2. Plaintiff Atlas Construction Supply, Inc. executing and transmitting to counsel for defendant American General Constructors a release of the mechanics lien recorded by plaintiff Atlas Construction Supply, Inc. in a form that is acceptable for recordation by the County Recorder of Los Angeles County." (Italics added, some capitalization omitted.)

A section 998 offer is construed strictly in favor of the party sought to be subjected to its operation—here, Atlas. (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 727.) A section 998 offer must be analyzed with reference to the facts and circumstances existing at the time the offer was made. (*Elrod v. Oregon Cummins Diesel, Inc*. (1987) 195 Cal.App.3d 692, 699.) Here AGC made its settlement offer of $65,000 "in full settlement of this action" in exchange for Atlas's filing a request for dismissal of "the entire lawsuit[.]" AGC's section 998 offer can only be construed to refer to Atlas's complaint, because AGC had not filed its cross-complaint at the time of its section 998 offer and would not do so until more than 13 months later. Likewise the reference to a request for dismissal of "the entire lawsuit" can only refer to Atlas's complaint, which comprised the entire lawsuit at the time the section 998 offer was made. AGC's section 998 offer, moreover, made no offer to release its potential claims. Where a section 998

offer can only refer to settlement of a complaint, the operation of section 998 must likewise be limited to the judgment on that complaint, not to the judgment in the entire action. (*Westamerica Bank, supra*, 158 Cal.App.4th at p. 143-144.)

In *Westamerica Bank*, defendants who had filed a cross-complaint offered to settle the complaint only. Plaintiff refused that section 998 settlement offer and later recovered on the complaint, but on terms less favorable than defendants' settlement offer. *Westamerica Bank* held that defendants were entitled to recover postoffer costs even though defendants' offer to settle the complaint had not addressed any causes of action alleged in defendants' cross-complaint. (*Westamerica Bank, supra,* 158 Cal.App.4th at p. 135.) This was because defendants' "offer to settle only the amended complaint was valid to trigger the provisions of section 998 because acceptance of that offer by the 'other party to the action' would have allowed 'judgment to be taken.' (§ 998, subd. (b).)" (*Westamerica Bank,* at p. 135.)

The terms of AGC's settlement offer—"this action" and "the entire lawsuit"—referred to settlement of Atlas's complaint only. The trial court correctly analyzed the operation of section 998 as being limited to the judgment Atlas obtained on its complaint, not as extending to the judgment on both the complaint and AGC's cross-complaint. Atlas recovered $68,410.35 on its complaint, which was a more favorable judgment than the $65,000 in AGC's settlement offer. The trial court therefore correctly denied AGC's motion to be determined the prevailing party.

## DISPOSITION

The judgment is affirmed. In the cross-appeal the order denying AGC's motion to be determined prevailing party is affirmed. The parties are ordered to bear their own costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.