IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ANDY K. LEE, and KWUN KEE CO., INC., SAIPAN Plaintiffs, v. TAC INTERNATIONAL CONSTRUCTORS, INC., ANTONIO T. LIM, J.G. SABLAN ROCK QUARRY, CMS CONSTRUCTION AND MATERIAL SUPPLY, INC., CENTURY INSURANCE COMPANY, INC., and MANUEL F. CHARGALAUF, Defendants. ET AL.	)	Civil Action No. 96-349 **ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. PROCEDURAL BACKGROUND

This matter came before the Court on April 1, 1998, at 9:00 a.m. in Courtroom D on Plaintiff's motion for partial summary judgment. Charles R. Robart, Esq. appeared on behalf of Plaintiffs. Michael W. Dotts, Esq. appeared on behalf of Defendant TAC International Constructors, Inc. Steven P. Pixley, Esq. appeared on behalf of Defendant Century Insurance Company, Inc. Vincente T. Salas, Esq., appeared on behalf of Defendant Antonio T. Lim. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision. **[p. 2]**

FOR PUBLICATION

II. FACTS

In July 1994, Plaintiffs Andy K. Lee and Kwun Kee Co., Inc.(hereinafter referred to as "Lee" and "KKCI", respectively) entered into a construction contract agreement with Defendants TAC International Constructors, Inc. and TAC's president/general manager Antonio T. Lim (hereinafter referred to as "TAC" and "Lim", respectively) to build a three-story commercial and residential building in Garapan designated the VIP Building. The building was to be constructed primarily of concrete.

In December 1994, TAC procured a performance bond from Defendant Century Insurance Company, Inc. (hereinafter referred to as "Century"). The bond was for $380,000 and insured and guaranteed that TAC would perform all the terms and conditions of the agreement.

In November 1995, Defendants TAC and Lim represented to Plaintiffs that the building had been completed according to the plans and presented Plaintiffs with a Certificate of Acceptance. Shortly thereafter, Plaintiffs undertook to rent out the residential and commercial spaces in the building. Plaintiff KCCI also took up residence on the first floor. With the first rain, Plaintiffs noticed that the roof leaked and that concrete on the roof showed substantial cracking.

In March 1996, Plaintiffs hired Geotesting to take concrete core samples from the roof, third floor, and ground floor. The core samples showed an average strength of 1900 pounds per square inch (psi).[1] Rather than agreeing with the Geotesting results, Defendants TAC and Lim retained their own experts who took additional core samples from the building. The samples were again analyzed by Geotesting who determined that the average strength of the second set of core samples was 1913 psi.[2]

[p. 3] In July 1996, Plaintiffs filed suit alleging several causes of action including breach of

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[1] The roof samples showed a strength of 1775 psi and 2163 psi. The third floor samples showed a strength of 1662 psi and 2008 psi. The ground floor samples showed a strength of 1663 psi and 2149 psi. *See* Exhibit E to Declaration of Andy K. Lee in Support of Plaintiff's Motion for Partial Summary Judgment against TAC International and Century Insurance ("Lee Declaration").

[2] In May 1996, an additional twenty (20) core samples were taken from the roof slab, roof beams, second floor beams, second floor columns, third floor slab, third floor beams, and third floor columns. Sixteen of the core samples were tested which indicated a range of strengths from 1290 psi to 2568 psi. One sample from the second floor beam tested at a strength of 3145 psi. *See* Exhibit F to Lee Declaration.

contract, breach of express and implied warranties, and building code violations.

On February 2, 1998, Plaintiffs filed the instant motion seeking partial summary judgment against Defendant TAC for breach of contract, breach of express and implied warranties, and violation of the CNMI Building Code, and against Defendant Century for indemnity and payment of the bond.

III. ISSUES

1. Whether Plaintiffs are entitled to partial summary judgment against Defendant TAC on the first cause of action for breach of contract?

2. Whether Plaintiffs are entitled to partial summary judgment against Defendant TAC on the second cause of action for breach of express warranty?

3. Whether Plaintiffs are entitled to partial summary judgment against Defendant TAC on the third cause of action for breach of implied warranty?

4. Whether Plaintiffs are entitled to partial summary judgment against Defendant TAC on the ninth cause of action for violation of the CNMI Building Code?

5. Whether Plaintiffs are entitled to partial summary judgment against Defendant Century on the seventh cause of action for contractual and equitable indemnity?

6. Whether Defendant Lim's opposition should be stricken?

IV. ANALYSIS

A. Summary Judgment Standard

The standard for summary judgment is set forth in Rule 56 of the Commonwealth Rules of Civil Procedure. Rule 56(a) provides:

> A party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

Com. R. Civ. P. 56(a). Rule 56(c) continues:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is **[p. 4]** no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Com. R. Civ. P. 56(c). Partial summary judgments are authorized by Rule 56(d). Once a movant

for summary judgment has shown that no genuine issue of material fact exists, the burden shifts to the opponent to show that such an issue does exist. Riley v. Public School Sys., 4 N.M.I. 85, 89 (1994).

B. Breach of Contract

In their opposition to Plaintiff's motion for partial summary judgment, Defendants contend that the 3000 psi compression strength requirement was not part of the contract, nor was it incorporated into the plans and specifications. As such, Defendant TAC did not breach the contract. The Court disagrees.

It is a well established principle of law that statutory enactments in existence at the time of making a contract form a part of such contract, whether they were expressly referred to or not, and become incorporated in the contract as part of its terms. Cunningham v. Weyerhaeuser Timber Co., 52 F.Supp. 654, 656 (W.D.Wa.1943). Every contract is made subject to the laws which exist at the time the contract was made. Edwards v. United States, 215 F.Supp.382, 385 (U.S.D.C.KS 1963); *see also*, 17 C.J.S. § 22 ("The law in force at the time a contract is entered into governs the validity and construction thereof."). Municipal ordinances and city codes have been held to come within the rules just stated. See, i.e., Schiro v. W.E. Gould & Company, 165 N.E.2d 286 (Ill.1960); Denice v. Spotswood I. Quinby, Inc., 237 A.2d 4 (Ct.App.Md. 1968).

As cited above, the Court finds the Denice case to be helpful and relevant to the instant case. In Denice, the defendant-builder contracted with the plaintiff-purchaser to build a single-family residence. Prior to completion, the plaintiff inspected the work and noticed that the recreation room failed to meet the height requirements of the county building code. The plaintiff demanded that the room height be corrected, but the defendant refused. Upon the plaintiff's refusal to accept the premises, the defendant notified the plaintiff that he was in breach of the contract and that his purchase deposit had been forfeited. The plaintiff filed suit for breach of contract alleging that the **[p. 5]** recreation room did not conform to the building code. The trial court found for the defendant and plaintiff appealed. On appeal, the appellate court reversed by holding that compliance with the building code was an implied condition in the contract and as such, the defendant was in default and the plaintiff was justified in refusing to accept the premises.

On February 2, 1990, Public Law 6-45 was signed into law as the Building Safety Code[3] and codified at 2 CMC § 7101, et seq. 2 CMC § 7142 specifically adopted the 1988 edition of the Uniform Building Code (hereinafter referred to as the "UBC").[4] §2625(c) of the UBC requires that concrete buildings which reside in seismic zone 3 be constructed of concrete with a minimum strength of 3000 psi in all load-bearing components, including floors, roof, beams and columns.[5]

In June 1996, the Department of Building and Safety reviewed the compression test results of March 1996 and May 1996 after being contacted by Plaintiff Lee and Defendant TAC. The Department concluded that the compression strengths in the load-bearing components of the VIP Building were significantly less than that required by the UBC.[6] Based on this deficiency, the Department notified Plaintiff Lee that the VIP Building had been constructed with defective concrete and rescinded its certificate of occupancy. Moreover, the Department concluded that the building was to be demolished.[7] As noted in the Denice decision above, compliance with local building codes is an implied condition in a building contract. Because Defendant TAC constructed the VIP Building **[p. 6]** with concrete at less than the required compression strength, it failed to comply with the local building code and breached an implied condition in the contract.

Based on the foregoing, the Court finds that Defendant TAC failed to comply with the UBC as incorporated into the CNMI Building Safety Code. Therefore, Defendant TAC breached the construction contract and Plaintiffs are entitled to summary judgment as to their first cause of action.

B. Breach of Express Warranty

In their motion for partial summary judgment, Plaintiffs contend that Defendants breached

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[3] PL 6-45, "An Act to provide for a Building Safety Code of the Commonwealth of the Northern Mariana Islands and for other purposes." February 2, 1990.

[4] 2 CMC § 7142, "Uniform Building Code Adopted."

[5] "For purposes of earthquake design requirements, the Northern Mariana Islands are declared to be in Seismic Zone 3." 2 CMC § 7146.

[6] *See* Letter Declaration of Andrew Smith in Support of Plaintiff's Motion for Partial Summary Judgment against TAC International and Century Insurance, dated December 29, 1997 ("Smith Declaration"). *See also* letter dated June 24, 1996, from Andrew W. Smith, P.E. to Mr. Andy K. Lee, attached as Exhibit G to Lee Declaration.

[7] Id.

an express warranty in the building contract by constructing the building with defective concrete.[8] The Court agrees.

A warranty that a building will be erected in a workmanlike manner, free from any material defects, constitutes a contractual agreement that the work will be performed in a proper manner, and that there do not exist any significant defects in the structure. Newcum v. Lawson, 684 P.2d 534, 540 (N.M.App. 1984). As discussed above, the load-bearing structural components of the VIP Building were required by law to be constructed of concrete with a minimum compressive strength of 3000 psi. Moreover, the Department of Building and Safety specifically concluded that the concrete in the load-bearing components was defective vis-a-vis the UBC.[9] Defendant TAC specifically warranted in Article 10 of the construction contract that the building would be free from defective or inferior materials. However, in constructing the VIP Building with inferior *and* defective concrete, Plaintiff was denied a permit for permanent occupancy. As such, the Court finds that Defendant TAC breached the express warranty in the construction contract. Therefore, Plaintiffs' motion for summary judgment as to their second cause of action is granted. **[p. 7]**

C. Breach of Implied Warranty

Plaintiffs contend that they are entitled to summary judgment as to their third cause of action for breach of implied warranty in that the VIP Building was built with substandard concrete. The Court agrees.

In order to recover for breach of an implied warranty of fitness for a particular purpose, a plaintiff must show by a preponderance of the evidence that (1) the seller at the time of the contracting had reason to know the particular purpose for which the goods were required; (2) reliance by the plaintiff as buyer upon the skill and or judgment of the seller to select suitable goods, and (3) that the goods were unfit for the particular purpose. R. Clinton Construction Company v.

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[8] ARTICLE 10. WARRANTY: The contractor warrants to the owner that the building including appurtenances are constructed in substantial conformity with the drawings and specifications and all mechanical and electrical work performed to be in accordance with the contract requirements and free from defective on (sic) inferior materials, equipments and workmanship for a period of one (1) year from the date of initial occupancy.

[9] *See* footnote 6, supra.

Bryant & Reaves, Inc., 442 F.Supp. 838, 845 (U.S. Dist. Ct. N.D.Miss 1977).

In the instant case, it is undisputed that Defendant TAC was aware of the particular purpose for which the cement was required, to wit, construction of the VIP Building.[10] Lee and KKCI ,as plaintiff-buyers, left selection of the particular goods (cement) to Defendant TAC in reliance on the latter's skill and judgment - facts of which Defendant TAC was aware of, and concerning which Defendant TAC interposed neither disclaimer nor exclusionary limitation.[11] Finally, the concrete provided by Defendant TAC was tested and found to be substantially less that than 3000 psi, as required by the UBC via the Building Safety Code. Thus, under the applicable legal standard, Defendant TAC breached the implied warranty of fitness for a particular purpose. Therefore, Plaintiffs are entitled to summary judgment as to their third cause of action.

D. Violation of the CNMI Building Safety Code

In opposing summary judgment as to Plaintiffs' ninth cause of action for building code violations, Defendant TAC contends: (1) that Plaintiffs lack standing to assert a cause of action for violation of the CNMI Building Code, (2) that Plaintiffs have failed to allege special damages to **[p. 8]** support a cause of action for public nuisance, and (3) that no violation of the CNMI Building Code has occurred. The Court disagrees.

1. Standing

The CNMI Building Safety Code provides for a private right of action for individuals who are damaged as a result of violations of the building safety code. 2 CMC § 7126(d) provides the following:

> (d) Private Action. Notwithstanding any other remedies available, any person damaged economically, injured, or otherwise aggrieved as a result of a violation of the building safety code has a cause of action against the person who committed the violation. Violation of the building safety code shall constitute a per se public nuisance. An award shall include damages and the costs of litigation including reasonable attorney's fees.

2 CMC § 7126(d).

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[10] *See* Construction Contract Agreement, attached as Exhibit A to Lee Declaration.

[11] Even Defendant TAC's architectural engineer was aware that the compressive strength should have been at least 3000 psi. *See* Declaration of Rogelio B. Salavaria in Support of Opposition to Plaintiff's Motion for Partial Summary Judgment, ¶ 14, dated February 26, 1998.

Based on the above statute, it is clear that the CNMI Building Code does provide a private right of action for violations of the building code. As owners of the building at issue, the Court finds that Plaintiffs do have standing to assert such a cause of action.

2. Special damages

To support their argument that Plaintiffs must allege special damages to support this cause of action, Defendant TAC points to a prior order by this Court in which it dismissed Defendant TAC's third cause of action in its counterclaim for abatement of nuisance. The Court opined that Defendant TAC failed to allege special damages distinctive from the alleged damages suffered by the general public. As such, Defendant TAC had no standing to maintain a claim for public nuisance.[12] Based on the prior order, Defendant TAC reasons that the instant Court should render a similar decision since Plaintiffs have not alleged special damages. However, Defendant TAC's cause of action for public nuisance was based on the common law and not under 2 CMC § 7126. Moreover, a simple review of Plaintiffs' ninth cause of action shows that is for violation of the CNMI Building Code, not for public nuisance. Therefore, the Court finds that special damages need not be alleged to support a cause of action under 2 CMC § 7126(d).

[p. 9] 3. Violation of the CNMI Building Code

As discussed at length above, all statutory enactments in existence at the time of the making of the contract form a part of the contract whether expressly referred to or not. Cunningham, supra. The UBC, as adopted by the CNMI Building Code, expressly requires that concrete buildings in seismic zone 3 be constructed of concrete with a minimum strength of 3000 psi in all load-bearing components of the building. After reviewing the compression test results from March 1996 and May 1996, the Building Safety official at the time concluded that the concrete in the load-bearing components the VIP Building failed to comply with the required minimum strength of 3000 psi.[13] As such, it was defective and violated the UBC.

Based on the foregoing, the Court finds that Plaintiffs are entitled to summary judgment as

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[12] *See* Order re Motion to Dismiss Second and Third Causes of Action of Counterclaim, filed January 14, 1997, pp. 5-7.

[13] *See* Footnote 6, supra.

against Defendant TAC on their ninth cause of action for violation of the CNMI Building Code. Defendant TAC has failed to raise a triable issue of fact as to this cause of action.

E. Century's Duty on the Performance Bond

Plaintiffs contend that they are entitled to summary judgment as against Defendant Century on the seventh cause of action for contractual and equitable indemnity in light of Defendant TAC's breach of the construction contract. The Court agrees.[14]

Generally, a suit under a surety bond does not arise until the principal breaches the underlying contract. R.E. Monks Construction Company v. Aetna Casualty & Surety Company, 944 P.2d 517, 520 (Ariz.App. Div.1 1997). However, as discussed above, the Court finds that Defendant TAC did in fact breach the underlying contract. Therefore, according to the terms of the bond, Defendant Century is bound by its obligation on the bond to pay Plaintiff KKCI the penal sum of $380,000.[15]

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F. Plaintiff's Motion to Strike Defendant Lim's Opposition

Although Plaintiffs moved for partial summary judgment as against Defendant TAC and Century Insurance only, Defendant Lim filed an opposition. Plaintiffs moved to strike the Lim opposition pursuant to Com.R.Civ.Proc.Rule 12(f), alleging that Defendant Lim is not a proper party respondent. Plaintiffs concede in their motion to strike that the motion for partial summary judgment involves Defendants TAC and Century only. This Court has already found that Defendant TAC is not the alter ego of Defendant Lim or that Defendant Lim is personally responsible for TAC's liabilities.[16] Moreover, the first three causes of action in Plaintiff's Second Amended Complaint (breach of contract, breach of express warranty, and breach of implied warranty) were dismissed by this Court as to Defendant Lim.[17] However, the ninth cause of action for violation of the CNMI Building Code has not been dismissed as against Defendant Lim. Although the motion for partial

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[14] Defendant Century did not file a written opposition to the instant motion, but joined in Defendant TAC's opposition. Defendant TAC's opposition did not address the issue of indemnity.

[15] *See* Performance Bond, attached as Exhibit C to Lee Declaration.

[16] *See* Order Granting Summary Judgment to Defendant Antonio T. Lim, filed January 6, 1997.

[17] *See* Order Granting Plaintiffs' Motion for Reconsideration in Part, filed March 19, 1997.

summary judgment does not on its face ask for relief against Defendant Lim, he remains a party defendant in this matter. In addition, Plaintiffs make several references to Lim in their memorandum and supporting affidavits and even ask the Court to hold Lim liable for building code violations.[18] Based on the references to Defendant Lim regarding allegations of building code violations, the Court finds that Defendant Lim should be allowed to oppose and refute Plaintiffs' assertions. As such, Plaintiffs' motion to strike Defendant Lim's opposition is denied

[p. 11] **V. CONCLUSION**

For all the reasons stated above, Plaintiffs' motion for partial summary judgment is **GRANTED** as to the first, second, third, seventh and ninth causes of action in the second amended complaint. Plaintiffs' motion to strike the opposition of Defendant Lim is **DENIED**.

So ORDERED this 21 day of September, 1998.

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Associate Judge

[18] *See, for example*, Memorandum of Points and Authority in Support of Plaintiff's Motion for Partial Summary Judgment, p.10.