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Case No.: _____

**IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA**

**UNITED RIGGERS & ERECTORS, INC.,
Plaintiff and Respondent,**

vs.

**COAST IRON & STEEL CO.,
Defendant and Appellant.**

**SUPREME COURT
FILED**

JAN 20 2016

Frank A. McGuire Clerk

Deputy

After a Decision By the Court of Appeal,
Second Appellate District, Division One
Case No. B258860

PETITION FOR REVIEW

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**TO THE HONORABLE CHIEF JUSTICE AND HONORABLE
ASSOCIATE JUSTICES OF THE SUPREME COURT OF
CALIFORNIA:**

Petitioner Coast Iron & Steel Co. (“Coast”) seeks review of the published opinion by the Court of Appeal, Second Appellate District, Division One, filed November 23, 2015, and modified on December 3, 2015 (Exhibit “A”). Order for publication on December 18, 2015. No rehearing was requested.

QUESTION PRESENTED FOR REVIEW

This case presents the following questions for review:

Issue One - the meaning of *Civil Code* §§ 8814 and 8818.

The Court of Appeal below identified the issue as follows: “at issue is whether a contractor may withhold the retention when there is a good faith dispute of any kind between the contractor and a subcontractor, or only when the dispute relates to the retention itself.”

Issue Two - determination of attorneys fees.

Where a plaintiff sues for retention under *Civil Code* §8814 and late payments under *Business and Professions Code* §7108.5 and prevails on the retention issues but the defendant prevails on the late payment issues, how are attorneys fees determined?

WHY REVIEW SHOULD BE GRANTED

California intermediate courts are in conflict with regard to the progress payment and retention payment statutes of the State. Contractors and governmental authorities need guidance as to how to conduct themselves in the thousands of construction disputes that occur every year in California.

There is a statutory scheme in California with regard to payment of retention and progress payments both with regard to public works and private construction projects. (*Public Contract Code* §7107, *Business and Professions Code* §7108.5, and *Civil Code* §8800 et seq.). These statutes are functional equivalents. There are no published decisions discussing *Business and Professions Code* §7108.5 or *Civil Code* §8800 et seq. There are two published opinions that address *Public Contract Code* §7107. The Trial Court in this case relied upon *Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.* (2009) 179 Cal.App.4th 1401 (“*Martin Brothers*”) for guidance. During the pendency of the appeal, a panel in the Second District issued its opinion in the *East West Bank v. Rio School District* (2015) 235 Cal.App.4th 742 (“*East West Bank*”) case which was completely contrary to the *Martin Brothers* opinion. The panel in this case followed the *East West Bank* opinion, but ignored *Business and Professions Code* §7108.5 and the fact that under any circumstance, Defendant prevailed under that statute.

This Court's guidance in this case will provide the entire construction industry in California with insight into the statutory payment and retention rules for both public and private projects.

The appellant subcontractor in *Martin Brothers* argued that section 7107(e) "cannot be applied to allow withholding of undisputed retentions." *Martin Brothers, supra*, at 1411. The court there rejected the argument that section 7107(e) only allowed withholding where there is a dispute over retention, as opposed to a dispute over other matters such as claims for extra work. Justice Cantil-Sakauye explained:

The statute contains no language restricting the word "dispute" to any particular kind of dispute other than it must be "bona fide." The ordinary meaning of "dispute" is a "verbal controversy," a "debate," or "quarrel." (Merriam-Webster's Collegiate Dict. (11th ed.2006) p. 362, col. 1.) A controversy, debate or quarrel, i.e., a dispute, does not change its character depending on its subject. The subject is immaterial to its nature as a dispute. Indeed, in the context of construction litigation, a dispute may arise between a general contractor and a subcontractor concerning any number of subjects, including, but not limited to, nonperformance, improper or substandard performance, the timing of performance, or additional performance of work.

Martin Brothers, supra, at 1412.

In its opinion, the Court in the instant case stated:

The *Martin Brothers* court affirmed the trial court's judgment denying the subcontractor relief. (*Martin Brothers, supra*, 179 Cal.App.4th at pp. 1417-1418.) The court rejected the subcontractor's argument that, because the statute was

intended to protect subcontractors, contractors were entitled to withhold retention payments only if there was a dispute over the amount of retention owed. (*Id.* at p. 1411.) It concluded that the statute was not ambiguous: "The statute contains no language restricting the word 'dispute' to any particular kind of dispute other than it must be 'bona fide.'" (*Id.* at p. 1412.)

In reaching that conclusion, the court in *Martin Brothers* failed to pay sufficient heed to our Supreme Court's instruction that, when interpreting the plain meaning of a statute, "[w]e do not examine [its] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) As the *Martin Brothers* court acknowledged, the remedial purpose of the prompt payment statutes is "to encourage general contractors to pay timely their subcontractors and to provide the subcontractor with a remedy in the event that the contractor violates the statute." (*Martin Brothers, supra*, 179 Cal.App.4th at p. 1410, quoting *Morton Engineering & Construction, Inc. v. Patscheck* (2001) 87 Cal.App.4th 712, 720.) Yet its interpretation of "dispute" promoted the opposite result."

The court then adopted the *East West Bank* analysis but assumed there was no *Business and Professions Code* §7108.5 issue.

Second, if this Court adopts the analysis of the *East West Bank* Court, which it should not, an additional issue is raised. In this case, plaintiff pled a cause of action for recovery of retention (*Civil Code* §8814) and also for delayed payment (*Business and Professions Code* §7108.5). The Trial Court ruled that Coast prevailed on both issues. The Court of Appeals below held that Coast prevailed on the delayed payment issue but that United Riggers

prevailed on the retention issues. If United Riggers prevailed on the retention issue, and Coast prevailed on the delayed payment issue, how should the trial court, on remand, determine the attorney fee award?

SUMMARY OF THE CASE

Coast is a licensed contractor and steel fabricator. United Riggers is a licensed contractor and erector. Both Coast and United Riggers submitted competing bids for a project at Universal Studios known as Project Dervish. Universal, the owner of the project, accepted Coast's bid, and on October 18, 2010, entered into a contract (the "Construction Contract") with Coast to provide Miscellaneous Metals Work for the project. (Volume 1 of Clerk's Transcript "CT" pages 26-128). Coast then hired United Riggers as a subcontractor on or about May 31, 2011 for the project by way of a purchase order. (1 CT 129). The parties entered into the lump sum purchase order in which Coast agreed to pay United Riggers \$722,742.00 for its work.

Under the purchase order between Coast and United Riggers, United Riggers agreed to "furnish all labor, supervision, equipment, supplies, tools, scaffolding, hoisting, layout, unloading and handling, incidentals, permits, licenses, taxes and everything else required to perform and complete the work required to install all Miscellaneous Steel per the Subcontract Agreement between Coast Iron & Steel Co. and Universal City Studios LLLP dated

10-18-10 (USH-10-6313-AMJ), which is attached and made a part of this agreement. All work is to be performed in accordance with the General Contract and the Contract Documents referred to in the General Contract. . . .All work is to be performed per the project schedule which is subject to change." (1 CT 129) (emphasis added).

The purchase order also states that United Riggers "agrees to be bound to Coast Iron & Steel Co. as Coast Iron & Steel Co. is bound to the Contractor and as the Contractor is bound to the Owner." (1 CT 129).

There were several issues that affected the project at Universal Studios; Both parties were well aware of these potential exigencies which were detailed in the Construction Contract. (1 CT 37: 1.4) First, the project could be shut down on a moment's notice due to filming, as Universal Studios is a functioning film studio. (Volume 4 of Reporter's Transcript "RT" page 1527, lines 23-26). Parking and storage at the job site was extremely limited since the project was located in a functional film studio and amusement park. Each contractor was limited to one parking pass. (4 RT 1526:26-1527:20).

The original lump sum purchase order called for Coast to pay United Riggers \$722,742.00. However, through a series of change orders, Coast paid an additional \$773,237.50 to United Riggers. (3 CT 922:1-4). *See also*, Trial Court's Statement of Decision page 2, lines 18-21, Exhibit 1 to Appellant's

Motion to Augment the Record "MA"). This additional amount more than doubled the purchase order price to a total of \$1,495,979.50 that was paid to United Riggers. The additional amount was paid through a series of change orders authorized by the Construction Contract. (Paragraph 12.2 of the Construction Contract, which is incorporated into the purchase order, covers "Claims for Increases in the Contract Sum" 2 CT 125.) That provision specifically requires that written notice of claims for extra compensation be given no "later than three (3) days after the occurrence of the event giving rise to the claim..." (Id.)

Throughout the duration of the project, United Riggers utilized the process of submitting change order requests when the scope of work changed. United Riggers was compensated accordingly when those change orders were approved by Universal, which represented the additional \$773, 237.50 paid to United Riggers.

Shortly after work was completed at Project Dervish, on or about March 27, 2012, United Riggers sent Coast a "claim" for payment for extra work. United Riggers demanded that Coast pay an additional \$352,542.40 by claiming that Coast lost parts, failed to communicate properly, made fabrication errors, caused delays, and failed to pay outstanding change orders. (Exhibit 3 to AOB). Coast disputed these claims. United Riggers filed its

complaint on January 24, 2013.

United Riggers sued Coast (in part) under *Civil Code* §§ 8814, 8818 (wrongful withholding of retention) and *Business and Professions Code* §7108.5 (delayed progress payments). See Complaint Third Cause of Action, (1 CT 19).

After a nine day bench trial between May 12 and 22, 2014, the Trial Court found that United Riggers' claims for money as set forth in its complaint were not submitted for approval via the change order process required by Paragraph 12.2 of the Construction Contract. (Exh. 1 to MA 2:22-27). Notably, United Riggers' own expert witness testified that any extra work by United Riggers was the "direct result of disruption caused by [Universal]'s scope changes" (4 RT 1232:21-25). The Trial Court entered its Statement of Decision on July 15, 2015 (Exh. 1 to MA). Coast then moved for its attorney fees on July 29, 2015 (2 CT 272-287), to which United Riggers filed an opposition on August 14, 2015 (2 CT 288-307), and Coast filed a reply on August 21, 2014 (2 CT 325-330). United Riggers filed a motion to strike or tax costs on August 15, 2014 (2 CT 312-324), to which Coast filed an opposition on August 28, 2014 (2 CT 338-351). After carefully considering written briefs and oral arguments, the Trial Court awarded Coast \$150,000 in attorney fees. United Riggers filed its notice of appeal on September 11, 2014.

DISCUSSION OF LEGAL PRINCIPALS

THE TRIAL COURT WAS CORRECT IN HOLDING THAT COAST DID NOT VIOLATE THE PROMPT PAYMENT STATUTES.

A. The Prompt Payment Statutes

"California has a series of so-called 'prompt payment' statutes that require general contractors to pay their subcontractors within specified, short time periods, and that impose monetary penalties for violations. *Business and Professions Code* section 7108.5 and *Public Contract Code* section 7107 are two of those statutes." *Martin Brothers. Const., Inc. v. Thompson Pacific Const., Inc.* (2009) 179 Cal.App.4th 1401, 1409 (quoting *Tesco Controls, Inc. v. Monterey Mechanical Co.* (2004) 124 Cal.App.4th 780, 800).

1. California Civil Code section 8814:

(a) If a direct contractor has withheld a retention from one or more subcontractors, the direct contractor shall, within 10 days after receiving all or part of a retention payment, pay to each subcontractor from whom retention has been withheld that subcontractor's share of the payment.

(b) If a retention received by the direct contractor is specifically designated for a particular subcontractor, the direct contractor shall pay the retention payment to the designated subcontractor, if consistent with the terms of the subcontract.

(c) If a *good faith dispute* exists between the direct contractor and a subcontractor, the direct contractor may withhold from the retention to the subcontractor an amount not in excess of 150 percent of the estimated value of the disputed amount.

Civil Code §8814 (emphasis added).

2. California Business and Professions Code section 7108.5

California Business and Professions Code section 7108.5 states in relevant part:

(a) A prime contractor or subcontractor shall pay to any subcontractor, not later than seven days after receipt of each progress payment, unless otherwise agreed to in writing, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest therein. In the event that there is a ***good faith dispute*** over all or any portion of the amount due on a progress payment from the prime contractor or subcontractor to a subcontractor, the prime contractor or subcontractor may withhold no more than 150 percent of the disputed amount.

(b) Any violation of this section shall constitute a cause for disciplinary action and shall subject the licensee to a penalty, payable to the subcontractor, of 2 percent of the amount due per month for every month that payment is not made.

(c) In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs.

Bus. & Prof. Code §7108.5 (emphasis added). United's third cause of action was based on this statute.

3. California Public Contract Code section 7107

California Public Contract Code section 7107 states in relevant part:

(c) Within 60 days after the date of completion of the work of improvement, the retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. For purposes of this subdivision, "completion" means any of the following:

[...]

(e) The original contractor may withhold from a subcontractor its portion of the retention proceeds if a *bona fide dispute* exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount.

(f) In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in *any action* for the collection of funds wrongfully withheld, the *prevailing party* shall be entitled to attorney's fees and costs.

Pub. Contract Code, §7107 (emphasis added).

B. The Prompt Payment Statutes Are Analogous to One Another

Business and Professions Code section 7108.5 and *Public Contract Code* section 7107 are functional equivalents of each other. More support for this interpretation can be found in *Tesco Controls, Inc, supra*, which stated that "[i]n the event there is a bona fide dispute over the amount owed, both statutes authorize the general contractor to withhold up to 150 percent of the disputed amount. (*Bus. & Prof.Code*, §7108.5; *Pub. Contract Code*, §7107, subd. (e).) Both statutes award attorneys fees and costs to the prevailing party in an action to collect amounts wrongfully withheld. (*Bus. & Prof.Code*, §7108.5; *Pub. Contract Code*, §7107, subd. (f)." *Tesco Controls, Inc.* at 767.

The prompt payment statutes' share the same intent. In essence, the statutes contain nearly identical provisions that permit the withholding of

retention payments in the event of a bona fide good faith dispute. Coast is unaware of, and United Riggers did not cite to, any authority that states the intent or interpretation of *Public Contract Code* section 7107(e) is different than that of *Bus. & Prof. Code* section 7108.5, or *Civil Code* sections 8814 and 8818. In interpreting analogous statutes, courts have interpreted "bona fide dispute" to mean "good faith dispute." See, e.g., *Taylor v. Van-Catlin Construction* (2005) 130 Cal.App.4th 1061, 1069 with respect to *Civil Code* section 3260(e). See also, *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1339 (stating that "good faith dispute" to mean "that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation" with respect to *Bus. & Prof. Code* section 7108.5.)

C. *Martin Brothers v. Thompson Pacific Const., Inc.* Sets Forth The Correct Interpretation of the Prompt Payment Statutes.

The concept of *East West Bank* case's limitation of the term "dispute" in section 7107(c) was expressly considered and rejected in *Martin Bros. Const., Inc. v. Thompson Pacific Const., Inc.* (2009) 179 Cal.App.4th 1401. The California Supreme Court denied petition for review of *Martin Brothers* on March 24, 2010. In that case, the subcontractor, Martin Brothers, submitted change order requests for compensation for extra work that it alleged the

contractor, Thompson Pacific directed or that were otherwise required. *Id.* at 1406. The dispute was about additional compensation that the subcontractor contended was owed over and above the agreed contract price for work that was allegedly outside the scope of the contract. The appellate court ruled that a general contractor could withhold retention without violating the prompt-payment statutes if there exists a good faith dispute between the parties. *Id.* at 1414.

The appellant subcontractor in *Martin Brothers* argued that section 7107(e) "cannot be applied to allow withholding of undisputed retentions." *Martin Brothers* at 1411. The court there rejected the argument that section 7107(e) only allowed withholding where there is a dispute over retention, as opposed to a dispute over other matters such as claims for extra work. Justice Cantil-Sakauye explained:

The statute contains no language restricting the word "dispute" to any particular kind of dispute other than it must be "bona fide." The ordinary meaning of "dispute" is a "verbal controversy," a "debate," or "quarrel." (Merriam-Webster's Collegiate Dict. (11th ed.2006) p. 362, col. 1.) A controversy, debate or quarrel, i.e., a dispute, does not change its character depending on its subject. The subject is immaterial to its nature as a dispute. Indeed, in the context of construction litigation, a dispute may arise between a general contractor and a subcontractor concerning any number of subjects, including, but not limited to, nonperformance, improper or substandard performance, the timing of performance, or additional performance of work. *Martin Brothers* at 1412.

The opinion in *Martin Brothers* confirmed the Legislature's intent was to make the test for liability under section 7107(c) whether there is a *bona fide dispute* between the parties, not whether there is a correct *type* of bona fide dispute.

The *Martin Brothers* court stated "[w]hen statutory language is clear and unambiguous there is no need for construction, and we will not indulge in it. We will not speculate that the Legislature meant something other than what it said. Nor will we rewrite a statute to posit an unexpressed intent." *Martin Brothers* at 1411 (internal citations omitted). See also, *People v. Gardeley* (1996) 14 Cal.4th 605, 621 (the words of the statute "generally provide the most reliable indicator of 'legislative intent' and when language of a statute is clear and unambiguous, there is no need for construction"); *People v. Connor* (2004) 115 Cal.App.4th 669, 678 (courts should give words in a statute their usual and ordinary meaning, and the plain meaning governs if there is no ambiguity.) A "bona fide dispute" means a "bona fide dispute," not a particular *type* of bona fide dispute. The term "dispute" is not ambiguous and not as limited as *United Riggers* would lead the Court to believe.

"When we 'scrutinize the actual words of the statute, giving them a plain and commonsense meaning', we conclude the exception of section 7107(e) applies to *any* good faith dispute between a general contractor and

subcontractor." *Martin Brothers* at 1414 (citation omitted; emphasis added). *Any* good faith dispute qualifies, not just certain types of disputes such as mechanics' liens. Accordingly, the Trial Court did not err in applying the analogous *Business & Professions Code* section 7108.5 when it held that there was a "good faith dispute" between the parties and that Coast did not violate the prompt payment statutes. The trial court correctly followed *Martin Brothers*.

D. *East West Bank's* Narrow Definition of "Dispute" Is Incorrect

The decision in *East West Bank v. Rio School District* (2015) 235 Cal.App.4th 742 cited by United Riggers ignores both established California law and the realities of the construction industry.

The court in *East West Bank* erroneously held that "a dispute over the contract price does not entitle a public entity to withhold funds due a contractor." (*East West Bank* at 745). The court there held that "dispute" as stated in section 7107 is limited to only mean "mechanic liens and deficiencies in the contractor's performance." (*Id* at 749). This narrow reading of "dispute" finds no basis in the legislative history of the statute and departs from the plain meaning of the statute. If the Legislature had wanted to limit disputes covered under the prompt payment statutes to only those two types of disputes, it would have done so, but did not. The court in *East West Bank* noted that the qualifier

"good faith" was added in *Civil Code* section 8812, subdivision (c), the analogous prompt payment statute for private works projects. (Id at 749). The recodification of *Civil Code* section 3260(c) into *Civil Code* section 8812 became operative in July, 2012 - three years *after* *Martin Bros. Const., Inc. v. Thompson Pacific Const., Inc.* (2009) 179 Cal.App.4th 1401 was decided. However, the Legislature did not amend section 7107 to add the term "good faith." Clearly, the Legislature reviewed the statutes and had every opportunity after the *Martin Brothers* decision to expressly limit the *type* of dispute to mechanic liens or contractor's performance, but declined to do so. The Legislature likewise could have added other limiting language to the term "dispute" but did not. It is evidently clear that the Legislature adopted the *Martin Brothers'* interpretation of the term "disputes" and decided not to disturb that ruling by revising the prompt payment statutes. "When the legislature has employed a term or phrase in one place and excluded it from another, it should not be implied where excluded." *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576.

More importantly, however, is the court's reasoning for declining to imply missing terms from the bench like the court in *East West Bank*: "[W]e will not imply terms where the legislature has excluded them in both statutes." *Alpha Mechanical* at 1340 citing to *People v. Gardeley* (1996) 14 Cal.4th 605,

622 ["When the Legislature has used a term or phrase in one part of a statute but excluded it from another, courts do not imply the missing term or phrase in the part of that statute from which the Legislature has excluded it"]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 725; *Citizens for Better Streets v. Board of Supervisors of San Francisco* (2004) 117 Cal.App.4th 1, 6 [court will not presume intention to legislate by implication]. The Court below adopted the *East West Bank* analysis and applied it to private works projects. In doing so, it declined to adopt the more sound analysis in *Martin Brothers*.

E. Coast Provided Compelling Evidence of the Disputes in United Riggers' Claims

Unlike the court in *East West Bank*, the court in *Martin Brothers* correctly understood the realities of construction litigation in that disputes may not be so easy to characterize:

[T]he precise nature of the dispute may be difficult to characterize. For example, what may be additional performance in the eyes of a subcontractor may be performance of the terms of the contract or correction of inadequate performance in the eyes of the general contractor. There may be questions over double billing, excessive billing, or allocation of billing. Thus, the nature or subject of a dispute in construction litigation is open to many possibilities. *Martin Brothers* at 1412.

The disputes between United Riggers and Coast are precise types of disputes that the *Martin Brothers* court contemplated in reaching its decision. United Riggers considered its work "additional performance" while Coast

successfully proved at trial that United Riggers' work was simply "the performance of the terms of the contract." There were also questions over double billing and excessive billing. Coast's witness Scott Sullivan testified at length about the dozens of change orders that United Riggers belatedly submitted. Mr. Sullivan testified to the satisfaction of the Trial Court that the change orders were for work already done or change orders already paid.

THE TRIAL COURT WAS CORRECT IN ITS AWARD OF REASONABLE ATTORNEYS FEES TO COAST

The Legislature added the 2% per month penalty provisions to the prompt payment statutes to give contractors an effective weapon against anyone who wrongfully withheld retention funds on a construction project. However, the Legislature also added that the *prevailing party shall* be entitled to reasonable attorney's fees and costs in any action for the collection of wrongfully withheld funds. The language and the purpose of the attorneys' fee provision is clear: A contractor or sub-contractor who misuses the powerful 2% per month penalty as a threat against an innocent defendant may be liable for attorney fees. This reciprocal attorney-fee provision is a disincentive against the coercive misuse of the prompt payment statutes. In this case, United Riggers asserted violations of *Civil Code* sections 8814, 8818 and *Business and Professions Code* section 7108.5 against Coast based on Coast's alleged wrongful withholding of the retention funds and late progress

payments. The Trial Court was correct in ruling that United Riggers did not prevail on its prompt payment claims. Because there was a good faith dispute between the parties that entitled Coast to withhold the retention. (Statement of Decision 5:1-2). United Riggers also did not prevail on its wrongful retention claims.

In *Martin Brothers*, the appellate court affirmed the trial court's conclusion that the defendant had not violated the applicable prompt payment statutes and was thus entitled to an award of \$150,000 in attorney fees. *Martin Brothers* at 1405. The Court of Appeal there noted that although section 7107 is a remedial statute designed to encourage timely payment of retention, section 7107 also contains the mandatory reciprocal attorney-fee provisions that "reflects the Legislature's balancing of the competing interests" of the parties to the construction contract. *Martin Brothers* at 1414. See also, *Hinerfeld-Ward, Inc. v. Lipian* (2010) 188 Cal.App.4th 86, 102 (holding that the legislative history of *Civil Code* 8814 and 8818 (formerly section 3260.1) demonstrates a legislative intent that both the monthly two percent charge and reasonable attorney fees are available to a party prevailing on an action under that statute.)

The intent of the Legislature is clear: any contractor that tries to misuse the penalty provisions as a means to coerce payment of retention funds will be

subject to paying an innocent defendant's attorney fees. "If the Legislature had intended only the successful demanding party to receive attorney fees, it would have so stated instead of permitting an award to the "prevailing party." There is simply no logical reason to punish the party who was not at fault—who *justifiably* retained payment in good faith—by denying that party attorney fees for successfully defending against the other party's action for payment." *Taylor v. Van-Catlin Const.* (2005) 130 Cal.App.4th 1061, 1069. (emphasis in original).

Here, the Trial Court correctly concluded that Coast is the prevailing party because it did not violate the prompt payment statutes, and properly awarded it attorney fees.

COAST WAS THE PREVAILING PARTY

Generally, a trial court's determination of a "prevailing party," within the meaning of an attorney-fee award statute, "should be affirmed on appeal absent an abuse of discretion." *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574.

When a prevailing-party attorney fee statute does not define the term "prevailing party," the courts apply a pragmatic test to determine if one party in fact prevailed. See, *Winick Corp. v. Safeco Insurance Co.* (1986) 187 Cal.App.3d 1502, 1508. ("undertaking a 'pragmatic inquiry' into whether the