

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GREAT WESTERN DRYWALL, INC.,

Plaintiff, Cross-Defendant and
Appellant,

v.

ROEL CONSTRUCTION CO., INC.,

Defendant, Cross-Complainant and
Appellant.

D049191

(Super. Ct. No. GIC818575)

APPEALS from a judgment and order of the Superior Court of San Diego County, Thomas O. LaVoy, Ronald S. Prager and Janis Sammartino, Judges. Judgment affirmed in part and reversed in part; order affirmed.

Great Western Drywall, Inc. (Great Western) and Roel Construction Co., Inc. (Roel), appeal a judgment entered after a bench trial on their respective actions arising from a construction subcontract. Roel's sole contention is that the court erred by

awarding Great Western prejudgment interest on its liquidated contract claims since Roel's damages exceed Great Western's damages and entirely offset the interest award.

Great Western challenges the sufficiency of the evidence to support certain items of damage the court awarded Roel, contends the court erred as a matter of law by awarding Roel a cleanup contribution not directly attributable to Great Western, and abused its discretion by denying Great Western prejudgment interest on unliquidated contract claims. Great Western also appeals a postjudgment order in which the court denied it penalty interest under Business and Professions Code section 7108.5 for Roel's failure to promptly make progress payments.

We find in Roel's favor on its appeal, and we find in Great Western's favor on the cleanup contribution issue. In all other respects, we affirm the judgment. We also affirm the postjudgment order.

FACTUAL AND PROCEDURAL BACKGROUND

Roel was the general contractor on the Renaissance Marina condominium project in San Diego, which consists of 218 units in two towers. In April 2001 Roel and Great Western entered into a subcontract for Great Western to install metal studs, drywall, lath and plaster and the exterior insulation finish system at the project.

Great Western worked on the project for about two years. The original amount of the subcontract was approximately \$4.5 million, but numerous approved change orders increased the amount to more than \$7.7 million. Roel did not approve numerous change order requests (COR's) by Great Western, and in July 2003 Great Western recorded a mechanic's lien against the Renaissance property.

In September 2003 Great Western sued Roel for breach of contract and related counts, alleging Roel underpaid it on extra work. Roel cross-complained against Great Western for breach of contract and related counts, and negligence. The cross-complaint alleged Roel was damaged by Great Western's failure to adequately perform its work, by its abandonment of the project before its work was complete, and by its damage to the work of others, such as the scratching of window glass. Each breach of contract claim for damage to the work or property of others was alternatively pleaded as a tort claim.¹

On November 29, 2005, after a four-day bench trial, the court issued a written ruling that awarded Great Western \$332,106 and awarded Roel \$320,848. The award to Roel included \$156,993 for glass replacement, and additional amounts to repair other property damages Great Western caused. The award did not specify whether Roel's recovery for property damages was on a contract or tort theory. The award to Great Western included \$251,263 in COR's that Roel admitted in discovery were undisputed, and \$57,534 in prejudgment interest on that amount. The court found there was no prevailing party for purposes of fees and costs. The ruling ordered Great Western "to prepare a judgment reflecting this decision if a Statement of Decision is not requested by either party."

On December 1, 2005, Roel moved ex parte for stay of entry of judgment, arguing the award of prejudgment interest to Great Western on the amount of undisputed COR's

¹ Additionally, Great Western sued the owner of the condominium project, and Roel's indemnity company joined in its cross-complaint. Those entities are not involved in this appeal.

was improper based on the facts and established case law. No party asked for a statement of decision.

The trial judge, Thomas LaVoy, was scheduled to retire on December 8. On December 5, Judge LaVoy granted a stay pending a noticed hearing requesting a modification of the court's "tentative decision" and a showing of good cause. On December 7, after receiving a joint letter from the parties, Judge LaVoy issued a tentative ruling to amend its original ruling to delete an amount awarded Roel for plaster repairs.

Also on December 7, Roel and Great Western jointly applied ex parte to the independent calendar judge, Ronald Prager, stating that because of Judge LaVoy's imminent retirement, "the parties seek guidance from this court on how it wishes them to proceed with respect to asserting objections to the tentative decision." The ex parte hearing was not reported, but on February 1, 2006, Judge Janis Sammartino entered a judgment that awarded Great Western \$332,106 on its complaint, which included \$57,534 in prejudgment interest on the sum of \$251,263, and awarded Roel \$315,398 on the cross-complaint.

On June 1, 2006, the parties filed a stipulation for amended judgment. The amendment corrected several computational errors in Judge LaVoy's November 29, 2005 ruling. Further, the amendment decreased the prejudgment interest award to Great Western by \$20,572.86, as the parties agreed Roel was entitled to an offset of that amount for contract-based counter-claims. The stipulation reserved to Roel "its objection to the entire award of prejudgment interest."

On June 2, Judge Sammartino entered an amended judgment that awarded Great Western \$328,819.69, which included prejudgment interest of \$36,961.14, and awarded Roel \$326,300.75. Roel filed a notice of appeal on August 4, within 60 days of Great Western's service of notice of the amended judgment.

Great Western then moved for interest and attorney fees under Business and Professions Code section 7108.5, which penalizes a contractor for violating its obligation to timely pay a subcontractor. On July 6, 2006, Judge Prager denied the motion, explaining Great Western's recovery was significantly less than it requested; the court previously denied fees and costs unless Great Western presented other factors at posttrial motions, which it did not do; and it failed to prove Roel's conduct was not in good faith. On August 21, Great Western filed its notice of appeal of the amended judgment and the postjudgment order.

DISCUSSION

I

Timeliness of Roel's Appeal

Unless otherwise provided by law, a notice of appeal must be filed on or before the earliest of three dates: (1) 60 days after the court clerk serves a notice of entry of judgment or a file-stamped copy of the judgment on the appealing party, (2) 60 days after the appealing party serves or is served by the opposing party with a notice of entry of judgment, or (3) 180 days after entry of judgment. (Cal. Rules of Court, rule 8.104(a).) "If a notice of appeal is filed late, the reviewing court must dismiss the appeal." (*Id.*, rule 8.104(b).) On our own motion, we asked the parties to brief the issue of whether Roel's

notice of appeal was untimely because it was not filed within 60 days of service of notice of entry of the original judgment.

"In the case of a civil judgment, the period for filing a notice of appeal is not extended by an amendment that corrects a clerical error, but it is extended by an amendment that effects a substantial or material change *or* involves the exercise of a judicial function or judicial discretion." (*Nestlé Ice Cream Co., LLC v. Workers' Comp. Appeals Bd.* (2007) 146 Cal.App.4th 1104, 1109, italics added (*Nestlé*).

" "[I]f the amendment merely corrects a *clerical error* and does not involve the exercise of judicial discretion, the original judgment remains effective as the only appealable final judgment; the amendment does *not* operate as a new judgment from which an appeal may be taken." " (*Nestlé, supra*, 146 Cal.App.4th at p. 1110.) If the amendment substantially changes the judgment *or* involves the exercise of a judicial function or judicial discretion, the amended judgment supersedes the original and becomes the appealable judgment since there can only be one "final judgment" in an action. (*Ibid.*) "Therefore, a new appeal period starts to run from notice of entry or entry of the *amended* judgment." (*Ibid.*)

Most of the changes in the amended judgment were made to correct computational, or clerical, errors. The amended judgment, however, also addressed a legal issue pertaining to Roel's right to an offset against prejudgment interest awarded Great Western on its undisputed contract damages, and thus it involved the judicial function. Further, the court's error in not originally allowing an offset was made in rendering the judgment rather than recording the judgment. "In determining whether an

amendment to a judgment is clerical in nature, the question is "whether the error [corrected] was made in rendering the judgment, or in recording the judgment rendered." (Nestlé, supra, 146 Cal.App.4th at p. 1110.) Even though the amended judgment improved Roel's position on the offset issue, and arguably gave it less reason to appeal than the original judgment, we conclude its notice of appeal was timely.

II

Substantive Merits of Roel's Appeal/Prejudgment Interest

Roel's sole challenge to the judgment is the award of \$36,961 in prejudgment interest to Great Western on the \$251,263 the court awarded it on its contract claim for undisputed COR's. Again, the court originally awarded Great Western \$57,534 in prejudgment interest, but the parties stipulated that Roel was entitled to an offset for its contract-based damages, which lowered prejudgment interest to \$36,961 and resulted in an amended judgment. Roel contends Great Western is entitled to *no* prejudgment interest because the entire amount of Roel's recovery, \$326,300.75, is an offset since it arose from Great Western's deficient performance of the subcontract. Great Western counters that Roel's *tort* damages may not be offset against Great Western's recovery on liquidated *contract* damages.

Civil Code section 3287, subdivision (a) provides that "[e]very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day." "Under this provision, prejudgment interest is allowable where the amount due plaintiff is fixed by the terms of the contract, or is

readily ascertainable by reference to well-established market values. [Citations.] On the other hand, interest is not allowable where the amount of the damages depends upon a judicial determination based on conflicting evidence." (*Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 375.)

Prejudgment interest on liquidated damages is an element of compensatory damages. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 815.) "The policy underlying authorization of an award of prejudgment interest is to compensate the injured party--to make that party whole for the accrual of wealth which could have been produced during the period of loss." (*Cassinovs v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1790.) "[I]n situations where the defendant could have timely paid [a certain] amount and has thus deprived the plaintiff of the economic benefit of those funds, the defendant should therefore compensate with appropriate interest." (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 962.) "It has long been settled that [Civil Code] section 3287 should be broadly interpreted to provide just compensation to the injured party for loss of use of money during the prejudgment period." (*Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 132.)

The " 'mere pleading of unliquidated counterclaims does not render unliquidated an otherwise certain or determinable debt owing to the plaintiff. The unliquidated counterclaims are given treatment as discounts, not as payments made at the time at the time the debt is due.' " (*Muller v. Barnes* (1956) 139 Cal.App.2d 847, 850; *Wisper Corp. v. California Commerce Bank, supra*, 49 Cal.App.4th at p. 960.) In other words, an

award of unliquidated damages to a cross-complainant is a setoff against prejudgment interest awarded a plaintiff for liquidated damages.

As the court explained in *Hansen v. Covell* (1933) 218 Cal. 622, 630-631, such an offset is allowed "on the theory that the contractor is entitled to interest only on such amount of the use of which he has been deprived during the period of default." "[T]he court may properly allow interest only on the balance found to be due after deduction of such offsets" because "to that extent only has the plaintiff been damaged." (*Id.* at p. 631.) In *Hansen*, offset was allowed where contractors sued an owner for the unpaid balance on a building construction contract, and the owner cross-complained against the contractors alleging abandonment of the project and seeking costs of completion and repair of defective work. (*Id.* at pp. 624-625, 630-631.)

Roel also relies on *Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 285 (*Burgermeister*), in which the court explained: "It is settled that when a plaintiff sues for a liquidated sum and the defendant establishes an offsetting claim based upon defective workmanship or defective performance *of the same contract* by the plaintiff, the amount of the former is to be offset against the latter *as of the due date of the original date* and only the balance bears interest." (First italics added.)

The *Burgermeister* court further stated: "We are unable to distinguish between defective performance and no performance at all. If a plaintiff who renders defective performance is not entitled to receive interest except on the balance after allowance of the offset we can conceive of no sound reason not to apply the same rule when the breach consists of a refusal (by wrongful termination) to *perform the plaintiff's obligations under*

the contract at all. And so we hold. As we see it, if, when the day of reckoning is reached, it has been decided that a defendant is entitled to an offset, this is a finding that the plaintiff was never entitled to more than the net amount. The defendant was therefore justified in having withheld payment from plaintiff even though the amount of his offset had not been then judicially determined." (*Burgermeister, supra*, 227 Cal.App.2d at pp. 285-286; see also *Burnett & Doty Development Company v. Phillips* (1978) 84 Cal.App.3d 384, 387.)

Great Western asserts that under the above cases only unliquidated contract damages may be offset from liquidated contract damages. The cases, however, do not consider whether unliquidated tort claims may ever be offset against liquidated contract claims. " 'A decision is not even authority except upon the point actually passed upon by the Court and directly involved in the case.' " (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1190.)

Great Western erroneously asserts that "[w]hile Roel could have asserted many of its tort claims as breaches of contract, it chose not to." Roel's cross-complaint alleged property damage claims under *both* the breach of contract and tort counts, and the court's ruling does not reveal which theory it relied on for the property damage award. Roel cited section 9.5b of the subcontract, which allows Roel damages for a subcontractor's default under the subcontract, and a 25 percent markup for profit and overhead. The subcontract defines the term "default" as including the failure to diligently perform the work, maintain the schedule or provide quality workmanship. The court specifically found certain claims were default items and awarded the markup on them, but on the

property damage claims the court disallowed a markup, finding they were not default items.

Contrary to Great Western's assertion, however, that raises no presumption the award for property damage claims could not have been for breach of contract. Rather, the court could have relied on section 5.7 of the subcontract, which provides that a breach of contract includes a subcontractor's damage to the work of another subcontractor or the property of a third party, or section 15.3f, which requires a subcontractor to protect the work of others and to repair and replace damaged property at its own expense. Great Western submits that Roel relied only on section 9.5b of the subcontract, but Roel specifically raised section 15.3f at trial, and the entire subcontract was admitted into evidence for the court's review. Roel points to no election by Roel to pursue a tort theory, and it does not appear that a tort theory offered any advantage over a breach of contract theory.² Evidence that Roel did not submit property damage claims to Great Western in the form of change orders does not necessarily indicate Roel elected to proceed in tort.

In any event, we conclude that even if the court intended to award property damages for negligence as opposed to breach of contract, Roel is entitled to a setoff of its entire award. It is undisputed that Roel's damages arose entirely from Great Western's deficient performance of the contract, and Roel's mere inclusion of an alternative count

² The reporter's transcript includes neither opening statements nor closing arguments.

for negligence in its cross-complaint, and any arbitrary reliance by the trial court on one theory over another, should not adversely affect Roel's setoff rights.³ Both parties had claims against each other under the subcontract, thus setoff serves the interests of justice and the purposes of the prejudgment interest statute. Another ruling would elevate form over substance. (Civ. Code, § 3528; see *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 687, fn. 5.) Because Roel's award exceeds Great Western's award, even after the adjustment to Roel's award for the cleanup contribution, addressed below, Great Western may not recover any prejudgment interest.

III

Great Western's Appeal

A

Cleanup Contribution

Great Western contends the court erred by awarding Roel a \$26,287 backcharge "for cleanup contribution." We agree.

³ Great Western cites *Kransco v. American Empire Surplus Lines Insurance Co.* (2000) 23 Cal.4th 390, for the proposition that "[w]ith respect to contract and tort claims, . . . even when pleaded in the same action, they are 'apples and oranges.'" In *Kransco*, the court held "a liability insurer cannot assert the comparative bad faith of its insured in the underlying third party litigation as an affirmative defense in a bad faith action brought against it." (*Id.* at p. 394.) The court noted that the distinction between tort and contract claims *by opposing parties in the insurance context* caused Montana's high court to "reject comparative bad faith as a defense in a bad faith action against an insurer ('the [insurer's] tort cannot be offset comparatively by the insureds'] contract breach') and characterize the differing legal concepts as 'apples and oranges.'" (*Id.* at p. 403.) *Kransco* is inapplicable here, where Roel pleaded both tort and contract claims arising from the same defective performance of the subcontract.

Mike Lyons was Roel's project manager at the relevant time. He testified that many of the subcontractors on the Renaissance project were not cleaning up after themselves as required by their subcontracts and it was impacting progress. Accordingly, Roel hired a superintendent to document the problem, take photographs and hire a cleanup crew. Roel backcharged each subcontractor proportionately to its total manpower on the job.

Lyons conceded that the \$26,287 backcharge to Great Western was "not directly attributable to any cleanup associated directly with Great Western's work." Lyons explained that Roel "caught" Great Western numerous times not cleaning up and in those instances it backcharged it for specific cleanup costs.

Great Western asserts the \$26,287 backcharge imposes a new contract term to which it never agreed. The subcontract includes an integration clause that required any amendments to be in writing and signed by the parties. Paragraph 6j of the subcontract provides: "Clean up shall be performed daily. If the project superintendent determines adequate clean up is not being performed by *this subcontractor*, Roel . . . reserves the right to perform the clean up and issue a backcharge for a reasonable cost associated with such clean up." (Italics added.) Great Western submits that the term "this subcontractor" means "the question of clean-up must be considered on a subcontractor by subcontractor basis," and "[n]othing in the subcontract permits imposition of additional backcharges for work not directly attributable to the subcontractor itself."

"Contract interpretation presents a question of law which this court determines independently. [Citations.] [¶] A contract must be interpreted to give effect to the

mutual, expressed intention of the parties. Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone." (*Ben-Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 472-473.) We agree with Great Western's assessment. Under the plain language of paragraph 6j of the subcontract, Roel may assess backcharges for cleanup based only on the particular subcontractor's fault. Accordingly, Roel's award must be reduced from \$326,300.75 to \$300,013.75.

Roel asserts that section 15.4e of the subcontract supports its proration of cleanup charges among subcontractors. It provides: "Cleanup - At the end of every workday, Subcontractor shall be responsible to leave its work area clean and free of debris. Within 24 hours notice by ROEL of an area that requires cleanup (for which Subcontractor is responsible in ROEL's reasonable opinion), Subcontractor shall cause the area to be cleaned. If Subcontractor fails to perform such cleanup then ROEL may cause the area to be cleaned and back-charge Subcontractor for any costs associated therewith." (Boldface omitted.) This section, however, does not authorize backcharges for cleanup that are unconnected to subcontractor fault. To the contrary, the section supports Great Western's position.

Additionally, Roel claims proration was reasonable because "[o]n an \$80 million jobsite with nearly 100 subcontractors, where a vast amount of overlap occurs in the work being performed by the subcontractors at any given time, it would be near impossible to accurately document each subcontractor's *exact* cleanup responsibilities." Roel states that the problem was a "foreseen imbroglio." Roel does not cite the record in

support of this claim, but assuming its truth, it merely shows that Roel anticipated the problem and could have included a proration clause in the subcontract in place of section 6j, which would have given subcontractors the opportunity to accept or reject proration as opposed to it being unilaterally imposed on them.

Further, Roel contends that even if its proration constituted an oral modification of the subcontract, Great Western waived its argument the integration clause prohibited the modification. Roel cites Civil Code section 1698, subdivision (b), which provides that a "contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties." Under that provision, "an executed oral agreement may alter an agreement in writing, even though, as here, the original contract provides that all changes must be approved in writing." (*Miller v. Brown* (1955) 136 Cal.App.2d 763, 775.)

Roel relies on the minutes of a July 23, 2002 jobsite meeting, which show a Roel superintendent informed subcontractors that Roel had hired a person for trash cleanup and "[s]ubs will be charged on the basis of the number of personnel on the job." Roel submits that since the minutes show that a Great Western superintendent, Bob Wasko, attended the meeting, but they do not show he made any objection, the company acquiesced in the proration of cleanup costs.

" "[W]aiver is the intentional relinquishment of a known right after knowledge of the facts." [Citations.] The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful" cases will be decided against a waiver" [citation].' [Citations.] The

waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.)

The evidence belies a waiver theory. Stephanie Schulkamp, Great Western's chief operations officer at the relevant time, testified that Wasko had no authority to enter into agreements on behalf of Great Western. Wasko also testified he had no authority to consent to a backcharge on behalf of Great Western, and he never agreed to a prorated backcharge for cleanup. He also testified Great Western "had enough manpower to clean up anything." Further, Roel never presented any evidence that Wasko had any authority to bind Great Western. Also, there is no evidence Roel modified its behavior based on anything Wasko may have said, or on his mere silence. At the July 23, 2002 jobsite meeting, Roel did not seek the input of subcontractors on the cleanup issue. Rather, the evidence shows Roel informed subcontractors it unilaterally decided that "everybody's going to be backcharged based on the percentage of employees working on-site." Accordingly, Roel did not meet its burden of showing an intentional relinquishment of a known right.

B

Drywall Repainting

The court awarded Roel \$48,554 for the repainting of drywall, and Great Western challenges the evidentiary basis for the award. When a party contends the evidence does not support the damages award, a substantial evidence standard of review applies. We must "consider the whole record, view the evidence in the light most favorable to the

judgment, presume every fact the trier of fact could reasonably deduce from the evidence, and defer to the trier of fact's determination of the weight and credibility of the evidence." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614.)

It is undisputed that Pecararo Painting Company (Pecararo) charged Roel, on a time and material basis, \$48,554 to repaint drywall Great Western installed. Raul Garcia, Pecararo's superintendent on the Renaissance project, testified the 218 units in the project were to get one prime coat of paint and two finish coats. He testified that after application of the finish coats, Pecararo was required to apply a third coat and sometimes a fourth coat "[b]ecause [of] either trade damage that happened or bad workmanship on the drywall."

Garcia testified Great Western had "a lot of problems, a lot of issues with the . . . taping" of the drywall, and "it was a terrible job." Garcia added that problems with taping were "typical throughout." He also testified he observed Great Western damaged the drywall, by causing "dings on the walls, scrapes [and] plaster on the walls" from workers "climb[ing] in through the windows" to get inside the units. When asked how often Great Western damaged the drywall, Garcia responded that it happened "*throughout the whole job.*" (Italics added.)

Great Western relies on Garcia's testimony that other trades also damaged the drywall after the initial painting, there was interior vandalism on the project, and Garcia could not exactly quantify the number of hours of repainting attributable to Great Western's conduct as opposed to the conduct of others. Great Western acknowledges that its damage to drywall required repainting, but it asserts the award is improper because

Roel failed to quantify the amount of repainting specifically attributable to Great Western.

We agree that Roel's showing could have been stronger. However, "[w]here the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873.) Great Western cites no evidence that disputes Garcia's testimony that it damaged drywall throughout the entire project. Further, Garcia testified that when repainting was required because of drywall damage, nearly the entire unit had to be repainted or "[i]t ain't going to look right." Accordingly, even if other causes contributed to the drywall damage, Great Western's damage throughout the project required wholesale repainting. Thus, we conclude the award was sufficiently supported by the evidence. Perhaps Great Western could have cross-complained against other parties that ostensibly contributed to the painting problems, but it apparently did not do so.

C

Replacement of Glass Panels

Additionally, Great Western challenges the evidentiary basis for the court's award to Roel of \$156,993 for the replacement of scratched window glass.

Center Glass installed the glass on the Renaissance Marina project, which consisted of several thousand panels. Curt Favinger, an assistant project manager for Roel, testified that when Great Western performed its stucco work on the exterior of the

buildings, it was required to protect the glass from overspray and damage by placing plastic entirely over the panels. Favinger, however, frequently saw plastic covering that was not properly protecting the windows, and he saw plaster overspray on unprotected glass.

Favinger testified that as homeowners began moving into the units, they complained to Roel about scratched glass. Favinger testified that Roel paid Center Glass to remove and replace several hundred of the glass panels because of scratches it believed Great Western caused by overspraying or trying to clean overspray off of the glass. Favinger looked at between 150 and 200 panels that were removed and replaced in the second phase of the operation and saw scratches on "nearly every one of them."

Frank Rodriguez formerly worked for Center Glass and supervised the installation of the glass panels at the Renaissance project. Rodriguez testified that the foreman of Center Glass's crew was responsible for ensuring there was nothing wrong with the glass panels before their installation. If a panel was flawed, it would not be installed. Rodriguez testified that Center Glass did not install any defective panels.

At some point, Roel pointed out approximately 50 damaged glass panels to Rodriguez, and he believed that when the glass was all cleaned more damage would be revealed. Rodriguez saw dry plaster on the glass and scratches "throughout the job." He testified it was Great Western's responsibility to cover the glass before it sprayed plaster, and he noted instances in which the coverings did not cover the entire surface of the panels. He explained that because "this particular job is close to the water, the wind will rip the protection, the plastic or the tape, away from the window. And if it wasn't retaped

the way it was supposed to protect the glass . . . , and they proceeded to plaster . . . , the overspray . . . was getting [onto] the windows." He also explained: "When the plaster hits the glass and it's not clean, and it's not clean when the plaster is wet, the plaster is going to cure into the glass and the . . . components on the plaster, which is lime, will permanently stain that piece of glass."

Several times Rodriguez saw Great Western employees spraying plaster that hit unprotected windows, and approximately five times he saw its employees attempt to scrape plaster from the windows with steel putty knives, which would "scratch the surface of the glass where it's beyond repair." He also saw Great Western employees try to remove plaster with water and sponges, which can damage glass if the water and sponges are not clean and too much pressure is put on the glass.

Rodriguez testified that he spoke with a Great Western superintendent, Wasko, four or five times about the overspray problems and Wasko always said he would take care of it. However, after each discussion the problems with overspray continued. Rodriguez also brought up the issue at site meetings that Wasko attended, to no avail. Rodriguez concluded that Great Western caused the glass problems. He testified that Center Glass replaced approximately 180 to 200 glass panels.

Great Western stipulated that Roel paid Center Glass \$156,993 to remove and replace damaged glass panels. Great Western also admitted "that [it] caused some of the scratched glass." Great Western asserts, however, that it "was clear that multiple parties were responsible for the scratched glass."

Great Western relies on the testimony of Wasiko that other trades also had access to exterior scaffolding to perform their work. When asked whether the trades were "working with cementous materials," he responded, "I imagine, if they were using concrete patch material, yes." The testimony is merely speculation. Wasiko also agreed that "[c]aulkers were putting putty-like material around the edges of some of the windows" and he claimed such work was outside the scope of Great Western's contract. Great Western points to no evidence, however, that the subcontractor that performed the caulking damaged the glass panels.

Further, Great Western relies on the comment by Roel's counsel, when cross-examining Great Western's expert witness, that "Roel concedes it damaged glass to the tune of \$5,047." Great Western, however, cites no evidence to show that amount was included in the \$156,993 award to Roel for scratched glass. Indeed, Roel's counsel later explained, "Roel concedes it scratched some glass *because it deducted some costs.*" (Italics added.)

Great Western also complains that Roel's trial exhibit 190, entitled "Broken / Scratched Glass Replacement Recapitulation Sheet," shows Roel made no effort to properly calculate damages attributable to Great Western, because it claimed \$162,040 for scratched glass when trial exhibit 184 claimed \$156,993 for it. Obviously, Great Western suffered no prejudice because the court awarded the lower number. We are not required to specifically address Great Western's numerous other assertions, as we have reviewed the record and are satisfied that the award for glass is supported by substantial evidence. The *fact* of substantial damages attributable to Great Western is certain, and

thus the "amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." (*GHK Associates v. Mayer Group, Inc., supra*, 224 Cal.App.3d at p. 873.)

D

Denial of Prejudgment Interest on Disputed COR's

Great Western also contends the court erred by denying it prejudgment interest on the disputed COR's that it prevailed on at trial, which totaled \$41,642. Great Western asserts that since the court awarded it the exact amount of the disputed COR's, its damages were "certain" within the meaning of Civil Code section 3287, subdivision (a). Our conclusion in Roel's appeal, however, moots the point, as its offset for its entire damage award, as adjusted on appeal, exceeds Great Western's damage award. Even if the court's analysis was incorrect, Great Western is not entitled to any prejudgment interest.

E

Penalty Interest

Lastly, Great Western contends the court erred by denying its motion for penalty interest under Business and Professions code section 7108.5 (hereafter section 7108.5), a prompt payment statute applicable to the construction industry. Section 7108.5 provides: "A prime contractor or subcontractor shall pay to any subcontractor, not later than 10 days of receipt [by the prime contractor] 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 there is a good faith dispute over all or any portion of the amount due on a progress payment from the prime contractor . . . , then the prime contractor . . . may withhold no more than 150 percent of the disputed amount. [¶] 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." (§ 7108.5.)

"The 2 percent penalty was added to [section 7108.5] by amendment in 1990. Prior to this amendment, the only sanction was a disciplinary action before the [Contractors' State License Board]. Despite the threat of discipline, the Legislature found there was a continuing problem with subcontractors receiving timely payment for their work; the amendment was to provide an incentive for contractors to pay subcontractors in a timely manner by providing remedies to the unpaid subcontractor." (*Morton Engineering & Construction, Inc. v. Patscheck* (2001) 87 Cal.App.4th 712, 717.) "The 2 percent penalty is intended to penalize the contractor for failing to comply with statutory requirements." (*Id.* at p. 718.)

Section 5.7 of the subcontract allowed Roel to "withhold from current and future payments due [Great Western] amounts necessary to protect [Roel] from loss if in the good faith opinion of [Roel], the following events have occurred or are likely to occur," including "[Great Western's damage] to the work of another subcontractor or a third party," and "[Great Western's default] of any term or provision of the [s]ubcontract [d]ocuments." Great Western asserts that notwithstanding section 5.7, Roel acted in bad

faith by not making progress payments on its COR's, particularly the undisputed ones totaling \$251,263. Great Western points to evidence that Roel did not make an informed decision to withhold payment on the COR's because of offsets, as was the scenario in this court's opinion in *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co.* (2005) 133 Cal.App.4th 1319, and rather merely failed to make any accurate accounting during the job. Great Western also faults the trial court for using a prevailing party analysis in denying penalty interest.

We are not, however, required to address Great Western's arguments. As at the trial court, on appeal Great Western seeks penalty interest "only on the balance owing after deduction of Roel's offset for its own contract-based claims, but not tort claims." Great Western explains that "[c]ommon sense and the public policy underlying . . . [s]ection 7108.5 support this approach." As discussed above, Roel is entitled to an offset for all of its damages, which exceed Great Western's damages. Accordingly, even if the court's reasoning was erroneous, Great Western is entitled to no penalty interest.

DISPOSITION

The judgment is reversed insofar as it awards Great Western \$36,961.14 in prejudgment interest on its liquidated contract claims and awards Roel \$26,287 for a cleanup contribution. The judgment is affirmed in all other respects. The order denying Great Western penalty interest is affirmed. The parties are to bear their own costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GREAT WESTERN DRYWALL, INC.,

Plaintiff, Cross-Defendant and
Appellant,

v.

ROEL CONSTRUCTION, INC.,

Defendant, Cross-Complainant and
Appellant.

D049191

(Sup. Ct. No. GIC818575)

ORDER CERTIFYING OPINION
FOR PARTIAL PUBLICATION

THE COURT:

The opinion filed August 13, 2008, is ordered certified for publication with the exception of parts I and III.

The attorneys of record are:

Sellar, Hazard, Manning, Ficenec & Lai, and Aaron C. Hancock for Plaintiff,
Cross-Defendant and Appellant.

Procopio, Cory, Hargreaves & Savitch LLP, and Steven R. Borer for Defendant,
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