2012 WL 10688295 (Cal.Super.) (Arbitration Award)
Superior Court of California.
Los Angeles County

In the Matter of the Arbitration Between HOTEL BEL-AIR, Claimant,
and
CITADEL CONSTRUCTION CORP., et al., Respondents.

Nos. BS138953, 7311000025210LGB.
August 14, 2012.

Editor's Note: This document was acquired from a Court file.

Case Type: Construction Defects
Award Amount: $0
Attorney for Petitioner: Rosemary K. Carson; Christine D. Baker; Ron Guisso; Mary Christine Roberts
Attorney for Respondent: Christopher R. Nelson; Steven L. Rodriguez
Award Date: 08/14/2012
Arbitrator: David P. Dapper

Final Award

Arbitrator: David P. Dapper

AMERICAN ARBITRATION ASSOCIATION CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the parties and dated as of December 1, 2008, issue this FINAL AWARD, as follows:

This matter came on before me, the undersigned Arbitrator, for hearing on April 16 and 18, 2012. Appearing for claimant Kava Holdings, Inc. dba Hotel Bel-Air ("HBA") were Rosemary K. Carson and Christine D. Baker of Gordon & Rees, LLP and Ron Guisso and Mary Christine Roberts of Stokes Roberts & Wagner; and for respondent Citadel Construction Corp. ("Citadel") were Christopher R. Nelson of Epport, Richman & Robbins, LLP and Steven L. Rodriguez of Wood, Smith, Henning & Berman.

The presentation of evidence concluded on April 18, 2012, save for the issues of attorneys' fees and costs, which were expressly reserved for briefing following the issuance of an interin award. A briefing schedule was established for the submission of post-hearing briefs.

On May 25, 2012, I issued an INterim Award, Sections I-IV of which are ser forth verbatim in Sections I-IV of this Final Award. In the Interim Awrad, I denied all of the remaining claims asserted by HBA and established a schedule for the submission of biefs regarding claims for attorneys' fees and costs sought by Citadel, as well as by respondents David Stack and Daniel Gordon who had previously been dismissed by my order of April 2, 2012.

The last reply briefs were received on July 16, 2012, although Citadel filed a "Motion to Strike False and Improper Material Set Forth in Reply By Stack and Citadel in Support of Their Motion for Attorneys' Fees and Costs; Request for Oral Argument." on July 19, 2012. In light of the comprehensive nature of the briefs, I denied the request for oral

argument on July 19, 2012. The motion to strike is hereby denied, as the material Citadel seeks to strike from the replies is simply argument. The AAA hearings were declared closed pursuant to AAA Construction Industry Rules [1], Rule R-36, as July 16, 2012.

I. INTRODUCTION

This case arises out of an agreement between HBA and Citadel for the construction by Citadel of a spa at the Hotel Bel-Air in Los Angeles. Citadel was ultimately terminated from its contract for cause and HBA incurred costs to complete the spa project.

HBA could easily have prevailed on a breach of contract claim against Citadel. However, because Citadel is apparently without assets, HBA chose to assert claims sunding in tort against Citadel and its prinicpals, with the avowed goal of recovering from Citadel's only remaining asset, a directors and officers liability policy. [2] While HBA is to be commended for its creativity the facts presented simply do not support recover under the legal theories asserted by HBA at the hearing of this matter.

As required by Paragraph 4 of the Scheduling Order goverming this matter, the parties filed an Amended Joint Memorandum of Contentions and Responses ("Joint Memorandum") detailing thier claims and defenses. The Scheduling Order required HBA to set forth a summary statement of its claims and the elements required to establish those claims. HBA asserted the following claims:
Claim 1: Alter Ego Liability against Respondent David Stack

Claim 2: Breach of Contract against Respondent Citadel

Claim 3: Negligent Misrepresentation against All Respondents

Claim 4: Negligence against all Respondents

Claim 5: Negligent Interference with Prospective Economic Relations against all Respondents

Claim 6: Negligent Interference with Contractual Relations against all Respondents

Claim 7: Negligence Per Se against all Respondents.

All claims against respondents Stack and Grodon were previously dismissed by my order datd April 2, 2012 pursuant to dispositive motions filed by those respondnts, leaving Citadel as the only respondnt. In its pre-hearing arbitration brief. HBA dismitssed Claims 2, 5 and 4 as against Citadel. (HBA's Arbitration Brief, fn 4.) As no evidence or arguments were persented at the hcaring with regard to Claim 7, that claim is considered abandoned and is dismissed. [3] Accordingly, the only claims remaining for a decision are Claims 3 (negligent misreprentation) and 4 (negligence) against Citadel.

Pursuant to the Scheduling Order, this case was bifurcated into two phases: Phase 1 (the just-concluded haring) was to datermine liability and Phase II, scheduled for August 2012, is to determine damges, if HBA is successful in proving liability at the Phase 1 hearing. Following the completion of HBA's prosentation of evidence Citadel moved for "onsuit." [4] Because counsel for Citadel advised that Citadel did not intend to present any live witnesses at the hearing, 1 degerred a ruling on the motion nutil after the submisison of post-hearing brigefs. This award also disposes of Citadel's "nonsuit" motion.

II. FACTS

Atypically, the material facts are largely not in dispute. [5]

Sometime prior to April 2008 HBA issued a Request for Proposals to various contractors for the contruction of a new spa and fitness center at the hotel. Citadel was among the contractors invited to submit a response to the RFP. The contractors selected to receive the RFP were contractors with which HBA was familiar or that had been recommended to HBA. (Trs. 65:11 - 66:6.) Before selecting Citadel to perform the spa project, representatives of HBA visited a similar nearby project that Citadel had recently completed. HBA also relied on information contained in Citadel's response to the RFP in selecting Citadel to construct the spa project. (Trs. 66:7 - 68:1)

Citadel was formed by Daniel Gordon in 2006 or 2007 and was wholly owned by him or entities under his control, at least until February 2009, and those entities contributed some or all of the capital of the company. (Deposition of Daniel Gordon ("Gordon Depo.") 31:16 -32:25, 80:2-20; Deposition of David Stack ("Stack Depo.") 47:3-48: 1.) At the time Citadel was formed, Daniel Gordon was incarcerated, having pled guilty to various securities fraud charges involving the purchase of $43 million in derivatives while he was employed at Merrill Lynch. (Gordon Depo. 99:7 - 102:1; 105:7-11.) In February 2009, Stack entered into an agreement to purchase shares constituting a 50% ownership interest in Citadel and became President of Citadel. (Stack Depo. 47:3-13; 60:1-6.) At least during the time Stack was President, there were no other officers of Citadel. (Stack Depo. 62:5 - 63:8.) However, Stack never paid the purchase price for the shares in Citadel and the seller of the shares (an entity controlled by Daniel Gordon) foreclosed on the shares in the fall of 2009 and Gordon effectively resumed full control over Citadel at that time. (Gordon Depo. 79:5-20; 80:10-13.)

Citadel began performing preconstruction services in February 2008. (Stipulation of Facts ("Stip." ¶2.) Although there was no written contract in place, HBA agreed to reimburse Citadel for preconstruction services at a fixed monthly rate, plus expenses. (Trs. 74:15-20; Exs. 67, 68.) Payments for preconstruction services were invoiced by Citadel and paid by HBA from May 2008 into early 2009. (Ex. 67.)

In approximatcly June 2008, HBA and Citadel began discussions over the formal contract for the spa project. (Trs. 72:12-20) In approximately December 2008 HBA forwarded an unsigned, modified version of an AIA A101 ("Agreement")/A201 ("General Conditions") (2007 edition) contract to Citadel dated as of Defecmber 1, 2008 (Trs. 76:8-13; Ex. 35.) Although this contract was never signed by HBA, and was not signed by Citadel until November 11, 2009 (shortly before Citadel was terminated), at the hearing both parties agreed that this contract govened the relationship between HBA and Citadel throughout the performance of the core and shell phase (Phase I) of the spa project. (Trs. 187:7-188:17, 211:20-22; Ex. 35.) The contract contained all of the essential elements of a contructionc contract (scpe, time, peric). The work for hte interior fit-out of hte spa (Phase II) was excluded from the AIA contract (Ex. 35, Agreement §3.3), although there was an agreement that the AIA A101/A201 "boilerplate" governing the core and shell would also gover the interiors work. (Trs. 211:23 - 212:20; see also Ex. 35, Agreement, p. I. describing the project as "Hotel Bel-ir - Spa Project. New constrcution and interior fu out of 11,000 sf of Iuxury spa adjacent ot existing hotel." (Emphasis added.) The parties' expectation was that he existing AIA contract would be modified by addig the relevant exhibits setting forth the scope, achedule ad price for the interiors work onec those items wer finalized. (Trs. 212:21 - 213:5.)

In October 2008, HBA hired Gardier & Theobald Inc. to serve as project manager for the spa project. (Stip., ¶3; Trs. 201:13-6.)

Citadel moved form the precjonstruction phase to actual construction work in approximately January 2009, beginning with the installation of driveway utilities (Ex. 67; see. Stip. ¶4) and began requesting deposits form HBA for necessary construction equipement, such as a crane, in February 2009. Beginning with its invoice for the period ending April 30, 2009, Citadel began submitting invoices in form required by the AIA contract, including a schedule of values and the AIA Application and Certificate for Payment. (Ex. 68.) Work on the core and shell continued throughout the summer

and by the end of July Citadel had billed HBA for over 67% of the total cost for the core and shell. (Ex. 68.) Following Gardiner & Theobeld's review and approval of Citadel's invoices HBA paid those invoices, generally within the time allowed under the AIA contract. (Exs. 41, 67, 68,)

In the meantinme, and despite the of a finalized contract goveming the interior work on the spa, preliminary work began on the interior fit-out while HBA completed the interior design. I May 2009 Citadel billed HBA for depposits for pulmbing, HVAC and electrical, as well as amounts for work in place for those tades, suggesting that Citadel hed begum actual construction work on the interiors phase April or May. (Ex. 28.) HBA also paid these invoices. (Ex. 41.) However, the final design for the intcriors had not yet been completed as Citadel continued during June and July to solicit subcontractor bids and perform value engineering in an effort to bring the interiors project within HBA's desired budget. (Trs. 213: 10 - 214:25)

Sometimes in June 2009 Ciatdel removed its then-project manager, Mo Hassahkani, from the project and replaces him with Casey Gordon, Who had apparently breen an assitant project manager up to that point. (Sup. ¶7; Trs. 104:20 - 105-14.) At the same time, two of Citadel's principals, Daniel Gordon and David Stack, began taking a more active role on the project, with Daniel Gordon taking overall charge of the project. (Trs. 105:14-18; Stack Depo. 131:22-25; 135-15-24.) This included one or both attending several weekly project meetings between June 10 and August 5, 2009. (Stip ¶9; Ex. 12.) Daniel Gordon also took on a significant role in value engineering the interiors work. (Ex. 19.) Christopher Carlin, Gardiner & Theobald's representative for the project, though that Gordon's involvement was helpful to the project. (Trs. 268:7-25, 270:2-8; 311:6-312:13.)

Sometime in June[6] or mid-to late July[7] HBA and Theobakld & Gardiner began hearing what HBA's two witness decribed variously as “rumblings” or “mumblings” that some contractors had no been paid by Citadel, despite Citadel having been paid by HBA. (Trs. 103:13-14; 235:34-25; 276;10-12.) In response to Clarke' inquiries, Stack assured HBA that any issues with payment of the subcontractors would be taken care. of (Trs. 111:3-25.) However, no evidence was presented that Daniel Gordon provided any assurances, or made any representations to HBA with respect to payment of the subcontractors on the spa project.[8] In any event, HBA contiued to issue payments to Citadel for both Phase I and II of the spa project thorugh September 4, 2009. (Stip. ¶¶8, 10, 12; Ex. 41.)

In July 2009 HBA also issued a new RFP for a separate project at the Hotel, called the Hotel Master Plan Renovation. (See, Ex. 18.) Citadel was among the contrctors HBA chose to receive the RFP. The issuance of the REP and Citadel's submission of its response coincided with Stack and Gordon's increased presence on the project site. In general, Citadel's July 31, 2009 response to the Master Plan RFP (Ex. 18) painted picture of healthy, well-run national construction company with significant financial strengths, including in-place liability insurance with limits (including excess) of over $25 million, and bonding capacity on any singly project of approximately $22 million. In discussing Citadel's proposed staffing for the Master Plan project, it identified Deniel Gordon as the part-time Principal in Charge and described him as a “consummated professional” with a reputation as a “pragmatic and knowledgeble construction expert” (Ex. 18), although Gordon tesified that he did not consider himself a “construction professional” or qualified to manage a construction project. (Gordon Depo. 36:9-20.) In any even, HBA notified Citadel that it was not the sucessful bidder for the Master Plan project. However, in response to a leading question, Clarke testifield that the RFP calmed HBA's fears with regard to Citadel's financial stability in connection with the spa project. (Trs. 118:15-23.)

Notwithstanding HBA's equanimity, subcontractors on the spa project continued to complain about non-payment by Citadel and, in early August, some walked off the job. (Stip. ¶11; Trs. 121:24-25; 252-7-21.) Ultimately, all of the subs on the spa project walked off in September, leaving the project idle for 5-6 weeks. (Stip. ¶¶13, 14; Trs. 121.25 - 122:14; 253:1-13.) Nevertheless, HBA issued over $469,000 in chcks to Citadel for the core and shell and interors projects on September 4. (Stip. ¶12; Ex.41.)[9] In addition, beginning in September a number of subcontractors recorded mechanic's liens on the project. (Ex. 23.)

During the same period in September 2009, Citadel shut down its Los Angeles office and moved its operations into a vacant room at the hotel. (Stip. ¶13; Trs. 122:25 - 123:7; 251:1-25.) Citadel told HBA that Citadel wanted to move its operations on the the project site to be closer to the subcontractors. (Trs. 123:12-19.) [10] However, Gardiner & Theobald later learned that Citadel had terminated the lease on its Los Angeles office speac as of October 1, 2009, and that the spa project was its only ongoing project in Los Angeles. (Trs. 251:11-12; Ex. 29.)

During the shutdown of the project in September, Gardiner & Theobald assessed the options for completing the project, including "releasing" Citabdel from the Phase II interiors work and sticking with Citadel to complete the entire project. (Ex. 29. Ultiomately, HBA decided to keep Citadel on the project but to pay the subcontractors directly. (Stip. ¶16; Trs. 289:8-290:7.)

Sometime in October, while Carlin was in New York, he met with Stack in Citdel's New York offices. (Stip. ¶15; Trs. 280:3-6.) During that meeting, Stack disclosed that he had discovered that Daniel Gordon had used what Stack believed to be in excess of $1 million of Citadel corporate funds for Gordon's personal benefit (Stack Depo. 169:22 - 190:13; 193:4 - 194:23), and that this was one cause of Citadel's inability to pay subcontractors on the Hotel Bel-Air project. (Stack Depo. 232:2 - 234:20.)

Following HBA's agreement to pay Citadel's subcontractors directly, work on the project resumed in October 13, 2009, HBA recieved notice that Citadel's liability insurance had been cancelled. (Stip. ¶17; Ex. 37.) As a consequence, and pursuant to the process described in the AIA contract (General Conditions, §14.2.2). HBA sought a decision from the project architect that there were grounds for termination of the contract, whereupon the architect issued a letter to Citadel on November 18, 2009 confirming Citadel's terminationn for cause under §14.2 of the General Conditions. (Stip. ¶18; Ex. 39.) HBA thereafter completed the project, incurring significant cast overruns. (Ex. 45.)

III. CLAIM 4 - NEGLIGENCE: ARE THE ACTIONS OF CITADEL THAT CAUSED HBA's DAMAGES MERELY BREACHES OF CONTRACT, OR DO THEY ALSO SOUND IN TORT?

A. Do the parties have a contractual relationship?

Prelimily,HBA asserts that because the December 1,2008 contract was never fully executed by both parties,they never entered into a binding contract,such that any duties owed by Citadel aer non-contractual. (HBA's Closing Brief("HBA Brief"),1:22-2:2.) However,such a position is inconsistent with the prior positions taken by HBA in this arbitration up to the week before the start of evidentiary hearings when HBA filed its Prechearing Brief abandoning its breach of contract claim against Citadel.Indeed,in the Joint Mimorandum,HBA expuessly asserted the existence of a written contract between the partics and feferenced specific provisions of the December 1,2008 contract. (Joint Memorandum,p.4, claim 2,¶¶1,3.) For its part,Citadel admitted the enistence of a written contract and that it promised to perform the specific terms refenced in ¶3 of HBA's claim. (*Id.*,pp.22-23,¶1,36.)And as noted above,during the evidentiary bearings both parties agreed that this contract governed the relationship between HBA and citadel throughout the performance of the core and shell phase (phase 1) of the spa project. (Trs.187:24-188:17.)Further,HBA's project representative tetified without challenge (and no contrary evidence was presented) the parties agreed that the AIA A101/A201"bolicerplate"governing the core and shell also governed the Phase II interiors wors. (Trs.211:23-212:20.) HBA's current position is not simply a case of HBA asserting alternate theories;HBA is trying to assert alternate-and inconsisten-facts. This it cannot do.*see e.g., Walker v. Dorn* (1966) 240 cal.App.2d 118,120(party may assert inconsistant defenses but not inconsistent facts).

In any event, both parties clearly acted throughout the project as if the written contract was binding. For example, once the Schedule of Values was established for the Phase I work Citadel promptly began submitting pay application in the required by Article 5.1 of the Agreement and Article 9 of the General Conditions. Similarly, when HBA sought to terminate Citadel, it carefully followed the dictates of § 14.2.2. of the General Conditions, which require the certification

of the Initial Decision Maker (i.e., the project architct) that grounds for termination exist before the owner can terminate the contractor. (See, Ex. 39.)

Finally, the contract contains a provision requiring arbitration. (Agreement. §6.2; General Conditions, §15.4.) In its Amended Demand for Arbitration HBA specifically cites the arbitration clause in the December 1, 2008 contract as the basis for its demand, HBA connot now claim that there is no enforceable contract between the parties, or that the December 1, 2008 contract does not contain the terms governing the parties' relationship on the project.

B. Given the existence of contract between the parties, has HBA proven that Citadel breached a duty owed independent of its contractual duties? [11]

Although the parties do not always discuss the viability of HBA's negligence claim in the context of the economic loss rule on by the parties are those that address the economic loss rule as applied to damages caused by breaches of duties arising out of contractual relationship.The economic loss rule generally bars tort claims for contract breaches,thereby limiting contracting parties to contract damages.*Aas v.Superior Court.* (2000) 24Cal.4th 627,643 ("A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations.")

1. The economic loss rule's application and exceptions.

Though the economic loss rule is esay to state, the rule's application and exceptions are more conceptually difficult. Applying the rule to the present circumstance requires considering the rule's exceptions and policy rationales. [12]

The rule "prevents the law of contract and the law of tort from dissolving into one another." *Robinson Helicopter Co.,Inc.v.Dana Corp.,* (2004) 34 Cal.4th 979.988(internal modification and quotations omitted).By preventing tort claims-and,thus,tort damages-the rule encourages parties to reach a mutually beneficial private bargain.Limiting recovery to contract damages makes it easier for parties to "estimate in advance the financial risks of their enterprise." *Freeman&Mills,Inc.v.Belcher Oil Co.,*11 Cal.4th 85,106(1995) (quoting *Applied Equip.Corp.v.Litton Saudi Arabia Ltd.,*(1994) 7Cal.4th 503,515);*Foley v.Interactive Data Corp.,*47 Cal.3d 654,694(1988).As a result the rule is pauticularly strong when a party alleges"commercial "commercial activities that negligently or inadvertantly [went]awry" *Robinson Helicopter,*34Cal.4th at 991,n.7.

2. Types of exceptions to the rule.

California's economic loss rule has exceptions that fall into two broad categories. The first category applies to products liability cases, where the California rule first arose. Id. In the products liabilty context, the rule may be overcome by allegations of "personal injury or damages to other property [besides the defective product]." Id. at 988 (internal quotations and citations omitted). This exception is clearly inapplicable to HBA's claims.

California's economic loss rule has a second catedgory of exceptions for breach of a noncontrctual duty. These exceptions require the breach of a tory apart form the general duty not to act negligently, Id. Indeed, "[i]f every negligent brach of a contract gives rise to tort damages, the [rule] would be meaningless, as would the statutory distinction between tort and contrct remedies." *Id.* at 990 (quoting *Erlich v. Menezes,* (1999) 21 Cl. 4th 543, at 553-554). Thus, the Supreme Court emphasizes that courts should focus on intentional conduct when considering whether to allow an exception to the rule. *Id.* That Court has likewise admonished courts to "conprehensively to consider the implications of their holdings" before allowing tort claims to invade contractual relationships. *Forley supra,* 47 Cal.3d at 688

Claifornia courts have found exceptions to the economic loss rule in the nocountractual duty category were the conduct also (1) breaches a duty imposed by some types of "special" or "confidential" relationships; (2) breches a "duty" not to commit certain intentional torts; or (3) was comitted "%20intendig or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personalhardship, or substantion consequential damagecs." *Robinson Helicopter,* 34 Cal.4th at 990 (citing and quoting *Erlich,* 21 Cal.4th at 553-554). None of these settled exceptions apply to the facts presented by HBA in this arbitration.

3. Creating new exceptions to the rule.

Even when allowing exceptions for a noncontractual duty-the type of exception least likely to blur the line between contract and tort-the California Supreme Court carefully reviews "public policy" considerations. Specifically, it has expressed concern for respecting the parties' bargain and allowing parties to voluntarily allocate risks in advance.

Robinson Helicaopter illustrates the rule, its policies, and its exceptions. Robinson, a helicopter maker, must comply with striet federal requirements for the parts it uses. *Id.* at 986. It contracted with Dana to supply an importment safety component. *Id.* at 985 & n.2, 991 n.7. The contract obligated Dana to supply Robinson with components that conformed to precise specifications. *Id.* at 985-86.

During one period under the supply contract, Dana changed the specifications to which the safety component was made. *Id.* at 986. Dana nevertheless provided intentionally false conformance certificates when it supplied those components. *Id.* at 986, 987. These began to fail at an alarming rate. *Id.* at 987. Robison had to recall the affcted helicopters and explain the situation to federal and foreign regulators. See id. at 986. Fortunately, no accidents were traced to the fraudulent components. *Id.*

Robison Helicopter explained the two categories of exceptions discussed above. *Id.* at 988-90. It then held that the knowingly false certificates were fraudulent misrepresentations independent of the supply contract. Specifically, providing nonconforming components breached the supply contract; but providing knowingly false certificates was "independent... fraudulent conduct" that breached an independent tort duty. *Id.* at 991.

But *Robinson Helicopter* didnot rest its exception solely on extraneous fraud in the certificates. Before allowing an exception, the court noted that the fraudulent safety components "exposed Robinson to liability for a personal damages if a helicoter crashed and to disciplinary action by [federal authorities]."34cal.4th at 991 (emphasis added). And the Court Summarized its holding as "narrow in scope and limited to a defendant's affinnative miserpresentations on which a plaintiff relies *and which expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss." Id.* at 993 (emphasis added).

Finally, the Court explained that the *Robinson Helicopter* parties had not negotiated or provided in their contract for fraudulent representaions as to the component's specifications. *Id.* at 992.

Regardless whether it can apply outside products liability cases, Robinson Helicopter creates a "narrow" and "limited" exception for extreme circumstances. Most important, it demonstrates California's strong resistance to further eroding the economic loss rule. [13]

C. The duties Citadel breached - and the damages HBA seeks - are encompassed in the parties' contract.

As even HBA acknowledges, no tort duty arises out of a contractual relationship where the contract remedies available to the aggrieved party are sufficient. (HBA Brief, pp. 7-13, citing, among other cases, *North American Chemical Co.,*

supra.) Here, the duties HBA asserts Citadel breached are expressly encompassed in the parties' contract and the contract provides HBA with the right to recover the very same damages it seeks to recover under its negligence claim.

HBA's damages (detailed in Ex. 45) fall into the following categories: [14]

● Costs to complete the project after Citadel's termination in excess of Citadel's unpaid contract balance, including amounts paid directly to subcontractors to secure the release of mechanic's liens;
● Costs incurred to provide project insurance once Citadel's policy was terminated and following Citadel's termination;

● Costs to remedy defective workmanship by Citadel;

Additional consultants' costs due to the project's extended duration resulting from Citadel's termination.

Each of these elements of damages is expressly contemplated under the parties' contract.

HBA's chief contention is that Citadel negligently failed to ensure that its subcontractors were timely paid and that funds paid to it by HBA were used to do so. But this a duty Citadel expressly assumed under the parties' contract. (Ex. 35.) For example, §9.6.2 of the General Conditions obligates the contractor "to pay each Subcontractor no later than seven days after receipt of payment from the Owner the amount to which the subcontractor is entitled... on account of the Subcontractor's portion of the Work." Indeed, under §9.6.4 the owner has the right to request evidence from the contractor that the contractor has properly paid subcontractors amounts paid by the owner for subcontracted work. What would be the purpose of such a right if the contractor did not have the obligation to timely pay its subcontractors?

There is more: in the absence of a payment bond (none was required for this project), payments made by the owner to the contractor for subcontracted work "shall be held by the Contractor for the Subcontractors...for which payment was made by the Owner." (§9.6.7.) [15]

Further, § 14.2 of the General conditions addresses the owner's right to terminate the contractor for cause and the dmages recovarable arising out of suth a termination. One of the expressly stated grounds for termination is the contrator's "fail[ure] to make payments to Subconractos for materals or labor in accordance with respecitve agreements between the Contractor the Subecontractor." (§14.2.1.2.) The General Conditions also allow the owner to terminate the contract if the contractor "is guilty of a substantial breach of a probision of the Contract Documnts." (§14.2.1.4.) The failure to pay subcontrators is clearly suce a "substantial breach."

HBA also asserts that HBA negligently allowed its insurance to lapse. But this, too, is an express obligation of Citadel under the contract. Article 10 of the Agreement states that the contractor "shall purchase *and maintain* insurance" (emphasis added) per Exhibit 4 to the contract, which shows all coverges in place thuough March 1, 2010. This obligation is reiterated in Article 11 of the General Conditions. Again, it cannot be doubted that the failure to mantain the required insurance coverage is a "substnatial breach" of the contract, entitling HBA (as it ded) to terminate the contractor and recover the resulting damages as contract damges.

Not only does the contract expressly set out the duties that Citadel breached, the contract expressly provides that HBA may recover-as a consequence of Citadel's breaches of contract - the very types of damages that HBA claims to have incurred as result of Citadel's "negligence." Section 14.2.4 of the General Conditions sets forth the measure of the owner's damages in the event the contractor is terminated for cause. Those damages in excess of the unpaid contract balance; compensation for the architect's services necessitated by the contractor's default; and "other damages incurred by the Owner and not expressly waived." [16]

Finally, HBA asserts that Citadel breached a duty not found in the contract by allowing Daniel Gordon to manage Citadel's finances, thereby facilitating his diversion of funds form the project and the company, particularly in light of his prior conviction for securities violations. (HBA Brief, p. 10.) HBA repeatedly asserts that Gordon was convicted of embezzlement (*see, e.g.,* HBA Brief, 3:22-24). But this assertion is supported only by the hearsay testimony of David Stack (Stack Depo., 115:6-10) and Howard Clark (Trs. 120:5-7). Gordon testified that he was convicted for an improper derivatives trade with a company in which he had an interest, and related counts. (Gordon Depo., 99:7 - 101:17). Gordon testified that he was convicted for an imporper derivatives trade with a company in which he had an interest, and related counts. (Gordon Depo., 99:7 - 101:17) While this doesn't make Gordon a member of the upstanding citizens brigade, it does suggest a tenuous link between Gordon's prior acts and his diversion of funds on the Hotel Bel-Air project. To suggest that Citadel was negligent in putting Gordon in control of the finances of a company he (or entities he controlled) founded and funded stretches the concepts of both duty and causation.

The express contractual provision discussed above defeat HBA's assertion that its available remedies under the contract are somehow inadequate. Accordingly, there is not basis for finding that Citadel's breaches "also violate a duty independent of the contract." *Erlich, supra,* 21 Cal.4th at 551, citing *Applied Equpment, supra,* 7 Cal.4th at 515. HBA's negligence claim, therefore, fails and Citadel is entitled to an award in its favor on that claim.

IV. CLAIM 3- NEGLIGENT MISREPRESENTATION

The parties agree on the elements of a claim for misrepresentation, both citing the same case (HBA's Arbitration Brief, 16:22-26; Citadel's Closing Brief, 5:23-27) : "(1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages." *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962.

HBA asserts that Citadel made the following misrepresentations (HBA Brief, pp. 3-5);

- It failed to disclose that Citadel's principal, Daniel Gordon, was a convicted felon;

- It falsely assured HBA that there were no problems with subcontractor payments;

- It submitted a response to HBA's RFP for the Master Plan Renovation project that misrepresented Daniel Gordon's expertise and Citadel's financial strength;

- It misrepresented the reason that Citadel was moving its personnel onto the hotel site;

- It failed to disclose suspicions about Gordon's misuse of project funds.

However, HBA's proof of each of these alleged misrepresentations fails at least one of the requisite elements to support a claim for negligent misrepresentation.

With regard to Citadel's failure to disclose Gordon's criminal background, there is no evidence that Citadel ever affirmatively misrepresented that Gordon had been convicted of securities fraud. Nor has HBA cited any law suggesting that Citadel had an affirmative duty to disclose this fact. Indeed, HBA relied on its own due diligence in selecting Citadel to perform the spa project - i.e., it relied on recommendations from others and inspected at least one project in Los Angeles that Citadel had successfully completed. (Trs. 65:11 - 68:1.) HBA also aserts that it never would have allowed Gordon to take a managerial role in the project in the summer of 2009 if had known of his criminal past. (HBA Brief, 3:27-4:1.) But HBA failed to show that Gordon's presence on the site facilitated his misuse of funds, which according

to HBA was the ultimate cause of Citadel's inability to complete the project. Rather, the evidence is that Gordon had access to Citadel's bank account at all times throughout the project until October 2009. (See, e.g., Stack Depo., 66:12-16; 177:12-16; 180:4-9; 188:4-23; 254:21 - 255:5.) Moreover, Carlin testified that Gordon's involvement in the project in the summer of 2009 was actually helpful to the value engineering process on the interiors project. (Tr. 268:7-25, 270:2 - 271:13; 311:6 -312:13.) Under these circumstances, HBA has failed to satisfy the elements necessary to sustain a claim for negligent misrepresentaion.

As to Citadel's assurances that there were no issues with payments to subcontractors, HBA cites two instances of such "assurances" (HBA Brief, 3:18) : Citadel's then project team's (Mo Hassanhkani, Casey Gordon and Greg Domani) statements sometime [17] in the summer of 2009 that there were "no issues and that everything was running well" (Trs. 103:21 - 140:16); and a conversation HBA's project manager, Howard Clarke, had with Casey Gordon after the subs had walked off the project in September 2009 (Trs. 129:24 - 130:1). As to the latter, the testimony cited does not show that Casey Gordon made any representation with respect to payment of the subs; rather, Clarke testified that Casey Gordon said he was "surprised" the subs hadn't been paid. (Trs. 130:17 - 131:21.) And as to the former, the evidence does not show that the persons claimed to have made the statements did not have a reasonable basis for believing them to be true. First, there was no evidence as to why payments to the subs that were complaining over the summer were late; it is pure speculation that that was related to Daniel Gordon's misuse of funds, and there is no evidence that anyone at Citadel was then award that Gordon was diverting funds to his personal use. Second, even Clarked testified that "to be fair [,] to that point[] the project was running well." (Trs. 10:22 - 23.) There is insufficient evidence that statements cited by HBA constitute actionable misrepresentations.

Next HBA cites misrepresentations made by Citadel in its July 31, 2009 response to HBA'S REP for the Master Plan Renovation Project (Ex.18).There are three problems with HBA's reliance on this document to support its misrepresentation claims. First, the RFP did not relate to citadel's existing contract with HBA for the constructionn of a spa. Rather, it sought information with regard to various contracators' ability to perform wholly separate work: the Master Renovation of the Hotel site. Thus, Citadel's response necessarily involved representations with regard to its ability to perfor the Master Renovation project, not the spa project that it was already under contract to perform.

Second, HBA has not presented any facts showing that any representations in the response to the RFP were not true at the time the RFP was submitted. HBA's insurance was in place on the spa project on July 31, 2009 and was not cancelled for another three and half months. (Ex. 37.) Daniel Gordon was described as a "pragmatic and knowledgeable construction expert" and a "consummate profeessional." While arguably stretchingg the boundaries of puffing (Gordon testified at his depostion that he didn't consider himself "a construction professioanl [and] would not have been an estimator or project manager" (Gordon Depo., 36:9-11), there is no evidence that HBA considered this particular statement in its subsequent actions on the spa project. In fact, as noted above Carlin felt Gordon was helpful in the value engineering process for the interiors work

Third, and most importantly, HBA fails to show how it relied to its detriment on any representaions made in the response to the RFP by presenting evidence of anything that it did or didn't do upon receiving Citadel's response to the RFP. Certainly, it did not award Citadel the Master Renovation project and suffered no loss in that regard. It was already obligated to,and did, pay Citadel for work performed on the spa project. It is hard to see how HBA relied to its detriment on representations with respect to Citadel's sales figures or bonding capacity, particulary as spa project was not bonded.

With regard to Citadel's statements about why it was moving its personnel onto the project site, this did not occur until sometime in September 2009 (Stip.¶13),and the statement in question apparently came from Casey Gordon (see, fn.9, above). However, HBA Presented no evidence that Casey Gordon did not then believe this to be true, that he had knowledge that the real real reason was because of Citadel's financial problems. As noted, Casey Gordon was surprised to find the subs hadn't been paid when they walked off in September. (Trs. 131: 15-21.)

Lastly, HBA claims that Citadel failed to disclose its "suspicions" about Daniel Gordon's misuse of project funds. (HBA Brief, 5:17-19.) There are a number of problems with this. First, HBA fails to demonstrate that Citadel had a legal duty to disclose its "suspicions" to HBA. Second, the evidence is insufficient to determine when anyone in a managerial position at Citadel first had suspicions that Gordon was misusing funds. Stack testified that he asked Citadel's then-controller about payments to a particular vendor in July 2009 (Stack Depo., 176:11-20) but the controller respondent that he should speak to Gordon about it, which he apparently never did. (Id., 176:21 - 177: 7.) Stack further testified that he did not conduct an investigation to determine if Gordon was in fact misusing funds until "September, October" when he reviewed the check rruns for the company. (Id., 169:22 - 171:18.) By this time, all of the payments that HBA ever made directly to Citadel had already been made. (Ex. 41, showing the last payments directly to Citadel were made on September 9, 2009.) Third, HBA did not demonstrate that if was harmed by HBA's non-disclosure. Had Stack revealed his concern that Gordon was misusing funds when he began his investigation in September or October, there is no evidence that HBA would or could have done anything differently to prevent its losses: as noted, it had already made the last payments it would ever make directly to Citadel.

HBA has failed to prove all of the necessary elements to support a claim against Citadel for negligent misrepresentation and Citadel is, therefore, entitled to an award in its favor on that claim as well.

V. ATTORNEYS' FEES, COSTS AND ARBITRATION EXPENSES

A. Attorneys' fees

The parties do not dispute that the December 1, 2008 contract between HBA and Citadel does not contain a provision for the award of attorneys' fees in the event of litigation or arbitration. As result, as the prevailing parties, Citadel, Stack and Gordon must find some other basis to avoid the "American Rule" governing the award of attorneys' fees pursuant to which each party bears its own fees regardless of who is the prevailing party. *Musaelian v. Adams* (2009) 45 Cal.4th 512, 515; *Code of Civil Procedure* § 1021.

1. Citadel and Stack

Citadel and Stack assert that they are entitled to attorneys' fees on three grounds: AAA Rule R-44(d); *Civil Code* §3260(g); and *Business & Professions Code* §7108.5(c).

Rule R-44(d) states:

> The award of the arbitrator may include... an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

In its Demand for Arbitration dated July 6, 2010, under the heading "Other Relief Sought," HBA checked the boxes for "Attorneys' fees and arbitration costs. On its face, these reciprocal demands appear to authorize the arbitrator under Rule R-44(d) to include an award of attorneys' fees in this Final Award.

The cases cited by the parties on the proper interpretation of Rule R-44(d) are, at best, only somewhat helpful. HBA cites *Thompson v. Jespersen* (1990) 222 Cal.App.3d 964, for the proposition that arbitrators are without power to award fees in the absence of a contract providing for the award of such fees. However, that case was decided under an earlier version of the Rules that did not include Rule R-44(d) and so is not helpful in determining whether that Rule gives arbiratiors the power that the *Thompson* court found lacking.

The case cited by Citadel and Stack are only somewhat helpful. In Taylor v. Van-Catlin Construction (2005) 130 Cal.App.4th 1061, the court was reviewing an arbitrator's award granting attorneys' fees to the prevailing party even though parties' construction contract did not include an attorneys' fee provision. One of the grounds identified by the arbitratior to support his award was Rule R-44(d). However, because the court found that the arbitrator's other basis for awarding attorneys' fees was correct (and beyond judicial review in any event,) it expressly held that "we need not decide whether the arbitrator's reliance on a request by 'all parties' constituted an error of fact or law or resulted in an act in excess of the arbitrator's powers." [18] Id. at 1067.

Next, Citadel cites two unpublished California Court of Appeal cases, *Sun Country Builders, Inc. v. Coker Equipment Co., Inc.* (2009) 2009 WL 33627, and *Amalfi Capitol, LLC v. Earl* (2010) 2010 WL 3789834. [19] In Sun Country, the arbitrator awarded attorneys' fees pursuant to Rule R-44(d) based on the parties' reciprocal requests for fees and not on any contractual provision. But the issue on appeal was not whether the arbitrator correctly applied Rule R-44(d), but whether the arbitrator exceeded his powers by modifying hsi Interim Award to include an award of fees. [20] The Court of Appeal found that the arbitrator had the power to modify his Interim Award and, so, never reached the propriety of the arbitrator's award of fees under Rule R-44(d).

Thus, all *Taylor* and *Sun Country* tell us is that at least two other arbitrators (not courts) have interpreted Rule R-44(d) in the same way as Citadel and Stack.

The third case by Citadel and Stack is *Amalfi Capital.* As in *Thompson, supra,* the appellant contended that arbitrator exceeded his powers by awarding attorney's fees to the prevailing party in the absence of a contractual provision for such an award. The parties' agreement provided that disputes arising under that agreement were subject to arbitration under the Construction Industry Arbitration Rules of the AAA. In addition, both Earl's demand for arbitration and Amalfi's counterclaim requested attorneys' fees. Citing Rule R-44(d), the Court of Appeal held that the parties therefore "intended the 'question' of attorneys' fees to be governed by the AAA rules which, in turn, authorized the arbitrator to award attorney fees." 2010 WL 37898234. at *5.

As with *Taylor* and *Sun Country, Amalfi* tells us that one more arbitrator interperts Rule R-44(d) in the same way as Citadel and Stack, And although the court chose not to publish the case, it also tells us that one panel of hte Second District Court of Appeal did so as well.

Turning to HBA'S other arguments against the applicability of Rule R-44(d), HBA argues that the parties' contract does not incorporate the AAA Rules such that the parties cannot be said to have agreed to have the issue of attonreys' fees decided by the arbiterator. (Opps., 9-13.) HBA relies on the specific enumeration of the Contract Documents set forth in Article 9 of the Agreement. but this ignores the fact that the defined term "Contract Documents" *includes* the General Conditions. And the General Conditions, in turn, make specific reference to the fact that arbitrated matters are to be "administered by the American Arbitration Association *in accordance with its Construction Industry Arbitration Rules* in effect on the date of the Agreement." (§ 15.4.1.)

HBA asserts that a reference to the "administration" of the case is "akin to a choice of forum or venue." (Opps., 11:9-11.) Perhaps, but the choice of a forum (e.g., the California Superior Court) carries with it the implicit agreement to the rules of that forum (i.e., the *Code of Civil Procedure and the California Rules of Court).* Here, the choice of governing rules is not implicit; Section 15.4.1 makes it explicit: disputes resolved by arbitration are to be governed by the AAA's Construction Industry Arbitration Rules.

This conclusion addresses the first two prongs of the three-part test set forth in *Williams Constr. Co. v. Standard-Pacific Corp.* (1967) 254 Cal.App.2d 442, 454, for determining if a document has properly been incorporated by reference into another, cited by HBA in its Opposition (is the reference clear and unequivocal; is the incorporated document called

to the attention of the party to be bound). As to the third prong (the incorporated document must be known or easily available to the party to be bound), Citadel and Stack correctly point out that the Rules are (and were in 2008) readily available from the AAA or easily accessible online. [21]

Finaly, HBA argues that "the only reasonable interpretation" of Rule R-44(d) is the it merely serves as a mechanism for opting out of a right to attorneys' fees created by a contractual provision for fees. (Opposition, 15:4-13.) Put another way, HBA argues that under Rule R-44(d) the failure of a party to requeest fees is a waiver of the right to those fees. But this interpretation is contradicted by the disjunctive language of the Rule: an award of attorneys' fees is apropriate "if all parties have requested such an award or it is authourized by law or their arbitration agreement." (Emphasis added.) Thus, that the contract provides for fees is enough to support an award fo fees; a reciprocal request is another, separate basid for awarding fee.

To summarize, I conclude that Rule R-44(d) authorizes an award of attorneys' fees where, as here, both sides have requssted such fees in advance of the arbitrator's ruling, even in the absence of a contractual provision mandation or authoirzinag the award of such fees. [22] Given this conclusion, it is unnecessary to discuss the alternate statutory bases for such an award asserted by Citadel and Stack.

However, given the permissive language of Rule R-44(d) (the award "may" include an award of attorneys' fees), it is equally clear that I have discretion to award - or not award - fees. I will now discuss whether and how to exercise that discretion.

In my view, Citadel and Stack warrant different treatment. Although Citadel prevailed on the claims remaining at the hearing of this matter, this is only because HBA made a stategic decision ot dismiss its breach of contract claim at the 11th hour. As I noted early in this Award, had HBA not done so, it could easily have prevailed on a berach of contract claim aagintt Citadel. Citadel's involvement in this arbiration - and the resultion attorneys' fees - were the direct result of its failure to have completed its contract with HBA. Citadel should not be rewarded woth the recovery of its attormeys' fees because of a strategic decision by HBA's counsel on the eve of the hearings in this matter. Accordingly, Citadel's requst for fees is denide.

Stack, on the other, hand, was brought into this arbitration based on legal claims that lacked merit from the outset, as detailed in my April 2, 2012 order granting Stack's motion to dismiss. Stack, through his counsel, protested his nvolvement in this dispute from its earliest stages. (Decl. of Lawrence A. Abelson in Support of Motion for Award of Attorneys Fees, ¶5.) Only after lengthy discovery and the filing of a dispositive motion was Stack able to extricate himself from this arbitration. As the prevailing party on all claims brought against him by HBA, 1 conclude in the exercise of my discretion under Rule R-44(d) that Stack should be awarded attorneys' fees.

As for the amount of such fees, Citadel and Stack jointly claim $419,291.50 in fees, including $14,940.00 incurred by Wood, Smith, Henning & Berman LLP on or after April 6, 2012, after that firm associated as counsel for Citadel and Stack had been dismissed. As Wood, Smith's fees were incurred solely in the representation of Citadel, those fees are excluded from my calculation of fees to be awarded to Stack. Similarly, once Stack was dismissed as April 2, 2012, any fees incurred by the Epport, Richman firm were necessarily incurred solely in defending Citadel. 1 calculate that the fees incurred after April 2, 2012 total $59,632.00 (Nelson Decl., Ex. A), and have also excluded them from my calculations. Finally, the Epport, Richman billing statement for services through May 25, 2012 *(id.)* reflects various write-offs totaling $4,010.16 to conform to the guidelines of the insurer paying the bills. These, too, should be duduted from the total fees acutally incurred. [23] Thus, I calculate that fees incurred in the joing representation of Citadel and Stack from the filing of HBA's complaint through April 2, 2012 total $340,709.34, calculated as follows:

Total fees claimed	419,291.50

Less Wood, Smith fees	-14,940.00
Less post-4/2/12 fees	-59,632.00
-	-
Less write-offs	-4,010.16
Net fees incurred	340,709.34

HBA asserts that fees incurred before the commencement of the arbitration proceedings should be excluded. (Opps., 27-28.) However, the parties' contract makes clear that all claims arising out of the contract are to be arbitrated. Counsel for Citadel and Stack began investigating the arbitrability of the claims asserted by HBA in its Superior Court complaint within days of his retention as counsel. (Abelson Decl., Ex. A, billing entry for 01/05/10.) Moreover, many of the legal claims asserted in the complaint were also the subject of HBA's claims in arbitration, so time spent investigating those claims was equally applicable to the defense of HBA's arbitration demand. In sum, I find no basis for excluding fees incurred before the commencement of arbitration in my calculation of fees to be awarded.

HBA also asserts that because Stack's fees were paid by his insurer he is not entitled to recover any fees. (Opps., 21-24.) However, Stack correctly points out that this is not the law, citing Staples v. Hoefke (1987) 189 Cal.App.3d 1397, 1409. Fees are awarded to Stack; his agreement with his insurer is of no import.

Stack correctly states that the starting point for an award of fees is the “lodestar” (Motion, 14-15), in this case $340,709.34. I find that the blended rate of $255.77 is reasonable, and HBA does not appear to contend that it is not. I also find that the amount of time is reasonable in light of the complexity of the issues involved and the amount of discovery that occurred, including that in the Superior Court.

Nevertheless, because these fees were incurred in the joint representation of both Citadel and Stack, and only Stack is to recover his fees, it is necessary to apportion fees billed by the Epport, Richman firm between Citadel and Stack. No party has provided any suggested methodology for doing so. I conclude, therefore, that the fees should be apportioned 50/50 between Citadel and Stack, such that Stack is entitled to recover 50% of the lodestar, or $170,354.67. In addition, Stack shall recover an additional $2,500 in fees incurred in the preparation of his motion for attorneys' fees and costs, for a total of $172,854.67.

2. Gordon

Gordon also bases his claim for attorneys' fees on Rule R-44(d). However, Gordon's claim fails for a fundamental reason: he never requested attorneys' fees until after 1 issued my tentative ruling granting his motion to dismiss. His motion merely cites Rule 44(d) and references Citadel's demands for fees, withourt demonstrating that he ever made an earlier request for attorneys' fees. Unlike Citadel and Stack, Gordon chose not to file an Answering Statement requesting fees, as was his right unde Rule R-4(c).

The fact that Gordon now seeks fees is not enough to invoke Rule R-44(d). Otherwise, a party not otherwise, exposed to paying the other side's fees in the event he loses the dispute (e.g., where, as here, there is no “revailing party” provision for fees in the parties' contract) could simply await the outcome of the case and, if successful, then demand fees if the other side had previously done so. Whatever the interpretation of Rule R-44(d), it could not have been intended to support such gamesmanship.

In any event, even if Gordon had made an earlier request for fees, I would exercise my discretion under Rule R-44(d) not to award him any fees, given the evidence presented that his defalctions contributed to Citadel's inability to complete its contract with HBA.

Gordon's request for attorneys' fees is denied.

B. Costs

All respondts submitted Memoranda of Costs seeking the recovery of expenses incurred in the arbitration. The recovery of costs (other than AAA fees and the arbitrator's compensation, dicussed below) is govemed by Rules R-44(c) and R-51, particulary in the absence of any provision in the parties' contract addressing the recovery of costs. Rule R-51 provides:

> The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

1. Citadel and Stack

To the extent the costs claimed jointly by Citadel and Stack consist of “expense of witnesses” for either Citadel or Stack, under Rule R-51 such costs are required to be borne by Citadel and Stack. However, their motion fails to make clear what witnesses are covered by the witness-related costs claimed, such as deposition costs, service of process and witness fees. The Memorandum of Costs also seeks various categories of costs that would not be recoverable even in an action in Superior Court (copying costs other than for trial exhibits, litigation support, local counsel fees, ecpert fees, travel expenses and undefined “other” expenses). Accordingly, I conclude that Citadel and Stack should bear therir own costs.

2. Gordon

For the reasons given for denying Gordon's request for attorneys' fees, his request for an award of the costs set forth in his Amended Memorandum of Costs is also denied.

C. AAA Fees and Arbitrator's Compensation.

The administrative fees and expenses of the American Arbitrartion Association totaling $11,850.00 and the arbitration compensation and expenses totaling $56,241.33 shall be borne as follows:

In accordance with Rules R-44(c), R-50 and R-51, the Arbitrator finds that Stack is entitled to reimbursement by HBA of 50% of the administrative filing fees and other of the American Arbitration Association incurred on his bechalf by the Epport, Richman firm in the sum of $1,650.00, and 50% of the Arbitrator's compensation and expenses incurred on his behalf by the Epport, Richman firm through April 2, 2012 in the sum of $ 4,781.51, for a total of $6,431.51. Each other party shall bear the amounts incurred by them.

VI. SUMMARY

As noted above, only thereee claims at the commencement of the evidentiary bearings in this matter: Claims 3 (negligent misrepresentation), 4 (negligence) and 7 (negligence per se). As no evidence or arguments were presented at the hearing with regard to Claim 7, that claim is considered abandoned and is dismissed. Citadel is entitled to an award in its favor on the remaining claims, Claims 3 and 4. Stack and Gordon were previously dismissed by my order of April 2, 2012 and are, therefore, also entitled to an award in their favor. Accordingly, HBA shall take nothing from Citadel, Stack or Gordon.

Citadel's and Gordon's claims for attorneys' fees, costs and expenses are denied.

Stack shall recover from HBA the total sum of $179,286.18, consisting of attorneys' fees of $172,854.67; and reimbursement of AAA fees and the Arbitrator's compensation incurred of $6,431.51.

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

Dated: August 14, 2012

<<Signature>>

David P. Dapper,

Arbitrator

Footnotes

1 Pursuant to the contract govening this dispute, the applicable Rules are those in effect on the date of the contract, i.e., December 1, 2008. (Ex. 35, General Conditions §15.4.1.) This means the Rules effective September 1, 2007 are the govening Rules (www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004245) and all further references to the Rules are to the September 1, 2007 version of the Rules.

2 I note these facts for context only, to explain HBA's choice of legal theories. The existence or non-existence of insurance coverage, of course, had no effect on how I ruled on the facts presented as applied to those theories.

3 In any event, counsel for HBA confirmed at the hearing that the only claims being pursued by HBA were those for negligence (Claim 4) and negligent misrepresentation (Claim 3). (Hearing Trnscript (“Trs.”) 20:8:17.)

4 Such a motion is normally made at the close of a plaintiff's case in a jury trial. The analogous motion in a non-jury trial in Superior Court is a motion under Code of Civil Procedure §631.8. In arbitration, such a motion is arguably contemplated by AAA Construction Industry Arbitration Rules, Rule R-31(c).

5 HBA presented only two live witnesses and Citadel did not present any. The parties submitted a written stipulatin of certain facts. Both parties submitted excepts from the depositions of Citadel's principals, Daniel Gordon and David Stack, and HBA submitted the declarations of two former Citadel employees, Casey Gordon and Mo Hassanhkani. All exhibits referenced at the hearing were admitted by stipulation or over objections that were overruled.

6 According to Howard Clarke, HBA's project manager, it was “middle of summer 2009, probably June.” (Trs. 103: 1-14.)

7 According to Carlin. (Trs. 235:21 - 237:2.) Carlin's testimony was more specific and, therefore, more credible.

8 Clark testified that HBA was “reassured” and made “comfortable” in continuing to make payments to Citadel by Gordon's and Stack's increased presence on the job site in the summer of 2009 (Trs. 115:16-22, 119-3-7). but their more presence cannot constitute a representatin of any affirmative fact on which HBA could rely.

9 Inexplicably, before making additional payments to Citadel HBA did not require Citadel to provide lien releases from its subcontractors for all prior amounts received by subcontractors that were covered by HBA's prior payments to Citadel.

10 The testimony does not make clear who at Citadel made this statement, but it appears to have been Casey Gordon, Citadel's project manager, as Citadel's principals, Stack and Daniel Gordon, stopped coming to project meetings annd essentially left the project site in early August. (Trs. 122:15-24; Ex. 12.)

11 Much of the discussion in this section relies on (and borrows from) the District Judge's opinion in United Guaranty Mortgage Co. v. Countrywide Financial Corp., (2009) 660 F.Supp.2d 1163, 118-1183, which addresses the very issue presented in this case: under what circumstances may a party in privity assert a tort claim against the other contracting party?

12 One line of cases relied on by HBA can be dispensed forthwith: HBA incorrectly argues that *J'Aire Corporation v. Gregory* (1979) 24 Cal.3d 799, which applied the five factors for determing the existence of a tort duty set out in Biakanja v. Irving, (1958) 49 Cal.2d 647, provides a framework for exceptions to the economic loss rule. Biakanja's test. by its own terms, determines whether a tort duty is owed to third parties "not in privity" of contract. Id. at 650. Similarly. J'Aire involved a claim by a tenant against a contractor *hired by the landlord.*

More recend cases confirm *Biakanja's* limited applieation. See, e.g., *Stop Loss Ins. Brokers, Inc. v. Brown & Tolard Med. Group,* (2006) 143 Cal.App.4th 1036, 1042-43 (Biakanja and J'Aire only apply to claims by an injured third party arising out of the defendant's breach of a contract with another). Thus, J'Aire and Biakanja are inapplicable when the parties have a contractual relationship, as exists between HBA and Citadel.

13 The Courts of Appeal have read *Robinson Helicopter* in this way, as the case's plain language mandates, See, e.g., *Benavides,* 136 Cal.App.4th at 1251-53 (recognizing that *Robinson Helicopter* "identified the limited circumstances" where a contractual relationship "can give rise to a tort claim").

HBA also argues that the economic loss rule does not apply to transactions for services, such as a construction contract, citing *North American Chemical Co. v. Superior Court,* (1997) 59 Cal.App.4th 764. 777 and a number of out-of-state cases. (HBA Brief. 15:3-10 & fn. 8.) But this contention appears to have been rejected by the California Supreme Court in *Aas, supra,* 24 Cal.4th at 645, n.11. Read in the context of the *Aas* opinion as a whole, footnote 11 of the opinion suggests that the *Aas* court rejected the plaintiffs' contention that negligent performance of services is to be treated differently than the negligent manufacture of goods. This interpretation of this passage is supported by other passages of the *Aas* opinion that draw no distinction between these situations. *See id.* at 636 ("For defective products and negligent services that have caused neither property damage nor personal injury, however, tort remedies have been uncertain."). In addition, Aas specifically rejected the plaintiffs' argument, based on *North American, supra.* 59 Cal. App.4th at 774, that those plaintiffs in contractual privity with the defendant are entified to recover for negligent performance of a service contract. *Ibid.* at 642-43. The Aas couyrt explained that a "person may not ordianrily recover in tort for the breach of duties that merely restate contractual ovligations." *Id.* at 643. For these re3asons. I conclude that economic loss rule applies to the negligent performance of services as well as to the negligent manufacture of goods.

14 Because the hearing in this matter was bifurcated, proof of HBA's damages was deferred until the Phase II hearing scheduled for August 2012. However, presumably because HBA sought to show that its contract remedies were inadequate, HBA nevertheless introduced (without objection by Citadel) a summary of its claimed damages, Exhibit 45.

15 This obligation is qualified by language indicating that it does not create any fiduciary liability or tort liability on the part of the contractor for breach of trust. *(Id.)* This reinforces the notion that tort remedies are not available for mere breaches of the contract.

16 In this regard, Citadel took the position during oral argument on its nosuit motion that HBA waived *all* of its claimed damages pursuant to the waiver of consequential damages in § 15.16 of the General Conditions. (Trs. 342:16-344:25.) But the damages sought by HBA do not consitute consequential damages (e.g., lost profits from the operation of the spa or the hotel). Rather, they are unquestinoably the tybe of damages that is recoverable under *Civil Code* § 3300 for breach of contract.

17 *See,* fns. 6, 7, *above.*

18 In discussing this case, HBA quotes what appears to be a headnote, not a direct quotation from the court's opinion, while purpoting to give a pinpoint cite to where this "quote" appears in the opinion. Opposition to Respondents' Motions for Attorney's Fees and Costs ("Opps."), 7:5-6.

19 HBA correctly points out that these cases would not be citable in California courts. However. the California Rules of Court prohibiting the citation of unpublished cases do not apply in arbitration. To the extent the cases shed any light on the courts' (and other arbitrators') thinkint on an issue before me. 1 find such cases useful.

20 Preseumably, the losing party did not challege the arbitrator's interpretation of Rule R-44(d) because such a challenge would have been unsuccessful under the limited scope of review allowed under Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1.

21 *See, fn.* 1, above, It is also significant to note that HBA's potebtial exposure to attorneys' fees under Rule R-44(d) was not triggered until it made a request for attorneys' fees in its Demand for Arbitration, at which time it was represented by counsel. Also, that very same document is headed "Construction Industry Arbitration Rules, Demand for Arbitration."

22 While not relying on Rule R-44(d), other courts and commentateors have concluded that reciprocal demands for attorneys' fees can vast the arbitrator with authority to award fees even in the absence of a contractual provision for fees. *McDaniel*

v. Bear Stearns & Co., Inc. (USDC S.D.N.Y. 2002) 196 F,Supp.2d 364-365; "An Arbitration Panel's Authority to Award Attorney's Fees, Interest and Punitive Dmages," 6 *Rutgers Confion L.J.,* No. 2 (Spring 2009)

23 It is possible that some of these write-offs relate to expenses not included in the fees claimed, but given the generally round amounts written off, they appear to represent fees written off.

End of Document