

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Axenics, Inc. f/k/a RenTec Corporation

v.

**Turner Construction Company,
Stryker Biotech, LLC, and
Stryker Sales Corporation**

NO. 217-2010-CV-5001

ORDER

The Plaintiff, Axenics, Inc. (“Axenics”),¹ has filed suit against the Defendants, Turner Construction Co. (“Turner”), Stryker Biotech, LLC, and Stryker Sales Corp. (Collectively “Stryker”), alleging that the Defendants owe Axenics money for materials, labor, equipment, and services. Axenics asserts claims of breach of contract (against Turner), unjust enrichment (against Turner and Stryker), and a violation of RSA 358-A, New Hampshire’s Consumer Protection Act (“CPA”), (against Turner and Stryker). Turner and Stryker have filed counterclaims against Axenics, alleging breach of contract and a violation of the New Hampshire CPA. The Court held a trial on the merits for a period of eighteen days between April 5, 2010, and September 16, 2010. For the reasons stated in this Order, the Court finds in favor of Axenics on its unjust enrichment claim and awards damages to Axenics against Turner and Stryker jointly in the amount of (\$1,080,000.00). The Court finds against Turner and Stryker on their counterclaims.

¹ During the course of the parties’ business relationship, Axenics was known as “Rentec Corporation.”

I

In this bench trial, the Court sat as the trier of fact. The Defendants argue that a party who calls an adverse party as a witness is bound by that testimony:

The Defendants note that in this memorandum, the testimony of David Page, Adam Parys[,] and James Dunn are listed as “Plaintiff’s witnesses (adverse)” because the Plaintiff put the testimony into evidence and therefore is necessarily bound by that evidence unless the Plaintiff specifically impeached its own adverse witnesses.

Defs.’ Post-trial Mem. at 2, n. 1. The Defendants, however, cite no case or rule of law supporting this notion. The Defendants appear to articulate the common law “adverse witness rule.” See 81 Am. Jur. 2d Witnesses Sec. 736 (2010). This common law rule, that a party is bound by the testimony of the witnesses it calls, does not appear to have been followed strictly in New Hampshire for the last 150 years. See, e.g., Connor v. New England Steam and Gas Pipe Co., 40 N.H. 537, 539-40 (1860). To the extent the adverse witness rule is still viable, it does not stand for the proposition that all evidence presented through an adverse witness binds the party presenting the evidence unless specifically impeached. Instead, what remains of the rule provides that the party “is bound by so much of the adverse witness’s testimony as is clear, reasonable, uncontradicted, and not discredited.” 81 Am. Jur. 2d Witnesses, Sec. 736 (2010). A party is not bound “by such of the witness’s testimony as is in conflict with the evidence introduced by that party.” Id. In fact, in New Hampshire, a party is not necessarily bound by his own testimony. Plume v. Couillard, 104 N.H. 267, 268-69 (1962). In other words, so long as Axenics presented evidence, at any time, contrary to its adverse witnesses’ testimony, it is not so bound. Parties do not vouch for their witnesses, and the common law rule prohibiting a party from impeaching its own witness

has been abandoned. Compare Bedford Sch. Dist. v. Caron, 116 N.H. 800, 805-06 (1976), with N.H. R. Evid. 607. With this in mind and based on the evidence submitted, the Court finds the following facts.

This litigation concerns the construction of a biotech facility, which is located at 9 Technology Drive in West Lebanon, New Hampshire. Stryker Sales Corp., which owns the property where the facility is located, is a Michigan corporation. Stryker Biotech, LLC, is a Michigan limited liability company that operates the facility. Turner Construction, Co., is a New York corporation that was hired as the general contractor to build the biotech facility. Axenics, Inc., is a Massachusetts corporation with its principal place of business in Nashua, New Hampshire. Axenics provides manufacturing, installation, and field services for ultrapure gas and liquid distribution systems in the biotechnology, pharmaceutical, and semiconductor industries.

The Subcontract's Language

Changes

On April 15, 2004, Axenics entered into a written subcontract ("Subcontract") with Turner to furnish labor, materials, equipment, and services for the production of Stryker's Biotech OP-1 Facility Expansion. Both parties agreed that the project was to be completed as quickly as possible. The Subcontract price was originally set at \$1,992,506.00.

Within the Subcontract, Axenics and Turner expressly planned for costs associated with delays, added directives, and added fees due to work outside the scope of the Subcontract. First, when Turner directed additional work to be performed, Axenics was required to submit to Turner a "lump sum proposal,"

whereby Axenics was required to itemize all costs associated with the additional work. The lump sum proposal was required to “be accompanied by accurate written estimates of the cost and [needed to] be submitted to Turner within (5) calendar days of receipt of the directive.” See Subcontract, Additional Prov. Sec. G2.² If, however, Axenics did not submit a proposal for additional work, Turner was required to “assign a fair and reasonable value for the additional work, and the additional work [would] become part of the subcontractor’s scope of work,” as defined in the Subcontract. See id.

When making changes in the work to be performed, Axenics was required to submit “change orders.” See id. at 5. The change orders were required to be in writing and, where Axenics believed that the changes were not within its “scope of work,” Axenics was required to obtain Turner’s concurrence before proceeding with such work. Id. at 5. Each written change order provided expressly that:

Through acceptance of this Change Order, this Subcontractor acknowledges that it has reviewed the progress of the Work related to this Project and the potential impact of the added work on the progress of the project in the future. As a result, this Change Order includes compensation to the Subcontractor for any and all effects, delays, inefficiencies or similar demands associated with this Project and the Subcontractor recognizes that there is no basis for any such claim in the future.

Id.

Additionally, the Subcontract provided that if Axenics was delayed, obstructed, hindered, or interfered with in its completion of the work, it was required to notify Turner in writing of the cause of the delay within forty-eight

² Under the Subcontract, A Turner representative could choose to issue a Superintendent’s Instructions to Subcontractors (“SIS”), where due to the interest in time, the parties could proceed with the work despite the fact that a subcontractor sought added costs. However, SIS documents were for record purposes only and were not required.

hours of the delay's commencement. Subcontract, Section V. Moreover, Axenics agreed that "such notice [was] an essential condition precedent to [its] rights in connection with. . .such delays. . . ." Subcontract, Section V.

Coordination

Also spelled out between the parties was the "OP-1 Expansion Project Construction Coordination Procedure." (Ex. A00116.) This procedure outlined the responsibilities of each party relating to the project's coordination. The responsibilities were as follows: (1) Turner was responsible for scheduling, facilitating, and controlling the coordination process; (2) PFI (Engineer) was responsible for supporting and reviewing design changes required due to field coordination issues; and (3) Axenics (as well as all other Subcontractor Representatives) was required to produce, maintain, and approve coordination drawings, as well as implement coordination driven changes. In the end, Turner was "responsible for coordination of all work" and to "conduct, prepare[,] and submit composite coordination drawings to the Engineer." (Ex. A00134.)

The Subcontract also required subcontractors to attend "coordination meetings." For the most part, the evidence demonstrates that Axenics, through Steven White and others, was in attendance at substantially all of these coordination meetings. The Defendants did not introduce any contemporaneous documents or meeting minutes which demonstrate or suggest that Mr. White was pressed for certain drawings or that he failed to deliver the proper drawings and documentation at such meetings.

Pay-if-Paid Clause

The Subcontract between the parties also contained a pay-if-paid clause.

The clause stated,

The Subcontractor agrees that it shall not be entitled to nor claim any cost reimbursement, compensation or damages for any delay, obstruction, hindrance or interference to the Work except to the extent that Turner has actually recovered corresponding cost reimbursement, compensation or damages from the Owner under the Contract Documents for such delay, obstruction, hindrance or interference, and then only to the extent of the amount, if any, which Turner on behalf of the Subcontractor, actually received from the Owner on account of such delay, obstruction, hindrance or interference.

Subcontract, Section V.

Blind Welds

Although the Subcontract does not necessarily address the issue of blind welds, the Engineer, PFI, does. In PFI's "Specification for Piping Fabrication and Erection" manual, PFI states that, "Blind welds are welds that will be inaccessible for visual internal, or borescope, examinations. The Contractor must first obtain written approval from the CM or his representative prior to making any blind welds." (Ex. A00408.) Furthermore, PFI goes on to specify the precise circumstances under which a blind weld may be performed in conjunction with the project. (See id.) Turner viewed blind welds as disfavored, but not necessarily prohibited. Mr. Parys testified, though somewhat evasively, that he instructed Axenics it could perform blind welds "if they met the requirements of the contract." The requirements, he maintained, were to perform work so that the subcontractor "would not have to perform blind welds." Mr. Parys testified that Axenics did not meet the requirements because it had problems "coordinating the drawings."

The Project, Its Scope, and Change Orders

Axenics and Turner entered into the Subcontract on April 15, 2004. The

mechanical completion date for the project was December 31, 2004, with the complete validation of the project to be finished by either July or August 2005. Ultimately, Axenics' last day on the job was June 2, 2005.

Although the project was completed on time, several delays occurred. Initially, Axenics bid the project on the basis that as of March 2004, it would be able to mobilize to fabricate process piping at the Project site. This, however, did not occur. When the project was less than one month away from the mechanical completion milestone, "several process equipment components and systems appear[ed] to be behind schedule." (Ex. S6.) The late equipment delivery included a "stopper washer, comminutor, separator, lyophilizer, and capper/crimper." (Ex. S347.) Moreover, flooding damage, which occurred on January 7, 2005, affected several rooms, and in turn, the installation of process equipment. In total, "[a]ll of the delays...in water damage, late-arriving process equipment, and general construction material deliveries...caused a month delay to the end of validation." (Ex. S505.)

According to Turner and Stryker documents, Mr. Parys, Turner's employee, was responsible for evaluating how the delays would affect the entire schedule. On several occasions, Mr. Parys specifically directed several process piping changes that were "outside the scope" of the contract. Axenics was required to follow Mr. Parys's direction. The changes ultimately required Axenics to work overtime.

Some of the equipment that was delivered late was defective. For instance, a processed water tank that was to be used by Axenics was delivered with a nozzle that was off 45 degrees. Such mishaps, and the changes at the job site, required

Axenics to seek the services of Gerald Mullane, a member of the PFI Engineering team. Around that same time, Turner and Stryker decreased PFI's field work contribution. (Ex. S947.) Mr. Mullane's primary job was to "rectify clashes" between all of the process piping installed by Axenics based on its model. Mr. Mullane testified, "There should have been half a dozen Adam Paryses, because he was the only go to guy, and he was inundated with equipment issues and . . . piping issues." Because carbon steel welding that might have contaminated process piping occurred on the site for approximately four months beginning on approximately March 2, Turner ordered Axenics to confine its activities to layout, hanger (pipe support installation), concrete hole coring for pipe chases, utility panel pre-mount, and other contract work, but no high purity piping installation. Meanwhile, the mechanical completion date remained the same.

Mr. Mullane also testified regarding the need for an off-site work area.

Mr. Mullane described Axenics' fabricating off-site:

You've got to have them there, you've got to have the contact and their own coordination. To have them fabricate off site is an issue... because you got [Axenics] guys, four guys walking with a length of pipe up the street. They put it up- in the air, and it hits something. They turn around, and they walk back down again. So now what you have is you [have] a heap of pipe that doesn't - that it's in - it's built per the model, but it isn't working on the real life size model. So I've got to go see what I have here, see if I can save any of it - because, again, it isn't the pipe. The least cost in here is the actual material.

Ultimately, Mr. Mullane credibly testified that problems caused by off-site work, including Axenics' need to fabricate off-site in the first place, would have been avoided if Turner had maintained tighter coordination with the 3D model and the other subcontractors.

Axenics was forced to rent additional space so that it could decrease the amount of time spent on field verification, fabrication, and installation. Further, as a result of many of the installation strikes, Turner told Axenics to rework its pieces because there were other systems in place. These requests were not followed up by any SIS or Change Orders as set forth by the Subcontract.

Turner attempts to blame many of these "strikes" on the type of computer program that Axenics chose to use, REBIS. However, the REBIS program was not necessarily prohibited. Axenics had used the program in prior jobs without issue. Additionally, PFI saw no issue with Axenics' decision to use REBIS.

Other subcontracts increased in scope as well. Axenics' owner, Haywood Schmidt, testified and provided documentation, which suggested that the scope of the project changed for all of the subcontractors by a margin of 110%. The documents suggested that some of the individual subcontractors' scope of work increased by as much as 639%, 307%, and 213%. In all, for Axenics the project increased by 25% through the written change orders. These increases, however, are not all necessarily reflective of an overall lack of coordination by Turner. Many of the changes made in other subcontracts were made with the agreement of all the parties involved. For example, one of the subcontractors, Trumbell Nelson, saw its scope increase by 639%. This increase was not a reflection of a failure to coordinate, but was instead a reflection of the Defendants' decision to hire Trumbell Nelson to provide miscellaneous carpentry and labor driven work on a month to month basis following the completion of its original duties under its subcontract. Thus, Mr. Schmidt's evaluation of the increase in scope of the other subcontracts is relatively unhelpful in quantifying Axenics' changes.

Despite the parties' non-adherence on many occasions to the requirement that notice be given and change orders be requested, Axenics did request reimbursement on eight separate written change orders, the last of which requested \$180,230. (Ex. A965.) Axenics did not notify Turner within 48 hours of the changes as required by the contract for any of the eight change orders. This lack of notice was never raised by Turner in reimbursing Axenics for the original change orders. Likewise, neither Turner nor Stryker ever raised this concern when Axenics requested additional funds following the project's completion. In all, the eight change orders increased the amount of the Subcontract from \$1,992,506.00 to \$2,518,078.00. Axenics also submitted a ninth change order, which was submitted after the project's completion, that Turner and Stryker refused to pay. The total amount of the ninth, unapproved change order was \$435,929.00. This change order forms part of Axenics' claim for damages.

Before each change order was submitted, Axenics asked Turner if it wanted it to proceed. In every case, Turner personnel told Axenics to get the work done and there was no choice but to correct the deficiencies. However, in late November, Axenics approached Turner for certain change orders to be approved. Turner got back to Axenics a month later with a few change orders, but at that point, Axenics claimed that it now was owed over \$500,000 for extra work. Axenics and Turner met in January to discuss the merits, and Turner told Axenics that Stryker questioned some of the work. Axenics then asked Turner if work should be stopped since authorization to proceed seemed to be in question; Turner said no, and the work continued. On multiple occasions, Stryker and Turner commended Axenics on its ability to finish its work before the validation

date. (See Ex. S272.) In fact, Mr. Page, Turner's employee, stated that Axenics finished the job in a timely manner. He stated that the only mechanical deadline Axenics missed was when it was late in installing the "lyophilizer," which, as noted above, was defective when delivered. Neither Turner nor Stryker claimed that Axenics' work did not meet the contract specifications.

Following the project's completion, Axenics indicated to Turner that it required additional reimbursement based on several changes that had not been previously documented. It identified these changes as "outside the scope" of the project itself, which were caused by certain "global changes." Stryker itself even viewed Axenics' reimbursement requests as outside the scope of the contract. (See Ex. T88500) (Stryker stated that Axenics had been paid for all of its original scope of work). Turner indicated to Axenics that it would help prepare a presentation to Stryker for the required funds. Turner sent one of its employees, Kimberly Rice, to Axenics in order to organize and assemble proper back-up information in preparation for Axenics' presentation to Stryker.

Several documents indicate that Ms. Rice was attempting to "develop a case" on Axenics' behalf. (See Ex. T88422-24; see also Exs. A1454, A1585, A1591-92, and A2080.) Ultimately, Turner representatives did meet with Stryker representatives and reported back to Axenics stating, "Stryker was receptive to hearing the details surrounding your entire outstanding amount and believe that there was legitimate schedule compression that fell outside [Axenics'] control. . . . We also stated that we agreed with your base estimate..., your expended hours (including projections), and changes." (Ex. A1591.)

Axenics made its presentation to Stryker on April 1, 2005. The presenta-

tion attempted to answer questions such as whether the additional expense was for work within Axenics' scope, whether documentation existed to show what work occurred and the extent of the issues involved, and why there was no notice of the costs earlier in the project. (Ex. A2152.) Axenics discussed the delay in carbon steel work, the prefabrication interferences, blind welds, and late delivery of equipment. Following the presentation, Turner representatives provided Stryker with a rebuttal to Axenics' costs presentation. This included specific rebuttals to Axenics' requests for funds based upon prefabrication, equipment delays, and lack of coordination. However, Turner did agree with several of Axenics' claims. Thereafter, Stryker refused to reimburse Axenics, through Turner, for the costs requested by Axenics.

The Subcontract also required Axenics to submit turn-over packages ("TOPs") upon the project's completion. TOPs are a collection of all of the documents, designs, specifications, *et cetera*, implemented on a certain project. TOPs are required if a particular facility is to be approved by a governing entity, in this case the FDA. In the present case, there was a great deal of dispute over TOPs. The Subcontract itself required Axenics to create TOPs. Axenics' own witness, Haywood Schmidt, stated that TOPs were an integral part of the agreement between the two and a major contractual obligation under the Subcontract. Here, Axenics had difficulty completing its TOPs. Turner provided Ms. Rice to assist Axenics in completing its TOPs. Ms. Rice assisted Axenics for approximately three weeks on two of the fifteen systems' TOPs. This was due to Axenics' failure to begin the TOP process until the site activities had finished and most of the documentation had been received.

Conflicting testimony exists on Stryker's claim that it lost money as a result of Axenics' failure to produce TOPs. In its writ, Stryker lists a figure of roughly \$400,000.00. However, during trial, Turner's representatives estimated a loss of approximately \$125,000. Axenics claims that the TOPs were not required for FDA approval and points to Stryker documents as evidence. (See Ex. T88500-01.) Upon examination of the documents, it appears that although Stryker identified other ways to obtain the FDA approval without the TOPs, such as evidence that the system was consistently producing a product that met FDA specifications, this alternative method of seeking approval did not relieve Axenics of its duty under the Subcontract to provide TOPs in a timely manner. There is little doubt that the TOPs were considered a bargaining chip by the parties. Evidence exists that Axenics threatened to withhold the TOPs until it received its money; ultimately, the relevant TOPs were offered or submitted. (Ex. A1656-58.) By the end of the construction period, Turner specifically declined Axenics' offer to provide it with the last TOPs. (Ex. A1777.) On the evidence presented, the Court therefore cannot find that the Defendants suffered loss by Axenics' failure to promptly provide the TOPs.

Litigation, Claims Made, and Damages Sought

Axenics initiated the present litigation on November 30, 2007. It asserted claims of contract abandonment, unjust enrichment, and violations of New Hampshire's Consumer Protection Act ("CPA"), RSA 358-A. In response, Turner and Stryker asserted counterclaims alleging breach of contract and violations of both the New Hampshire and Massachusetts CPAs. Axenics later added its own claim based upon the Massachusetts CPA. Both parties agree that only the New