

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

WASHBURN-LANE PARKWAY)
RENOVATION, LLC,)
)
Plaintiff,)
) Case No. 07C823
vs.)
)
JERRY MORGAN and)
JEAN MORGAN,)
)
Defendants.)
_____)

MEMORANDUM OPINION AND ORDER

NATURE OF THE CASE:

This case arises out of a real estate sales agreement. The case was originally filed by the Plaintiff, Washburn-Lane Parkway Renovation, LLC, against the Defendants, Jerry and Jean Morgan, on June 13, 2007, seeking a declaratory judgment as to whether or not it was excused from performance of a contractual obligation between the parties to construct an addition to property owned by the Defendants. On October 15,

2007, the Plaintiff filed an amended petition adding a claim for damages based on prevented performance occasioned by the actions of the Defendants allegedly causing Plaintiff to change and alter its development plans.

The Defendants' answer to the original petition filed September 14, 2007, basically was a denial of Plaintiff's pleading assertions. It also asserted a counterclaim for damages. On January 25, 2008, Defendants' answered Plaintiff's amended petition, but this time asserted three counterclaims, one of which sought reformation of the underlying contract claiming their lack of intent to sell a portion of the property identified as 1419 Lane and denying any agreement or binding force to a Declaration of Restrictions, Covenants and Easements signed at closing by the parties, particularly, a provision for use of a common wall between the properties purchased by Plaintiff and the property at 1415 Lane remaining with the Defendants. Additionally, Defendants restated their previous counterclaim for damages from Plaintiff,

claiming a breach of agreement arising from Plaintiff's demolition activities allegedly causing damage to Defendants' building and the creation of a snow load hazard to Defendants' building at 1415 Lane arising from Plaintiff's adjacent buildings intended to be constructed.

The Court, by a *Memorandum Opinion* filed October 1, 2008, dismissed Defendants' reformation claim and Defendants' claim of lack of an agreement to the *Declaration of Restrictions, Covenants and Easements* signed at closing.

This case first proceeded to trial intermittently in October, 2008, and was continued after mid-October and renewed in February, 2009, on intermittent days. Closing arguments were held on March 20, 2009.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF FACT

AND LAW:

Here, after all evidence was advanced, there is little dispute, and not material dispute of fact, as to what occurred between the parties. Dispute, if any, only arises as to why certain matters occurred as they

did and the legal consequences, if any, to Plaintiff and Defendants as a result of their conduct, or the lack thereof.

The Court finds Plaintiff's *Trial Brief's* statement of facts of what did, or did not, occur reasonably and fairly premises the principal background facts of this case and which it believes supports its position. The Court would adopt these facts, as modified, as its own rendition, at least as a corollary to certain other facts proffered by the Defendants and other express findings of fact to be made by the Court.

However, before such facts are set forth, the Court finds the material portions of the parties sales contract signed February 9, 2006, are as follows, however, the Court has inserted ["Washburn-Lane"] and ["Morgan"] for the terms "Buyer" or "the Buyer" and "Seller" or "the Seller" in the contract, respectively:

"REAL ESTATE SALES CONTRACT"

This Contract is made and entered into as of the _____ day of _____, 2006, by and between JBS Morgan, LLC and Jerry Morgan & Jean Morgan (herein 'Seller'), and Washburn Lane Parkway Renovation, L.L.C. (herein

'Buyer').

In consideration of the covenants contained herein, the parties hereto agree as follows:

1. Sale of Property. [Morgan] hereby agrees to sell and convey to [Washburn-Lane], and [Washburn-Lane] hereby agrees to purchase from [Morgan], pursuant to the terms and conditions set forth herein, certain land, (the 'Property'), the property located 1411 SW Lane Street, the approximate west 52 feet of 1415 Lane and 1419 Lane Street, in Topeka, Shawnee County, Kansas. Exact legal will be shown on the deed, and shall be in conformity with Exhibit 'R'. [Morgan] will maintain ownership and is not conveying the building in which his bike shop is located commonly known as 1415 Lane.

2. Consideration. The total cash purchase price (the 'Purchase Price') for the above-described Property shall be One Hundred Eighty Thousand Dollars (\$180,000.00), subject to modification described in this paragraph. The Purchase Price shall be due and payable as follows: \$5,000 escrow deposited to be deposited with Capital Title Company (the 'Title Company'), and held pursuant to this Contract, \$55,000 to be paid in cash or certified funds at closing. (This total of \$60,000 shall not be subject to modification.) In addition, [Washburn-Lane] will make a payment to the Title Company at closing in the amount of \$120,000 to be held in escrow and used in accordance with paragraph 10a herein. [Washburn-Lane] shall have the right to increase the \$120,000 escrow payment prior to closing if [Washburn-Lane] obtains a construction bid that reasonably alters the

amount of consideration necessary to complete the improvements described in paragraph 10a.

. . .

10. [Washburn-Lane's] Covenants, Representations, and Agreements. [Washburn-Lane] agrees that:

a. [Washburn-Lane] agrees to supervise the construction of a two-story 25 x 40 structure -- 2,000 sq.ft. +/- -- immediately behind existing Bike Shop located at 1415 Lane. [Morgan] shall own these improvements. The existing lean-to will be replaced. The new building will be on a slab. Its first floor will be finished to 'vanilla box' standards, and will include a garage door, HVAC, and a I bathroom (the only built out area on the first floor). The second floor will be a two-bedroom, two bath apartment unit, finished to the standards of the remainder of the multi-family homes to be constructed by the [Washburn-Lane] in the College Hill District. The apartment unit will have full appliance hook-ups, including washer/dryer, but [Morgan] will provide appliances to unit. Access to second floor unit will be from a stairwell from the first floor. This stairwell shall have an outside entrance with its own metal clad door. There will also be a second metal 'people door' on the west side of the shop allowing for direct access to and from the shop. [Washburn-Lane] will reinstall the alarm system after it is moved to accommodate the addition. The apartment and the bike shop shall have separate utilities and meters. Access to the basement under the bike shop shall be provided through the garage in the new addition. The additional consideration held by the Title Company in escrow shall be

used to pay the contractor for the construction of this addition, with regular progress payments due when authorized by [Washburn-Lane] and certified by an architect using general AIA standards that the job is so partially completed in accordance with such standards. In the event that the cost to complete the improvements so specified in this paragraph exceeds the funds deposited in escrow, [Washburn-Lane] shall be solely responsible to make such payment(s). The General Contractor will be the same contractor that [Washburn-Lane] uses to construct the other improvements in College Hill. [Morgan's] primary residential occupant may use the [Washburn-Lane] pool and clubhouse that [Washburn-Lane] may open for its residential tenants. Such occupant is subject to all the rules and regulations that pertain to residential tenants who are permitted to use the same. However, if such facilities are ever converted to a membership or fee basis, [Morgan's] tenant shall make payment of such fees for use.

b. [Washburn-Lane], at [Washburn-Lane's] expense, may make upgrades to the facade of Bike Shop including the addition of a paraput, cleaning of brick, and changes to signage, awning or windows in an effort to allow the Bike Shop to blend and conform with the remainder of the College Hill Redevelopment. [Washburn-Lane] and [Washburn-Lane's] contractors will use best efforts to minimize any construction impacts on the operation of the Bike Shop. [Washburn-Lane] shall not destroy the structural integrity to [Morgan's] building, and [Morgan] shall have a working public entrance from the rear if public access from the front is disrupted. If the security glass is removed from [Morgan's]

building the glass shall be replaced with comparable or better glass.

c. [Washburn-Lane] will cooperate and execute all necessary documents to assist [Morgan] to qualify for tax benefits under the Neighborhood Revitalization Act or other programs arising out of the improvements built at 1415 Lane, provided that property located in such district legally qualifies for such tax benefits.

. . .

16. Default. [Washburn-Lane] shall be in default hereunder if [Washburn-Lane] shall fail to comply with this Contract for any reason, other than a default by [Morgan] or any failure of a specified condition or contingency. If [Washburn-Lane] has failed or refused to cure such default within fifteen (15) days after receipt of written notice of such default from [Morgan], then [Morgan], as [Morgan's] sole and exclusive remedy for such default, shall be entitled to terminate this Contract, and declare the Contract null and void, by written notice to [Washburn-Lane], and retain [[Washburn-Lane's] Earnest Money, as liquidated damages for a default of [Washburn-Lane] hereunder because of the difficulty, inconvenience, and the uncertainty of ascertaining actual damages for such default. In the event of a default by [Morgan] hereunder, unless [Morgan] has cured the default within the fifteen (15) day period following receipt of written notice of such default from [Washburn-Lane], then [Washburn-Lane] may terminate this Contract and declare this Contract null and void, or exercise any remedies allowed under Kansas law, including specific performance.

. . .

25. Complete Agreement. This Contract embodies the complete agreement between the parties. hereto and cannot be varied or terminated except by written agreement of the parties. This ,contract is between two private parties and the consideration described herein is the total amount to be paid by [Morgan] & [Washburn-Lane].

. . .

EXHIBIT C

. . .

ARTICLE II
RECIPROCAL EASEMENTS

. . .

(e) Self-Help Easements. Nonexclusive rights of entry and easements over, across and under each tract for all purposes reasonably necessary to enable any other Owner of a tract to perform any of the provisions of this Agreement which a defaulting Owner has failed to perform."

Further, the parties agreement as set forth in the Declaration of Restrictions, Covenants and Easements, signed subsequent to the sales contract and at the May 11, 2006, closing, is relevant and material to the issues, as follows:

"DECLARATION OF RESTRICTIONS,

**COVENANTS AND EASEMENTS
CONCERNING**

**College Hill Shopping Center,
Topeka, Kansas**

THIS DECLARATION is made as of the 11th day of May, 2006 by Washburn Lane Parkway Renovation, L.L.C. ('Developer') and Jerry Morgan and Jean Morgan ('Morgan') with respect to the following facts and objectives:

. . .

C. Developer and Morgan both can use their respective properties for both retail and residential uses consistent with the limitations of these covenants and restrictions. The Developer's Property and the Morgan Property together shall be collectively referred to as the 'Property.'

. . .

3.5 License to Enter. During the term of this Declaration, each Owner ('Licensor') hereby grants to the other Owners (collectively, 'Licensee') and to Licensee's contractors, agents and employees, a temporary license to use such portions of the Licensor's Lot (other than areas occupied by buildings) as may be reasonably necessary to permit Licensee to effect the construction, reconstruction, repair, maintenance and replacement of the Improvements on the Licensee's Lot or any improvements (whether on or off the Licensee's Lot) which are the subject of any easements granted Licensee under this Declaration; provided, however, Licensee shall (I) obtain Developer's prior written approval, (ii) perform its work on

Licensors Lot with due diligence, (iii) take all safety measures reasonably required to protect persons and property, (iv) perform such work on areas reasonably designated by Licensor so as to avoid, to the extent practical, interference with operations on Licensor's Lot, (v) use reasonable efforts to avoid performing any such work on Licensor's Lot between November 20 and January 2 (except in an emergency situation or in a manner which does not interfere with the business operations on Licensor's Lot), (vi) indemnify and hold harmless Licensor of and from all claims for bodily injury, property damage or non-payment which may be asserted against Licensor by reason of Licensee's exercise of rights under this Section 3.6, (vii) notify Licensor at least twenty (20) days prior to any work being performed, except in an emergency situation, in which case prior notice, to the extent practical, shall be given to Licensor, and (ix) provide Licensor, upon request, with a certificate evidencing a policy of commercial general liability insurance, naming Licensee and the insured and Licensor as an additional insured, against claims on account of bodily injury and property damage included upon or about Licensor's Lot, such insurance to be written with a combined single limit (bodily injury and property damage) of not less than \$1,000,000.00.

. . .

4.1 Building Construction. The parties will be removing improvements from their respective property, constructing new improvements upon the same and from time to time may need to remodel or maintain the same. Construction activity will occur during as

well as after business hours and days. The constructing Owner and its agents are hereby given a license and an easement to cross and situate on adjoining Lots for the purpose of constructing, remodeling and maintaining said improvements to the reasonable extent as may be necessary to properly complete the same. Such construction may necessarily cause inconvenience and disruption to adjoining Owners and other Lots on the Property. The work will be completed in a manner so that the front and back entry to an Owner's existing premises will not both be inaccessible at the same time. Adjoining parking may be disrupted as may be reasonably necessary to complete said improvements or necessary maintenance. Utilities are to be interrupted only a minimum of time that may be reasonably necessary to complete required tasks.

. . .

ARTICLE V COMMON WALL RIGHTS AND DUTIES

5.1 Application. To the extent any two Owners have improvements on their Lots that adjoin and share a common wall, the provisions of this Article apply. The two *lot* Owners so affected *shall* be known hereinafter after 'Adjoining Owners.'

5.2 The Right to Use and Attach. The Adjoining Owners and their respective successors and assigns, shall have the right to use the Common Wall, as a party wall. Both Adjoining Owners shall have the right to attach to said Common Wall, for the purpose of supporting the buildings owned by each of them, and agree that such attachment will be of such a type so as not to injure or damage

the existing buildings of either of them.

5.3 Damage or Destruction to a Building.

In the event that the respective building owned by an Adjoining Party should be removed or destroyed, the Adjoining Party whose building is being removed or destroyed shall complete any and all repairs to the Common Wall at such party's own expense so that the Common Wall can continue to be used by the remaining building as its wall, and that any outside surfaces of such wall shall be finished in a manner that shall protect such surface from damage from the elements for a commercially reasonable period. Further, nothing herein shall prevent an Adjoining Party from rebuilding a structure that uses all or part of the Common Wall in a manner that is consistent with the intent of this Declaration.

5.4 Easement for Repair.

Each Adjoining Party shall have, a right-of-way easement to maintain, repair, and replace the Common Wall, said right-of-way easement being 15 feet in width, over the other Adjoining Party's Lot, or through the nearest doorways, provided that access shall be at reasonable times and in a manner that is not generally disruptive. Said easement is given for the sole purpose of ingress and egress and to perform the necessary maintenance, and it is not to be construed as an easement given to the exclusion of anyone, or to others later granted similar rights.

. . .

ARTICLE VII
UNPERFORMED COVENANTS

7.1 Owner's Right to Cure. If any Owner ('the Defaulting Party') fails to perform any of the covenants on its part to be performed as set forth in this Agreement, any other Owner (the 'Curing Party') may (but shall not be required to) (i) if no emergency exists, perform the same after giving twenty (20) days notice to the Defaulting Party (unless within such twenty (20) day period the Defaulting Party shall commence the necessary action and thereafter continue the same with diligence), and (ii) in an emergency situation, perform the same with as much notice to the Defaulting Party as is practical. The Defaulting Party shall; on demand, reimburse the Curing Party for the reasonable cost thereof.

7.2 Survival. The rights and easements granted under this Section shall survive the termination or expiration of this Declaration for the purpose of performing and enforcing' compliance with the provision of this Article X.

ARTICLE VIII REMEDIES; NO WAIVER

8.1 Enforcement. Each Owner shall have the right to enforce any provision of the Declaration in any court of competent jurisdiction by injunction, specific performance or any other means, whether in law or in equity.

8.2 Remedies Cumulative. All rights, privileges, and remedies afforded any Owner by this declaration shall be deemed cumulative and the exercise of anyone of such remedies shall not be deemed to be a waiver of any other right, remedy or privilege provided for

herein.

8.3 No Waiver. No breach of this Agreement will entitle any Owner to cancel, rescind or otherwise terminate this Agreement. The foregoing limitation will not affect, in any manner, any other right or remedy which any Owner might have by reason of any breach of this Agreement. No waiver of any default by any Owner will be implied from the failure by any other Owner to take action in respect of any default. No express waiver of any default will affect any default or extend any period of time for performance other than as specified in such express waiver. One or more waivers of any default in the performance of any provision of this Agreement will not be deemed a waiver of any subsequent default in the performance of the same provision or any other provision.

9.3 Modifications. Any alteration, change or modification hereof, in order to become effective, shall be made by written instrument or endorsed hereon."

Against these contractual provisions binding the parties, the Court finds certain background facts exist, which are as follows as adopted and modified from Plaintiff's Trial Brief's proffered facts. Facts proffered but not adopted will be shown by an omission of text, in whole or in part. Findings modified or added by the Court are bracketed [].

"II. STATEMENT OF FACTS

1. The plaintiff and defendants Jerry and Jean Morgan entered into a Real Estate Sales Contract on February 9, 2006. In consideration for [agreeing] to conveying 1411 SW Lane, approximate west 42 feet of 1415 Lane, and all of 1419 Lane Street, the plaintiff paid \$60,000 and put \$120,000.00 into escrow to be utilized by the plaintiffs contractor to construct a 25 x 40 foot two-story addition to the defendants' bike shop building at 1415 Lane Street. (Exhibit 3.)

2. On or about May 11, 2006, the parties closed the February 9, 2006 Real Estate Sales Contract by delivering consideration and deeds. In addition, the parties executed and recorded the Declaration of Restrictions, Covenants and Easements concerning the College Hill Shopping Center, Topeka, Kansas. (Exhibit 3.)

3. Plaintiff intended to construct 183 multi-family units for rent with 24,000 square feet of townhouses and planned for 33 townhouses of which 25 have been constructed. (Newsome, p.20.) There has been about \$30 million of public and private money invested in the project. (Newsome, p. 31.)

4. It was important to the plaintiff that the new addition to be constructed to the Morgan building on the rear 'blend with the rest of the project' since it faces townhouses that are to be sold. (Newsome, p. 31.)

5. Each building in the project were given a letter. The two buildings adjoining the Morgan property are Building I North and Building I South. Building I South contained the project clubhouse which included a

swimming pool, workout equipment, television, a theater with theater-style seating and surround sound, a business center-conference room, computers for tenants, gathering area, a small kitchen area where breakfast can be served, and a pool table. The clubhouse was considered by the plaintiff to be 'extremely important' to attain the rents thus needed to make the project 'economically viable.'
(Newsome, p. 39.)

6. Typically, when the plaintiff principals develop similar projects, they start with the clubhouse first. (Newsome, p. 40). The clubhouse was initially scheduled to be completed by August 2007. (Newsome, p. 42). However, occupancy did not occur in the south part until March of 2008 and the north part of Building I until July of 2008. (Newsome, p. 42.)

7. Jason Nudson, the representative contractor, testified that the Building I clubhouse building was the first priority. (Nudson, p. 113.) 'That's always the building that needs to be built first, is the clubhouse, because it does showcase the amenities, it showcases what we can do. ... [1]t's our leasing hub, everybody can-tenants can go, and it's just been beaten into my head that it is the thing we do first and we do it best in order to make everything else kind of fall together. ... It's just that total package of what brings that project together, sets it apart from just a building being built over in a field somewhere.' (Nudson, p. 115.)

8. Building I both South and North were to be built immediately adjacent to the defendants' bike shop building. [The original

plans only indicated a two inch gap between the buildings on each side when completed covered by a wall cap. (Testimony of J. Nudson: TR 10/7/08, Vol. II, p. 231; Defendants' Exhibit 1, p. 89A8 @ A2.)]

9. Exhibit 5 are the notes Jason Nudson kept as project superintendent which contain references to Building I and to the Morgan project. (Nudson, p. 117.) Exhibit 5A is a compilation of the notes summarized from Exhibit 5. (Nudson, p. 119.)

10. 1419-21 Lane, on the south side of the bike shop, which was sold by the defendants to the plaintiff, was formerly a T-shirt shop and was demolished to make room for part of Building I South. Demolition on 1419-21, being the same building, began on September 25, 2006. (Exhibit 5, p. 14, Nudson, p. 120.) Demolition was done by McPherson Construction, an experienced demolition contractor. (Nudson, p. 127.)

11. [The Morgan building at 1415 S.W. Lane had a lean-to in the rear which housed the buildings principal utilities, restroom, and parts storage.] To facilitate the demolition of the lean-to, the contractor delivered a roll-off container on September 19, 2006 to encourage the Morgans to put their business possessions in it so that defendants could get their items out and the contractor could proceed with demolition. (Nudson, p. 121.)

12. On September 27, 2006, Craig Collins, attorney for the defendants, sent an electronic message to Grant Glenn, attorney for the plaintiff, expressing concerns about the status of the remaining south wall of 1415

Lane.

13. [The parties, since their agreements were entered into, entertained thoughts about changing their agreement, principally, Morgan relocating his business in return for yet unidentified concessions from Washburn-Lane.] On September 28, Glenn sent an electronic message to Collins indicating that the time for making a deal had about run out, but that the plaintiff's representative, Henry McClure, would be in touch with the defendants to determine whether an alternative was a real possibility, otherwise, plaintiff was set to begin construction on the addition. (Exhibit 1, p. 5.)

14. On September 29, Collins sent an electronic message to Glenn indicating that Morgan was open to relocating his business to a different site and possibly selling his building to the plaintiff. He indicated that David Morgan, the defendants' son, had already been in contact with Washington and had visited Drake University in regard to relocating. (Exhibit 1, p. 5.)

15. On October 10, 2006, Glenn sent an electronic message to Collins again urging defendants to speak with Henry McClure if they were serious about wanting to make an alternative deal. Collins responded that Henry McClure had been attempting to contact Collins but Collins had been unavailable. (Exhibit 1, p. 13.)

16. On October 25, Collins sent an electronic message to Glenn indicating that he had been extremely busy, and apologized for not getting back to Henry McClure in a 'timely manner.' (Exhibit 1, p. 14.)

17. No mutually acceptable arrangement was made for relocation and on November 29, Collins sent Glenn an electronic message indicating that Jason Nudson had spoken with Jerry Morgan regarding how the remodeling of 1415 was to proceed. [Collins] suggested a meeting between Glenn and Collins to discuss outstanding issues. (Exhibit 1, pp. 15-16.)

18. On November 29, 2007, Jason Nudson went to Jerry Morgan with his electrical subcontractor, Heartland Electric, to look at the Morgan premises for the demolition. At that time, Morgan told Jason that he could not use Heartland as a subcontractor on his building. (Nudson, pp. 130-131.) Personal property had still not been removed from the lean-to. When Nudson came on the Morgan premises on November 29 with the electrical subcontractor, Morgan told him 'there would be no work done on his building in January.' (Nudson, Vol. II, pp. 38-39.)

19. The parties agreed to meet with their architects on December 13. (Exhibit 1, p. 17.) The discussion of the meeting was subsequently memorialized. [Defendants' Exhibit 219.]

20. On December 22, Glenn sent Collins an electronic message stating as follows:

. . . We need to set a date in January for the demolition for the rear part of the building. Failure to cooperate can result in nothing being built at worst or delay of the project, which is not acceptable. Please contact Jason and agree on a date for the demolition to begin. I know this is difficult, but we are going to have a situation of

impossibility of performance. I am sure that Jerry does not want to pay to litigate the various rights, nor does our client. I think we have been constructive in our meeting with the designers, and we welcome your professional to speak with us. However, we all must rely on professionals not our gut opinions. Please, talk to Jason and get this off of dead center. Have a great holiday. (Exhibit 1, p. 18.)

21. On January 3, 2007, Glenn sent Collins an electronic message stating in part, 'we need to confirm a demolition date for the pertinent portion of the bike shop property. Please let me know your thoughts.' (Exhibit 1, p. 66.)

22. After trying to call Collins, Glenn sent him an electronic message on January 10 advising him that Morgan should no longer use the sewage line and that the plaintiff would be delivering a portable toilet to the bike shop. While digging footings in the neighboring building, plaintiff discovered 'Jerry's sewer line crossing the excavation area.' They determined that the line had been previously capped in another location, not knowing that it was Jerry's at the time.

'As I understand it, the city's line runs in front of the building, but this connection must have been with some other building and never directly into the city's line as probably required by code.' (Exhibit 1, p. 20.) Glenn indicated again that plaintiff was still needing to raze the lean to and the lean-to issue needed to be addressed right away so the new addition could be timely started. (Exhibit 1, p. 20.)

23. On January 15, 2007, Glenn sent Collins a message requesting a meeting to discuss the sewer line. (Exhibit 1, p. 22.) The parties met on Wednesday, January 17. (Exhibit 1, p. 25.) During that meeting, Glenn advised Collins the contractor would be moving utilities the following week to prepare for the new addition. He confirmed in an electronic message two days later on January 19 that 'all personal property needs to be removed from that lean-to by January 29.' Glenn indicated to Collins that the cost to hook up properly to the city sewer system will be \$8,000 to \$10,000 additional dollars which cost he would advise his client to pay, but he thought the enthusiasm to pay this expense would be linked to how smoothly the contractor could proceed with the planned demolition of the lean-to. In that message, Glenn confirmed that Collins had told him that [Collins] had contacted three engineering firms concerning the south wall of the bike shop and that Collins had anticipated getting him an engineering report on the previous day of January 18 which had not been received. He reminded Collins that time was of the essence. (Exhibit 1, pp. 25-26.) Collins responded on the same day and anticipated that he would have reports delivered to Glenn's office the following day. (Exhibit 1, p. 25.)

24. On January 22, 2007, Collins delivered a letter to Glenn that included reports of the engineering firm, Poe and Associates, dated December 20, 2006 and January 15, 2007, documents from Finney and Turnipseed, P.A., dated January 11, 2007 and January 15, 2007, and an email from Jerry Morgan dated January 16 that he had received

from his insurance agent regarding [his inability] to continue insurance coverage on the property. (Exhibit 1, pp. 78-78A 12.)

25. Following the meeting of the parties on January 17, the contractor believed that Morgan would be out of the lean-to by January 29 and they could plan demolition. Accordingly, Superintendent Nudson shifted the excavators to begin work on the Building I work pads in January. (Nudson, Vol. II. p. 13.)

26. Jason Nudson went to Morgan again on January 31 to determine if the lean-to had been vacated. Morgan had still not removed his personal property from the lean-to to permit it to be torn down. (Nudson, p. 145.)

27. On February 6, Jason Nudson, Grant Glenn, Jerry Morgan and Craig Collins met and walked through the bike shop again. Again the inquiry was made when could all the items be removed from the lean-to. (Nudson, p. 147.)

28. On February 7, Glenn sent an electronic message to Collins offering to have the plaintiff s engineer meet with the defendant and his engineer the following Monday. (Exhibit 1, p.29.)

29. On February 9, Jason Nudson was able to bring subcontractors onto the Morgan property to help plan the demolition and construction of the addition. (Nudson, p. 147.) Specific plans for the electrical were sent by electronic message by Nudson to Glenn on that date who forwarded the same on the following morning to Collins. (Exhibit 1, p. 88.)

30. On February 12, a meeting was held between the parties including the plaintiffs architects Joseph Stramberg, and Micah Kimball, and plaintiffs engineer, Mike Falbe of Bob B. Campbell Co., Jason Nudson, and plaintiffs lawyer Grant Glenn, together with defendants Jerry Morgan, his son and his attorney Craig Collins and his engineers Shawn McGarity of Finney and Turnipseed and Norman Davis of Poe & Associates. The substance of that meeting is set forth in more detail in Stramberg's letter to Glenn dated February 12, 2007 which was forwarded by Glenn to Collins late in the day of February 12, 2007. (Exhibit 1, pp. 63-63A8.) It was agreed that the contractor would provide temporary weather protection to defendants' south wall. The contractor would further provide temporary fill material to protect the soils adjacent to the south wall from further moisture. The contractor was advised it could proceed with the foundation work for the new wall adjacent to the existing south wall as designed. The plaintiffs engineer was directed to provide a recommendation for whether to tie the new wall on Building I South's north side to the Morgan south wall. Finally, the parties agreed that the contractor was to install crack monitoring devices in defendants' building along the north and south walls.

31. On February 26, Glenn contacted Collins by electronic communication to advise that the Morgan south wall had been sealed and monitors had been placed on the inside. The Morgans had removed most of the property from the lean-to. (Exhibit 1, p. 90.)

32. By March 6, the Morgans had removed their personal property from the west

lean-to and the contractor was able to begin demolition of the lean-to. In the process of tearing it down, 'Mr. Morgan stopped the work.' Nudson's notes indicated that he was told, 'the wall must stay or Morgan must be paid for it.' (Nudson, p. 150.) [The wall referred to was a masonry wall extension of the south wall along the lean-to that ran west from the 1415 building.] At 9:11 a.m. on March 6, Glenn sent Collins an electronic message advising that he had left a voicemail for Collins that the contractor was in the process of tearing down the west structure and Jerry Morgan had told them that they would have to pay for the south wall. He advised, 'The crew is standing by. Please call me ASAP.' (Exhibit 1, p. 96.)

33. Having received no response to the preceding message, at 11:07 a.m. the next day on March 7, Glenn sent Collins another electronic message asking Collins to call, and forwarding information from the contractor indicating that the contractor could not proceed on constructing Building I-South until the subject wall was removed. The following part of the message from the contractor was also forwarded to Collins. The building to the south contains our Leasing Office, which is desperately needed to fill our obligations to this project. McPherson Wrecking is on site to do the work and incur fees to come back time and again. The fees are passed on to us. I met with Jerry the afternoon before this demolition was to take place, 2/5/07, to schedule times and make sure everything was OK. No mention of this wall issue was brought up. (Exhibit 1, p. 97.)

34. At 2:30 in the afternoon of March

7, 2007, Collins sent Glenn an electronic message that it was now okay to 'go-ahead' to remove the entire wall. At 2:39 on the same day, Glenn sent Collins an electronic message advising that Glenn had contacted the contractor who was still being told by the defendant Jerry Morgan that the wall was staying and that they could not proceed. At 3:02 the same afternoon, Collins sent Glenn an electronic message, 'I just confirmed with Jerry that the wall could be removed.' (Exhibit 1, p. 39.) Following the demolition of the lean-to during the month of March, the contractor began grading the site for Building I South. The grading included placing controlled fill underneath the bearing points on the building. The bearing points were around the parameter footing and the location of the various columns in the building. (Nudson, p. 154.)

35. On March 13, after the lean-to had been raised, Collins emailed to Glenn a message indicating that he had a load study from his engineer and that, 'at this time, I would request that no additional work be done to 1415 unless that action is necessary to secure the property.' He asked for a meeting with Glenn. Glenn responded with a willingness to meet the next day and he requested the load study be faxed to him. (Exhibit 1, p. 103.)

36. On March 14, Glenn sent Collins an electronic message advising that the plaintiffs engineers and contractor would be on the Morgan premises the following morning

to inspect the same.

37. On March 23, Glenn sent Collins an electronic message thanking him for meeting with him. In the message, Glenn set forth three alternatives for the Morgan roof that the engineers were considering. Further, Glenn advised Collins that the developer was not interested in tearing down the Morgan building and building Morgan an apartment building in its stead [as Morgan had suggested as an alternative to their existing agreement.] However, if Morgan wanted to move locations, he would advise his client of Morgan's willingness to sell his property. Later the same day in response to the message, Collins advised Glenn, 'My clients are under no legal duty to mitigate damages nor are they bound to any remedial procedures that are considered in an effort to salvage their building.' (Exhibit 1, pp. 45-46.)

38. On March 27, Glenn sent an electronic message to Collins enclosing an insurance policy proposal from the Brier Payne Meade Insurance Agency to insure Jerry's Bike Shop at 1415 SW Lane. The developer's insurance agent had been working on a proposal after learning that Morgan's insurance would be cancelled [because of Morgan's present insurer's being leery of the potential for the Morgan building's collapse.] In the forwarding electronic message, Glenn indicated that he understood that Morgan may have found coverage through

another source but that the attached proposal was another alternative for him to consider. (Exhibit 1, pp. 61-6IA8.) Collins confirmed receipt of the message and attachment on the same date. (Exhibit 1, p. 47.)

39. On April 4, 2007, the plaintiff's contractor prepared the pad site for the Morgan addition that the developer had contracted to construct in accordance with the sales agreement. On April 5, work continued on the site and the excavating subcontractor began excavating footings for the new addition on the Morgan site. These footings were 36" to 48" deep. During the afternoon of April 5, the Morgans watched the excavator work from about 2:00 to 2:30, then at 2:30 somebody else showed up and following the discussion with him, David Morgan told the excavator to stop work, and he did so. At 3:17 that same afternoon, Glenn sent Collins an electronic message advising him of the work stoppage, which included the following message:

'It is our understanding the pad site was prepared yesterday with new soil. Today they have begun the trenching for the footings when they were told to stop. If it rains while these trenches are open, it will cause more work and delay from the mud. In addition, the excavators are on the site, and there will be more expense and delay if they cannot finish while they are on the job.

I understand that there maybe another side to the story, but you are going to have to help me understand what it may be. If you want our client's representatives off the property, call me.

As you know, these delays only add to the expense of the project. It is not reasonable that our client incur extra expense trying to do the job it has contracted to do (build an addition). Please advise me this afternoon why the work was stopped and when it can be resumed.' (Exhibit 1, p. 109; Nudson, p. 157.)

40. The contractor's superintendent, Jason Nudson, testified as to the particular problems that were caused by this stoppage at this time.

Q. And were further efforts made to try to resume the work?

A. Absolutely. If-where the site was left, which was an unfortunate timing on that, that we had started to dig out footings, and there a 4-foot high, 3 foot deep trench that's up against the existing building, you start there and you dig yourself out, that is then, as far as a weather scenario goes, the worst thing you can do. The length of the building is 25 x 42,

you got feasibly, 90 to 100 feet of water that's 3 feet deep, 18 inches wide resting against a building.

Q. And it's-and all that footing trenching is all the way next to the. . .

A. Abuts the building, yes, sir, abuts the west wall. (Nudson, P. 158.)

41. Having received no response from Collins to his April 5 electronic message, Glenn sent him another one on April 6 at 1:56 p.m. which enclosed a letter from Glenn to Collins along with correspondence from the developer's architects and engineers. The cover letter forwarded communications from the architects and engineer that were received that same day. Therein very specific recommendations were made by the design professionals with regard to steps that would be taken regarding defendants' building. The engineer and architect were the project design professionals who were hired to design the project as well as the addition to the Morgan building. Glenn's letter of April 6 referenced an earlier communication of February 12 and the enclosed letter from the project architect. The letter was written after their meeting with the client and engineers and explained that Bob D. Campbell as project engineer would be making specific engineering recommendations for the project. The letter made it clear that the project engineer had now made the specific

recommendations 'and the contractors would be returning to the job site on Monday to resume work on foundation underpinnings to the Morgan building as well as resuming all other necessary work including work on the footings that was interrupted without explanation.' (Exhibit 1, pp. 62-62A 7.)

42. Collins replied by electronic message at 5:46 that same Friday afternoon. He acknowledged that receipt of the recommendations by the architects and structural engineer. Collins state he would pass on the recommendation to Morgan's engineers. The message included the following:

'At this time, please instruct your client not to proceed on the foundation pinning on Monday April 9, 2007, as stated in your April 6, 2007 letter to me. . . . Further, no additional work is to be done on the addition until you are notified.'

The message went on to say that Collins would contact Glenn the following week after he 'obtained additional information and opportunity to meet with my clients.' (Exhibit 1, p. 48.)

43. Having not heard anything further the next week as promised from Collins as a follow up to the stop work directive, Glenn sent Collins an electronic message on Friday, April 20 indicating that he expected to hear further from Collins the preceding week. He indicated that he understood the Morgans were still conducting business at the location.

Although Glenn had a trial the following week that would last two to four days, he asked for a meeting with Collins the following Friday to 'discuss the status of things.' 'We are not proceeding with things we need to do and are suffering damages. We need to get this off dead center.' (Exhibit 1, pp. 54-55.)

44. On Monday, April 23, Glenn again contacted Collins and asked for a meeting the following Friday. On Wednesday, April 25, the attorneys agreed to a time and location for a meeting for Friday, April 27. (Exhibit 1, p. 54.)

45. David and Jerry Morgan attended the meeting with Craig Collins in Glenn's office on Friday, April 27. As a follow up to that meeting, Glenn wrote Collins and the Morgans a letter dated May 3, 2007 and sent the same by certified mail to Collins which follows. (Exhibit 1, pp. 112-114.)

"May 3, 2007

Mr. Craig E. Collins 420 SW 33rd Street
Topeka, Kansas 66611

Dear Craig:

I am writing you and sending a copy of this letter directly to Mr. and Mrs. Morgan, since the notice requirements of the Covenants require them to be directly notified in the stated manner.

Your clients are in breach of the Real Estate Sales Agreement executed by the Morgan's on or

about February 9, 2006 with our client Washburn-Lane Parkway Renovations, L.L.C. 'Contract' and the Declaration of Restrictions, Covenants and Easements Concerning College Hill Shopping Center, Topeka, Kansas, executed on or about May 11, 2007 ('Covenants').

Generally, these numerous and continuing breaches include but are not limited to the following:

1. Failure by the Morgan's to vacate the west shed by January 29, 2007 as requested on January 17.
2. Directing the demolition contractor on March 6 to cease demolition of the south wall of the shed, for alleged failure to pay compensation.
3. Directions on March 13 that no additional work be done on the Morgan building unless the action was necessary to secure the property.
4. Directing the excavating sub-contractor on April 5 to cease work. Written directive by counsel on April 6 declaring that the Morgan's were no longer insured, and all work on the addition and the foundation pinning should cease until 'we are notified.' Despite this message advising that counsel would be in contact the following week, there was no contact until I requested a meeting that was held April 27. At that time I was told

that the Morgans had in fact resumed business on April 9, when they had procured liability insurance. At no time during the meeting was I told that the developer could resume work on either the addition or the foundation pinnings.

I told you and Jerry and David Morgan, who you brought along to the meeting, that we believed that the Covenants clearly give our client the right to connect to the wall with pinnings and do other necessary work to what will become the common wall. The developer has hired *licensed* architects and engineers to prepare plans.

Further, I advised that the failure to permit our client's sub-contractors to timely proceed with the new addition to the Morgan building would not only result in increased costs and damages, but would also constitute a breach of the Contract since our client understood that the west side of the Morgan building would be substantially improved. Its current condition is certainly not acceptable and would substantially deteriorate the value of the developer's project if the addition is not timely and properly completed.

These breaches have caused and continue to cause substantial damage, and delay. The Contract and Covenants provide certain legal rights and duties following notice of breach. If these breaches are not lawfully and substantially resolved in accordance with the Contract and Covenants, then our client will likely pursue a legal action for equitable relief, which may include specific performance

and other appropriate remedies as well as monetary damages arising out of the continued delays. Please know that our client's damages increase each day.

Our client has repeatedly stated that it will follow the requirements of its contract with the Morgans. A project of this magnitude obviously involves certain inconveniences, but these were clearly contemplated and addressed in the Contract and Covenants.

Thank you.

Very truly yours,

WONER, GLENN,
REEDER & GIRARD, P.A.

By: Grant M. Glenn

GMG/

cc: cc: Jerry and Jean Morgan
(via Certified Mail/Return Receipt Requested)"

46. On or after April 7, Jason Nudson, the contractor's superintendent, was never told by Mr. Morgan or his lawyer directly or indirectly that he could return to the site and continue to work. (Nudson, p. 159.)

47. Throughout the construction process, Morgan had direct access to the project superintendent who tried to be respectful and offer as much time as possible trying to accommodate Mr. Morgan. (Nudson, pp. 166-167.)

48. When the contractor was told to cease

work on the Morgan property, the contractor was prevented from following the design plans of putting foundation underpinnings for the new walls for Building I underneath the foundation of the existing Morgan building since it would extend onto the Morgan property as had been disclosed and planned. The work could not be done without being on the Morgan property. (Nudson, pp. 237-238.)

49. Nudson was asked by Morgan's counsel if he was aware the Morgan's had to close their business for a few days while their insurance coverage lapsed or ended. Nudson stated:

'There may have been some discussion that they were going to close their business. This is a Friday. There may have been some conversation about an insurance problem, that their business had been closed, but I don't ever recall a day of there not being activity at the Morgans' whenever I was there so . . .'

50. Nudson believed that if the Morgans had gotten their personal property out of the lean-to by January 29 and had not stopped further progress, construction, excavation on the project and everything had run smoothly from the 29th, that he would have been able to deliver Building I South by August 2007, 'absolutely'. (Nudson, Vol. II (Oct. 7, 2008 testimony), p. 14). Nudson believed that he had a right and responsibility to be on the Morgan premises to do his job in addition to having an easement to cross the Morgan property for certain purposes, except that

there were days when he was told by the Morgans that he could not come on the job. (Nudson, Vol. II, p. 15.) Nudson had no reason to believe that the Morgans were closed for business after he was told to leave the job on April 5, as he continued to observe people come and go into and out of the Morgan bike shop. (Nudson, Vol. II, p. 16.)

51. On April 5, 2007, when the contractor was stopped from continuing work on the Morgan addition, the developer [expressed an] intention to make and build that addition. (Newsome, p.35.)

52. The developer still wants the addition to the Morgan building completed [but believes now that would be Morgan's responsibility.] (Newsome, p. 35.)

53. The plaintiff has asked to be excused from the responsibility of building the building addition to the Morgan building based upon the following:

Our company and its contractor, I think, went to great lengths over a period of time to work with Mr. Morgan and his representatives, and that to date has just not worked, and to date, as I understand it, we have never been allowed to come back on the property to build the drawings as they were drawn, and so I think that ability to work together is irreparably harmed. And so we are being asked to be

excused from that. (Newsome, p.51.)

54. The plaintiff decided to redesign the two Building I's and move them away from the Morgan building. The [Plaintiff says the] decision was based upon the following considerations according to Mr. Newsome:

He barred us from his property until we had to make a decision, do we continue to after months and months and delays, do we continue to run that risk of stops and starts and stops, or do we- we've got a multi-million dollar investment here that lenders are counting on, investors are counting on. Do we need to-since Mr. Morgan has demonstrated a track record of not allowing us on his property, which we felt was in breach of the contract, we felt we had no other choice but to redesign the buildings so that we did not have to go on his property, and that we could control the time schedule to get I-South and I-North built.

55. Jason Nudson, the superintendent for the general contractor, agreed, 'It seemed the only thing that would make it better would be to do a set-back on each building. . . .' (Nudson, p. 160.)

56. In redesigning the building and moving the footings and controlled fill, the plaintiff [claims it] incurred both direct

expense and consequential damages. Exhibit 11 is a summary of the direct out-of-pocket costs [Plaintiff claims it incurred] in moving Building[] I. These total \$43,462.44. (Roth, Vol. II, p. 62.) Exhibit 10 contains copies of the invoices described on summary Exhibit 11. (Roth, Vol. II, p. 60.)

57. In addition to the direct out-of-pocket expenses, the plaintiff [claims it] incurred consequential damages as a result of the failure to complete Building I South and North by August 2007 when they planned to complete the Clubhouse Building. (Newsome, p. 42.) The Clubhouse Building I South was not completed until March 2008. (Newsome, p. 42.)

. . .

60. Likewise, the importance to the plaintiff developer and having his Clubhouse completed first as a showcase is also described above.

'We've been doing this a long time, and we know how to lease units, and we know what you have to have to put yourself in the best position to lease units, and you don't typically lease units, so to speak, in a unit itself. You lease it in the club house, where there is some excitement and the prospective tenant can see the amenities, and so we didn't have that available.' (Newsome, p. 41.)

61. Exhibit 4 describes two kinds of consequential damages that total \$231,137.00.

62. The greater of these amount[s claimed is] \$141,246.00 from the failure to timely deliver Building I. The detailed explanation as to how this number was derived is set forth on the first page of Exhibit 4a and more adequately described in the testimony of William Newsome at page 48. In addition, Newsome testified that the plaintiff was damaged an additional amount of \$89,891.00 for the impact of the delay to the completion of the Clubhouse and its impact on the inability to lease units in other buildings because of the lack of availability of Clubhouse amenities to persons prior to the completion of the Clubhouse. This damage as set forth in Exhibit 4 is itemized in further detail [at] the second and third pages of Exhibit 4a."

The Defendants also proffered certain facts, which the Court adopts by reference as its own. Again, facts proffered, but not adopted by the Court, will be shown by their omission, in whole or in part. Findings modified or added by the Court are bracketed [].

"34. A provision was incorporated into the parties Real Estate Sales Contract prior to execution that stated specifically, "Buyer shall not destroy the structural integrity to

Seller's building, and Seller shall have a working public entrance from the rear if public access from the front is disrupted. (Testimony of Jerry Morgan) [Plaintiff's Exhibit 3: *Declaration* at ¶ 5.1.]

35. Defendants were assured in a letter from plaintiff dated May 11, 2006, that they would be provided the construction schedule for the add-on to the Bike shop. ([Defendants'] Exhibit 214)

36. Defendants were never provided a construction schedule relating to their property at any time. [Mr. Nudson opined that the reason for that is that it could not be done until questions about the Morgan building were resolved. Mr. Morgan was never advised that Plaintiff's wanted the I-South Building constructed first.] (Testimony of Jerry Morgan; Testimony of Steve Roth; Testimony of Jason Nudson)

37. Plaintiff began demolition of 1419 on September 25, 2006, and discovered that the [masonry] wall between 1415 and 1419 was [actually] 1419's north wall and that 1415's south wall is a wood stud wall attached to 1419's [north] stone wall and that there is no [frost free] foundation for [either] wall []. [Further, the supports for the roof of 1415 were imbedded in the 1419 wall. The 1419 wall was on the property of Washburn-Lane. Regardless of whose wall it was, Mr. Nudson agreed, it needed to remain. The original

design plans (Plaintiff's Ex. 89A5) showed the north-south width of the Morgan building at 1415 S.W. Lane was 42'1". Plaintiff's building I-South was designed to be two inches away (Fact No. 8, *supra*). Neither party, particularly, Washburn-Lane, appears to have anticipated the function of this north wall of the 1419 building and the lack of an independent wall for the 1415 building. Subsequent plans show the width of the Morgan building is 42' 11" (Plaintiff's Exhibit 8D), which by apparent dimension (Plaintiff's Exhibit 1, p. 78A7; Defendants' Ex. 222: Finney & Turnipseed Report at p. 2, figures 1-3) would include this 1419 building's north wall. The 1419 north wall probably belongs to Washburn-Lane (Testimony of J. Nudson.)] (Testimony of Jason Nudson; Exhibit 1, [p.] 1 [; Exhibit 5A at 9/26/06;] [testimony of Keith Finney])

38. On September 27, 2006, Defendants' attorney was informed by Nudson of the discovery that the wall between 1415 and 1419 was [actually the wall of 1419] and that 1415's south wall [and the 1419 north wall] did not have a [frost free] foundation and that he would be in contact with the engineers and architects regarding options. (Testimony of Jason Nudson; Exhibit 1, [p]. 1)

39. Defendants' attorney sent plaintiffs attorney an e-mail on September 27, 2006, regarding his visit to the project and discussion with Nudson regarding the issues of

the 1415 south wall and foundation and requested that counsel tour the site with Nudson and that he contact plaintiff's architects regarding options and get back to me as soon as possible with one option of putting a basement under 1415 that could also serve as a foundation for [a] south wall of 1415. (Testimony of Jerry Morgan; Exhibit 1, [p]. 1)

. . .

42. Defendants' attorney sent an e-mail to plaintiffs attorney dated November 29, 2006, that defendants had been informed by Nudson how the construction and remodeling was going to be done on 1415 without any consultation with defendants and that he had received no response from his e-mail request of September 27, 2006, as to options by the architects to address the south wall and foundation of 1415. (Testimony of Jerry Morgan; Exhibit 1, [p]. 15-16) [This e-mail was as follows:]

"Grant Glenn

From: Craig E Collins
[craig@collinslawoffice.net] Sent: Wednesday,
November 29, 2006 3:54 PM
To: 'Grant Glenn'
Subject: Morgan Property

Grant:

I just received a telephone call this morning

from Jerry Morgan regarding a meeting he just had with Jason regarding intentions on how repairs and remodeling are being planned to the 1415 property by your client. At a minimum, I must say I am shocked that my clients are now being told how the "work" will be preformed and when without a single mention to them as property owners and the impact to their on-going business. This is not acceptable process and what was stated by Jason as to how certain structural problems are planning to be approached is in full breach of the parties' contract.

In my September 27, 2006, e-mail (attached) I informed you of my site visit to the project at which time your client was in the final stages of demolishing 1419 and my conversation with Jason. In that e-mail, the fourth, fifth, sixth and seventh paragraphs specifically addressed some of the structural problems that occurred and/or were revealed during the removal of 1419. This included the issues that it was 'discovered' that 1415 did not have its own outside supporting wall nor did it share the wall between 1415 and 1419 as a support wall and that 1415 did not have its own foundation on its south wall. As stated in the e-mail, Jason stated to me that he would be informing the project's architects. I had requested of you that several actions be taken including my being informed of your client's position on possible remedies.

In your e-mail response to mine, also on

September 27, 2006 (attached), you stated you would get back to me later. To date, I have not heard anything or received any type of response regarding the issues I noticed you of immediately after my becoming aware of them through notice from Jason. After a telephone conversation with my client the evening of October 9, 2006, I sent an e-mail (attached) to you requesting a meeting with you the next day. After several e-mail exchanges, in your October 10, 2006, e-mail (attached) to me, you stated that I would need to meet with Henry McClure. As you will recall there was a delay on my meeting with Henry due to my schedule. I did subsequently meet with Henry at his office.

At my meeting with Henry, after our initial exchange of introduction and general conversation, the first issue I presented to Henry was the concern with the structural problems with the south wall of 1415. I told him I believed that the project's architects should have specifically looked for and discovered the impact to the structural integrity to 1415 with the removal of 1419. They had been in those buildings at least twice and had been informed of the concerns by my client. Henry said he would rather not discuss that issue but rather the possibility of my clients relocating which was the topic the remaining time of our meeting.

The south wall of 1415 is continuing to separate as well as there is also separation

to the structure attached to the west side of 1415. It is my understanding that Jason had also visited with my clients regarding other aspects of remodel. In one of the conversation between Jason and my clients, he stated that the plans are to build another wall next to the presently standing wall of 1419 to apparently be the "support wall" for 1415. Not only does this present a structural problem with 1415 but multiple legal issues. A simple deed transferring a strip of ground *off* of 1419 to 1415 does not resolve the issue.

Also, discussed were items such as the water heater and furnace would have to be moved into the main 1415 structure. Per my understanding, Jason said he agreed with my clients that he did not see how it was going to work due to the space limitations without a major disruption of my clients' business.

Many of the issues that we are now facing were readily foreseeable from at least September 27, 2006. Then, now to find out that some 'barn yard' plan of construction is how the 1415 structural problems as well as the other construction are going to handled is ludicrous. These issues are different from the original phase the parties encountered as it related to the acquisition of the other property.

It has been my sincerest desire since I became involved in this matter to work cooperatively with you and your client. I believe I have

done so and sincerely want to continue in that same manner. So there is no misunderstanding, at this moment I do not have any comfort level that will be possible. It is my hope that we can get back on track but we are at critical mass.

I would suggest as a beginning point that you and I meet. The basis for this suggestion is because there are multiple legal ramifications to discuss that may cause because of the history, emotions to be impinged or individuals putting stakes in the ground while we are working through options and alternatives.

Please let me know your thoughts and any suggestions you have. I do have a fairly full schedule through Thursday but that may change depending on the weather for a meeting. I will be able to get time to talk with you if your schedule allows today or tomorrow. My office number is 785-233-4545 and my cell number is 785-2496041.

Sincerely, Craig

[Plaintiff's Exhibit 1, pp. 15-16]

43. Plaintiffs attorney scheduled a meeting that was held on December 13, 2006, in Nudson's office that was attended by plaintiffs engineer and architects, Nudson and the parties' attorneys. (Testimony of Jerry Morgan; Exhibit 1, [p]. 1)

44. On December 18, 2006, Micah Kimball, one of plaintiff s architects, sent an email to those attending the December 13, 2006, meeting with a 3-page memorandum regarding the meeting. (Testimony of Jerry Morgan; Testimony of Micah Kimball) ([Defendants'] Exhibit 219)

45. In [the] second half of December 2006 and in January 2007, engineers from two different engineering firms retained by defendants communicated with plaintiff's engineers and architects.

46. Defendants' attorney hand-delivered to plaintiffs attorney a letter dated January 22, 2007, that had 5 enclosures including expert reports by defendants' two engineering firms and notified plaintiff s attorney that the damage to the south wall of 1415 breached the parties contract. (Testimony of Jerry Morgan; ([Defendants'] Exhibit 222; also as Exhibit 1, [pp.] 78-79, 78A1-12)

47. Keith Finney, one of defendants' engineers testified that the demolition of 1419 did [harm and compromise] the structural integrity of defendants' building and that [additionally] because there are taller buildings planned on either side, the roof of 1415 did not meet the City of Topeka code requirements for snow load [which could drift and accumulate from the higher adjacent buildings intended by I-South and I-North.] (Testimony of Keith Finney)

48. A meeting was held on February 12, 2007, at plaintiffs attorney's office attended by defendants' engineers, Nudson, and plaintiffs engineers and architects together with the parties and their attorneys. (Testimony of Jerry Morgan; Testimony of Jason Nudson; Testimony of Michael Falbe; Testimony of Micah Kimball) (Exhibit 1, No. 89)

49. On February 12, 2007, Joseph Stramberg, one of plaintiffs architects sent an email to those attending the February 12, 2007, meeting with a 2-page memorandum and 7 pages of attachments regarding the meeting. (Testimony of Jerry Morgan; Testimony of Jason Nudson; Testimony of Micah Kimball) ([Defendants'] Exhibit 219; also as Exhibit 1, [pp.] 63A1-8)

50. The February 12, 2007, memorandum listed several agreements and proceeding with certain scope of work but did not identify the issue of snow load concerns relating to 1415 that had been raised by one of defendants' engineers and that plaintiffs engineers are to provide recommendations and forward those directly to defendants' engineers to address concerns. (Testimony of Jerry Morgan; Testimony of Jason Nudson; Testimony of Keith Finney) (Exhibit 1, [p.] 89) [The results of this meeting was summarized in a letter of the same date, as follows:]

"February 12, 2007

Grant Glenn, Esq.
Woner, Glenn, Reeder, Girard, f:t Riordan,
P.A. 5611 SW Barrington Court South
Topeka, Kansas 66667

RE: College Hill Mixed-Use Development, 1415
SW Lane Street, South Wall

Dear Grant,

Per your request, we have summarized below the outcome of the meeting today at your office regarding the condition and proposed solutions of the existing south wall of the above referenced building. In attendance, were Craig Collins, Jerry Morgan, David Morgan, Shawn McGarity, Norman Davis, Grant Glenn, Mike Falbe, Jason Nudson, Micah Kimball, and Joseph Stramberg. In summary, it was agreed upon by all parties to proceed with the following scope of work:

1. To address the immediate concern of the weather tightness of this wall, First Management will provide temporary weather protection such as tarps or poly to protect the wall from water intrusion.

2. First Management will provide additional temporary fill material to protect the existing soils adjacent to the south wall from further moisture. This material will be graded away from the existing south wall for positive drainage away from the existing building.

3. First Management will proceed with the foundation work for the new wall adjacent to the existing south wall as designed per detail B5/S002.

4. Bob D. Campbell will provide a recommendation for the proposed new wall and existing south wall of 1415 SW Lane. This recommendation will address whether to either mechanically tie the new and existing walls together, or mechanically fasten the two existing walls together.

5. First Management will provide and install crack monitoring devices (Avongard or similar product) on the existing south and north walls of 1415 SW Lane. These devices will be monitored and results recorded at regular intervals to determine if there is additional movement in the existing walls.

In addition, we would like to request access to the existing building at 1415 SW Lane to review the existing wall and roof construction. We have enclosed copies of the sheets pertaining to the work adjacent and at 1415 SW Lane for your records. Let us know if need any additional information.

. . .

cc:
file
Bill Newsome, Southwind Capital

Jason Nudson, First Management
Craig Collins, Law offices of Craig Collins
Jerry Morgan, Jerry's Bike Shop
David Morgan, Jerry's Bike Shop
Shawn McGarity, Finney & Turnipseed Norman
Davis, Poe & Associates
Mike Falbe, Bob D. Campbell
Micah Kimball, Treanor Architects
encls."

[Plaintiff's Exhibit, pp. 89A1-89A2]

51. Plaintiff did not proceed with foundation work [] as designed per detail B5/S002 as agreed to by all parties at the February 12, 2007, meeting. (Testimony of Jerry Morgan; Testimony of Jason Nudson; Testimony of Keith Finney) (Exhibit 1, [pp.] 89A1-9)

. . .

53. Defendants' insurance coverage for 1415 and the business was cancelled due to the damage [that] occurred during the demolition of 1419 and on March 16, 2007, defendants' attorney e-mailed plaintiffs attorney that he had faxed a copy of defendants' insurance cancellation notice of April 3, 2007, as requested. (Testimony of Jerry Morgan, Exhibit 1, [p.] 44)

54. Plaintiff obtained its building permit from the City of Topeka for Building I - South on January 8, 2007. (Testimony of Jason

Nudson, [Defendants'] Exhibit 247)

55. Plaintiff obtained its building permit from the City of Topeka for defendants' property and Building I - North on March 30, 2007. (Testimony of Jason Nudson, [Defendants'] Exhibit 247)

. . .

57. On April 5, 2007, defendants' requested that plaintiffs subcontractor discontinue dirt work on the west side of 1415. (Testimony of Jerry Morgan; Testimony of Jason Nudson)

58. Plaintiff's attorney e-mailed and faxed defendants' attorney April 6, 2007, with his letter dated April 6, 2007, regarding the work stoppage and attached 3 letters from plaintiff's engineers and architects. (Testimony of Steve Roth; Testimony of Jerry Morgan; Exhibit 1, [pp.] 62, 62A1-7) [One of these documents was Plaintiff's project engineer's recommendations, as follows:]

. . .

"April 6, 2007

Mr. Joe Stramberg
Treanor Architects
110 McDonald Drive Suite 192
Lawrence, KS 66044-1055

Re: Review of Existing Structure
College Hill/Jerry's Bike Shop
1415 SW Lane
Topeka, KS

Dear Joe:

Per your request, we are summarizing our review of the above referenced building. In summary, we feel there are structural components of this building, which in their present condition and with the future adjacent construction will not meet building code. The existing roof structure consists of 2x4 roof purlins and 2x8 ceiling joists spanning north-south 14' ± (3 spans) between exterior north and south walls and two interior east-west girders. The 2x4 roof purlins are of questionable capacity to support roof loadings and must rely on the 2x8 ceiling joists to support roof loads. The roof purlins and ceiling joists are supported by triple 2x10 members spanning 13'-0" ± maximum span between columns with fairly random girder spans. These 2x10 girders are of very questionable roof capacity to support present roof loadings.

Interior columns are 4x6 wood members. In review of these wood columns, solid blocking 10 the supporting foundation wall is absent in many column bearing locations at the ground level floor atop the basement foundation wall. This condition produces a questionable bearing condition with interior columns bearing atop the first floor deck and no solid bearing to

the foundation.

The existing east canopy is presently cantilevering of the east exterior masonry facade above the east storefront windows. The framing of the canopy and all associated east facade framing is of very questionable structural capacity. Masonry at anchor points presently appears to be pulling away from the facade. The overall structural integrity of this elevation is of very questionable structural capacity. The canopy structure presently must support snow drift loadings which is not impacted by new construction. This element of the existing structure is in our opinion the most critical existing building component in distress in its present condition.

In review of the north-south exterior masonry bearing walls, we find these building components to be the one item in the structure where we are not presently concerned with its structural integrity in its present condition. These walls are in good condition for a brick masonry wall of its age and very similar to other brick masonry bearing walls in the greater Topeka area. The level of cracking is quite similar to exterior brick masonry of this age.

This building has many components presently in questionable structural condition, although snow loadings are not a matter of concern for the next six months with warm weather. In our

2-12-07 meeting in Topeka, this office was given the responsibility as the structural engineer of record for this project to correct items of concern with the existing masonry wall and the existing roof on Jerry's Bike Shop. Our recommendation to meet that goal is construction of a new roof structure atop the existing north and south exterior walls spanning over the existing roof. This new roof structure is recommended to avoid any disturbance inside Jerry's Bike Shop during construction and also eliminate the numerous items of structural concern with the existing roof structure. The new roof structure will mechanically tie the north and south exterior walls together addressing another concern discussed at the 2-12-07 meeting. This new roof will also apply all new roof loads to the proposed new foundations at the north and south exterior walls. It is our understanding that the existing east canopy is planned for replacement as part of the College Hill project. Demolition of the existing canopy will be needed to reveal presently concealed conditions and properly design a new east canopy structure which can meet building code. This demolition is needed to expose all framing concerns with this elevation. Concealed Items Of structural concern must be exposed to be properly addressed with the east facade and canopy.

Please feel free to call if you have any questions.

Sincerely,

BOB D. CAMPBELL & CO., INC.
Structural Engineers
Michael J. Falbe, P.E., President
MJF:kd/cs/kn
cc: File I TRN0605"

[On April 6, the Defendants' attorney e-mailed a response to Plaintiff's attorney and the reports, including Mr. Falbe's, saying, in part, as follows:

"It should be suffice that the work was requested to be stopped due to the Morgan's loss of insurance coverage on the property with the exposure to liability. Notwithstanding the loss of insurance, proceeding with work on the back addition prior to resolving the other roof and wall/foundation issues, is nothing more than a ruse."]

[Subsequently, in March/April, 2008 based on wood strength tests done (Plaintiff's Exhibit 13), Mr. Falbe, Plaintiff's structural engineer, concluded the Morgan building roof was stronger than thought and could endure more snow load and given that fact, in conjunction with the distance and the parapets installed on Buildings I-South and I-North, as re-sited, he felt snow load was not an issue and met Topeka City Code (TR: Vol. I, 2/4/09; Testimony of M. Falbe). However, Defendants' structural engineer believed that while the

risk of snow load was diminished, it was not eliminated because of the condition of the masonry wall on the south of the Morgan building. The Court concurs with the latter opinion. (TR: Vol. I, 2/3/09; Testimony of K. Finney.)]

[Plaintiff's Exhibit 1, pp. 62A5-62A6.]

60. Plaintiffs architect, Micah Kimball testified that on April 24, 2007, he was given the instruction by plaintiff to proceed with moving "the North and South portions of building I [five] feet away from Jerry (1415)" and that he gave notice on April 25, 2007, to Bartlett and West to relocate the buildings. (Testimony of Micah Kimball) (Exhibit 20)

61. Defendants and their attorney met with plaintiffs attorney in his office on April 27, 2007, and were told plaintiff was doing some redesign and he expected the plans with the next few days as that was how plaintiff was going to proceed and were not going to do the foundations and walls as discussed. (Testimony Jerry Morgan; Exhibit 1, [p]. 58)

The relationship evidenced by the contract between Washburn-Lane and the Morgans, now subject of this lawsuit, was, at best, a marriage of convenience, now in total disarray. It began under a threat of the use

of eminent domain to acquire the Morgan properties, which yielded to the referenced agreement, a solution clearly not satisfactory to either party. The fact the parties almost exclusively communicated with each other through their attorneys is indicative of the relationship. As noted, the what of this case is not materially at issue, only the why and then sorting out the consequences.

Probably, the most expressive statement of the Morgan position throughout is found in one of the e-mails admitted in this case:

"My clients are under no obligation to accept either of the options regarding the roof nor even separately, the proposed effort to shore up the foundation and walls. My clients have already endured major disruption to their business. They have been not included in multiple areas of the project that directly impact them and continue to be dealt with as if they were to forego their property rights during the construction of the remainder of the project. That is not the terms of the contract. All property rights were preserved by the Morgans."

Plaintiff's Exhibit 1, p. 45.

Equally expressive, however, was the four letter word description given the Morgan building by one of Plaintiff's representatives. (Plaintiff's Exhibit 5: J. Nudson project notes at 12/13/06.)

While Washburn-Lane cites incidences in its May 3, 2007, letter advising the Morgans of its basis for believing the Morgans were in breach of contract (Plaintiff's Exhibit 1, pp. 113-114), the Court finds the instances cited through April 6, 2007, and any others that may have occurred prior thereto to be, both as a matter of fact and a matter of law, not material and insufficient, independently or collectively, to support a claim of breach.

Clearly, the demolition of the buildings sold by the Morgans, while preserving the bike shop business building at 1415 S.W. Lane, was a seminal event since the 1419 building was obviously a substantial pillar in

support of 1415 S.W. Lane, that is, 1415 S.W. Lane was not, itself, apparently designed as a stand alone building. Its south wall was but an interior wall attached to the north masonry wall of 1419 S.W. Lane. The true south wall of 1415 S.W. Lane was, therefore, merely a facade attached to this wall. Further, removal of the east wall of the 1419 S.W. Lane building allowed this remaining north wall of the 1419 S.W. Lane building to separate from the east wall of the 1415 S.W. Lane building, hence, needing stabilization. The now exposed north wall of 1419 S.W. Lane itself needed, pending construction of the I-South building, at least, temporary protection from the weather.

Further, this remaining north masonry wall, the Court finds, was not below the frost line and hence was structurally unsuited, as it was presently situated, as a supporting wall since it would be, as a mortar and brick wall, subject to deterioration from the freeze

and thaw process inherent in the local weather in Topeka. While dispute existed as to this latter fact, the Court finds that the only substantive opinion as to the state of this wall was proffered by the Finney & Turnipseed engineering firm through Keith Finney. While others expressed an opinion, none proffered any substantive, credible evidence that would support a conclusion that a suitable foundation supported the 1419 north wall, which wall was then the sole support for the 1415 building's roof and its south wall. Further, the Court finds, as expressed by Mr. Finney, from the Court's review of the architectural drawings, and by the architects' admission (Defendants' Exhibit 219 @ Foundation Wall & Footing Design Concerns) that the professionals working for Washburn-Lane had not anticipated the existence of this condition for 1415 S.W. Lane.

Thus, until the structural integrity of 1415 S.W.

Lane was investigated and substantially assured, any other delays cited had no material impact as a cause of delay in constructing at least the building designated as I-South. This concern was raised by the Morgans, and known to the Plaintiff, as expressed in a September 27, 2006, e-mail from Morgans' attorney to Plaintiff's attorney. The relevant portions are as follows:

"Jason did inform me that they discovered the wall between 1415 and 1419 is not a community or shared wall but is actually 1419's north wall. He said that 1415's south wall is a wood stud wall that is attached to that 1419 stone wall. Well, I guess things were starting to go to smooth so one should be surprised. While this does create a situation that will have to be addressed, I was wondering if you would have time to go to the site and have Jason give you a short tour. I believe it would be beneficial in that it would allow us to discuss options with the same facts and considerations.

I asked Jason about his schedule so I could convey it to you for your consideration. He said he will probably be at the site until about 3 p.m. today, will not be at the project on Thursday but plans on being at the site on Friday. He told me that he had just told Henry

about the wall situation this morning and that he would be conveying the information to the architects. He said he hoped to have 1419 and 1421 to the ground with nearly all rubble removed by Friday.

I realize that the wall presents us with several issues to consider and address. Before anyone panics, I believe it might be best if the architects would give us (rather quickly) some options or if the 1419 north wall must be removed how that might be accomplished since that would leave the south wall of 1415 exposed. Such considerations as how the new building on 1419 would be built vis-a-vis the type of material that would be needed to enclose the 1415 south wall.

There is also the issue of the footing/foundation of the 1419 north wall. I understood Jason to say that 1415's south wall presently does not have a foundation since it was built by tying into the 1419 wall. . . ."

On April 6, 2007, however, the problems that had been identified, collated, and for which a plan had been made for identifying a solution to them at a February 12, 2007, meeting of all interested parties and professionals (Plaintiff's Exhibit 1 at p. 62A7) ostensibly came to an acceptable solution with the

delivery of the report of Mr. Falbe, the Plaintiff's project's structural engineer, and in association with Treanor and Associates, the project architects.

(Plaintiff's Exhibit 1 at pp. 62A1-62A6.) This report, with suggested solutions, plus the previously designated solution of underpinning of the north masonry wall of 1419 and the attached south wall of 1415, which was then imminent, was forwarded on April 6th to the Morgans' attorney. However, the underpinning of the 1419 north wall, scheduled to begin on April 9, 2007, was halted by the Morgans on that date ostensibly based on insurance issues still outstanding.

(Plaintiff's Exhibit 1, at p. 55.)

While the absence of liability insurance would be good cause to prevent third parties, such as customers, on the premises, it would be a questionable basis to exclude Plaintiff's third party workman from the premises if assurances of insurance coverage through

Washburn-Lane or the contractors own policies could be verified. There is no evidence this verification was ever made, however. Nevertheless, the fact is that only liability insurance was obtained by the Morgans on April 9th, while insurance covering collapse or other casualty had not been obtained. Mr. Morgan says his stop work order was intended to apply to the slab work only behind the building, however, Mr. Morgan, by this point, was of the belief that attaching an addition to his building in the condition it was had ceased to make sense.

Thus, while the Morgans' cease work order was never revoked and the April 6th letter identifying solutions was never formally responded to thereafter by the Morgans, even in the face of Plaintiff's May 3, 2007, letter advising the Morgans of Plaintiff's belief they were in breach of their contract, nevertheless, such a response seems substantially immaterial as an April

27th meeting of the parties was held at which Washburn-Lane advised the Morgans that Washburn-Lane did not intend to pin and underlay a new foundation for the wall and tie it into the foundation intended for its I-South building has had been agreed, but, rather, had made some design changes, the exact nature of which were not disclosed. This circumstance effectively mooted the need for a response by the Morgans. The May 3, 2007, letter sent by Washburn-Lane advising the Morgans of coming litigation and Washburn-Lane's recitation of the basis claimed for Morgan's breach, given the rejection of the foundation pinning plan and the "redesign" made any further response by the Morgans problematical, if not unnecessary, particularly, since unknown to the Morgans, Plaintiff's design changes would moot all prior solutions agreed or proposed.

The Court finds that the Morgans' work stoppage order of April 5, 2007, confirmed further by Morgans'

attorney's e-mail of April 6, 2007, that halted the repairs due to lack of insurance and, as yet, a resolution of how to proceed, was reasonable. However, after that date, the Morgans, at least by the testimony of Mr. Finney, their structural engineer, never forwarded the Plaintiff's structural engineer, Mr. Falbe's, proposed solution for Mr. Finney's review, which at trial, and upon review, he would voice no objection. The latter failure is not satisfactorily explained at least to April 27, 2007.

Based on the evidence, the solutions proposed, particularly, in conjunction with the fact that a new roof would have also supported the walls of 1415 S.W. Lane as well as negating *any* concerns regarding a snow drift and snow load threat to 1415 S.W. Lane from the proximity of the proposed I-South and I-North buildings, seemed facially reasonable, particularly, when had in conjunction with the foundation pinning

plan. No reasons are advanced by the Morgans for non-concurrence other than time or, inferentially, that they believed it was ultimately to be their decision as to how or what was to be done to *their* building, not Plaintiff's, and that decision had yet to be made.

This latter Morgan position, if held and if carried too far, would ignore the contract existing between them and the Plaintiff. Plaintiff was under a "no harm" contractual obligation concerning the building of 1415 S.W. Lane and a breach thereof would have provided the Morgans a remedy. While nothing in the contract obliged Morgans to agree, correspondingly, nothing in the contract gave them control over the design of solutions to ameliorate existing, or perceived, risks. While the Morgans were entitled to operate their business during construction, this right, too, as a matter of necessity implied from the contract and the easements granted, would be required to yield to

reasonable construction intrusions and to endure unexpected events, such as the cutting of the *improperly* hooked up sewer line that exited from 1415 S.W. Lane.

In the circumstances cited here where Plaintiff thought the Morgans attempted to control or dictate the construction progress, a Court could have, had these instances been material, enjoined them from interfering, based on Plaintiff's easement access, had the Plaintiff simply sought remedy through the Court as the *Declaration of Restrictions, Covenants and Easements* permitted at Article VIII of that *Declaration*.

However, this is not to say the Morgans would have no say in how their 1415 building was to be made structurally sound in light of the hazard created by the demolition of the 1419 building and the construction of Plaintiff's adjacent buildings, but,

rather, only a reasonable say, coupled with a good faith attitude aimed at finding a viable solution. It was not a card to be played for a better or different deal. Unfortunately, the parties agreement was silent in providing means to resolve disputes. However, if, by an example, the parties could not agree on remediable action, litigation on the viability of a solution could have been had in advance, rather than, as here, after the fact.

However, as, perhaps, misplaced as the Morgans position was in regard to some incidences occurring during the construction process, the Plaintiff, Washburn-Lane's, response to the latest Morgans' work stoppage, though, perhaps, thought by it as remediable of their immediate problems, actually exacerbated the problems and was destructive in nature, rather than an ordered and constructive response. In warfare, it would have been a nuclear strike in a situation where

merely firing a round over the head of the other party might had simply sufficed.

The facts are, unbelievable as it would seem, that the Morgans were never advised of Washburn-Lane's plans, made no later than April 24, 2007, to abandon discussions and not await an agreement for shoring up and protecting the structural integrity of 1415 S.W. Lane and, rather, instead, to re-site buildings I-South and I-North some five feet away from the Morgans' building. By May 24, 2007, the Plaintiff's had re-graded and moved the I-South pads, incurring \$20,697 in additional expense (Plaintiff's Exhibit 10: Invoice #18476.) Then, on June 13, 2007, this suit was filed by Washburn-Lane asking the Court for authority to excuse performance of its contractual duty to build an addition, which, by changing the design and placement of existing buildings, had been made more onerous, expensive, and, perhaps, impractical as a result of the

redesign decision.

While, like the Morgans, perhaps, misperception of the bounds of their authority and their duty of good faith as reasons for their obstinate posture, a search for sound, logical reasons cannot be found for Washburn-Lane's conduct, particularly, in omitting a clear notice to the Morgans that the Morgans continued insistence on having the absolute right to approve in advance every move in aid of 1415 S.W. Lane would result in Washburn-Lane's re-siting the buildings and abandoning to the Morgans any further solution to 1415 Lane's problems, particularly, when these solutions were clearly and finally on the table as a result of Mr. Falbe's report. However, there is no evidence that at the April 27, 2007, meeting Plaintiff's demanded a response or a formal objection by the Morgans to Mr. Falbe's report and recommendation for solving the Morgans' snow load and other concerns. Tellingly, a

close reading of the May 3, 2007, letter from Washburn-Lane's attorney, correspondingly, makes no specific demand or reference to the solutions proposed by Mr. Falbe. Given the Morgans were advised on April 27th that Plaintiff's were abandoning the plan to pin the foundation and had made some redesign decisions would indicate that it was not the Morgans delay in response to Mr. Falbe's report that was truly a determinative issue for them.

Had, perhaps, the Morgans been asked and then rejected the solutions proposed by Mr. Falbe, might it then be said that the additional costs and the consequences of that decision could fairly rest on the Morgans, if, in fact, the rejection was not in good faith while the solutions proposed were, themselves, reasonable. However, as the facts stand, the Washburn-Lane re-siting decision was unjustified, abrupt, precipitant and lacked good faith, both in fact and

law, under the circumstances then existing.

While frustration, undoubtedly, was settling in and the clock was ticking on the degree of profitability of Plaintiff's project, the parties' agreements secured Plaintiff's designated workman ingress to the Morgan property (Plaintiff's Exhibit 3: Real Estate Agreement at Exhibit C, Article II(e))' *Declaration of Restrictions, Covenants and Easements* at ¶ 3.5). Here, though suit was contemplated, then filed, no such immediate remedy was sought. Certainly, a fit of pique would not justify a renunciation of a solemn contract, particularly, when, as noted, previous delays, if any, occurring to I-South's and I-North's construction (the rest of the buildings, however, were going forward), could not be assigned to the Morgans' until beginning April 6, 2007, when, finally, practical solutions to resolve the outstanding questions about the stability and structural integrity of 1415 were proposed.

Whether other reasons, unspoken, existed are unknown. However, it can be noted that the Morgan building remaining after the plans were redesigned (Plaintiff's Exhibit 8D) was some ten inches wider than the original architectural drawings indicated (Plaintiff's Exhibit 1, p. 89A5). Considering that only a two inch gap had been intended between the I-South building and the Morgan building by the original plans with an I-South building wall independent of an independent Morgan building wall, it is obvious something had to give somewhere. The evidence here is that moving the I-South and I-North buildings the five foot distance required no other architectural design plan changes other than a small reduction in the Clubhouse area and patio. Whether moving I-South just ten inches south to accommodate the existing 1419 north wall now discovered needed to support the Morgan building was equally feasible is unknown. As

Plaintiff's, Mr. Roth, noted, the costs associated with any move would be similar. (Testimony of Steve Roth: TR Vol II, p. 67, L. 21 - L. 25.)

To the Court, it seems extremely unlikely that given Plaintiff's project engineer's report providing solutions to the last remaining engineering questions regarding the 1415 building's structural integrity and to which report the Morgans had not yet responded, that the Morgans' work stoppage order of April 6th was, or could be or should be, the causative or full reason for Washburn-Lane's re-siting the buildings, a decision obviously made before the April 27 meeting where the Morgans were then told that Plaintiff's were doing some "design changes," but not what, and that Washburn-Lane was abandoning the previously agreed foundation pinning plan. Thus, the absence of evidence explaining this structural design anomaly leaves Washburn-Lane's stated reasons for re-siting the I-South and I-North building

suspect and its expenses claimed therefore not only the same, but, as well, self-inflicted.

However, even if this just discussed inference from the architectural drawings and the testimony is misperceived, the Court would find that Washburn-Lane's decision to re-site the buildings so lacked good faith under the circumstances that the consequences that followed from it should be assigned to Washburn-Lane, not the Morgans. Any conduct of the Morgans to such date would not have excused Washburn-Lane's obligations under the parties agreements or justified retreat from the solutions on the table.

Further, and independent of the above findings and conclusions that Washburn-Lane's claimed damages are of its own making, the Court finds that Washburn-Lane's claim of damages founded on projected lost rentals from delay lacks substantive proof of delay assignable to the Morgans. The evidence is that while the parties

were dealing with the issues stemming from the demolition of 1419 S.W. Lane and, hence, the corresponding delay to the intended I-South building's construction, nothing prevented construction, and, in fact, site clearing and construction had begun, on the other building units of the development complex beginning with Building A.

Thus, until full resolution of the structural issues raised, which were not answered until Mr. Falbe reported by letter on April 6th his solutions to the concerns and plan of proceeding adopted at the February 12, 2007 meeting, delays would have to be considered, at best, as mutual and agreed. Plaintiff's construction superintendent himself agreed that it could not be until April 6th that delay could be ascribed to the fault of any one party. In fact, the building permits for both the I-South building and the I-North building were not issued until March 30, 2007.

Hence, Plaintiff's claim of delay damages arising from delays calculated before April 6 in regard to Buildings I-South or I-North are misplaced.

Finally, as discussed previously, Plaintiff's attempt to ascribe delay thereafter to the Morgans is also misplaced because, in fact, until it was made clear that Plaintiff intended to proceed in regard to its own structural engineer's recommendations, these issues regarding the structural integrity of 1415 still stood as outstanding and unresolved, even from Plaintiff's perspective, much less the Morgans.

However, even aside from these findings, Plaintiff's claim for delay damages cannot stand. As noted, as other building units proceeded with construction and were not delayed, even, in fact, perhaps, advanced. Plaintiff cannot claim, until all other units were rented, any lost opportunities arising from a delay in renting the apartments in buildings I-

South and I-North. These apartments, at least by the rental prices asked, were priced the same as other units and enjoyed no pricing premium. No evidence exists to show that Plaintiff's supply of units for rent had been exhausted before the I Buildings' apartment units became available.

Nevertheless, Plaintiff claims its loss otherwise arises from diminished gross rentals occasioned from lack of the availability of the clubhouse intended for building I-South, both as an existing amenity and as a marketing tool. While Plaintiff's developer witnesses, Mr. Newsome and Mr. Roth, opined to the impact to their development of this delay, the Court finds their naked opinions are insufficient to support the claim made. No evidence was proffered which would support their assertions or to provide a basis from which their opinion could be judged as substantively correct.

Though engaged in previous developments, the exact

nature of these developments is undisclosed, such that no analogy can be made in order to provide a reliable projection of a same result to the Washburn-Lane project. Plaintiff makes no showing that an apartment was declined because the apartment complex's clubhouse was not ready or that the intended clubhouse could not otherwise be visualized by a prospective tenant. Telling, as well, was the fact that Plaintiff did not feel any downward adjustment in the rental amount to be asked for any apartment should be made because the complex yet lacked a clubhouse.

Finally, on this issue, no firm basis is advanced to differentiate those who did rent at full price without a clubhouse to those who did not rent for one reason or another. These apartment units were in large part aimed at Washburn University students. Whether the apartment complex clubhouse was available or not, Washburn was still right next door. (Defendants'

Exhibit 212: Feasibility Study (Revised), 3/13/08, at pp. 10-12.) To say the reason for the existence of unrented units could *only* be ascribed to the lack of a clubhouse requires a leap of faith that the Court would not make from the testimony of interested parties. Accordingly, beyond the holding that no fault can independently be assigned to the Morgans for delay, the Court would find this character of damages claimed by Plaintiff has not been proved.

As noted, though the parties were estranged from the beginning, the seminal event subsequent involved the demolition of the 1419 S.W. Lane address that adjoined the building holding Jerry's Bike Shop which is owned by the Morgans.

The parties contract specified that the '[b]uyer shall not destroy the structural integrity to Seller's building. . . ." (Plaintiff's Exhibit 3: Real Estate Sales Contract at ¶ 10b.)

Further, the parties entered into an agreement denominated as a *Declaration of Restrictions, Covenants and Easements*, which, though set forth previously, provides as relevant for discussion as follows:

"5.1 Application. To the extent any two Owners have improvements on their Lots that adjoin and share a common wall, the provisions of this Article apply. The two lot Owners so affected shall be known hereinafter after 'Adjoining Owners.'

5.2 The Right to Use and Attach. The Adjoining Owners and their respective successors and assigns, shall have the right to use the Common Wall, as a party wall. Both Adjoining Owners shall have the right to attach to said Common Wall, for the purpose of supporting the buildings owned by each of them, and agree that such attachment will be of such a type so as not to injure or damage the existing buildings of either of them.

5.3 Damage or Destruction to a Building. In the event that the respective building owned by an Adjoining Party should be removed or destroyed, the Adjoining Party whose building is being removed or destroyed shall complete any and all repairs to the Common Wall at such party's own expense so that the Common Wall can continue to be used by the remaining building as its wall, and that any outside surfaces of such wall shall be finished in a manner that shall protect such surface from damage from the elements for a commercially

reasonable period. Further, nothing herein shall prevent an Adjoining Party from rebuilding a structure that uses all or part of the Common Wall in a manner that is consistent with the intent of this Declaration.

5.4 Easement for Repair. Each Adjoining Party shall have, a right-of-way easement to maintain, repair, and replace the Common Wall, said right-of-way easement being 15 feet in width, over the other Adjoining Party's Lot, or through the nearest doorways, provided that access shall be at reasonable times and in a manner that is not generally disruptive. Said easement is given for the sole purpose of ingress and egress and to perform the necessary maintenance, and it is not to be construed as an easement given to the exclusion of anyone, or to others later granted similar rights." (Emphasis added)

(Plaintiff's Exhibit 3: *Declaration.*)

The demolition of 1419 S.W. Lane revealed the true structure of 1415 S.W. Lane showing it is now dependent for support on the masonry wall of 1419 S.W. Lane that was once an interior wall and lacks a frost free foundation. This wall was the north wall of 1419 S.W. Lane, which now probably is, or is on, the real property of Washburn-Lane. However, this latter fact

is probably not material. If true, however, before demolition of 1419 S.W. Lane, this wall was a "common wall" as defined in the parties agreement. Upon the removal of the balance of 1419 S.W. Lane, the repair of the still standing wall of 1419 S.W. Lane would fall to Washburn-Lane as it was still a "common wall" by ¶ 5.3 of the parties *Declaration*.

However, ambiguity can exist in reference to this wall in reference to the *Declaration's* "common wall" provisions, if it is read in conjunction with the original plans and designs in regard to the relationship of 1415 S.W. Lane and Plaintiff's intended Building I-South. By the original plans a two inch gap was intended between the Plaintiff's I Buildings and the 1415 S.W. Lane building. In that case, the 1419 north wall, if not Plaintiff's, would not then technically be an adjoining shared wall, *i.e.*, "common wall" (*Declaration* at ¶ 5.1), even though connected by

a roof cap between the two walls. The easement of repair granted by the *Declaration* at ¶ 5.4 would apply only exclusively to ingress through the Morgan property given that the two inch gap and the independent I-South wall would, as a practical matter, prohibit repair of the 1419 north wall externally from the south, if not all together.

However, given the contractual requirement that Washburn-Lane "not destroy the structural integrity [of 1415 S.w. Lane]," the razing of the balance of the 1419 S.W. Lane structure, that is, all but its north masonry wall, also had the effect of removing the lateral structural support for both the 1419 north wall and the 1415 S.W. Lane building. Further, as the still standing 1419 S.W. Lane north wall lacked a frost free foundation and was previously an interior wall, the razing compromised the structural integrity of 1415 S.W. Lane. Likewise, total removal of the north wall

of 1419 S.W. Lane would exacerbate, if not completely destroy, the 1415 building's structural integrity. The fact Washburn-Lane's original development plans cannot account for, or accommodate, a ten inch structural discrepancy in its architects' plans if the 1419 S.W. Lane north wall remained, gives rise to the belief the development's designers were unaware that 1415 S.W. Lane had no structurally independent south wall.

Washburn-Lane's plans, as finally materialized, included underpinning the foundations of 1415 S.W. Lane by underpinning the 1419 north wall with the independent wall of building I-South, or, perhaps, additionally tying the two structures together by pinning the walls or, in lieu thereof or together, installing a new roof structure over 1415 S.W. Lane tied into buildings I-South and I-North to act as both a brace for the walls and to prevent the risk of excessive snow load. These plans as they were finally,

fully presented by Mr. Falbe's report of April 6, 2007, seemed both feasible and a substantial, workable solution to the damage occasioned by the demolition of 1419 S.W. Lane. However, Washburn-Lane's decision, upon which they took unilateral action to re-site the buildings, which was completed during the pendency of these proceedings, leaves 1415 S.W. Lane still structurally compromised and without any current solution proffered by Washburn-Lane. The failure of Washburn-Lane to follow through on the recommendations of its own engineers and architects to secure the structural integrity of 1415 S.W. Lane leaves its contract with the Morgans unfulfilled and Washburn-Lane in clear breach of the "no harm" proviso of its real estate sales agreement.

The Morgans' perception that a breach of the contract's provisions requiring that Washburn-Lane not destroy 1415 S.W. Lane's structural integrity occurred

immediately upon the demolition of 1419 S.W. Lane was an opinion prematurely arrived at in the Court's view. Notwithstanding, the Morgans had a good faith duty to, *and did*, allow Washburn-Lane the reasonable opportunity to cure the breach by reconstruction or repair, which process was still in effect to April 27, 2007, but which effort was abandoned by Washburn-Lane on its decision to implement a plan to re-site its I-South and I-North buildings. The re-siting of the I Buildings, without notice to the Morgans or the proffer of an additional viable plan to both assure the integrity of 1415 S.W. Lane and build the intended addition to it, was in contravention of Washburn-Lane's good faith duty to assure the successful completion of their contract with the Morgans.

The effect of Plaintiff re-siting its buildings I-South and I-North, particularly, I-South, was, and is, destructive of its contract with the Morgans, given

that no alternative plan whatsoever to ameliorate the structural condition of 1415 S.W. Lane has been proffered or is known to exist that would accommodate the physical change imposed by Washburn-Lane's unilateral act of re-siting its buildings.

In *Bonanza, Inc. v. McLean*, 242 Kan. 209 (1987), the Kansas Supreme Court referred to and quoted from the earlier case of *Sykes v. Perry*, 162 Kan. 365 (1947), relevant here, as follows:

"*Sykes* involved a controversy over a contract pertaining to the lease and sale of real property. *Sykes* quotes the applicable principles of law from 6 R.C.L.856, § 244, as follows:

"Necessary implication is, beyond doubt, as much a part of an instrument as if that which is so implied were plainly expressed. If it can be plainly seen from all the provisions of the instrument taken together, that the obligation in question was within the contemplation of the parties when making their contract, or is necessary to carry their intention into effect-in other words, if it is a necessary implication from the provisions

of the instrument-the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted by the parties, being supposed to have made those stipulations which as honest, fair and just men they ought to have made. Therefore, whatever may fairly be implied from the terms or nature of an instrument is, in judgment of law, contained in it.... In fact, it may be said that contracts impose on parties, not merely obligations expressed in them, but everything which, by law, equity, and custom, is considered incidental to the particular contract, or necessary to carry it into effect. Implied promises always exist where equity and justice require the party to do or refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject-matter of the contract a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it. Whatever the law necessarily implies in a contract is as much a part thereof as if expressly stated therein....'" p. 373."

Id. pp. 221.

Further, the *Bonanza* court went on to explain, as

follows:

"The modern trend is to apply the duty of good faith and fair dealing in every contract. The duty imposes both affirmative and negative obligations. 17 Am.Jur.2d, Contracts § 256, pp. 653-654, states:

'Every contract implies good faith and fair dealing between the parties to it, and a duty of co-operation on the part of both parties. Accordingly, whenever the co-operation of the promisee is necessary for the performance of the promise, there is a condition implied that the co-operation will be given. Indeed, it may be said that contracts impose on the parties thereto a duty to do everything necessary to carry them out. When one undertakes to accomplish a certain result he agrees by implication to do everything to accomplish the result intended by the parties. If the giving of notice is requisite to the proper execution of a contract, a promise to give such notice will be inferred. Moreover, there is an implied undertaking in every contract on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out his part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Ordinarily if one exacts a promise from another to perform

an act, the law implies a counterpromise against arbitrary or unreasonable conduct on the part of the promisee. However, essential terms of a contract on which the minds of the parties have not met cannot be supplied by the implication of good faith and fair dealing.'"

Id. at p. 222.

Thus, at least on the present evidence before the Court, Washburn-Lane appears to have abandoned its contract with the Morgans and, further, it has compromised, if not abrogated, its own ability to perform its contractual obligations to the Morgans, including, beyond the issue of 1415's structural integrity, the building of the addition, for which Washburn-Lane holds the responsibility for cost overruns. While the Morgans had a duty to permit and accept the construction of this addition, the Morgans never had, nor have they gained a duty by Plaintiff's actions or inactions, to build the addition themselves. The Morgans, as a consequence, are not only left

without the compensation intended by the contract as represented by the addition, but are also left with an existing building that is so structurally compromised that its insurability or ability to be sold is significantly in question. Further, the 1415 building's utility as a place of business has been impacted by its condition, including the lack of a functioning sewer and space within the building for heating, cooling, and storage, the latter all occasioned by the prior site work and the demolition by Washburn-Lane of the lean-to structure at the rear of the Morgan business premises.

Here, Plaintiff brought suit initially seeking a declaratory remedy asking to declare its obligation to proceed or not proceed with its contract. The Defendants responded with a counterclaim for damages based on damage to 1415 S.W. Lane. At best, this initial suit should only have paused the parties'

obligations. Until the Court declared Plaintiff's rights, and Plaintiff refused to perform, if found to be so obligated, it is questionable that Defendants' counterclaim would, or should be, considered subject to full adjudication until that point. The Plaintiff's declaratory prayer now has, in fact, been answered. It is obligated to proceed. It was not excused from performance.

Plaintiff's subsequent amended petition, though maintaining its declaratory claim, also included a second count for damages. Again, Defendants answered and counterclaimed for monetary damages and equitable relief that principally asked for reformation of their agreements with Plaintiff. The Court has now found Plaintiff's damages, where found to exist, arose wholly from Plaintiff's own acts, and further, that Defendants caused no material delays. The Court had earlier found Defendants' equitable claims were inappropriate to the

facts.

The Court finds that Defendants' counterclaim for monetary damages is, though perhaps not premature, not yet fully ripened, since the Court has, by this opinion, just declared Plaintiff's rights. As noted, the Court has found Plaintiff had, and has, no right to abandon its contract. However, whether further performance by Plaintiff is intended, possible, or even viable is unknown, and has yet to be declared by Plaintiff, notwithstanding, on present facts, as noted, the Plaintiff might be viewed as having reputed its agreements with the Morgans. If, and when, such might ultimately be found to be the case, then the Morgans' claim for monetary damages may present the only remedy. The Morgans yet argue, alternatively, for the Court to craft an equitable remedy such as ordering agreements never reached, however, these alternative remedies are neither viable nor within this Court's authority on any

set of facts advanced or found. The contract between the parties, except for the form of compensation due the Morgans, has now been substantially executed to Plaintiff's benefit and the Morgans' attempt to retreat to other alternatives that could have been pursued prior to their arriving at their agreements now before the Court can not be resurrected here.

As Plaintiff should have opportunity to declare its intentions given the Court's holdings here, likewise, the Defendants should have the opportunity to proceed in the interest of justice with any evidence of their dollar damages, if Plaintiff will not, or cannot, satisfactorily perform its obligations at this juncture of the case. Given the fractured relationship of the parties to this case, a remedy short of monetary damages in favor of Defendants may not be productive or even practical, but equity should command the opportunity in order that justice might not be wholly

frustrated either by the pleading framework of this case or the parties misperception of their rights and remedies.

ORDER

Accordingly, the Court would retain jurisdiction in order to provide any further necessary hearings or to superintend the administration of any disputes should construction proceed. Entry of judgment shall be withheld pending determination of the course to be followed.

The Plaintiff is given twenty days to proffer its decision to proceed or not and, if to proceed, the steps intended to successfully complete its obligations under the contract. The Court will not revisit its findings of need or necessity in regard to the structural integrity of 1415 S.W. Lane. If Plaintiff's election is to proceed, rather than repudiate its obligations under its agreements, then the Defendants

will have twenty days to review the proffered plan of proceeding and may object and shall propose alternatives, in whole or in part. Plaintiff shall have fifteen days to respond if objection is made. If there remains a dispute, the Court will conduct an appropriate hearing to resolve it.

If Plaintiff elects to repudiate its obligation to proceed, the Defendants may request a further hearing on the issue of remedy or damages and, if it is to be a claim for monetary damages, shall provide Plaintiff with its detailed claim and its witness and exhibit list within twenty days and the Plaintiff will supply its witness and exhibit list within twenty days thereafter.

However, either before the above described process begins or, at least, prior to any hearing, the Court directs the parties engage in mediation in a good faith effort to resolve remaining issues. Given that the

legal issues have been declared and substantially determined, the issues remaining seem of a nature that can be resolved by the competent businessmen involved in this case, acting in good faith and with best effort.

If necessary, the deadlines first described above would be suspended once mediation is set and not resume until mediation is concluded.

IT IS SO ORDERED, this ____ day of July, 2009.

Franklin R. Theis
Division Seven
District Court Judge

cc: Grant Glenn

Craig Collins