

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PORT OF VANCOUVER, USA,

CASE NO. C17-5571RBL

Plaintiff,

ORDER

v.

METRO METALS NORTHWEST,
INC., and PACIFIC COAST
SHREDDING LLC,

Defendants.

THIS MATTER is before the Court on the parties’ cross motions for summary judgment. [Dkt. #s 70 & 75]. This case arises out of the use, maintenance and repair of a dock (Terminal 2, Berth 2, or T2B2) on the Columbia River. The Port of Vancouver built T2B2 in 2000, and since 2004 has leased it to Defendant Metro Metals¹ to export scrap metal. The dock is designed to support large shoreside cranes and has a concrete surface able to support a 1000 pound per square inch live load, rather than the more typical 750 psi. This case arises from damage to that concrete surface, and the issue is which party is responsible for the cost of its repair.

¹ Defendant Pacific Coast Shredding is the sole member of Metro Metals Northwest, Inc. The parties have agreed that PCS is as bound by the agreement as Metro is. This Order uses “Metro” for clarity and ease of reference.

1 **A. Background.**

2 Metro began exporting heavy scrap metal from the dock in 2007. By November 2009,
3 both parties wanted Metro to export additional scrap from the wharf and entered into a “Shred
4 Berm Expansion and Repair Agreement” designed to facilitate such an increase. The Agreement
5 provided for a re-arrangement and enlargement of the upland area used to stage scrap for loading
6 onto ships from the dock (revisions “inside the berm”); provided for a minimum annual export
7 amount, and a revised wharfage fee calculation (the amount paid by Metro to the Port for the use
8 of T2B2); and articulated the parties’ respective financial, operation and maintenance
9 responsibilities. Of specific import here is the list of the tenant’s repair obligations:

10 - **Metro Metals responsibilities:**

11 - **Repair damage to the terminal areas used for scrap steel operations. The Port will determine the extent of repair based on initial condition of damaged areas.**

12 - **Provide asphalt as required, initially and in the future, to protect scrap steel operational areas.**

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14 - **Repair Port areas damaged by tracked equipment. The Port requires that tracked equipment be moved into the Terminal 2 storage area by truck – not by driving it across the terminal area.**

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16 - **Operate and maintain storm water treatment facility for scrap steel operational area.**

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18 - **Pay for terminal modifications as a result of berm extension. A list of these modifications is attached as Exhibit 2 to this agreement.**

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20 - **Agree to follow BMPs as may be amended by the parties from time to time.**

21 [Stadler Dec Ex 4; Dkt. # 77]. The Agreement included two exhibits, one of which spelled out in
22 more detail the amounts the parties were going to spend to implement the new arrangement. It
23 included a requirement that Metro repair the existing concrete surfaces damaged by its shredding
24 activities:

1	Repair existing concrete		
2	and asphalt surfaces	Metro Metals	\$90,000 est.
3	damaged by shred activities		

4 [Stadler Dec Ex 4; Dkt. # 77].

5 As anticipated, Metro expanded its operations and began exporting far more scrap metal,
6 including heavy metal scrap, or HMS. Within a year, the Port claims, it notified Metro that its
7 operations were damaging the dock. By 2011, the longshoremen working on the dock began
8 expressing their concern that the concrete dock surface was unsafe. It was being “torn up” by
9 Metro’s activities: transporting shredded steel (and HMS) to the site in dump trucks, dumping it
10 on to the surface, moving it around with front end loaders, and loading it onto ships with
11 “grapple” (or “Fuchs”) cranes. The top layer of concrete was effectively scraped off, exposing or
12 damaging the re-bar underneath.

13 By October 2011, the Port engaged an engineer (KPFf) to evaluate the situation. KPFf
14 determined and reported that the dock was suffering structural damage. [See Krout Dec. Dkt. #
15 72, Ex. 4] The Port demonstrates that it put Metro on notice that its activities were damaging the
16 dock, and that it was going to have to engage someone to fix it. [See November 28, 2011 meeting
17 “Agenda” attached to Krout Dec Dkt. # 72, Ex. 6].

18 In June 2012 the Port engaged Lakeside Industries to perform emergency repairs
19 (asphalt) on the dock surface, until a permanent repair (new concrete) could be implemented. It
20 did so at a cost of approximately \$90,000.

21 Later that summer, the Port solicited bids for a permanent repair to the dock at T2B2. It
22 ultimately engaged the low bidder, Mowatt, to repair the dock surface. Mowatt did so by the end
23 of 2012, at a cost of almost \$1.5 million. Metro continued its operations during Mowatt’s repairs,
24 moving its operations to one end of its “area” and then the other. The Port claims that Metro’s

1 Operations Manager was “fully apprised” of the ongoing work. It is not debatable that Metro
2 knew the work was proceeding, and why.

3 Since the concrete repair was completed, Metro has been maintaining a 4-inch protective
4 asphalt layer over the concrete dock.² In 2016, the Port gave Metro the bill for the dock repair
5 work. Metro claimed it was not responsible and refused to pay. The Port sued.

6 The Port now seeks summary judgment on its breach of contract claim, and a judgment
7 for the cost of the repairs. [Dkt. # 70]. It argues that the contract is unambiguous: Metro Metals
8 agreed to repair the areas of T2B2 that it used, and predictably damaged, including the concrete
9 dock.

10 Metro Metals opposes the Port’s motion, and affirmatively seeks summary judgment on
11 the same claim, arguing there was never a meeting of the minds because it never intended to
12 agree to pay for any repairs to the concrete dock, rendering the agreement “unenforceable and
13 void.” It claims it agreed at most to retrospectively repair the berm area it was vacating (upland
14 from the concrete dock). It claims it never agreed to repair the concrete dock in the future,
15 because it did not consider that area part of the terminal that it used (“[Metro] always understood
16 its scrap steel operational area at Terminal 2 as the asphalt shred berm, not the concrete Dock
17 itself.”). [Dkt. # 75 at 11].

18 Metro also argues that any agreement imposed on the Port a condition precedent—
19 performing an “initial survey” of the dock’s condition— before it could require Metro to perform
20 or pay for any repairs. Indeed, it claims that the Port’s failure to conduct such a survey was a
21 material breach of the agreement excusing Metro’s performance. Metro argues that if it did not
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23 ² The Port points out that the Agreement requires this asphalt protection. Metro’s failure to maintain it prior to the
24 dock repair is a breach of the Agreement; it is not evidence that the Agreement does not impose that obligation.

1 have an enforceable repair obligation, the Port's alternative quasi-contract claim fails as a matter
2 of law, because the repair could not have conferred a benefit on Metro. Finally, in the alternative,
3 Metro argues that the Port's quasi-contract claim must fail where there is an actual contract
4 governing the same subject matter.

5 **B. Discussion.**

6 Summary judgment is proper "if the pleadings, the discovery and disclosure materials on
7 file, and any affidavits show that there is no genuine issue as to any material fact and that the
8 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether
9 an issue of fact exists, the Court must view all evidence in the light most favorable to the
10 nonmoving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty*
11 *Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

12 A genuine issue of material fact exists where there is sufficient evidence for a reasonable
13 factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is "whether
14 the evidence presents a sufficient disagreement to require submission to a jury or whether it is so
15 one-sided that one party must prevail as a matter of law." *Id.* at 251-52. The moving party bears
16 the initial burden of showing that there is no evidence which supports an element essential to the
17 nonmovant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

18 Once the movant has met this burden, the nonmoving party then must show that there is a
19 genuine issue for trial. *Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the
20 existence of a genuine issue of material fact, "the moving party is entitled to judgment as a
21 matter of law." *Celotex*, 477 U.S. at 323-24. There is no requirement that the moving party
22 negate elements of the non-movant's case. *Lujan v. National Wildlife Federation*, 497 U.S. 871
23 (1990). Once the moving party has met its burden, the non-movant must then produce concrete
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1 evidence, without merely relying on allegations in the pleadings, that there remain genuine
2 factual issues. *Anderson*, 477 U.S. 242, 248 (1986).

3 Contracts are to be interpreted to give effect to the parties' intentions. *Berg v. Hudesman*,
4 115 Wash.2d 657, 663, 801 P.2d 222, 226 (Wash. 1990). Contract interpretation is a question of
5 law if it is unnecessary to rely on extrinsic evidence, or if only one reasonable inference can be
6 drawn from the extrinsic evidence. *Tanner Elec. Corp. v. Puget Sound Power & Light Co.*, 128
7 Wash.2d 656, 674, 911 P.2d 1301, 1310 (Wash. 1996).

8 The Port's articulation of the rule of contract interpretation is accurate: "If a contract is
9 unambiguous, or its language, in context, has but one reasonable meaning, a court may grant
10 summary judgment even if the parties dispute the legal effect of a term or provision." *Mayer v.*
11 *Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995) (citing *Voorde*
12 *Poorte v. Evans*, 66 Wn. App. 358, 362, 832 P.2d 105 (1992)). The Port argues that the terms of
13 the agreement are unambiguous, and they require Metro to repair the damage to the terminal
14 areas used for scrap steel operation.

15 Metro's effort to interject some ambiguity or alternate meaning into the clear contract
16 terms fails as a matter of law. Its claim that it thought the contract only referred to the asphalt-
17 covered "berm area" does not make sense considered in light of the objective evidence, including
18 photographs documenting the area and its use over time, and the contract itself. KPFF
19 documented Metro's HMS stacked right on the concrete portion of the dock, waiting to be loaded
20 onto ships docked at the dock. The contract language (and the exhibit, describing existing
21 damage to "concrete," not just asphalt) in the context of Metro's ongoing T2B2 operations is
22 plain and unambiguous. Metro used the terminal area that plainly included the concrete dock.
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1 Metro cannot manufacture a question of fact, or a contract defense, by claiming that it
2 subjectively meant something else entirely.

3 Metro's second argument, that the Agreement imposed on the Port a condition precedent
4 (namely, to conduct a formal pre-contract survey of the dock's condition) is equally unavailing.
5 Metro complains that the Port did not "formally document" the dock's condition at the time of
6 the contract or at the time the new shed berm was completed, a year later. But the Agreement
7 makes no reference to a formal survey or documentation; the operative phrase says the Port will
8 determine the extent of the repair Metro must undertake, based on the initial condition of the
9 damaged areas. It does not describe a conditional³ obligation.

10 Nor was such a formal survey required to ascertain the damage. The dock was only four
11 years old at the time of the agreement. It is the same age as the adjacent dock to the west. The
12 volume of material processed in the berm and on the dock was far less than when the damage
13 was thoroughly documented. There is no credible argument that the damage KPFF documented
14 existed⁴ at the time of the Agreement, and Metro does not really claim that it did. The parties
15 knew the initial condition of the dock.

16 Metro's better argument is that the dock was already slightly used, so if the repair gave
17 the Port an effectively brand-new dock, it obtained an improvement. This is a damages
18 argument.

19 If the repair had not been yet completed, and there were factual issues about the necessity
20 of the repair or the reasonable cost to complete it, Metro would have a good claim that the

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22 ³ Metro's claim that the Port's failure to conduct such a survey was a "material breach" "excusing" (presumably *all*
23 of) "Metro's performance" under the Agreement demonstrates why this makes no sense. If this were true, Metro
could destroy the dock entirely (or even fail to pay for its use) and the Port would have no contractual recourse.

24 ⁴ If the concrete dock *was* already damaged to that extent in 2009, the Agreement's Exhibit 2 clearly imposed on
Metro the obligation to repair it.

1 amount of damage presented a triable question. But there is ample evidence that the Port
2 undertook the repairs in a reasonable manner, used the lowest bid, and paid marginally more for
3 microsilica concrete that was “tougher,” to avoid having to repeat the repairs. There is no
4 evidence that the repairs were not necessary or reasonable, or that they were not in fact
5 successfully performed.

6 The Port has established as a matter of law that the Agreement required Metro to repair
7 the dock, and that the Port reasonably performed those repairs in its stead. The actual (and
8 reasonable) cost of the repairs was \$1,558,141.46. The Port is entitled to summary judgment on
9 its contractual claim for that amount as a matter of law, and its Motion on this point is
10 GRANTED.

11 These determinations make the parties arguments about the quasi-contract claims moot,
12 and Metro’s motions on them are DENIED as such. But if the contract did not impose on Metro
13 the obligation to repair the damage it caused, or if there were questions of fact about whether it
14 imposed that obligation, the Port’s alternate quasi-contract claims would survive summary
15 judgment. A fact-finder could certainly determine that it would be unjust to permit Metro to use
16 the Port’s asset to conduct its steel export business quickly and carelessly—to consume its
17 concrete dock—without having to compensate the Port for that benefit.

18 **C. Conclusion**

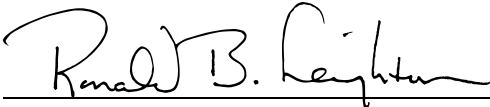
19 The Port’s Motion for Summary Judgment [Dkt. # 70] on its contract claim is
20 GRANTED. Metro Metals and Pacific Coast Shredding were and are contractually obligated to
21 repair the concrete dock they leased from the Port for their scrap metal export business, at T2B2.
22 They did not, and the Port reasonably undertook efforts to preserve the dock. There is no
23 evidence that the repair was not required or that it could have been done at a materially lower
24 cost.

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Metro’s Motion for Summary Judgment [Dkt. # 75] is DENIED. All other pending motions [Dkt. #s 69, 101 and 102] are DENIED as moot.

IT IS SO ORDERED.

Dated this 17th day of October, 2019.



Ronald B. Leighton
United States District Judge