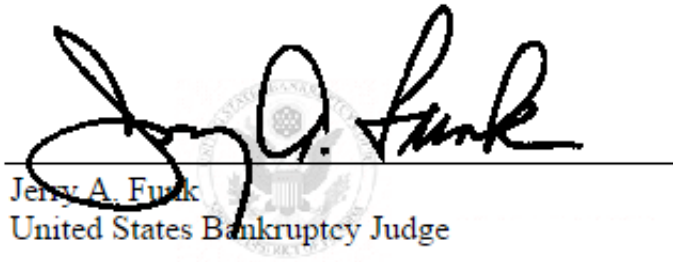
ORDERED.

Dated: September 14, 2018



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

CLIMATE CONTROL MECHANICAL SERVICES, INC.,	Chapter 11 Case No.	3:15-bk-2248-JAF
BASE 3, LLC,	Case No.	3:15-bk-2249-JAF
THE ALEXANDER GROUP, LLC, and	Case No.	3:15-bk-2250-JAF
FACILITY PERFORMANCE, LLC.	Case No.	3:15-bk-5021-JAF
Debtor,	(Jointly Administered Under Case No. 3:15-bk-2248-JAF)	

_____/

SKANSKA USA BUILDING, INC.,

Plaintiff,	Adv. Pro. No.	3:16-ap-0100-JAF

v.

CLIMATE CONTROL MECHANICAL SERVICES, INC.,

Defendant.

_____/

ORDER DENYING SKANSKA'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS AFFIRMATIVE DEFENSES 3 AND 4

This proceeding is before the Court on the Motion for Partial Summary Judgment as to the Plaintiff's Affirmative Defenses 3 and 4 to the Defendant's Counterclaim, filed by Plaintiff

SKANSKA USA BUILDING, INC. ("Skanska"). (Doc. 72). Defendant CLIMATE CONTROL MECHANICAL SERVICES, INC. ("Climate Control") filed a response in opposition. (Doc. 79). Skanska filed a reply. (Doc. 81). Based on the argument presented and for the reasons set forth below, the Court determines that Skanska's motion should be denied.

Procedural Background

On May 18, 2015, Climate Control filed a voluntary petition under Chapter 11 of the Bankruptcy Code. (Doc. 1 in 3:15-bk-2248). The Court authorized Climate Control to operate as a debtor-in-possession. (Doc. 15 in 3:15-bk-2248). In April 2016, Skanska filed this adversary proceeding. (Doc. 1). Skanska later filed an amended complaint, alleging breach of a construction subcontract between Skanska and Climate Control (the "Subcontract"). (Doc. 36). The Subcontract was executed on May 19, 2015, one day after Climate Control filed its bankruptcy petition. Skanska claims Climate Control hid its financial condition throughout Skanska's prequalification process, and its financial condition put Climate Control in default under Section 12.1(a) of the Subcontract. Skanska also alleges Climate Control defaulted under Section 12.1(b) due to various work/performance defaults.

In March 2017, Climate Control filed a counterclaim. (Doc. 26). Only Counts 1 and 4 of the counterclaim remain pending. See (Docs. 58 & 59). Count 1 alleges Skanska breached the Subcontract by terminating the Subcontract without a valid basis. Climate Control claims damages for Skanska's refusal to pay for work performed. (Doc. 26 at 15-16). Count 4 seeks to enforce a payment bond against various sureties. Liability on Count 4 is coextensive with Skanska's liability on Count 1 for failure to pay Climate Control under the terms of the Subcontract.

Skanska filed an answer to the counterclaim with two affirmative defenses relevant here. Affirmative Defense 3 essentially restates a portion of Skanska's breach-of-contract claim and

alleges Climate Control defaulted under Section 12.1(a) by hiding its financial condition and its bankruptcy filing. Affirmative Defense 4 alleges an equitable-estoppel defense and contends Climate Control should be estopped from asserting its counterclaim because Climate Control materially misrepresented its financial condition.

Skanska's instant motion two arguments corresponding to these two defenses. As to Affirmative Defense 3, Skanska contends that, because Climate Control filed its Chapter 11 petition the day before the Subcontract was executed, there is no dispute that Climate Control defaulted under Section 12.1(a) of the Subcontract. Skanska argues this default establishes a basis for Skanska's termination of the Subcontract and, thus, Climate Control should not be entitled to relief on its counterclaim. As to Affirmative Defense 4, Skanska contends that, had Climate Control been forthcoming about its financial condition, it would have recognized Climate Control was not able to assume its obligations under the Subcontract and Skanska would not have entered the Subcontract.

Factual Background

Climate Control is a commercial heating, ventilation, and air conditioning ("HVAC") subcontractor. The Subcontract pertained to a construction project in which Skanska, as the prime contractor, undertook to build a chemistry building and research facility at the University of Florida (the "Project"). The Project consisted of a four-story building with a mechanical penthouse. The Subcontract called for Climate Control to furnish and install HVAC systems. One of the largest components of the Project was the "mechanical scope" (i.e., heating, cooling, piping, ducting, etc.), which included the installation of "labor-intensive stainless-steel ductwork" by Climate Control. The ductwork entailed a large outlay of cash for materials and labor and, therefore, required substantial cash flow from Climate Control.

In January 2015, Skanska began obtaining bids for the "mechanical scope" of the Project. In February 2015, Climate Control furnished Skanska with a bid proposal, in the base amount of $5.95 million. Skanska had purchased a type of first-party insurance called subcontractor default insurance. The insurer required Skanska's bidding subcontractors to go through a "prequalification" process to mitigate risk to the insurer. In general, the prequalification process assesses the financial risk and performance risk of the given subcontractor and the extent to which it may be incapable of performing under the subcontract.

In March 2015, Climate Control faced cash-flow problems that caused it to seek financial aid from its bonding companies. Climate Control indicated to these bonding companies that it did not have the financial resources necessary to complete existing obligations on other unrelated bonded projects. At that time, Climate Control was prequalified with Skanska for $1 million. However, Skanska (and its subcontractor default insurer) required its subcontractors to be prequalified in an amount equal to or greater than the bid amount.

Skanska never asked Climate Control to provide a bond, apparently due to Skanska's subcontractor default insurance. Nevertheless, on March 18, 2015, Climate Control furnished to Skanska a letter from its bonding agent that opined, "In our opinion, Climate Control Mechanical Services, Inc. remains properly financed, well equipped, and capably managed." (Doc. 72-3 at 10 & 85). "At the present time, Fidelity and Deposit Company of Maryland provides a $6,500,000.00 single project / $12,000,000.00 aggregate surety program to Climate Control Mechanical Services, Inc." (Doc. 72-3 at 10 & 85).

In May 2015, one of Climate Control's major lenders levied on its accounts receivable and effectively quashed Climate Control's cash flow. Skanska contends this nullified Climate

Control's ability to perform its obligations due to the cash-intensive nature of the work. The parties dispute whether and to what extent Skanska had knowledge of these facts.

Minor issues regarding the scope of work were ironed out between the parties and, on the afternoon of Friday, May 15, 2015, Skanska notified Climate Control that the final draft of the Subcontract had been reissued for acceptance and execution by Climate Control. On Monday, May 18, 2015, Climate Control filed its Chapter 11 petition. On Tuesday, May 19, 2015 (post-petition), Climate Control's president, Louie Wise, electronically signed/executed the Subcontract.

The Subcontract

In pertinent part, Section 12.1 of the Subcontract provides:

> Subcontractor [i.e., Climate Control] shall be in default under this Subcontract if Subcontractor:
>
> (a)(i) becomes insolvent or is unable to meet its debts as they mature; (ii) admits its inability to pay its debts generally; or (iii) institutes or has instituted against it under any law relating to bankruptcy, insolvency or reorganization or relief of debtors, a proceeding which seeks the adjustment, protection or composition of Subcontractor or its debts or an order providing for the appointment of a receiver, trustee, or other similar official for Subcontractor or a substantial part of its property; or
>
> (b)(i) fails to supply enough properly skilled workmen or proper materials or equipment or to make sufficient progress, in each case so as to endanger the timely or proper performance of the Work; (ii) abandons the Work; (iii) repeatedly or persistently disregards Applicable Law or Contractor's instructions; or (iv) otherwise breaches any provision of the Subcontract.
>
> Subject to Subcontractor's right to notice and an opportunity to cure for certain defaults as provided below, Contractor may on written notice to Subcontractor at any time after it is in default: terminate Subcontractor's right to proceed with all or part of the remaining Work, take possession of the terminated Work and any and all of Subcontractor's materials, tools, appliances, equipment and other items at the Project site and finish the terminated Work by whatever method Contractor may deem expedient.
>
> . . .

(Doc. 36-5 at 8). Section 12.1(a) conditions Skanska's right to terminate the Subcontract on Climate Control's financial condition. Section 12.1(b) conditions Skanska's right to terminate the Subcontract on Climate Control's work/performance.

The Wise Affidavit

Climate Control filed an affidavit of its president, Louie Wise (the "Wise Affidavit"). (Doc. 79 at 20-25). Paragraph 7 of the Wise Affidavit recounts the Subcontract execution:

> 7. . . . [Climate Control] and Skanska continued negotiations and reached an agreement as to price on, or about, Apri1 29, 2015 in the amount of $6,410,706.00. As there were still minor issues under discussion, Skanska did not send the final subcontract to [Climate Control] until May 15, 2015. . . . By 3:50 PM on May 15, 2015, [Wise] received Skanska's contract for his review and execution. As [Wise] needed time to review the final scope of work with his preconstruction, project manager, and Chief Operating Officer to confirm all changes had been made, [Climate Control] did not execute the agreement until May 19, 2018. [Climate Control] did not delay execution of the subcontract until May 19 due to the pending bankruptcy issues or pressure any of its employees to have the subcontract executed.

(Doc. 79 at 22).

Paragraph 10 of the Wise Affidavit attests that Climate Control began experiencing cash flow problems due to unrelated projects during the Subcontract negotiations and that the "financial information [Climate Control] provided to Skanska included the records for both of those [unrelated] projects." (Doc. 79 at 23, ¶ 10). Paragraph 11 attests that Skanska "was advised during the negotiations" that Climate Control "would require some financial assistance to perform" its obligations, including quick turnaround on payments by Skanska to Climate Control and direct payments from Skanska to Climate Control's materialmen. (Doc. 79 at 23, ¶ 11).

Finally, paragraphs 17-19 provide:

> l7. Skanska was well aware of the fact that the project would be financially difficult for [Climate Control] both before and after award of the contract. [Climate Control's] decision to file for

> bankruptcy was made after negotiations were essentially completed. **It is my recollection, Skanska knew [Climate Control] may have to file for bankruptcy to restructure its finances and allow it to complete the work at the time Skanska sent [Climate Control] the subcontract for execution.**
>
> 18. Skanska was notified [Climate Control] filed bankruptcy shortly after [it] filed its petition in bankruptcy court. While Skanska knew [Climate Control] filed bankruptcy since shortly after the May 18, 201[5] filing, Skanska did not express any concerns about [Climate Control's] pending bankruptcy filing or [Climate Control's] ability to perform the contract at any time prior to Skanska's termination of the contract for default . . . .
>
> 19. On Friday, March 11, 2016, Skanska sent [Climate Control] a two-day cure notice . . . which did not make any reference to paragraph 12.1 and only referred to [the] time frame for performing the work and terminated [Climate Control] two days later. Skanska did not raise paragraph 12.1 of the subcontract as a concern or otherwise raise any issues about [Climate Control's] ability to perform the work at [any] time during [Climate Control's] performance of the work.

(Doc. 79 at 24) (emphasis added). The affidavit also attributes any work/performance defaults to Skanska and contends the Project fell behind schedule before Climate Control began work.

Standard for Summary Judgment

The chief question at summary judgment is whether there is sufficient conflicting evidence to warrant a trial. That is, summary judgment is appropriate if the pleadings and discovery show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056. The court must view the evidence in a light most favorable to the non-movant. In re Delco Oil, Inc., 599 F.3d 1255, 1257 (11th Cir. 2010). The movant bears the initial burden of demonstrating the absence of a triable issue. Id. Once the movant meets the initial burden, the burden shifts to the non-movant to come forward with evidence, beyond its pleadings, showing a genuine fact-question exists. Id.

Analysis

A. Affirmative Defense 3 – Breach under Section 12.1(a) of the Subcontract.[1]

"For a breach of contract claim, Florida law requires the plaintiff to plead and establish: (1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach." Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1272 (11th Cir. 2009). "In addition, in order to maintain an action for breach of contract, a claimant must also prove performance of its obligations under the contract or a legal excuse for its nonperformance." Bookworld Trade, Inc. v. Daughters of St. Paul, Inc., 532 F. Supp. 2d 1350, 1357 (M.D. Fla. 2007). "To prove the existence of a contract, a plaintiff must plead: (1) offer; (2) acceptance; (3) consideration; and (4) sufficient specification of the essential terms." Vega, 564 F.3d at 1272.

Here, Skanska's Affirmative Defense 3 alleges that Climate Control "materially breached the subcontract through its misrepresentation and intentional omission of material facts" concerning its financial condition. (Doc. 60 at 8). This defense is a portion of Skanska's affirmative claim for relief cast as an affirmative defense. Nevertheless, the Wise Affidavit shows conflicting evidence on what information was conveyed to Skanska, when such information was conveyed, and what actions were taken in response. (Doc. 79 at 23-24, ¶¶ 11, 17-19). This leaves open the question of waiver of any breach. (Doc. 79 at 17) (arguing waiver); see also 11 Fla. Jur 2d Contracts § 276 (discussing waiver of breach). Therefore, summary judgment on Affirmative Defense 3 is improper.

[1] The Court must address a legal issue not mentioned by either party although the reason for not raising it may be apparent. Section 365(e)(1) of the Bankruptcy Code usually invalidates so-called ipso facto or anti-bankruptcy clauses such as Section 12.1(a) of the Subcontract. 11 U.S.C. § 365(e)(1) (2015). Yet, "[g]enerally, in order for [§] 365 to be applicable, the Code mandates the existence of an executory contract on the day the debtor files its petition for relief." In re Nemko, Inc., 163 B.R. 927, 935 (Bankr. E.D.N.Y. 1994). Additionally, "[t]here is no provision in the Bankruptcy Code which prohibits the termination before bankruptcy of a contract on account of insolvency." LJP, Inc.v. Royal Crown Cola Co. (In re LJP, Inc.), 22 B.R. 556, 558 (Bankr. S.D. Fla. 1982) (discussing § 365(e)(1)). Here, the Subcontract is an executory contract. However, the Subcontract was not executed as of the day Climate Control filed its petition. Therefore, it appears § 365(e)(1) does not apply to the Subcontract.

B. Affirmative Defense 4 – Equitable Estoppel.

Under Florida law, "the doctrine of equitable estoppel is 'nothing more than an application of the rules of fair play.'" VFW John O'Connor Post #4833 v. Santa Rosa County, Florida, 506 F. Supp. 2d 1079, 1095 (N.D. Fla. 2007) (applying Florida law). "Equitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct." Major League Baseball v. Morsani, 790 So. 2d 1071, 1077 (Fla. 2001). "The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct." Id. "Equitable estoppel thus functions as a shield, not a sword, and operates against the wrongdoer, not the victim." Id. "Equitable estoppel is an affirmative defense, not a cause of action, and equitable estoppel is not designed to aid a litigant in gaining something but only in preventing a loss." 22 Fla. Jur 2d Estoppel and Waiver § 24 (2018).

"To prove estoppel under Florida law a party must show: (1) a representation by the party to be estopped made to the party claiming estoppel as to some material fact which is contrary to the position later asserted by the estopped party; (2) a reasonable reliance on the representation by the party claiming estoppel; and (3) a detrimental change in position by the party claiming estoppel caused by the representation and the reliance on it." Chick-Fil-A, Inc. v. CFT Dev., LLC, 652 F. Supp. 2d 1252, 1261 (M.D. Fla. 2009). "[E]stoppel must be applied cautiously, and if the conduct on which the estoppel is based 'is ambiguous and thus susceptible of two constructions, one of which is inconsistent with the right asserted by the party sought to be estopped, there is no estoppel.'" In re Adoption of R.M.H., 538 So. 2d 477, 480 (Fla. 2d DCA 1989).

Here, the Wise Affidavit constitutes conflicting evidence concerning what representations were made to Skanska by Climate Control about its financial condition. The true extent of these

facts must be determined at trial, based on the weight of the evidence. Thus, summary judgment is inappropriate on Affirmative Defense 4.

Accordingly, it is hereby ORDERED that Skanska's motion (Doc. 72) is DENIED without prejudice to raising these defenses at trial and presenting evidence on the same.