

IN THE CIRCUIT COURT OF _____ COUNTY
STATE OF MISSOURI

_____,)	
)	
Plaintiff,)	
)	
v.)	Case No. _____
)	
MIKE [Doe],)	Div. _____
)	
&)	
)	
[Doe Enterprises, L.L.C.],)	
)	
Defendants.)	

**Defendants' Reply Memorandum to Plaintiff's Response to
Defendants' Motion for Summary Judgment**

Plaintiff makes an assortment of arguments why Defendants aren't entitled to partial summary judgment. The arguments are meritless or immaterial.

I. Defendant Mike Doe Cannot Be Held Personally Liable

Defendant Mike Doe cannot be held personally liable because the undisputed material facts establish that during contract negotiations, formation, and performance Mr. Doe disclosed to Plaintiff both the existence and identity of his principal – Doe Enterprises, L.L.C., doing business as "Anytime Fitness," a gym that is part of a chain – before signing the contract. Plaintiff responds that Plaintiff has established a prima facie case that Defendant Mike Doe can be held personally liable for breach of contract. That is so, argues Plaintiff, because of five "facts." But none of these

facts, which shall be addressed *seriatim*, establish Mr. Doe's personal liability for any (alleged) breach of contract or wrongdoing by Doe Enterprises.

(1) Plaintiff notes that the original agreement, prepared by Plaintiff, is addressed to "Mr. Mike Doe." But to whom else would it be addressed? Plaintiff was negotiating and dealing with Doe Enterprise's sole agent, Mike Doe. A business entity such as a corporation or limited liability company can only act through its agents. So it is utterly unsurprising and insignificant that the agreement here was addressed to Mike Doe. Plaintiff concedes as much, by tacitly conceding that had Mr. Doe wrote next to his signature that he was "President" of Doe Enterprises, L.L.C., he wouldn't be personally liable. Plaintiff's Memorandum 11.

(2) Plaintiff observes that Mr. Doe's signature appears under a section entitled, "Acceptance of Proposal." But where else would an agent signing for a principal sign a proposal – in the margins? on the back? That the agent signs the agreement in the applicable location for acceptance doesn't *ipso facto* establish that the agent is signing both as agent for a principal and in the agent's own capacity. The location of an agent's signatures says nothing about the scope or significance of the agent's signature, except when (as is *not* the case here) there are two signature lines, one for the signer to sign as agent of a disclosed principal and one for the signer to sign as an individual.

(3) & (4) Plaintiff notes that the written agreement doesn't expressly state in what capacity Mr. Doe is signing (e.g., "President" or "Treasurer") and the agreement nowhere mentions the name "Doe Enterprises." True, but unimportant. For starters, Plaintiff is confusing the contract – the mutual exchange of promises, each supported by consideration – with the written

memorialization of the contract. Save as shorthand for a written summary of a contract or where the statute of frauds mandates such a written memorialization, the phrase “written contract” is gibberish. The question here is whether during the contractual transaction both the existence and the identity of the Principal (Doe Enterprises, L.L.C.) was revealed by the principal’s agent (Mike Doe). There just is no requirement that the agent disclose the existence and identity of the principal on whose behalf the agent is signing in the written memorialization of the contract, which would be passing strange since a great many contracts are done a handshake, without any corresponding written memorialization ever created. (Plaintiff must tacitly be assuming that in such contracts the agent is *always* liable, no matter how clearly the parties are in agreement that the agent should *not* be liable!) The answer to the question here is clearly yes. Immediately before signing the proposal prepared by Plaintiff and mailed to him, Mr. Doe revealed that Doe Enterprises, L.L.C., doing business as “Anytime Fitness” – the name of a gym chain – was going to operate a gym and needed a contractor to do a “build-up” of the work space that Doe Enterprises was going to lease. Defendant’s Statement of Uncontroverted Material Facts ¶2¹;

¹ Plaintiff’s response to Defendants’ statement of uncontroverted material facts denies that Mr. Doe identified his principal, Doe Enterprises, L.L.C., in his dealings with Plaintiff, but the denial is unaccompanied by any reference to an affidavit or other document supporting the denial. Consequently, the denial is defective, as are all the others, and for the same reason: None makes specific references to the discovery, exhibits, or affidavits that (allegedly) demonstrate a genuine issue for trial, contrary to Mo. Sup. Ct. R. 74.04(c)(2) (“A denial [of movant’s factual statements] may not rest upon the mere allegations or denials of the party’s pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.”). This Court must deem all of the Defendants’ factual statements in the statement of uncontroverted material facts as admitted truths. Mo. Sup. Ct. R. 74.04(c)(2).

Even if this Court were to overlook the stark violation of Rule 74.04(c)(2), the only evidence to which the denial of Defendants’ factual allegation that Mr. Doe disclosed Doe Enterprises, L.L.C., as his

Plaintiff's Response to Defendants' Statement of Facts ¶3. No more was required to shield Mr. Doe from personal liability.

(5) Finally, Plaintiff thinks it important that Mr. Doe signed every change order without specifying that he was doing so solely as agent for Doe Enterprises, L.L.C. Plaintiff is begging the question. He is assuming what is at issue here – namely, in what capacity Mr. Doe was signing, solely as agent for Doe Enterprises, L.L.C., or also in a personal capacity? If, as explained above, Mr. Doe's signed the proposal sent to him by Plaintiff solely as an agent for Doe Enterprises, then his subsequent signatures were made in the same capacity, unless clearly stated otherwise on the change orders. Plaintiff is also making the false assumption that the change orders were valid. As explained before and as explained below, they lacked support by fresh consideration, and also were the product of economic duress, and so were invalid. They cannot be used to inform the scope of Mr. Doe's liability.

This Court may wonder: Why didn't Mr. Doe just sign as "President" of Doe Enterprises, L.L.C. That would have been the easy way for him to avoid personal liability. But while such a designation clearly eliminates any personal liability (absent clear evidence to the contrary), see Plaintiff's Memorandum 10 (citing General Electric Capital Corp. v. Rauch, 970 S.W.2d 348, 356

principal could refer is the affidavit of Raymond Bulte, with whom Mr. Doe was negotiating, and that affidavit says *nothing* about the matter, let alone deny Mr. Doe's allegation. Exhibit 1 to Plaintiff's Statement of Additional Uncontroverted Material Facts. Nor should this Court allow Plaintiff to correct the Rule 74.04(c)(2) violation. Plaintiff's response specifically invokes Rule 74.04(c)(1), revealing that Plaintiff's counsel, a veteran attorney, is, to be expected, familiar with the requirements of Rule 74.04. Moreover, Defendants have already consented to allowing Plaintiff additional time, of which Plaintiff used nine days, to prepare and file their response. So Plaintiff had ample time to comply with the clear mandates of Rule 74.04.

(Mo. Ct. App. S.D. 1998)), neither such a designation nor an express disclaimer of personal liability on the agent's part is *necessary* to avoid personal liability. What *could* have been done to avoid personal liability should not be confused with what *must* have been done to avoid personal liability. Both the existence and identity of Mr. Doe's principal was disclosed to Plaintiff, causing any signature by Mr. Doe (i.e., acceptance of Plaintiff's offer) to be made solely in his agentive, and not personal, capacity. As the Missouri Court of Appeals, Eastern District, has held, citing the very case upon which Plaintiff relies – Moore v. Seabaugh, 684 S.W.2d 492 (Mo. Ct. App. 1984) – “the general rule is that where a third party [here, Plaintiff] and an agent for a disclosed principal [here, Doe Enterprises, L.L.C., doing business as “Anytime Fitness”] make a contract, the agent is not personally liable[.]” Ingram v. Lupo, 726 S.W.2d 791, 796 (Mo. Ct. App. E.D. 1987). The Western District agrees: “The general rule in Missouri with respect to agent liability is that one who, as an agent for another, enters into a contract with a third party without disclosing his agent status, or discloses his agent status without the identity of his principal, can be held liable on the contract at the third party's election.” Central Missouri Prof. Serv. v. Shoemaker, 108 S.W.3d 6, 10 (Mo. Ct. App. W.D. 2003) (citing case law stretching back to 1984).

Granted, the Eastern District did note that its decision in Moore acknowledged an exception to this “general rule” – to wit, that the agent of a disclosed principal can be held personally liable “*if the parties to the contract agree upon the personal liability of the agent*” the identity of whose principal was disclosed. But nothing in the written agreement here even hints that the parties intended to hold Mr. Doe personally liable (and not just Doe Enterprises, L.L.C.), notwithstanding his disclosure of the identity and name of his principal. Compare Suburban

Business Products, Inc. v. T.E. Schmitt Co., 796 S.W.2d 77, 78-79 (Mo. Ct. App. E.D. 1990) (holding that clear evidence of agent's personal liability where agent not only signed as agent for disclosed, but contract also separately signed as "THOMAS E. SCHMITT, an individual"). Hence, the presumption that Doe Enterprises, L.L.C., alone could be held liable was not rebutted.

Confirmation that Plaintiff knew, or should have known, that he was contracting solely with Doe Enterprises, L.L.C. (not that such confirmation is needed, given Plaintiff's admission that Mr. Doe disclosed the identity of the principal on whose behalf he was contracting) includes the fact that the agreement referred to "Anytime Fitness," the name of a franchise, a franchise highly unlikely to have been operated by a sole proprietor; that Plaintiff's own invoices identified Doe Enterprises, L.L.C., (as well as Anytime Fitness) as the party obligated to pay Plaintiff; and that Plaintiff's lien waivers also referred to Doe Enterprises. It also would be asymmetrical and aberrational for Plaintiff, a corporation, to enter into the contract with a personal entity, instead of, as the parties' expected, two business entities to enter into the contract. The truth is that Plaintiff knew it was entering into a contract with a fellow business entity; its attempts to evade that fact are unavailing.

II. Under the Preexisting Duty Rule The Change Orders Are Unenforceable

Plaintiff agrees that the change orders submitted to Defendant Mike Doe must be supported by fresh consideration to be effective, as required by the preexisting duty rule, with especial force in construction contract cases. (As Corbin explains: "It is certainly possible that a contractor may purposely bid low in order to get the contract, and then refuse to perform, after

it is too late to obtain another contractor without loss and convenience, in order to induce the promise of more pay. The strict enforcement of the [preexisting duty rule] would tend to remove this temptation from bidders, since they would know that a promise so induced would not be legally enforceable." Corbin on Contracts, Section 171, at p. 106 (1963).) Where Plaintiff parts company with Defendants is Plaintiff believes that the work necessitated by Jefferson County's ordinances goes above and beyond what the original agreement required and so, according to this reasoning, the change orders were supported by fresh consideration. Plaintiff's Memorandum 13-14. One problem: The original contract encompassed all the work described by the original contract, which Plaintiff drafted.

The original agreement required (and requires) Plaintiff to complete the following work: "(1) New Walls, (1) Electric (\$7,500 estimate), (1) HVAC Service & Freon Charging, (1) Plumbing *\$15,000 estimate), (500) square feet Carpet, (1) Tile (1000 sq. feet ceramic floor tile), (1) Installation of Owner Provided Rubber Flooring (4500 sq. feet)." Exhibit A to Amended Petition; Plaintiff's Response to Defendants' Statement of Facts ¶4. To complete that work, construction and other permits from Jefferson County, Missouri, where the work site was located, had to be obtained. And as Defendants alleged, Defendant's Statement of Uncontroverted Material Facts ¶8, and as Plaintiffs have admitted, supra note 2, Plaintiff agreed to do "all things necessary to apply for and procure the required building and other permits to do [the] construction work." It was thus Plaintiff's duty under the original agreement to satisfy the Jefferson County's requirements for obtaining the necessary permits. The "extra" work is not extra, but rather simply the work that Plaintiff had originally agreed to do.

Plaintiff does not deny that failure to complete all the work covered by the change orders would have resulted in Jefferson County prohibiting the construction covered by the original agreement. Rather, Plaintiff argues that (1) the original agreement authorized the change orders and (2) in any event, Jefferson County's requirements were unforeseen circumstances, thereby excusing Plaintiff's nonperformance under the terms of the original agreement. Plaintiff's Memorandum 3, 17-18. The memorialization of the original agreement states: "Agreement is contingent upon strikes, accidents, or delays beyond our control" and "Work will be completed by 9/01/07 barring any unforeseen consequences" and "Contract Amount Based on Preliminary Layout (drawing attached) and Discussion." These provisions do not help Plaintiff. In essence, Plaintiff is alleging that the Jefferson County ordinances, as enforced by Jefferson County, were unforeseen circumstances. But Plaintiff makes no allegation that Jefferson County misconstrued its ordinances, or applied them in a shocking way, let alone that the ordinances are unclear – only that he assumed that the building and other permits would be issued "almost immediately." Plaintiff's Memorandum 4.

Plaintiff had an opportunity to inspect the work site, before June 9, 2007, more than three months before the work was to be completed, and at least 10 days before mailing his proposal Mr. Doe. Plaintiff's Response to Defendants' Statement of Facts ¶9. Defendants cannot be faulted because Plaintiff made a poor estimation of the cost of complying with Jefferson County's building code. Plaintiff's misunderstanding or misapplication of the Jefferson County building code and ordinances is no "unforeseen circumstance" or a "delay beyond our control" analogous to a strike or accident. See Albana v. State Bd. Regis. Healing Arts, 293 S.W.3d 423, 431 (Mo.

2009) (discussing canon *noscitur a sociis*). Unlike a strike, which involves the actions of a third party whose behavior generally cannot be controlled, or an accident, which despite the best precautions can still occur, correct estimations of the work necessary to satisfy building code and ordinances is done every day, across the land, by construction firms like Plaintiff.

Moreover, and with particular respect to Plaintiff's contention that Jefferson County required him to build additional or higher walls than under the original agreement, that agreement specifies that Plaintiff agreed to build "walls," a term that would include the walls necessary to make the work site useable as a gym. Exhibit A to Amended Petition. The "walls" Plaintiff agreed to build was not "the walls Plaintiff anticipates having to build" or "walls that would not satisfy Jefferson County code," but simply "walls," meaning, given Plaintiff's acknowledgment that it knew it was being hired to prepare the work site for a gym that was to be part of the "Anytime Fitness" chain, "walls" necessary to open a gym. In this case, Defendant Doe Enterprises was not asking Plaintiff to build a special well, nor an ornate wall with custom materials, nor a wall beyond that required by the minimum code requirements. The original agreement clearly required Plaintiff to build the walls required by Jefferson County. And to the extent there is any ambiguity here, given the fact that Plaintiff drafted the agreement, the "walls" provision must be interpreted against the interests of Plaintiff.

Regarding Plaintiff's contention that the original agreement contemplate modifications, by authorizing "changes," Defendants agree. The original agreement does not, however, authorize consideration-free modifications. It merely establishes that the agreement is modifiable (unlike some agreements, which state that they aren't or which could be (mis)construed as forbidding

modifications). Moreover, the phrase “changes” does not anticipate a unilateral demand – e.g., in the amount to be paid for work already covered by the original agreement. Nor is it a change for Plaintiff to promise to do what he was already required to do.

Plaintiff is correct that the original agreement states, “Contract Amount Based on Preliminary Layout (drawing attached) and Discussion.” Yet that provision *supports* the conclusion that Plaintiff did not base its bid on the actual physical condition of the work site, about which he complains. Also, that provision notes that the layout is “preliminary,” implying that Plaintiff knew (or should have known) that the layout presented him not final, but a final layout would be produced later, or rendered unnecessary by Plaintiff’s actual review of the physical location, an opportunity Plaintiff admits having (and also availing himself of). Nor should Defendants be faulted because Plaintiff decided (if it ever did decide) to ignore what Plaintiff saw when it inspected the work site before submitting its bid.

With respect to Plaintiff’s feigned ignorance of the actual condition of the work site – to which this Court should turn a deaf ear, given his admitted opportunity to inspect the work site – Plaintiff notes that Defendant Mike Doe discussed with Rich Reiche of Grewe, the site landlord, that the wall must be fire rated due to a “code change in Jefferson County.” Plaintiff’s Memorandum. But what Plaintiff fails to disclose is that it was Plaintiff’s own representative that told Mike Doe there had been such an alleged code change, when in truth Jefferson County had merely followed 2003 IBC code compliance reviews, which were neither new nor recently changed when the 2007 agreement here was executed. Exhibit D to Defendant’s Motion for Summary Judgment. Plaintiff cannot transmogrify a lie told to Defendants to persuade

Defendants to agree to changed orders into the truth merely because Defendants (initially) believed the lie.

Plaintiff also notes that the landlord of the work site, Grewe, had provided Plaintiff plans of the space that depicted a sprinkler system and that Defendants' counsel had discussed with Grewe that the absence of a sprinkler system led Jefferson County to require the construction of a shaft wall. But what Plaintiff fails to disclose is that Grewe put Plaintiff's representative on specific notice *several* times that the "plans are not exact and will need to be field verified" and the plans were only given to Plaintiff by landlord Grewe *after* the construction plan had been rejected by Jefferson County. Grewe Memorandum (dated October 15, 2007). Further, Defendants and their counsel were completely unaware, when discussing the plans with Grewe, that Grewe had ever advised Plaintiff that the plans were not exact; nor did Defendants or their counsel know that Grewe had first provided Plaintiff with the plans on August 29, 2007, after the building permit was rejected by Jefferson County. Defendants and their counsel only learned of these facts during discovery, when Grewe produced documents responsive to Plaintiff's request after filing of this case. Grewe Memorandum (dated October 15, 2007). Regardless, any argument that the fire-rated wall requirement was "unforeseen" at the time of the parties agreement because of Plaintiff's (alleged) reliance on the landlord's plan depicting sprinklers in place is utterly meritless, given that the landlord's plans were given Plaintiff on or after August 29, 2007, long after the original agreement was executed (on June 26, 2007). Grewe Memorandum (dated Oct. 15, 2007).

In essence, Plaintiff is making a veiled invocation of a unilateral-mistake defense. That is to say, Plaintiff is arguing that it botched its cost estimate, upon which it based its proposal, by failing to anticipate what Jefferson County's ordinances required or by assuming that whatever preparatory work need to be done to complete the work expressly listed on the original agreement would be insignificant (hence, Plaintiff's assumption that the construction and other permits would be promptly issued) and seeks to hold Defendants responsible for its mistakes. But unilateral mistake, as opposed to mutual mistake, is generally *not* a valid defense. I. E. Allan Farnsworth, *CONTRACTS* § 9.4, p. 614 (3d ed. 2004). In addition, the defense does not apply to mistakes of *law*, Landers v. Sgouros, 224 S.W.3d 651, 664 (Mo. Ct. App. S.D. 2007); Kassebaum v. Kassebaum, 42 S.W.3d 685, 695 (Mo. Ct. App. E.D., 2001), such as the interpretation or application of building ordinances. That Plaintiff misunderstood, or failed to consider, what Jefferson County's building ordinances required is thus immaterial.

Finally, even if unilateral mistake could be extended to a mistake of law, Plaintiff could establish no such mistake. That is because any such unilateral "mistake must relate to the existence or nonexistence of a material fact as it exists at the time of the agreement, not to a future contingency." Kassebaum, 42 S.W.3d at 695. The original agreement required Plaintiff to procure the necessary permits to do the listed work (hence the fact that it was Plaintiff who applied for the permits, not Defendants). So any mistake about what Jefferson County's ordinances required concerned a future contingency, making Plaintiff's veiled unilateral mistake defense a nonstarter.

III. The Change Orders Are Invalid Because They Were the Product of Economic Duress

Defendants signed the change orders proposed by Plaintiff not because they believed that the work described in the orders was in addition to that in the original agreement – they did not; but only because of Plaintiff’s direct threat to discontinue work until the orders were signed. This is economic duress, pure and simple. Defendants had no realistic choice but to sign the change orders to ensure compliance with the original agreement. Defendants’ arguments to the contrary are meritless.

Plaintiff begins by attempting to distinguish the cases cited by Defendant. These attempts are either meritless or immaterial. Regarding Alaska Packers’ Ass’n v. Domenico, 117 F. 99 (9th Cir. 1902), Plaintiff argues that because the breaching parties (i.e., the fisherman) in that case had already begun the contract work (while at sea) when they threatened to breach, unless their contract modification demands were met, whereas in here no work had begun when Plaintiff had proposed the first change order. The proposed distinction is irrelevant – irrelevant because the duress defense is designed to prevent improper conduct used to elicit contract modifications; the improper conduct needn’t follow the start of performance under the (original) agreement. If Plaintiff were right, X could point a loaded gun at Y, his contracting party, and threaten to blow Y’s brains out if Y refuses to agree to modify the original contract, performance under which was not to begin, say, for a day or two, yet X would have no duress defense. That is not the law.

A second flaw with the proposed distinction is that it is factually untrue. Plaintiff has admitted that performance under the contract by Doe Enterprises, L.L.C. – namely, the \$30,000

down payment to Plaintiff. Plaintiff's Response to Defendant's Statement of Facts ¶6; Plaintiff's Statement of Additional Facts ¶13. Moreover, if anything, the fact that Plaintiff had received a sizeable down payment and, according to Plaintiff, had not even begun work actually *strengthens* the duress argument, by exposing the leverage Plaintiff possessed to extort additional money from Defendants. If Defendants did not agree, Plaintiffs could walk off with the down payment, claiming a material breach (which is, in essence, what they did when they walked off the job), forcing Doe Enterprises to do one of two things: Either acquiesce in the improper demands or take legal action, thereby forestalling the opening of his business, losing money in the process. That assumes that Plaintiff is not judgment proof. Remember, too, that no contract, no statute, authorizes recovery of legal fees. And there is also the uncertainty of any law suit, no matter how strong the evidence or the law in support of the suit.

Plaintiff further attempts to distinguish Alaska Packers on the ground that, unlike in that case, where the employer couldn't hire substitute fisherman once out to sea, to replace the fisherman threatening the work stoppage, Defendants weren't faced with a situational monopoly; they could have hired another contractor to complete the construction and refurbishing work. But that was not even a remotely feasible option. Defendants had already paid Plaintiffs a significant \$30,000 down payment. Moreover, even if Defendants could have hired a replacement contractor, the contractor would have insisted on a price premium above the compensation to be paid Plaintiff, given the preexisting legal dispute with Plaintiff, the need to begin work immediately, during what Plaintiff describes as the "busy season" for construction, and the lack of any long stretch of time before the work needed to be finished.

Finally, the only court to embrace the situational monopoly view of Alaska Packers advanced by Plaintiff is the Seventh Circuit Court of Appeals. No Missouri court has addressed the issue, let alone adopted the situational monopoly view – nor should any Missouri court. The duress defense is designed to deter misconduct in renegotiation of contract terms; the existence of a situational monopoly only makes misconduct worse than it otherwise would be. In any event, the harm of a situational monopoly – no realistic substitute contracting party – is equally applicable here, where, just as in Alaska Packers, there was, when the change orders were proposed, no realistic alternative to signing the options, for the reasons given above.

Plaintiff next attempts to distinguish the present case from Austin Instrument Inc. v. Lorai Corp., 29 N.Y.2d 124 (N.Y. Ct. App. 1971). As with Alaska Packers, the distinctions here don't work. Regarding Plaintiff's situational-monopoly reading of Austin, Defendants will not repeat the response given above. Regarding Plaintiff's argument that Austin turned on the fact that the contract there required the construction of "a highly sophisticated item of military machinery requiring parts made to the strictest engineering standards," that is not, and cannot be, true. Otherwise, the finding of duress in Alaska Packers – the classic duress case, from which all other cases derive, which concerned only blue-collar work by fisherman – never would have been reached. To be sure, harm to the public (in Austin, indirectly caused by harm to the U.S. Armed Services, a vital tool in protecting this great nation of ours) strengthens a duress case, but it is not necessary.

Finally, Plaintiff seeks to turn Selmer Company v. Blakeslee –Midwest Co., 704 F.2d 924 (7th Cir. 1983), which Defendants cited, against Defendants, noting that Selmer declares that

"[t]he mere stress of business conditions will not constitute duress where the defendant was not responsible for the conditions," *id.* at 923. The quotation is accurate, but beside the point. Defendants don't seek to hold Plaintiff responsible for the recession or economic downturn making realistic alternative contracting parties available (no such argument appears in Defendant's summary-judgment motion), but rather for Plaintiff's own misconduct – namely, Plaintiff's threat to breach the contract in order to extort a pay premium for work Plaintiff had already agreed to perform.

To summarize: Plaintiff made a direct threat to breach its contract with Doe Enterprises, L.L.C., while holding \$30,000 of Doe Enterprise's money. Doe had no feasible alternative but to sign the change orders proposed by Plaintiff. Because the change orders were procured by economic duress, they are invalid.

IV. Plaintiff Cannot Recover Attorney's Fees

After acknowledging the general rule that parties must shoulder their own attorney's fees, Plaintiff nonetheless insists that he is "entitled" to attorney's fees under Mo. Rev. Stat. Section 431.180 – a statute that has hitherto gone unmentioned – and the original agreement.

A. Section 431.180 Is Inapplicable

Section 431.180 does not entitle Plaintiff to attorney's fees, for four distinct reasons. First, Section 431.180 creates no *entitlement* to such fees; rather, it confers discretion on trial courts to award attorney's fees, assuming the statute is applicable. Vance Bros. v. Obermiller Const. Services, 181 S.W.3d 562, 564 (Mo. 2006); Structure & Design v. Contemporary Concepts, 151

S.W.3d 904, 910 (Mo. Ct. App. W.D. 2004) (“This statute merely accords the circuit court with discretion to award attorney fees.”).

Furthermore, it would be a poor invocation of this Court’s discretion to award Plaintiff attorney’s fees. It is Plaintiff that drafted the cursory agreement that is source of much of the legal dispute here. But for Plaintiff’s poor draftsmanship, this legal dispute might never have transpired. Awarding Plaintiff attorney’s fees would merely encourage more such misbehavior.

Second, Section 431.180 is inapplicable. It applies only to “persons who enter into a contract for private design or construction work.” MO. REV. STAT. §431.180.1 (2005). “Persons” is not defined in Chapter 431. In interpreting the term “persons,” this Court must be guided by the “primary rule of statutory interpretation” – namely, “to effectuate legislative intent through reference to the plain and ordinary meaning of statutory language.” State v. Graham, 204 S.W.3d 655, 656 (Mo. 2006). Ordinarily, the term “person” refers to a natural person, not an artificial person, such as corporation, limited liability company, or other business organization, which are ordinarily referred to as an “entity” or “organization” or, sometimes, “individual.”² See Black’s Law

² Why would the legislature have chosen to limit recovery of attorney’s fees to “persons” – that is, people, but not business organizations, such as L.L.C.’s and corporations. Businesses often have the financial resources to protect themselves from contractual breaches, especially those business that typically handle transactions involving “scheduled payments.” It is also simple for such business to include a clear provision authorizing recovery of attorney’s fees. When such a clear provision is missing, the natural assumption is that the parties’ declined to authorize attorney’s fees. (So reading Section 431.180, which has only been in existence since 1995, as authorizing such fees, no matter what the parties’ to a contract otherwise covered by Section 431.180, is especially perverse.) Sometimes, too, artificial persons, such as corporations and limited liabilities, generally prefer (binding) arbitration in lieu of litigation, which minimizes the size – and hence the need for recovery – of attorney’s fees. (The risk of litigating an opponent to death, through excessive and abusive discovery, is minimized in arbitration.) Moreover, the downside of denying attorney’s fees to an artificial person is that the business’s profits decline might

Dictionary 1257 (8th ed. 2009) (defining “person” as “1. A human being – Also termed a natural person. 2. The living body of a human being.”); Merriam-Webster’s Dictionary of Law (1996) (defining “person” as “natural person”); Black’s Law Dictionary 773 (6th ed. 1996) (noting that “individual” sometimes includes an artificial person). That is why Section 130.028 distinguishes between “every person” and corporations and labor organizations, and why Chapter 347 adopted a specialized definition of “person” as including an artificial, as well as a natural, person, MO. REV. STAT. §347.015(15). (Otherwise, these statutory definitions would be superfluous.) Confirmation that “persons” as used in Section 431.180 means only flesh-and-blood people can be found in the remainder of Chapter 431. For instance, Section 431.055 states, “The legal age at which a person becomes competent to contract in Missouri is eighteen years and any rule or provision of the common law to the contrary is hereby abrogated.” Needless to say, corporations and other artificial persons do not have birth-dates. (Nor did the common-law on the competence of infants to contract, to which Section 431.055 refers, ever apply to artificial persons.) If the General Assembly had wanted to allow any contracting *party* – whether a natural or artificial person – to be able to avail themselves of the benefits of the Section 431.180, it would have been much, much easier to state that Section 431.180.1 applies to “*parties* [not persons] who enter into a contract for private design or construction work.” (Or alternatively Section 431.180.1 could have been to refer to “persons or business organizations” or “persons or

decline or, in severe case, the artificial person will go bankrupt. Given the limited liability of members, managers, and other agents of such artificial persons, the harm is thus mitigated. Not so when a natural person, with a meritorious case, is threatened with protracted litigation, a risk that evaporates because Section 431.180 authorizes recovery of attorney’s fees for such a natural person.

entities.”) After all, the use of the phrase “party” instead of “person” appears in the statute immediately following Section 431.180 – namely, Section 431.183³ – and both statutes were passed at the same time, as part of the same law – namely, Law 1995 Senate Bill 93. For the foregoing reasons, neither a corporation, such as Plaintiff, nor a limited liability company, such as Defendant Doe Enterprises, can recover attorney’s fees under Section 431.180.

Even if Doe Enterprises were a “person” under Section 431.180, Section 431.180 would still not authorize an award of attorney’s fees, because the contract here is not for “*private* design or construction work.” “Private” is, like “persons”, an undefined term. “Private” normally means “not available to the public.” Merriam-Webster’s Dictionary of Law (1996). Here, though, the sole reason Plaintiff was hired was so that Doe Enterprises, L.L.C., could open an “Anytime Fitness” gym, to be patronized by members of the public. Moreover, the statutory context – in particular, paragraph 3 of Section 431.180 – reveals that Section 431.180 is designed to allow contractors who make improvements to residential property to recover from nonpaying owners of large rental units. Paragraph 3 of Section 431.180 states that the statute does not apply to “contracts for private construction work for the building, improvement, repair or remodeling of owner-occupied residential property of four units or less.” The implication is that “private” means “with respect to ‘residential property’ (over a certain size) or to property generally not open to the

³ “Any provision in a contract, agreement or understanding that provides that a payment from a contractor to a subcontractor, trade contractor, specialty contractor or supplier is contingent or conditioned upon receipt of a payment from any other *private party*, including a private owner, is no defense to a claim to enforce a mechanic’s lien pursuant to the provisions of chapter 429, RSMo.” (emphasis added)

public.”⁴ The work site here, a gym-site in a strip mall, to be made available to the general (paying) public, is neither type of property, but rather public, commercial property.

A third reason Section 431.180 doesn't help Plaintiff is that Plaintiff never invoked Section 431.180, either in its original or its amended petition. The Eastern District of the Missouri Court of Appeals has held that such an omission is fatal to any attempt to recover under attorney's fees under Section 431.180. Lucas Stucco & Eifs Design, LLC v. Landau, No. ED 92941 (Mo. Ct. App. E.D. Feb. 2, 2010) (“[W]e find that a party seeking attorney fees pursuant to [Section 431.180] must specifically invoke [Section 431.180] in an initial or amended pleading.”). That is because Mo. Sup. Ct. Rule 55.19 requires special damages, including attorney's fees, to be pleaded with specificity. Ridgway v. TTnT Dev. Corp., 126 S.W.3d 807, 818 (Mo. Ct. App. S.D. 2004).

Allowing Plaintiff to amend the petition for a second time would not remedy this lack-of-notice defect. “The purpose of [Rule 55.19] is to prevent surprise by informing the defendant what damages are claimed.” Lucas Stucco, at p. 4 (citing Fidelity State Bank & Trust Co. v. Gibson, 568 S.W.2d 574, 575 (Mo. Ct. App. 1978)). Allowing Plaintiff to recover attorney's fees for the discovery conducted by Plaintiff's counsel, including depositions; the preparation of not one, not

⁴ Plaintiff implies that because he is a “private contractor” – that is, he is not contracting with a governmental body – the “private” requirement is satisfied. Not so; “private” modifies the type of work done – namely, design and construction – not the doer of the work, and, as the context indicates, “private” means either residential or with respect to property to be open to the public.

two, but three petitions; and the repeated negotiations with Defendants' counsel would reward the very surprise that Rule 55.19 is designed to prevent.⁵

Fourth, and finally, Section 431.180 requires Plaintiff to prove that Defendants have failed to make "all scheduled payments," which Plaintiff cannot satisfy, for two distinct reasons. First of all, Defendants never breached their contract with Plaintiff; alternatively, Plaintiff's material breach (whether it be in failing to meet the completion deadline, or performing defective work, or failing to complete some work at all) excused any (alleged) nonperformance by Defendants. Second, neither the agreement nor Plaintiff identifies what "schedule" of payments were required by the agreement (or any subsequent modification of the agreement); there was no such schedule established. Hence, the plain terms of Section 431.180 do not apply. Nor does the purpose of Section 431.180 apply. That purpose is to prevent contractors from doing large-scale work (hence, the exception making Section 431.180.1 inapplicable to "owner-occupied units of four units or less") pursuant to a contract with a payment schedule. The payments are broken down into a schedule to safeguard the contractor from expending a large amount of time and resources and money on a large-scale project with no requirement of payment until the project is complete. Where there is no such schedule, the implication is that the contractor is satisfied with a large down payment being made, as was the case here (Plaintiff admits receiving a \$30,000 down payment), with the remainder to be paid after the work is complete, or just with being paid once

⁵ At a minimum, this Court should decline to award any attorney's fees incurred by Plaintiff up and until the filing of any second amended petition permitted by this Court. Otherwise, if Plaintiff were to recover ordinary damages, and hence also be allowed to recover attorney's fees, Plaintiff would be rewarded for sandbagging Defendants.

the work is complete. Adopting Plaintiff's (apparent) interpretation of "scheduled" would mean that a contractor hired to fix a small crack on a porch for a one-time payment of \$50 could sue for attorney's fees if the fee weren't timely paid, even though no agreement were specified about when the fee was to be paid. It is highly unlikely the legislature ever intended to encourage such picayune disputes to be litigated in Missouri's courts.

B. The Contract Here Does Not Authorize Attorney's Fees

Plaintiff contends that its agreement with Doe Enterprises, merely by conferring on Plaintiff a right to recover "fees" (in the event of breach), rebuts the ordinary rule that parties to a contract dispute must pay their own attorneys fees. Plaintiff makes a series of arguments in support of this contention. All are meritless.

Plaintiff maintains that Dillard v. Shaughnessy, Fickel and Scott Architects, Inc., 943 S.W.2d 711 (Mo. Ct. App. W.D. 1997), which Defendants cited, does not announce that attorney's fees cannot be recovered unless the magic phrases "attorney's fees" or "counsel fees" is used. Plaintiff is attacking a straw man. Dillard was cited solely for the proposition, embraced therein, that jurisdictions that follow the American rule require clear, "express" contractual language to rebut the ordinary rule prohibiting recovery of attorney's fees. No such clear, express language appears anywhere in the agreement here; it authorizes the award of "fees," nothing more. And as Defendants previously noted, neither an authorization to recover "all legal fees," Tanner v. Tanner, 67 Cal.Rptr.2d 204, 207-08 (Cal. Ct. App. 1997), nor "generalized" language, Mayor, Councilmen, and Citizens of City of Liberty v. Beard, 636 S.W.2d 330, 331 (Mo. banc 1982), such

as the “fees” language here, suffices to rebut the presumption against recovery of attorney’s fees. Never did Defendants allege that attorney’s fees are authorized only if magic phrases, such as “attorney’s fees” or “counsel fees” were used – language missing here.

In response to Defendants’ observation that the “fees” to which the agreement refers could be the authorization of 18 percent interest on outstanding balances, an authorization that appears immediately after the “fees” provision, Plaintiff notes that the fees and interest provisions are separated by a period. Why this is significant is unclear. The meaning of a contract provision is ascertained by consulting the contract as a whole, interpreting the terms *in pari materia*; purely clause-bound interpretation is verboten. Monsanto Co. v. Syngenta Seeds, Inc., 226 S.W.3d 227, 231 (Mo. Ct. App. E.D. 2007) (“We read the terms of a contract as a whole . . .”); cf. Rish v. Peters, 50 S.W.3d 814 (Mo. Ct. App. S.D. 2001) (“Statutes relating to the same subject matter are considered *in pari materia* and are to be construed together, even though the statutes are found in different chapters and were enacted at different times.”) (internal quotation marks omitted).

Nor do Defendants embrace the absurd proposition, attributed to them by Plaintiff, that the meaning of a provision in a contract is *always* delimited by the provision immediately following the provision to be interpreted. The “fees” provision here is unclear, necessitating review of the other contract provisions to help clarify the “fees” provision. Moreover, not all contractual disputes result in *attorney’s* fees. (Sometimes such disputes are pursued in small-claims court without counsel or resolved by arbitration.) So “fees” could mean court costs. Or it could mean actual damages, given that a non-lawyer drafted the agreement. Or it could mean, as Plaintiff acknowledges, “a fixed charge” – such as the 18 percent interest mentioned in the

provision immediately following the “fees” provision. (By the way, most attorneys do not charge flat (i.e., fixed) fees to handle litigation, making the “fixed charge” definition invoked by Plaintiff beside the point.) Given the proximity of the interest and the fees provisions, the fees-as-interest meaning is the most likely meaning. In any event, whatever “fees” means here, that meaning is unclear, and, as Dillard and the other cases cited by Defendants dictate, attorney’s fees are unauthorized when the contract language purporting to authorize them is either general or unclear. That the agreement here fails to authorize attorney’s fees is further strengthened by *contra proferentem* – that is, the interpretive canon that requires ambiguous contract terms to be interpreted against the interests of the drafter. City of Beverly Hills v. Village of Velda Village Hills, 925 S.W.2d 474, 477 (Mo. Ct. App. E.D. 1996). The drafter here is Plaintiff. Plaintiff’s Statement of Additional Fact ¶8. Only by ignoring this rule and the requirement of clear, express language authorizing attorney’s fees can this Court find that the contract here authorizes recovery of attorney’s fees.

V. Conclusion

This Court should enter partial summary judgment against Plaintiff, finding that (1) Defendant Mike Doe, because he disclosed both the existence and the identity of his principal, Doe Enterprises, L.L.C., cannot be held personally liable; (2) the change orders proposed by Plaintiff are unenforceable under the preexisting duty rule; (3) the change orders are also invalid because the product of economic duress; and (4) even if Plaintiff were to prevail on the merits, Plaintiff can recover no attorney’s fees.

Respectfully submitted,

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