DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 S. Potomac Street, #100 Centennial, CO 80112	DATE FILED October 31, 2023 11:18 AM
Plaintiffs: Dunkirk Place, LLC, a Colorado limited liability company; and The Landings at Gateway, LLC, a Colorado limited liability company, v. **Defendant:** Petra, Inc., an Idaho corporation	▲COURT USE ONLY▲
Attorney for Plaintiffs: Name: FOLEY & LARDNER LLP Tamera D. Westerberg (#29859) Address: 1400 16th Street, Suite 200 Denver, CO 80202 Telephone: 720.437.2000 Facsimile: 720.437.2200 Email: twesterberg@foley.com	Case Number: Div:

COMPLAINT

Plaintiffs, Dunkirk Place, LLC, and The Landings at Gateway, LLC, through their counsel, Foley & Lardner LLP, for their Complaint alleges as follows against Defendant, Petra, Inc.

NATURE OF THE ACTION

1. This is a dispute about a general contractor who, after nearly three years of protracted negotiations regarding the constructions agreements, an agreed-upon GMP and submission of such commitment to HUD to ensure the construction loan, and then, agreement upon a limited notice to proceed, walked away from, and breached its promises to the Plaintiffs.

Defendant's breaches caused significant financial injury to the Plaintiffs, who ultimately were forced to mitigate their damages and sell the Project (as defined below). Defendant should be held liable to Plaintiffs for their significant loss.

PARTIES

2. Plaintiff, Dunkirk Place, LLC ("Dunkirk"), is a Colorado limited liability company, with its principal place of business located at 260 Josephine Street, Suite 600, Denver, Colorado 80206.

3. Plaintiff, The Landings at Gateway, LLC ("The Landings," and together with Dunkirk, "Plaintiffs" or the "Owner"), is a Colorado limited liability company, with its principal place of business located at 260 Josephine Street, Suite 600, Denver, Colorado 80206.

4. On information and belief, Petra, Inc. ("Defendant" or "Petra") is an Idaho corporation, which conducts business in Colorado and is located in this state at 9250 E. Costilla Avenue, #630, Greenwood Village, Colorado 80112.

JURISDICTION AND VENUE

5. Defendant conducts business, in and out of Arapahoe County, Colorado. Defendant entered into various contracts with Plaintiffs in Colorado, partially performed thereunder, and then breached such contracts in this state.

6. Jurisdiction and venue are proper in Adams County District Court, State of Colorado pursuant to Colo. R. Civ. P. 98.

GENERAL ALLEGATIONS

7. On November 7, 2019, Petra – a self-pronounced experienced HUD contractor - submitted to Dunkirk a general contracting bid for a mixed residential community of 192

apartment unit construction project located at Tract B, Lot 1, East Range Crossings, Filing No. 1, 59th Avenue and Biscay Street, Denver, Colorado, and known as "The Landings at Gateway Apartments" (the "Project"). The bid consisted of the following categories of costs, along with an estimated total cost of construction: (1) $92,000 – preconstruction services; (2) $2.7 million general Contracting Services; (3) 4% developer fee; (4) $384,000 cost to provide a Performance and Payment Bond (collectively, the "Bid").

8. As a part of its Bid, Petra expressly agreed "to enter into and execute a contract upon award, in accordance with the Instructions for Procurement."

9. Thereafter, for multiple months – years, even - during the design development phase of the Project, the parties engaged in negotiations of the definitive construction contract, including the GMP, schedule, and other material terms and conditions for the construction phase. Throughout those negotiations, the parties made clear that Petra would be the general contractor on the Project.

10. During those negotiations, Petra repeatedly increased the GMP, complaining throughout that construction costs were going up. As a result, and in compliance with its HUD application, the Owner paid for a third-party cost-reviewer, Intrawest, to work through the increased construction costs with both of the parties.

11. The third-party reviewer went through Petra at least twice before the parties finalized the GMP. Then, upon the parties' agreement to the GMP budget, on January 25, 2021, the Owner submitted Form 2328 – signed by Petra - to HUD for its review, modification and approval. A true and accurate copy of the Form 2328, together with other HUD forms signed by Petra as the General Contractor, is attached hereto as Exhibit 1. While HUD had the final say –

and generally does not accept revisions to the General Contractor AIA forms from the contracting parties - as between Dunkirk and Petra, they had agreed on all material final terms on which they would proceed, including the GMP. Upon acceptance from HUD, The Landings at Gateway would be the owner, and as Petra – an experienced HUD contractor well knows – the general contractor agreement is not signed until the closing of the HUD financing.

12. Petra, though, was unable to hold its pricing while the parties waited for HUD's approval or modification. As a result, Petra told the Owner that subcontractors and suppliers needed to be locked in, to hold the GMP. Petra demanded $200,000 to secure and commit subcontractors and suppliers. Owner agreed.

13. Thereafter, to accomplish that purpose – locking in costs of construction while HUD completed its approval process - on October 19, 2021[1], the parties entered into a "Letter of Intent to Award Contract/Limited Notice to Proceed" (the "Notice to Proceed"), pursuant to which Petra became obligated to lock in subcontractors and suppliers for the Project so that construction could begin at those locked-in costs, once HUD approved the parties' application for closing. A true and accurate copy of the Notice to Proceed is attached hereto as Exhibit 2.

14. To be clear: the parties had agreed on the GMP, and they subsequently agreed to the Notice to Proceed, to lock in subcontractors and suppliers to keep the GMP on which they had agreed and then roll the associated costs into the general contractor agreement – and that was to be submitted to HUD for approval or modification – intact. While the parties were still discussing

[1] The date of the letter attached as Exhibit 2 is October 19, 2022, however, the date automatically self-populated to a new year upon printing. The actual date of the letter and the parties' agreement was October 19, 2021.

immaterial terms of the final agreement for the Project (the "Agreement") – which was not yet signed when submitted to HUD because HUD had the right to modify the terms before acceptance – there was a clear meeting of the minds to proceed with Petra as the general contractor for the Project, consistent with the agreed-upon GMP. Without the agreement on the GMP, there was no need for the Notice to Proceed in the first place.

15. However, Petra never fulfilled that contractual obligation. It did not prepare the Project site for construction and it did not lock in subcontractors or suppliers – all at a time where subcontractors were scarce in the first place. Then, on November 10, 2021, days before the parties were submitting closing documents to HUD and two years after Owner accepted Petra's bid and months after they had agreed on a GMP and submitted it for HUD approval, Petra terminated the contract.

16. Upon Petra's wrongful termination on the verge of HUD approval and the start of construction of the Project – two years into the contract relationship – Owner had to find a replacement general contractor at a substantially higher GMP, and at a significantly higher interest rate. As well, Owner had to engage in an entirely new pre-development and bidding process with the replacement general contractor, rendering Petra's work – and the money that Owner had paid to it - useless to Owner. Likewise, Owner incurred over $350,000 in out of pocket costs related to financing that was contingent upon the parties' agreement to the GMP and to proceed with the contract, all of which, too, were useless to Owner upon Petra's wrongful termination.

17. Moreover, since Petra did not lock in the subcontractors and terminated their agreement, the costs of the Project continued to escalate to a point that it became infeasible to secure financing. This outcome was the exact reason the Owner entered into the Notice to Proceed

and agreed to be liable for up to $200,000 to stabilize the GMP. Because Petra failed to lock in the subcontractors and ultimately terminated the Project, the Owner was forced to sell off the Project to help recoup some of the millions of dollars spent to prepare the Project for development. Petra knew that when it terminated the contract and failed to lock in the GMP prices with the subcontractors, that the Project would be in dire jeopardy and would likely fail. Absent Petra's conduct, that foreseeable loss would not have occurred.

18. As such, Petra's breaches of contract and other conduct have significantly damaged the Owner.

FIRST CAUSE OF ACTION
(Breach of Contract – the Agreement)

19. Plaintiffs incorporate by reference paragraphs 1- 18 above as if fully set forth herein.

20. Owner and Defendant were parties to the Agreement.

21. Owner performed all of its obligations under the Agreement.

22. Defendant breached the Agreement as set forth above.

23. As a result of Defendant's breach of the Agreement, Owner has been damaged in an amount to be determined at trial.

SECOND CAUSE OF ACTION
(Breach of Contract – Notice to Proceed)

24. Plaintiffs incorporate by reference paragraphs 1- 23 above as if fully set forth herein.

25. As discussed above, Owner and Defendant were parties to the Notice to Proceed.

26. Owner preformed all of its obligations under the Notice to Proceed.

27. Defendant, however, breached the Notice to Proceed as set forth above.

28. As a result of Defendant's breach of the Agreement, Owner has been damaged in an amount to be determined at trial.

THIRD CAUSE OF ACTION
(Quantum Meruit)

29. Plaintiffs incorporate by reference paragraphs 1- 28 above as if fully set forth herein.

30. As discussed above, at Plaintiffs' expense, Defendant received a benefit under circumstances that would make it unjust for Defendant to retain the benefit without paying it back to the Owner.

31. As a result of Defendant's conduct, Plaintiffs have been damaged in an amount to be determined at trial.

JURY DEMAND

Plaintiffs demand a trial by jury.

WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

1. Damages in an amount to compensate Plaintiffs for Defendant's breaches of contract;

2. Alternatively, damages in quantum meruit;

3. Attorneys' fees and costs as provided by Colorado law; and

4. Any such other and further relief as this Court may consider just and proper.

Dated: October 31, 2023

Respectfully submitted,

s/ Tamera D. Westerberg

Tamera D. Westerberg
FOLEY & LARDNER LLP

Attorney for Plaintiffs,
Dunkirk Place, LLC and The Landings at Gateway, LLC

Plaintiffs' Address:
260 Josephine Street, Suite 600
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