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United States Court of Appeals
Tenth Circuit

July 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ENVIRONMENTAL DIMENSIONS INC., a New Mexico corporation,

Plaintiff - Appellant,

v.

ENERGYSOLUTIONS GOVERNMENT GROUP, INC., a foreign for profit corporation, n/k/a Atkins Energy Government Group, Inc,

Defendant - Appellee.

No. 21-2044
(D.C. No. 1:16-CV-01056-KWR-JHR)
(D. N.M.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **MORITZ**, and **EID**, Circuit Judges.

This appeal arises from a contract dispute involving a nuclear waste remediation. Environmental Dimensions, Inc. ("EDi") provides environmental resources and radioactive waste management for government agencies. EDi bid for qualification to contract with Los Alamos National Security ("LANS"). To position itself to win a contract, EDi executed an agreement with Energy Solutions Government Group, Inc. ("ESGG"), which provides nuclear waste remediation and

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

personnel support. LANS awarded the contract to EDi, which then subcontracted with ESGG. After EDi and ESGG subcontracted, there was an incident involving the release of radiological materials. ESGG helped package a drum under a previous contract before EDi was involved, and a later investigation found ESGG's actions contributed to the drum bursting.

EDi filed a lawsuit, alleging, in part, that ESGG should have disclosed certain information relating to the drum incident. During discovery, the district court entered a stipulated order governing the confidentiality of discovery materials. The court later made other discovery rulings which EDi asserts materially changed the case's outcome. Ultimately, the court entered summary judgment in ESGG's favor. This appeal followed.

EDi argues the district court abused its discretion relating to discovery, and erred in granting summary judgment against EDi's claims and for ESGG's counterclaims. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[1]

I.

In 2011, EDi bid for qualification to contract with LANS for transuranic waste remediation work designated as Master Task Order Agreement No. 2 ("MTOA2"). In pursuit of qualification for MTOA2, EDi entered into a Teaming Agreement with ESGG. In 2012, EDi qualified as a potential contractor, but no work was assigned.

[1] During the pendency of this appeal, ESGG filed a motion to remove, strike, or seal confidential documents from EDi's appendix and replace them with publicly available redacted copies. EDi opposed the motion. Having considered the matter, we GRANT ESGG's motion to remove confidential documents from EDi's appendix.

Meanwhile, EDi subcontracted with ESGG to carry out MTOA2. In 2013, EDi and ESGG executed a subcontract which guaranteed ESGG "a minimum of 35% of the total contract labor value earned in performance of the life cycle of the anticipated contract issued by LANS." App'x Vol. I at 48. The subcontract also required EDi to pay ESGG for its work within ten days of receiving payment from LANS.

Prior to subcontracting with EDi, ESGG contracted with LANS in 2009 to remediate nitrate salt drums under Master Task Order Agreement No. 1, Task Order 10 ("TO10"). EDi was not involved with TO10. In 2014, a waste drum that ESGG packaged burst due to an exothermic reaction, causing the Waste Isolation Pilot Plant to close for several years (the "WIPP Incident"). The Accident Investigation Board ("AIB") investigated and issued a report. The AIB report concluded that the WIPP Incident's direct cause was incompatible materials within the drum, which created the potential for an exothermic reaction. While the report listed twelve contributing factors, AIB stated that none individually caused the accident.

Around two months after the WIPP Incident, LANS awarded EDi Task Order No. 1 ("TO1") under MTOA2. Work began in July 2014. Under TO1, ESGG performed more than the thirty-five-percent minimum share of the subcontract's labor that ESGG was guaranteed. However, ESGG only completed work that was authorized and assigned by EDi. ESGG submitted six invoices to EDi, totaling $1,057,354.63. Meanwhile, EDi submitted invoices for the same work to LANS and received payment.

In 2015, EDi sent a letter to ESGG stating that ESGG was not in compliance with the Teaming Agreement, and avowing that, if the matter was not resolved by May 15, 2015, "any work performed by [ESGG] above and beyond 35% is done so solely at [ESGG's] risk." *Id.* Vol. III at 529. ESGG complied, and EDi kept assigning ESGG work until LANS ended TO1. In its termination letter, LANS explained that the "waste program . . . has reduced the scope and budget . . . this fiscal year and for the next two fiscal years." *Id.* at 543. In June 2015, EDi and ESGG ceased work on TO1.

EDi later brought claims for breach of contract, civil fraud, violation of the New Mexico Unfair Practices Act, and "Tortious Damage to Reputation and Contract" against ESGG. *Id.* Vol. I at 33–38 (cleaned up). ESGG counterclaimed for breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel, detrimental reliance, unjust enrichment, open account, and account stated.

The district court entered a stipulated confidentiality order. EDi submitted only one set of written discovery on ESGG. ESGG timely responded and asserted proper objections to EDi's requests aimed at ESGG's performance under its prior contract relating to WIPP Incident liability.

During discovery, EDi served ESGG with a request for a settlement agreement between LANS and ESGG. ESGG objected to the agreement's production. EDi moved to compel production; however, the district court denied EDi's motion because it was untimely. EDi later received the agreement after the court rejected ESGG's motion to quash EDi's subpoenas; the agreement was designated "attorneys'

eyes only." EDi then filed a motion to compel or, in the alternative, to reopen discovery to prevent prejudice. The court denied EDi's motion on timeliness grounds and because EDi failed to establish good cause to extend discovery deadlines.

ESGG later moved for summary judgment on all claims and counterclaims.[2] The district court ruled wholly in ESGG's favor. EDi appealed.

II.

In this diversity action, EDi first contends that the district court erred in managing discovery. We review the district court's management of discovery for abuse of discretion. *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1514 (10th Cir. 1990). "An abuse of discretion occurs where the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances," or "when it issues an arbitrary, capricious, whimsical or manifestly unreasonable judgment." *Hamric v. Wilderness Expeditions, Inc.*, 6 F.4th 1108, 1117 (10th Cir. 2021) (cleaned up).

The first issue is whether the district court abused its discretion when it entered the stipulated confidentiality order, denied EDi's motion to compel certain interrogatories, did not require ESGG to produce a privilege log, and ruled that ESGG was not required to supplement its answers and responses.

a.

EDi argues that none of the four magistrate judges successively assigned to preside over the case carefully reviewed the confidentiality order, thus allowing

[2] EDi consented to the district court's dismissal of the "Tortious Damage to Reputation and Contract" claim.

ESGG to abuse the order. EDi asserts that, when this case was filed, ESGG was aware of LANS' intent to pursue claims against ESGG involving the faulty drum packaging and constructed an order to deny EDi access to relevant documents.

EDi avows for the first time on appeal that the stipulated confidentiality order was not properly reviewed. The record lacks any such claim made by EDi below. "[I]f the theory simply wasn't raised before the district court, we usually hold it forfeited." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011) (Gorsuch, J.) (cleaned up). Still, "we will entertain forfeited theories on appeal, but we will reverse a district court's judgment on the basis of a forfeited theory only if failing to do so would entrench a plainly erroneous result." *Id.* (cleaned up). Yet, EDi abandoned any argument for plain error review when it omitted waiver concerns from its briefing before this Court. EDi's reply brief offers no defense to ESGG's observation that EDi waived this issue, even though "[t]he burden of establishing plain error lies with the appellant." *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1151 (10th Cir. 2012) (cleaned up); *see also Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998) (we "are wary of becoming advocates who comb the record of previously available evidence and make a party's case for it.") (cleaned up). EDi's failure to argue plain error precludes us from considering this claim.

b.

EDi states that the district court should have ruled on the merits of EDi's motion to compel the settlement agreement, instead of relying on its finding that EDi untimely filed the motion and failed to argue good cause.

A party served with objections to a production request "must proceed under D.N.M.LR-Civ. 37.1 within twenty one (21) days of service of an objection . . . ." D.N.M.LR-Civ. 26.6. "Failure to proceed within this time period constitutes acceptance of the objection." *Id.* On May 1, 2017, ESGG objected to EDi's production request for the settlement agreement. Despite the twenty-one-day period deadline, EDi did not move to compel until March 21, 2018—nearly a year later. Compounding its error, EDi did not argue good cause or excusable neglect. Nor did EDi file a reply brief. The district court ultimately held that "[e]ven assuming arguendo that EDi could show excusable neglect, the Court concludes that it has failed to show the requisite good cause to excuse its failure to comply with this Court's deadlines and the deadlines imposed by the Local Rules." App'x Vol. V at 1066–67. We agree. EDi's "[f]ailure to proceed within the 21-day period constitutes acceptance of the objection." *United States v. New Mexico State Univ.*, No. 1:16-CV-00911-JAP-LF, 2018 WL 1353014, at *3 (D.N.M. Mar. 15, 2018) (cleaned up). We affirm the district court's discretionary choice to deny EDi's motion to compel.

c.

EDi declares that the district court abused its discretion by denying EDi's motion to compel ESGG to produce a privilege log as untimely. Contending its

request for production of a privilege log falls outside of the scope of a motion to compel under Federal Rule of Civil Procedure 37, EDi proclaims there is no time bar.

Despite EDi allegedly twice asking ESGG to produce a privilege log, EDi only moved to compel a log once, over ten months after the deadline for filing discovery motions, and after neglecting to meet and confer.[3] The district court denied EDi's motion, finding EDi failed to demonstrate "good cause" for disregarding scheduling deadlines. App'x Vol. V at 1062. The court found "[i]n practice, [good cause] requires the movant to show the scheduling deadlines cannot be met despite the movant's diligent efforts," and courts must "focus [on] the relative diligence of the lawyer who seeks the change." *Id.* at 1066–67 (cleaned up).

EDi has not offered any caselaw supporting its position nor explained why a privilege log would have materially altered this case's outcome. We affirm because the district court was entitled to make this discretionary decision and did not abuse its discretion by declining to require ESGG to produce a privilege log.

d.

Lastly, EDi maintains that the district court abused its discretion by denying EDi's motion to compel ESGG to supplement ESGG's answers and responses. EDi asserts that the deadlines in Federal Rule of Civil Procedure 37 and District of New

[3] EDi suggests the scheduling order deadline only applied to Rule 37 motions and that a motion for a privilege log falls outside Rule 37's scope. EDi cites no authority for this assertion. More importantly, however, the scheduling order contains no such limitation. The order states "[m]otions relating to fact discovery . . . shall be filed with the Court and served on opposing parties by September 27, 2018." Supp. App'x Vol. VII at 65.

Mexico Local Rule 37 only apply to "motions to compel related to objections to discovery produced under Fed. Rule Civ. P. 26(a)," and that "there was an objectively reasonable likelihood that the additional information could substantially affect or alter the opposing party's discovery plan or trial preparation," so the court should have granted the motion. Aplt. Br. at 37.

We disagree. EDi cites no caselaw supporting the idea that its motion did not fall under either Rule because it was requesting supplementation. The district court considered EDi's arguments, applied the proper legal standards, and properly exercised its discretion. We affirm the district court's denial of EDi's motion to compel ESGG to supplement ESGG's answers and responses.

III.

Next, we turn to whether district court erred in its entry of summary judgment against EDi's claims and for ESGG's counterclaims. EDi alleges that the court should have sanctioned ESGG for violations of the local rules and denied ESGG's various motions for summary judgment. "We review the district court's summary judgment rulings de novo. Summary judgment is appropriate if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Hamric*, 6 F.4th at 1121 (cleaned up).

a.

EDi contends that ESGG's non-compliance with the local rules should have resulted in sanctions, including denial of ESGG's summary judgment motions. EDi

says that ESGG violated District of New Mexico Local Rule 7.1 by not conferring with EDi prior to filing motions.

> D.N.M.LR-Civ. 7.1(a) provides in relevant part that a "[m]ovant must determine whether a motion is opposed, and a motion that omits recitation of a good-faith request for concurrence *may* be summarily denied." (emphasis added). The express language of the rule thus makes clear that while seeking the concurrence of opposing counsel before filing a motion is mandatory, the sanction for violation of the rule rests in the discretion of the Court, *i.e.*, the Court may impose a sanction up to and including summary denial of the motion.

Bustamante v. Bd. of Cnty. Comm'rs of San Miguel Cnty., No. CV 08-315 JP/WPL, 2009 WL 10706762, at *2 (D.N.M. Dec. 16, 2009) (emphasis in original) (cleaned up).

We decline to micromanage the district court's reasonable oversight of its own docket. Rule 7.1 states that the court *may* impose sanctions or deny a motion—not that the court *must* do so. We affirm the court's decision not to sanction ESGG.

b.

EDi maintains that its unconscionable trade practice claim was valid. Under New Mexico law, an "unconscionable trade practice" includes "an act or practice in connection with the sale . . . of any goods or services . . . that to a person's detriment [] takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree." N.M. Stat. Ann. 1978, § 57-12-2(E). An "unfair or deceptive trade practice," which involves "a false or misleading oral or written statement . . . knowingly made in connection with the sale . . . of goods or

services . . . that may, tends to or does deceive or mislead any person . . . .” is also unlawful. *Id.* § 57-12-2(D).

Count V of EDi’s complaint is titled “Unfair Trade Practices.” App’x Vol. I at 35. Nowhere does the complaint argue that ESGG engaged in unconscionable trade practices; instead, EDi raised an *unfair* trade practice argument. However, EDi avows for the first time on appeal that its claim survives summary judgment because ESGG engaged in *unconscionable* trade practices. Since EDi did not raise an unconscionable trade practices argument below, EDi’s “failure to argue for plain error and its application on appeal [] surely marks the end of the road for an argument for reversal not first presented to the district court.” *Richison*, 634 F.3d at 1131. EDi could have sought reversal under the plainly erroneous standard—but EDi again declined to raise such an argument in its briefing before this Court. *Id.* Despite ESGG’s answer brief pointing out EDi’s preservation issues, EDi’s reply makes no mention of overcoming the applicable criterion here, even though EDi is the burdened party. *Somerlott*, 686 F.3d at 1151. Since EDi waived any argument for reversal under the plain error standard, we decline to consider this claim.

c.

EDi alleges that the district court erred in granting summary judgment to ESGG on the breach of contract claim. Under New Mexico law, a breach of contract claim includes: “(1) the existence of a valid and binding contract; (2) the [aggrieved party’s] compliance with the contract and his performance of the obligations under it; (3) a general averment of the performance of any condition precedent; and

(4) damages suffered as a result of [the other party's] breach." *Young v. Hartford Cas. Ins. Co.*, 503 F. Supp. 3d 1125, 1179 (D.N.M. 2020) (cleaned up). Two contracts are at issue here: (1) the Teaming Agreement, and (2) the subcontract, which terminated the Teaming Agreement upon its execution. EDi alleges that ESGG breached the Teaming Agreement by not disclosing certain information related to the MTOA2, and also breached the duty of good faith and fair dealing implicit in the subcontract by not being more open about the WIPP Incident.

EDi contends that ESGG breached the Teaming Agreement by failing to disclose a stop work order that the Los Alamos National Laboratory issued ESGG due to waste packaging concerns eight months after the Teaming Agreement was executed, arguing the order could have adversely affected EDi's rights or capabilities. The AIB report appears to be the only evidence in the record that ESGG withheld any information, but the report cannot overcome the admissions of EDi's own witnesses that ESGG was forthcoming about the investigation. The district court found "EDi's employees directly involved with the MTOA2 project testified that no misrepresentations were made by [ESGG] at the time of entering into the Teaming Agreement or the subcontract, and that [ESGG] did not attempt to obscure its involvement after the WIPP Incident but was in fact cooperative." App'x Vol. V at 1140. This claim is futile because "[t]he record is devoid of evidence of misleading statements made by [ESGG] or misrepresentations regarding its involvement in the WIPP Incident." *Id.*

EDi alleges that ESGG should have been forthcoming about the extent of its involvement in the WIPP's closure, arguing a related breach involving the implied covenant of good faith and fair dealing in the subcontract. Admitting it continued to authorize work, EDi claims that it asked ESGG to transfer employees to other team members, but when ESGG refused, EDi says it had no option but to continue under the LANS contract. We disagree. EDi cannot point to any record evidence showing ESGG was not forthcoming about the WIPP Incident, or that the Incident negatively affected EDi's rights under MTOA2.

We affirm the district court's grant of summary judgment to ESGG on the breach of contract claim.

d.

EDi's civil fraud claim likewise avows that ESGG made a misrepresentation by omission and the district court erred in finding ESGG did not intend to deceive. In New Mexico, civil fraud involves: "(1) a misrepresentation of fact, (2) either knowledge of the falsity of the representation or recklessness on the part of the party making the misrepresentation, (3) intent to deceive and to induce reliance on the misrepresentation, and (4) detrimental reliance on the misrepresentation." *Sandau v. Old*, No. 1:21-CV-00426-MV-JHR, 2021 WL 3403644, at *1 (D.N.M. Aug. 4, 2021) (cleaned up). EDi claims that ESGG did not notify EDi that it was issued a stop work order due to waste packaging concerns. EDi states that the lack of notice prevented EDi from evaluating its position and the possibility of continuing with ESGG. But, once again, EDi does not point to any evidence in the record showing

that ESGG concealed information with the intent to deceive, or even that EDi detrimentally relied on misrepresentations. Because EDi cannot carry its burden of showing a genuine issue of material fact, we affirm the court's grant of summary judgment in ESGG's favor on EDi's civil fraud claim.

e.

The district court also considered and granted ESGG's counterclaims on summary judgment.

1.

ESGG raised a breach of contract counterclaim, asserting that EDi violated the subcontract when it failed to pay ESGG for work completed at EDi's direction and approval. EDi declares the contracts at issue are open to multiple interpretations. Not so. As the district court aptly found, "[a] plain reading of the Teaming Agreement reveals that it unambiguously prescribes that [it] expires upon execution of the subcontract." App'x Vol. V at 1128–29. Instead of pointing to a specific provision in either contract involving multiple interpretations, EDi makes cursory arguments related to its intent surrounding the Teaming Agreement's formation. EDi cites nothing in the record to support this view. Nor can it. The WIPP Incident occurred after both contracts were executed, ESGG made no misrepresentations prior to the Incident when entering either contract, ESGG could not have foreseen the Incident, and ESGG did not obscure any facts surrounding the Incident. LANS even told EDi that "[n]one of us contemplated at that time the discovery of the drum [or]

the temporary suspension of the WIPP site," *id.* Vol. III at 544, and also assured EDi that its association with ESGG was not an issue.

Similarly, EDi argues that ESGG breached the contract by exceeding thirty-five percent of the work and monopolizing work. But the contract entitled ESGG to a *minimum* of thirty-five percent of the work, *not* a maximum of thirty-five percent. ESGG merely performed tasks that EDi had assigned, authorized, and approved; neither can EDi prove that ESGG monopolized work. As the district court confirmed, the idea that ESGG "should have limited its work . . . when it was expressly authorized and assigned by [EDi], is illogical and contradicted by unrefuted testimony of [EDi's] own employees." *Id.* at 1277.

Thus, we affirm the district court's grant of summary judgment to ESGG on the breach of contract counterclaim.

2.

ESGG also brought promissory estoppel and unjust enrichment counterclaims. In New Mexico, an unjust enrichment claim encompasses showing "another has been knowingly benefitted at one's expense . . . in a manner such that allowance of the other to retain the benefit would be unjust." *ABQ Uptown, LLC v. Davide Enterprises, LLC*, No. CV 13-0416 JB/KK, 2015 WL 8364799, at *31 (D.N.M. Oct. 19, 2015) (cleaned up). A promissory estoppel claim under New Mexico law entails an actual promise, which the promisee reasonably relied on by taking or bypassing action in a manner actually or reasonably foreseeable to the promisor, amounting to a substantial change in position, and the promise's enforcement is necessary to prevent

injustice. *Salazar v. Quikrete Companies, LLC*, No. 1:18-CV-00765-RB-LF, 2019 WL 4860915, at *2 (D.N.M. Oct. 2, 2019), *aff'd sub nom*. *Salazar v. Quickrete Companies, LLC*, 817 F. App'x 565 (10th Cir. 2020) (unpublished).[4]

EDi's sole argument against ESGG's unjust enrichment and promissory estoppel counterclaims is that ESGG performed the work at its own risk after receiving the letter. However, the letter's existence creates no genuine issue of material fact as to the still-unpaid work ESGG completed prior to the letter's transmission nor work performed after EDi sent the letter. EDi assigned, authorized, and approved all work ESGG performed, including after EDi sent the letter. EDi confirmed its intent to pay ESGG when EDi executed the subcontract and continued to assign and authorize ESGG's work. Before the non-payment issues arose, EDi consistently remitted payment to ESGG for work performed. This pattern of assignment, authorization, and payment made it reasonable for ESGG to expect payment for the ongoing work. EDi's continued authorization and assignment of work after the letter, and EDi's submission of invoices to LANS, plus the collected payments, makes this reasonable expectation obvious. We affirm the district court's decision for ESGG on the promissory estoppel and unjust enrichment counterclaims.

3.

Finally, ESGG alleged an open account counterclaim. In New Mexico, an "open account" means one "based upon running or concurrent dealings between the

[4] Unpublished decisions are not precedential, but may be cited for their persuasive value." Fed. R. Civ. P. 32.1; 10th Cir. R. 32.1 (2023).

parties which has not been closed, settled, or stated, and in which the inclusion of further dealings between the parties is contemplated." *Ries Biologicals, Inc. v. Bank of Sante Fe*, 780 F.2d 888, 892 (10th Cir. 1986) (cleaned up).

The district court held that EDi ceased paying ESGG for authorized work which ESGG performed after seven consecutive months of payment. In finding an open account, the court held that there was no clear termination to the contract and the scope of the work did not encompass a single task. The court determined that, considering the EDi's pattern of assignment, authorization, and payment, it was reasonable for ESGG "to presume it would be paid for its continued work." App'x Vol. VI at 1301. On appeal, EDi maintains that the court erred and argues the invoices are separate and distinct charges, with a set amount of available funds under TO1 which limited the work to be completed. Contrary to EDi's claim, the district court fittingly concluded interrelated dealings show EDi intended to issue continued assignments within the meaning of an open account, so we affirm the court's grant of summary judgment to ESGG on the open account counterclaim. *Ries Biologicals, Inc.*, 780 F.2d at 892.

IV.

For the reasons stated, we AFFIRM the district court on all issues.

Entered for the Court

Allison H. Eid
Circuit Judge