NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 18-3631

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CONNELLY CONSTRUCTION CORPORATION,
Appellant

v.

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA;
TRAVELERS CASUALTY & SURETY COMPANY; FIDELITY & DEPOSIT CO OF MARYLAND;
FEDERAL INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY;
WALSH HEERY JOINT VENTURE

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(No. 2-16-cv-00555)
District Judge: Honorable Gene E. K. Pratter

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
September 9, 2019

Before: CHAGARES, JORDAN, and RESTREPO, Circuit Judges.

(Filed: October 11, 2019)

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OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

CHAGARES, Circuit Judge.

Connelly Construction Corporation ("CCC") appeals the dismissal of its claims against the Walsh Heery Joint Venture ("WHJV") and WHJV's sureties after a bench trial. For the following reasons, we will affirm.

I.

In 2012, Pennsylvania's Department of General Services contracted with WHJV to construct a new prison facility. WHJV then subcontracted out the project's masonry work to CCC. The project, however, experienced delays, and CCC alleges that it suffered additional and unexpected costs as a result. So, after finishing its work, CCC filed a lawsuit against WHJV and WHJV's sureties in federal court, claiming that WHJV owed it more than $3.3 million. CCC alleged against WHJV breach of contract, violation of the Commonwealth Procurement Code, unjust enrichment, and quantum meruit. Against the sureties, CCC alleged breach of bond obligation.

The defendants moved for summary judgment, arguing that CCC had waived its claims against them. They pointed to two sets of documents. First, as required by its subcontract with WHJV, CCC had executed "monthly waiver and release forms," signed by CCC's president, every month from April 14, 2014, through September 4, 2015. Joint Appendix ("JA") 241. Second, CCC had executed five "change orders" over the course of the project and all except the first contained language releasing WHJV from any additional costs. The defendants therefore argued that, through both the releases and the change orders, CCC waived its claims against them.

In response, CCC argued that it had not knowingly and voluntarily waived its claims against WHJV and that, in any event, WHJV itself had waived enforcement of the releases and change orders through its statements and conduct.

The District Court determined that deciding "the waiver issue . . . would require a finding on credibility," JA 429, and so it held a bench trial focused on two issues: (1) "[w]hether [CCC] waived any potential claims against [WHJV] by signing the periodic releases and change orders," and (2) "[e]ven if so, whether statements made by [WHJV's] employees waived [WHJV's] claim to rely on the releases and change orders," JA 4. Based on its assessment of the witnesses and the documentary evidence, the District Court found that CCC had knowingly and voluntarily waived its claims by signing the releases and change orders. The District Court further found that "WHJV did not waive its right to rely on the releases and change orders," and that CCC "has not shown that WHJV had unclean hands." JA 17.

After denying a motion for reconsideration, the District Court entered judgment dismissing all of CCC's claims against the defendants. CCC timely appealed.

II.[1]

[1] The District Court had jurisdiction under 28 U.S.C. § 1332(a), and we have jurisdiction under 28 U.S.C. § 1291. "After a bench trial, as here, we review the District Court's factual findings, and mixed questions of law and fact, for clear error, and we review the Court's legal conclusions de novo." Alpha Painting & Constr. Co. v. Del. River Port Auth. of Pa. & N.J., 853 F.3d 671, 682–83 (3d Cir. 2017).

CCC argues that the District Court erred in finding (a) that it knowingly and voluntarily waived its claims and (b) that WHJV had not itself waived its right to rely on the waivers in the releases and change orders.[2] We are unpersuaded.

A.

CCC does not dispute that the releases and change orders, by their plain terms, waived its claims against the defendants. Those written agreements, signed by the parties, are binding "absent fraud, accident, or mutual mistake." Buttermore v. Aliquippa Hosp., 561 A.2d 733, 735 (Pa. 1989). The District Court found not only that CCC had showed no fraud but also that CCC knew and understood the release language in the change orders. We review that factual finding, which CCC now challenges, for clear error. See Alpha Painting, 853 F.3d at 682–83; see also Hanover Const. Co. to Use of Ede v. Fehr, 139 A.2d 656, 658 (Pa. 1958) ("[O]rdinarily the question of waiver is a question of fact for a jury[.]").

The District Court's finding was far from clear error. The record supports the District Court's conclusion that CCC's president, Rita Connelly, knew what she was doing when she signed the releases and the change orders. As Ms. Connelly testified, CCC is "a competent and experienced masonry contractor" that "has been in business since 1982." JA 467-68. And Ms. Connelly demonstrated her sophistication when negotiating the change orders. Consider that the draft of the first change order initially

[2] CCC also argues that the District Court should have found that CCC had put WHJV on notice of its claims. But the District Court rejected CCC's claims not because of lack of notice but because of waiver. Whether CCC adequately notified WHJV is thus irrelevant to this appeal, and we need not address the issue any further.

contained broad release language. Ms. Connelly, wary of that language, testified that she objected and proposed new language to preserve a future claim against WHJV. And yet, despite recognizing the effect of the broad release language in the first change order, Ms. Connelly then signed four subsequent change orders containing the very same release language to which she had once objected. Finally, when time came to sign one last change order, Ms. Connelly refused to sign it out of concern that it would waive potential claims CCC had. Given that evidence, it was not clear error for the District Court to find that CCC, by agreeing to the four change orders containing the release language (and by signing the monthly releases), knowingly and voluntarily waived its claims.

CCC argues that the District Court applied an incorrect legal standard. It contends that, under Pennsylvania law, the District Court was required to consider whether CCC's conduct demonstrated "an evident purpose" to waive its rights. CCC Br. 25 (quoting Brown v. City of Pittsburgh, 186 A.2d 399, 401 (Pa. 1962)). That is incorrect. Had CCC's waiver only been implied, then it would have been appropriate for the District Court to consider evidence of CCC's subjective intent. Brown, 186 A.2d at 401. But here we have express written waivers, and it is "firmly settled" that "the intent of the parties to a written contract is contained in the writing itself." Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc., 247 F.3d 79, 92 (3d Cir. 2001) (quoting Krizovensky v. Krizovensky, 624 A.2d 638, 642 (Pa. Super. Ct. 1993)). "However improvident their agreement may be or subsequently prove for either party, their agreement, absent fraud, accident or mutual mistake, is the law of their case." Buttermore, 561 A.2d at 735. The

District Court thus applied the correct standard, and it correctly disregarded evidence of CCC's subjective intent.

CCC also argues that WHJV "exerted extreme financial pressure over [CCC] to compel it to sign forms required by the Commonwealth." CCC Br. 30. But whatever the extent of that pressure, it was not enough to prevent CCC from objecting to release language in both the first and last change orders. CCC further contends that WHJV employees "intentionally misled Connelly about the effect of the [monthly releases]." CCC Br. 30. But even if those employees misstated the effects of the releases, that does not excuse CCC's president — "a sophisticated businesswoman with decades of hands-on experience in the construction industry," JA 379 — from failing to read and understand the releases' plain terms. Moreover, CCC points to no evidence in the record showing any fraud or misrepresentation during the negotiation of the third through sixth change orders. And again, the record demonstrates that Ms. Connelly knew what she was doing when signing those orders.

In sum, the District Court did not clearly err in finding that CCC had knowingly and voluntarily waived its claims.

B.

CCC next argues that, even if it did agree to waive its claims through the releases and change orders, WHJV impliedly waived its right to enforce those agreements.

Under Pennsylvania law, "[w]aiver is essentially a matter of intention." Brown, 186 A.2d at 401. That intent can be revealed through an express agreement — as CCC did here — or it can be implied. Id. But an implied waiver of a legal right still requires

"a clear, unequivocal and decisive act of the party with knowledge of such right and an evident purpose to surrender it." Id. And the party asserting the implied waiver — here CCC — bears the burden of establishing it. See Steinman v. La Charty Hotels Co., 50 A.2d 297, 298 (Pa. 1947).

The District Court, after weighing all the testimony and evidence, found that CCC failed to prove that WHJV intended to relinquish its right to rely on either the releases or the change orders. CCC now challenges that finding by pointing to the following evidence, which it claims the District Court should have considered: (1) trial testimony from a WHJV top executive, Mr. Swain, that WHJV did not always enforce its waivers; (2) testimony from Mr. Delaney (WHJV's senior project manager for the prison project) that he told Ms. Connelly that "I will make you whole at the end of this job, you have to trust me,"; (3) evidence that WHJV, despite the waivers, would sometimes pay CCC for performing extra work; (4) evidence that WHJV sometimes paid CCC without the required releases; and (5) evidence of the same conduct with other subcontractors.

But the District Court considered CCC's statements and conduct and concluded that they "did not amount to a waiver." JA 381. That was not clear error.[3] We start with Mr. Swain's testimony. Although he did testify that WHJV is "not going to use a waiver process to stop" subcontractors from recovering certain costs, JA 826, he then clarified that he meant that WHJV simply tries "to be fair," JA 839, 849. Mr. Delaney's alleged

[3] CCC argues that our review here is de novo. But after a bench trial, we review the District Court's application of law to facts — a classic "mixed question[] of law and fact" — for clear error. See Alpha Painting, 853 F.3d at 682–83.

statement of "I will make you whole," which he denied making, see JA 619, is even more equivocal. As the District Court fairly put it, that statement "is, at best, a vague and ambiguous promise to try to help CCC out in the future." JA 24.

And that WHJV would sometimes pay CCC and others for extra work does not necessarily mean that WHJV intended to waive its right to enforce the releases. CCC argues that such a failure to assert waiver shows an intent to relinquish it, directing our attention to Lydon Millwright Services, Inc. v. Ernest Bock & Sons, Inc., No. 11-7009, 2013 WL 1890355, at *7 (E.D. Pa. May 7, 2013), and Quinn Construction, Inc. v. Skanska USA Building, Inc., 730 F. Supp. 2d 401, 418 (E.D. Pa. 2010). But those cases explain that whether such conduct "rise[s] to the level of implied waiver is an issue for" a factfinder. Lydon, 2013 WL 1890355, at *7; see also Quinn Constr., 730 F. Supp. 2d. at 418 (denying summary judgment "because a genuine issue of fact exists as to whether [the defendant] waived enforcement of" a release). Here, that factfinder was the District Court, to which we owe deference. See Anderson v. City of Bessemer, 470 U.S. 564, 574 (1985). We are unconvinced that, on this record, the District Court clearly erred in concluding that WHJV did not clearly and unambiguously relinquish its right to enforce the release language in its agreements.

III.

For the foregoing reasons, we will affirm the judgment of the District Court.