STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 30, 2018)

MANAFORT BROTHERS, INC.,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2016-4542**
	:	
STATE OF RHODE ISLAND, by and through SETH MAGAZINER, in his capacity as General Treasurer, and RHODE ISLAND DEPARTMENT OF TRANSPORTATION, by and through PETER ALVITI, JR., P.E., in his capacity as Director,	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. Before the Court is Plaintiff Manafort Brothers, Inc.'s (Manafort or Plaintiff) motion for partial summary judgment on Counts I, II, and III of its Complaint, as well as on Defendants' Counterclaim Count I and all Defendants' remaining Affirmative Defenses. Plaintiff's motion follows a decision by this Court striking four Affirmative Defenses asserted by Defendants State of Rhode Island, by and through Seth Magaziner, in his capacity as General Treasurer, and Rhode Island Department of Transportation, by and through Peter Alviti, Jr., P.E., in his capacity as Director (RIDOT or Defendants). This Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14 and Super. R. Civ. P. 56.

I

Facts and Travel

On January 11, 2013, Defendants and Manafort entered into a contract agreement (Contract) by which Manafort agreed to complete a public works project consisting of the construction of a new, independent southbound bridge—extending approximately 1290 feet and

across 4 lanes—on the west side of an existing structure and the reconstruction of an adjacent ramp structure to the north and south of the Providence Viaduct (the Project). Compl. at ¶ 6. Notice to proceed with the Project was provided by Defendants on January 24, 2013. Defs.' Ex. 1, Aff. Michael Studley (Studley Aff.) at ¶ 5. Pursuant to the Contract, the Substantial Completion Date was November 20, 2015. Compl. at ¶ 8; Studley Aff. at ¶ 6. Further, the Contract provides, in part, the following,

> "for and in consideration of payments . . . to be made by the State, [Manafort] agrees to furnish all equipment, machinery, tools and labor; to furnish and deliver all materials required to be furnished and delivered in and about the improvement and to do and perform all work in the performance of RI Contract No. 2012-CB-078, FAP NHP-0578 (002), NHP-TIGR(001) & NHPG-0578(003), for the New Providence Viaduct Southbound Bridge No. 578 in strict conformity with the provisions of this contract agreement, the notice to contractors, the proposal, the specifications and the plans approved by the Engineer, as defined in the specifications." Compl. at ¶ 9; Studley Aff. at ¶ 7.

The Contract additionally contained language by which Defendants agreed to compensate Manafort for all damages, costs, fees and expenses related to unknown or differing site conditions, project delays, and extra work completed. Compl. at ¶¶ 12-13.

Manafort commenced work on the Project on January 24, 2013. Studley Aff. at ¶ 5. During the construction phase of the Project, Manafort encountered delays, and the Project was substantially completed on July 18, 2017. Compl. at ¶¶ 17-21; Studley Aff. at ¶ 9.

Manafort filed its Complaint against Defendants on September 28, 2016 asserting claims of, *inter alia*, breach of contract, breach of the implied covenant of good faith and fair dealing, and *quantum meruit*. Defendants answered Manafort's Complaint and asserted a number of Affirmative Defenses and a Counterclaim asserting breach of contract and contribution claims.

Manafort propounded its First Set of Requests for Admission in December 2016.[1] The requests for admission were delivered to three employees—including two attorneys—at RIDOT; Defendants failed to respond to the requests. In July 2017, Manafort—relying heavily on its requests for admission—filed a motion for partial summary judgment on Defendants' Third, Fourth, Sixth, and Seventh Affirmative Defenses. This Court heard oral argument on the motion on September 19, 2017[2] and issued a Bench Decision granting Manafort's motion on December 13, 2017. In its Decision, this Court relied on a number of admissions deemed admitted by RIDOT's failure to respond or object to Manafort's requests. Manafort then filed its second motion for summary judgment on Counts I, II, and III of its Complaint, as well as Defendants' Counterclaim Count I and all Defendants' remaining Affirmative Defenses. Defendants filed their opposition to Manafort's motion. Both parties have further submitted supplemental memoranda in support of their positions.

II

Standard of Review

"It is a fundamental principle that '[s]ummary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously.'" *Takian v. Rafaelian*, 53 A.3d 964, 970 (R.I. 2012) (alteration in original) (quoting *Emp'rs Mut. Cas. Co. v. Arbella Prot. Ins. Co.*, 24 A.3d 544, 553 (R.I. 2011)). With that in mind, in ruling on a motion for summary judgment, the Court is instructed to "review[] the evidence and draw[] all reasonable inferences in the light most favorable to the nonmoving party," *id.* (citation omitted) (internal quotation marks

[1] Plaintiff elected to use an unconventional format in drafting its requests for admission. For nearly the entire document, each odd numbered request presents an affirmative statement and the following even numbered statement presents the same statement as a negative. As explained in further detail below, Plaintiff's chosen format has been a source of conflict between the parties.

[2] Defendants also filed a motion to withdraw the deemed admissions on October 3, 2017. An Order denying Defendants' motion was entered on October 13, 2017.

omitted), and to "'look for factual issues, not determine them.'" *Steinhof v. Murphy*, 991 A.2d 1028, 1032-33 (R.I. 2010) (quoting *Steinberg v. State*, 427 A.2d 338, 340 (R.I. 1981)). However, summary judgment is appropriate "'if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" *Takian*, 53 A.3d at 970 (quoting *Classic Entm't & Sports, Inc. v. Pemberton*, 988 A.2d 847, 849 (R.I. 2010) (internal citation omitted)); *see* Super. R. Civ. P. 56(c).

III

Discussion

Manafort asserts that Defendants have admitted to liability with respect to Counts I, II, and III of the Complaint. Further, Manafort contends that—through the deemed admissions—Defendants have waived their asserted Affirmative Defenses and the right to assert a Counterclaim for breach of contract. Plaintiff argues that, pursuant to the law of the case doctrine, the Court must rely upon Defendants' deemed admissions following its Bench Decision.

RIDOT argues that Plaintiff's reliance on the law of the case doctrine is misplaced because it contends the Court here is addressing a different question than the issues presented in Manafort's first motion for partial summary judgment. Specifically, RIDOT asserts that the Court's reliance on certain deemed admissions serves as the rationale for its conclusion and is therefore distinct from the law of the case. Moreover, RIDOT reasserts its contention that the contradictory format of Plaintiff's requests for admission does not settle issues of fact, but rather creates additional questions of fact. Finally, RIDOT contends that, even if the Court were to accept the deemed admissions, they do not settle all issues of material fact required for summary judgment at this time.

A

Law of the Case Doctrine

Our Supreme Court first adopted the law of the case doctrine in *Payne v. Superior Court for Providence Cty.*, 78 R.I. 177, 184, 80 A.2d 159, 163 (1951). There, the Court stated that "[w]here a pure question of law is involved, ordinarily the second justice should not, if the same question is presented to him in the same manner, review the action of the first justice." *Id.* The second justice, however, is "not bound to follow the reasons given by the first justice for his decision" if the same question arises in a different manner. *Id.* Rather, "[i]t is the first justice's *action* that is the law of the case and that should not be disturbed; not his *conception of the law* that induced him to act." *Id.* The Court in *Payne*, however, recognized—and indeed continues to recognize—that the law of the case doctrine "is a flexible rule; one more in the nature of a rule of policy and convenience." *Id.*; *see also Gucfa v. King*, 865 A.2d 328, 332 (R.I. 2005); *Goodman v. Turner*, 512 A.2d 861, 864 (R.I. 1986); *North Am. Planning Corp. v. Guido*, 110 R.I. 22, 24, 289 A.2d 423, 424 (1972). "Nevertheless it is one that generally ought to be adhered to for the principal reason that it is designed to promote the stability of decisions of judges of the same court and to avoid unseemly contests and differences that otherwise might arise among them to the detriment of public confidence in the judicial function." *Payne*, 78 R.I. at 184-85, 80 A.2d at 163.

In the present matter, Manafort contends that this Court's Bench Decision obligates it to accept Defendants' deemed admissions in deciding this second partial motion for summary judgment. In adopting the law of the case doctrine, however, our Supreme Court was clear in its decision that a second justice is "not bound to follow the reasons" relied upon by the first justice. *Payne*, 78 R.I. at 184, 80 A.2d at 163. Rather, the law of the case doctrine is applicable when a

second justice is examining the same question under the same circumstances amounting to a review of the first justice's decision. *Id.* Here, Manafort has filed another motion for partial summary judgment. The question presented to the Court, however, is with regard to three Counts contained in Manafort's Complaint, Defendants' remaining Affirmative Defenses, and one of Defendants' Counterclaims—none of which was contemplated under Manafort's first motion. The Court therefore is satisfied that the instant question before the Court is different than the question contemplated by the Court in its Bench Decision.

The law of the case doctrine is most often utilized when two justices are presented with the same question in the same case. *Id.*; *Gucfa*, 865 A.2d 328; *Goodman*, 512 A.2d 861; *North Am. Planning Corp.*, 110 R.I. 22, 289 A.2d 423. Nonetheless, when a single justice is involved he or she "'should hesitate to undo his [or her] own work.'" *Payne*, 78 R.I. at 185, 80 A.2d at 163 (quoting *Peterson v. Hopson*, 306 Mass. 597, 603, 29 N.E.2d 140, 145 (1940)). While the question presented by the current motion is distinct from the question previously determined by the Court—*i.e.*, whether to strike the four aforementioned Affirmative Defenses—the path which the Court must take to arrive at a conclusion is familiar. Accordingly, the Court will again examine Manafort's requests for admission and, in particular, whether the format utilized by Plaintiff settles or creates issues of fact.

B

Requests for Admission

Rule 36(a) of the Superior Court Rules of Civil Procedure (Rule 36) clearly indicates that an admission is "admitted unless, within thirty (30) days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection[.]" Super. R. Civ. P. 36(a). Nevertheless, the Court may allow a deemed admission

to "'be withdrawn if the admitting litigant acted diligently; if adherence to the admission must cause a suppression of the truth; and if the withdrawal can be made without prejudice to the party who requested the admission.'" *Cardi Corp. v. State*, 524 A.2d 1092, 1095 (R.I. 1987) (quoting *Gen. Elec. Co. v. Paul Forsell & Son, Inc.*, 121 R.I. 19, 23, 394 A.2d 1101, 1103 (1978)). Rule 36(b) further provides for the withdrawal or amendment of admissions "when the presentation of the merits of the action will be promoted thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the party's action or defense on the merits." Super. R. Civ. P. Rule 36(b). Here, following their failure to respond to Manafort's requests for admission, Defendants filed a motion to withdraw the admissions asserting that they had acted diligently; that Plaintiff would not be prejudiced by the withdrawal; and that adherence to the admissions would cause suppression of the truth. After a hearing on the merits, this Court denied Defendants' motion on October 13, 2017.

The requests for admission propounded by Manafort in this matter were drafted using an unusual format. As stated above, the admissions contained within the document alternate between an affirmative statement and a negative variant of the preceding statement.[3] The Rhode Island Supreme Court has not addressed a requests for admission drafted in this manner; however, other jurisdictions have issued decisions regarding what they have referred to as

[3] By way of example, four paragraphs from Manafort's requests for admission are transcribed in full below.

> "3. RIDOT administered the Contract on behalf of the State of Rhode Island and Providence Plantations and acted as its authorized representative with respect to all aspects of the Project.
> "4. RIDOT did not administer the Contract on behalf of the State of Rhode Island and Providence Plantations and did not act as its authorized representative with respect to all aspects of the Project.
> "5. The original Substantial Completion Date in the Contract was November 20, 2015.
> "6. The original Substantial Completion Date in the Contract was not November 20, 2015."

mirror-image or converse requests for admissions. *See State ex rel. Widmer v. Mohney*, 2008 WL 625220 (Ohio Ct. App. 2008); *Noons v. Arabghani*, 2005 WL 2037985 (Tex. Ct. App. 2005); *CEBI Metal Sanayi Ve Ticaret A.S. v. Garcia*, 108 S.W.3d 464 (Tex. Ct. App. 2003); *see also* Robert K. Wise; Katherine Hendler Fayne, *A Guide to Properly Using and Responding to Requests for Admission under the Texas Discovery Rules*, 45 St. Mary's L.J. 655 (2014) ("Although there is nothing inherently improper about such 'mirror-image' or 'converse' requests, mirror-image admissions, which result if the responding party fails to respond to the requests or admits both requests, are useless because they create a fact issue.").

In each of the cases cited to above, one party filed requests for admission comprised of "couplets requesting diametrically opposed admissions." *CEBI Metal*, 108 S.W.3d at 466; *see also Mohney*, 2008 WL 625220, at ¶ 12; *Noons*, 2005 WL 2037985, at *3. Moreover, in each of these cases the entireties of the requests for admission were deemed admitted following the answering party's failure to respond to the request. *CEBI Metal*, 108 S.W.3d at 466; *Mohney*, 2008 WL 625220, at ¶ 12; *Noons*, 2005 WL 2037985, at *2. The Texas and Ohio Appellate Courts held that the contradictory admissions could not be used to settle questions of fact, but rather created factual questions. *CEBI Metal*, 108 S.W.3d at 466 ("[B]ecause each of [plaintiff's] requests was paired with its opposite, they conclusively established every proposition and its opposite as well. When all were deemed admitted, they created fact questions rather than resolving them.") (original emphasis omitted); *Mohney*, 2008 WL 625220, at ¶ 12 ("The court found that if all of the requests for admissions are deemed admitted and the admissions are contradictory, those admissions are useless for evidentiary purposes.") (internal quotation marks omitted); *Noons*, 2005 WL 2037985, at *5 ("While a movant's exhibit can support a motion for summary judgment, it may also create a fact question, as in the present case."). One court even

went so far to say that "[b]y requesting admissions on contested issues and coupling them with mirror-image opposites, [plaintiff's] attorney took the risk that if all were deemed admitted[,] they would prove too much." *CEBI Metal*, 108 S.W.3d at 467. In each of these cases, the moving party's motion for summary judgment was denied as a result of the contradictory admissions. *CEBI Metal*, 108 S.W.3d at 467; *Mohney*, 2008 WL 625220, at ¶ 67; *Noons*, 2005 WL 2037985, at *5.

Manafort has utilized the same unconventional format which has proved fatal to movants in alternative jurisdictions. This Court recognizes the decisions issued in other jurisdictions; however, with respect to the matter herein, the Court determines they prioritize form over function. *See Sarni v. Meloccaro*, 113 R.I. 630, 636, 324 A.2d 648, 651-52 (1974) (noting that courts, in construing our "liberal rules" of civil procedure, should "look to substance, not labels"); *see also Sch. Comm. of Cranston v. Bergin-Andrews*, 984 A.2d 629, 649 (R.I. 2009). At oral argument for its first motion for partial summary judgment, Manafort's counsel asserted that the rationale for this irregular format was to compel Defendants to give specific admissions. Defendants' subsequent failure to respond to Manafort's requests therefore seemingly subverts the intended result of achieving specific answers. Generally, an admission obtained pursuant to a request for admission "does not bind the requesting party." 1 Kent, Simpson, Flanders, Wollin, *Rhode Island Civil and Appellate Procedure* § 36:5 (2017); *see also* 8B Wright and Miller, *Federal Practice and Procedure* § 2264 (3rd ed. 2017); *Indiana Constr. Serv., Inc. v. Amoco Oil Co.*, 533 N.E.2d 1300, 1301 (Ind. Ct. App. 1989) ("[A]n admission binds the party answering the request for admission . . . [an] admission does not bind the person requesting it."). Likewise, "[a] party may not utilize its own admissions . . . [i]t is only when the admission is offered against the party who made it that it comes within the exception to the hearsay rule[.]" 8B Wright and

Miller, *Federal Practice and Procedure* § 2264 (3rd ed. 2017). Thus, the Court is satisfied that allowing RIDOT to cite to the negative admissions deemed admitted to create a question of material fact does not effectuate the objective of the Rhode Island Rules of Civil Procedure and effectively permits the use of RIDOT's own admissions. The Court therefore accepts the deemed admissions relied upon by Manafort.[4]

Through the deemed admissions, Manafort has established—and RIDOT has admitted—that it performed and complied with its obligations under the Contract. Pl.'s Mot., Ex. 3. Manafort further established that RIDOT was notified when Manafort encountered subsurface or latent physical conditions at the Project site, and that those conditions caused Manafort to experience delays in construction. *Id.* Under the Contract, the State agreed to compensate Manafort for all damages, costs, fees and expenses caused by these unknown physical conditions. *Id.* Moreover, RIDOT has admitted to causing at least some of the delay through its own acts or omissions. *Id.* RIDOT also admits that Manafort is entitled to additional compensation or an equitable adjustment under the Contract for performing extra work as a result of the unknown physical conditions at the Project site. *Id.* Finally, through its admissions, RIDOT admits to materially breaching the Contract with Manafort. *Id.* Accordingly, after accepting the deemed admissions relied upon by Manafort in its motion, Plaintiff's motion for partial summary judgment with respect to Counts I, II, and III of its Complaint, Defendants' Counterclaim Count I, and all Defendants' remaining Affirmative Defenses is granted.

[4] Specifically, the cited admissions include Nos. 3, 21, 23, 47, 55, 57, 59, 65, 83, 95, 103, 107, 111, 127, 129, 131, 133, 135, 137, 139, 149, 151, 153, 155, 157, 159, 161, 165, 167, 169, 171, 173, 175, 177, and 179. This Court, through its aforementioned Bench Decision, has already accepted admission Nos. 33, 43, 45, 51, 113, 141, 143, 147, and 163.

IV

Conclusion

After reviewing the evidence in the light most favorable to the Defendants, the Court accepts the deemed admissions relied upon by Plaintiff and therefore finds no genuine issue of material fact with respect to Counts I, II, and III of its Complaint, as well as Defendants' Counterclaim Count I and all Defendants' remaining Affirmative Defenses. Accordingly, Plaintiff's motion for partial summary judgment is granted. The parties may confer in order to schedule a trial with regard to damages resulting from the Court's decision herein and with regard to the merits of any remaining counts.

Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Manafort Brothers, Inc. v. State of Rhode Island, et al.**
CASE NO:	**PC-2016-4542**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 30, 2018**
JUSTICE/MAGISTRATE:	**Silverstein, J.**

ATTORNEYS:

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