

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: *Battaglia Electric, Inc. v. Bancroft Construction Company*
C.A. No. 01C-04-114 RRC

Submitted: March 7, 2003
Decided: March 13, 2003

Upon Defendant's Motion for Summary Judgment. **DENIED.**

Dear Counsel:

Currently pending is a Motion for Summary Judgment filed by defendant Bancroft Construction Company ("Bancroft") through which Bancroft moves this Court to enter summary judgment in its favor and against plaintiff Battaglia Electric, Inc. ("Battaglia" or "Battaglia Electric"). Bancroft argues that a contract between the parties precludes Battaglia Electric's suit for damages because (as Bancroft argues) Battaglia Electric did not strictly comply with certain contractual provisions relating to changes to the contract, and, alternatively, that Battaglia Electric's suit is

precluded because of certain releases executed by Battaglia Electric in Bancroft's favor. Because the Court finds that there are material facts in dispute with regard to Bancroft's contract-based claim and that the limited scope of the April 26, 2000 release of Battaglia's "lien rights" otherwise precludes the Court from awarding Bancroft summary judgment, Bancroft's motion is **DENIED**.

FACTUAL AND PROCEDURAL HISTORY

Bancroft and Battaglia Electric were parties to an agreement dated July 15, 1998 wherein Battaglia Electric was to "[f]urnish all necessary labor, materials, tools, equipment, and inspections" related to electricity in the Stine Haskell Research Center¹ ("Research Center"), a building that had been owned by E.I. DuPont de Nemours and Company, Inc. ("DuPont"). Bancroft had been the general contractor on the building project. By the contract's terms, Battaglia Electric was to receive a total contract payout of \$3,897,600.²

The parties provided a method by which changes in the work contemplated by their contract could be enforced, *i.e.*, paragraph three of the "General Conditions" document attached to the agreement, such paragraph having been captioned "Change Orders." That paragraph stated, in pertinent part:

All changes in services must be authorized in writing by Bancroft before such work or service is begun.

If Bancroft and [Battaglia Electric] are unable to agree that an item of work or service constitutes a change, or that [Battaglia Electric] is entitle[d] to additional compensation and/or an extension of time for such item or work of service, [Battaglia Electric], upon receipt of a written order signed by Bancroft, will promptly proceed with, and expeditiously perform and/or supply, the item of work or service and will submit a claim therefore[e] as provided herein.

¹ Ex. "A" to Def.'s Mot. at 1.

² Id. at 2.

In the event Bancroft orders completion of services being provided on a lump sum basis to be delayed or accelerated, adjustment of [Battaglia Electric]'s compensation will be determined by mutual acceptance of a lump sum price based on [Battaglia Electric]'s submission of a written estimate of the cost of delay or acceleration. Bancroft reserves the right to reimburse [Battaglia Electric] for delays on an actual cost basis, in which case [Battaglia] will document such delays daily. [Battaglia Electric] will provide such supporting documentation as Bancroft may require to evaluate the proposal.

If the parties are unable to agree on the amount of adjustment or schedule, Bancroft will provide written notification to [Battaglia] of the adjustment Bancroft considers appropriate and such adjustment will be effective subject to [Battaglia]'s right to submit a claim as provided herein.

Any claim for an adjustment of compensation or schedule or in opposition to an adjustment imposed by Bancroft[] will be submitted to Bancroft in writing within fifteen (15) days of commencement of the event giving rise to such claim. [Battaglia Electric] will submit to Bancroft, in writing, the amount of the claim with supporting data within sixty (60) days of completion of the services or termination of the event for which it claims adjustment.³

Additionally, Battaglia Electric has averred that a “project schedule” made part of its contract with Bancroft “described, in significant detail, start and finish dates for each task [and] task duration[]” which Battaglia was to undertake.⁴

Battaglia Electric began working on the Research Center in July 1998. By December 1998, both Bancroft's steel and concrete subcontractors were experiencing delays in the performance of their respective duties, a setback which Battaglia has averred “significantly delayed the entire [p]roject [s]chedule.”⁵ Because of these impediments, Battaglia averred that it “could not begin its work according to the [p]roject [s]chedule...”⁶ (Battaglia also

³ Ex. “A” to Def.’s Mot. at 4-5.

⁴ Compl. ¶ 5.

⁵ Id. ¶ 9.

⁶ Id. ¶ 11.

averred that it was further heldup “[a]s a direct and proximate result of...delays associated with...installation of...fume hoods and case work....”⁷ According to Battaglia, Bancroft then “unilaterally decided to accelerate the [p]roject [s]chedule[]” because of these delays.⁸ Bancroft later acknowledged that it had made changes to the project schedule “during the course of construction.”⁹

By as early as February 1999 (and possibly earlier), Battaglia began corresponding with Bancroft with regard to “the pressure being placed on [Battaglia’s] men and [Battaglia’s]...bottom line....”¹⁰ As part of that correspondence, Battaglia requested that “these concerns be reviewed and addressed by Bancroft in a timely fashion,” and that it either “be allowed some adjustment in [its] schedule or a provision be made to help [it] cover the costs of accelerating the schedule.”¹¹ Bancroft responded that “[u]ntil Battaglia...demonstrates a meaningful effort to adhere to the construction schedule[,]”¹² no additional time or compensation would be given. Bancroft recommended that Battaglia “concentrate on planning, coordination and expediting the work...in lieu of [its] extensive letter[-]writing campaign to generate change orders or claims.”¹³

⁷ Id. ¶ 13.

⁸ Id. ¶ 14.

⁹ Answer ¶ 14.

¹⁰ Letter from Matthew Holloway (Battaglia’s Project Manager) to Bart Nave (Bancroft’s On-Site Project Manager) of 2/3/99, at 1 (Ex. “A” to Holloway Aff. (Ex. “1” to Pl.’s Resp.)). The affidavit executed by Mr. Holloway generally supports these assertions.

¹¹ Id.

¹² Letter from Nave to Holloway of 2/8/99, at 2 (Ex. “A” to Def.’s Reply).

¹³ Id.

Nevertheless, Battaglia Electric later executed at least two “waiver and release” forms, both of which contained the same language. The first form, executed on April 26, 2000 between Battaglia and Bancroft, acknowledged receipt by Battaglia of \$109,586.22, and was related to work performed by Battaglia before April 30th of that year.¹⁴ The second form, executed on May 24, 2000, acknowledged receipt by Battaglia of \$6,000, and was related to work performed by Battaglia before the date of execution of that release.¹⁵ Both forms were captioned “Waiver and Release of Lien Rights,” and both contained language to the effect that “upon receipt of payment...as satisfaction in full for all labor, services, and materials furnished to Bancroft, this document shall become effective to release *pro tanto* any mechanics’ liens, stop notices or bond rights...[Battaglia Electric] ha[d] in connection with...[the] Research Center...”¹⁶ (Each form further provided that Battaglia “waive[d], release[d] and discharge[d] Bancroft and...[DuPont] from any and all claims for mechanics’ liens and rights to any such claim which...[Battaglia] has or may have....”)¹⁷ The only apparent difference between the two forms was the typewritten assertion inserted by Battaglia into the May 24, 2000 document that “this [release] excludes all claims for delays, disruptions and inefficiency.”¹⁸

(Additionally, two days prior to execution of the May 24, 2000 release, Gene Battaglia, President of Battaglia Electric wrote to Reggie Braud, Vice President of Bancroft, to inform Bancroft that Battaglia was “in

¹⁴ Ex. “B” to Def.’s Mot.

¹⁵ Ex. “D” to Def.’s Mot.

¹⁶ Ex. “B” to Def.’s Mot.; Ex. “D” to Def.’s Mot.

¹⁷ Id.

¹⁸ Ex. “D” to Def.’s Mot.

the process of preparing a claim for...[the delays]”, which claim was to be submitted to Bancroft “under separate cover [and] within a few weeks [from then].”) ¹⁹

Ultimately, however, Battaglia filed a complaint in this Court alleging that it had “incurred a significant increase in the cost to perform its work,” ²⁰ and that it was entitled to damages “in excess of \$900,000.” ²¹ After filing its Answer, Bancroft moved for summary judgment.

CONTENTIONS OF THE PARTIES

Bancroft’s arguments in support of its motion are relatively straightforward: 1) Battaglia Electric is precluded from bringing this action by virtue of its failure to submit its claims within 15 days of commencement of the event giving rise to such claims as purportedly required by the contract between the parties; and 2) Battaglia Electric is precluded from bringing this action by virtue of its execution of the April 30, 2000 release. Battaglia, in addition to arguing that there are material facts in dispute such that summary judgment cannot now be awarded, also responds that: 1) it did timely notify Bancroft of its claims; and 2) the releases it executed apply only to claims for mechanics’ liens.

Citing L.A. Merrell v. County of Sussex, ²² Bancroft argues that the “unambiguous” language of the “Change Orders” provision, together with Battaglia’s failure to file any claim “until 7 months after completion of the

¹⁹ Letter from Battaglia to Braud of 5/22/00, at 1 (Ex. “A” to Battaglia Aff. (Ex. “3” to Pl.’s Resp.)). The affidavit executed by Mr. Battaglia generally supports these assertions.

²⁰ Compl. ¶ 17.

²¹ Compl. ¶ 18.

²² C.A. No. 91C-03-016, 1993 WL 476484 (Del. Super. Feb. 25, 1993) (holding that where contract terms are clear and unambiguous those terms control and that where a party is aware of specific “claims” provisions contained in such a clear and unambiguous contract, a failure to abide by those provisions constitutes a waiver).

[p]roject[][,]”²³ now precludes Battaglia from making any recovery. Bancroft also cites Egan & Sons Air Conditioning Company v. General Motors Corporation²⁴ in support of its argument that the April 26, 2000 release “covers all claims arising from work performed or labor or services provided by Battaglia through April 30, 2000.”²⁵ Bancroft contends that “[t]he intent of the parties to include all claims...in th[at] [document] is further supported by Battaglia’s addition of language...[in the May 24, 2000 release]”;²⁶ Bancroft argues that “[t]his additional language would not be necessary if the...[April 26, 2000] release did not include such claims [for delays and disruptions].”²⁷

In response, Battaglia Electric also relies on the Egan & Sons case; Battaglia contends it supports its argument that because Battaglia “promptly and frequently”²⁸ notified Bancroft of its claims, summary judgment in Bancroft’s favor is inappropriate.²⁹ Battaglia also cites Egan & Sons (as well as L.A. Merrell) as contrasting authority relative to the two releases

²³ Def.’s Mot. at 3. Bancroft submitted an affidavit executed by Mr. Braud supporting this statement. See Braud Aff. ¶ 2 (“Ex. “C” to Def.’s Mot.).

²⁴ C.A. Nos. 86L-MY-18, 86L-MY-28, 1988 WL 47314 (Del. Super. April 27, 1988) (holding that a court, when reviewing a general release of a party, scrutinizes said release for its validity, clarity, and scope, in that order).

²⁵ Def.’s Mot. at 4.

²⁶ Id.

²⁷ Def.’s Reply at 4.

²⁸ Pl.’s Resp. at 4.

²⁹ Plaintiff cites to (but does not comment on) the Court’s holding in Egan & Sons that when a contract provision requires notification of asserted entitlements to increased payments for additional work, a party making such a notification “must giv[e] the most precise notice possible,” and a factual question will exist “as to whether [that party] could state the amount...claim[ed] with reasonable certainty.” Egan & Sons Air Cond. Co., 1988 WL 47314 at *9.

entered into by the parties in this case: “Unlike the broad, encompassing waiver language in Egan and Merrell..., here[] the purported...[releases] expressly apply [only] to ‘claims for mechanics’ liens and rights to any such claim...’”³⁰

STANDARD OF REVIEW

Summary judgment is granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.³¹ The court must view the facts in a light most favorable to the non-moving party.³² Summary judgment will not be granted if “upon examination of all the facts, it seems desirable to inquire [more] thoroughly into them in order to clarify the application of the law to the circumstances.”³³

BANCROFT IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS CONTRACT-BASED “NOTICE” CLAIM BECAUSE OF MATERIAL FACTUAL DISPUTES

Here, there is a genuine issue of material fact as to when and how Battaglia Electric notified Bancroft of its intention to assert any claim it may have had for increased expenditures; thus there is also a material issue as to whether Battaglia’s notice was timely under the “Change Orders” provisions of paragraph three of the “General Conditions” document attached to the agreement between the parties.³⁴ And while the holdings contained in the

³⁰ Pl.’s Resp. at 4.

³¹ Super. Ct. Civ. R. 56(c); Burkhart v. Davies, 602 A.2d 56, 59 (Del. 1991).

³² Merrill v. Crothall-American, Inc., 606 A.2d 96, 99-100 (Del. 1992).

³³ Ebersole v. Lowengrub, 180 A.2d 467, 470 (Del. 1962) (reversing grant of summary judgment where the record failed to explain why a driver of a motor vehicle suddenly stopped his vehicle thereby causing a multiple-vehicle collision).

³⁴ Ex. “A” to Def.’s Mot.

Egan & Sons and L.A. Merrell cases may be correct statements of the law, this Court will not now apply those holdings to the facts of this case, when those facts have not yet been fully developed.³⁵ Granted that both parties have submitted multiple affidavits and pieces of correspondence in support of and in order to clarify their respective positions, but a “nontrivial factual dispute created by the nonmovant [such as by the attachment of an affidavit disputing the other side’s allegations] will usually bar summary judgment so long as the contested facts are material....”³⁶ Bancroft’s Motion for Summary Judgment on this ground is **DENIED**.

THE APRIL 26, 2000 “WAIVER AND RELEASE” IS LIMITED IN SCOPE AND DOES NOT PRECLUDE BATTAGLIA’S ACTION FOR DAMAGES

Bancroft (as well as Battaglia) contends that the language of the release is clear. Nevertheless, Bancroft argues “if the release[] only applied to mechanics’ liens, it would be nonsensical and meaningless for Battaglia to release Bancroft, as a mechanics’ lien is brought *in rem* against the real property of an owner.”³⁷ Furthermore, Bancroft argues, to hold otherwise would render “meaningless a[s] surplusage”³⁸ the provision that Battaglia “waive[d], release[d] and discharge[d] Bancroft and...[DuPont] from any and all claims for mechanics’ liens and rights to any such claim which...[Battaglia] has or may have....”³⁹

³⁵ Indeed, as the time of the filing of Bancroft’s motion, discovery “ha[d] not [yet] commenced.” Pl.’s Resp. at 1.

³⁶ 11 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 56.11[7][b], at 56-124 (3d ed. 2002).

³⁷ Def.’s Reply at 3.

³⁸ Id. at 4.

³⁹ Ex. “B” to Def.’s Mot.

As stated, a reviewing court “first scrutinizes...releases for their validity, secondly for their clarity, and finally, for their scope.”⁴⁰ Here, the parties agree on the validity and clarity of the subject release (by virtue of each parties’ concession of a lack of ambiguity), so the Court must determine only the release’s scope. As Bancroft points out, the scope of the release “is not rendered ambiguous simply because the parties...differ concerning its meaning.”⁴¹ And the Court notes “in the absence of ambiguity, there is no room for construction of an agreement [such as a release].”⁴²

In determining the scope of the April 26, 2000 release, this Court looks to that document as a whole.⁴³ As stated, each release executed by Battaglia in Bancroft and DuPont’s favor was captioned “Waiver and Release of Lien Rights” and released *pro tanto* “any mechanics’ liens, stop notices or bond rights...[Battaglia Electric may have] ha[d] in connection with...[the] Research Center....”⁴⁴ Thus the Court holds that the scope of Battaglia’s April 26, 2000 release relates solely to claims to secure payment for debt-type actions. Battaglia Electric’s Complaint was for breach of contract and not for any claim to a mechanics’ lien it may have asserted.

⁴⁰ Egan & Sons Air Cond. Co., 1988 WL 47314 at *3.

⁴¹ Def.’s Reply at 3 (citing City Investing Co. Liquid. Trust v. Continental Cas. Co., 624 A.2d 1191, 1198 (Del. 1993)).

⁴² Nepa v. Marta, 415 A.2d 470, 473 (Del. 1980) (holding that where “exclusive agency agreement” was unambiguous, intervenor realty brokerage company’s argument that that agreement supported its contention that it was entitled to a full commission “regardless of how or by whom a tenant was found” was erroneous).

⁴³ See E.I. duPont de Nemours and Co., Inc. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985) (en banc) (stating that a reviewing court “must construe an agreement as a whole, giving effect to all provisions therein[]”).

⁴⁴ Ex. “B” to Def.’s Mot.; Ex. “D” to Def.’s Mot.

The fact that a mechanics' lien action is an *in rem* action does not, as Bancroft suggests, make it “nonsensical and meaningless for Battaglia to release Bancroft...”;⁴⁵ DuPont, as owner of the Research Center site, may itself have required Bancroft to secure the releases, without regard to their effect as between Bancroft and Battaglia (but the present record is unclear on this point). Furthermore, Bancroft's argument that insertion of the additional language into the May 24, 2000 release shows that Battaglia intended the April 26, 2000 release to preclude claims such as the present action is not determinative. As stated above, even before execution of the May 24th release, Battaglia was “in the process of preparing a claim for...[the already-existing delays].”⁴⁶

Because the Court finds the scope of the April 26, 2000 release as limited only to mechanics' liens and similar debt-type actions and therefore not extending to preclude Battaglia Electric's current suit for breach of contract, Bancroft is not entitled to summary judgment on this ground; Bancroft's Motion for Summary Judgment on this ground is **DENIED**.

CONCLUSION

Based on the above analysis, there are material facts in dispute with regard to Bancroft's contract-based claim and the limited scope of the April 26, 2000 release of Battaglia's “lien rights” otherwise precludes the Court from awarding Bancroft summary judgment. Accordingly, Bancroft's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/

oc: Prothonotary

⁴⁵ Def.'s Reply at 3.

⁴⁶ Letter from Battaglia to Braud of 5/22/00, at 1 (Ex. “A” to Battaglia Aff. (Ex. “3” to Pl.'s Resp.)).