SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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RE: *Carey's Home Construction, LLC A Delaware Limited Liability Company v. Estate of David L. Myers and Arlene J. Myers*
C.A. No. S11C-10-029 RFS

Date Submitted: January 17, 2014
Date Decided: April 16, 2014

Dear Counsel:

Before the Court is the Motion for Partial Summary Judgment of Defendants the Estate of David L. Myers and Arlene J. Myers ("Defendants") against Plaintiff Carey's Home Construction, LLC ("Plaintiff"). This Motion is **DENIED**.

Facts & Procedural Background

This is a breach of contract case involving Plaintiff's construction of a house for Defendants, the homeowners. The contract at issue is a nine-page document. On the first page read the words "Proposal for New Custom Home," and "Submitted by: Richard B. Carey." On the bottom of that page reads "Carey's Custom Home

Construction 26023 Broadkill Road Milton, DE 19968 302-684-3008."

The second page repeats the address of Carey's Custom Home Construction. It also reads "To: MR. David Myers," is dated September 12, 2008, and states "We hereby propose to furnish labor and materials for new custom home per spec from M.R. DESIGN for the sum of . . . $246,000.00." Additionally, it reads "in case of increase in material cost, it will be the responsibility of the homeowner to cover expenses." The page is signed by Richard B. Carey.

The third page is titled "Acceptance of Proposal," contains language accepting the proposal, is dated September 14, 2008, and contains two lines with the word "Signature" before each. On the one line appears the signature of David L. Myers. ("Mr. Myers"). On the other appears the signature of Arlene J. Myers ("Mrs. Myers").

The fourth page contains the payment schedule for the work performed. There are eight installment payments in total, beginning with $30,000.00 being due upon acceptance of the proposal, and ending with $16,000.00 being due when the job is complete. The remaining pages of the document list the various materials to be used for the various parts of the construction.

Plaintiff began construction, for which Defendants paid the first six installments, totaling $200,000.00. Plaintiff submitted a bill for the seventh

installment, plus fees for extras, per the payment schedule. Defendants refused to pay this bill. Various communications passed between the parties. No further monies were paid to Plaintiff, who ceased work.

Plaintiff, as Carey's Home Construction, LLC, filed a complaint against Defendants for breach of contract on October 31, 2011. Plaintiff amended its complaint on February 9, 2012 to amend the name of the LLC and to add Richard B. Carey individually as a plaintiff. Defendants filed an answer and a counterclaim on April 20, 2012. Plaintiff answered the counterclaim on May 10, 2012.

In the amended complaint, Plaintiff avered that "Carey Home Construction, LLC also does business as Carey's Custom Home Construction," and that "[o]n or around September 14th, 2008, Defendants entered into a contract with Richard B. Carey, either in his own behalf or on behalf of the LLC, for the construction of a new custom home . . . ." To the first statement, Defendants responded in its answer that they "lack[ed] any knowledge to admit or deny that Cary Home Construction, LLC does business as Carey's Custom Home Construction." Further, "[i]t appears that Plaintiff, whoever that may be, does business under multiple fictitious names. By further response, Defendants contracted with Richard B. Carey who was conducting business under an unregistered trade name at the time." To the second statement, Defendants "[a]dmitted that [they] entered into a contract with Richard B. Carey."

However, they "[d]enied that [they] entered into a contract with Carey's Home Construction, LLC."

During discovery, Defendants submitted to Plaintiff requests for admissions under this Court's Civil Rule 36. On these requests, Defendants first asked for Plaintiff to admit that Richard B. Carey did not indicate that he signed the contract in his capacity as a member of the LLC, and that nowhere in the contract was the LLC identified. Plaintiff denied both of these requests, but then explained that it admitted that Richard B. Carey did not indicate that he signed the contract in his capacity as a member of the LLC, and that Richard B. Carey did not identify the LLC anywhere in the contract.

Defendants then asked for Plaintiff to "[p]lease admit that the proposal . . . constitutes a proposal by Richard Carey, and not by Carey's Home Construction LLC." Plaintiff denied this request. Defendants also asked for Plaintiff to "[p]lease admit that the proposal . . . constitutes a proposal by Carey's Home Construction, and not by Richard Carey." Plaintiff denied this request as well. To the former, Plaintiff explained that it "admit[ted] that the contract . . . was a proposal offered by Richard Carey and not on behalf of Carey's Home Construction, LLC, but on behalf of Carey Home Construction, LLC, the proper name of the LLC of which he is a sole member." To the latter, Plaintiff explained that "[t]he contract . . . , prior to being signed by

Defendants and when it was a proposal, was offered by Richard B. Carey on behalf of Carey Home Construction, LLC."

Plaintiff's responses to these requests accompanied an affidavit stating that "Richard B. Carey, individually and for Plaintiff, Carey Home Construction, LLC . . . did depose and state that the foregoing Plaintiffs' Response to the Defendants' Request for Admissions is true and correct to the best of his knowledge and belief."

Defendants then filed the present Motion. Plaintiff filed an Answering Brief to that motion. In that brief, Plaintiff states that "Plaintiffs are Richard B. Carey . . . and Carey Home Construction, LLC. On or around September 14th, the Defendants entered into a contract with Richard B. Carey for the construction of a new custom home . . . ." The brief is supported by an affidavit that reads "Richard B. Carey does depose and swear as follows . . . ." Defendants moved to strike, *inter alia*, Plaintiff's Answering Brief in its entirety, or all sections of the brief which reference Plaintiff as Richard B. Carey individually.[1]

Analysis

Parties' Contentions

Defendants first argue that Arlene Myers was not a party to the contract.[2]

[1] The Court denied this Motion on February 7, 2014.

[2] In their Reply Brief, Defendants describe how the identity of the contracting plaintiff(s) is confused in this case. They claim that this confusion means that Plaintiff cannot establish a

Therefore, the first count of Plaintiff's complaint for breach of contract should be dismissed as to Mrs. Myers. Defendants recite the familiar maxims of contract law that one cannot accept an offer which is not made to that person, that the offeror controls whether a certain a party possesses the power of acceptance, and that under normal circumstances the power of acceptance is not assignable.[3] Defendants point out that the second page of the contract, which is labeled a "proposal," clearly states "To: MR. David Myers." Mrs. Myers is not mentioned. Thus, Defendants argue that because she was not the intended recipient of the offer, Mrs. Myers did not have the power to accept Plaintiff's offer. Because of this, it is argued that her signature on the next page is inconsequential.

Furthermore, Defendants assert that to argue that the contract was intended for both Mr. and Mrs. Myers is to violate the parol evidence rule. Because the written contract clearly indicates the identity of the offeree, any evidence to the contrary should not be considered. Also, Defendants argue that this Court should not find significant that the third page of the contract contained two signature lines rather than

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breach of contract action. Defendants did not discuss the issue in their Opening Brief. Thus, the Court will not consider it here. *See Camtech Sch. Nursing and Tech. Scis. v. Del. Bd. of Nursing*, 2014 WL 604980, at *3 n.29 (Del. Super. Jan. 31, 2014 (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)). Defendants did discuss the issue in their Motion to Strike, which the Court denied.

[3] Defendants cite *Corbin on Contracts* §§ 1.11, 3.2, 3.28.

one. First, neither line identified an expected signatory. Second, even if two lines implies two signatures, such creates an ambiguity which should be construed against Plaintiff as the drafter of the document.[4] Defendants stress that no ambiguity exists as to the identity of the offerees.

Defendants also argue that the first count of Plaintiff's complaint for breach of contract should be dismissed against both defendants because the contract is illusory. The contract establishes a set price for construction of a house. Yet, a line on the second page reads that "in case of increase in material cost, it will be the responsibility of the homeowner to cover expenses." Defendants state that contracts which are terminable by one party are illusory and thus void. Defendants claim that this clause gives Plaintiff the right to change a material contract term (*i.e.* the price). Thus, Plaintiff is able to escape the obligation of constructing a house at a set price, making the contract illusory and thus void.

Plaintiff counters that the contract does not expressly identity the offerees. Rather, one page, which requires no acceptances or signatures at all, addresses Mr. Myers personally. The following page, the acceptance page, contains two signature

[4] Plaintiff counters, without citation, that the Court may only construe the document against Plaintiff as the drafter if it finds that a provision is contradictory, and that the parties maintained unequal bargaining power. Plaintiff claims that this determination requires a factual analysis that should preclude summary judgment.

lines. Plaintiff asserts that the page containing Mr. Myers's name is merely incorporated into the acceptance page.[5] Also, the presence of Mr. Myers's name on that page, which does not appear on the acceptance page, does not create an ambiguity as to the parties' identities.

Plaintiff claims that the contracting parties' identities are not "terms" to be construed, thus avoiding an ambiguity analysis. Even if the parties' identities are "terms" which create an ambiguity, parol evidence can be admitted to explain, although not contradict the contract's terms, which delves into factual questions which should preclude summary judgment.

Plaintiff argues that Richard B. Carey, as master of the offer, stated in his affidavit that the offer was intended for both Mr. and Mrs. Myers. The document was only directed to Mr. Myers because he was the primary contact person for the couple. Also, Plaintiff asserts that the notion that Mrs. Myers was not part of the contract contradicts Defendants' prior positions. Specifically, Defendants' answer and counterclaim to Plaintiff's amended complaint states that they "[a]mitted that *Defendants* entered into a contract with Richard B. Carey." Their counterclaim reads "Now comes *Defendants*/Counterclaim *Plaintiffs* (*Myers*) . . . ." Additionally, various

[5] Defendants interpret this argument to be that Plaintiff, erroneously, asserts that the second page containing Mr. Myers's name is not part of the contract.

communications passed between the parties which were signed by *both* Mr. and Mrs. Myers. Plaintiff claims that Mrs. Myers should be equitably estopped because she received a benefit from being a party to the contract, and now attempts to divest herself from that contract to the prejudice of Plaintiff. Throughout the life of this litigation, it has never been disputed that the offerees were Mr. and Mrs. Myers. Even if the Court disagrees, Plaintiff argues, the issue raises a fact question which precludes summary judgment.

Regarding Defendants' illusory contract argument, Plaintiff asserts that there was mutuality of obligation, as required of a contract. Plaintiff was obliged to build a home; Defendants were obliged to pay. An illusory contract argument succeeds if one party can terminate the contract at will. No such provision exists in this contract. Rather, the provision to which Defendants cite permits Plaintiff to increase the price if the cost of materials increases.

Standard of Review

Summary judgment will be granted only if the moving party, who bears the initial burden, can establish that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[6] The Court examines all of

[6] *See, e.g.*, *Direct Capital Corp. v. Ultrafine Techs., Inc.*, 2012 WL 1409392, at *1 (Del. Super. Jan. 3, 2012) (citations omitted) (iterating the exacting standard of summary judgment).

the evidence, and the reasonable inferences therefrom, in the light most favorable to the non-moving party.[7] Using this lens, only if the moving party establishes that no factual questions indeed exist does the burden shift to the non-moving party to establish the existence of such factual questions which must "go beyond the bare allegations of the complaint."[8]

Discussion

As an initial matter, the Court considers Defendants' argument that Mrs. Myers was not a party to the contract to be waived. Under this Court's Civil Rule 8, "a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or an affirmative defense."[9] Under this Court's Civil Rule 12, "[e]very defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required . . . ."[10] Defendants' answer and counterclaim make no reference that Mrs. Myers was not a party to the contract.[11] Thus, that

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[7] *Id.*

[8] *Id.*

[9] Super. Ct. Civ. R. 8(c).

[10] Super. Ct. Civ. R. 12(b).

[11] Paragraph 35 of Defendants' answer and counterclaim states that Defendants raise various affirmative defenses in order to avoid their waiver. It is like a laundry list. The Court does not consider this general paragraph to be a proper preservation of their argument regarding Mrs. Myers.

argument is waived.

Morever, even on its merits, Defendants' argument fails. Under general contract law, "[a]lthough apart from statute a signature is not necessary to the formation of a contract, it may serve as a manifestation of an intent to make a contract."[12] An objective manifestation of mutual assent to be legally bound is what is necessary for the formation of a contract.[13] However, the issue of a contract's signatories not being named in the contract is discussed this way:

> Generally, when the body of a contract purports to set out the names of the parties thereto and a person not named in the body of the contract signs the contract, and there is nothing in the contract to indicate that such person signed as a party, such [a] person is not bound by the contract and hence is not liable thereunder. In other cases, it has been held that under the circumstances the person who signed but was not named in the body of the contract as a party thereto was nevertheless liable on the contract.
> . . . .
> According to some authority, the rule that a person who signs an instrument, but is not named therein is not a party thereto, is applicable only where the instrument itself distinctly designates others as parties. It has been held that where a person signs an instrument with the intention of being a party thereto and the omission of such person's name from the body thereof was unintentional, such person will be considered as a party to the contract.[14]

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[12] 17A Am. Jur. 2d *Contracts* § 174 (citations omitted).

[13] 17A Am. Jur. 2d *Contracts* § 31 (citations omitted).

[14] 17A Am. Jur. 2d *Contracts* § 414 (citations omitted).

In the past, this Court has denied summary judgment when presented with a contract containing inexplicably extraneous signatures.[15] In *Woodcock v. Udell*, the realtor-plaintiff sued the husband-and-wife-defendants on a real estate contract. The contract named as its parties the realtor and a corporation, in which the husband and wife were the sole stockholders. The contract was signed by the realtor, the corporation, and the husband and wife personally. The Court noted that the contract displayed no explanation as to why the husband and wife signed the contract themselves; and the husband and wife argued that to glean such an explanation could only come from the use of inadmissible parol evidence. The realtor countered, however, that the evidence showed "that there was a direct undertaking on th[e husband and wife's] part to be primarily responsible to him."[16] Because the husband and wife were the sole stockholders and controllers of the corporation, the realtor argued "therefore, that the agreement was entered into for their personal benefit and the promise made to [the realtor] by them did in part induce him to undertake the sale of the property."[17] The realtor's allegation of a supposed oral agreement that glossed over the written agreement convinced the Court to deny summary judgment, ruling

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[15] *See Woodcock v. Udell*, 97 A.2d 878, 881–82 (Del. Super. 1953).

[16] *Id.* at 881.

[17] *Id.*

that the husband and wife's "signatures on the agreement d[id] not bar proof of the alleged oral promise, because the written contract d[id] not purport to be a complete memorial of whatever agreement they as individuals had with [the realtor]."[18]

Turning to the case at hand, the Court disagrees the contract clearly expresses that Mr. Myers meant to be the sole contracting party with Plaintiff. The second page of the document, signed by Richard B. Carey, discusses Plaintiff's performance of the contract. This page is addressed "To: MR. David Myers." The next page, however, which is expressly titled "Acceptance of Proposal," contains *two* lines with the word "Signature" next to each. Mr. Myers's signature appears on the first line. Mrs. Myers's signature appears on the second line. If the contract were meant to bind Mr. Myers only, this second line, with the word "Signature" typed next to it, would be mere superfluity.[19]

The Court does not believe that any ambiguity exists that Mrs. Myers was indeed a party to this contract. Even if an ambiguity could be found, however, *contra proferentem* does not require that the contract be construed against Plaintiff. "If there exist[s] an ambiguous provision in a negotiated bilateral agreement, extrinsic

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[18] *Id.* 881–82.

[19] Furthermore, in the context of trying to hold one spouse liable for the contracts of the other spouse, such a spouse may be liable under a quasi-contract theory. *See* 41 Am. Jur. 2d *Husband and Wife* § 157 (citations omitted).

evidence should be considered if it would tend to help the court interpret such a provision."[20] Moreover, because the instrument does not distinctly designate the parties,[21] whether Mrs. Myers was a party to the contract presents a fact question, rendering summary judgment inappropriate.

Lastly, the Court rejects Defendants' final argument claiming that the contract was illusory. First, in Paragraph 5 of their answer and counterclaim, Defendants admitted the existence of a contract between themselves and Richard B. Carey. They may not now claim that no contract existed at all.[22]

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[20] *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998) (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232–33 (Del. 1997), a case in which "the fundamental facts that led inexorably to the need to consider extrinsic evidence established that the two parties to the agreement (business people on an equal footing with each other) negotiated back and forth on the key indemnity provision and its risk-allocation consequences." *Wininger*, 707 A.2d at 43)).

[21] The Court does not consider "To: MR. David Myers" on the document's second page to constitute clear designation.

[22] *See Jackson v. Rotach*, 2000 WL 1211516, at *6 (Del. Super. June 8, 2000) ("The law is quite clear that . . . pleadings constitute the admissions of a party opponent and are admissible in the case in which they were originally filed as well as in any subsequent litigation involving that party. A party thus cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories." (quoting *United States v. McKeon*, 738 F.2d 26, 31–33 (2d Cir. 1984)) (internal ellipses omitted)).

Furthermore, Defendants' judicial admission that *they* admit to the existence of a contract with Richard B. Carey weighs heavily against their argument that Mrs. Myers was not a party to the contract.

Second, it is a fundamental principal that "[c]ontracts are to be interpreted in a way that does not render any provisions illusory or meaningless."[23] The provision at issue reads "[i]n case of increase in material cost, it will be the responsibility of the homeowner to cover expenses." This is what is referred to as an "escalator clause."[24] These clauses are not uncommon in the landlord-tenant context.[25] Naturally, the party upon whom such a clause is being enforced desires to repel it:

> Attacks on escalator clauses have usually been based on the claim that, because of the open-price provision, the contract was too indefinite to be enforceable and did not evidence an actual meeting of the minds of the parties, or that the arrangement left the price to be determined arbitrarily by one party so that the contract lacked mutuality. In most instances, however, these attacks have been unsuccessful.[26]

These clauses may also appear in construction contracts, like the one at issue. "Under a provision in a building or construction contract permitting alterations or modifications, the right is limited to changes that do not unreasonably alter the

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[23] *See, e.g.*, *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) (citations omitted) (finding a proffered interpretation of a certain contract provision illusory and meaningless).

[24] *See Black's Law Dictionary* 623 (9th ed. 2009) (defining an escalator clause as "[a] contractual provision that makes pricing flexible by increasing or decreasing the contract price according to change market conditions, such as higher or lower taxes or operating costs.").

[25] *See, e.g.*, *Mergenthaler v. M & K Bus Serv., Inc.*, 1995 WL 339037, at *1 & n.1 (Del. Super. May 22, 1995) (mentioning a clause in a commercial lease that permitted changes to the rent in relation to the Consumer Price Index ("C.P.I."), noting that "C.P.I. clauses are among the most widely used linkage clauses.").

[26] 17A Am. Jur. 2d *Contracts* § 496 (citations omitted).

character of the work or unduly increase its costs."[27] As the Court does not consider the clause in the contract to unreasonably alter the character of the work or unduly increase its costs, the Court does not find the clause illusory.

Based on the foregoing, this Motion is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Cc: Prothonotary
Judicial Case Manager

[27] 17A Am. Jur. 2d *Building, Etc. Contracts* § 16 (citations omitted).