

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

ROSS ISLAND SAND & GRAVEL CO.,

No. 3:15-cv-01369-PK

Plaintiff,

v.

OPINION AND ORDER

LEHIGH SOUTHWEST CEMENT CO.,

Defendant.

PAPAK, Magistrate Judge:

Plaintiff Ross Island Sand & Gravel Co. (Ross Island) brought this action against Defendant Lehigh Southwest Cement Co. (Lehigh), claiming that Lehigh sold it defective cement and that Lehigh agreed to expand the parties' price protection agreement to include additional construction projects. This court granted Lehigh's motion for summary judgment as to the price protection claims and denied it as to the defective cement claims. *Ross Island Sand & Gravel Co. v. Lehigh Southwest Cement Co.*, 2016 WL 6398799 (D. Or. Oct. 27, 2016) (the Opinion). The parties then resolved their remaining disputes, except for Ross Island's claim for attorney's fees.

Ross Island now moves for judgment on its claim for attorney's fees. For the reasons that

follow, I deny the motion.

BACKGROUND

In January 2015, before Ross Island filed this action, Lehigh filed an action against Ross Island in Multnomah County Circuit Court, seeking amounts due under its agreements to sell cement to Ross Island. Later that month, the parties executed a settlement agreement (the 2015 Settlement Agreement), in which Ross Island agreed that it owed Lehigh \$1.3 million. The 2015 Settlement Agreement is the basis for Ross Island's claim for attorney's fees here.

The 2015 Settlement Agreement includes the following release:

5. RELEASES

Subject to the complete and timely performance of all obligations set forth in this Agreement, the Parties, on behalf of themselves and their subsidiaries, parent companies, affiliates, owners, members, shareholders, agents, officers, attorneys, directors, employees, contractors, and representatives hereby release and discharge each other from all claims, counterclaims, cross-claims, causes of action, liens, damages, charges, penalties, and obligations whether known or unknown, or which the Parties have ever had or now have, arising at any time up to the Effective Date of this Agreement (the "**Released Claims**"). Except as expressly set forth herein, the Parties shall each pay their own attorney fees incurred in connection with the Litigation and this Agreement.

Explicitly excluded from the Released Claims are any and all: (i) claims arising from or in any way related to the enforcement of this Agreement; (ii) claims made by Ross Island against Lehigh arising out of the quality of the Product; and (iii) claims that are not otherwise released in this Agreement. Notwithstanding anything to the contrary herein, Lehigh's obligations, if any, under any warranty or warranty exclusion or limitation applicable to any of the Product shall remain unchanged.

Opinion at **3-4 (quoting 2015 Settlement Agreement with emphasis added).

In Lehigh's answer in this action, it asserted as an affirmative defense that the 2015 Settlement Agreement "released in part [Ross Island's] right to pursue certain claims against Lehigh. To the extent that [Ross Island's] claims . . . are covered under the release in the Settlement Agreement, those claims are barred." Def.'s Answer & Affirm. Defenses ¶ 44, ECF

No. 36.

Ross Island now argues that the release in the 2015 Settlement Agreement does not bar its claims here because the claims all arise out of the quality of Lehigh's cement, including the price protection claims. Based on this assertion, Ross Island now contends it should be considered the prevailing party on Lehigh's affirmative defense of release, and therefore is entitled to fees based on the following provision in the 2015 Settlement Agreement:

If any arbitration, action, suit, or proceeding is instituted to interpret, enforce, or rescind this Agreement, or is otherwise in connection with the subject matter of this Agreement, including but not limited to any proceeding brought under the United States Bankruptcy Code, the prevailing party on a claim will be entitled to recover with respect to the claim, in addition to any other relief awarded, the prevailing party's reasonable attorney fees and other fees, costs, and expenses of every kind, including but not limited to the costs and disbursements specified in ORCP 68 A(2), incurred in connection with the arbitration, action, suit, or proceeding, any appeal or petition for review, the collection of any award, or the enforcement of any order, as determined by the arbitrator or court.

Anderson Decl., Ex. 10, at 13, ECF No. 47.

A few months after the 2015 Settlement Agreement, Ross Island brought this action against Lehigh, alleging both that Lehigh sold it defective cement and that Lehigh had agreed to expand the parties' price protection agreement to offer discounted cement prices for additional construction projects. Lehigh moved for summary judgment on all of Ross Island's claims, and Ross Island moved for partial summary judgment on its claim for attorney's fees based on 2015 Settlement Agreement. This court granted Lehigh's motion for summary judgment as to Ross Island's price protection claims, concluding that the price protection claims were barred by the Statute of Frauds. This court denied Lehigh's motion for summary judgment as to Ross Island's defective cement claims, concluding that disputed issues of material fact remained on those claims. This court expressly declined to address whether the release in the 2015 Settlement

Agreement barred Ross Island's price protection claims:

Alternatively, Lehigh contends that it is entitled to summary judgment on Ross Island's price protection claims because of the 2015 Settlement Agreement, which releases all claims except, as relevant here, "claims made by Ross Island against Lehigh arising out of the quality of the Product [i.e., cement]." Lehigh argues that Ross Island's price protection claims are based on the quantity of Lehigh's cement, not its quality.

Because I conclude that the Statute of Frauds bars the price protection claims, I need not address the effect of the 2015 Settlement Agreement.

Opinion at *7. This court also denied Ross Island's motion for partial summary judgment as to Lehigh's affirmative defense based on the release of claims in the 2015 Settlement Agreement, stating, "The affirmative defense may apply to Ross Island's claims related to the Price Protection Agreement." Opinion at *11. This court concluded that "it would be premature to address entitlement to attorney's fees under the 2015 Settlement Agreement." *Id.*

Ross Island now moves for judgment on its Sixth¹ Claim for Relief, which states:

[Lehigh] has asserted an affirmative defense of release, alleging that Ross Island's claims should be denied in whole or in part based on the fact that Ross Island and [Lehigh] executed a Settlement Agreement dated January 23, 2015. [Lehigh] alleges that Ross Island released, in part, its right to pursue certain claims against [Lehigh], including some or all of the claims alleged by Ross Island in this matter.

Under the Settlement Agreement, Ross Island is entitled to recover its reasonable attorney fees and other fees and costs incurred in connection with the subject matter of the Settlement Agreement if Ross Island prevails on [Lehigh]'s affirmative defense of release.

Third Am. Compl. ¶¶ 89-90, ECF No. 31.

LEGAL STANDARDS

The parties agree that in resolving Ross Island's claim for attorney's fees, this court may

¹ Because the Third Amended Complaint, which is the operative complaint, includes two claims each labeled "Second Claim," the Sixth Claim is actually Ross Island's seventh claim.

make findings of fact and conclusions of law without a jury. Fed. R. Civ. P. 52. Ross Island has the burden of proving its claim by a preponderance of the evidence.

In construing the 2015 Settlement Agreement, I apply Oregon law. “Oregon subscribes to the objective theory of contracts.” *Fogg v. Wart*, 06-cv-160-ST, 2006 WL 3716745, at *5 (D. Or. Dec. 14, 2006). “In Oregon, contract interpretation is a question of law for the court.” *Id.* (citing *Anderson v. Jensen Racing, Inc.*, 324 Or. 570, 575, 931 P.2d 763, 765 (1997)).

DISCUSSION

In the 2015 Settlement Agreement, the parties released all possible claims against each other, with the exception, as relevant here, of “claims made by Ross Island against Lehigh arising out of the quality of the Product [i.e., cement].” Lehigh asserted this release as an affirmative defense, alleging that “[t]o the extent that [Ross Island’s] claims . . . are covered under the release in the Settlement Agreement, those claims are barred.” Def.’s Answer & Affirm. Defenses ¶ 44. In response, Ross Island claimed it would be entitled to attorney’s fees under the Settlement Agreement if it prevailed on Lehigh’s affirmative defense of release.

Ross Island has not shown that it is a prevailing party on any claim for purposes of the attorney’s fee provision of the 2015 Settlement Agreement. This court granted Lehigh’s motion for summary judgment in part on the price protection claims, denied Ross Island’s motion for partial summary judgment on Lehigh’s affirmative defense of release, and declined to address entitlement to attorney’s fees. Ross Island is not entitled to attorney’s fees under the Settlement Agreement as a prevailing party.

Ross Island contends that it now may show that it qualifies as a prevailing party. I conclude, however, that the issue is moot in light of this court’s summary judgment rulings and

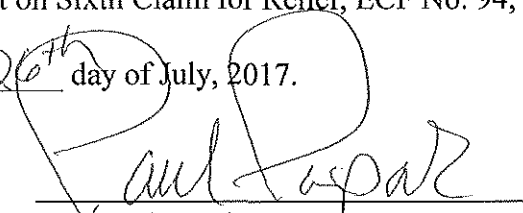
the parties' subsequent settlement.

Even if I were to address the merits of Ross Island's claim for attorney's fees, I would conclude that Ross Island could not show it would prevail on Lehigh's affirmative defense. To prevail, Ross Island would have to show that the release's exception for claims arising out of the quality of cement applies to all of Ross Island's claims, including the price protection claims. I agree with Lehigh that the price protection claims concern the price and quantity of the cement, not its quality.

CONCLUSION

Ross Island's Motion for Judgment on Sixth Claim for Relief, ECF No. 94, is DENIED.

Dated this 26th day of July, 2017.



Honorable Paul Papak
United States Magistrate Judge