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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001756-MR

ESI COMPANIES, INC. APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 08-CI-00442

RAY BELL CONSTRUCTION
COMPANY, INC. APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; LAMBERT,[1] SENIOR JUDGE.

MOORE, JUDGE: This is an action for breach of contract. The controlling issue is whether and to what extent an interpretation of contract provisions in dispute made in a prior action between the parties is binding on them in the present suit.

[1] Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case were substantially stated in its previous disposition before the Tennessee Court of Appeals in *ESI Companies, Inc. v. Ray Bell Const. Co., Inc.*, 2008 WL 544563 (Tenn.Ct.App. 2008) (unpublished):

> Ray Bell Construction Company, Inc. . . . has its principal offices in Brentwood, Tennessee. On October 8, 2001, [Bell] entered into a "Design/Build Contract" with the Commonwealth of Kentucky, Department of Facilities Management . . . to design and construct a project known as the Elliott County Medium-Security Correctional facility, located in Sandy Hook, Kentucky, for a total price of $76,762,000. The bulk of the terms and conditions of the Design/Build Contract were set out in a "Request for Proposal." The Request for Proposal contained the following provision that is central to the issues before us:
>
> W. DISPUTE RESOLUTION
>
> A question or act arising under the [Prime] Contract which is not disposed of by agreement may be brought to the Secretary of the Finance and Administration Cabinet pursuant to Kentucky Revised Statutes 45A.225 through KRS 45A.280. *Actions on the Contract shall be brought in Franklin Circuit Court, Frankfort, Kentucky* within one year from the date of completion specified in the Contract, notwithstanding the requirement to present Contract claims to the Secretary of the Finance Administration cabinet for administrative review.
>
> Pending final determination of any dispute hereunder, the Design/Builder shall proceed diligently with the performance of the

> Contract and in accordance with the Secretary of the Finance and Administration Cabinet's direction.

(Emphasis added.) The Request for Proposal also provided:

> M. PERSONNEL, SUBCONTRACTORS AND SUPPLIERS
>
> 1. Subcontractor Defined: A "Subcontractor" means an entity which has a direct contract with Design/Builder to perform a portion of the Work or the Design Services. . . .
> 3. Terms of Subcontracts: All subcontracts and purchase orders with Subcontractors shall afford Design/Builder rights against the Subcontractor which correspond to those rights afforded to Owner against Design/Builder herein, including those rights of Contract suspension, termination, and Stop Work Orders as set forth herein. . . .

On or around August 5, 2002, the General Contractor entered into a subcontract agreement . . . with ESI Companies, Inc. . . . which has its principal offices in Memphis, Tennessee. Pursuant to the Subcontract, the Subcontractor would furnish and install certain detention and security equipment, metal, hardware, glass, glazing, and doors for the project for the sum of $9,193,449.00. The Subcontract provided, in relevant part:

> This agreement entered into this 23rd day of January, 2002 by and between Ray Bell Construction Company, Inc., hereinafter called Contractor, and ESI Companies, Inc., hereinafter called Subcontractor.
>
> WITNESSETH, that, WHEREAS Contractor has heretofore entered into a Design/Build Contract with Commonwealth

of Kentucky Facilities Management Division of Contract Administration of 702 Capitol Avenue, Frankfort, KY 40601, hereinafter called the Owner, to furnish all labor and materials and perform all work required for Design & Construction of Elliott County, KY Medium Security Correctional Facility, in strict accordance with the general contractor, specifications, schedules and drawings and amendments or addenda prepared by Arch, II of Lexington, KY, and DLR Group, Inc., of Overland Park, KS Architect and/or Engineer which are made a part of said Design/Build Contract, and which are now made a part of this Subcontract insofar as they apply, and the parties heretofore desire to contract with reference to a part of said work.

. . .

ATTACHMENTS "A", "B" AND "C" ARE PARTS OF THIS DOCUMENT AND ESI AMENDMENT #1, PAGES 1 OF 1

. . .

Article VII – (a) Contractor shall have the same rights and privileges as against the Subcontractor herein as the Owner in the Design/Build Contract has against Contractor. Subcontractor shall have the same rights, remedies and privileges against the Contractor herein as the Contractor in the Design/Build Contract has against Owner.[2]

(b) Subcontractor acknowledges that he has read the Design/Build Contract and all plans

[2] The opinion of the Tennessee Court of Appeals states that this provision "is an example of a "flow-down" or "conduit" clause. Flow-Down clauses are commonly used in subcontracts and are closely related to the concept of incorporation by reference. If the clause functions as intended, the same rights and obligations of the subcontractor should flow from the subcontract up through the general contractor to the owner, and conversely down the same contractual chain. The use of flow-down clauses represents efforts to ensure consistency of obligations throughout the various tiers of the contracting process." *ESI,* 2008 WL 544563 at *5 (internal citations omitted).

and specifications together with all amendments and addenda thereto and is familiar therewith and agrees to comply with and perform all provisions thereof applicable to Subcontractor. The intent of the Contract documents is to include all items necessary for the proper execution and completion of the work. The Contract documents are complementary and what is required by any one shall be as binding as if required by all. Work not covered in the Contract documents will not be required, unless it is consistent therewith and is reasonably inferrible therefrom as being necessary to produce the intended results.

. . .

Article XII – It is understood and agreed that the laws of the State of Tennessee will govern interpretation of this contract. The provisions of this document shall be controlling should there be a conflict between its terms and the terms of any attached or referred to materials.

. . .

ATTACHMENT 'B'

. . .

5) IT SHOULD BE UNDERSTOOD BY SIGNATURE OF THIS AGREEMENT THAT THE REQUEST FOR PROPOSAL PREPARED BY THE OWNER PROVIDES INFORMATION AS TO PROJECT OVERVIEW, STATUTORY LAW, MASTER PLAN AND PROGRAM REQUIREMENTS, AS WELL AS, TECHNICAL REQUIREMENTS AND PERFORMANCE FOR MATERIALS, INSTALLATION PRACTICES AND SYSTEMS OPERATION AND PERFORMANCE.

. . .

ATTACHMENT 'C'

. . .

> 1) AS STATED HEREIN, ALL TERMS AND CONDITIONS OF THE CONTRACT BETWEEN THE COMMONWEALTH OF KENTUCKY AND RAY BELL CONSTRUCTION COMPANY, INC. ARE FULLY INCORPORATED HEREIN BY REFERENCE. WITHOUT LIMITING THE FOREGOING STATEMENT, THE CONTRACTOR WOULD SPECIFICALLY REFERENCE THE FOLLOWING TERMS FOR THE BENEFIT OF THE SUBCONTRACTOR.
>
> A. THE TERMS OF SUBCONTRACT: ALL SUBCONTRACTS AND PURCHASE ORDERS WITH SUBCONTRACTORS SHALL AFFORD DESIGN/BUILDER RIGHTS AGAINST THE SUBCONTRACTOR WHICH CORRESPOND TO THOSE RIGHTS AFFORDED TO OWNER AGAINST DESIGN/BUILDER HEREIN, INCLUDING THOSE RIGHTS OF CONTRACT SUSPENSION, TERMINATION, AND STOP WORK ORDERS AS SET FORTH HEREIN. . . .

According to [ESI], it performed all work required of it under the Subcontract. A dispute subsequently arose between [Bell] and [ESI], and on January 12, 2006, [ESI] filed a "Notice of Lien/Claim" with the Finance and Administration Cabinet of the Commonwealth of Kentucky against the funds due to [Bell] under its Design/Build Contract with the Commonwealth. [Bell] procured a bond from Fidelity & Deposit Company of Maryland to release the lien claim.

On May 10, 2006, [ESI] filed a complaint in Shelby County Chancery Court against [Bell]. [ESI] alleged that while working on the Project, it received several directives from [Bell] to perform additional work, which caused [ESI] to incur unanticipated, additional

> costs and expenses, as well as delay damages, for which [ESI] has not been paid.
>
> In response, [Bell] filed a motion to dismiss the complaint for lack of venue. First, Bell contended that the exclusive venue for the dispute was in Franklin County Circuit Court in Frankfort, Kentucky, pursuant to the forum selection clause in the Design/Build Contract that was incorporated by reference in the Subcontract. [Bell] also claimed that it could enforce the forum selection clause against [ESI] because the [Commonwealth of Kentucky] had the right or privilege of enforcing it against [Bell], relying on the "flow down" provision of the Subcontract.
>
> . . .
>
> Following a hearing, the chancellor entered an order simply stating that [Bell's] motion to dismiss for lack of venue was denied. [Bell] filed a motion requesting permission to seek an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, but the trial court denied the motion. [Bell] then filed an application for extraordinary appeal to [the Tennessee Court of Appeals] under Rule 10 of the Tennessee Rules of Appellate Procedure, which [was] granted.

Id. at *1-4.

On February 29, 2008, the Tennessee Court of Appeals reversed and remanded the judgment of the chancery court. Of relevance, the opinion of that Court specifically addressed the issues: 1) "Whether the Subcontract incorporates by reference the forum selection clause contained in the Design/Build Contract, which requires all disputes to be brought in the Circuit Court of Franklin County, Kentucky," and 2) "Whether the forum selection clause is enforceable."

Regarding whether the forum selection clause in the "DISPUTE RESOLUTION" section applied to the subcontract via incorporation by reference, the Tennessee Court of Appeals held:

> [Bell] argues . . . that [ESI's] claim does arise from the Contract because all terms of the Contract were incorporated by reference and made a part of the Subcontract. We agree with [Bell's] contention, as the Subcontract clearly provided that "ALL TERMS AND CONDITIONS OF THE CONTRACT BETWEEN THE COMMONWEALTH OF KENTUCKY AND RAY BELL CONSTRUCTION COMPANY, INC. ARE FULLY INCORPORATED HEREIN BY REFERENCE." Because the terms of the Contract were expressly incorporated into the Subcontract, the language of the Contract became a part of the Subcontract, and both writings must be construed together. *See Staubach Retail Services-Southeast, LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 525 (Tenn. 2005); *T.R. Mills Contractors, Inc. v. WRH Enterprises, LLC*, 93 S.W.3d 861, 870 (Tenn. Ct. App. 2002).
>
> [Bell] also argues that the forum selection clause requires [ESI] to file its lawsuit in Kentucky because of the following provision of the Subcontract:
>
> > Article VII – (a) Contractor shall have the same rights and privileges as against the Subcontractor herein as the Owner in the Design/Build Contract has against Contractor. Subcontractor shall have the same rights, remedies and privileges against the Contractor herein as the Contractor in the Design/Build Contract has against Owner.
>
> [ESI] does not offer any argument as to how this section affects its rights. However, we find that this provision is dispositive of the issue before us and requires [ESI] to file its action in Kentucky. It is undisputed that the [Commonwealth of Kentucky] had the "right" against [Bell] to have any actions against it

> filed in Franklin County Circuit Court in Frankfort, Kentucky. *Black's Law Dictionary*, 8th Ed. 2004, defines a "right," as used in this context, as "[a] legally enforceable claim that another will do or will not do a given act." If [Bell] did not file its action in Kentucky, the Owner could assert the forum selection clause in order to have its right enforced. *See, e.g., Woodruff v. Anastasia Intern., Inc.*, No. E2007-00874-COA-R3-CV, 2007 WL 4439677, at *4 (Tenn. Ct. App. Dec. 19, 2007) (speaking of a party's "right" to assert a forum selection clause defense). Pursuant to the flow-down clause, [Bell] has the same right to enforce the forum selection clause against [ESI]. Similarly, [Bell's] corresponding remedy against [the Commonwealth] was to file an action in Kentucky, and pursuant to the flow-down provision, [ESI] has that same remedy. A "remedy" is defined by *Black's Law Dictionary*, 8th ed. 2004, as "the means of enforcing a right or preventing or redressing a wrong; legal or equitable relief." In sum, we find that the flow-down provision of the Subcontract required [ESI] to file any actions against [Bell] in Franklin County Circuit Court in Frankfort, Kentucky, just as [Bell] would have proceeded with claims against the [Commonwealth].

ESI, 2008 WL 544563 at *4-5.

As such, the Tennessee Court of Appeals held that the forum selection clause in the Design/Build Contract was effectively incorporated into the Subcontract, and that the "flow-down" clause provided ESI and Bell the same rights against each other as Bell had against the Commonwealth. That Court further held that the forum selection clause gave Bell an enforceable right to venue in the Franklin Circuit Court in Frankfort, Kentucky. Because the Tennessee Court of Appeals found that Bell had exercised that right, ESI's complaint was dismissed as a consequence.

On March 12, 2008, after the Tennessee Court had dismissed ESI's case, ESI filed a complaint against Bell, substantially similar to the complaint it filed in Tennessee, in the Franklin Circuit Court. However, Bell again moved to dismiss ESI's claims, this time on the basis of the clause contained in the Design/Build Contract's "Dispute Resolution" provision, which limited the period of time for asserting actions under the contracts to one year from the specified date of completion. Bell argued that, in light of the holding of the Tennessee Court of Appeals, ESI was collaterally estopped from contesting that the one-year limitation applied to the Subcontract in the same manner as the forum selection clause. The completion date specified in ESI's Subcontract was December 18, 2003; Bell's completion date for its Design/Build Contract, specified in a change order issued by the Commonwealth, was September 27, 2004. Thus, Bell argued that under either completion date, ESI's filing of its action on May 10, 2006, was untimely under the one-year limitation.

ESI contended that the one-year contractual limitations period did not apply because 1) the concept of a one-year limitation originated from Kentucky's Model Procurement Code, KRS 45A.225 through KRS 45A.280, and the Model Procurement Code only applies to disputes between the general contractor and the Commonwealth, and not to subcontractors; 2) the terms of ESI's Subcontract state that it incorporates the terms of the Design/Build Contract only "where applicable," and no language stated that the terms of the Design/Build Contract would be incorporated into the Subcontract for the specific purpose of determining

a period of time limiting claims arising under its Subcontract; 3) applying a one-year limitation period against ESI would work an undue forfeiture upon ESI's rights; 4) collateral estoppel could not apply because a dismissal on the basis of venue is not a dismissal "on the merits," as that doctrine requires; 5) its claims were timely because Kentucky law provides a fifteen-year statute of limitations for contract actions, and 6) ESI last performed substantive work on the project on March 30, 2007, which was accepted by Ray Bell and pursuant to extra work directives issued by Ray Bell.

In further support of its last contention, ESI provided a sworn affidavit from its President, Warner Speakman, stating that:

> As a consequence of the extra work directives, the delays and impacts to ESI's prosecution of its work on the Project, ESI did not complete its substantive work on the Project until March 30, 2007. During this time frame, in which I was personally on-site to review the situation and associated work involved, ESI's work activities included providing additional work, labor, services, materials in connection with the electronic perimeter security fence on the Project and ensuring that it complied with the proper design requirements for the integrated security system and completed the fully functional detention facility.
>
> In fact, as reflected in the attached weekly time sheet record for Harold Dale Felts, one of ESI's technicians, ESI performed work on the Project specifically regarding the aforementioned extra or changed work issue from March 24-30, 2007. A true and correct copy of the time sheet for Mr. Felts' work on the Project during the period of March 24-30, 2007 is attached hereto as Exhibit A-2.

ESI also included timesheets for the period of March 24 through March 30, 2007, noting that Felts had spent time at "Job 2058" in "ELLIOT CO."

In an opinion and order dated August 14, 2008, the Franklin Circuit Court dismissed ESI's claims against Bell as untimely. Specifically, the court held that collateral estoppel barred ESI from contending that the one-year claims limitation contained in the Design/Build Contract was not also incorporated into its Subcontract, and that it required ESI to assert its claims against Bell no later than September 26, 2005. Regarding ESI's contention that its last substantive work on the project was not performed until March 30, 2007, the trial court held that "the terms of the contract make it clear that that is not the appropriate date from which the contractual time limit is to run."

On appeal, ESI restates the same six contentions it made before the trial court in opposition to the application of the one-year claims limitation contained in the Design/Build Contract. Taken as a whole, these contentions may be summarized as contesting 1) whether the one-year claims limitation actually was incorporated into its Subcontract; and 2) whether the one-year claims limitation, if incorporated, may be enforced against ESI. We hold that ESI is collaterally estopped from contesting the incorporation of the one-year claims limitation into its Subcontract. However, we also hold that there remains a genuine issue of material fact as to whether the conduct of the parties caused this term to be waived.

STANDARD OF LAW

Although Bell moved to dismiss for failure to state a claim pursuant to Kentucky Rule of Civil Procedure (CR) 12.02(f), it attached to its motion the supporting affidavit of its project manager, Randy Young, as a means to substantiate ESI's original contract completion date and prove that ESI's claims were outside the one-year limitation clause. This affidavit was an item outside of the pleadings. As ESI made no objection to its introduction, we treat Bell's motion to dismiss as a motion for summary judgment. *See Cabinet for Human Resources v. Women's Health Services, Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994); *see also, Pearce v. Courier-Journal*, 683 S.W.2d 633, 635 (Ky. App. 1985).

As Bell's motion to dismiss is converted into a motion for summary judgment, the issue is not whether the complaint states a claim but whether the record discloses a genuine issue of fact. *See* CR 56.03. As such, when considering a motion for summary judgment, the court is to view the record in the light most favorable to the party opposing the motion, and all doubts are to be resolved in that party's favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky.1991). The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue of material fact exists. *Id*. The moving party bears the initial burden of showing that no issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *See Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

ANALYSIS

We begin by first addressing whether the Tennessee Court of Appeals' previous holding now precludes ESI from contesting that the "flow-down" clause of the Design/Build Contract incorporated the "one-year limitation of actions" clause into the Subcontract. We hold that ESI is so precluded.

In determining the effect of the prior judgment on whether the terms of the Design/Build Contract were incorporated into the Subcontract, the issue of collateral estoppel is dispositive; it bars the relitigation of certain facts necessarily determined in the former action. *See Moore v. Commonwealth*, 954 S.W.2d 317, 319 (Ky. 1997); *see also King v. Brooks*, 562 S.W.2d 422, 424 (Tenn. 1978) ("Under the doctrine of collateral estoppel, when an issue has been actually and necessarily determined in a former action between the parties, that determination is conclusive upon them in subsequent litigation.") The essential elements of collateral estoppel are: 1) identity of issues; 2) a final decision or judgment on the merits; 3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and 4) a prior losing litigant. *See Moore, supra*.

Here, the meaning and implication of the "flow-down" clause and the Subcontract's "incorporation by reference" of the Design/Build Contract were at issue in the prior suit between these parties, and the Subcontract, by its own terms, is subject to interpretation under the laws of Tennessee. The Tennessee Court of Appeals interpreted these provisions and whether, through them, the term designating venue in the Design/Build Contract was also incorporated into the

Subcontract and binding upon ESI. In order to do so, the Court first determined that all of the terms of the Design/Build Contract were expressly incorporated into the Subcontract, that the language of the Design/Build Contract became a part of the Subcontract, and that both writings must be construed together. Second, that Court determined that the Subcontract's flow-down clause mandated that ESI had the same rights, remedies and privileges against Bell as Bell in the Design/Build Contract had against Kentucky, and vice-versa. *See ESI Companies, Inc. v. Ray Bell Const. Co., Inc*., 2008 WL 544563 at *4 (Tenn. Ct. App. 2008) (unpublished). As a result of the incorporation of the Design/Build Contract into the Subcontract, the term designating venue in the Design/Build Contract was applied to the Subcontract. In turn, Bell was entitled to venue in the Franklin Circuit Court. The Tennessee Court of Appeals determined that right was enforceable. And because the Tennessee Court of Appeals found that Bell had exercised that right, ESI's complaint was dismissed as a consequence.

In sum, the Tennessee Court of Appeals has already applied Tennessee law and decided that all of the terms of the Design/Build Contract have been incorporated into the Subcontract. The Court determined that the flow-down clause gave ESI and Bell the same rights against each other as Bell had against the Commonwealth and that the selection of forum was a "right" covered under the flow-down clause.

With regard to the limitation upon the period of time in which a claim may be brought under contract, we likewise restate the reasoning of the Tennessee

Court of Appeals. Analogous to the selection of forum, the limitation upon the period in which a claim may be brought under contract is also a "right" within the definition provided by the Court. The Commonwealth had the "right" against Bell, under the dispute resolution provision, to have any actions against it filed in Franklin Circuit Court within one year of the date of completion specified in the Design/Build Contract. If Bell did not file its action within one year of the date of completion, the Commonwealth could assert the dispute resolution clause in order to have its right enforced. Pursuant to the flow-down clause, Bell has the same right to enforce the dispute resolution clause against ESI. Similarly, Bell's corresponding remedy against the Commonwealth was to file an action in Kentucky within one year of the date of completion, and pursuant to the flow-down provision, the Subcontractor has that same remedy. In sum, the flow-down provision of the Subcontract required ESI to file any actions against Bell within one year of the specified date of completion, just as Bell would have proceeded with claims against the Commonwealth.

ESI argues that a dismissal on the basis of venue does not constitute a "judgment on the merits" as required by the doctrine of collateral estoppel. Under the specific circumstances of this case, we disagree. The issues resolved by the Tennessee Court of Appeals did not consist only of whether the Shelby County Chancery Court was the particular locality where ESI's suit should have been heard, *i.e.*, whether venue was proper. Another issue was whether the meaning of the Design/Build Contract and Subcontract, construed together, demonstrated that

Bell had the contractual right to venue elsewhere and, in light of Bell's exercising that right, whether ESI had met a condition precedent to filing suit. In simply classifying that Court's dismissal as "not on the merits," ESI is essentially disputing the Tennessee Court's interpretation of the forum selection clause, the flow-down clause, and the contracts as a whole.

The parties fully litigated whether Bell's right to forum in the Franklin Circuit Court had been incorporated into the Subcontract by invoking terms of the contracts that required proofs and interpretations. Determining that *all* of the terms of the Design/Build Contract were necessarily incorporated into the Subcontract was the essence of the Tennessee Court of Appeals' resolution of whether Bell had the right to venue elsewhere as it was a prerequisite to incorporating the Design/Build Contract's forum selection clause into the Subcontract and ultimately dismissing ESI's claims.

The general rule of collateral estoppel is "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27. That Court's resolution of these issues is conclusive upon the contracts in the present action. Its application may not be altered without altering that Court's interpretation of the contracts. Regardless of whether the parties or this Court agree with that result, that Court's interpretation of these contracts has become final; any objections should have been raised before

the Tennessee Supreme Court in the prior case. They were not, and the decision is now binding.

Nevertheless, while we agree that the terms of the Design/Build Contract were incorporated into the terms of the Subcontract, we disagree that such incorporation necessarily required the dismissal of ESI's claims against Bell on the basis of the contractual limitations period. Here, the trial court erred in dismissing ESI's claims without also considering the effect of ESI's continued work on the project, through March 30, 2007, upon the term's enforceability.

In Tennessee, a contractual limitations period, like any other term in a contract, may be waived by the conduct of the parties. As stated by the Tennessee Court of Appeals,

> [i]t is true that parties to a contract are generally free to impose whatever conditions they wish on their contractual undertakings and that if such conditions are not literally met or exactly fulfilled, no liability can arise on the promise qualified by the conditions. However, it is also "well established that a party to a contract may waive a condition precedent to his or her own performance of a contractual duty, even in the absence of a provision in the contract expressly authorizing a waiver." This is so even where . . . the contract contains a clause stating that the entire agreement will be null and void if the condition is not met. If, in spite the failure of the condition precedent, the party in whose favor it was drafted performs or receives performance under the contract, the condition precedent is waived. The contract will be enforced despite the nonoccurrence of the condition, and the party that waived the condition is estopped from asserting the failure of the condition as a defense in a suit to enforce the agreement.

Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt University, 174 S.W.3d 98, 115 (Tenn. Ct. App. 2005) (internal citations omitted).

In the case at bar, the affidavit of Speakman, as well as Felt's timesheets, taken in the light most favorable to ESI, are some evidence demonstrating that ESI continued to work at the project at the request of Bell and that Bell received its performance pursuant to the contract until March 30, 2007. We find that this evidence creates a genuine issue of material fact regarding whether Bell did in fact accept ESI's performance subsequent to the specified date of completion, and whether, through its conduct in accepting ESI's performance subsequent to the specified date of completion, Bell waived its right to assert that the one-year period started to run earlier than March 30, 2007.

Bell argues at length that the contractual one-year limitation period is *incorporated* into ESI's Subcontract. However, Bell offers no argument as to how the issue of ESI's continued performance and its acceptance of ESI's performance, following the contract's specified date of completion, could affect its right to *enforce* the contractual one-year limitation period, which period is entirely dependent upon that date of completion. Rather, Bell contends that this fact is irrelevant in light of the date specified in the contract, and in support cites our decision in *Jasper Contracting Co., Inc. v. Commonwealth*, 890 S.W.2d 296 (Ky. 1994). We disagree.

In *Jasper*, a contractor agreed to perform work for the Commonwealth's Finance and Administration Cabinet and to complete that work

by January 31, 1992. On that date, the work was completed, but not properly. *Id.* at 298. Between May 19, 1992, and March 4, 1993, consulting engineers and Finance's engineers (but not purchasing officers) sent the contractor a series of letters. These letters first stated that the contractor's work was unsatisfactory, later stated that the contractor had until a certain date to decide whether it intended to satisfactorily complete its work or pay to have the work done, and finally stated that Finance would pay the contractor $3,000 for the work it had done, but would complete, to its satisfaction, the contractor's work by some other manner. In closing, it added that the contractor would no longer be involved with the project.

The contractor filed suit on April 6, 1993, and its case was dismissed based upon the one-year statute of limitations contained in KRS 45A.260. The contractor argued that the statute of limitations did not begin to run until the project was completed or terminated, and that its cause of action did not accrue until March 4, 1993, when Finance clearly stated that the project with the contractor was over. In affirming the dismissal, the Kentucky Supreme Court held that the one-year limitation ran from the date of completion specified in the contract. Further, the Court held that while the agreement could have been modified, there were no other change orders, and the letters upon which the contractor relied were signed by either a consulting engineer or one of Finance's engineers, not an authorized agent (*i.e.*, a purchasing officer) as required by statute.

The facts of this case are distinguishable from *Jasper*. *Jasper* turned upon the issues of whether a one-year statute of limitations was fair and whether

someone other than a purchasing officer had the authority to validly modify the date of completion specified in the contract. In *Jasper*, the issue of waiver through the acceptance of further performance did not arise because there was no allegation that that contractor did any further work after the date specified for the project's completion, or that the contractor's work, completed after that date, had been accepted under the terms of the contract. Here, the Speakman affidavit and Felt's timesheets, taken in the light most favorable to ESI, are some evidence that ESI did further work after the date specified for the project's completion, and that that work was accepted by Bell.

As noted by the Tennessee Court of Appeals on the previous disposition of this case, "a 'right,' [is] 'a legally enforceable claim that another will do or will not do a given act.'" *ESI*, 2008 WL 544563 at *5. Nothing prevents the Commonwealth from voluntarily waiving an affirmative defense granted to it through statutory right. Likewise, nothing prevents a general contractor, who has borrowed from one of the Commonwealth's statutes to craft a contractual right against a subcontractor, from voluntarily waiving that right as well.

CONCLUSION

Whether Bell has presented the one-year limitation clause as a meritorious basis for dismissal of ESI's claims is an issue that would be better addressed substantively on the merits. For the reasons herein stated, we AFFIRM the decision of the Franklin Circuit Court as it relates to the incorporation of the one-year limitation clause into ESI's subcontract, REVERSE its decision as it

relates to the enforceability of the one-year limitation clause, and REMAND for further consideration of whether Bell waived its right to enforce said clause.

ALL CONCUR.

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ORAL ARGUMENT FOR APPELLANT:

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