IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vern's Electric, Inc.	:	
	:	
v.	:	
	:	No. 1197 C.D. 2007
Mount Lebanon School District	:	
	:	
v.	:	Argued: May 6, 2008
	:	
Turner Construction Company	:	
	:	
v.	:	
	:	
Maracon, Inc.	:	
	:	
Appeal of: Maracon, Inc.	:	

BEFORE: HONORABLE ROCHELLE FRIEDMAN, Judge
HONORABLE RENEÉ COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge[1]

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER[2] **FILED: September 12, 2008**

This case involves Maracon, Inc.'s (Maracon) claims for breach of a school construction contract against Mount Lebanon School District (District) and Turner Construction Company (Turner). Maracon appeals from an order of the Court of

[1] This matter was argued before a panel consisting of Judge Friedman, Judge Cohn Jubelirer and Senior Judge Colins. Because of the conclusion of Senior Judge Colins' service, the case was submitted on briefs to Judge Butler for consideration as a member of the panel.

[2] This case was reassigned to the opinion writer on July 16, 2008.

Common Pleas of Allegheny County (trial court) granting the motions for summary judgment and related motions in limine of the District and Turner. Maracon argues that the trial court erred in concluding that: (1) Maracon failed to give the District and Turner notice of its claims within 21 days as required by a provision of the contract for construction of the Markham School (Contract); (2) Maracon waived certain claims through a settlement agreement between itself, the District, and Turner; (3) certain of Maracon's claims are barred by an exculpatory clause in the Contract; (4) the Contract bars certain of Maracon's claims as consequential damages; and (5) Maracon waived certain of its claims involving another school construction project by entering into a waiver regarding that project. We affirm in part, reverse in part, and remand this matter to the trial court.

On March 31, 2004, Maracon entered into the Contract with the District. The Contract comprises the General Conditions of the Contract for Construction (General Conditions), the Supplementary Conditions of the Contract for Construction (Supplementary Conditions), the Summary of Work, and AIA Document A101/CMa – 1992 (AIA Document). Maracon was the prime contractor for general trades on the construction of the Markham School (Markham Project). Other prime contractors included contractors for HVAC work, plumbing and fire protection work, electrical work, casework, and window installation. The District also made contracts for asbestos abatement, moveable fixtures, and equipment.

The parties originally intended construction to commence in April 2004 and to be substantially completed by the beginning of the school year in September

2004. The completion date of the Markham Project was October 1, 2004. The Markham Project did not begin as scheduled, which led to problems with the scheduling and coordination of the prime contractors. While the Markham Project was still underway, Maracon sent a number of letters to Turner regarding failures of timely or adequate performance by Turner or by other prime contractors, lack of access to portions of the worksite, and acceleration of the work due to the delay of the Markham Project's start and the District's unwillingness to extend the completion date.

On November 24, 2004, after the Markham Project had been substantially completed, Maracon, by correspondence (Demand Letter), made a demand to the District, Turner, and the Markham Project architect for events which Maracon alleged had delayed the work and increased its costs in performing the Contract. Maracon and the District settled some of the claims raised in the Demand Letter through a Settlement Agreement entered into on November 3, 2005 (Settlement Agreement).

In January 2006, Maracon filed suit against the District and Turner[3] alleging various breaches of the Contract, chiefly relating to additional expenses caused by the District's and Turner's failure to properly supervise and coordinate the prime contractors and to make allowances for delays in the schedule. These claims related both to the expenses Maracon incurred in performing additional or out-of-sequence work, or performing work in a shorter time than expected

[3] Other parties were also involved in the suit, including the Markham Project's architect and electrical prime contractor; however, these parties settled and are not parties to this appeal.

(acceleration/delay claims), and in the expenses Maracon incurred due to financial difficulties of one of its subcontractors (Davis claims).[4]

The District moved for summary judgment, which the trial court granted. The trial court held that: (1) Maracon failed to give timely notice of its claims as required by the Contract; (2) Maracon waived the Davis claims by entering into the Settlement Agreement; (3) exculpatory clauses of the Contract bar those of Maracon's claims dealing with failures by other prime contractors to perform under the Contract and, because Maracon's expert failed to segregate damages caused by the failures of other prime contractors from damages caused by the breaches of the District or Turner, Maracon's claims were barred; (4) the Davis claims were barred by clauses in the Contract exempting consequential damages; and (5) by accepting final payment for the construction of Jefferson Elementary School (Jefferson Project), Maracon waived any claims relating to the Jefferson Project. Maracon appealed the trial court's grant of the District's motion for summary judgment, and the matter is now before this Court.[5] Before this Court, Maracon argues that the trial court erred in each of the holdings enumerated above.

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[4] Due to cash flow problems allegedly caused by the problems with the Markham Project which Maracon complains of, one of its subcontractors, Davis Interiors (Davis), became insolvent before the completion of the Markham Project. The insolvency of Davis exposed Maracon to liability to one of Davis' suppliers, Architectural Interior Products (AIP), and to two labor unions representing Davis' employees. Maracon settled the suit by AIP for $187,500 and settled three suits by the unions for a total of $57,428. With attorney's fees and a "reasonable 15% mark-up on these Damages," Maracon's expert opines that Turner and the District owe Maracon $320,282.54 as a result of Davis' insolvency. (Report of Ellis Consulting Services at 73-75.)

[5] In reviewing a trial court's grant of summary judgment, this Court's review "is limited to determining whether the trial court committed an error of law or abused its discretion." Fagan v. Department of Transportation, 946 A.2d 1123, 1125 (Pa. Cmwlth. 2008). It is also worth

Maracon's first argument is that the trial court erred in holding that the District failed to comply with the 21-day notice requirement provided for in the Contract. Section 4.7.3 of the General Conditions states that "[c]laims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice." (General Conditions § 4.7.3.) Section 4.7.7 of the Supplementary Conditions states with regard to claims for additional cost that "the Contractor's Claim shall be made in writing within 21 days after the occurrence of the event giving rise to the Claim." (Supplementary Conditions § 4.7.7.) The trial court first considered whether Maracon gave the District timely notice of its acceleration/delay claims. The trial court construed Maracon's letters to the District as proof that Maracon knew of the conditions giving rise to its claims, but did not consider these letters to be notice to the District of the claims. Rather, the trial court considered Maracon's Demand Letter to be the first notice it gave to the District or Turner regarding its acceleration/delay claims or claims for additional work.

Maracon argues that it could not quantify the damages caused by the problems it raised in its letters until the end of the Markham Project, and through the letters it did notify the District and Turner of the problems it was experiencing on the Markham Project. We agree. In James Corp. v. North Allegheny School District, 938 A.2d 474 (Pa. Cmwlth. 2007), this Court considered a contract for

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noting that the evidentiary record must "be viewed in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." Id.

school construction with a nearly identical notice provision.[6] In James Corp., this Court determined that the school district in that case "clearly knew of the operative facts giving rise to the construction delays and Contractor's claims for accelerated work. . . . Thus the notice provisions of the contract, albeit informally, were satisfied." Id. at 486. Likewise, in this case, Maracon notified Turner and the District of the operative facts underlying its claims through the letters it sent to Turner. The District argues that James Corp. is distinguishable on this point because, "in James, the Court concluded that the 'School District had actual notice of Contractor's claims and, therefore, that the contractor sufficiently satisfied the notice provisions of the contract." (District's Br. at 18 n.11 (quoting James Corp., 938 A.2d at 486).) However, in James Corp., this Court considered the school district's knowledge of the operative facts of the claim: that the school district knew the project to be behind schedule and that the school district had not extended the project completion date "or take[n] other corrective measures." James Corp., 938 A.2d at 486. Likewise, here, Turner and the District were aware that the Markham Project had started behind schedule, and Maracon's letters notified them that Maracon was forced to perform additional work, accelerated work, and out-of-sequence work due to the delay and the necessity of meeting the completion deadline. Therefore, the trial court erred in concluding, for purposes of summary judgment, that Turner and the District did not receive notice of Maracon's acceleration/delay claims within 21 days as required by the Contract.

[6] The notice provision at issue in James Corp. stated, "[c]laims by either party must be made within 21 days after occurrence of the events giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice." James Corp., 938 A.2d at 485 n.10.

The trial court next considered whether Maracon gave timely notice of the Davis claims to the District. Again, the trial court found that Maracon knew that the lawsuit from which the Davis claims stemmed began in February 2005, but Maracon did not disclose the details of the Davis claims until November 2006, after the suit against the District had already commenced. The trial court determined that Maracon had failed to give timely notice of its claims to the District and that these claims were, therefore, barred by the notice provisions of the Contract. Maracon argues that it could not give notice of these claims until after the Markham Project was completed and that these claims do not, therefore, fall within the 21-day notice provision. Alternately, Maracon argues that the Davis claims should merely be seen as additional damages arising from its acceleration/delay claims, of which Turner and the District had notice.

We agree with Maracon's alternative argument. The Davis claims are essentially additional damages which Maracon alleges resulted from the same underlying conduct that Maracon gave notice of to Turner and the District, as discussed above. Therefore, we hold that the trial court erred in concluding, for purposes of summary judgment, that Maracon did not give timely notice of the Davis claims to Turner and the District as required by the Contract.

Next, Maracon argues that the trial court erred in concluding that the Settlement Agreement bars Maracon from asserting the Davis claims. Maracon argues that in interpreting the Settlement Agreement, this Court should look not only to the plain meaning of the Settlement Agreement itself, but to the extrinsic evidence showing the alleged intent of the parties. We disagree.

Generally, settlements are governed by contract law. Porreco v. Maleno Developers, Inc., 761 A.2d 629, 632-33 (Pa. Cmwlth. 2000). While Maracon attempts to argue that it did not intend to waive the Davis claims, the parol evidence rule bars evidence of such intention unless the agreement is ambiguous. Pavlich v. Ambrosia Coal & Constr. Co., 441 Pa. 210, 213, 273 A.2d 343, 345 (1971). A contract is ambiguous when it is reasonably subject to more than one interpretation. Gamble Farm Inn v. Selective Ins. Co., 656 A.2d 142, 143-44 (Pa. Super. 1995).

The Settlement Agreement states:

> The submittal of such a Final Payment Application by Maracon and receipt of payment thereof from the School District shall constitute a waiver of any and all claims by Maracon, including, but not limited to, requests for change orders, excepting only Maracon's delay/acceleration claim *as set forth* in its correspondence to Turner Construction Company . . . .

(Settlement Agreement ¶ 3 (emphasis added).) Most notable is the language "*as* set forth." The Settlement Agreement is clear that Maracon's acceleration/delay claims are only preserved to the extent it was set forth in the Demand Letter. In the Demand Letter, Maracon set forth specific damages it incurred as a result of what it alleges were failings by Turner, other contractors, or the District. Maracon specifically stated that it incurred $281,445 in additional labor costs and was owed an additional $320,620 for unpaid work on change orders. Maracon did not hold open the possibility that it might be owed other damages as a result of the delays, additional costs, or unpaid work. Such damages are of a different nature than those Maracon set forth in the Demand Letter. Even if Maracon was not aware of the possibility of consequential damages, such as the bankruptcy of one of its

subcontractors, when it wrote the Demand Letter, it was aware of the same when it entered into the Settlement Agreement nearly one year later. Additionally, the Demand Letter explicitly states that "[n]o claims are included on behalf of any subcontractors of Maracon on the Markham Project who may have incurred similar such delays, inefficiencies or other such financial impacts by reason of the matters set forth herein or otherwise." (Demand Letter at 10.) Clearly, then, by the language of the Demand Letter, it did not include claims stemming from the impact of the alleged delays or inefficiencies of Maracon's subcontractors. Therefore, the trial court did not err in holding that the Settlement Agreement bars Maracon's assertion of the Davis claims.[7]

Next, Maracon argues that the trial court erred in holding that exculpatory clauses in the Contract bar Maracon's acceleration/delay claims. Maracon, in the Settlement Agreement, preserved seven claims which this Court must address: (1) that the District and Turner failed to timely obtain trailers for use as temporary classrooms, delaying the beginning of the Markham Project by three weeks; (2) that the District effectively moved the completion date from October 1, 2004 to late August by requiring the second floor ceilings to be installed for a life safety inspection; (3) that the District and Turner failed to coordinate the schedules of the prime contractors, resulting in delays and inefficiencies for Maracon; (4) that the District and Turner failed to respond to Maracon's requests for information in a timely manner; (5) that Maracon did not have access to an elevator shaft where it needed to do work; (6) that asbestos abatement took weeks longer than provided for in the project schedule, restricting areas in which Maracon could work; and (7)

[7] Because of our holding on this issue, we do not reach Maracon's fourth and fifth arguments on appeal, both of which dealt only with the Davis claims.

that lighting and power on the jobsite were inadequate. The trial court found that these claims were barred by exculpatory clauses in the Contract, particularly sections 4.10 and 4.11 of the Supplementary Conditions. The trial court also found that these claims were barred by Maracon's failure to differentiate between damages and delays caused by the District or Turner and those caused by other contractors.

In support of its holding that Maracon's claims on these seven issues were barred by exculpatory clauses in the Contract, the trial court cited Guy M. Cooper, Inc. v. East Penn School District, 903 A.2d 608 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 591 Pa. 706, 918 A.2d 748 (2007). In Cooper, this Court was presented with a similar case in which a contractor argued that the owner-school district was responsible for damages the contractor sustained resulting from failing to resolve scheduling conflicts between the contractors, failing to "make work areas available," failing to "timely respond to requests for information," and otherwise failing to ensure timely completion of the project. Id. at 612 n.3. The school district argued that it was not liable for these claims by virtue of a no damages for delay clause in the contract. Similar to Maracon's argument in this case, the contractor in Cooper argued that the exculpatory clause should not be enforced because the school district had "failed to act on an essential matter necessary for the prosecution of its work." Id. at 613. This Court noted that:

> Generally, 'no damages for delay' clauses are enforceable. However, Pennsylvania law recognizes exculpatory provisions in a contract cannot be raised as a defense where (1) there is an affirmative or positive interference by the owner with the contractor's work, or

> (2) there is a failure on the part of the owner to act on some essential matter necessary to the prosecution of the work.

Id. Additionally, this Court relied on Henry Shenk Co. v. Erie County, 319 Pa. 100, 178 A. 662 (1935), for the principle that:

> In construction work, an owner does not generally guarantee or indemnify against loss occasioned by the delays of independent contractors connected with the work which may be reasonably anticipated. The owner fulfills his duty when he selects as contractor a person generally known as responsible. Where contracts contain a provision against delay of other contractors or other incidents of the work, which provide in substance . . . for no liability on the part of the owner for delays of contractors or changes in work, such provision includes delays of other contractors in connection with the work, or delays which are covered by the contract or reasonably anticipated from the circumstances attending the project. But such provisions have no reference to an affirmative or positive interference on the part of the owner or his representative apart from the contract, or ordinarily to a failure to act in some essential matter necessary to the prosecution of the work unless delay in performance is contemplated by the contract . . . .

Shenk, 319 Pa. at 104, 178 A. at 664 (citations omitted) (quoted in Cooper, 903 A.2d at 614-15.) This Court, in Cooper, found that the school district was not responsible for the delays and other failures alleged by the contractor because the failures the contractor complained of fell, under the terms of the contract, within the duties of the general contractor, and not the school district. Cooper, 903 A.2d at 615. Therefore, in this case, we must look to the terms of the Contract and determine whether the failings Maracon complains of were the responsibility of Turner, the District, or other contractors.

Maracon's first allegation is that the District and Turner failed to set up temporary trailers within the timeframe contemplated by the Contract, delaying the availability of the worksite. The Contract documents on record do not reveal whose contractual responsibility it was to provide the trailers. Because the Contract is silent on this point, it is possible that it was the responsibility of the District or Turner to provide the trailers. If it was the responsibility of either the District or Turner to provide the trailers and it failed to do so, this could be a failure to act on a matter essential to the work. Therefore, this issue must be remanded to the fact finder.

Maracon's second allegation is that the District and Turner required Maracon to complete the second floor ceiling sooner than the date provided for by the Contract in order to ready the area for a life safety inspection. Maracon argues that Turner required the ceilings on the second floor to be finished earlier than provided in the original bid documents. Maracon argues that Turner later required the second floor ceiling to be finished in time for a life safety inspection to ensure that the building complied with the requirements of the local fire code. The crux of this argument is that Turner required Maracon to perform work out of sequence and sooner than expected in order to comply with local codes and regulations. This is the sort of request envisioned by the Contract documents. The Contract provided that work necessary for Life Safety Equipment Certifications had to be substantially complete by August 25, 2004. (AIA Document § 3.2.) Additionally, the Contract provides that "[n]o increase in Contract Sum shall be allowed or authorized by the Owner on account of overtime employment or premium time compensation or similar additional expenses which any Contractor . . . engaged in

or in conjunction with the Work may incur." (Supplementary Conditions § 3.3.5.) Therefore, Maracon's claim that Turner ordered it to do work by late August in preparation for the life safety inspection, and that Maracon should be compensated for the additional expenses it incurred in accomplishing this, is not supported by the Contract language.

Third, Maracon alleges that the District and Turner failed to coordinate the schedules of the prime contractors, resulting in inefficiencies. There is no language in the Contract indicating that the District has any responsibility for coordinating the schedules of the prime contractors. In fact, the Contract states:

> [w]hen separate Contracts are let within the limits of any one project, each Contractor shall conduct his work so as not to interfere with or hinder the progress of completion of the Work being performed by other Contractors. *Contractors working on the same project shall coordinate and cooperate with each other as directed*.

(Supplementary Conditions § 4.10.2 (emphasis added).) The exculpatory clauses of the Contract state that the District is not responsible for the failure of the contractors to work in harmony. The Contract is ambiguous, however, regarding whether Turner had any obligation to coordinate the work of the contractors. In addition to the language quoted above, regarding the duty of the contractors to coordinate their schedules, the Contract also states that "[t]he Construction Manager will schedule and coordinate the activities of the Contractors in accordance with the latest approved Project construction schedule." (General Conditions § 4.6.4.) Because it is unclear whether Turner had a duty to coordinate the schedules of the contractors, or whether it was the contractors' duty, alone, to

coordinate their schedules, this issue, with regard to Turner, must be resolved by the fact finder.

Fourth, Maracon alleges that the District and Turner failed to compel the architect to timely respond to its requests for information. The exculpatory clauses of the Contract do not exempt the District or Turner from liability for a failure of the architect to timely respond to requests for information. Therefore, the issue of whether the architect failed to timely respond and whether the District and Turner are responsible for such failure must be determined by the fact finder.

Fifth, Maracon alleges that the District and Turner failed to make the elevator shaft area available for work. Specifically, Maracon alleges that the District failed to ensure that existing power lines were adequate for the new building. The Contract documents in the record do not reveal whose responsibility it was to ensure that the existing power lines were adequate for the Markham Project. Because the Contract does not clearly make this the responsibility of another party, this issue must be remanded to the fact finder for a determination.

Sixth, Maracon alleges that Turner, or the District, failed to ensure that asbestos abatement took place within the time contemplated by the Contract. Maracon alleges that the asbestos abatement took weeks longer than anticipated, denying Maracon access to areas in which it needed to work. The exculpatory clauses of the Contract exempt the District and Turner from liability for delays caused by the contractors' interference with one another. (Supplementary Conditions §§ 4.10.1 – 4.10.8.) The Contract defines "contractors" as "persons or

entities who perform construction under Conditions of the Contract that are administered by the Construction Manager, and that are identical or substantially similar to these Conditions." (General Conditions § 3.1.2.) The Contract documents provide that the District would make a separate contract for asbestos abatement. According to the Contract documents, the asbestos abatement contractor was not a prime contractor under the Contract. (Summary of Work at 1, February 10, 2004.) Additionally, there is no indication in the record that the asbestos abatement contractor was working under the conditions of the Contract, or conditions similar or identical to the conditions of the Contract. Therefore, the asbestos abatement contractor was not a contractor for purposes of the exculpatory clause, and the issue of whether the District was liable for the interference by the asbestos abatement contractor with Maracon's work must be remanded to the fact finder.

Lastly, Maracon argues that the power and lighting on the worksite were inadequate. Neither the District nor Turner was responsible for providing lighting and temporary power to the worksite. The Contract specifically provides that the contractor for the electrical work was responsible for all lighting and temporary power. (Summary of Work at 16.) The Supplementary Conditions explicitly provide that neither the District nor Turner is responsible for the failure of any prime contractor:

> In the event that any Prime Contractor shall not complete the various portions of the Work in general harmony, and another Prime Contractor shall be caused damage or injury by the failure to so act in harmony, the Prime Contractor damaged or injured shall settle with the Prime Contractor causing the damage or injury by agreement or arbitrate such claim or disputes in accordance with the provisions of Subparagraph 4.11 as set forth hereinafter. The Construction

> Manager, Architect, and the Owner, however, shall not be liable to any Prime Contractor for any increased costs or damages resulting from the defective work, interference, or delays of other Prime Contractors.

(Supplementary Conditions § 4.10.7.) Therefore, neither the District nor Turner is responsible for any failure to provide lighting or temporary power to the site.

In holding that the exculpatory clauses barred Maracon's acceleration/delay claims, the trial court also held that these claims were not permitted because Maracon failed to segregate the damages attributable to the District's failures from those attributable to the failures of other contractors. The District raises the same argument in its brief to this Court. (District's Br. at 32-34.) Maracon argues that this holding was in error. We agree.

In A. G. Cullen Constr., Inc. v. State System of Higher Education, 898 A.2d 1145 (Pa. Cmwlth. 2006), this Court held that: "[i]n order to recover for an alleged compensable delay, a contractor must prove: (1) the extent of the delay with a reasonable degree of accuracy; (2) the delay was caused solely by the government's actions; and (3) the delay caused specific, quantifiable injury to the contractor." Id. at 1160. While a contractor is not required to provide "proof of damages to a mathematical certainty," it must provide sufficient evidence for a "fact-finder to make an intelligent estimation, without conjecture of the amount" of damages. Id. at 1160-61. Here, the report of Maracon's expert, Ellis Consulting Services, provides a breakdown of costs attributable to each alleged failure and a description of how those costs were calculated. (Report of Ellis Consulting Services at 71-78.) While the report is not always precise regarding which failure

is attributable to the District or to Turner, this information is discernable from the duties of each party as set out in the Contract and may be developed further at trial.

For these reasons, we affirm the order of the trial court in part, reverse in part, and remand this matter to allow the surviving issues to go forward.[8]

RENÉE COHN JUBELIRER, Judge

[8] The following claims survive our analysis pursuant to Cooper: (1) that the District and Turner failed to make the worksite timely available due to their failure to obtain trailers for use as temporary classrooms; (2) that Turner failed to coordinate the schedules of the prime contractors; (3) that the District and Turner failed to compel the architect to respond to Maracon's requests for information; (4) that the District and Turner failed to make the elevator shaft available for work due to their failure to ensure that the existing power lines were adequate for the Markham Project; and (5) that Turner and the District failed to ensure that asbestos abatement was substantially completed.

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Appeal of: Maracon, Inc.	:	

O R D E R

NOW, September 12, 2008, the order of the Court of Common Pleas of Allegheny County in the above-captioned matter is hereby **AFFIRMED** in part and **REVERSED** in part, and this matter is **REMANDED** for further determinations consistent with this opinion.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vern's Electric, Inc.	:	
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	:	Argued: May 6, 2008
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Appeal of: Maracon, Inc.	:	

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

CONCURRING AND DISSENTING OPINION
BY JUDGE FRIEDMAN FILED: September 12, 2008

I agree with the majority to the extent that the majority reverses the grant of summary judgment by the Court of Common Pleas of Allegheny County (trial court) to Mount Lebanon School District (District) and Turner Construction Company (Turner) and remands for further proceedings. I disagree to the extent that the majority affirms based on its conclusions that: (1) the Settlement Agreement bars Maracon, Inc. (Maracon) from asserting claims against the District and Turner for damages Maracon incurred as a result of the insolvency of subcontractor Davis Interiors (Davis); (2) exculpatory clauses in the construction contract (Contract) bar Maracon's acceleration claim with respect to the school's

second-floor ceiling work; and (3) exculpatory clauses in the Contract bar Maracon's delay claim with respect to the provision of permanent electrical power.

On November 24, 2004, after completing a school construction project for the District, Maracon submitted a written claim for acceleration/delay damages (Demand Letter). Maracon asserted that October 1, 2004, was the scheduled completion date for Phase 4 work, which included completion of the school's second-floor ceiling; however, the District moved that completion date to the end of August so that a Life Safety Inspection could occur.[1] (Demand Letter at 2 (¶II.2), R.R. at 150a.) Maracon also asserted that the temporary lighting and power was inadequate because of the District's delay in completing permanent lighting and electrical outlet work. (Demand Letter at 2 (¶II.7), 8, R.R. at 156a.)

On November 3, 2005, Maracon and the District entered into a Settlement Agreement regarding certain other matters. The Settlement Agreement released the District from claims arising out of the construction project, except "Maracon's delay/acceleration claim as set forth in its correspondence to Turner Construction Company dated November 24, 2004…." (Settlement Agreement at 3 (¶4(b)), R.R. at 270a.)

Maracon filed a lawsuit against the District and Turner, seeking damages for breach of contract. As the litigation proceeded, Maracon indicated

[1] In support of the October 1, 2004, Phase 4 completion date, Maracon attached the March 19, 2004, "Milestone Schedule." (District's Motion, ex. 6, attachment 1.) The Contract also shows October 1, 2004, as the completion date for Phase 4. (District's Motion, ex. 1.)

that it was seeking damages for money that Maracon paid in settlement of a suit brought against Maracon involving Davis and others. Maracon had not included these specific damages in its November 24, 2004, Demand Letter.

The District filed a motion for summary judgment (Motion), arguing that the District was entitled to summary judgment because: (1) Maracon released the District from liability for the Davis claim in the Settlement Agreement; (2) the contract clearly set August 25, 2004, as the completion date for the Life Safety Inspection; and (3) the District was not liable under the Contract for the failure of the electrical contractor to provide adequate temporary lighting and power.

Maracon filed a response (Response) to the Motion. As to whether Maracon released the District from damages relating to the Davis claim in the Settlement Agreement, Maracon argued that there is a disputed question of material fact as to the interpretation of the Settlement Agreement. Maracon asserted that it did not intend to release the District from additional damages directly related to the events set forth in the Demand Letter. (Response, ¶2, R.R. at 542a.)

As for Maracon's claim that the District moved the completion date for the second-floor ceilings, Maracon argued that there is a disputed question of material fact as to whether the Contract establishes a completion date of October 1, 2004, or August 25, 2004. (Response, ¶7, R.R. at 545a.) In support of this argument, Maracon attached "Addendum Number: Four" (Addendum), which states, "The Bidding Requirements and the Contract Documents are modified as

follows." (Addendum at 1, R.R. at 560a.) The Addendum sets August 25, 2004, as the completion date for the "Life Safety Equipment Certifications (fire alarm, sprinklers, exits, emergency generator, etc.)" and October 1, 2004, as the completion date for the "Phase 4 work – Includes the entire second floor." (Addendum at 1-2, R.R. at 560a-61a.) Maracon pointed out that the items to be completed for the Life Safety Inspection included **only** safety-related items, **not** ceilings, and that the completion of the "entire second floor" in Phase 4 obviously included the second-floor ceilings.

As for Maracon's lighting and power claim, Maracon argued that there is a disputed question of material fact as to whether the District's failure to provide adequate **permanent** electrical power prevented the electrical contractor from providing Maracon adequate **temporary** lighting and power. (Response, ¶6, R.R. at 544a.) To support this argument, Maracon offered an expert report indicating that Dr. George Wilson testified at his deposition that: (1) Duquesne Power had informed the District that the existing power lines were not adequate to carry the power supply required by the new construction; and (2) the lack of adequate permanent power delayed progress on the project. (R.R. at 411a-12a.) Other depositions showed that: (1) adequate permanent power was expected to be available throughout the school construction project; (2) the school's neighbors objected when Duquesne Power planned to cut down trees to make room for a new transformer; and (3) the District needed to wait for Mount Lebanon to give permission to cut down the trees before the District could provide adequate permanent power for the project. (R.R. at 412a-14a.) Maracon argued that the electrical contractor could not provide adequate **temporary** lighting and power

until the District acquired a new transformer and power lines that could provide adequate **permanent** power.

After considering the matter, the trial court granted the District's motion for summary judgment. The majority recognizes that the trial court erred in doing so with respect to many of the issues before this court. However, the majority concludes that the trial court properly granted summary judgment with respect to the Davis claim issue, the ceiling completion date issue and the power issue. Unlike the majority, I agree with Maracon that summary judgment was not proper with respect to these issues because of disputed questions of material fact.

I. Release from Liability

The Settlement Agreement states that the District is released from liability, except liability for "Maracon's delay/acceleration **claim** as set forth in its correspondence to Turner Construction Company dated November 24, 2004…." (R.R. at 270a) (emphasis added). I agree with Maracon that the words "delay/ acceleration claim as set forth in [the Demand Letter]" could reasonably refer to the charge in the Demand Letter that the District caused delays in the work and accelerated specific completion dates and do not refer to the related monetary losses set forth in the Demand Letter.

The majority concludes that the words unambiguously refer to the "damages" set forth in the Demand Letter. (Majority op. at 8.) However, the Settlement Agreement does not use the word "damages," and, although claims

include damages, the words are not synonymous or interchangeable.[2] To me, there is sufficient ambiguity in the release provision of the Settlement Agreement to give the matter to a jury.

Because Maracon has presented a reasonable interpretation of the release provision of the Settlement Agreement, I submit that there is disputed question of material fact as to its meaning and, thus, that the trial court erred in granting summary judgment on that issue.

II. Completion Date

In holding that summary judgment was proper on the second-floor ceilings completion date issue, the majority relies on the fact that the Contract sets August 25, 2004, as the completion date for the Life Safety Inspection. (Majority op. at 12.) However, the majority ignores the fact that the Addendum modified the Contract by specifying that the Life Safety Inspection only involved completion of the fire alarm, sprinklers, exits, emergency generator and any other safety-related items. It did **not** involve completion of the second-floor ceilings. Moreover, the Addendum set October 1, 2004, as the completion date for the "entire second floor." Certainly, a jury could find that the second-floor ceilings were not part of the Life Safety Inspection, but were part of the "entire second floor."

Because Maracon has presented a reasonable interpretation of the Contract, as modified by the Addendum, I submit that there is a disputed question

[2] The word "claim" means a "cause of action," i.e., the "facts which give a person a right to … relief against another." Black's Law Dictionary 221, 247 (6th ed. 1990). However, the word "damages" refers only to the relief sought. Black's Law Dictionary at 389.

of material fact with respect to the completion date for the second-floor ceilings and, thus, that the trial court erred in granting summary judgment on that issue.

III. Temporary/Permanent Power

In holding that summary judgment was proper on the power issue, the majority relies on the fact that the electrical contractor was responsible for all lighting and temporary power and that neither the District nor Turner is responsible for any failure of a prime contractor. (Majority op. at 15.) However, the majority fails to apply the rule that, in Pennsylvania, exculpatory provisions in a contract cannot be raised as a defense where there is a failure on the part of the owner to act on some essential matter necessary to the prosecution of the work. (Majority op. at 10-11) (quoting *Guy M. Cooper, Inc. v. East Penn School District*, 903 A.2d 608, 613 (Pa. Cmwlth. 2006), *appeal denied*, 591 Pa. 706, 918 A.2d 748 (2007)).

Here, Maracon has presented evidence showing that the District failed to provide adequate **permanent** power to the work site so that the electrical contractor could provide adequate **temporary** lighting and power. I submit that a jury could find that the District's provision of an adequate transformer and power lines to the work site was an essential matter necessary to the prosecution of the electrical contractor's work. To the extent that the District and the majority might disagree, there is a disputed question of material fact that precludes the grant of summary judgment on this matter.

Accordingly, I would reverse and remand.

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ROCHELLE S. FRIEDMAN, Judge