STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: February 19, 2018]

A. RICCI & SONS, INC.	**:**	
	:	
VS.	**:**	**C.A. NO. PC 2015-1062**
	:	
ANTHONY FARINA	**:**	

DECISION

LANPHEAR, J.

This case came on for trial before the Court, jury waived, on February 2, 2018. Counsel were given additional time to supply legal memoranda. Each side has now submitted post-trial memoranda and the case is before the Court for decision.

FINDINGS OF FACTS

In 2008, Dr. Anthony Farina was in the process of constructing a building on Mineral Spring Avenue in North Providence when disagreements with the contractor resulted in the contractor ceasing performance. Dr. Farina was an experienced professional and had some experience with construction contracts in the past. Dr. Farina contacted Joseph Ricci, a principal of the Plaintiff-corporation, to coordinate the completion. Mr. Ricci referred the matter to Mark Mercure, a vice president, who handled ongoing negotiations with the client.

While there was some discussion of having Plaintiff-corporation (Ricci) serve as a general contractor, Dr. Farina had already enlisted certain subcontractors, and some work had already been performed. After negotiations between the parties and to minimize the charge to the client, Mr. Mercure suggested that Ricci serve only as the construction manager. He drafted a contract (Ex. 1) which each of the parties executed. Although Dr. Farina signed the contract,

the contracted party is listed as Branting, LLC, [1] which the Court infers Dr. Farina controlled for his construction. The agreement is an American Institute of Architects form contract for Construction Management dated July 15, 2008 with various exhibits attached. The contract was reviewed completely by both parties and signed on July 15, 2008. Exhibits A, B and C of the contract were attached to it and initialed.

The contract is entitled "Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is NOT a Constructor." It clearly delineates that the Construction Manager is to advise on the method of selecting subcontractors (§ 2.2.10), prepare a construction schedule (§ 2.2.11), expedite and coordinate delivery of materials (§ 2.2.12), work with the architect (§ 2.2.16), coordinate bids for subcontractors, (§ 2.2.17), keep the owner updated (§ 2.3.5), manage the subcontractors (§ 2.3.7), do financial forecasts (§ 2.3.9) and monitor payments to subcontractors (§ 2.3.11.1). Unlike a general contractor, the construction manager does not have control over the construction means or the work to be performed (§ 2.3.15), nor does he enlist the individual subcontracts. Unlike a general contractor, Ricci did not hire the subcontractors or take a percentage of the project as a markup. The subcontracts are with the owner. As Dr. Farina already had subcontractors, work in progress and design professionals, this agreement worked well for each of them.

In Exhibit A, the total payment due Ricci is listed, as are the specific dates of payment. Only the final payment is dependent on a proviso that it will be paid on "November 15, 2008 or upon such extended date as it completes its services." (Ex. A at 3.) Exhibit B to the contract is an estimated budget, clearly indicating the general conditions and fixed fees. Exhibit C to the contract is a "Description of Project."

[1] Counterclaims regarding Branting, LLC were dismissed prior to trial.

In December 2008, Ricci had completed its work under the contract and Dr. Farina took occupancy of most of the building, to the extent it was built out. After adding the total amount of the contract, plus the change orders due to Ricci, less the payments made, Branting, LLC continued to owe $252,707 in December 2008. Ricci continued to press for prompt payment, to no avail. Dr. Farina did not question the quality of Ricci's work; he only indicated he did not have the funds available to pay. By late spring, the parties were discussing a promissory note. The first draft of the promissory note was rejected by Dr. Farina, and the note was rewritten by Ricci. The second version was produced, and Dr. Farina modified it in the presence of Mr. Mecure and Joseph Ricci and then signed it freely and voluntarily. Dr. Farina removed an interest rate and extended a due date. The revised note was signed and given to Ricci on June 10, 2009 and is trial Exhibit 3.

Although Dr. Farina was continuously apprised of the status of the construction during the construction phase, once the work of Ricci was done, efforts were made to obtain timely and additional payments from Dr. Farina, to no avail. Pursuant to the note, payments of $252,707.08 were due on January 1, 2010. By January 1, 2010, payments of only $187,000 had been made. The following payments were made by Dr. Farina thereafter:

March 2, 2010 – $10,000.00
May 17, 2010 – $20,000.00
July 21, 2010 – $15,000.00

Thereafter, the note had a remaining principal balance due of $20,707.08 and it was already past due.

In June of 2009, Dr. Farina began to prepare a document which he referred to as a "Punch List" for work to be done at the property. He reviewed it and gave it to Ricci on July 6, 2009 (Ex. 4), after the note had already been signed. Ricci had not received any indication that there

was work left to be done until then, and there was no Punch List mentioned. As the Construction Management contract performance was due by November 15, 2008, the Punch List was presented seven months after the five month period for performance expired. There are ten different subcontract projects listed on the Punch List. Only one column is entitled "A. Ricci." Much of it applies to work in the basement level which was excluded from the Construction Management contract.

Dr. Farina never disputed the scope of the contract, or the work to be performed under the contract.

PRESENTATION OF EVIDENCE

The Court received testimony from two different witnesses. Mark Mercure is a Vice President and an owner of Ricci. After meeting with Dr. Farina, he prepared a proposal which was the basis for discussions determining the scope of work, and he appears to have supervised the majority of the work. The Court found him frank, clear, prepared, and credible. The Plaintiff's exhibits were authenticated by his testimony and he was familiar with the documents, as well as Ricci's performance of work for Dr. Farina. Mr. Mercure was defensive but professional and responsive on cross-examination, and consistent with his direct examination. Rather than guessing, he was clear about the limitations of his knowledge, indicating he was not sure if a certificate of occupancy had been issued for the entire building, or if various subcontractors had filed suit. His credibility remained intact, and he underscored that the Ricci work was complete.

Dr. Farina acknowledged signing the note, and indicated that the purpose was to allow Ricci to receive a disbursement from the bank. He did not dispute the note, or that the amount was due. His testimony was highly consistent with Mr. Mercure, except that he alleged that only $17,800 remained due, he claimed the promissory note "expired" on January 1, 2010, and that

Joseph Ricci promised to return chillers and do finish work. He did not document his payments, but Mr. Mercure was able to date each amount paid. The Court doubted that such an educated, experienced man would sign a document indicating that he owed significant monies to circumvent bank financing, and without obtaining a separate agreement. His meticulous concern about the language of the note, and his delay in executing the note is inconsistent with this testimony. He testified that he informed Joseph Ricci that he was unsatisfied in 2008; still, he executed the note thereafter. Dr. Farina attempted to avoid direct questions, particularly on cross-examination, continued to attempt to add other issues to his answers, and repeatedly avoided questions about whether he made any unsatisfied demands to Ricci during the contract. He avoided answering a question concerning his knowledge of the personal obligation. Although professional, he was uncooperative during his testimony. With his inconsistency, late excuses and failure to respond to questions, the Court found him to be of low credibility.

ANALYSIS AND CONCLUSIONS OF LAW

The debt has been clearly established, as well as the execution of the promissory note. Dr. Farina admitted signing the note and acknowledged the debt. He presses two separate defenses for this debt. First, he claims that he relied upon promises from Joseph Ricci that additional work would be done. Second, he claims that he was signing this document on behalf of Branting, LLC, which was a party to the construction.

Dr. Farina never proved that the payment of the debt was contingent on Ricci doing additional work. In fact, he acknowledged Ricci's limited contract, and the contract time had ran. He pointed to work to be done in the basement, although the basement is excluded from the contract (*see* Ex. A ¶ 5).

Dr. Farina questions whether there was consideration for the note, so as to form a binding contract. However, he acknowledges that he signed this in settlement of the debt owed by

Branting, LLC. Ricci, in return, agreed to wait several months for payment from him. Sufficient consideration was exchanged by each side.

Dr. Farina revised the note extensively, even though his payments were significantly past due. He made sure the debt was not tied to his medical practice. After the note was revised, he then handwrote changes to the payment terms. Dr. Farina signed his own name, ensuring that he would not bind his professional businesses. However, he never added Branting, LLC (the party to the Construction Management Agreement). He signed his own name and recognized that he alone was responsible for the debt. Of course, he never established that Branting, LLC or anyone else satisfied the debt. Clearly, Dr. Farina was precise and knew what he was doing.

To suggest that a party or condition exists which is not spelled out in the promissory note implicates the parol evidence rule. Our high court has noted:

> "The parol-evidence rule provides that 'parol or extrinsic evidence is not admissible to vary, alter or contradict a written agreement.'" *Paolella v. Radiologic Leasing Assocs.*, 769 A.2d 596, 599 (R.I. 2001) (quoting *Supreme Woodworking Co. v. Zuckerberg*, 82 R.I. 247, 252, 107 A.2d 287, 290 (1954)). "The basis of the rule is that a complete written agreement merges and integrates all the pertinent negotiations made prior to or at the time of execution of the contract." *Fram Corp. v. Dav*is, 121 R.I. 583, 587, 401 A.2d 1269, 1272 (1979). A document is integrated when the parties adopt the writing as "a final and complete expression of the agreement." *Id.* at 587, 401 A.2d at 1272. Once integrated, other expressions, oral or written, that occurred prior to or concurrent with the integrated agreement are not viable terms of the agreement. *See id.* at 587-88, 401 A.2d at 1272; *Filippi v. Filippi*, 818 A.2d 608, 619 (2003).

While Dr. Farina attempted to establish that another agreement was pending, he drafted and presented a Punch List several days after the promissory note. He failed to establish by a preponderance of evidence that there was an additional promise or any ambiguity in the note.

Frankly, not only is the note clear, there is no room left for interpretation. As our high court recently declared: "Pursuant to our established contract law principles, when there is an unambiguous contract and no proof of duress or the like, the terms of the contract are to be applied as written." *Walsh v. Lend Lease (US) Constr.*, 155 A.3d 1201, 1205 (R.I. 2017). (Citations omitted.)

In his post-trial memorandum, Dr. Farina claims "fraud in the inducement," and he relies on the affirmative defense of fraud in his answer. In Rhode Island:

> "if one is induced to enter into a contract based upon a fraudulent statement from the other party to the contract, then the party who has been fraudulently induced is not bound by the contract." *Bjartmarz v. Pinnacle Real Estate Tax Service*, 771 A.2d 124, 127 (R.I. 2001) (*per curiam*); *Carlsten v. Oscar Gruss & Son, Inc.*, 853 A.2d 1191, 1195 (R.I. 2004).

However, the Court is convinced that the change of the date in the promissory note resulted from Dr. Farina's insistence on rewriting the note and then revising it. The "Punch List," so-called, was drafted after the note. It was never refuted that the Punch List contained work to be done by Dr. Farina's subcontractors, or work to be done for the basement—all well outside the scope of the Construction Management Agreement which the promissory note was to ensure payment of. Neither party called Joseph Ricci to testify nor was it ever established that the Plaintiff or Mr. Ricci made any misrepresentation to Dr. Farina.

Liability is also established by Dr. Farina's failure to respond to request for admissions issued in July 2015. (Super. R. Civ. P. 36.) By this, Defendant admits that $21,048.95 was due.

The promissory note (Ex. 3) was revised by Dr. Farina relative to the amount of interest due. Interest accrues commencing May 1, 2009. All payments are due on January 1, 2010. The note bears interest at "0%" after maturity. G.L. 1956 § 9-21-10 provides for interest "at the rate of twelve percent (12%) per annum thereon from the date the cause of action accrued . . ." It is

appropriate to apply interest in a breach of contract case or a breach of a promissory note from the date the debt is past due. *See Danforth v. More*, 129 A.3d 63, 71 (R.I. 2016). The federal courts have interpreted this accrual date as the date on which plaintiff began to suffer damages, or when the money was due. *Allstate Interiors & Exteriors, Inc. v. Stonestreet Constr., LLC*, 907 F. Supp. 2d 216 (D.R.I. 2012), *aff'd*, 730 F.3d 67 (1st Cir. 2013). The date the money was due was January 1, 2010. Prejudgment interest shall run from that date.

CONCLUSION

Partial judgment shall enter in favor of the Plaintiff against the Defendant for $20,707.08, plus prejudgment interest at the rate of 12% per annum from January 1, 2010. Plaintiff has also requested attorneys' fees. Each of the parties shall submit memoranda on this issue, if they desire, within twenty (20) days of the date of this Decision. Plaintiff shall itemize its fee request appropriately. If any party desires a hearing on the issue, they shall notify the Court in writing within thirty (30) days of the date of this Decision. If they fail to do so, this issue and the entire case shall be deemed submitted for Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	A. Ricci & Sons, Inc. v. Anthony Farina
CASE NO:	PC 2015-1062
COURT:	Providence County Superior Court
DATE DECISION FILED:	February 19, 2018
JUSTICE/MAGISTRATE:	Lanphear, J.

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