In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00213-CV

HSM ADKISSON RANCH, LTD., Appellant

V.

MEGATEL HOMES III, LLC, Appellee

On Appeal from the 393rd District Court
Denton County, Texas
Trial Court No. 18-10933-393

Dissenting Memorandum Opinion by Justice Wallach

DISSENTING MEMORANDUM OPINION

The majority holds that to extend the substantial completion date, Appellant HSM Adkisson Ranch, Ltd. ("Developer") was required to give written notice to Appellee Megatel Homes III, LLC ("Contractor"). The contract contains no such requirement, and we should not invent one. Indeed, elsewhere in the contract, the parties expressly required notice of other matters; it is therefore telling that they did not require notice before Developer could extend this date. Because the unambiguous terms gave Developer the right to unilaterally extend the date without notice, and because there is some evidence that Developer exercised this right, I would reverse and remand. Because the majority holds otherwise, I respectfully dissent.

This case is a simple contract dispute. Developer executed a Lot Purchase Contract with Contractor on June 19, 2015 whereby Developer agreed to develop and sell single family building lots to Contractor. Section 7 addressed substantial completion. Section 7(q) provided: "In addition to all other remedies of Purchaser [(Contractor)], should Seller [(Developer)] fail to achieve Substantial Completion within twelve (12) months of the Effective date hereof, [Contractor] may terminate the Contract and receive a return of the Earnest Money Deposit." Section 5.02, titled "[Contractor's] Remedies," generally provided that if Developer defaulted in performing its obligations in the contract for other than Contractor's default or force majeure, Contractor was entitled to: (1) waive Developer's contractual obligation in

writing, (2) extend the time for performance in writing by the mutual consent of the parties, or (3) terminate the contract and receive return of the earnest money deposit. Section 5.02 was not subsequently amended.

On May 5, 2017, the parties executed a First Amendment to the Lot Purchase Contract, which included a new section 7(q). The amended version of section 7(q), which replaced the original, is much lengthier. The first portion of the amended section 7(q) provides for notices involving deficiencies in substantial completion and failures to cure regarding such deficiencies. The last portion of the amended section 7(q) states,

> In addition to all other remedies of [Contractor], should [Developer] fail to achieve Substantial Completion Date by October 31, 2018, [Contractor] may terminate the Contract and receive a return of the Earnest Money Deposit, provided however, that such date may be extended by [Developer] due to delays caused by inclement weather, governmental approvals or requirements, acts of God, or any other causes of any kind whatsoever which are beyond the control of [Developer], for so long as [Developer] determines to be appropriate to accommodate such delay, as determined in [Developer's] reasonable discretion.

Thus, the right to extend the deadline was solely in the hands of Developer, in its reasonable discretion, if needed because of the reasons stated. Most importantly here, there was no requirement that Developer give notice to Contractor that it was extending the substantial completion deadline, even though the parties negotiated extensive notice provisions in the preceding sentences addressing default for substantial completion, as well as in the original contract.

Prior to October 31, 2018, Developer allegedly encountered difficulties with obtaining plat approval from the Town of Shady Shores, Texas, and it also experienced torrential rains affecting the lots. Developer submitted evidence that it internally determined to extend the Substantial Completion Date to February 28, 2019, consistent with its rights under the amended Section 7(q). Developer, however, did not notify Contractor of its decision. When Developer did not meet the substantial completion requirements by October 31, 2018, Contractor declared a default on November 2. Developer responded by letter on November 3 advising of its decision to extend the substantial completion deadline and contending that there was no actual default. Contractor refused to accept Developer's contention that no notice of the deadline extension was required. Eventually, Contractor terminated the contract and demanded return of the earnest money deposit as provided in the amended contract. The parties could not work out their disagreement, so Contractor sued Developer and Developer counterclaimed against Contractor.

Contractor moved for traditional summary judgment that it properly terminated the contract, for return of the earnest money deposit and for recovery of attorney's fees. In support of its position that it properly terminated the contract, Contractor argued that there was no substantial completion before October 31, 2018; that no cure had been effected; and, under the plain language of the amended contract, that it was entitled to terminate the contract and receive the earnest money deposit plus an award of attorney's fees. Further, it contended that any extension of

the completion date would have to have been made before default was declared and that it received no extension notice before default was declared.[1] Developer responded by relying on the express language of the contract, which did not require that notice of the deadline extension had to be given to Contractor. The Court granted the motion, found that the contract had been properly terminated, awarded Contractor the money in the earnest money deposit, and awarded Contractor its attorney's fees and costs at trial and conditionally on appeal.

Resolution of this case should follow basic rules of contract construction. First, when construing contracts, the primary concern is to ascertain the true intent of the parties as expressed in the instrument. *Fort Worth Transp. Auth. v. Thomas*, 303 S.W.3d 850, 857 (Tex. App.—Fort Worth 2009, pet. denied); *NP Anderson Cotton Exch., L.P. v. Potter*, 230 S.W.3d 457, 463 (Tex. App.—Fort Worth 2007, no pet.). As summarized by this Court in *Thomas*, 303 S.W.3d at 857–58:

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[1]In its Appellee's Brief, Contractor raises the argument that a change in the substantial completion date of a contract is a change in the material terms of a contract requiring written notice to be enforceable under the statute of frauds. In support of this argument, Contractor cites *SP Terrace, L.P. v. Meritage Homes of Tex., LLC*, 334 S.W.3d 275, 283 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (op. on reh'g). However, Contractor never affirmatively pleaded the statute of frauds in the trial court. An affirmative defense not pleaded in the trial court and not tried by consent is waived and cannot be raised for the first time on appeal. *Ramji v. 6100 Clarkson, L.P.*, No. 01-18-00044-CV, 2019 WL 2455620, at *7 (Tex. App.—Houston [1st Dist.] June 13, 2019, no pet.) (mem. op.); *Cannon v. MBCI*, No. 14-11-00895-CV, 2013 WL 1845736, at *4 (Tex. App.—Houston [14th Dist.] Apr. 30, 2013, pet. denied) (mem. op.); *Nicol v. Gonzales*, 127 S.W.3d 390, 393 (Tex. App.—Dallas 2004, no pet.).

> To ascertain the parties' intent, we may consider together all writings relating to the same transaction, even if they were executed at different times. *DeWitt Cty. Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 102 (Tex. 1999). We must examine and consider the entire contract in an effort to harmonize and give effect to all provisions so that none are rendered meaningless. *Potter*, 230 S.W.3d at 463; *see also J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). "We construe contracts 'from a utilitarian standpoint bearing in mind the particular business activity sought to be served' and 'will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive.'" *Frost Nat'l Bank v. L & F Dist., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005) (quoting *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987)). "If, after the pertinent rules of construction are applied, the contract can be given a definite or certain legal meaning, it is unambiguous and we construe it as a matter of law." *Id.* (*citing Webster*, 128 S.W.3d at 229).

Additionally, it is well established that specific contractual provisions govern over general provisions. *Clark v. Cotton Schmidt, L.L.P.*, 327 S.W.3d 765, 773 (Tex. App.—Fort Worth 2010, no pet.); *City of the Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 722 (Tex. App.—Fort Worth 2008, pet. dism'd).

Here there were two documents involved, the original Lot Purchase Agreement and the First Amendment. The Lot Purchase Agreement section 7(q) made no specific reference to extensions of the substantial completion deadline. The amended section 7(q) was totally rewritten, clearly indicating that the parties were specifically negotiating the terms of section 7(q), whose only subject was substantial completion. The first portion of the amended section 7(q) creates several requirements for notice when certain events related to substantial completion occur. Yet, when the final portion of amended section 7(q) was written to give Developer wide, unilateral discretion in extending the substantial completion date, the parties did not establish

any requirement that Developer notify Contractor of this decision. Certainly, if notice of extension of the substantial completion deadline was such a critical issue for the parties, especially for Contractor as argued, the parties would have addressed it in the Amendment. In other portions of the agreements, the parties established requirements for notice about other topics when they apparently deemed it material, but not here.

Although the parties amended section 7(q), they did not amend section 5.02. However, section 5.02 was of general applicability and applied only to situations where a default actually occurred, such as where Developer defaulted on an obligation, not specifically substantial completion, and needed an extension of a deadline or to have its deadline waived. Section 7(q), as amended, was specific to substantial completion and set up a framework for handling substantial completion issues, particularly extension of the substantial completion deadline to presumably avoid a default.

Since the parties provided for notice for some obligations in the contract, but not others, especially regarding substantial completion, it would be improper for the Court to imply a covenant on Developer to give notice of its decision to extend the substantial completion deadline when there was no express requirement in the contract. *See Clovis Corp. v. Lubbock Nat'l Bank*, 194 S.W.3d 716, 719 (Tex. App.—Amarillo 2006, no pet.) (stating that when there already exists an express term covering a particular subject, no implied term can exist encompassing the same

subject); *Snyder v. Eanes Indep. Sch. Dist.*, 860 S.W.2d 692, 697–98 (Tex. App.—Austin 1993, writ denied) (where contract contains provisions providing specific instances when written notice is required, no implied covenant can exist as to the same subject).

Implied covenants are looked upon with disfavor in Texas law. *Gamma Grp., Inc. v. Transatlantic Reinsurance Co.*, 242 S.W.3d 203, 212 (Tex. App.—Dallas 2007, pet. denied). A term "will not be implied simply to make a contract fair, wise, or just." *Universal Health Servs., Inc. v. Renaissance Women's Grp., P.A.*, 121 S.W.3d 742, 748 (Tex. 2003); *Gamma Grp., Inc.*, 242 S.W.3d at 212–13. As noted by the Supreme Court, we have "long recognized Texas' strong public policy in favor of preserving the freedom of contract." *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653, 664 (Tex. 2008); *see also Wood Motor Co. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951). "Freedom of contract allows parties to . . . allocate risk as they see fit." *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007). "The role of the courts is not to protect parties from their own agreements, but to enforce contracts that parties enter into freely and voluntarily." *El Paso Field Servs., L.P. v. Mastec N. Am., Inc.*, 389 S.W.3d 802, 810–11 (Tex. 2012) (citing *Wood Motor Co.*, 238 S.W.2d at 185). Further, courts

> are not permitted to rewrite an agreement to mean something it did not. We cannot change the contract simply because we or one of the parties comes to dislike its provisions or thinks that something else is needed in it. Parties to a contract are masters of their own choices and are entitled to select what terms and provisions to include in or omit from a contract.

Thedford Crossing, L.P. v. Tyler Rose Nursery, Inc., 306 S.W.3d 860, 867 (Tex. App.—Tyler 2010, pet. denied) (op. on reh'g) (citing *Birnbaum v. SWEPI LP*, 48 S.W.3d 254, 257 (Tex. App.—San Antonio 2001, pet. denied)).

In this case, the parties initially did not specifically address extending the deadline for substantial completion in section 7(q). They did provide generally under section 5.02, which was titled "[Contractor's] Remedies," that if Developer defaulted for any reason other than Contractor's fault or force majeure, Contractor could waive the Developer's contractual obligation, extend the time for performance by mutual agreement of the parties in writing, or terminate the contract and receive a refund of the earnest money. By amendment specifically directed at the issue of substantial completion, the parties completely replaced the original section 7(q) to give Developer the right to unilaterally extend the substantial completion deadline (versus by mutual agreement in section 5.02), with no requirement that the extension be in writing (versus the writing requirement in section 5.02) or that notice must be given to the Contractor (compared to the other notice provisions in amended section 7(q) as well as in the original contract and other amended sections). The intent of the parties was that the Developer be given broad discretion in deciding if, and for how long, the substantial completion deadline should be extended, making no reference to Developer's having to give notice, in writing or otherwise. When notice was material to the contract, it was provided, but it was not provided on this issue. While failing to give notice of a deadline extension might make the project completion more awkward,

implied covenants are looked upon with disfavor, and making the plan wiser is not sufficient to justify implying such an obligation.

There is more than a scintilla of evidence that Developer internally exercised its option to extend the substantial completion date before Contractor terminated the contract. Therefore, a fact issue remains as to whether Contractor's termination was proper.

For the above stated reasons, I would hold that Contractor did not meet its burden of proof to show that it was entitled to judgment as a matter of law, and I would reverse the summary judgment in favor of Contractor and remand the case for further proceedings consistent with such ruling.

/s/ Mike Wallach
Mike Wallach
Justice

Delivered: June 25, 2020