Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-093

AUGUST TERM, 2017

All Seasons Excavating, Inc.	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
v.	}	Civil Division
	}	
	}	
Town of Colchester and Colchester Fire District # 2	}	DOCKET NO. 1187-12-15 Cncv
	}	
		Trial Judge: Robert A. Mello

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the court's order granting summary judgment to defendants in plaintiff's suit for breach of contract. On appeal, plaintiff argues that the court erred in its interpretation of the contract. We affirm.

The court recited the following undisputed facts. Defendant Town of Colchester owns the pedestrian sidewalk on River Road, but does not own the fire hydrants on the road. Defendant Colchester Fire District #2, a separate municipality, is the sole owner of the public water system, including the fire hydrants. In June 2015, the Town solicited bids to improve the sidewalk along River Road. The advertisement for bids identified the Town as the owner of the property and did not disclose that the fire hydrants were owned by the Fire District. To perform the sidewalk work, three fire hydrants would have to be moved. Plaintiff submitted a bid of $323,997, including $25,005 to move the hydrants. The Town accepted plaintiff's bid and the parties signed a contract in August 2015. The contract was not signed by the Fire District.

In August 2015, the Fire District informed the Town that it objected to the Town including the District's fire hydrants in the sidewalk-improvement project and indicated that it would move the hydrants itself. The Town then informed plaintiff that it intended to delete the $25,005 related to the hydrants from the contract. Plaintiff objected and would agree only if the Town included the $4000 of profit built into that contract item. The Town rejected the condition and signed a change order deleting the fire hydrants, but plaintiff refused to sign it. Plaintiff did not move the fire hydrants and the Town did not pay any part of the $25,005 to plaintiff.

Plaintiff filed suit against both the Town and the Fire District alleging that the Town breached the contract by unilaterally deleting a portion of the work from the contract and that the Fire District is liable for the Town's breach because the Town was acting as the Fire District's agent in signing and then breaching the contract. Both defendants filed for summary judgment. The court granted the motions. As to the Town, the court held that § 35 of the contract, "Measurement and Payment Quantities," precluded plaintiff from seeking or recovering damages for work not actually completed. As to the Fire District, the court concluded that even if the Fire

District were bound by the contract, § 35 precluded any recovery by plaintiff. Plaintiff then filed this appeal.

This Court reviews a summary judgment decision de novo using the same standard as the trial court. White v. Quechee Lakes Landowners' Ass'n, 170 Vt. 25, 28 (1999). Summary judgment will be granted where there are no disputed material facts and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(a). Here, the dispute is primarily about the meaning of the parties' contract. A contract is interpreted to give effect to the intent of the parties; therefore, when the "language is clear, the intent of the parties is taken to be what the agreement declares." Hamelin v. Simpson Paper (Vt.) Co., 167 Vt. 17, 19 (1997).

The center of this dispute is § 35 of the contract, which is entitled "Measurement and Payment Quantities." The section is seven paragraphs long. Most of the paragraphs describe how different types of materials are to be measured. The final paragraph reads

> Payment for all work items bid at a price per unit of measurement shall be based upon the actual quantities of the accepted work upon completion. The Estimated Quantities provided in the Bid Schedule are for bid comparison only. The Owner does not express or imply that the actual amount of work or materials will correspond to the Estimated Quantities. The Contractor shall make no claim nor receive any compensation for anticipated profits, loss of profits, damages, or any extra payment due to any difference between the amount of work actually completed, or materials or equipment furnished, and the Estimated Quantities.

Plaintiff argues that the language of the section is unambiguous and its plain language does not allow the Town to unilaterally remove work items from the contract.* Plaintiff concedes that pursuant to the provision, it cannot recover damages for lost profits when quantities are decreased, but asserts that it does not allow the Town to wholly remove an item from the contract.

We agree with plaintiff that the language is unambiguous, we but interpret the language in the same manner as the trial court. The contract language states that the estimated quantities in the bid do not necessarily represent the actual work or materials that will be required and that contractor may not claim compensation for "any difference between the amount of work actually completed . . . and the Estimated Quantities." Under this plain language, where the bid schedule estimated that three fire hydrants needed to be moved, but no fire hydrants were actually required to be moved, contractor did not have a claim for lost profits due to this difference. Plaintiff has agreed that it would not have a claim for damages if the quantity of items is decreased—in other words, that the provision would preclude recovery if the number of hydrants had been decreased from three to one. There is nothing in the language of the contract to indicate that it does not apply if a reduction wholly eliminates one category of work or materials. The cases plaintiff cites in support of its assertion that § 35 does not allow for removal of an entire category of work involve different contract language than that presented here and do not compel the result plaintiff seeks.

* Because we conclude that the court did not err in granting summary judgment for the Town and the Fire District, we need not reach the Town's argument that plaintiff failed to preserve this argument for appeal because plaintiff did not include any argument related to § 35 in its response to the Town's motion for summary judgment.

Plaintiff argues that this interpretation fails to consider the contract as a whole and would render meaningless other sections of the contract, which require a change order to alter the amount of work to be performed under the contract. See Dep't of Corr. v. Matrix Health Sys., P.C., 2008 VT 32, ¶ 12, 183 Vt. 348 (explaining that contract should be read as whole to give effect "to every part contained therein to arrive at a consistent, harmonious meaning, if possible" (quotation omitted)). Plaintiff points to §§ 29 and 30, which are entitled "Alterations" and "Extra work." Section 29 states that the Town's engineer may make alterations to the work. It further states:

> If such alternations diminish the quantity of work to be done, they shall not warrant any claim for damages or for anticipated profits on the work that is eliminated. Engineer approved alterations affecting the original bid quantities shall be authorized by a change order signed by the Owner and Contractor identifying the increase/decrease to the original bid quantities and the corresponding change in the contract price prior to the alterations being implemented.

Section 30 defines extra work and states: "Extra work shall only be authorized by a change order signed by the Owner prior to the undertaking of the extra work."

Sections 29 and 30 are not inconsistent with our interpretation of § 35 and are not rendered meaningless. Section 29 is consistent with § 35 in precluding recovering of damages for changes that eliminate work. Further, §§ 29 and 30 deal with situations not covered by § 35. The requirement of the change in orders for §§ 29 and 30 makes sense because in both cases the scope of work could be enlarged, which could require extra cost.

The language of § 35 precluded plaintiff from recovering the damages claimed in this case because it was related to work not actually performed. Therefore, the court did not err in awarding defendants summary judgment.

Affirmed.

BY THE COURT:

_____
Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice

_____
Karen R. Carroll, Associate Justice