

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

CNP MECHANICAL, INC.,

Plaintiff,

v.

Index #2007/08310

ALLIED BUILDERS, INC.,
HARTFORD INSURANCE COMPANY,
HARTFORD CASUALTY COMPANY, and
HARTFORD ACCIDENT AND INDEMNITY
COMPANY,

Defendant.

Defendants, Allied Builders, Inc., Hartford Fire Insurance Company, Hartford Casualty Company, and Hartford Accident and Indemnity Company, move for an order granting partial summary judgment limiting plaintiff's claims on four change orders to the amount approved and paid by Wal-Mart. This case is scheduled for trial in January 2010.

The objection to the last Natalello affidavit is overruled. Given the tenor of the Nani reply affidavit, it would have been unfair not to permit a response thereto, especially if the court was inclined to grant defendant's motion. But the objection does not make any difference anyway, because the court finds that defendants do not establish their initial burden on summary judgment. To do that, defendants had to establish that their interpretation of the contact documents was the only plausible interpretation, especially since they drafted the language.

CNP's proffered interpretation is a plausible reading of the contract documents, and therefore defendants fail to satisfy their initial burden on summary judgment to show that their interpretation "is the only construction that can fairly be placed on it." Sullivan v. Troser Management, Inc., 34 A.D.3d 1233, 824 N.Y.S.2d 828 (4th Dept. 2006). See Chimart Associates v. Paul, 66 N.Y.2d 570, 573, 498 N.Y.S.2d 344, 489 N.E.2d 231 (1986). "An agreement is unambiguous when its words 'have a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.'" Vintage, LLC v. Laws Const. Corp., 13 N.Y.3d 847 (Nov. 23, 2009) (quoting Breed v. Insurance Co. of N. Am., 46 N.Y.2d 351, 355 (1978)). "A party seeking summary judgment has the burden of establishing that the construction it favors 'is the only construction which can fairly be placed thereon.'" Arrow Communication Laboratories, Inc. v. Pico Products, Inc., 206 A.D.2d 922, 923 (4th Dept 1994), quoting Dowdle v. Richards, 2 A.D.2d 486, 489 (4th Dept. 1956). See also, Lippman v. Despatch Industries, Inc., 8 A.D.3d 1051 (4th Dept. 2004).

In April 2006 plaintiff entered into a subcontract with Allied to furnish and install plumbing and fixtures as part of the construction of a new Wal-mart Superstore in Brockport, New York. The base price for plaintiff's work was \$280,000, as

stated in the subcontract. However, during the course of the project, Allied directed plaintiff to perform work outside the scope of the original subcontract. On some occasions a Contract Change Directive ("CCD") was issued identifying the change or addition, and on other occasions a CCD was not issued.

Plaintiff alleges that it has not been paid in full for the CCD work and that, additionally, Allied has not paid it for the additional work Allied directed it to perform without a CCD. It is alleged that CCDs allegedly were not always issued on these items because they were often repairs required when other subcontractors and Allied employees damaged pipes on the work site. Allied could not pass this cost along to Wal-mart and thus did not reduce it to a CCD.

On the current motion, defendants contend that plaintiff's claims on four change orders are limited contractually to the amount of each change order approved by the project owner. Defendants conclude that plaintiff's claims for these change orders should be reduced to the amounts approved and paid by Wal-mart. Of the \$429,332.46 sought by plaintiff in the complaint, \$297,335.59 is attributable to four CCDs that are the subject of this motion. On those four change orders, defendants contend that recovery on the \$297,335.59 sought should be limited to \$187,863.00. The record, however, shows that, in the cases of CCD #1 and CCD #4, neither part actually executed a change order.

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted). See also, Potter v. Zimmer, 309 A.D.2d 1276 (4th Dept. 2003) (citations omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003), *citing Alvarez*, 68 N.Y.2d at 324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also, Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater Buffalo, 12 A.D.3d 1089 (4th Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v Johnson, 147 A.D.2d 312, 317 (2nd Dept. 1989) (citations omitted).

Plaintiff and Allied are parties to a Standard Subcontract

Agreement made as of April 17, 2006, wherein plaintiff agreed to provide plumbing work. The Subcontract incorporates by reference the prime contract between Wal-Mart and Allied, and states:

1.3 Subcontractor acknowledges that its authorized representatives have read and understood this Subcontract Agreement and the Prime Contract and are familiar with their terms and conditions. Subcontractor agrees that it is bound to Contractor to each and all of the provisions of this Subcontract Agreement (as defined in paragraph 1.2 above) and assumes toward the Contractor all of the duties, obligations and responsibilities that the Contractor, by the Prime Contract, assumes toward the Owner. The Prime Contract, in its entirety, is EXPRESSLY INCORPORATED BY REFERENCE and made a part of this Subcontract. Contractor shall have the same rights and remedies against the Subcontractor as the Owner has against the Contractor with the same force and effect as though every such obligation, responsibility, right or remedy in the Prime Contract were set forth in this Subcontract.

Defendants' Exhibit D, ¶1.3. The Project Manual/Specifications, dated October 24, 2005, are incorporated by reference into the Subcontract. The general conditions of the Project manual further incorporate by reference the General Conditions for the Contract of Construction AIA Document A201-1997. Article 7 of the document contains the change order provisions. The standard AIA change order provisions are modified by paragraph 7.2 of the Supplementary Conditions in the Project Manual:

8. Section 7.2.4 of the Special Conditions reads as follows:

7.2.4 The Contractor shall include a written

provision in contracts with the Subcontractors requiring the Subcontracts and Sub-Subcontractors to submit any changes in cost to adjust the subcontract amount using written Change Orders. No adjustments will be accepted by the Contractor nor Wal-Mart from any Subcontractor or Sub-Subcontractor except for those submitted on a written Change Order.

Defendants Exhibit E, ¶8 of Special Conditions. Defendants contend that plaintiff's claims on CCD's 1 through 4 should be limited to amounts approved by Wal-Mart.

Contrary to defendants' contentions, the court's reading of these paragraphs does not reveal that plaintiff's entitlement to change order recovery is limited. Paragraph 7.2.4 of the Special Conditions does not limit recovery on change orders, but rather requires Allied to include a provision in subcontracts requiring subcontractors to submit written change orders. Article 16 of the Subcontract complies with this directive. See Defendants' Exhibit D, at 30. The only directive with respect to extra work states:

16.1 In addition to changes which may be required under the Prime Contract, the Contractor may at any time during the progress of the Work require changes in the specifications and plans; Subcontractor agrees to make such changes as a part of this Subcontract. In case any such change or changes shall make the Work more or less extensive than by the original plans and specifications, a reasonable proportionate addition or deduction shall be made in the Subcontract Price herein agreed to be paid; and the additional time, if any, to be allowed the Subcontractor on account of any

change or changes shall be determined by the Contractor.

Id.

The contracts before the court, and certainly the provisions thereof cited by defendants, do not limit recovery on change orders to whatever amount the general contractor was able to recover from the owner. Defendants fail to establish prima facie entitlement to partial summary judgment by reference to these contractual provisions.

Nor does the Notice of Intent language on the change orders themselves lend itself to unambiguous interpretation. Each change order submitted contains the following identical pre-printed notice:

Notice of Intent

Per our contract with Wal-Mart Stores, Inc., we have been either directed by Construction Change Directive (CCD) or acceptance of a PCOB (Potential Change Order Budget) to proceed with the work described above. Wal-Mart Stores, Inc. still has the opportunity to review and ask questions that may result in possible modifications in the total cost [of] the your work. Payments for the above work will be made based on the final acceptance of the change order by Wal-Mart Stores, Inc.

See, e.g., Defendants' Exhibit G. Defendants would have the court interpret this language as limiting CNP to recovery of amounts Allied ultimately recovered from the owner. Such a one-sided interpretation, if truly intended, could easily have been

reduced to clear and unmistakable language. The last sentence of the Notices of Intent, however, does not state in unambiguous terms that CNP's rights under the change order are limited to whatever amount Wal-Mart ultimately decided to pay Allied. Such a one-sided interpretation would need clearer expression, and therefore CNP's argument has merit "that . . . [defendants'] interpretation of the . . . [contract documents] . . . is so one-sided as to be wholly beyond the possible intention of the parties." Supermarkets General Corp. v. Oster Apartments, 163 A.D.2d 475, (2d Dept. 1990). Cf., Baldwin Piano, Inc. v. Deutsche Wurlitzer GmbH, 392 F.3d 881, 883 (7th Cir. 2004) ("When there is a choice among plausible interpretations, it is best to choose a reading that makes commercial sense, rather than a reading that makes the deal one-sided."); id. 392 F.3d at 883-84 ("Businesses are not compelled to make sensible bargains, but courts should not demolish the economic basis of bargains that would be sound if the contract were given a natural reading."), quoted in Automation By Design, Inc. v. Raybestos Products Co., 463 F.3d 749, 761 (7th Cir. 2006).

To the extent that defendants seek to rely on concessions made by plaintiff during the course of settlement negotiations, such reliance is misplaced. CPLR 4547 states:

Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting

to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations. . . .

Here, plaintiff's settlement figures are contained in a letter dated April 3, 2007 which states:

Setting aside what I've stated before, the following is my proposal to settle all claims, CCDs and back charges on this Brockport Wal-Mart project. This settlement offer shall encompass all issues as a whole and shall not be dissected apart. This settlement offer is being submitted for settlement purposes only. These statements, figures, etc., do not constitute nor may they be used as an admission of liability of any kind for any other purpose against CNP except that which its intensions (sic) are, settlement and prompt payment in full within 30 days.

Plaintiff's Exhibit B. The letter continues, stating that plaintiff is willing to accept \$4,800 of the \$7,034.50 sought on CCD #1, \$102,000 of the \$106,920 sought on CCD #2, \$43,305 of the \$44,000 sought on CCD #3, and \$53,758 of the \$83,609 sought on CCD #4. Id.

Defendants' proof submitted in support of a reduction on CCD #1 post dates the April 3, 2007, letter and references the reduction figure state in the settlement letter. See Defendants'

Exhibit G. Likewise, the evidence of a reduction for CCD #2, CCD #3, and CCD #4 all post-date the April 3, 2007, letter and refer to the reduced amount set forth in that settlement offer. See Defendants' Exhibits H, I, and J.

Defendants fail to establish prima facie entitlement to partial summary judgment. Even if defendants had established a prima facie case, the argument and proof submitted by plaintiff raises a question of fact. The motion for partial summary judgment is denied.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: January __, 2010
Rochester, New York