SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2866-15T3

RAY ANGELINI, INC.,

Plaintiff-Appellant,

v.

CAPITOL INDEMNITY CORPORATION,

Defendant,

and

STROBER-WRIGHT ROOFING, INC.,

Defendant-Respondent.

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Argued March 2, 2017 – Decided April 7, 2017

Before Judges Lihotz, Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1268-14.

Daniel E. Fierstein argued the cause for appellant (Cohen Seglias Pallas Greenhall & Furman, P.C., attorneys; Roy S. Cohen and Mr. Fierstein, on the briefs).

Robert L. Grundlock, Jr., argued the cause for respondent (Rubin, Ehrlich & Buckley, P.C., attorneys; Mr. Grundlock, on the brief).

PER CURIAM

Plaintiff Ray Angelini, Inc. (RAI) appeals from a February 4, 2016 Law Division order granting summary judgment in favor of defendant Strober-Wright Roofing, Inc. (Strober). This decision also rendered moot the motion for summary judgment filed by defendant Capitol Indemnity Corporation (Capitol) in response to Strober's cross-claims. RAI moved for reconsideration, which the motion judge denied.

We have reviewed the arguments advanced by RAI and Strober on appeal. In light of the record and applicable law, we affirm the order granting summary judgment for Strober. Our determination obviates review of the Law Division's order declaring Capitol's motion moot.

I.

We discern the following facts from the record, viewed in the light most favorable to RAI, the non-moving party. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405-06 (2014). This dispute concerns contracts for the construction of a career center in Bridgewater. The parties to the initial contract were the Somerset Educational Services Commission (Somerset), a public entity tasked with constructing the career center, and Tekton Development Corp. (Tekton), a general contractor. On August 16, 2013, Somerset and Tekton entered into a contract for

the construction of the career center. Several months later, on November 14, 2013, Strober entered into a subcontract with Tekton (the subcontract) to perform certain roofing and metal siding work. The sum price of this contract was $630,000.

The subcontract contained the following relevant provisions:

> 3.1.1 The Contractor shall cooperate with the Subcontractor in scheduling and performing the Contractor's Work to avoid conflicts or interference . . . . The Subcontractor shall be notified promptly of subsequent changes in the construction and submittal schedules and additional scheduling details.
>
> 4.1.1 The Subcontractor shall cooperate with the Contractor in scheduling and performing the Subcontractor's work to avoid conflict, delay in or interference with the Work of the Contractor, other subcontractors or Owner's own forces.
>
> 4.1.2 The Subcontractor shall promptly submit Shop Drawings, Product Data, Samples and similar submittals required by the Subcontract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Contractor or other subcontractors.
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> 5.2 The Subcontractor may be ordered in Writing by the Contractor . . . to make changes in the Work . . . . The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor any claim for adjustment . . . .
>
> 5.3 The Subcontractor shall make claims promptly to the Contractor for additional

> cost or extensions [of] time in accordance with the Subcontract Documents. . . .
>
> 6.1.1 The Subcontractor may terminate this Agreement for the same reasons and under the same circumstances . . . as the Contractor may terminate with respect to the Owner under the Prime Contract or for nonpayment of any of the Approved Amount under this Subcontract for 60 days or longer.
>
> 8.3 The Work of this Subcontract shall be substantially completed no later than August 20th, 2014, subject to adjustments of this Subcontract time as provided in the Subcontract Documents.

Section 8.6 of the subcontract incorporated by reference a construction schedule for the work, which was subject to change. The first revision required Strober to perform its roofing work between February 14 and March 14, 2014. A total of four revised schedules were issued in connection with this contract.

In February 2014, before construction began, Tekton defaulted on its contract. Somerset demanded that Capitol, as surety for Tekton, take the necessary steps to complete the project. Capitol retained Forcon International Pa. Ltd. (Forcon) as a consultant.

Capitol, through Forcon, offered "ratification agreements" to Strober and the other subcontractors requesting they complete their work. Strober and Capitol then entered into a ratification agreement (the ratification agreement), effective March 7, 2014. The ratification agreement stated Tekton's

rights could be assigned to Capitol or a competing contractor. It ensured, "Except as otherwise modified by this Agreement, the terms of the Subcontract remain in full force and effect."

The ratification agreement further contained the following relevant provisions:

> 7. Commencement of work. Subcontractor will commence work under the Subcontract and this Ratification Agreement within three (3) days of notice to proceed given by Surety or its consultant.
>
> 18. Election Not To Proceed. In the event that the Surety elects, at its option, not to issue a Notice to Proceed to Subcontractor within one hundred twenty (120) days of the execution of this Ratification Agreement, Surety will promptly pay the retainage withheld as set forth in line number 5 of paragraph 6 of this Ratification Agreement, provided that Subcontractor's work in place is acceptable to owner. . . .
>
> 19. Time is of the essence. Subcontractor hereby acknowledges and agrees that time is of the essence with respect to the performance of the Subcontract Work under the Subcontract and this Agreement once such work is recommenced. Subcontractor shall perform the Subcontract work . . . as directed by Forcon and/or the Owner's representatives and/or the Completion Contractor. . . .
>
> 21. Subcontractor shall have the right to terminate this Agreement only in the event of non-payment by Surety for work performed by Subcontractor after the effective date of this Agreement.

> 22. Non-Performance. If the Surety finds, in its sole discretion, that Subcontractor is not performing work in accordance with the Contract, Subcontract, this Agreement, the Project schedule, or as per the direction of Surety . . . the Surety . . . shall send Subcontractor written notice regarding the Subcontractor's lack of proper performance. If the Subcontractor does not correct the non-performance issue within three (3) calendar days, the Surety, at its sole discretion, may perform or hire another subcontractor to perform the Subcontractor's work and backcharge the Subcontractor for the work performed. . . .

After signing the ratification agreement, Strober entered into seven other contracts to perform work on unrelated projects during the summer of 2014. Strober had also entered into other contracts for work in summer 2014 prior to signing the ratification agreement.

On March 19, 2014, Capitol, through Forcon, issued a request for quotation (RFQ) for bids from contractors to complete the contract. Upon receiving the RFQ, RAI called Strober to confirm it would perform its duties under the $630,000 contract price. On April 17, 2014, Capitol awarded the project to RAI, and entered into a contract whereby RAI replaced Tekton as the general contractor.

During this time, the fourth revised construction schedule was in effect, which required Strober to complete the roofing work between April 3, 2014, and May 1, 2014. RAI later

acknowledged that Strober was prepared to perform the contract during the designated time, and in May and June 2014. The ratification agreement did not modify this fourth schedule or provide a new schedule.

On May 27, 2014, RAI representative Chris Bonner emailed Strober, stating, "We are looking for your submittals for roofing and wall panels. We requested them [two] weeks ago and are running out of time." Strober emailed Forcon on that same date, stating RAI was "calling us for submittals" and inquiring whether Strober should "expect to receive a contract from [RAI], or is the ratification agreement from you sufficient for us to proceed with work?" Forcon responded, "When you signed the Ratification Agreement you agreed to complete the Project under the terms and conditions of your contract with Tekton."

The next day, on May 28, 2014, RAI sent Strober and its other subcontractors an email requiring their attendance at the project "Kick Off" meeting on June 2, 2014. On May 29, 2014, RAI sent Strober a proposed subcontract (proposed amendment), containing what RAI describes as its "standard and preferred contractual terms, which it had developed over the years." The proposed amendment required Strober to complete its work by July 10, 2014. Neither party signed this proposed amendment.

On May 30, 2014, RAI sent an email to the subcontractors containing a proposed project schedule and requesting they review it prior to the "Kick Off" meeting. However, the record shows RAI did not include Strober in this email.

Strober representatives attended the June 2 meeting and provided RAI with roofing submittals on that date. Strober received RAI's new construction schedule at this meeting, which gave Strober from June 25 to July 14, 2014, to install the roofing, and from July 15 to July 25, 2014, to install the wall panels. The project was broken into two phases, with completion of certain work scheduled for August 22, 2014. Strober said at deposition it "could have probably got some of the work done" by August 22.

The next day, June 3, 2014, Strober informed RAI it could only work on the roofing either before June 25 or after September 7, 2014, due to its full schedule of other roofing projects. On June 5, RAI's scheduling consultant sent Strober an email asking for clarification regarding these scheduling issues. Strober did not respond to this email. Also on June 5, RAI sent an email to Strober and copied RAI personnel, stating, "I just finished talking to [Strober's project manager] and he is telling me that . . . they are completely booked for the

summer and will not be able to do the job. . . . We are going to think of getting another contractor."

Shortly thereafter, RAI's business development director spoke with Strober's president and said, "[J]ust give me Phase [one]. We can work out Phase [two]." Another RAI employee contacted a Strober administrator in late June 2014, who informed him Strober was "too busy, and that they would not be able to do [the] project, that I should find another roofer."

Based on these communications, RAI attempted to find a replacement subcontractor for the roofing work. On July 21, 2014, RAI hired Palomino Roofing Company (Palomino) to complete Strober's work. On August 7, 2014, RAI sent Strober a formal notice, stating Strober breached the ratification agreement by refusing to perform.

RAI filed its complaint against Strober and Capitol on September 15, 2014, asserting claims for breach of contract and unjust enrichment. Strober filed an answer asserting cross-claims against Capitol. Capitol filed a separate answer.

The parties conducted discovery, and on November 20, 2015, Strober moved for summary judgment. Capitol and RAI reached a settlement on December 7, 2015; thereafter, Capitol filed a motion for summary judgment to dismiss Strober's cross-claims against it.

Following oral argument, the motion judge granted summary judgment in favor of Strober and issued an accompanying written opinion. The judge found the subcontract and ratification agreement remained in effect, but RAI had breached their terms. First, the judge determined that under the "Election Not to Proceed" paragraph of the ratification agreement, Strober anticipated receiving a Notice to Proceed within 120 days of the contract's effective date. The judge found RAI did not issue Strober a notice to proceed within this time, March 7 to July 7, 2014.

Second, the judge found the "Non-Performance" section of the ratification agreement required RAI to give Strober written notice of its lack of proper performance, and to provide Strober with three days to cure its breach. The judge found RAI did not advise Strober of its default until August 2014, at which point it had already hired a new subcontractor.[1]

Third, the judge determined RAI breached its duties under the subcontract by failing to cooperate with Strober due to its "unilateral decision" to set the new schedule. She found, after the fourth revision expired on May 1, 2014, that Strober "only

[1] The judge wrote RAI hired a new subcontractor "under a contract dated 5/28/14." This is a reference to the original contract between RAI and Palomino, dated May 28, 2014. RAI later sent Palomino a revised contract on July 21, 2014, covering the scope of Strober's work.

had an expired work schedule, and was not even assured by any writing that they remained a valid subcontractor on this project. This is the period where Strober sought other business contracts."[2]

The judge also found RAI, in the place of Capitol, had the "full power in the relationship" and "[a]s the maker of [the ratification agreement], the terms should be held most harshly against them." She found although Strober told RAI it was unable to follow the new schedule, it offered alternate dates; therefore, she rejected RAI's argument Strober committed anticipatory breach, which required "unconditional declaration" it could not perform the contract. The judge concluded:

> The Ratification Agreement under which RAI has sued Strober has remained effective and enforceable. The ratification agreement gave Capitol 120 days from the execution of the Ratification Agreement to issue a notice to proceed. This [c]ourt finds that RAI did not comply with the terms of either the Ratification Agreement (Notice to Proceed or Default Notice), nor the Subcontract (cooperation as to scheduling), therefore these initial breaches by RAI require this [c]ourt to grant Summary Judgment in favor of the Defendant . . . . This [c]ourt has reached this decision based on the explicit terms of the various contracts entered between these sophisticated parties.

[2] The record shows Strober entered into some contracts prior to May 2014.

After the motion judge denied reconsideration, this appeal followed.

II.

We review an order granting summary judgment pursuant to the same standard as the trial judge. Qian v. Toll Bros. Inc., 223 N.J. 124, 134-35 (2015). This standard compels a court to grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). We must construe the facts in the light most favorable to the non-moving party. Robinson v. Vivirito, 217 N.J. 199, 203 (2014). However, an issue of fact is only genuine "if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

When there is no issue of fact, and only a question of law remains, we review that question de novo; the legal determinations of the trial court are not entitled to any special deference. Gere v. Louis, 209 N.J. 486, 499 (2012);

Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). When "summary judgment is based on an issue of law, we owe no deference to an interpretation of law that flows from established facts." State v. Perini Corp., 221 N.J. 412, 425 (2015) (citing Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013)).

Contractual interpretation is a legal matter ordinarily suitable for resolution on summary judgment. Celanese Ltd. v. Essex Cty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009). When construing contract terms, "unless the meaning is both unclear and dependent on conflicting testimony," its interpretation is a matter of law. Ibid. (quoting Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001)).

Well-established rules of construction govern our review of contractual terms. "The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 492 (App. Div.) (citations omitted), certif. denied, 127 N.J. 548, 606 (1991). "A 'court should not torture the language of [a contract] to create ambiguity.'" Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (alteration in original) (quoting Stiefel v.

Bayly, Martin & Fay, Inc., 242 N.J. Super. 643, 651 (App. Div. 1990)).

The focus of review is "the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain." Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 339 (App. Div.) (citation omitted), certif. denied, 188 N.J. 353 (2006). Courts may not re-write a contract or grant a better deal than that for which the parties expressly bargained. Solondz v. Kornmehl, 317 N.J. Super. 16, 21 (App. Div. 1998).

Indeed, reviewing courts must read the contract "as a whole in a fair and common sense manner." Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009) (citation omitted). "[W]ords and phrases are not to be isolated but related to the context and the contractual scheme as a whole, and given the meaning that comports with the probable intent and purpose." Republic Bus. Credit Corp. v. Camhe-Marcille, 381 N.J. Super. 563, 569 (App. Div. 2005) (quoting Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 426 (1956)).

III.

On appeal, RAI argues the motion judge overlooked genuine issues of material fact and made findings that RAI disputed with evidence in the record. The challenged findings are: (1) RAI did not provide Strober with valid "notice to proceed"; (2) RAI did not cooperate with Strober on scheduling; and (3) RAI did not provide Strober with notice of default and the opportunity to cure. We address these arguments in turn.

First, we concur with the motion judge's finding that RAI failed to give Strober valid notice to proceed. The ratification agreement did not define "notice to proceed"; however, it required Strober to "commence work . . . within three (3) days of notice to proceed." It further required RAI to pay Strober's retainage if it declined to issue a notice to proceed within 120 days of the agreement's effective date.

RAI argues "notice to proceed" is "an industry term of art that constitutes direction to a contractor to commence work." RAI points to several communications in the record that purportedly met this definition, specifically: the May 27, 2014 email from RAI to Strober requesting "submittals"; the May 28, 2014 email from RAI to the subcontractors requiring attendance at the "Kick Off" meeting; and the "Kick Off" meeting where RAI "called upon" Strober to complete its work under the new

schedule. RAI further contends Strober rendered part performance by providing RAI with submittals on June 2, 2014, thereby completing part of its "work" under Section 4.1.2 of the subcontract.

However, at no point did RAI give Strober notice "to commence work . . . within three (3) days of notice to proceed." The email requesting submittals did not set a date to begin "work," nor did RAI identify it as such. The communications involving the "Kick Off" meeting similarly did not constitute notice to proceed under the ratification agreement, as RAI informed Strober on June 2 that it was scheduled to commence work on June 25. Therefore, we decline to reverse on this basis.

Second, we agree with the motion judge that RAI breached its duty to cooperate with Strober on scheduling. RAI contends its communications with Strober after the "Kick Off" meeting show it attempted to cooperate, and Strober failed in its reciprocal obligation by searching for other work while bound by the ratification agreement and without informing RAI. However, after the fourth revision expired on May 1, 2014, RAI left Strober without a schedule for approximately one month, and then unilaterally created a new schedule without Strober's input. As such, RAI breached Section 3.1.1 of the subcontract by failing

to cooperate with Strober or promptly notify it of the schedule changes.

RAI further contends the motion judge erred because the subcontract and ratification agreement prohibited Strober from terminating due to scheduling issues. RAI contends Sections 5.2 and 5.3 of the subcontract required Strober to request time and money changes rather than refuse to perform. RAI also cites Section 6.1.1 of the subcontract and Section 21 of the ratification agreement, which state Strober can terminate "for the same reasons . . . as the Contractor" or for nonpayment. However, the judge granted summary judgment because RAI committed the initial breach by unilaterally creating a new schedule, leaving Strober unable to perform its contractual duties in full. Summary judgment was appropriate because Strober was not responsible for RAI's damages. As such, we decline to reverse on this basis.

Third, we agree with the motion judge that RAI breached its duty under Section 22 of the ratification agreement to provide Strober with a valid notice of nonperformance and opportunity to cure. RAI contends it satisfied this requirement through its August 7, 2014 letter. RAI further argues, since Strober did not respond to this letter, the motion judge had no basis to find RAI failed to give Strober opportunity to cure. However,

the record shows RAI hired Palomino to complete Strober's work prior to issuing its August letter. Therefore, RAI did not give Strober the required three-day window to cure its breach.

RAI also argues Strober committed an anticipatory breach after June 5, 2014, and therefore, it had no obligation to provide notice of default. Our Supreme Court has defined anticipatory breach as "a definite and unconditional declaration by a party to an executory contract — through word or conduct — that he will not or cannot render the agreed upon performance." Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 340-41 (1961). However, "the modern view does not 'limit anticipatory repudiation to cases of express and unequivocal repudiation of a contract. Instead, anticipatory repudiation includes cases in which reasonable grounds support the obligee's [belief] that the obligor will breach the contract.'" Spring Creek Holding Co. v. Shinnihon U.S.A. Co., Ltd., 399 N.J. Super. 158, 179 (App. Div.) (citation omitted), certif. denied, 196 N.J. 85 (2008).

RAI failed to cite to the modern standard described in Spring Creek Holding Co.; instead, RAI argues the record shows Strober gave "unequivocal" notice of its intent to breach. Nevertheless, this purported anticipatory breach occurred due to RAI's initial failure to cooperate on scheduling. Therefore, we decline to reverse on this basis.

IV.

RAI also argues the motion judge erred by construing the ratification agreement "most harshly" against RAI as the drafter. Under the doctrine of contra proferentem, when a contract term is ambiguous, a court is required to "adopt the meaning that is most favorable to the non-drafting party." Pacifico v. Pacifico, 190 N.J. 258, 267 (2007). However, this doctrine only applies as a "doctrine of last resort" where the parties have "unequal bargaining power." Id. at 268. Moreover, Section 24 of the ratification agreement states, "This Ratification Agreement shall be construed without regard to any presumption or other rule requiring construction against the party drafting this Ratification Agreement."

In light of Section 24, we discern no basis for construing the ratification agreement against RAI. Nevertheless, the judge concluded her opinion by stating, "This [c]ourt has reached this decision based on the explicit terms of the various contracts entered between these sophisticated parties." Because we conclude the contracts and the parties' course of conduct fully support the grant of summary judgment to Strober under these facts, without construing the ratification agreement against RAI, we decline to reverse on this basis.

Any arguments not specifically addressed lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.