

FLATROCK PARTNERS, L.P.,	:	July Term 2003
Plaintiff,	:	
v.	:	No. 1194
KASCO-CHIP CONSTRUCTION, J.V.,	:	
ADVANCED GEOSERVICES CORP.,	:	COMMERCE PROGRAM
Defendants.	:	
	:	Control Number 100892
	:	
	:	

AND NOW, this 14TH day of February 2007, upon consideration of Additional Defendant Advanced GeoServices Corp.'s Partial Motion for Summary Judgment, Kasco-Chip Construction's response in opposition, all matters of record and in accord with the contemporaneous Memoranda Opinion filed of record, it hereby is **ORDERED** that said motion is **Granted in part** and any damages awarded on the breach of contract claim only shall not exceed the lesser of the total contract value of the Agreement or \$40,000.00. All other aspects of the motion are **Denied**.

HOWLAND W. ABRAMSON, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

FLATROCK PARTNERS, L.P.,	:	July Term 2003
Plaintiff,	:	
v.	:	No. 1194
KASCO-CHIP CONSTRUCTION, J.V.,	:	
ADVANCED GEOSERVICES CORP.,	:	COMMERCE PROGRAM
Defendants.	:	
	:	Control Number 100892
	:	

ABRAMSON, J.

OPINION

This is an action for indemnification, contribution and legal fees and costs. On August 11, 2000 defendant Advanced GeoServices Corp. (“AGC”), a licensed professional geotechnical engineer, submitted a proposal to Albert M. Greenfield & Co. (“Greenfield”) to conduct a geotechnical investigation at the site of a proposed apartment complex at 100 Leverington Avenue, Manayunk, Pa. On September 7, 2000, AGC issued its geotechnical investigation to Greenfield.

On April 3, 2001, the property upon which the Project was to be constructed was acquired by FlatRock Partners, L.P. (“Flatrock”). On the same date, Flatrock and Kasco Construction Co., entered into a Guaranteed Maximum Price Contract (“Contract”) for construction of the Project. The Contract for construction of the project was transferred to the joint venture Kasco-Chip Construction, J.V. (“Kasco-Chip”).

On July 26, 2001, AGC submitted a proposal for foundation construction monitoring services for the project to Kasco-Chip. The services to be provided by AGC were to consist of the monitoring of foundations in addition to providing engineering consultation with respect to unexpected conditions or problems associated with

geotechnical issues during construction. Kasco-Chip accepted AGC's proposal on July 30, 2001.

The proposal presented to Kasco-Chip included Terms and Conditions which were presented on a separate form attached to and made part of this proposal. The terms and conditions contained a Liability Limitations provision which provides:

(b) Notwithstanding any other provisions of these General Terms and conditions and unless a higher limit of liability is expressly provided elsewhere in this Agreement in a provision making specific reference to this Paragraph, AGC's total liability to the Client for any loss or damages from claims arising out of or in connection with this Agreement from any cause including AGC's strict liability, breach of contract or professional negligence, errors and omissions shall not exceed the lesser of the total contract value of the Agreement or \$40,000. The Client hereby releases AGC from any liability exceeding such amount.

Following foundation construction and erection of the steel it was discovered on or about December 19, 2001 that some of the steel was at the wrong elevation and the steel was dipped downward in the middle of the structure. Kasco-Chip contends that the deflection in the steel, which resulted in sloping concrete floors in the building, are the result of vertical displacement of some of the caissons which are part of the foundation of the Project.

On December 29, 2004, Flatrock Partners, L.P. the owner of the Project commenced an action against defendant Kasco-Chip, the general contractor and others. Kasco-Chip has joined AGC as an additional defendant alleging that AGC negligently monitored the caisson construction work and breached its contract with Kasco Construction Co., Inc. Kasco-Chip seeks indemnification and/or contribution, for all damages or other relief awarded to Flatrock in this case on account of defective or deficient foundation construction work and sloping floors.

Kasco-Chip further alleges that AGC made negligent misrepresentations in the Geotechnical Investigation of September 7, 2000 by representing that it had “drilled its test borings to intact rock, as indicated by auger refusal,” and that “Kasco Chip relied on AGC’s negligent conclusion that auger refusal showed intact rock.” On May 1, 2006, Flatrock and Kasco-Chip settled for \$3,900,000.00. As part of the settlement, Flatrock assigned its rights against AGC to Kasco-Chip. Kasco-Chip subsequently settled claims for indemnification and contribution with additional defendants McKinney Drilling Company and Rosen R. Rosen Associates.

AGC has now filed the instant motion for partial summary judgment to limit any damages award against it to the lesser of the amount of Kasco-Chip paid for AGC’s deficient services or \$40,000.00. AGC also moves for dismissal of Kasco-Chip’s claim in Count III for negligent geotechnical investigation/negligent misrepresentation because there is no evidence establishing reasonable reliance.

DISCUSSION

In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Potter v. Herman, 762 A.2d 1116, 1117-18 (Pa. Super. 2000). Summary judgment is proper only when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Id. In sum, only when the facts are so clear that reasonable minds cannot

differ, may a trial court properly enter summary judgment. Basile v. H & R Block, Inc., 761 A.2d 1115, 1118 (Pa. 2000).

Under Pennsylvania law, limitation of liability clauses are routinely enforced in contracts negotiated between sophisticated parties. Conomos, Inc. v. Sun Company, Inc., 831 A.2d 696 (Pa. Super. 2003). Such are a fact of every-day business and commercial life. Absent unconscionability, limited liability provisions are binding on the parties that fashioned the terms of their agreement. Vasilis v. Bell of Pa., 409 Pa. Super. 396, 598 A.2d 52, 54 (Pa. Super. 1991).

In interpreting the limitation of liability clause at issue here, general contract principles are instructive. When construing agreements involving clear and unambiguous terms, the Court need only examine the writing itself to give effect to the parties understanding. Creeks v. Creeks, 422 Pa. Super. 432, 619 A.2d 754, 756 (1993). The court must construe the contract only as written and may not modify the plain meaning of the words under the guise of interpretation. Id. When the terms of a written contract are clear, this Court will not re-write it or give it a construction in conflict with the accepted and plain meaning of the language used. Id. Conversely, when the language is ambiguous and the intentions of the parties cannot be reasonably ascertained from the language of the writing alone, the parol evidence rule does not apply to the admission of oral testimony to show both the intent of the parties and the circumstances attending the execution of the contract. Id.

A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. Walton v. Philadelphia National Bank, 376 Pa. Super. 329, 545 A.2d 1383, 1389 (1988). The court must determine as a

question of law whether the contract terms are clear or ambiguous. Id. When acting as the trier of fact, the court also resolves relevant conflicting parol evidence as to what was intended by the ambiguous provisions, examining surrounding circumstances to ascertain the intent of the parties. Id.

Here, the language contained in the instant limitation of liability clause is clear and unambiguous and will not be disregarded by the court under any pretext. The clause is the subject of a private contract between two sophisticated business entities dealing at arm's length who are at liberty to fashion the terms of their bargain as they wish. The court will give effect to the meaning intended by the clause. Consequently the limitation of liability provision is valid and enforceable to the breach of contract claim.¹

As it pertains to the negligent misrepresentation claim, the court finds that the limitation of liability claim does not apply. Kasco-Chip asserts a negligent misrepresentation claim pursuant to the recent Superior Court decision in Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270 (Pa. 2005). Specifically, Kasco-Chip maintains that it relied upon AGC's Geotechnical Investigation performed for Albert M. Greenfield in August 2000 to estimate the depth to which the caissons would have to be drilled and how much concrete would be required. AGC and Albert M. Greenfield entered into a contract for the work to be performed. Similar to the contract between Kasco-Chip and AGC, the same General Terms and Conditions form was attached to the proposal. The limitation of liability provision contained therein does not limit the damages for Kasco-Chip's negligent misrepresentation claim. The clause

¹ The court finds that counsel fees and costs do not lie outside the scope of the limitation of liability provision since attorney's fees and costs fall within the definition of losses. See Paragraph 6(a) General Terms and Conditions.

clearly and unequivocally applies to limit liability to the “Client”. Kasco Chip was not the client when AGC conducted the geotechnical investigation to assist in the design and construction of project. Accordingly, the limitation of liability clause is inapplicable to Kasco Chip on the negligent misrepresentation claim.²

CONCLUSION

For the foregoing reasons, Additional Defendant Advanced GeoServices Corp.’s Partial Motion for Summary Judgment is granted in part and denied in part and any damages awarded on the breach of contract claim shall not exceed the lesser of the total contract value of the Agreement or \$40,000.00. All other aspects of the Motion are denied. An order consistent with this Opinion will follow.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

² The court finds ACG’s incorporation of the geotechnical investigation to the Kasco Chip proposal unavailing.