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

CARSON/DEPAUL/RAMOS, A Joint Venture RAMOS/CARSON/DEPAUL, A Joint Venture,	:	FEBRUARY TERM 2004
	:	No. 02166
Plaintiffs,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control No. 091216
DRISCOLL/HUNT, A Joint Venture,	:	
	:	
Defendant,	:	
	:	
v.	:	
	:	
RICHARD GOETTLE, INC.,	:	
	:	
Add'l Defendant.	:	

ORDER

AND NOW, this 29th day of June, 2006, upon consideration of defendant Driscoll/Hunt, a Joint Venture's Motion for Partial Summary Judgment As To Released Claims, the response thereto, the briefs in support and opposition, and all other matters of record, and in accordance with the Opinion issued contemporaneously, it is hereby **ORDERED** that said Motion is **DENIED**.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

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OPINION

This case arises out of the construction of Citizens Bank Park, a baseball stadium (the "Project") built for the Philadelphia Phillies (the "Owner"). The Owner contracted with defendant Driscoll/Hunt, a Joint Venture ("DH") to act as Construction Manager on the Project. In that capacity, DH entered into Subcontract Agreements (the "Subcontract") with plaintiff Ramos/Carson/DePaul, a Joint Venture ("RCD") to install concrete foundations for the Project. Towards the end of the Project, RCD commenced this action to recover from DH over $10 million in impact cost/delay damages[1] that RCD allegedly incurred during the course of the Project.[2]

[1] The amounts claimed are in addition to the approximately $24 million due (and apparently paid) to RCD under the Subcontract.

[2] In addition to its breach of contract claims, RCD later tried to assert a fraud claim based on DH's representations that RCD could submit its impact claims late in the Project. This court denied RCD's Motion to Amend because the fraud claim was essentially duplicative of RCD's breach of contract claims. In other words, the gist of RCD's action against DH sounds in contract not in tort. *See* Hart v. Arnold, 884 A.2d 316, 339-340 (Pa. Super. 2005).

DH's motion for summary judgment is presently before the court. In its motion, DH argues that RCD's impact claims are barred as a result of certain releases signed by RCD. RCD argues that the releases do not speak to its impact claims because RCD entered into a side agreement with DH to hold such claims until the end of the Project.

The Subcontract between RCD and DH provides for the subcontractor to submit impact claims to DH in writing within certain time frames. *See* DH's Motion for Summary Judgment ("Motion"), Ex. B, §§ 10, 18, 21. The Subcontract also provides that the parties may modify it only in writing:

> No Oral Modifications: This subcontract may be amended only by a written document signed on behalf of Construction Manager and Subcontractor by authorized persons designated in Section 27.

Id. at ¶ 35.5.

In February 2003, approximately a year into the Project, DH and RCD met and subsequently exchanged letters regarding the understandings reached at that meeting. RCD wrote to DH as follows:

> While we did not have the opportunity to elaborate, it is understood that we have been accruing cost for prior impacts to our work which will be submitted for payment during or at the conclusion of the project.

See Response to Motion, Ex. 35. DH responded as follows:

> Additionally, I must go on record since you made reference to impacts. As you are fully aware, we have not been at all satisfied with joint venture's [RCD's] performance on this project and have and will continue to incur costs as a result of delays caused by your joint venture. You indicated that you felt your joint venture was impacted by jobsite issues and that you will submit same. However,

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The issues presented in this action are whether the parties modified their agreement and, if so, whether DH breached the modified agreement. If RCD's evidence is not sufficient to show that the parties altered their agreement, then it is not sufficient to show fraud either. If a modification is proven, then it does not matter whether DH breached the modified agreement intentionally, negligently or otherwise; RCD's claim is still just for breach of contract.

> I must alert you that the costs incurred by the DH joint venture will be submitted to you at the appropriate time, including any costs submitted by subcontractors.
>
> In summary, we have both agreed to put theses [sic] issues on the sidelines to get the project completed and will discuss same at the appropriate time.

See id., Ex. 37.

Throughout the Project, both before and after this exchange of letters, RCD obtained periodic progress payments for the work it had completed by submitting forms entitled "Statement of Contractor" ("Statements"). These Statements were required by the Subcontract and contained the following language:

> The undersigned certifies further that the work performed and the materials supplied to date as shown on the above represent the actual value of accomplishment under the terms of the Contract (and all authorized changes thereto) between the undersigned and Driscoll/Hunt, a Joint Venture relating to the above referenced Project. No other monies are claimed to be or are due from Driscoll/Hunt, a Joint Venture except as listed on the reverse side hereof.

See Motion, Ex. H. In exchange for each periodic progress payment, RCD also executed a form entitled "Affidavit and Partial Waiver of Claims and Liens and Release of Rights" ("Waivers"). These Waivers were required by the Subcontract and contained the following language:

> The undersigned further represents and warrants . . . that he has no other outstanding and unpaid payment applications, invoices, retentions, holdbacks, chargebacks or unbilled work or materials against Driscoll/Hunt, A Joint Venture as of the date of the aforementioned payment application . . .
>
> In addition, for and in consideration of the amounts and sums received, the undersigned hereby waives, releases and relinquishes any and all claims, rights or causes of action whatsoever arising out of or in the course of the work performed on the above-mentioned project, contract or event transpiring prior to the date hereof, excepting the right to receive payment for work performed and properly completed and retainage, if any, after the date of the above mentioned payment application or invoices.

See id., Ex. I.

On September 24, 2003, after executing numerous Statements and Waivers, RCD informed DH by letter that it had incurred $9,245,976.00 in impact damages from the inception of the Project through June 25, 2003. *See id.*, Ex. K. DH refused to consider the claim on the grounds that: 1) the claim had been released in the Statements and Waivers; and 2) the claim was untimely and otherwise violated the claim submission requirements of the Subcontract. *See id.*, Ex. L. RCD commenced this action five months later. RCD also continued with its work on the Project, receiving payment and executing additional Statements and Waivers in the Spring of 2004. *See id.*, Ex. P.

The Statements and Waivers can certainly be read to preclude a subcontractor from subsequently asserting claims where such claims are based on work done prior to the cut-off dates set forth in the Statements and Waivers. *See* Kleinknecht Electric Co. v. Jeffrey M. Brown Assoc., 2006 Phila. Ct. Com. Pl. LEXIS 180 (Apr. 10, 2006). *See also* G.R. Sponaugle & Sons, Inc. v. Hunt Constr. Group, Inc., 366 F.Supp.2d 236 (M.D. Pa. 2004). However, in this case, there is evidence that the parties agreed separately in writing[3] to allow RCD's impact claims to be submitted late despite the release language in the Statements and Waivers.

Specifically, in February, 2003, RCD represented to DH that RCD had "been accruing cost for prior impacts to our work which will be submitted for payment during or at the

[3] RCD also claims that DH made certain oral representations and engaged in a course of conduct that modified the Subcontract's requirements for submission of claims. "An agreement that prohibits non-written modification may be modified by subsequent oral agreement if the parties' conduct clearly shows the intent to waive the requirement that the amendments be in writing." Somerset Community Hospital v. Allan B. Mitchell & Assoc., Inc., 454 Pa. Super. 188, 197, 685 A.2d 141, 146 (1996). *See also* Universal Builders, Inc. v. Moon Motor Lodge, Inc., 430 Pa. 550, 560, 244 A.2d 10, 13 (1968) ("the effectiveness of a non-written modification in spite of a contract condition that modifications must be written depends upon whether enforcement of the condition is or is not barred by equitable considerations.") However, it is for the finder of fact to determine whether such an oral modification occurred. *See* Somerset Community Hospital, 454 Pa. Super. at 197, 685 A.2d at 146

At the summary judgment stage, the court must review the alleged written modifications to determine if they do indeed modify the contract. Interpretation of the parties' written contract(s), including any written modifications thereto, is a question of law for the court. *See* Madison Const. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606, 735 A.2d 100, 106 (1999); Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 201, 519 A.2d 385, 389 (1986).

conclusion of the project." *See* Response to Motion, Ex. 35. DH[4] acknowledged that RCD believed it "was impacted by jobsite issues and that [it would] submit same" to DH, and DH further "agreed to put these issues on the sidelines to get the project completed and [to] discuss same at the appropriate time."[5] *See id.*, Ex. 37. In doing so, these letters evidence an intent by the parties to modify the Subcontract's requirements with respect to the time for submission of certain of RCD's impact claims.[6] In addition, by agreeing that RCD may submit such claims late, DH necessarily agreed to the continued viability of RCD's existing impact claims, and thereby modified the language of release contained in the Statements and Waivers with respect to those impact claims.

The parties' letters do not make clear whether they intended to allow late filing of only those impact claims that existed at the time of the parties' meeting in February, 2003, or if they intended to waive the timing requirements with respect to all other RCD impact claims as well. Since the modification of the Subcontract contained in the February 2003 letters is ambiguous[7] on this issue, the parties may offer parol evidence at trial as to their intentions with respect to claims for impact accruing before and after February 2003. Furthermore, with respect to those of

[4] The February, 2003 letter to RCD is signed by the President of L.F. Driscoll Co. ("Driscoll"). Driscoll is one half of the DH joint venture. The President of Driscoll is not listed in the Subcontract as one of the persons authorized to modify the Subcontract in writing. *See* Motion, Ex. B, Attachment I. However, one of Driscoll's senior vice presidents is authorized, so presumably anyone above him in the corporate chain of command also has such authority. *See id.* DH, wisely, does not dispute the President's authority to issue the letter on behalf of DH.

[5] The parties engaged in a similar exchange of correspondence a year earlier. In March, 2002, RCD wrote to DH requesting that, as a result of Project delays, "an extension of time to our contract be formalized by a change order, the extended overhead expense we have incurred be reimbursed and that any and all expenses associated with accelerating our future operation to compress the schedule be paid by [DH]." *See* Response to Motion, Ex. 16. DH responded by letter in which it blamed RCD for the delay and stated "we have a long way to go to get to spring of 2003 and it is way too early to be talking about extra cost." *See id.*, Ex. 17.

[6] It appears that there was sufficient consideration for the modification, in that RCD gave up its right to bring its existing disruption claims at that point in exchange for the right to bring them later. In the alternative, there was apparently reliance by RCD on the representation by DH that DH would allow RCD to file claims late.

[7] "The court, as a matter of law, determines the existence of an ambiguity and interprets the contract whereas the resolution of conflicting parol evidence relevant to what the parties intended by the ambiguous provision is for the trier of fact." Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 201, 519 A.2d 385, 389 (1986).

RCD's claim that are timely filed under any modification of the Subcontract, DH may still prevail if, for instance, RCD is found not to have suffered the impact damages it claims or RCD is found to have caused its own impact damages.

CONCLUSION

For all the foregoing reasons, DH's Motion for Partial Summary Judgment As To Released Claims is denied.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.