



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: July 20, 2011

CBCA 1460

WALSH/DAVIS JOINT VENTURE,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Martin R. Salzman of Hendrick Phillips Salzman & Flatt, P.C., Atlanta, GA, counsel for Appellant.

Dalton F. Phillips, Leigh Erin S. Izzo, and Heather Cameron, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STERN**, and **HYATT**.

DANIELS, Board Judge.

We now take up another issue in the appeal by Walsh/Davis Joint Venture (WDJV) of the decision issued by a General Services Administration (GSA) contracting officer regarding a claim under a contract for the construction of a complex of buildings in Washington, D.C. As a part of this claim, WDJV, on behalf of its electrical subcontractor, AES Electrical, Inc. d/b/a Freestate Electrical Construction Company (Freestate), sought to be paid \$1,296,085 to compensate for inefficiencies allegedly imposed on Freestate's work due to the cumulative impact of changes made to the contract at GSA's instigation. GSA has moved for summary relief as to a portion of this element of the claim.

The parties modified the contract many times – GSA says 104 – affecting Freestate’s work. Many of these modifications – GSA says forty-three – included the following sentence:

Settlement of this change includes all costs, direct, indirect, and impact and delay associated with this change.

Other modifications – said to be sixty-one in number – included instead the following sentence:

In consideration of the modification agreed to herein as complete equitable adjustments for the direct costs of work described herein, the Contractor hereby releases the Government from any and all liability under this contract for further equitable direct cost adjustments attributable to such facts or circumstances giving rise to the modification, except for the time-related costs for extended field and home office overhead, labor inefficiency, disruptions, impact to the critical path, schedule resequencing and acceleration.

In June 2009, the Court of Appeals for the Federal Circuit issued its decision in *Bell BCI Co. v. United States*, 570 F.3d 1337 (Fed. Cir. 2009). In this decision, the Court analyzed the impact of a construction contract modification which contained the following language:

The modification agreed to herein is a fair and equitable adjustment for the Contractor’s direct and indirect costs. This modification provides full compensation for the changed work, including both Contract cost and Contract time. The Contractor hereby releases the Government from any and all liability under the Contract for further equitable adjustment attributable to the Modification.

Id. at 1339. The Court held (notwithstanding a vigorous dissent by Judge Newman) that this language is unambiguous and therefore must be given its plain and ordinary meaning; parol evidence could not be examined. “The language plainly states that Bell released the government from *any and all* liability for equitable adjustments attributable to [the modification].” *Id.* at 1341. Consequently, the Court appeared to conclude, all requirements were met for a showing that the contractor’s claims were resolved through an accord and satisfaction. *See id.* at 1340-41.

GSA maintains that although the wording of the key sentence in the first group of modifications in the contract before us is slightly different from the wording of the modification to the Bell BCI contract,

there is no actual difference in content. *Bell BCI* released the Government from any and all liability under the Contract for further equitable adjustment attributable to the Modification. WDJV released GSA from “all costs, direct, indirect, and impact and delay associated with” the change orders at issue.

Respondent’s Motion at 6. Therefore, says the agency, the Court’s decision in *Bell BCI* “controls the issues at bar.” *Id.* The Board should grant the motion for summary relief, finding that the language at issue constitutes an accord and satisfaction with regard to the cumulative inefficiency impact claim, and deny that claim to the extent that it involves the modifications that contain the key sentence. The motion does not address the second group of modifications, which contain the more extensive sentence regarding potential claims for other costs.

WDJV notes differences between the language in the Bell BCI modification and the language in the first group of modifications to the contract on which we now focus. The Bell BCI sentence speaks to “any and all liability” and expressly uses the term “release”; the WDJV sentence does neither. We do not believe that these differences are significant. Notwithstanding the spareness of the language in the WDJV initial modifications, the sentence is unambiguous in precluding further efforts to recover “direct, indirect, and impact and delay [costs] associated with” each of the affected contract modifications. The fact that the sentence does not include the word “release” is immaterial; it conveys clearly that the contractor has released future claims of the sort sought here. *Trataros Construction, Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,460.

If nothing more were at issue here, we would follow in the course of the many board of contract appeals decisions – both before and after *Bell BCI* – which have enforced similarly-phrased releases. *See, e.g., Program & Construction Management Group, Inc. v. General Services Administration*, GSBCA 14149, 99-2 BCA ¶ 30,579, at 151,002, 151,008; *Selpa Construction & Rental Equipment Corp.*, PSBCA 5039, et al., 11-1 BCA ¶ 34,635, at 170,674, 170,686-87 (2010) (citing *Bell BCI*); *Whiting-Turner Contracting Co.*, ASBCA 56319, 10-1 BCA ¶ 34,436, at 169,947, 169,951 (citing *Bell BCI*); *Gavosto Associates, Inc.*, PSBCA 4058, et al., 01-1 BCA ¶ 31,389, at 155,058, 155,060; *Technocratica*, ASBCA 46567, et al., 99-2 BCA ¶ 30,391, at 150,226-27.

Bell BCI is hardly the only decision of our appellate authority to speak to a situation like the one presented here, however. As the Court of Claims (the Federal Circuit’s

predecessor) explained in *J. G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801 (1963):

There are, of course, special and limited situations in which a claim may be prosecuted despite the execution of a general release. For instance, where it is shown that, by reason of a mutual mistake, neither party intended that the release cover a certain claim, the court will reform the release. . . . Similarly, where the conduct of the parties in continuing to consider a claim after the execution of the release makes plain that they never construed the release as constituting an abandonment of the claim, or where it is obvious that the inclusion of a claim in a release was attributable to a mistake or oversight, or where fraud or duress is involved, the release will not be held to bar the prosecution of the claim.

Id. at 806-07 (citations omitted).

The Federal Circuit has more recently returned to these themes. We discuss here, as relevant to our case, two of the “special and limited situations” noted in *Watts* as permitting the prosecution of a claim despite the existence of a release. In *Howmedica Osteonics Corp. v. Wright Medical Technology, Inc.*, 540 F.3d 1337 (Fed. Cir. 2008), the court explained:

When a written contract “fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement.” Restatement (Second) of Contracts § 155 (1981). The purpose of reformation, therefore, is to correct a mistake that occurred in reducing the parties’ actual, negotiated agreement to writing.

Id. at 1348;¹ *see also National Australia Bank v. United States*, 452 F.3d 1321, 1329 (Fed. Cir. 2006).

¹ The Court gave this further guidance in *Howmedica*: “Reformation of a contract requires clear and convincing evidence of a mistake common to both parties that causes the written instrument not to reflect the real agreement between the parties. Moreover, the mistake must be a material one; it must be one in the absence of which the party who made it would not have entered into the compromise.” 540 F.3d at 1349 (citations and quotations omitted).

In *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993), the Court amplified another exception noted in *Watts*:

[C]ourts may refuse to bar a claim based upon the defense of accord and satisfaction where the parties continue to consider the claim after execution of a release. *Winn-Senter Constr. Co. v. United States*, 75 F. Supp. 255, 110 Ct. Cl. 34 (1948). “Such conduct manifests an intent that the parties never construed the release as an abandonment of plaintiff’s earlier claim.” *A & K Plumbing & Mechanical, Inc. v. United States*, 1 Cl. Ct. 716, 723 (1983).

Id. at 1581.

Boards of contract appeals have consistently reviewed assertions by contractors that notwithstanding unambiguous releases in contract modifications, claims should be considered on their merits because the release language did not represent the parties’ intentions. These intentions may have been demonstrated, for example, by the Government having considered a claim after execution of the release. *Trataros Construction*, 03-1 BCA at 159,465-66 (board found after hearing testimony that “the parties intended for modification 82 to be a comprehensive settlement”); *Young Enterprises of Georgia, Inc. v. General Services Administration*, GSBCA 14437, et al., 00-2 BCA ¶ 31,148, at 153,865 (accord and satisfaction could not be found because “the record clearly reveals an understanding between the parties to defer the . . . claim”; no meeting of the minds that the claims were fully resolved); *Jordan & Nobles Construction Co.*, GSBCA 8349, et al., 91-1 BCA ¶ 23,659, at 118,514 (1990) (language of release enforced because despite contractor’s allegations, there was no “hard proof” that an agreement to consider the claim existed); *Robinson Quality Constructors*, ASBCA 55784, 09-1 BCA ¶ 34,048, at 168,390-91 (board found documentation that claim was reserved); *Campbell Industries*, ASBCA 38688, 93-3 BCA ¶ 26,165, at 130,068-69 (conduct of parties makes plain that they limited the scope of the release).

WDJV’s opposition to GSA’s motion for summary relief addresses both of the exceptions to the general rule discussed above that a contract modification’s clear expression of release of claims should be enforced. First, the contractor has supplied evidence that the parties did not ever intend, in settling change order proposals through contract modifications, to preclude delay and inefficiency claims. WDJV’s project manager, Vincent Michalesko, states in an affidavit that GSA represented from the beginning of the project that such claims would be addressed during the course of construction. Mr. Michalesko says that in settling direct cost claims, both parties understood that delay and inefficiency claims were not waived. He additionally tells us that the language at issue was clarified to reflect the parties’ intent after WDJV learned that it would have to pursue all time-related and impact claims

through a formal process because GSA did not have available funds to pay those claims. Freestate's project manager, Larry Clark, supplements Mr. Michalesko's affidavit with one of his own, stating that in every change order proposal submitted by Freestate on this project, the subcontractor in two ways noted its reservation of rights to claims for cumulative impacts and labor inefficiencies. On the cover letter transmitting the proposal, Freestate said that its request "sets forth only the direct cost for performing the above referenced work. Freestate . . . reserves its rights to assert any and all claims for . . . working out of sequence, disruption, hindrances, interferences, acceleration, compression, [and] loss of efficiency . . . because of . . . the impact of the changed work on unchanged work." On the proposal itself, Freestate said, "This quote covers direct costs only and we reserve the right to claim for impact and consequential costs." Mr. Clark attests that "it was made clear to GSA that Freestate was only negotiating the direct costs associated with the change order at issue and that all other cumulative impacts, including its labor inefficiency claim, were reserved to be included in a separate claim submitted to GSA." He also tells us that "all of Freestate's proposed change orders were settled with GSA at or below Freestate's originally quoted direct cost."²

Mr. Michalesko's affidavit also speaks to GSA's consideration of labor inefficiency claims, notwithstanding the language of the releases contained in contract modifications. According to WDJV's project manager, in December 2009 and January 2010, he was involved in negotiations with GSA regarding subcontractors' labor inefficiency claims. GSA settled many of these claims – a fact we know for certain because in June 2010, we granted a motion for stipulated award in which the parties asked us to direct that GSA pay to WDJV \$1,434,544 "regarding inefficiency claims the parties have resolved through negotiation." Mr. Michalesko says, "At no time during those negotiations with GSA did GSA raise the issue that any of the subcontractors or [WDJV] had waived their right to pursue a loss labor productivity claim because of the language contained in the GSA issued modifications through October 2006." WDJV notes that these negotiations occurred months after the Federal Circuit issued its decision in *Bell BCI*.

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v.*

² This last point is presented in support of a defense WDJV advances in opposition to the motion: The language in question cannot be viewed as a release of the contractor's labor inefficiency claims because GSA gave no consideration in exchange for the purported waiver. In light of how we resolve the motion, we do not need to address this defense.

Catrett, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). To resolve GSA's motion, we must accept as true the statements made by Messrs. Michalesko and Clark in their affidavits. If the parties did indeed agree, in modifying the contract to compensate WDJV for various of Freestate's direct costs, that they were not precluding the contractor from later pursuing the subcontractor's labor inefficiency costs, the modification language did not represent the parties' intent and therefore cannot be enforced. If GSA did consider inefficiency claims of other subcontractors, notwithstanding modification language which appeared to waive such claims,³ this action confirms that the parties never intended the language to preclude the claims.

Decision

We therefore **DENY** GSA's **MOTION FOR SUMMARY RELIEF**.

STEPHEN M. DANIELS
Board Judge

We concur:

JAMES L. STERN
Board Judge

CATHERINE B. HYATT
Board Judge

³ We infer, from Mr. Michalesko's affidavit, that the negotiated and settled claims involved inefficiencies stemming from modifications which include the language on which we focus here. We think this inference is justifiable at the moment – but whether it is correct will have to be proved.