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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-000872-MR

LEXICON, INC., D/B/A SCHUECK
STEEL COMPANY APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 02-CI-00128

ICON CONSTRUCTION, INC.;
NORTH AMERICAN STAINLESS, L.P.;
CARROLL COUNTY, KENTUCKY;
SMS DEMAG, INC.; WESTCHESTER
FIRE INSURANCE COMPANY; AND
SAFECO INSURANCE COMPANY
OF AMERICA APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; GRAVES,[1] SENIOR JUDGE.

[1] Senior Judge J. William Graves sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, JUDGE: Lexicon, Inc., d/b/a Shueck (hereinafter "Shueck") appeals from summary judgment entered in favor of Appellees on each of Shueck's causes of action to recover contract damages. After careful review, we affirm.

This case arises out of an expansion to the meltshop and casting portion of the North American Stainless, L.P. (hereinafter "NAS") stainless steel plant located in Carroll County, Kentucky. In 1998, the NAS facility was a fully integrated production facility except for the capacity to melt, refine, and slab-cast its own stainless steel for processing on downstream production lines.

Prior to 1998, NAS relied on a supply of stainless slabs from other stainless producers, and it ultimately determined to develop and implement a phased expansion to provide the capacity to melt and cast its own slabs. Accordingly, on November 22, 1999, NAS contracted with SMS-Demag, Inc. (hereinafter "SMS") and entered into a $100 million contract for the design, procurement, assembly, and installation of equipment for NAS's new Melt Shop expansion project.

The contract required that SMS design, procure, install, and commission all Melt Shop equipment, and the parties agreed that NAS would delegate the remaining responsibilities for civil work, the main Melt Shop building, equipment foundations, and general Melt Shop infrastructure to other contractors. Central to the contract between NAS and SMS was the achievement of the "hot run," the first casting of steel melted in the facility, on or before May 22, 2001. Thus, SMS committed to an 18-month schedule, with three and a half months of

preconstruction engineering work and seven months of installation activities to reach "hot run" by the agreed-upon date. The failure of SMS to achieve "hot run" by May 22, 2001, would potentially have carried substantial liquidated damages.

SMS retained the engineering, design, fabrication, manufacture, procurement, installation, and commissioning services for the Melt Shop equipment. SMS entered into an Internal Consortium Agreement (hereinafter "ICA") with Icon Construction, Inc. (hereinafter "Icon") for the actual on-site installation of the Melt Shop project equipment. The ICA was executed on April 13, 2000, and pursuant to the agreement Icon provided site supervision for erection activities but subcontracted its detailed engineering responsibilities for incoming piping and electrical services to its sister company, Datel Engineering (hereinafter "Datel"). Further, Icon delegated its mechanical installation scope of work to Lexicon, Inc. D/B/A Schueck (hereinafter "Schueck"), the appellant herein. Schueck was to provide the millwrights and related labor support for the mechanical installation of the Melt Shop project machinery.

Ultimately, Schueck agreed to install the Melt Shop equipment for Icon for a flat fee of $5 million. Schueck claims that they lowered their original contract price in light of the favorable work conditions promised by Icon. Schueck agreed to mobilize to the job site in late September or early October 2000 and to complete installation services by March 23, 2001, thereby providing a sufficient period of time for equipment adjustments, etc. to meet the "hot run" deadline of May 22, 2001. While the notice to proceed was issued on October 2, 2000, and

Lexicon began work on October 9th, the contract was not officially executed by Schueck until January 2, 2001. Schueck argues that it was bound by the contract on October 2, 2000.

The pertinent portions of the subcontract between Icon and Schueck are as follows:

> 3.7 Modifications
>
> The Agreement may be amended or changed only by a modification in writing. Icon and Schueck expressly agree that any oral communication, later course of conduct or other attempt to change the Agreement other than by a written Modification shall not be binding or enforceable.
>
> ARTICLE 6-PRICE AND PAYMENT
>
> 6.1 Work to Be Performed For Agreement Price
>
> The Agreement Price is the total amount, which is due and payable by ICON (Owner/SMS Demag) for the full performance and completion of the Work. Under no circumstances shall the Agreement Price be increased except by Change Order.
>
> 6.4 Applications for Payment
>
> Each Application for Payment shall be deemed to be an express representation that Schueck has no grounds to make a claim for money, compensation, damages, or anything else of value against ICON, except as expressly stated in the Application for Payment.
>
> 9.4 ICON'S Ownership of Work Schedule Float
>
> Float or slack time associated with one chain of activities is defined as the amount of time between earliest start date and latest start date or between earliest finish date and latest finish date for such activities, as set forth in an

approved schedule for the Work (assuming the critical path method is used), including any revision or updates thereto. All float or slack time is for the exclusive use or benefit of ICON, Schueck, Owner or SMS-Demag.

1. The time during which Schueck is delayed in the performance of the Work by the acts or ommissions of ICON, or SMS DEMAG, Owner, Owner's Representative, or their employees, agents, acts of God, unusually severe and abnormal climatic conditions beyond Schueck's control and which Schueck could not have reasonably have foreseen and provided against, shall be added to the time for completion of the Work (i.e., Schedule Completion Date) stated in the Agreement; provided, however, that no claim by Schueck for an extension of time for delays shall be considered unless delays incurred impact the critical path of the Master Project Schedule along a path which directly delays Schueck's Work and written requests for extension of time are made within ten (10) days for the first event providing a basis for extension. A failure to submit a written request for extension of time in accordance with this provision shall constitute a waiver of Schueck's entitlement to such extension.

2. In the event any such delay due to the foregoing causes or events occurs or is anticipated, Schueck shall promptly notify ICON in writing of such delay or expected delay and the cause and estimated duration of such delay. In the event of a delay due to the foregoing causes or events, whether such delay is excused or not, Schueck shall exercise due diligence to shorten and avoid the delay and shall keep ICON advised as to the continuance of the delay and the steps taken to shorten or terminate the delay. Schueck shall, within ten (10) working days of the commencement of any such delay, given to ICON written notice thereof and of the anticipated results thereof. Otherwise, such claims are expressly waived. Within ten (10) working days of the termination of any such delay, Schueck shall file a written notice with ICON specifying the actual duration of the delay. If ICON determines that the delay was beyond the control and without the fault or negligence of

Schueck and not foreseeable by Schueck at the effective date of the Contract, ICON shall determine the duration of the delay and shall extend the time of performance of the Contract thereby. Schueck shall have the right to contest the extension of time granted by ICON pursuant to article 13.2.

ARTICLE 13-SCHUECK'S RIGHTS AND REMEDIES

13.1 [Termination by Schueck]

13.2. Permitted Claims

The exclusive rights, claims, and remedies which Schueck shall have against ICON are as provided below:

1. [Termination by Schueck]

2. Schueck may also make a claim for an increase in the Agreement Price or an extension of the Schedule Completion date pursuant to the procedures in Article 12, Changes in the Work.

3. Schueck may also make a claim for an increase in the Agreement Price or an extension of the Schedule completion date pursuant to a claim for delay under Article 9, Time, Schedules, and Completion.

13.3 Claims Procedure

Schueck shall follow the procedure provided below in making any permitted claim against ICON.

1. Schueck shall give written Notice to ICON on the basis for the claim within 10 Days following Schueck's actual discovery of the first act, omission, occurrence or event giving rise to the claim. Schueck's failure to provide such Written Notice in a timely fashion constitutes a waiver of any such claims.

2. Schueck shall, within 10 Days after giving Written Notice to ICON of the basis for the claim, prepare and provide ICON with a written detailed summary of the

> basis for the claim, together with all the facts, documents, back-up data and other information supporting the claim. Schueck's failure to provide such information in a timely fashion constitutes a waiver of any such claims.
>
> WAIVER OF LIEN
>
> Lexicon, Inc., in consideration of and conditioned upon the receipt of payment in the amount of $____, hereby waives and releases all actions, debts, claims, and demands against the North American Stainless Project located in Ghent, Kentucky, excepting those rights and liens that the mechanic or materialman might have in any retained amounts, on account of all work services, equipment and materials performed or furnished by us in connection with the construction of a building, improvements, and facilities on real property of the Owner. Lexicon hereby waives and releases any mechanics', materialmen's or like liens, and all rights to file any such lien in the future against said real property on account of said work, services, equipment, and material performed or furnished by us, which are the subject of the application for payment.

(Emphasis in original).

Schueck's equipment installation could not be completed until NAS, SMS, and Icon completed their work. Schueck was delayed while waiting for equipment to be delivered and assembled. Once the equipment arrived, the building foundations, structures, and equipment foundations were not completed and ready for equipment installation, and overhead cranes were not available. Schueck claims that it notified Icon within the first few days of work that significant delays were occurring, which would render their work impossible. Schueck claims Icon acknowledged the delays and impacts to Schueck and advised Schueck to maintain cost records and to submit a claim for time and cost impacts at

the end of the project. Despite the delays, Icon promised Schueck that it could complete the equipment installation by March 23, 2001. However, the delays continued.

Icon asked Schueck to remain on site until January 2002, and Schueck completed the installation at that time. Schueck claims that it notified Icon of its delays and that this notification was sufficient to satisfy the terms of the contract. Icon, in turn, notified SMS of Schueck's delays and gave notice that if the delays continued, there would be ongoing cost impact on a daily basis. Schueck claims that throughout the project it submitted daily reports, written correspondence, and had weekly conversations with Icon, all of which notified Icon of Schueck's delay and impact claims. Schueck claims that throughout the process Icon advised it to maintain cost records of its labor hours and impacts and to submit a claim for its delay and impact costs when those costs were capable of determination at the end of the project.

During the project, Schueck executed documents entitled "Waiver of Lien" and submitted them to Icon with "Applications for Payment" per the terms of the subcontract. Schueck maintains that these waivers and applications pertained to work performed during specified time frames and pertained only to work specified in those specific Applications for Payment and did not constitute a waiver of its delay and impact claims under the subcontract. Schueck argues those claims were preserved by its notice to Icon of the delays and impacts beginning in October 2000.

Schueck argues that the delays and impacts were ongoing and bridged all Applications for Payment and could not be fully determined until the completion of the project. Further, Schueck argues that nothing in the subcontract required it to expressly reserve its right to delay and impact claims in each Application for Payment and each Waiver of Lien. Finally, Schueck claims that Section 9.4.2 of the subcontract specifically states that Schueck must notify Icon of its claim for delay and impact damages promptly and within ten days of the termination of the delay, Schueck must give Icon written notice and detail the anticipated results.

After completing work on January 10, 2002, Schueck presented a three-tiered claim for: 1) base contract balances and retainage for Schueck's original scope of work; 2) additional and extra work; and 3) the delay and impact claim that is the subject of this action. Schueck presented its claim for cost impacts by letter dated January 18, 2002, which it argues is well within the subcontract's required ten days for notice and details of the delay. Schueck claims that Icon accepted this letter without objection and that on March 8, 2002, it submitted a more detailed claim letter outlining its claim for reimbursement for cost impacts arising out of the various delays and inefficiencies on the project. Icon acknowledged receipt and informed Schueck that it intended to submit Schueck's claim to SMS and/or NAS for payment. Schueck claims that at no time did Icon object to its claims, and in fact Icon requested additional cost information

and relied on that information to assert its own claim for delay and impact damages.

On August 30, 2002, Icon and Schueck entered into a letter agreement, whereby the first two tiers of Schueck's claim were satisfied, leaving only Schueck's delay and impact claim unresolved. On November 6, 2002, Schueck executed a partial waiver and release which it expressly limited to contract purchase orders and additional work except for delay and impact claims.

Schueck argues that Icon then continued to mark up and present the delay and impact claims to SMS and that such conduct indicates Icon's acknowledgement that Schueck's delay and impact claims were preserved. Icon claims that it never endorsed or admitted the liability or scope of Schueck's claims and that it affirmatively represented that it did not in any manner endorse or admit the liability or scope of the Schueck claim. Icon argues that it merely presented the claim as a possible liability to SMS when discussing payment, etc. with NAS and SMS.

Meanwhile, NAS, SMS, and Icon agreed to resolve their claims against one another through binding arbitration. Schueck was not a party to the arbitration and its claims were not presented therein. In the instant case, SMS, NAS, and Icon filed dispositive motions based upon the subcontract's Section 9.4.2 pertaining to delay claims, Article 6.4 pertaining to Applications for Payment and Waivers of Lien which Schueck signed during the project. On August 29, 2005, the trial court denied these dispositive motions. In October 2005, SMS,

NAS, and Icon filed a second round of motions for summary judgment, arguing that Schueck's claims were barred by *res judicata* by the arbitration award issued on October 1, 2005. On February 10, 2006, the trial court found that Schueck was not bound by the arbitration award and again denied the dispositive motions. In July 2006, NAS, SMS, and Icon renewed their respective motions based upon the subcontract Section 9.4.2 and Article 6.4. On December 20, 2006, the trial court granted the parties' respective motions.

The trial court explained its reasoning for granting the defendant's CR 56 motion because it had previously denied the same motion. The court noted that at the time it originally denied the defendant's motions for summary judgment, it had not seen the contract between Icon and Schueck. The trial court found that Schueck's Applications for Payments waived any other claims it might have had through the date of each application. The court found that the language in Article 6.4, "money, compensation, damages or anything else of value" was comprehensive. The court found that although Schueck claimed it only released claims against Icon, the claims against NAS and SMS-Demag were also released if no claims could be made against Icon. Further, the court found that when the Waiver of Lien was read in concert with the Application for Payment language, the Waiver of Lien became more than just a Waiver of Lien relative to NAS but in fact became a waiver of any claims except as might be stated in the Application for Payment. The court found that Schueck had not reserved any claims in the Application for Payment or Waivers of Lien documents that were submitted during

the period in which the alleged damages occurred, nor had it given the initial detailed notice of any delays as required by Section 13.3.1. Therefore, the language of the parties' contract explaining the Applications for Payment and the Waivers of Lien was sufficient to be a complete defense to Schueck's claims for delay and impact damages.

The trial court also dismissed Schueck's claims against SMS and NAS for unjust enrichment and quantum meruit because Schueck had failed to show that those defendants benefited from whatever damages may have been incurred by Schueck. The trial court noted that Schueck had failed to provide any case law or evidence that it could present at trial to show a benefit received by either SMS or NAS.

On March 28, 2007, the trial court made its order final and appealable and applied the order to the March 13, 2007, order dismissing Schueck's claims against Safeco on the payment bond. This appeal followed.

When reviewing a trial court's entry of summary judgment, "[o]ur determination must center upon whether the trial court erred in its conclusion that there were no genuine issues of material fact and the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). We are not required to give deference to the trial court as factual findings are not at issue. *Lewis v. B &R Corporation*, 56 S.W.3d 432 (Ky.App. 2001).

Schueck's first argument that the trial court erred in granting summary judgment is that the subcontract permitted monetary damages for delay. Initially,

we agree with Schueck on this matter. Section 13.2.3 of the subcontract clearly and explicitly states that Schueck may make a claim for an increase in the Agreement Price or obtain an extension of the Schedule completion date pursuant to a claim for delay. Schueck claims the court erred in finding that the contract only allowed for an extension of time in the event of a delay. The trial court's order indicates, however, that it based its decision to grant summary judgment on the fact that even if Schueck were permitted monetary damages or an increase in Agreement Price under the subcontract, Schueck waived any claims by executing the Applications for Payment and the Waivers of Lien. Thus, although we agree with Schueck that it could have been entitled to an increase in the Agreement Price under the explicit terms of the contract, this argument is moot given the subsequent findings by the trial court that Schueck waived any claims for delay by executing other contract documents which clearly state that Schueck must reserve any claims or else they are waived.

Schueck next argues that its Applications for Payment and Waivers of Lien did not waive its delay and impact claims. Schueck contends that the trial court considered Article 6.4 of the subcontract and failed to consider Section 9.4.2, and thus gave more credence to the language of Article 6.4. We find this argument misguided, given that those sections of the subcontract address different issues entirely. Article 6.4 states that each Application for Payment shall be a representation by Schueck that is has *no other claims* against Icon (emphasis added). Section 9.4.2, on the other hand, establishes the specific procedures

Schueck must follow in order to preserve those claims. Even assuming that Schueck followed the procedures of Section 9.4.2, Article 6.4 would still apply. Article 6.4 explicitly states that by submitting Applications for Payment for the work completed by Schueck, Shueck warranted that it had no further claims against Icon of any kind. The trial court found no instance where Schueck asserted or preserved any delay claims whatsoever in conjunction with filing the Applications for Payment. Given the clear and explicit language in the subcontract, we agree with the trial court that Schueck was required to raise such claims in the Applications for Payment and the Waivers of Lien, which it absolutely failed to do.

Schueck then argues that Icon's verbal notice of the initial delay claims and the letter dated January 18, 2002, fully detailing the delays and impacts somehow negates the explicit language in Article 6.4. We disagree. When reading the contract as a whole, it is clear that Schueck was required to give written and detailed notice of any delays within ten days of their occurrence and was required to give written and detailed notice within ten days of the delay's termination. While Schueck claims it noted the delays in its logs and verbally notified Icon, there is nothing in the record indicating that the explicit notice required by Article 9 of the subcontract was given, as the trial court properly found. Furthermore, even assuming *arguendo* that Schueck gave appropriate notice, Article 6.4 explicitly states that by submitting the Applications for Payment, Schueck was asserting it had no further claims of any kind *"except as expressly stated in the*

*Application for Payment."* (Emphasis added). We agree with the trial court that Schueck cannot reconcile the clear language of Article 6.4 with its actions. Schueck simply did not expressly state its delay and impact claims in the Applications for Payment at any time. Accordingly, per the subcontract, Schueck waived those claims entirely.

Schueck also asserts a cardinal change claim, arguing that it is entitled to recover the total cost of the benefit conferred to Icon. The cardinal change doctrine permits a party to recover the total cost of the difference between the contract price and the cost to complete the work where alterations in the scope and duration of the work render the project so different from the original agreement that breach of contract remedies cannot adequately compensate the claimant for the actual work performed. *See L.K. Comstock & Co., Inc. v. Becon Const. Co., Inc.*, 932 F. Supp. 906 (E.D. Ky. 1993). If a cardinal change exists, contractual waivers are ineffective to bar a cardinal change claim.

Under the facts of the case at bar, it is clear that the cardinal change doctrine does not apply. Aside from the delays in the schedule to the project, it appears that Schueck ultimately completed the project in much the same manner it would have had the delays not occurred. Schueck's task was to install the machinery needed for the "hot run." Schueck does not articulate how the ultimate completion of installing the machinery was cardinally different from the work it agreed to perform under the subcontract.

Furthermore, because Schueck chose to stay on the job site during the delays, it completed extra work and was fully compensated for that work by Icon. While Schueck may not have been compensated specifically for the delay and the costs incurred by such a delay, it was compensated for the original work and for the extra work it performed. Furthermore, had Schueck properly preserved its delay and impact claims in the Applications for Payment, it would have been compensated for those claims as well. Simply put, Schueck ultimately performed the exact work it had contracted to perform. Any additional work which may not have been outlined in the contract was done by Schueck and was properly compensated. There is nothing to indicate that any work performed was cardinally different from the work contemplated by the subcontract and we therefore decline to apply the cardinal change doctrine to the facts of this case.

Schueck next argues that the trial court improperly relied primarily on *Dugan & Meyers Construction Co., Inc. v. Ohio Dept. of Admin. Services*, 162 OH App. 3d 491, (Oh.App. 2005) in granting summary judgment to the defendants in the case below. We agree with the parties that Ohio law is applicable per the terms of the subcontract. However, we find Schueck's statement regarding the trial court's reliance to be completely untrue. The trial court addressed Icon's argument of whether *Dugan* applied in one short paragraph and in no way centered its opinion on the case. The trial court agreed with Icon that there were "no circumstances in the present case that 'rendered the owner-furnished plans

unbuildable or otherwise wholly inadequate to accomplish the purpose of the contract.'"

In *Dugan*, the contract clearly stated that the only remedy for delay would be an extension of time and explicitly stated that there would be no delay damages whatsoever. In the case at bar, Schueck might have been entitled to delay damages, had it properly preserved its claims under the contract. Schueck failed to preserve such claims, and any reliance by the trial court on *Dugan* is therefore harmless error, as it was clearly not the sole basis for the court's decision.

Schueck next argues that Icon waived its right to argue that Schueck was not entitled to delay and impact damages under the terms of the subcontract. Schueck makes several statements in its briefs indicating that Icon directly stated that Schueck had a delay and impact claim when Icon was dealing directly with NAS and SMS. We are unable to find such a statement by Icon in the record. Furthermore, waiver of a contractual defense in litigation is viewed with suspicion and is rarely proven. In *White Co. v. Canton Transportation Co.*, 131 Ohio St. 190 (Oh. 1936), the court found that waiver is a voluntary relinquishment of a known right and that courts must move slowly and carefully when dealing with waiver. Furthermore, the court cautioned that when the party claiming waiver is the same party who has breached the terms of the contract, courts must give even more consideration because such an arrangement is contrary to sound business principles. Finally, the court stated that to prove waiver, a party must prove a clear, unequivocal, decisive act of the party against whom the waiver is asserted.

In the instant case, Schueck must prove that Icon clearly and unequivocally waived its rights to claim that Schueck did not properly preserve its delay and impact claims. Schueck contends that when Icon gave notice of Schueck's claims for delay and impact claims to NAS and SMS, it waived its rights to deny those claims. However, we agree with Icon that it presented those claims as exposures to it and never vouched for the validity of Schueck's claims. In its answer to Schueck's complaint, Icon reserved the defenses of waiver and release. We decline to say now that Icon simply noting that Schueck might have a possible claim for delay and impact damages when dealing with NAS and SMS amounts to a clear and unequivocal waiver as described in *White*, *supra*.

Schueck also argues that the August 30, 2002, letter agreement between it and Icon revived Schueck's cost impact claims and constitutes a novation of Schueck's right to assert a delay and impact claim. This argument was not presented in Schueck's prehearing statement and therefore is not properly before this court. Pursuant to Kentucky Rules of Civil Procedure (CR) 76.03(8), "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." *See also Sallee v. Sallee*, 142 S.W.3d 697 (Ky.App. 2004). No such motion or cause has been made or shown to this court and therefore we decline to address this argument.

Schueck finally claims that it conferred a benefit on NAS and SMS and is therefore entitled to assert an unjust enrichment claim. Schueck relies on

*Dirt & Rock Rentals, Inc. v. Irwin & Powell Construction, Inc.*, 838 S.W.2d 412, 414 (Ky.App. 1992) for the proposition that it would be unjust for NAS and SMS to retain a benefit without paying Schueck for the benefit it conferred. However, *Dirt & Rock Rentals* holds that a subcontractor may recover from a landowner and upstream construction in unjust enrichment/quantum meruit where the landowner has not paid any person or party for the benefit conferred by the subcontractor. *Id*. In the case at bar, NAS and SMS paid Icon for the work that was done and thus under the clear holding of *Dirt & Rock Rentals*, Schueck cannot now recover from SMS and NAS under an unjust enrichment theory or in quantum meruit.

For the foregoing reasons the decision of the Carroll Circuit Court is affirmed.

GRAVES, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND WILL NOT FILE A SEPARATE OPINION.

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