

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 15th day of December, 2016.

Construction Development Services, Inc., Appellant,

against Record No. 160240
Circuit Court No. CL12-4307

Modern Environments, Inc., Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Virginia Beach.

Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of opinion that there is reversible error in the order that is the subject of this appeal.

Construction Development Services, Inc. (CDSI) was the general contractor on a project to renovate a three-story office building at the Norfolk Naval Base (Project). Under an April 7, 2009 contract with CDSI and subsequent change orders, Modern Environments, Inc. (Modern) was a subcontractor on the Project responsible for designing and installing furnishings. The Project was divided into two phases, the second of which is the subject of this dispute.

Following discussions about finalizing the Project, CDSI sent Modern a change order regarding Phase 2 dated August 12, 2009 (CO2) "to buy out the rest of the contract, phase 1 and phase 2." Modern commenced work under CO2, and exchanged e-mails with CDSI in November and December 2009 regarding the scheduling of Phase 2 work.

After these e-mails, and upon CDSI's request, Modern returned CO2 to CDSI on December 15, 2009, with two allegedly material changes. After receiving Modern's signed CO2 on December 15, CDSI notified Modern by e-mail on December 21, 2009 that it did not accept Modern's changes to CO2, stating that CO2 was "voided on our end," and attaching a revised

change order.¹ CDSI and Modern continued to negotiate regarding the Phase 2 work into February 2010, but when they could not reach an agreement, CDSI hired another subcontractor, New Day Office Products and Furnishing, Inc. (New Day), to complete the Phase 2 work using the design provided by Modern.

On May 14, 2010, Modern sued CDSI for breach of contract in the Circuit Court of the City of Virginia Beach (State Case).² On February 7, 2011, while the State Case was pending, Modern also sued CDSI and New Day in the United States District Court for the Eastern District of Virginia for copyright infringement that allegedly occurred after CDSI contracted with New Day (Federal Case). Modern alleged that it “created, and is the owner of the copyright in, the design necessary and appropriate to meet the requirements” of the Project and that, after CDSI wrongfully terminated its contract with Modern, CDSI and New Day “used [Modern’s] said design in completing the [Project].”

CDSI served interrogatories on Modern in the Federal Case, including Interrogatory Number 7, which asked Modern to “[i]dentify in detail all damages you claim to have sustained as a result of each defendant’s alleged violation of your copyright registration.” Modern responded to this Interrogatory as follows:

- [1] 9% sales commission on \$229,815.37 of systems product and
- [2] \$26,385 of wall product -- \$23,058.03;
- [3] Installation of systems product and wall product -- \$45,275.79;
- [4] Sale and installation of Indiana desk product -- \$811.88;
- [5] Sale and installation of JAL product -- \$1,781.50;
- [6] Sale and installation of Nevers product -- \$2,569.40;
- [7] Knock down and removal of existing furniture -- \$14,488.00;
- [8] Design of Phase 2 -- \$3,550.00.
- [9] Total: \$91,534.60.

Plaintiff also claims profits of the infringers pursuant to 17 U.S.C. § 504(b) (amount unknown until Defendants respond to Plaintiff’s discovery requests) and attorney’s fees.

On January 13, 2012, Modern, CDSI, and New Day settled the Federal Case, and later executed a “Settlement Agreement and Release” (Settlement Agreement). CDSI and New Day

¹ CDSI later confirmed that CO2 was voided by letter dated January 22, 2010.

² Modern nonsuited the State Case at some point, but subsequently refiled it.

agreed to pay Modern \$30,000, and Modern agreed to release its claims against CDSI and New Day. The release language in the Settlement Agreement pertaining to CDSI stated that Modern released CDSI “of and from *all claims for damages asserted* in the [Federal Case].” (Emphasis added.) Pursuant to the Settlement Agreement, the Federal Case was dismissed with prejudice on January 20, 2012.

CDSI filed special pleas of release, accord and satisfaction, and res judicata in the State Case. It argued that the Settlement Agreement barred Modern from pursuing the claims asserted in the State Case. CDSI also asserted that res judicata applied in the State Case, because the dismissal with prejudice of the Federal Case barred a subsequent action between the same parties concerning the same Project.

CDSI propounded discovery to Modern in the State Case. Interrogatory Number 2 instructed Modern to “[i]temize and set forth fully and in detail all elements and calculations in support of your claim of damages as alleged in your Complaint, and identify the facts and documents which support your claimed damages.” Modern responded as follows:

- [1] 9% sales commission on \$229,815.37 of systems product and
- [2] \$26,385 of wall product -- \$23,058.03;
- [3] Installation of systems product and wall product -- \$45,275.79;
- [4] Sale and installation of Indiana desk product -- \$811.88;
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- [7] Knock down and removal of existing furniture -- \$14,488.00;
- [8] Design of Phase 2 -- \$3,550.00.
- [9] Total: \$91,534.60.

In addition, Plaintiff is entitled to interest for late payments in violation of Paragraph 7 of the parties’ “Contract Agreement for Labor and Materials” dated April 7, 2009, and the Prompt Payment Act.

On December 17, 2013, the circuit court held a bench trial during which the parties presented testimony and evidence consistent with the facts described above. Modern’s owner and president acknowledged that the specific line items were the same in Modern’s responses to CDSI’s damages interrogatories in both cases.

The circuit court subsequently issued a letter opinion dated September 30, 2015, finding that neither the Settlement Agreement nor res judicata barred Modern’s claims. As to the merits of the alleged breach of contract, the court found that CO2 was a binding contract for Phase 2,

and that CDSI breached the contract by early termination. The court awarded Modern total damages in the amount of \$48,716.53 for CDSI's breach of the contract. The court entered a Final Order on November 13, 2015.

This Court granted CDSI an appeal on four assignments of error. The first concerns whether the Settlement Agreement barred Modern from proceeding with the State Case. The second concerns whether *res judicata* barred the State Case. The third concerns whether Modern received a double recovery in the State Case, and the fourth concerns whether there was a valid contract for Phase 2. This Court also granted Modern's assignment of cross-error, relating to the circuit court's finding that Modern's claimed damages for lost commissions were not recoverable because they were consequential damages.

In its first Assignment of Error, CDSI claims that the circuit court erred in overruling CDSI's plea in bar, which asserted that Modern's State Case claims were barred by the Settlement Agreement. "We apply a *de novo* standard of review when there are no disputed facts relevant to the plea in bar and it presents a pure question of law." *Shevlin Smith v. McLaughlin*, 289 Va. 241, 251, 769 S.E.2d 7, 12 (2015) (internal quotation, alteration and citation omitted). Similarly, "[t]he interpretation of a contract presents a question of law subject to *de novo* review." *Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 178, 788 S.E.2d 237, 243 (2016).

"The scope of a release agreement, like the terms of any contract, is generally governed by the expressed intention of the parties." *First Sec. Fed. Sav. Bank v. McQuilken*, 253 Va. 110, 113, 480 S.E.2d 485, 487 (1997). An unambiguous contract is interpreted according to its plain meaning; to determine whether contractual provisions have a plain meaning, "words used are given their usual, ordinary, and popular meaning," and, "when considering the meaning of any part of a contract, we will construe the contract as a whole." *Babcock & Wilcox*, 292 Va. at 179, 788 S.E.2d at 244 (citations and internal quotation marks omitted).

Here, the plain language of the Settlement Agreement defined the scope of Modern's release regarding CDSI as "all claims for damages asserted in the [Federal Case]." We therefore must discern what claims for damages were asserted in the Federal Case, and then determine whether any of those damages are being claimed in the State Case.

There is no dispute regarding the relevant facts. In the Federal Case, Modern revealed the claim for damages it was asserting in its answer to an interrogatory. It likewise revealed the claim for damages it was asserting in the State Case in an interrogatory answer. A comparison of Modern's responses to CDSI's interrogatories in both cases establishes that, although the claims and theories of recovery were different in the Federal Case and the State Case, the "damages asserted" were the same. Not only were the total amounts of damages asserted identical in both cases, but the specific line items enumerated by Modern were also identical in both cases.³


Because all of the "claims for damages asserted" in the State Case were alleged in the Federal Case and released by the Settlement Agreement entered in the Federal Case, Modern is barred from pursuing the damages it is claiming in the State Case. The circuit court erred in denying CDSI's plea in bar based on the release in the Federal Case Settlement Agreement.

Accordingly, we will reverse the judgment of the Circuit Court of the City of Virginia Beach and enter final judgment for Construction Development Services, Inc.⁴

This order shall be certified to the said court.

A Copy,

Teste:



Clerk

³ Modern's president also admitted that the damages asserted were identical.

⁴ In light of this decision, we need not reach the other assignments of error or cross-error.