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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

A.M. CLASSIC CONSTRUCTION, INC.,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES
DEPARTMENT OF PUBLIC WORKS,

Defendant and Respondent.

B254292

(Los Angeles County
Super. Ct. No. BC486267)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Ronald M. Sohigian, Judge. Affirmed.

Sean Goodman for Plaintiff and Appellant.

Greenberg, Whitcombe, Takeuchi, Gibson & Grayver, Richard C. Greenberg, Samantha F. Lamberg, and Michael J. Weinberger; Richard D. Weiss, Acting County Counsel, Robert C. Cartwright, Assistant County Counsel, and Rosa Linda Cruz, Senior Deputy County Counsel, for Defendant and Respondent.

A.M. Classic Construction, Inc. (AMC) sued the County of Los Angeles (County) for breach of contract arising out of a public works project. The County cross-complained for breach of contract. AMC challenges a trial court ruling granting the County's motion for summary adjudication. AMC contends the trial court erred in concluding: 1) there were no triable issues of material fact regarding AMC's release of claims against the County arising before July 2011; and 2) there were no triable issues of material fact regarding AMC's duty to continue work on the project, even in the face of a dispute between the parties. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2009, AMC and the County entered a contract (the 2009 contract) for the seismic strengthening of the Queensway Bridge in Long Beach (the project). As part of the work, AMC, the contractor, was to drive "piles," or long steel columns, into the ground at specified locations, and to specified depths, known as "pile tip elevations." The 2009 contract was comprised of several documents, including "the bid proposal, plans, and Special Provisions for the Project, the Additions and Amendments to the Standard Specifications for Public Works Construction, 2006 Addition (the 'Graybook'), the Standard Specifications for Public Works Construction, 2006 Addition (the 'Greenbook'), and Caltrans Standard Specifications."¹

The "Greenbook" contains at least two provisions regarding changed conditions and disputed work. Under section 3-4, the contractor is to promptly notify the "engineer," upon discovering certain conditions, and before disturbing such conditions, including "[s]ubsurface or latent physical conditions differing materially from those represented in the contract," and "[u]nknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in work of the character being performed." After receiving this notification, the engineer is to "promptly investigate conditions which appear to be changed conditions."

¹ Although most of these documents are not included in the record on appeal, it appears undisputed that at least some portion of the documents set forth the technical specifications for the project.

If the engineer determines the conditions are changed conditions and “will materially affect costs, a Change Order will be issued adjusting the compensation for such portion of the Work If the Engineer determines that conditions are changed conditions and they will materially affect performance time, the Contractor, upon submitting a written request, will be granted an extension of time”

However, the engineer may also determine the conditions do not justify a change order. If the contractor disagrees with that decision, “it may submit a written notice of potential claim to the Engineer before commencing the disputed work. In the event of such a dispute, the Contractor shall not be excused from any scheduled completion date provided by the Contract and shall proceed with all work to be performed under the Contract. However, the Contractor shall retain any and all rights provided by either Contract or law which pertain to the resolution of disputes and protests between the contracting parties.” Section 3-5, “Disputed Work,” states: “If the Contractor and the Agency are unable to reach agreement on disputed work, the Agency may direct the Contractor to proceed with the work. Payment shall be as later determined by mediation or arbitration, if the Agency and Contractor agree thereto, or as fixed in a court of law.”

Section 6-2 sets forth the contractor’s duty to prosecute the work: “To minimize public inconvenience and possible hazard and to restore street and other work areas to their original condition and state of usefulness as soon as practicable, the Contractor shall diligently prosecute the Work to completion.”

The 2009 contract included termination provisions—termination for default and termination for convenience. Under the termination for default provision, the County had the right to terminate AMC’s right to proceed with the work if AMC refused or failed “to prosecute the work with the diligence that will ensure completion within the time specified in the Contract.” When terminating for default, the County had fewer payment obligations to AMC than when terminating for the County’s convenience.

It was undisputed that AMC suspended work on the project in November 2010, due to disputes over the work and payment. Eventually, after negotiations, the County issued Change Order No. 5, which included a monetary settlement and mutual releases of

claims arising from the 2009 contract and the project. Change Order No. 5 was fully executed in July 2011. In August 2011, AMC began working on the project again. However, in late November 2011, AMC again stopped work on the project. It began removing equipment from the project site. In January and February 2012, the County sent AMC notices to cure the abandonment of the project, or face termination by default. AMC did not resume work on the project.

In April 2012, a Department of Public Works hearing officer presided over a hearing to determine whether there were grounds for a termination of the 2009 contract by default. The hearing officer found AMC had not demonstrated the County's actions prevented AMC from performing its work under the contract. The hearing officer concluded the County had a reasonable basis to terminate the contract for default. In May 2012, the County Board of Supervisors found AMC in default on the 2009 contract.

In June 2012, AMC sued the County. In July 2012, AMC filed the operative first amended complaint for breach of contract. The complaint alleged the County breached the 2009 contract by failing to pay for labor, materials, and equipment AMC provided. The complaint further alleged AMC had either performed under the contract, or its performance was excused or prevented by the County's actions. In addition, the complaint alleged the County breached the implied covenant of good faith and fair dealing by, among other things, failing to promptly respond to AMC's requests; intentionally misapplying the contract specifications; adopting an "out-to-get-you attitude"; promising to institute a dispute review process and failing to do so; wrongfully terminating the contract "for cause"; and "[e]ngaging in hurtful conduct designed to hinder, and eventually render completely impracticable, [AMC's] ability to perform the work required to complete the project to a degree nearly unheard of in the public works construction industry."

In September 2012, the County filed a cross-complaint for breach of contract. The County alleged AMC breached the 2009 contract by, among other things, failing to timely complete the project, and failing to perform the work in the most economical

manner. The County asserted it was entitled to liquidated damages and other delay and consequential damages.

In June 2013, the County filed a motion for summary adjudication. As to AMC's breach of contract cause of action and one of AMC's affirmative defenses to the County's cross-complaint, the County asserted any breach claims arising on or before July 5, 2011 were barred because AMC had released those claims in Change Order No. 5. The County further sought summary adjudication of AMC's affirmative defense that it did not breach a duty owed to the County. The County asserted the defense failed because AMC abandoned its work on the project. The County similarly asserted it was entitled to summary adjudication on the issues of "duty" relating to AMC's duty to diligently prosecute the project work to completion; the County's lack of a contractual duty to pay for any claims arising after July 5, 2011; and the County's lack of contractual duty to AMC other than to pay AMC in accordance with the 2009 contract's provisions relating to termination for default.

In opposition to the motion, AMC argued there were triable issues of fact regarding the purportedly released claims. AMC asserted the release in Change Order No. 5 was unenforceable because AMC executed it while under severe economic distress and there was a lack of consideration. AMC further argued Change Order No. 5 was not the final expression of the parties. It asserted the parties had a contemporaneous oral agreement, pursuant to which the County agreed to a method to adjust certain technical specifications of the project, and the parties had agreed to a procedure to quickly resolve disputes over the work. AMC contended the County's failure to comply with that oral agreement invalidated the release.

AMC further asserted there was a triable issue of fact on the issue of whether it had a duty under the 2009 contract to complete the project. AMC argued its performance was physically impossible and the County refused to issue a change order that would allow AMC to continue working. Specifically, AMC asserted that due to subsurface soil conditions, it could not drive piles to the depths required under the 2009 contract, yet the County refused to issue a change order adjusting the "pile tip elevation."

AMC contended that although the County eventually issued a change order, the order required AMC to incur half the cost of excess pile. According to AMC, the excess pile was unusable “because of [the County’s] faulty plans,” it could not be returned, and AMC “rightfully refused to sign the Change Order and incur the cost.”

AMC did not dispute the County’s asserted material fact that AMC stopped work on the project in November 2011 and began removing equipment from the project site. AMC added: “Near the end of November 2011, AMC suspended Work awaiting payment for costs associated with delays caused by County following recommencement of Work. During the three months of restart work from September to November 2011, AMC incurred expenses of \$583,000 but was paid only \$132,000. AMC suspended Work because the County again refused to pay for costs associated with delays and failed to comply with the terms of the Restart Settlement by delaying adjustment of tip elevation for a month and [a] half and not promptly escalating the welding splice or pile tip dispute. County still disputed there was any changed subsurface condition, but it furnished Unilateral Change Order No. 9 which adjusted the pile tip elevations on the condition that AMC incur half the cost of the excess steel pile that would be left over. Said cost was the result of incorrect tip elevations set forth in the Contract plans and AMC refused to execute the Change Order where County’s position contradicted its agreement pursuant to the Restart Settlement.”

The trial court granted the motion for summary adjudication. The court concluded there was no triable issue of material fact regarding the terms or effectiveness of the release in Change Order No. 5. The court further concluded there were no triable issues of material fact regarding AMC’s abandonment of the project, in violation of the 2009 contract’s requirement that work continue despite a dispute between the parties over change orders. The court found the 2009 contract’s provisions regarding payment in the event of a termination by default governed the County’s duty to pay AMC.

The parties then stipulated for entry of judgment with the express purpose of facilitating an appeal by AMC. They stipulated that AMC had already received all compensation to which it was entitled under the termination for default provision of the contract. Judgment was entered against AMC on the first amended complaint. The parties further stipulated that the County was entitled to liquidated damages under the contract, and judgment would be entered in favor of the County on its cross-complaint in the negotiated amount of \$345,000. The court entered the stipulated judgment in December 2013. This appeal timely followed.

DISCUSSION

I. Applicable Legal Principles

“Summary judgment and summary adjudication provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. (Code Civ. Proc., § 437c, subd. (f)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) A defendant moving for summary judgment or summary adjudication may demonstrate that the plaintiff’s cause of action has no merit by showing that (1) one or more elements of the cause of action cannot be established, or (2) there is a complete defense to that cause of action. [Citations.] This showing must be supported by evidence, such as affidavits, declarations, admissions, interrogatory answers, depositions, and matters of which judicial notice may be taken. [Citations.]

[¶] . . . [¶]

“After the defendant meets its threshold burden, the burden shifts to the plaintiff to present evidence showing that a triable issue of one or more material facts exists as to that cause of action or affirmative defense. [Citations.] The plaintiff may not simply rely on the allegations of its pleadings but, instead, must set forth the specific facts showing the existence of a triable issue of material fact. [Citation.] A triable issue of material fact exists if, and only if, the evidence reasonably permits the trier of fact to find the contested fact in favor of the plaintiff in accordance with the applicable standard of proof. [Citation.]

“In ruling on the motion, the trial court views the evidence and inferences therefrom in the light most favorable to the opposing party. [Citations.] If the trial court concludes the evidence or inferences raise a triable issue of material fact, it must deny the defendant’s motion. [Citations.] But the trial court must grant the defendant’s motion if the papers show there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [Citation.]

“We review an order granting summary judgment or summary adjudication de novo. [Citation.] We independently examine the record to determine whether a triable issue of material fact exists. [Citation.] The trial court’s stated reasons for granting summary judgment or summary adjudication are not binding on us because we review its ruling, not its rationale. [Citation.]” (*Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582, 587-588.)

II. No Triable Issue of Material Fact with Respect to Claims Arising Before the Parties Entered into the Settlement and Release in July 2011

As to breach of contract claims arising before the parties executed the release in Change Order No. 5, the County met its burden of establishing a complete defense to such claims. The County adduced evidence that AMC had released all such claims. AMC has not established a triable issue of one or more material facts exists on this issue.²

AMC argues the release lacked consideration, and was unenforceable because AMC agreed to the settlement and release under economic duress. As we understand its argument, AMC also contends: (1) Change Order No. 5 did not represent the parties’

² Although AMC pled only a single breach of contract claim, the County argued it could seek summary adjudication of any alleged contract breaches arising before July 5, 2011. The County cited authority such as *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, for the proposition that when separate and distinct wrongful acts are combined in a single cause of action, a party may seek summary adjudication challenging such separate and distinct wrongful acts even though the motion will not dispose of the entire cause of action as pled. AMC did not challenge this approach below or on appeal, thus we are not called upon to consider this issue.

entire agreement; (2) there was a separate oral agreement containing additional terms; (3) the County failed to abide by the terms of the oral agreement; thus (4) the County cannot enforce the release provisions of Change Order No. 5 and/or AMC has the right to rescind Change Order No. 5. We consider these arguments in turn.

A. Lack of Consideration

AMC has not established a triable issue of material fact on the question of consideration for the release. AMC asserts the monetary payment was simply money already owed, thus the release lacked consideration. However, AMC marshaled no evidence to support this assertion. Indeed, AMC admitted there were many problems and disputed claims related to the project prior to Change Order No. 5, and further, that it had ceased work on the project and the County was considering terminating the contract as a result. Pursuant to Change Order No. 5, AMC received a substantial monetary payment, the release of the County's claims against it, the County's waiver of liquidated damages accrued, and an extension of time to complete the project. The release of a disputed claim alone is good consideration for a contract. "[A]n agreement to settle a bona fide disagreement is supported by sufficient consideration on each side." (*Miller v. Johnston* (1969) 270 Cal.App.2d 289, 299; *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 742.) AMC offered no evidence that would allow a trier of fact to conclude the release included in Change Order No. 5 was not supported by adequate consideration.

B. Economic Duress

Likewise, AMC offered no evidence to raise a triable issue of fact regarding economic duress. Setting aside AMC's failure to plead rescission in its complaint, AMC did not oppose the motion for summary adjudication with any evidence sufficient to create a triable issue as to any of the factors necessary to support rescission of Change Order No. 5 based on economic duress. As explained in *San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1058, "the courts, in desiring to protect the freedom of contracts and to accord finality to a privately negotiated dispute resolution, are reluctant to set aside settlements and will apply 'economic duress' only in limited circumstances and as a 'last resort.' [Citation.]" (*Id.* at p. 1058.) Courts have thus

recognized several criteria relevant to the economic distress basis for rescission: “(1) the debtor knew there was no legitimate dispute and that it was liable for the full amount; (2) the debtor nevertheless refused in bad faith to pay and thereby created the economic duress of imminent bankruptcy; (3) the debtor, knowing the vulnerability its own bad faith had created, used the situation to escape an acknowledged debt; and (4) the creditor was forced to accept an inequitably low amount.” (*Ibid.*, citing *Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1156-1157.)

AMC’s evidence in opposition to summary adjudication contained only the statement of its principal, who declared he was forced to suspend construction on the project in November 2010 because the County owed AMC “in excess of \$800,000 and [he] had been forced to finance the PROJECT for a number of months due to delays resulting from errors and omissions in the contract plans.” The principal further declared that although Change Order No. 5 did not address the entirety of the parties’ settlement agreement, due to his “state of economic duress,” and because he believed the County would abide by the unwritten portions of the agreement, he signed Change Order No. 5.

This is the entirety of the evidence AMC offered to create a triable issue on economic duress. AMC identified no evidence the County knew it was liable for some amount greater than what it paid under Change Order No. 5 yet refused to pay, that it refused to pay in bad faith, or that it used Change Order No. 5 to avoid paying an “acknowledged debt.” (*Perez v. Uline, Inc.* (2007) 157 Cal.App.4th 953, 960 (*Perez*); *Steinman v. Malamed* (2010) 185 Cal.App.4th 1550, 1559.) Moreover, AMC’s evidence indicates it was owed “in excess of \$800,000,” and, through Change Order No. 5, the County agreed to pay AMC over \$862,223. Although AMC contended this sum was “a compromised amount of what [it] was rightfully entitled,” it offered no evidence suggesting the amount was inequitably low. AMC also provided no evidence to show it was forced to accept the settlement amount “to stave off financial disaster.” (*Perez*, at p. 960.) This was insufficient to raise a triable issue of material fact on economic duress as a basis for rescission of the release.

C. Oral Agreement

Finally, AMC has not offered any evidence that would allow a trier of fact to conclude by a preponderance of the evidence that Change Order No. 5 was not the parties' complete agreement on the issues considered therein, or that the validity of the release of claims was contingent on the terms of a contemporaneous oral agreement.

Change Order No. 5 itself stated that AMC agreed the payments it received pursuant to the change order were "a full and final payment of any and all of AMC's claims for all expenses, costs, delays and events . . . occurring before the date AMC recommences work pursuant to this Change Order arising from, related to, or connected with" the project. Further, pursuant to the release, AMC released the County "from any and all claims, rights, actions, causes of actions, liability, costs and expenses of every kind, known and unknown, foreseen and unforeseen, which were or could have been claimed or asserted by AMC, specifically including, without limitation, all claims arising from, related to, or connected with, the Contract or the Project." The parties acknowledged that in entering into the Change Order they had not "relied upon any statement of any other party or any party's attorneys, and should any party be mistaken in the party's belief with regard to some issue of fact or law regarding the matters herein released, this Change Order shall nonetheless remain in full force and effect and binding as to each and all of AMC and the County."

AMC's evidence indicating the validity of the release was contingent on the terms of a separate oral agreement is parol evidence that cannot be introduced to contradict the terms of a completely or partially integrated written agreement. "A writing that the parties intended to be a complete and exclusive statement of the terms of their agreement is as an 'integrated' writing or an 'integration.' [Citation.] Whether the parties intended an integration is a question for the court to decide. (Code Civ. Proc., § 1856, subd. (d).) We independently review that determination. [Citation.] A writing may, but need not, expressly state that it is intended as an integration. [Citation.] In addition to the terms of the writing, a court should also consider the surrounding circumstances, including prior negotiations, and the nature of the purported collateral agreement to determine whether it

is reasonable to conclude that the collateral agreement was intended to be part of the bargain.” (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 352-353 (*Singh*).

AMC asserts the parol evidence rule does not bar extrinsic evidence of a collateral oral agreement because there was no merger or integration clause in Change Order No. 5. Yet, “[o]bviously where following negotiations the parties execute a written agreement, that agreement is at least ‘partially’ integrated and parol evidence cannot be admitted to contradict the terms agreed to in the writing.” (*Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 637.) Here, AMC seeks to show that the validity and enforceability of the release was contingent on the County’s compliance with terms contained in a separate oral agreement regarding procedures for the project going forward. This would be completely inconsistent with the terms of written Change Order No. 5, which indicated the release was in exchange for payments set forth in the change order; the releases would remain unaffected by the subsequent discovery of different facts or law respecting the released claims; and even if a party was mistaken in its belief with regard to some issue of fact or law regarding the released matters, the Change Order was to remain binding, and in full force and effect.

The explicit terms of Change Order No. 5 indicated AMC’s release of claims against the County was upon the condition that the payments specified in the agreement were made. The agreement further stated that in consideration of the payments to be made under the agreement, AMC agreed that the payments were to be a full and final payment of any and all of AMC’s claims relating to the project and occurring before the date AMC recommenced work. Evidence that an additional condition precedent of the release of claims was the County’s compliance with terms of a collateral oral agreement regarding procedures for the project moving forward, would contradict the express terms of the written release. AMC’s attempt to defeat the release with evidence of such a collateral agreement is barred by the parol evidence rule.

AMC also appears to separately argue the County's alleged oral promise to certain technical terms or procedures for the future prosecution of the project was *consideration* for AMC's release of prior claims against the County. AMC thus contends the County's breach of those oral promises provided a basis for AMC to rescind the release of claims. Even if extrinsic evidence of this alleged collateral oral agreement did not contradict the written agreement, it is a collateral agreement that would certainly have been included, or at least referenced, in the written agreement. It would not naturally have been made as a wholly separate agreement. As such, we would find the parties intended the written release to be a complete and exclusive statement of the terms of their agreement on the consideration for the release of claims, and evidence of a collateral agreement on the same issue would not properly be considered. (*Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1511-1513; *Singh, supra*, 186 Cal.App.4th at pp. 353-354.)

Extrinsic evidence of an oral agreement that would invalidate the release due to the County's failure to comply with the terms of that separate oral agreement could not be used to contradict Change Order No. 5. We therefore conclude AMC did not raise a triable issue of fact as to the released claims.

III. No Triable Issue of Fact with Respect to AMC's Duty to Continue Prosecuting the Disputed Work

The County sought summary adjudication of three additional issues: (1) AMC's affirmative defense to the County's cross-complaint, in which AMC claimed the County was barred from any recovery because AMC did not breach any duty owed to the County; (2) whether AMC had a duty to diligently prosecute the work to timely completion; and (3) in light of AMC's abandonment of the project and breach of its duty to diligently prosecute the work, the assertion that the County had no contractual duty to AMC other than to pay AMC in accordance with the termination for default provisions. The trial court concluded there were no triable issues of fact.³ We agree.

³ We note that while the existence or non-existence of a duty under a contract may be a proper basis for a summary adjudication motion under section 437c, subdivision

The County offered evidence that the 2009 contract included a provision stating that, even in the event of “disputed work,” as explained in the contract, AMC was required to continue working on the project. The County further offered evidence that the 2009 contract allowed it to terminate AMC’s right to proceed with the work if AMC failed to prosecute the work with the diligence that would ensure completion within the time specified in the contract. The County proffered evidence that AMC ceased all work on the project in November 2011. This evidence satisfied the County’s initial burden of showing AMC could neither establish its affirmative defense that it breached no duty to the County, nor establish that the County was not entitled to invoke the termination for default provision.

In opposition to the motion, AMC admitted it had ceased all work on the project in November 2011. The actual provisions of the contract were not disputed. However, AMC contended there were triable issues of material fact as to whether it had to continue work on the project because, it alleged, AMC’s performance was impossible, and the County breached the contract by failing to issue a change order due to “changed

(f)(1), at least one court has held there is no statutory basis for summary adjudication on the issue of whether a party *breached* a contractual duty. (See *Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 518-519 [finding “if, under the facts and circumstances of a given case, a court finds it appropriate to determine the existence or non-existence of a duty in the nature of a contractual obligation, it may properly do so by a ruling on that issue presented by a motion for summary adjudication”]; *Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 241, 243-244 [there is no statutory basis for summary adjudication on the issue of whether a party breached a duty; plaintiff could not seek summary adjudication of liability under a contract, leaving the resolution of damages to a later trial].) We further note that while the County framed the issues regarding AMC’s alleged breach of the contract as raised in one of AMC’s affirmative defenses to the cross-complaint (see Code Civ. Proc., § 437c, subd. (f)(1)), the answer’s asserted defense of “no breach” could equally be framed as merely a denial of the allegations in the cross-complaint. However, AMC has not challenged the propriety of the summary adjudication motion either below or on appeal. Any possible claim of error on that issue is forfeited. (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 678, fn. 11 [“The parties have not raised whether [CCP] section 437c, subdivision (f) authorized summary adjudication of only liability [citations], and therefore any issue in that regard is forfeited”].)

subsurface conditions.” On appeal, AMC again contends that due to different or changed subsurface conditions, it could not diligently prosecute the work, and its performance was excused since the County refused to issue a change order adjusting the pile tip elevations.

However, even AMC’s chronology of events defeats its argument. According to AMC, following the issuance and execution of Change Order No. 5, AMC began work on the project again. But it could not meet the required pile tip elevations in certain locations because the subsurface conditions differed from those set forth in the project plans. The County disagreed and, for a time, did not issue a change order. Yet, as AMC admitted, the County *did* issue a change order in mid-November 2011, adjusting the pile tip elevations. This did not solve the dispute because the change order had a term to which AMC objected—AMC was to incur “half the cost of the excess steel pile that would be left over.” According to AMC’s principal: “This condition contradicted the RESTART SETTLEMENT. The cost of the pile was incurred pursuant to the CONTRACT . . . and so I did not sign Change Order #9.”

On appeal, AMC asserts the issuance of Change Order No. 9 did not change the impossibility or impracticability of its continued performance on the project because the Change Order was unilateral, and it contained financial terms with which AMC disagreed. This argument misses the point. To the extent progress on the project was impossible or impracticable because of subsurface conditions and the technical requirements of the contract, AMC has offered no evidence that Change Order No. 9 was ineffective in resolving the problem. Instead, AMC contends the financial terms of Change Order No. 9 were unacceptable to it. This was not evidence that AMC’s performance was impossible or impracticable.

Indeed, AMC has not proffered any evidence showing that the facts were anything other than the situation covered by Greenbook sections 3-4 and 3-5, which were incorporated into the 2009 contract. As explained above, section 3-4 provides that if the contractor disagrees with the engineer’s decision not to adjust compensation for the work based on subsurface conditions differing materially from those represented in the contract, the contractor may submit a notice of potential claim, but is not excused from

any scheduled completion date, and must proceed with all work to be performed under the contract. Further, if the parties are unable to reach agreement on disputed work, the agency may direct the contractor to proceed with the work, with payment to be determined later.

AMC contends the Greenbook provision requiring the contractor to diligently prosecute the work is “not unequivocal.” AMC argues that in this case, “the facts that AMC encountered a different site condition and could not complete the Project in connection with the conduct of County personnel present triable issues regarding whether AMC abandoned.” Yet, as AMC explained in response to the County’s separate statement of undisputed facts, a physical inability to comply with the technical specifications of the contract was not the reason AMC stopped work on the project. Instead, at the end of November 2011, “AMC suspended work awaiting payment for costs associated with delays caused by County following recommencement of work. . . . AMC suspended work because the County again refused to pay for costs associated with delays and failed to comply with the terms of the Restart Settlement by delaying adjustment of tip elevation for a month and a half and not promptly escalating the welding splice or pile tip dispute.”

It was undisputed that the County eventually issued a change order adjusting the pile tip elevations—thus eliminating the argument that the work was not physically possible. AMC has not offered any evidence from which a trier of fact could find AMC was excused from continuing the work in November 2011, as required by the contract.

Public Contract Code section 7104, subdivisions (a)(2) and (b), does not mandate a different result. Under that statute, any public works contract of a local public entity which involves excavations that extend deeper than four feet below the surface must contain certain clauses. This includes a clause providing that if the contractor encounters “subsurface or latent conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids,” or “[u]nknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the

character provided for in the contract,” the contractor is to promptly notify the local public entity. In addition, the contract must contain a clause “[t]hat the local public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.”

AMC argues on appeal that the County violated this provision by not issuing a change order, and, as a result, AMC was excused from performing and the County could not terminate the contract for default. However, subdivision (c) of the same section requires that contracts also include a provision: “That, in the event that a dispute arises between the local public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor’s cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.” (Pub. Contract Code, § 7104, subd. (c).)

The statute contemplates that even if the public entity fails to comply with a provision required by subdivision (b), the contractor is not excused from continuing the work, consistent with the provision required by subdivision (c). The contract in this case contained provisions required by Public Contract Code section 7104. And, as explained above, the 2009 contract required that AMC continue work under the contract, despite a dispute over whether there were changed conditions and/or whether the County should issue a change order. The motion for summary adjudication concerned only AMC’s contractual obligation to continue the work in the face of a dispute over the necessity for, or the contents of, a change order, consistent with Public Contract Code section 7104, subdivision (c).

Finally, AMC argues the County breached the implied covenant of good faith and fair dealing, thereby excusing AMC from performance under the contract. However, as we understand the argument, it relies in part on conduct occurring before July 2011, when AMC released any claims against the County relating to the project. Further, to the extent the argument relies on conduct arising after the execution of the July 2011 release, it concerns the County's alleged failure to "issue a necessary change order due to the change[d] condition or acknowledge the different subsurface site condition" Express provisions in the contract governed the issuance of change orders and the process when the contractor believes a change order is required. There can be no implied covenant when the subject at issue is completely covered by the contract. (*Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1208.)

"[A]s a general matter, implied terms should never be read to vary express terms 'As to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct.'" (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374.) The 2009 contract expressly allowed the County to demand that AMC continue with the work, even if the parties disagreed about the necessity of a change order requiring an adjustment in compensation.⁴ Thus, it is not possible to imply that the covenant of good faith and fair dealing prevented the County from requiring AMC to continue work on the project, even in the face of a disagreement between the parties over a change order.

⁴ As noted above, although the contract requires the contractor to continue working, and allows the agency to direct the contractor to continue with the work, the contractor retains all rights regarding dispute resolution, and contemplates that disputes over payment will be determined by a dispute resolution process such as mediation, arbitration, or in court.

DISPOSITION

The judgment is affirmed. Respondent to recover its costs on appeal.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.