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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

AMERICAN WATER JETTING, INC.,

Plaintiff and Respondent,

v.

HIGHLAND CONSTRUCTION, INC. et
al.,

Defendants and Appellants.

E054004

(Super.Ct.No. CIVDS1013632)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez,
Judge. Affirmed.

Mahoney & Soll, Paul M. Mahoney and Richard A. Soll for Defendants and
Appellants.

Oles Morrison Rinker & Baker, Allen W. Estes and Meghan A. Douris for
Plaintiff and Respondent.

BACKGROUND

Highland Construction, Inc. and its surety, Fidelity and Deposit Company of Maryland (hereafter referred to jointly as Highland), appeal an order denying their motion to compel arbitration of a claim for breach of contract by American Water Jetting, Inc. (hereafter referred to sometimes as AWJ).

AWJ is a subcontractor retained by Highland to perform a portion of the work under a contract between Highland and the California Department of Transportation (Caltrans) for the repair of specified bridges in San Bernardino County. AWJ alleged that Highland breached the subcontract in a number of ways, and that despite having been paid by Caltrans for the work performed by AWJ, Highland refused to pay AWJ. AWJ filed suit in Contra Costa County, where its principal place of business is located. Highland filed its answer and cross-complaint, and simultaneously filed a motion for a change of venue to San Bernardino County, where the work was performed. The motion was granted.

Approximately eight months after the case was transferred to San Bernardino County, Highland filed a motion to compel arbitration, contending that the subcontract contained a provision for arbitration and that there was a pending arbitration between Highland and Caltrans on the prime contract involving issues of law and fact in common with the litigation between Highland and AWJ. AWJ opposed the motion, contending that the subcontract provided AWJ with the option to choose arbitration or litigation of claims arising from the contract, or in the alternative, that Highland had waived

arbitration by waiting 10 months from the date it was served with AWJ's complaint to seek arbitration. It contended that it would be greatly prejudiced if it were required to join in the arbitration between Highland and Caltrans.

The trial court denied the motion to compel arbitration, and AWJ filed a timely notice of appeal.

LEGAL ANALYSIS

THE SUBCONTRACT DOES NOT PERMIT HIGHLAND TO COMPEL AMERICAN WATER JETTING TO ARBITRATE THE DISPUTE

Parties to a contract may agree to submit disputes arising from the contract or its performance to arbitration. (Code Civ. Proc., § 1281.) AWJ contends that paragraph 13 of the subcontract gives it the option to litigate or arbitrate claims against Highland. It quotes the following language in paragraph 13: "Subcontractor shall have the right to request arbitration in accordance with the provisions of the prime contract if permissible there under, or file an action." Highland responds that the quoted portion of paragraph 13 is taken out of context, and that the subcontract expressly incorporates the prime contract by reference, including specification 9-1.10 of the prime contract, which provides that claims for damages "arising under or related to performance of the contract shall be resolved by arbitration," unless, after the claim has arisen, the parties agree in writing to have the claim litigated in court. Both parties point to language in other portions of the subcontract which, they contend, buttresses their position.

Where no extrinsic evidence as to the meaning of a contract has been introduced, interpretation of the contract, based exclusively on the words of the contract, is a question of law which an appellate court reviews independently. (*Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1185.) *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.) No extrinsic evidence was adduced in this case. Accordingly, we must determine independently whether the subcontract permits Highland to compel arbitration of this dispute.

We begin with paragraph 13, on which AWJ relies. It provides:

“13. SUBCONTRACTOR’S CLAIMS: Subcontractor shall be bound to Contractor to the same extent as Contractor is bound to Owner [Caltrans], by all the terms and provisions of the prime contract, and by all decisions, ruling [*sic*] and interpretations for [*sic*] the Owner or his authorized representative. In the event Subcontractor claims that he is entitled to additional compensation, other than for extra work for which written authorization has been given prior to performance thereof, or [in the] event that Subcontractor disputes any determination made by Owner or Owner’s representative, he shall, within the time allowed by the prime contract, prepare his claims or contentions in such written form as may be required by the provisions of the prime contract for presentation by Contractor to Owner. Subcontractor, at his own cost and expense, shall designate a person who shall be charged with presenting the claims or contentions of Subcontractor to the Owner, and such person shall, together with a representative of Contractor, act jointly as Contractor’s representative in all dealings with the Owner

relative to such claims or contentions. Subcontractor shall be bound by the ruling or decision of the Owner upon all such matters to the same extent that Contractor is bound, and Subcontractor shall have no right to receive payment from Contractor upon any such claim or contention in any sum greater than that allowed and paid by Owner. *In the event Subcontractor is not satisfied with the disposition made of his claim by Owner, and Subcontractor wishes to pursue his claim either by arbitration or by the filing of an action, Subcontractor shall have the right to request arbitration in accordance with the provisions of the prime contract if permissible there under, or file an action.* Such arbitration or court action shall indicate the name of contractor [sic] as the party thereto because of the lack of privity of contract between Subcontractor and Owner, but all such proceedings shall be conducted by Subcontractor with the cooperation of Contractor and at the sole cost and expense of Subcontractor. Subcontractor shall hold harmless and indemnify Contractor against all costs of arbitration, suit attorneys' fees and other items of expense connected with such proceedings.

“Contractor shall have the right to receive fifteen percent (15%) of any amount allowed by Owner or recovered through arbitration or court proceedings in connection with any such claim or contention presented on behalf of Subcontractor for Contractor's overhead, bond premium, profit and work performed by Contractor in presenting the Subcontractor's claims or contentions.” (Italics added.)

AWJ relies on the italicized sentence to contend that the subcontract gives it the option of filing a breach of contract suit against Highland in court or submitting it to

arbitration. Paragraph 13, however, appears to apply only to claims by AWJ that it is owed additional payments by Caltrans: Paragraph 13 requires AWJ to make a claim to Caltrans and requires Highland to cooperate with AWJ in pursuing AWJ's claim against Caltrans, and makes Highland only a nominal defendant in any suit AWJ thereafter files to recover sums allegedly owed by Caltrans.¹ Paragraph 13 does not appear to apply to claims that Highland failed to pay AWJ amounts which were approved by Caltrans and paid to Highland for work performed by AWJ or to claims that Highland breached the contract in any other manner, as alleged in AWJ's complaint. Accordingly, the provision in paragraph 13 allowing AWJ to sue or pursue arbitration in the event that Caltrans rejects AWJ's claim for additional payment does not answer the question raised in this case, i.e., whether Highland can compel arbitration of AWJ's claim that Highland breached the subcontract.

We now turn to Highland's contentions. Highland states² that the prime contract contains the following provision, which it describes as "Standard Specification 9-1.10":

"Article 7.1 (Sections 10240-10240.13, inclusive) of Chapter 1, Division 2 of the Public Contract Code provides for the resolution of contract claims by arbitration.

¹ AWJ's complaint appears to reflect this; it alleges that AWJ gave Highland timely notice of its claims regarding payment, and that Highland "failed and refused to pay AWJ for its claim and/or pass AWJ's claim through to Caltrans *when and to the extent AWJ[']s claims were against Caltrans.*" (Italics added; capitalization normalized.)

² Highland did not produce the prime contract in the trial court; it produced only a copy of Standard Specification 9-1.10

“Claims (demands for monetary compensation or damages) arising under or related to performance of the contract shall be resolved by arbitration unless the Department and the Contractor agree in writing, after the claim has arisen, to waive arbitration and to have the claim litigated in a court of competent jurisdiction. Arbitration shall be pursuant to Public Contract Code Sections 10240-10240.13. inclusive, and applicable regulations”

Highland contends that paragraphs 3 and 13 of the subcontract incorporate the prime contract in its entirety by reference, including specification 9-1.10. We disagree.

We begin with Paragraph 3. It provides in pertinent part:

“3. EFFECT OF PRIME CONTRACT: To the extent that they are applicable to the work to be performed by Subcontractor under this agreement, *the provisions of the prime contract, plans, specifications, addenda, change orders, and other documents forming a part of the prime contract, are hereby incorporated into this agreement* with the same force and effect as though set forth in full. . . . In the event that any provision of this agreement as applied to the work of Subcontractor hereunder is found to be inconsistent with the provisions of the prime contract, the provisions of the prime contract shall prevail and shall govern the rights and obligations of the parties hereto.”
(Italics added.)

Highland contends that the language italicized above reflects the parties’ agreement that all provisions of the prime contract are incorporated into the subcontract. AWJ counters that paragraph 3 applies only to those provisions of the prime contract

which pertain to the *work* to be performed under the subcontract, and that it does not apply to payment or resolution of disputes. We agree. The first sentence of paragraph 3 states, “*To the extent that they are applicable to the work to be performed by Subcontractor under this agreement*, the provisions of the prime contract, plans, specifications, addenda, change orders, and other documents forming a part of the prime contract, are hereby incorporated into this agreement with the same force and effect as though set forth in full.” (Italics added.) The final sentence of paragraph 3 which we have quoted above also states that if any provision of the subcontract “*as applied to the work of Subcontractor hereunder*” (italics added) is inconsistent with the provisions of the prime contract, the provisions of the prime contract shall prevail. “The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.” (Civ. Code, § 1638.) Here, paragraph 3 clearly and explicitly states that those provisions of the prime contract which apply to the work to be performed by AWJ are incorporated by reference into the subcontract. It contains no reference to provisions of the prime contract which pertain to payment or to arbitration of disputes.

The first sentence of paragraph 13, also relied upon by Highland as incorporating all terms of the prime contract by reference, states: “Subcontractor shall be bound to Contractor to the same extent as Contractor is bound to Owner, by all the terms and provisions of the prime contract, and by all decisions, ruling [*sic*] and interpretations for [*sic*] the Owner or his authorized representative.” In isolation, that sentence at least arguably incorporates the prime contract in its entirety in the subcontract. However, the

remainder of the paragraph describes in detail the procedure AWJ must follow in order to obtain “additional compensation” to which it believes it is entitled. Nowhere does paragraph 13 state that Highland may require AWJ to arbitrate if AWJ is dissatisfied with Caltrans’s resolution of the dispute. On the contrary, it explicitly states that after AWJ has gone through the procedure described in paragraph 13, AWJ has the option of filing suit or arbitrating the claim if it is dissatisfied with Caltrans’s resolution of the dispute. This is entirely inconsistent with Highland’s contention that the subcontract incorporates by reference the arbitration provision of the prime contract.

Because arbitration involves the waiver of the right to a jury trial, an agreement to arbitrate must be “clear and unmistakable.” (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 804.) Highland has not pointed to any provision of the subcontract which clearly and unmistakably requires arbitration of a payment dispute between it and AWJ. Accordingly, Highland has not met its burden to show that the trial court erroneously denied its motion to compel arbitration.

Because we conclude that the subcontract does not permit Highland to compel arbitration of a payment dispute, we need not address the remaining issue.

DISPOSITION

The judgment is affirmed. American Water Jetting, Inc. is awarded costs on appeal.

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MCKINSTER
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.