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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

ATASCADERO GLASS, INC.,

Plaintiff and Appellant,

v.

DAVID A. BUSH, INC. et al.,

Defendants and Respondents.

F071426

(Super. Ct. No. VCU254015)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Lloyd L. Hicks, Judge.

Braun & Melucci and Kerri M. Melucci for Plaintiff and Appellant.

Griswold, LaSalle, Cobb, Dowd & Gin and Michael R. Johnson for Defendants and Respondents.

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The question raised in this appeal is whether a general contractor on a school district construction project breached its contract with a subcontractor by withholding

retention payments due to the subcontractor after the project was completed. At the project's completion, the subcontractor was pursuing a claim for extra work and the contractor withheld the retention funds as security for the payment of contractual attorney fees the subcontractor might owe if its claim for extra work failed. The fact that the construction project was for a school district means the project qualifies as a "public work of improvement." (Pub. Con. Code, § 7107, subd. (a).)¹ As a result, the withholding of retention payments from the subcontractor is governed by subdivision (e) of section 7107. The parties' contractual provision addressing the withholding of retention payments loosely tracked the statutory language and the statutory prompt payment protections may not be waived. Accordingly, whether the contractor's withholding of the retention payments was authorized by the contractual provision is, for all practical purposes, a question about whether the withholding was allowed under section 7107, subdivision (e).

The question of how to interpret section 7107, subdivision (e) currently is pending review by the California Supreme Court in *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2015) 243 Cal.App.4th 151, review granted March 16, 2016, S231549 (*United Riggers*). The court will consider whether a contractor may withhold retention payments when there is a good faith dispute of any kind between the contractor and a subcontractor, or only when the dispute relates to the retention itself. Currently, there is a split among the Courts of Appeal on this issue.²

¹ All unlabeled statutory references are to the Public Contract Code. The text of subdivision (a) and the other relevant subdivisions of section 7107 is set forth in part III.A, *post*.

² The Second Appellate District, Division Six, concluded retention is not allowed for every kind of good faith dispute, but is allowed only when the dispute relates to the retention itself. (*East West Bank v. Rio School Dist.* (2015) 235 Cal.App.4th 742 (*East West Bank*)). In contrast, the Third Appellate District concluded retention is allowed for all types of good faith disputes. (*Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.* (2009) 179 Cal.App.4th 1401 (*Martin Brothers*)).

We join *East West Bank* and conclude that a general contractor may not withhold retention payments when a subcontractor asserts a claim for extra work and the dispute does not relate to the retention itself. Consequently, the general contractor in the present case breached the contract by withholding payment of the retention amount and, thus, was not necessarily the prevailing party entitled to recover contractual attorney fees and costs.

We therefore reverse the judgment in part and remand for further proceedings as to attorney fees and costs.³

FACTS

The facts relevant to the issues raised in Atascadero Glass Inc.'s (Atascadero Glass) appeal are relatively simple because those issues do not include more complicated questions involving the change orders and claims for extra work, which were part of the litigation below. The facts described in this opinion are taken from the trial court's written decision and the contents of trial exhibits.

On December 21, 2010, defendant David A. Bush, Inc. (Bush) and Burton School District entered into a lease-leaseback agreement for the construction of the New Northwest Elementary School Project in Porterville, California. This type of agreement differs from the responsible-low-bidder procedure, which involves competitive bids based entirely on detailed plans and specifications. The lease-leaseback agreement stated the guaranteed project cost would not exceed \$19.1 million. It also provided that Bush would "finance" the cost of construction and the school district would pay Bush sublease payments pursuant to the terms and conditions of a "sublease," "which terms and conditions include the 10% retention described in Section 6 of the Sublease."

³ If the contractor in this case seeks review of our decision, which joins the rationale and conclusion adopted in *East West Bank*, we anticipate that our Supreme Court would grant review and defer briefing pending a decision in *United Riggers, supra*, 243 Cal.App.4th 151, review granted.

On January 20, 2011, Bush and Atascadero Glass executed a written subcontract agreement (Subcontract) in which Atascadero Glass agreed to furnish and install the project's storefront, curtain wall, glazing and related work in accordance with the plans and specifications. The Subcontract provided for payment of \$739,322. This sum was adjusted over the course of the construction both up and down by various change orders. The final contract sum was \$664,721.50.

Paragraph 22 of the Subcontract stated that Atascadero Glass would be paid in installments based on the progress payments made to Bush by the school district. The amount of the installment was to be Atascadero Glass's proportionate interest in each of the school district's progress payments to Bush. Thus, the fact that the payments made to Bush were reduced by the 10 percent retention meant that installments made to Atascadero Glass also were reduced by 10 percent.

Paragraph 23 of the Subcontract is the basis for the breach of contract claim that is central to this appeal. The paragraph stated that Bush would make the final payment to Atascadero Glass within 10 days following Bush's receipt of the funds released by the school district. It also stated: "In the event a bona fide dispute exists between [Bush] and [Atascadero Glass], [Bush] may hold from the final payment an amount not to exceed 150% of the estimated value of the disputed amount." This contractual language loosely tracked the text of subdivision (e) of section 7107.⁴

A secondary matter in this appeal is the award of attorney fees and costs. That topic is addressed in two places by the Subcontract. First, paragraph 15 of the Subcontract states: "In the event legal action is instituted by either party hereto, the prevailing party shall be entitled to reasonable attorney's fees and costs." Second,

⁴ "The original contractor may withhold from a subcontractor its portion of the retention proceeds if a *bona fide dispute* exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the *disputed amount*." (§ 7107, subd. (e), italics added.)

immediately above the signature block on the Subcontract's last page is an unnumbered paragraph that includes the following sentence: "If a dispute arises concerning this Agreement resulting in arbitration or litigation, the prevailing party shall be entitled to reasonable costs and expenses, including reasonable attorney fees and costs."

During the performance of the Subcontract, a disagreement arose over whether Atascadero Glass was entitled to a change order for the inclusion of "head cans" (i.e., compensating channels that deal with live load deflections) in the storefront systems. In addition, a dispute arose from the request of Atascadero Glass for a change order relating to a curtain wall header. Bush never submitted the request to the project's architect and, thus, it was never approved by the architect.

Atascadero Glass's requests for change orders did not affect its timely receipt of progress payments, less retention, during the construction. Atascadero Glass asserted its work was completed in December 2012 and it submitted a final retention invoice to Bush on April 25, 2013. The amount of the invoice was \$67,060.44.⁵

In August 2013, Atascadero Glass sent a payment bond claim notice to Bush and Western Surety Company. Atascadero Glass claimed a total amount of \$84,824.44 for the retention amount (\$67,060.44) and extra work relating to the head cans (\$17,764).

In September 2013, Atascadero Glass filed a stop notice with the school district in the amount of \$71,919.43. The amount included the unpaid retention plus \$5,607.60 for the never-approved change order relating to the curtain wall header.

Later in September 2013, the school district signed and recorded a notice of completion. As a result, the school district released the retention it was holding under its contract with Bush, less about \$140,000 to cover stop notices. Of this amount, \$107,870.15 was attributed to the stop notice filed by Atascadero Glass.

⁵ In contrast, Bush's records at that time showed a retention balance of \$66,035.60. The trial court's decision states: "This difference was never reconciled by either party."

Bush responded to Atascadero Glass's demand for payment of the retention amount by asserting the right to withhold 150 percent of the \$17,764 (i.e., \$26,646) for extra work claimed by Atascadero Glass relating to the head cans. When Atascadero Glass stated it would no longer assert its stop notice, Bush conceded that Atascadero Glass was entitled to be paid the retention amount less the withholding for the dispute of the rejected change order for head cans. As a result, Bush paid Atascadero Glass \$39,389.60 and withheld \$26,646 of the retention for the extra work relating to the head cans.

PROCEEDINGS

In October 2013, Atascadero Glass filed a complaint against Bush, Western Surety Company, and the school district. The complaint alleged causes of action against Bush for breach of contract, enforcement of a stop notice claim, common counts and other theories. The breach of contract cause of action alleged that Bush materially breached the Subcontract by failing (1) to make timely progress payments, (2) to pay for the extra work relating to the head cans, and (3) to pay the final Subcontract balance and retention.

In August 2014, a five-day court trial was completed. The court issued a 21-page intended decision on October 24, 2014. The section in the intended decision addressing Bush's right to withhold 150 percent of the amount disputed for the rejected head cans change order stated:

“When Bush's retention was released (actually before, but in anticipation of it being released), [B]ush with[e]ld \$26,646 from the \$66,035.60 due [Atascadero Glass] for its retention. [Bush] did not withhold for the [curtain wall] header claim of \$5,607.60, which had apparently fallen through the cracks at Bush.

“Bush was within its rights to do so. It seems counter-intuitive to permit a general to withhold from moneys earned and indisputably due to a sub any money based on the sub's claim to be entitled to additional money.

“However, that precise question was before the court in [*Martin Brothers, supra*,] 179 Cal.App.4th 1401. The Court addressed ... [section]

7107[, subdivision](e), which permits a general to withhold from a sub's portion of its retention up to 150% of the amount of any sum as to which a bona-fide dispute exists between the sub and the general.

“[*Martin Brothers*] flatly held that the statute by its terms covered all disputes, and therefore was not limited to disputes over the amount of the retention, and included claimed additional change[] orders, even though the money was with[e]ld from undisputed retention.

“This Court is bound by that holding, and therefore the withheld sum is not due or payable until the dispute over the requested change order is resolved. That dispute is the subject of this litigation, so is not payable until final resolution of this litigation.”⁶

The trial court's intended decision also addressed Bush's claim for an offset related to the defective installation of window gaskets. Bush claimed \$2,708.48 for costs related to the defect, which amount included overhead and time spent on other work. The court allowed an offset of \$500 for the work on the window gaskets. Taking into account the payment already made and the \$500 offset, the trial court found Bush still owed Atascadero Glass \$26,146 on the retention.

The intended decision also addressed Atascadero Glass's claims for additional compensation for performing extra work. The trial court denied these claims, stating that Atascadero Glass's “requested change orders here were for work within the scope of the contract, and that [Atascadero Glass] was not entitled to any additional compensation for performing that work.” The court's conclusion stated:

“Judgment shall be for Defendant Bush. Bush shall pay to [Atascadero Glass] the balance of its retention, the sum of \$26,146.

“Bush, as prevailing party, shall recover its costs, per cost bill to be filed, and attorney's fees, per motion to be filed.”

After the trial court's intended decision was filed, Atascadero Glass filed a request for a statement of decision and then filed objections to the intended (i.e., tentative)

⁶ It should be noted that the *East West Bank* decision was decided on April 1, 2015, after judgment was entered in this case.

decision. In December 2014, the trial court (1) issued an order addressing Atascadero Glass's objections to the decision and (2) directed Bush to prepare a judgment.

On January 5, 2015, the court entered a judgment in favor of Bush. On March 19, 2015, Atascadero Glass filed a notice of appeal challenging the judgment after court trial.

Later in March, Atascadero Glass filed a notice of ruling on its motion to tax costs. The notice stated the trial court had granted the motion by striking costs amounting to \$1,863.07 from Bush's claimed costs.

DISCUSSION

I. THRESHOLD QUESTION

A threshold question is this appeal involves the role of section 7107, subdivision (e) in resolving the parties' dispute. Atascadero Glass contends, in effect, that the contractual provision authorizing Bush to withhold retention proceeds in certain circumstances is subject to section 7107, subdivision (e) and, thus, the main question before this court is the interpretation of the statutory provision. In contrast, Bush argues this is a contract case that does not include any statutory claims. Bush notes that Atascadero Glass voluntarily dismissed its statutory cause of action related to a prompt payment penalty. At oral argument, Bush contended that the outcome in this appeal would not be affected by the Supreme Court's decision in *United Riggers*.

We reject Bush's contention about the role section 7107 plays in this appeal. First, Atascadero Glass's cause of action for breach of a written contract asserted Bush materially breached the Subcontract by, among other things, "failing and refusing to pay [Atascadero Glass] its final Subcontract Balance and Retention." Thus, the claim Bush wrongfully withheld the retention payment was part of the breach of contract cause of action alleged and subsequently pursued by Atascadero Glass.

Second, whether Bush acted wrongfully or properly in withholding the retention payment depends on how section 7107, subdivision (e) is interpreted. The statute itself

provides that “retention proceeds withheld from any payment ... by the original contractor from any subcontractor, shall be subject to this section.” (§ 7107, subd. (b).) This statutory text applies in this case because (1) Bush was an “original contractor;” (2) Atascadero Glass was “any subcontractor;” and (3) the \$26,646 in question qualifies as “retention proceeds withheld from any payment” owed by a contractor to a subcontractor. Also, we interpret the statutory phrase “subject to this section” to mean section 7107 controls in situations where a contractual provision purports to impose a less prompt payment obligation on the contractor. (*Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1193 [statutory phrase “subject to” means governed by]; *Gapusan v. Jay* (1998) 66 Cal.App.4th 734, 741 [“subject to” means subordinate to].) Another reason a contractual provision cannot override the requirements of section 7107, subdivision (e) is that the statute explicitly states: “Any attempted waiver of the provisions of this section shall be void as against the public policy of this state.” (§ 7107, subd. (h).) Consequently, paragraph 23 of the Subcontract cannot be interpreted as waiving the subcontractor’s statutory protections. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 752 [“applicable laws ... in existence when the agreement is made become a part thereof as fully as if incorporated by reference”].)

To summarize, we conclude the portion of Atascadero Glass’s breach of contract cause of action addressing the wrongful withholding of retention payments is affected by the interpretation of section 7107, subdivision (e), because paragraph 23 of the Subcontract must be interpreted to operate in harmony with the statute. Accordingly, the interpretation of the statute plays the dominant role in determining whether Bush breached the Subcontract.

II. STATUTORY CONSTRUCTION

A. Standard of Review

The interpretation of a statute and the application of that interpretation to a set of undisputed facts are questions of law subject to independent review on appeal. (*Twedt v. Franklin* (2003) 109 Cal.App.4th 413, 417.)

B. Basic Principles

When considering questions of statutory interpretation, a court's fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 674.) Courts start with the language of the statute, giving the words their usual and ordinary meaning, while construing them in light of the statute as a whole and the statute's purpose. (*Ibid.*)

1. *Plain Meaning*

When the statutory language is clear and unambiguous there usually is no need for further construction, and courts adopt the plain meaning of that language. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) However, the "plain meaning" rule is not absolute. (*Ibid.*) A court must consider whether the literal meaning of a statute comports with its purpose and whether a literal construction of one provision is consistent with other provisions of the statute. (*Ibid.*) "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Ibid.*; see *Bob Jones University v. United States* (1983) 461 U.S. 574, 586 [a well-established canon of statutory construction provides that literal language should not defeat the plain purpose of the statute]; *Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645 [legislative purpose will not be sacrificed to a literal construction].) Similarly, a literal construction of statutory language that leads to absurd results may be disregarded for a construction that furthers the legislative intent apparent in the statute. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d

208, 245; see *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 567 [plain meaning of constitutional provision rejected to avoid absurdity].)

2. *Ambiguous Language*

Alternatively, when the statutory language has no plain meaning—that is, it is susceptible to more than one reasonable interpretation—the language is ambiguous. (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198.) In resolving the ambiguity, the court’s goal is to adopt the construction that best effectuates the purpose of the law. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) To achieve this goal, courts look to various extrinsic aids, including the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. (*Fluor, supra*, at p. 1198.)

III. WITHHOLDING OF RETENTION

A. Statutory Text

California’s prompt payment statutes are designed to implement the prompt payment of progress payments and retention monies from owners to general contractors and from general contractors to subcontractors. (9 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 31:92, p. 31-370.) The dispute between Atascadero Glass and Bush involves a public works project and a general contractor’s obligation to promptly pay retention⁷ to a subcontractor. The provisions of section 7107 relevant to this dispute state:

“(a) This section is applicable with respect to all contracts entered into on or after January 1, 1993, relating to the construction of any public work of improvement.

⁷ Retention refers to amounts withheld or retained by the contractor from payments owed to the subcontractor to secure full performance of the subcontract. (9 Miller & Starr, Cal. Real Estate, *supra*, § 31:92, p. 31-371 [distinction between progress payments, retention, and final payment].) Full performance means that the subcontractor completes the work properly, which includes repairing any defects. (See *East West Bank, supra*, 235 Cal.App.4th at p. 748.)

“(b) The retention proceeds withheld from any payment ... by the original contractor from any subcontractor, shall be subject to this section. [¶] ... [¶]

“(d) Subject to subdivision (e), within seven days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor’s share of the retention received....

“(e) The original contractor may withhold from a subcontractor its portion of the retention proceeds if a *bona fide dispute* exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the *disputed amount*. [¶] ... [¶]

“(h) Any attempted waiver of the provisions of this section shall be void as against the public policy of this state.” (Italics added.)

The purposes of the provisions in section 7107 addressing the contractor-subcontractor relationship are (1) to encourage general contractors to pay their subcontractors in a timely manner and (2) to provide the subcontractor with a remedy in the event that the contractor violates the statute. (See *Morton Engineering & Construction, Inc. v. Patscheck* (2001) 87 Cal.App.4th 712, 720 [dispute between contractor and subcontractor on school district construction project].)

B. Contentions of the Parties

Atascadero Glass contends this court should follow *East West Bank* and conclude that the meaning of the words “dispute” and “disputed amount” used in section 7107, subdivision (e) is limited by the purposes of the statute, which includes providing the contractor security against unfinished work and defects in the work already performed. Atascadero Glass argues that the withholding based on Atascadero Glass’s claim for payment of \$17,764 for extra work served neither purpose and, as a result, the dispute was not the type of dispute for which withholding is allowed by section 7107, subdivision (b).

Bush contends that the court in *Martin Brothers* properly interpreted the term “dispute” when it applied the ordinary meaning of that term and noted the statute contained “no language restricting the word ‘dispute’ to any particular kind of dispute other than it must be ‘bona fide.’” (*Martin Brothers, supra*, 179 Cal.App.4th at p. 1412.) Based on its literal approach, the court concluded: “There is simply nothing in the language of section 7107[, subdivision](e) that evinces a legislative intent to limit the types of honest dispute that will justify the withholding of retentions.” (*Ibid.*)

C. Interpreting the Statute

We assume for purposes of this appeal that “dispute” and “disputed amount” have a plain meaning that is not limited to particular types of disagreement. If this plain meaning were adopted, then the disagreement involving Atascadero Glass’s claim of \$17,764 for extra work relating to the compensating channel would be covered by the provision in section 7107, subdivision (e) that allows the contractor to withhold 150 percent of the disputed amount.

Whether we adopt or reject this meaning of the terms “dispute” and “disputed amount” will turn on the canon of statutory construction that literal language should not defeat the plain purpose of the statute. (See *Bob Jones University v. United States, supra*, 461 U.S. at p. 586.) In other words, the legislative “purpose will not be sacrificed to a literal construction.” (*Select Base Materials, Inc. v. Board of Equalization, supra*, 51 Cal.2d at p. 645.)

We, like the court in *East West Bank*, conclude that allowing a contractor to withhold retention funds based on a subcontractor’s claim for extra work (1) defeats, rather than promotes, the statutory purpose of prompt payment for work properly done and (2) does not serve the statutory purpose of protecting the contractor from (a) the subcontractor not finishing its work or (b) expenses incurred in correcting a subcontractor’s defective work. Accordingly, to avoid defeating the purpose of the

statute, we interpret subdivision (e) of section 7107 as authorizing a contractor to withhold retention payments only when there is a bona fide dispute relating to the retention itself.

Applying this statutory interpretation to the facts of this case, we conclude that, notwithstanding the dispute over payment for extra work, Bush did not have a statutory basis for withholding the retention funds. Consequently, Atascadero Glass established its claim that Bush breached the Subcontract by wrongfully withholding payment of the retention proceeds.

III. AWARD OF ATTORNEY FEES AND COSTS TO PREVAILING PARTY

The foregoing interpretation of section 7107 and the related provision in paragraph 23 of the Subcontract leads to the conclusion that Atascadero Glass is entitled to have the judgment modified to show that Atascadero Glass won its claim for a wrongful delay of the payment of its retention. Accordingly, the judgment in favor of Bush on Atascadero Glass's claim for payment of retention proceeds wrongfully withheld by Bush is reversed. In contrast, we affirm paragraph No. 7 of the judgment, which states that Atascadero Glass "shall take nothing on its claims for the requested change orders for the store front and curtain wall as the work performed was required by the contract documents." Furthermore, our resolution of this appeal partially changes the outcome of the litigation and, as a result, the trial court must render a new determination as to which party prevailed in the litigation.

DISPOSITION

We affirm the part of the January 5, 2015, judgment stating that "Atascadero [Glass] shall take nothing on its claims for the requested change orders for the store front and curtain wall as the work performed was required by the contract documents."

The judgment is reversed with respect to (1) Atascadero Glass's claim for payment of the portion of the retention proceeds withheld by Bush and (2) the award of costs and

attorney fees to Bush. The case is remanded to the trial court for further proceedings, including (1) the entry of judgment in favor of Atascadero Glass in the amount of \$26,146 on its claim for payment of the withheld retention amount and (2) a determination of the prevailing party, if any, in the litigation for purposes of awarding attorney fees and costs.

Atascadero Glass shall recover its costs on appeal.

FRANSON, J.

WE CONCUR:

LEVY, Acting P.J.

KANE, J.