

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 0211

B. F. CARVIN CONSTRUCTION COMPANY, INC.

VERSUS

**HOSPITAL SERVICE DISTRICT NO. 1
OF THE PARISH OF TERREBONNE**

SEP 11 2009

Judgment rendered: _____

**On Appeal from the 32nd Judicial District
Parish of Terrebonne, State of Louisiana
Number: 134,312**

The Honorable Timothy C. Ellender, Judge Presiding

**Brian A. Gilbert
New Orleans, LA**

**Counsel for Plaintiff/Appellant
B. F. Carvin**

**Ann M. Barker
Houma, LA**

**Counsel for Defendant/Appellee
Hospital Services District No. 1
of the Parish of Terrebonne**

BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.



DOWNING, J.

B. F. Carvin Construction Company, Inc. (Carvin), appeals a partial summary judgment¹ rendered in favor of Hospital Service District No. 1 of the Parish of Terrebonne, State of Louisiana, as owner and operator of Terrebonne General Medical Center (referred to herein as TGMC). The judgment dismissed the portions of Carvin’s claim alleging that TGMC owed Carvin funds withheld for the non-installation of a fire window and for failure to keep the construction site clean. For the following reasons, we affirm the judgment of the trial court.

PROCEDURAL OVERVIEW

At issue in this appeal is whether the trial court erred in granting summary judgment on the basis that Carvin accepted a settlement offer in full satisfaction of the parties’ dispute regarding the fire window and construction clean-up. After Carvin submitted its final “Application and Certification for Payment,” the project architect authorized payment of the application, excepting payment for three items: 1) the cost of a fire window²; 2) clean-up costs; and 3) certain punch list items. The architect tendered payment to Carvin by check, excluding payment for the these items. His tender letter to Carvin contained the following language:

This payment is the final payment for work completed on the project.
This amount was determined as follows:

Construction Sum To Date:	\$4,281,410.00
Less Previous Certificates for Payment	4,004,318.11
Less Fire Window “L”	35,199.00
Less Clean-up Cost	22,124.00
Less Punch List Items	<u>14,990.00</u>
Payment Amount	\$ 204,178.99

Cashing of this check constitutes acceptance of Terrebonne General Medical Center’s offer of settlement of all claims except for the sum of \$14,990 which constitutes the punch list items referenced above. Return the payment to our office and follow

¹ The partial summary judgment at issue became final and appealable when final judgment was subsequently rendered. See La. C.C.P. art. 1915(B)(2).

² The parties disputed whether this window was included in the plans.

the procedures outlined in 4.5 of the General Conditions of the contract if you do not agree with this settlement offer.

Carvin cashed the check. Several months later, it filed suit against TGMC for the disputed sums. TGMC generally denied the allegations in the petition. During the course of litigation, TGMC filed a motion for summary judgment. The trial court granted the motion for summary judgment in part, finding that Carvin had settled its claims for the fire window and clean-up costs. Subsequently, the parties settled their dispute on the record regarding the punch list items, which settlement resolved all remaining issues. Judgments were entered accordingly.

Carvin now appeals the grant of summary judgment, asserting in seven assignments of error that the trial court erred by misapplying and misinterpreting applicable law and by entering summary judgment where questions of material fact exist.

DISCUSSION

Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's determination of whether summary judgment is appropriate; i.e., whether there is any genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. **Wright v. Louisiana Power & Light**, 06-1181 (La. 3/9/07), 951 So.2d 1058, 1070. "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La. C.C.P. art. 966B.

Louisiana Revised Statutes 38:2248

Carvin argues that the terms of La. R.S. 38:2248 preclude a compromise and settlement of its differences with TGMC. This argument, however, fails to

apprehend the qualitative distinction between the concepts of waiver and of compromise.³ A prohibition against waiver does not preclude a compromise.

Louisiana Revised Statutes 38:2248 provides as follows:

§ 2248. Provisions for withholding payment; effect on liability of contractor or agency; punch list

A. No contracts for the construction, alteration, or repair of any public works executed in conformity with this Part shall provide that the state or any of its agencies, boards, or subdivisions or any other public entity letting such a contract may withhold payment of more than ten percent of the contract price on projects of less than five hundred thousand dollars, and five percent of the contract price on projects of five hundred thousand dollars or more until the expiration of forty-five days after the recordation of formal acceptance of such work, or notice of default by the contractor or subcontractor. Such provision for withholding of payment shall in no way change or affect the liability of the letting agency or of the contractor, subcontractor, or their sureties.

B. All public works contracts shall contain a clause stating that any punch list generated during a construction project shall include the cost estimates for the particular items of work the design professional has developed based on the mobilization, labor, material, and equipment costs of correcting each punch list item. The design professional shall retain his working papers used to determine the punch list items cost estimates should the matter be disputed later. **The contracting agency shall not withhold from payment more than the value of the punch list.** Punch list items completed shall be paid upon the expiration of the forty-five day lien period. **The provisions of this Section shall not be subject to waiver,** nor shall these provisions apply to the Department of Transportation and Development. (Emphasis added.)

Carvin argues that the language of paragraph B precludes TGMC from withholding any payments other than punch list items and that this requirement cannot be waived.⁴ Accordingly, Carvin argues that the “settlement” offer was an illegal and unenforceable waiver, even though it negotiated TGMC’s check stating that it was a settlement offer.

³ “Settlement” must be equated with “compromise” in connection with the rules governing compromise. *Townsend v. Square*, 94-0758 (La. App. 4 Cir. 9/29/1994), 643 So.2d 787, 788 n.1.

⁴ Carvin argues that its right to payment became absolute when the work was formally accepted based on substantial completion of the project, citing La. R.S. 38: 2191, La. R.S. 38:2241.1 and La. R.S. 38:2248A. We note, however, that the record on summary judgment contains no formal acceptance or certificate of completion. Even so, we need not, and do not, decide this issue here.

Generally, “[w]aiver occurs when there is an existing right, a knowledge of its existence and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished.” **Steptore v. Masco Const. Co., Inc.**, 93-2064 (La. 8/18/94), 643 So.2d 1213, 1216.

In contrast, a civil law compromise is defined in La. C.C. art. 3071⁵ as follows: “A compromise is a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship.” La. C.C. art. 3079⁶ governs compromises based on tender, as follows: “A compromise is also made when the claimant of a disputed or unliquidated claim, regardless of the extent of his claim, accepts a payment that the other party tenders with the clearly expressed written condition that acceptance of the payment will extinguish the obligation.” It is well settled that compromise agreements between parties to avoid litigation are favored by law, and courts will not declare them void without a clear showing that they violate good morals or public interest. **Barker v. Dept. of Transp. and Development for State**, 08-1084 (La.App. 1 Cir. 12/23/08), 4 So.3d 869, 871.

In the matter before us, TGMC’s offer is clearly stated as an offer to settle. Carvin is not asked to expressly waive or relinquish any known right. Rather, he is asked to return the check and follow dispute resolution procedures if the offer to settle their disputes was not acceptable. As the pleadings and evidence show, disputes existed between the parties regarding whether the fire window was included in the original contract and whether Carvin adequately cleaned the job site. The trial court observed that questions of fact existed regarding these matters that would preclude summary judgment in the absence of a valid compromise.

⁵ This Article is new. It is not intended to change the law. La. Acts 2007, No. 138, § 1.

⁶ This Article is also new. It is not intended to change the law. La. Acts 2007, No. 138, § 1.

We do not concede that La. R.S. 38:2248B's restrictions on waiver apply to the matter before us.⁷ Even so, the statute's restriction on waiver does not limit the parties' rights to compromise their differences. And compromise in this instance does not violate good morals or public interest.

Accordingly, we conclude that Carvin's arguments that compromise is precluded by law are without merit.

Intent

Carvin further argues that if TGMC's offer was a valid offer of compromise, a question of fact exists regarding its intent in cashing the tendered check that precludes entry of summary judgment. Carvin's only evidence in the record in opposition to TGMC's motion for summary judgment, however, is an affidavit in which its owner, William Carvin, asserts "[t]hat he has reviewed the fact statement in the attached opposition, and that all factual allegations contained therein are based upon his personal knowledge, and are true and correct." Regarding the settlement offer, the opposition contains the following factual allegations only: 1) "Carvin never agreed to the 'purported settlement'"; 2) "Carvin did not agree to the conditional payment."

The initial burden of proof on a motion for summary judgment remains with the mover to show that no genuine issue of material fact exists. **Lewis v. Four Corners Volunteer Fire Dept.**, 08-0354 (La.App. 1 Cir. 9/26/08), 994 So.2d 696, 699. Once the mover makes a prima facie showing that the motion should be granted, the burden shifts to the non-moving party to present evidence demonstrating that a material factual issue remains. **Id.** "The failure of the non-moving party to produce **evidence** of a material factual dispute mandates the granting of the motion." **Id.** "Affidavits that are devoid of specific underlying

⁷ We further note that the trial court found that Paragraph B pertained only to punch list items, since Paragraph A appears to allow certain contractual retentions other than punch list items.

facts to support a conclusion of ultimate “fact” are not legally sufficient to defeat summary judgment.” *Id.*, 994 So.2d at 700.

Here, TGMC put on evidence of an offer of settlement, which was apparently accepted in accordance with La. C.C. art. 3079, quoted above. TGMC, therefore, has made a prima facie showing that it is entitled to summary judgment. Carvin’s conclusory, self-serving affidavit is devoid of any specific underlying facts establishing that a genuine issue of material fact exists. The affidavit is, therefore, legally insufficient to defeat TGMC’s motion for summary judgment. Accordingly, we conclude that the trial court did not err in granting summary judgment in favor of TGMC.

Carvin’s assignments of error are without merit.

DECREE

For the foregoing reasons, we affirm the judgment of the trial court. Costs of this appeal are assessed to B. F. Carvin Construction Company, Inc.

AFFIRMED