

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 0741

CRAIG NEAL & SONS, L.L.C.

VERSUS

F. G. SULLIVAN, JR. CONTRACTOR, L.L.C. AND STATE OF
LOUISIANA, DEPARTMENT OF TRANSPORTATION AND
DEVELOPMENT

DATE OF JUDGMENT: February 20, 2008

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
(NUMBER 540,333 I(24)), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA


HONORABLE R. MICHAEL CALDWELL, JUDGE

* * * * *

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F. G. Sullivan, Jr., Contractor, L.L.C.

* * * * *

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Downing, Jr. concurs and assigns reasons.

Disposition: REVERSED AND REMANDED.

Parro, J., concurs.

Kuhn, J.

Plaintiff, Craig Neal & Sons, L.L.C. (“Neal”), appeals the dismissal of its breach of contract suit against F.G. Sullivan, Jr., Contractor, L.L.C. (“Sullivan”). Neal asserts that the trial court improperly granted Sullivan’s motion for summary judgment based on a misinterpretation of the payment clause of the contract. Finding genuine issues of material fact, we reverse and remand for further proceedings.

I. PROCEDURAL AND FACTUAL BACKGROUND

Sullivan was the general contractor on a project for the State of Louisiana, Department of Transportation and Development (“the State”), relating to roadwork to be performed on US 61-LA 64, Route 964, in East Baton Rouge Parish (“the Project”).¹ Sullivan entered into a subcontract with Neal, whereby Neal agreed to perform certain work “as called for under the terms of a certain [Original Contract]” between Sullivan and the State, referenced as “Contractor” and “Owner,” respectively, in the subcontract.

Pursuant to the terms of the Original Contract, the State made payments to Sullivan for certain line items, which included general excavation work, the removal of Portland cement, and the removal of surfacing and stabilized base. Sullivan then calculated the amount of excavation work performed by Neal and paid Neal \$257,390.33. Neal later filed suit, claiming that Sullivan still owed it approximately \$42,099.00 under the terms of the subcontract. Sullivan filed a motion for summary judgment, which the trial court granted, dismissing Neal’s

¹ Neal also named the State as a defendant in its petition but later voluntarily dismissed the State without prejudice.

suit against Sullivan with prejudice. Neal appeals, contending that Sullivan has not established it is entitled to summary judgment in its favor; Neal asserts it is entitled to be paid in accordance with the “express terms of the subcontract.”

II. ANALYSIS

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966A(2); *Love v. AAA Temporaries, Inc.*, 06-1679, p. 4 (La. App. 1st Cir. 5/4/07), 961 So.2d 480, 483.

The burden of proof is on the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to provide factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966C(2); *Love*, 06-1679 at p. 4, 961 So.2d at 483.

On appeal, summary judgments are reviewed *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966B; *Love*, 06-1679 at p. 3, 961 So.2d at 483.

A “genuine issue” is a “triable issue” or one on which reasonable persons could disagree. *Champagne v. Ward*, 03-3211 (La. 1/19/05), 893 So.2d 773, 777. A “material fact” is a fact, the existence or non-existence of which may be essential to plaintiff's cause of action under the applicable theory of recovery. *Kennedy v. Sheriff of East Baton Rouge*, 05-1418 (La. 7/10/06), 935 So.2d 669, 687. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. *Boudreaux v. Mid-Continent Cas. Co.*, 05-2453 (La. App. 1st Cir. 11/3/06), 950 So.2d 839, 843, *writ denied*, 06-2775 (La. 1/26/07), 948 So.2d 171.

The interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. art. 2046. The words of a contract must be given their generally prevailing meaning. La. C.C. art. 2047. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract. La. C.C. art. 2048. The use of extrinsic evidence is proper only when a contract is found to be ambiguous after an

examination of the four corners of the agreement. *James Const. Group, L.L.C. v. State ex rel. Dep't of Transp. and Dev.*, 07-0225, p. 3 (La. App. 1st Cir. 11/2/07),

____ So.2d ____.

Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. La. C.C. art. 2050. Further, courts should not strain to find an ambiguity where none exists. Finally, whether a contract is ambiguous is a question of law. When addressing such legal issues, a reviewing court conducts a *de novo* review of questions of law and renders a judgment on the record. *Id.*

In instances where the mutual intention of the parties has not been fairly explicit in the contract, the court may consider all pertinent facts and circumstances, including the parties' own conclusions rather than adhere to a forced meaning of the terms used in the contract. Intent is an issue of fact that is to be inferred from all of the surrounding circumstances. *Naquin v. Louisiana Power & Light Co.*, 05-2103, pp. 7-8 (La. App. 1st Cir. 9/15/06), 943 So.2d 1156, 1161, *writ denied*, 06-2476 (La. 12/15/06), 945 So.2d 691. In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished the text. La. C.C. art. 2056.

In pertinent part, the subcontract provides:

THE PARTIES AGREE AND BIND THEMSELVES ... as follows:

1. PERFORMANCE:

Subcontractor agrees to perform the work specified and furnish all necessary labor, materials, equipment, supplies and other items therefor and to promptly pay for all of such, for which Contractor may be held and to complete the work in strict compliance with the terms of the Original Contract

2. ORIGINAL CONTRACT:

The terms, conditions, specifications, drawings, schedules and contract documents forming a part of this subcontract by reference as fully as set out in detail. Subcontractor shall be bound to the same extent that Contractor is bound by each and every covenant, obligation and provision of said Original Contract insofar as the same is applicable to the work of Subcontractor.

3. WORK:

Subcontractor shall perform all of the necessary and incidentally required to complete the following items of the Original Contract and none other:

ITEM NO.	APPROXIMATE QUANTITY	DESCRIPTION	UNIT PRICE	APPROXIMATE PRICE
20301A	110,767 CM	GENERAL EXCAVATION	\$2.616/CM	\$289,766.47
20304A	59,064 CM	EMBANKMENT	\$2.616/CM	\$154,511.42
		...		

APPROXIMATE AMOUNT OF THIS SUBCONTRACT: \$453,277.89

It is understood that all quantities set out above are approximate. Subcontractor shall perform said items for the Unit Prices set opposite each item and said prices shall constitute the sole consideration for all work performed hereunder. Any increase of (sic) decrease in quantities shall be adjusted on the same basis.

...

5. PAYMENT:

Subject to other provisions hereof, Contractor agrees to pay Subcontractor the stated consideration for said work on the basis of the quantities allowed and paid for by Owner.... Subcontractor fully understands that payment to the Subcontractor is contingent upon the Contractor receiving payment from the Owner. It is the intention of the parties to transfer the risk of payment by the Owner from the Contractor to the Subcontractor. If the Owner should not make payment to the Contractor, then the Contractor has no obligation to pay the Subcontractor.

...

21. SPECIAL OR ADDITIONAL PROVISIONS:

...

- d) Item Number 20301A includes, but is not limited to, removing, hauling and stockpiling/placing all excavated material that is

paid for under this Item Number. Excavated materials to be used as embankment or stockpiled on site for use by others.
(Emphasis added.)

On appeal, the parties do not contest that Sullivan has paid Neal for general excavation of only 98,390.8 cubic meters. Neal argues, however, that the payment clause of the subcontract obligates Sullivan to pay Neal for general excavation of 110,767 cubic meters because the State paid Sullivan under the terms of the Original Contract based on that quantity. Although the State made payments on final estimates rather than actual quantities of excavated material, Neal contends the actual volume it excavated is immaterial under the terms of the subcontract. Moreover, Neal urges that Sullivan's conclusory affidavits submitted in support of its motion for summary judgment do not actually establish that Neal only excavated 98,390.8 cubic meters.

Sullivan responds that Neal, as plaintiff, had the burden of proving the amount of general excavation that it performed. Sullivan submitted evidence based on final "estimates" purporting to establish that Neal only performed general excavation of 98,390.8 cubic meters. Thus, Sullivan urges that Neal was only entitled to recover the agreed-upon unit price under the subcontract for that quantity of excavation.

Sullivan contends that Article 2 of the subcontract "places the same obligations on Neal that Sullivan had with the State under the State's specifications." Sullivan asserts, "Those specifications define what is included in general excavation." Sullivan submits that "the specifications indicate that included in general excavation is the quantities for item 202-02-C removal of Portland cement concrete pavement, and item 202-02-G removal of surfacing and

base [(“removal items”)].” The parties do not dispute that Sullivan rather than Neal performed the removal work encompassed by these two item numbers. The parties do not address, however, why Sullivan rather than Neal performed this work.

Sullivan urges that Article 21d of the subcontract clearly provides that “the particular item number for general excavation involves the removal and hauling of all of the material excavated under this item number.” Because Neal did not perform the work associated with the removal items, Sullivan argues that Neal did not perform all of the general excavation referenced in the subcontract. Sullivan contends that under Article 3 of the subcontract, Neal is only entitled to be paid for the lesser amount of general excavation based on the specified unit price.

In support of its motion for summary judgment, Sullivan introduced the affidavit of Steve A. Strickland, Sullivan’s representative who signed the subcontract with Neal, and the affidavit of Rita Leggett, an Engineer Tech 5, who works in the Construction Audit Section of the Department of Transportation and Development.

Mr. Strickland’s affidavit sets forth: 1) he signed the contract with Neal regarding the Project; 2) under the terms of the subcontract Neal was to perform general excavation at “an estimated quantity of 110,767 cubic meters”; and 3) “a total of 110,767 cubic meters of General Excavation work [was] performed” during the course of the Project, but Sullivan removed 7,080 cubic yards of Portland cement and concrete pavement and 9,098 cubic yards of surfacing and base, which totaled 16,178 cubic yards or 12,376.2 cubic meters. Deducting that amount from the final estimated total of general excavation work performed,

Sullivan determined that Neal's excavation had not exceeded 98,390.8 cubic meters, and Neal was paid based upon that quantity.²

Ms. Leggett's affidavit stated that she had conducted a final audit for the Project. The final estimates for the Project reflected that Sullivan was paid for general excavation of 110,767 cubic meters, removal of 20,771.2 square meters of Portland cement concrete, and removal of 31,806.5 square meters of surfacing and stabilized base. Ms. Leggett's affidavit also referenced the Louisiana Standard Specifications for Roads and Bridges Section 202.06, which provides, "When the removal is in an area to be excavated and payment for excavation is made under other items, no deduction will be made from the excavation quantities." Based on this provision, Ms. Leggett confirmed that the "final quantity for item 203-01-A, general excavation, includes the quantities for the other items 202-02-C and 202-02-G."³

In essence, Sullivan's defense to Neal's claim is that Neal is not entitled to recover payment for the full amount of general excavation work referenced in the subcontract, i.e., the "110,767 CM," based on Neal's non-performance; Sullivan contends it performed part of Neal's obligation under the subcontract. Sullivan offset the amount due Neal under the subcontract by the general excavation unit price times the amount of removal work Sullivan performed that was ultimately classified by the State as general excavation work.

Louisiana Civil Code article 1994 provides:

² It is undisputed that no one actually measured the amount of material excavated by Neal.

³ Ms. Leggett's affidavit further stated that "Sullivan was paid \$0.60 a square meter for item 202-02-C[,] \$7.18 a square meter for item 202-02-G, and was also paid \$4.12 per cubic meter for item 203-01-A."

An obligor is liable for the damages caused by his failure to perform a conventional obligation.

A failure to perform results from nonperformance, defective performance, or delay in performance.

Addressing the measure of such damages, Louisiana Civil Code article 1995 sets forth, “Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived.”

Sullivan urges that under the subcontract language “Neal’s responsibility [was] to perform **all** of the work for item 203-01-A relating to general excavation.” Sullivan urges that Article 21d of the subcontract clearly provides that Neal’s obligation to perform the general excavation work also involved the removal and hauling of all of the material excavated under this item number. Because Neal did not remove any of the Portland cement concrete pavement or any of the surfacing and base, Sullivan contends Neal did not actually excavate 110,767 cubic meters as contemplated by the subcontract.

According to the State (Ms. Leggett’s affidavit), the “general excavation” final estimate included the quantities for the other “removal” item numbers. Ultimately, the removal of these items was estimated and paid twice, once under item number 203-01-A and again under either item number 202-02-C or 202-02-G. However, we conclude the subcontract language is ambiguous with respect to whether Neal had any obligation to excavate and remove these other “removal” items. Although Article 21d specified that “Item number [203-01-A] includes … removing … all excavated material that is paid for under this Item Number,” the subcontract neither indicated that item numbers 202-02-C and 202-02-G were to be paid for

under item number 203-01-A nor otherwise referenced the removal of these other items.

In order to prevail on its motion for summary judgment, Sullivan bore the burden of proving Neal's nonperformance under the terms of the subcontract and that Neal's nonperformance caused damages equal to the amount of the payment that was withheld by Sullivan. Thus, Sullivan was required to establish that Neal was obligated to perform the excavation of other removal items as part of the general excavation work based on either the specifications in the Original Contract, which formed a part of the subcontract by reference therein, or based on the parties' intent pursuant to the terms of the subcontract. Sullivan failed to introduce the Original Contract into evidence to support its motion. Further, the affidavits submitted by Sullivan did not address the issue of intent. Ms. Leggett's affidavit merely established that the final quantity paid by the State for general excavation included the quantities of the other removal items. The intent of the State and of Sullivan with respect to the Original Contract, however, cannot determine the intent of the parties to the subcontract. We also note the record does not establish who drafted the subcontract. Where the doubt cannot be otherwise resolved, contract interpretation of ambiguous terms requires construction against the contract's drafter. See La. C.C. art. 2056; *Campbell v. Melton*, 01-2578 (La. 5/14/02), 817 So.2d 69, 75.

Accordingly, we find there are genuine issues of material fact regarding: 1) the terms of the Original Contract between the State and Sullivan; 2) whether Neal and Sullivan intended that the removal work was part of the general excavation work referenced in the subcontract; and 3) who drafted the subcontract.

In the absence of Sullivan establishing Neal's nonperformance of the obligations of the subcontract, Neal is entitled to recover payment "on the basis of the quantities allowed and paid for by [the State]." Thus, Sullivan, as mover, has not met his initial burden of proof and has not established that it is entitled to judgment as a matter of law.

III. CONCLUSION

Because we conclude that genuine issues of material fact preclude a finding that Sullivan is entitled to judgment as a matter of law, we reverse the trial court's judgment and remand this matter for further proceedings. Appeal costs are assessed against Sullivan.

REVERSED AND REMANDED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 0741

CRAIG NEAL AND SONS, L.L.C.

VERSUS

**F. G. SULLIVAN, JR. CONTRACTOR, L.L.C. AND STATE OF
LOUISIANA, DEPARTMENT OF TRANSPORTATION AND
DEVELOPMENT**

Downing, J., concurs and assigns reasons.

R. Downing
In my opinion, the motion for summary judgment was properly granted based upon the evidence which is in the record. However, a summary judgment should not be granted when there is a triable issue, i.e., one on which reasonable persons could disagree. Since I consider my fellow judges reasonable and we disagree, I concur in the opinion.