

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND
FOR NEW CASTLE COUNTY

WILLIAMS HOLDING COMPANY,)
LLC,)

Plaintiff,)

v.)

BUILDING CONCEPTS OF AMERICA,)
INC.,)

Defendant.)

C. A. No.: O5C-05-001 CLS

Date Submitted: February 8, 2007

Date Decided: May 11, 2007

Upon Consideration of Plaintiff's Motion for Summary Judgment
GRANTED.

Upon Consideration of Defendant's Motion for Summary Judgment
DENIED.

ORDER

Stephen B. Potter, Esquire, Wilmington, Delaware, Attorney for Plaintiff.

Donald L. Logan and Victoria K. Petrone, Esquires, Logan & Associates,
LLC, Wilmington, Delaware, Attorneys for Defendant.

SCOTT, J

INTRODUCTION

Plaintiff Williams Holding Company, LLC (“Plaintiff”) and Defendant Building Concepts of America, Inc. (“Defendant”) have filed Motions for Summary Judgment. These motions arise from a dispute regarding the duties imposed by a construction agreement between the parties. Plaintiff and Defendant generally disagree as to whether issuance of a building permit requires payment of the first and second half of a sewer impact fee. The Court must, therefore, interpret the terms of the party’s agreement and make a determination on this issue.

After reviewing the pleadings and discovery presented by both parties, the Court finds that the entire sewer impact fee arises from the permit requirement. Plaintiff’s Motion for Summary Judgment is, hereby, **GRANTED**, and Defendant’s Motion for Summary Judgment is **DENIED**.

FACTS

Plaintiff entered into an agreement with Defendant to construct two commercial buildings in Middletown, Delaware. On June 6, 2003, Plaintiff and Defendant subsequently signed a Statement of Intent to establish the duties of both parties. The Statement of Intent contains the following

clause: “The Contract price to include all Licenses, Permits, Fees, Assessments, etc...necessary to construct two structures.”¹

For construction of a building in Middletown, the builder/developer must pay a sewer impact fee in order to acquire a building permit. The Middletown Code of Sewer Allocation §136-8.A. states that, “the developer shall submit a written request for sewer allocation... specify(ing) the number of gallons per day requested, the number and type of dwelling units, square footage of commercial and/or building area.” Middletown Code §136-8.C. also states that, “The developer shall pay the sewer connection fees corresponding to the use and discharge requested.”

A standard letter sent to all builders describes the Middletown commercial permit fee calculation and collection policy in more detail.

Pursuant to this letter, the “Sewer Connection Fee” requires:

The greater of 350 gallons or the average daily flow within the first six months of sewer usage, times the current sewer charge per gallon. (2005 per gallon fee is \$30.53.) One half of this fee is to be included on the building permit; the remainder will be billed six months after service begins.²

In addition to this letter, the Town of Middletown sent an invoice that specifically calculated the projected fees for the two buildings constructed.

The town estimated the total sewer impact fee to be \$9,985.50, half of which

¹ Pl. Mot. Summ. J., Ex. B.

² Pl. Mot. Summ. J., Ex. E.

was due at the time the building permit was issued, being \$4,992.75. Below these calculations, the invoice also states that, “The business/developer will be billed in six months the difference between the actual sewer impact fee and the portion of the estimated impact fee **required for receipt of the building permit.**”³

In a deposition taken July 6, 2006, the town manager for the Town of Middletown, Morris Deputy, confirmed that, “The sewer impact fee is required.”⁴ He also explained how Middletown divides the sewer impact fee in order to lessen the financial impact on builders/developers applying for a commercial building permit. According to the town manager, half of this fee is to be paid at the time of permit issuance and the other half at the Certificate of Occupancy. The building permit includes the balance billed six months after issuance of the Certificate of Occupancy. Therefore, the town manager answered in the affirmative when questioned whether the permit fee is “One fee. Half paid at the time the permit is issued... And the other half to be paid at a later point?”⁵

On behalf of Defendant, Gibson C. Yoder (“Yoder”) applied for building permits with Middletown. Yoder paid five times \$4,992.75,

³ Pl. Mot. Summ. J., Ex. F.

⁴ Pl. Mot. Summ. J., Ex. C.

⁵ *Id.* The Court notes that Defendant refused to make a stipulation at the February 2, 2007 hearing in regard to the town manager’s deposition.

totaling \$24,963.75, for the initial permit issuance. After the construction and occupation of the buildings, the town sent five invoices to Plaintiff for the balance of the sewer impact fee of \$4,992.75, amounting to \$24,963.75. Plaintiff paid the \$24,963.75 and now asks Defendant to reimburse it for this amount plus interest.

Hence, the issue before this Court concerns the Statement of Intent signed by both parties and the sewer impact fee. Defendant simply argues that the Court must decide whether the Statement of Intent clause in dispute “means the second half of the sewer impact fee was included in the contract, or not.”⁶ On the other hand, Plaintiff argues that the Court must decide whether this clause “means what it says, i.e. that defendant is responsible for **all** permits.”⁷ Both parties have filed Motions for Summary Judgment on the matter at hand.

STANDARD OF REVIEW

The Court may grant summary judgment if it concludes that “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 any material fact and that the moving party is entitled to summary judgment

⁶ Def. Mot. Summ. J. ¶7.

⁷ Pl. Resp. to Def. Mot. Summ. J. ¶7.

as a matter of law.”⁸ The moving party bears the initial burden of showing that no material issues of fact are present.⁹ Once such a showing is made, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact in dispute.¹⁰ In considering a motion for summary judgment, the Court must view the record in a light most favorable to the nonmoving party.¹¹ The Court’s decision must be based solely on the record presented and not on all evidence “potentially possible.”¹²

PARTIES’ CONTENTIONS

Defendant argues that the words “necessary to construct” in the Statement of Intents controls the issue at hand. Accordingly, Defendant claims that the costs at issue extend beyond the sewer impact fee required for a permit. Defendant avers that the second half of the sewer impact fee relates to usage that occurred after construction of the building. Because these costs relate to usage, the contract does not require Defendant to pay

⁸ Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

⁹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

¹⁰ *Id.* at 681.

¹¹ *Burkhart*, 602 A.2d at 59.

¹² *Rochester v. Katalan*, 320 A.2d 704, 708 (Del. 1974) (citing *United States v. Article Consisting of 36 Boxes*, 284 F.Supp. 107 (D. Del. 1968), *aff’d*, 415 F.2d 369 (3d Cir. 1969)).

them. Defendant supports this contention by referring the Court to Plaintiff's contract with its tenants which provides for sewer charges.¹³

However, Plaintiff asserts that, "Defendant's argument that the contract should not be interpreted to obligate Defendant to pay fees based on sewer usage is a red herring."¹⁴ Plaintiff contends that the word "all" clearly controls the issue at hand. In the Statement of Intents, "all" includes all permit fees. The costs at issue arise from the sewer impact fee required for a building permit. This requirement includes both the first half and the second half of the fee. Hence, Plaintiff asserts that the second half of the fee arises from the permit requirement, not from usage.

DISCUSSION

For purposes of this Motion for Summary Judgment, the parties have relied on the following exhibits: 1) the Statement of Intents; 2) the Middletown Code of Sewer Allocation; 3) a letter and invoice from the Town of Middletown for the buildings at issue; 4) the lease agreement between Plaintiff and tenants; 5) the deposition of the town manager; 6) the deposition of Gibson Yoder; and 7) the deposition of Kenneth Williams.¹⁵ The Court generally finds that no genuine issue of fact exists in regard to

¹³ Def. Mot. Summ. J., Ex. G.

¹⁴ Pl. Resp. to Def. Mot. Summ. J. ¶10.

¹⁵ The Court notes that discovery closed on June 30, 2006.

these exhibits. As such, the contract issues here involve matters of legal intent for the Court to decide.

In order to make a decision, the Court must look to the principles of contract construction in Delaware. “The primary rule of contract construction is (that) where parties have created an unambiguous integrated written (contract),... the language of that contract will control.”¹⁶ A disagreement by parties on the meaning of a contract does not lead to the conclusion that the contract is ambiguous.¹⁷ “Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.”¹⁸ Hence, the Court must not determine “what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.”¹⁹

The Court generally finds that the Statement of Intents clause at issue is unambiguous. This clause explicitly states, “The Contract Price to include all Licenses, Permits, Fees, Assessments, etc... necessary to construct the two structures.” A reading of this clause leads to the conclusion that the

¹⁶ *Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 19 (Del. Ch. 2005)(quoting *U.S. WEST*, 1996 WL 307445 at *9, 1996 Del. Ch. LEXIS 55 at *29-30).

¹⁷ *Id.* at 19-20 (quoting *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 1059, 1061 (Del. 1997)).

¹⁸ *Id.* at 20 (quoting *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).

¹⁹ *Id.*

contract price includes all permits required for construction of the building. In essence, the Court finds that both parties recognize this contention.

The true issue lies in whether the building permit, obtained by Defendant for construction of Plaintiff's building, required payment of only the first half of the sewer impact fee or the second half as well. The Court must, therefore, decide whether the second half of the sewer impact fee arises from the permit requirement or from usage.

First, the Middletown Code of Sewer Allocation provides the Court with an initial overview of the issue at hand. It generally requires the builder/developer to pay a sewer impact fee in order to acquire a building permit. Middletown Code §136-8.A. states that the developer must submit a written request specifying the amount of water requested and description/measurements of the building. Middletown Code §136-8.C. also states that, "The developer shall pay the sewer connection fees corresponding to the use and discharge requested."

While the Middletown Code does not address the splitting of the sewer impact fee into two separate payments, a letter and invoice sent by the town to businesses/developers explains the town's calculation. The letter states that, "One half of this fee is to be included on the building permit; the remainder will be billed six months after service begins." The invoice also

provides that, “The business/developer will be billed in six months the difference between the actual sewer impact fee and the portion of the estimated impact fee **required for receipt of the building permit.**” Hence, these documents clearly explain the requirements for a permit in relation to sewer connection. For receipt of a building permit in Middletown, the permit requirement includes both the initial sewer impact fee and the remainder billed six months after service begins.

The town manager’s deposition testimony reinforces this conclusion by recognizing the entire sewer impact fee as one fee. The town manager explained from the outset that, “The sewer impact fee is required” for a commercial building permit. The town simply divides the fee in order to reduce the financial impact on builders/developers. As such, the town manager acknowledged that the sewer impact fee for a building permit is essentially one fee.

Upon reviewing the exhibits presented by both parties, the Court finds that the entire sewer impact fee arises from the permit requirement. Everything is one fee simply billed at different times and places. The billing arrangement does not make the permit fee divisible.

CONCLUSION

Based on all of the foregoing, Defendants' Motion for Summary Judgment is, hereby, **DENIED**, and Plaintiff's Motion for Summary Judgment is **GRANTED**.

The contract at issue explicitly provides that Defendant must pay for all costs associated with building permits. Because the entire sewer impact fee arises from the permit requirement, Defendant must reimburse Plaintiff for the second half of this fee plus interest.

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.