

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock, Rm 256 Denver, Colorado, 80202	DATE FILED: August 5, 2021 6:37 PM CASE NUMBER: 2020CV31028
Plaintiff: Hamon Infrastructure, Inc. d/b/a Hamon Infrastructure v. Defendant: Colorado Department of Transportation	▲ COURT USE ONLY ▲ Case Number: 2020CV31028 Courtroom: 269
Order Regarding Plaintiff's Motion for Partial Summary Judgment	

This Matter is before the Court on Plaintiff's Motion for Partial Summary Judgment, filed May 19, 2020. After the Motion was filed, Briefing was stayed as the Court ruled on Defendant's Motion to Dismiss, and other procedural issues. Briefing then resumed with Plaintiff's Supplement to Motion for Partial Summary Judgment, filed March 1, 2021. Defendant's Response was filed March 19, 2021 and Plaintiff filed a Reply on April 2, 2021. The Court has reviewed the Motion, the Supplement, Defendant's Response, the Reply, and has considered argument of counsel at the April 9, 2021 hearing. The Court now Finds, and Orders as follows:

I. Background Summary

In summary,¹ the parties are contractually involved in an extremely large highway construction project for the expansion of interstate 25 governed by a complex contract. The contract provides an elaborate dispute resolution process. Pursuant to the dispute resolution provision, if there is a dispute regarding the project, the parties must go through a non-binding process before bringing the issue to a court for resolution. A central feature of the dispute resolution process is the Dispute Resolution Board (“DRB”), which is made up of three members. One of the members is chosen by the contractor, another by CDOT, and the third member is selected by the first two DRB members. If either contractor or CDOT has issues with any of the DRB members, they must make their objection known. Plaintiff argues that the DRB is the most significant stage, because it is the only independent part of the process. The stages before and after the DRB are staffed by CDOT officials. At a most basic level, Plaintiff alleges that CDOT has violated the contract and dispute resolution procedure by never making known their serious misgivings about DRB member William Hinton (“Mr. Hinton”), and improperly engaging in *ex parte* communications with him in an attempt to influence the DRB and never intending to abide by any DRB decision that was not in CDOT’s favor.

¹ The background summary is taken nearly exclusively from the Court’s summary in its order regarding Defendants Motion to Dismiss.

Plaintiff brings three claims for relief: 1) Breach of Contract against Defendant for *ex parte* communications with the DRB chair, Mr. Hinton; 2) Breach of Contract—Breach of the Implied Covenant of Good Faith and Fair Dealing and for damages, for how CDOT exercised its discretion under the contract in a manner inconsistent with the expected process by attempting to improperly influence the DRB; and 3) Declaratory Judgement, asking the Court to find and order that Plaintiff is excused from complying with the contract dispute resolution process for any additional disputes.

Hamon's Motion for Partial Summary Judgment asks the Court to rule in its favor on the Breach of Contract Claims, declare that Hamon is excused from the dispute resolution process and, to leave for trial, a jury determination of its monetary damages.

Defendant objects and argues that Plaintiff's factual allegations are untrue, that its claims fail as a matter of law, or, at the least, that genuine issues of material fact exist.

II. Standard of Review or Applicable Law

Summary judgment is a drastic remedy and should be granted only if it has been clearly established that the moving party is entitled to a judgment as a matter of law. *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 225-26 (Colo. 2001). The court may grant a motion for summary judgment when 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 a judgment as a matter of law. C.R.C.P. 56(c); *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999). Summary judgment may not be granted when pleadings and affidavits show material facts in dispute. *GE Life & Annuity Assurance Co. v. Fort Collins Assemblage, Ltd.*, 53 P.3d 703, 706 (Colo. App. 2001).

A material fact is one that will affect the outcome of the case. *Struble v. Am. Family Ins. Co.*, 172 P.3d 950, 955 (Colo. App. 2007); *Krane v. St. Anthony Hosp. Sys.*, 738 P.2d 75, 76 (Colo. App. 1987). The moving party has the initial burden of showing no genuine issue of material fact exists; the burden then shifts to the nonmoving party to establish that there is a triable issue of fact. *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1029 (Colo. 1998). If the moving party meets its burden, the non-moving party must set forth specific facts demonstrating the existence of a real controversy. C.R.C.P. 56(e). To survive summary judgment, the non-moving party must present sufficient evidence to demonstrate that a reasonable jury could decide in its favor. *Andersen v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007). A court is to “view all evidence properly before [it] in the light most favorable to the nonmoving party, give the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the evidence, and resolve all doubts as to the existence of a material fact against the moving party.” *Wilson v. Prentiss*, 140 P.3d 288, 290 (Colo. App. 2006).

III. Analysis

Breach of Contract—Breach of the Implied Covenant of Good Faith and Fair Dealing

The contract at issue here is specifically the agreement regarding the dispute resolution board and the process for resolving disputes. It does not address any alleged breach for actual construction work that is involved in the other matter, 2020CV31722.

The Court begins its analysis with Plaintiff's second claim for relief as this is where the Motion for Partial Summary Judgment begins.

In order to prevail on its claim for breach of contract, Hamon must prove: (1) the existence of a contract; (2) that [it] performed [its] duties under the contract (or that [it] was justified in failing to do so); (3) that [CDOT] failed to perform the contract; and (4) resulting damages. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992); *Long v. Cordain*, 343 P.3d 1061, 1067, 2014 COA 177, ¶ 19 (Colo. App. 2014).

Plaintiff argues that the purpose of the DRB is to provide an independent and impartial board that would fairly resolve disputes at the contract level in a timely manner. While the DRB decisions are not binding, and are a step in the dispute resolution process, they are designed to resolve issues before reaching litigation and related expenses. The integrity of the process, however, is not so much how the

DRB may resolve a particular issue, but the willingness of the parties to abide by its decisions, especially when they are unfavorable.

Plaintiff argues that the evidence shows that CDOT violated the contract because it had grave reservations about Mr. Hinton, which it never disclosed. The contract requires the parties to participate in the DRB process. The DRB process for selection of its members requires a party to object to a member if a party is uncomfortable with a nominee. By failing to object to Mr. Hinton, Plaintiff argues, CDOT was never going to abide by any of his decisions in Hamon's favor, given CDOT's belief that he was biased. CDOT disputes that it had concerns about Mr. Hinton. In fact, it argues, CDOT project engineers Abra Geissler, Jason Lucerna, and Andrew Stratton believed that Mr. Hinton would be an asset to the DRB and advantageous to both parties because of the experience that he had from an earlier segment of the project. Also, even assuming Mark Straub, the manager of the DRB program, was unhappy with Mr. Hinton, he was not the entirety of CDOT and, in fact, his concerns were ignored because Mr. Hinton was accepted in spite of Straub's objections. Additionally, CDOT argues that the DRB policy cited by Plaintiff was not part of the contract, and that pursuant to § 105.23(b)(5) of the contract, CDOT could only object to Hinton if it had a conflict of interest. Because they did not have a conflict, they had no discretion and, therefore, no violation of good faith and fair dealing.

The contemporaneous emails provided as exhibits show a clear concern by CDOT regarding Mr. Hinton. In November of 2015, for example, Mr. Straub wanted to “pull Mr. Hinton’s pre-approved status as a potential DRB member. At a minimum I think we could put him on some kind of probation.” Pl.’s Mot. for Partial Summ J. Ex 8. Plaintiff’s Reply lists multiple other examples of CDOT’s concerns with Hinton’s perceived bias which the Court will not restate here. See Pl.’s Reply at 5. While the three project engineers may have been confident in Mr. Hinton, their superiors, such as Stephanie Alanis, resident Engineer, and Mr. Staub were not. See Pl.’s Exs. 6, 8, 9. Mr. Staub was the manager of the DRB program and while Defendant argues that CDOT basically ignored him, he had tremendous influence over the DRB process. Indeed, at Staub’s urging, and with consultation of the “Chief Engineer and the AG office,” Mr. Hinton was removed from the DRB prequalification list for future DRBs. Pl.’s Mot. Ex. 22. Mr. Straub also informed Mr. Hinton of discussions regarding “re-instating” him on the list. Pl.’s Mot. Ex. 23.

Defendant argues that the DRB was not biased in CDOT’s favor and, in fact, ruled in favor of Hamon in disputes before the board. However, this misses the point of Plaintiff’s breach of contract claim. It is not so much the DRB that Plaintiff objects to, rather, it is the compromised process. Hamon’s concern is that given CDOT’s lack of trust in Mr. Hinton, that it was never going to abide by his decisions, if they were unfavorable to CDOT because he was perceived as biased in favor of

contractors. The contract, and process of DRB member selection, requires a system of trust and transparency. If the most fundamental aspect of the process of DRB hearings is undermined by CDOT's lack of confidence in the chair of the DRB, the entire dispute resolution process is compromised. It is uncontested that Hamon was unaware of the lack of confidence that CDOT had in Mr. Hinton. It is unexplained why such a view of Mr. Hinton was not communicated to Hamon.

CDOT's argument that it had no discretion under the contract to object to Mr. Hinton, because it did not have a conflict of interest, rings hollow. At the very least the provision requiring an objection to a DRB member is incorporated into the contract by implication, because the parties assume it is the process everybody will follow. A simple disclosure to Hamon of the history of concerns CDOT had with Mr. Hinton would surely have resulted in another selection by Hamon. Additionally, Hamon's rejection of a board member, without objection by CDOT, was not due to a conflict of interest. Finally, because the DRB Disclosure Requirement, even if not expressly incorporated into the contract, guides the parties' conduct under the contract, in the Court's view, failure to voice the concerns regarding Mr. Hinton was a breach of the covenant of good faith and fair dealing. The expectation of the parties was that both sides would choose only DRB members that they had complete confidence in and reject those they didn't have confidence in, so that the process would be neutral, have integrity, and would be

fair. Here, however, CDOT asks Hamon, and the Court, to simply ignore the serious, multiple concerns it had regarding a DRB member for whom they had little confidence, and were actively sanctioning. All without disclosure to Hamon, and while he was actively sitting on the DRB charged with resolving their disputes. It is incomprehensible to the Court how the integrity of the DRB cannot, objectively, be seen as compromised under these circumstances.

Breach of Contract against Defendant for *ex parte* communications with the DRB chair, Mr. Hinton

Plaintiff's next basis for Breach of Contract is *ex parte* communications with Mr. Hinton. CDOT argues that there has been no breach because the communications between it and Mr. Hinton were merely administrative. There is no factual dispute that there were extensive communications between CDOT and Mr. Hinton and no dispute regarding the content of those communications, the divide is over the nature of those communications, and whether they in fact constitute *ex parte* communication vis a vis the contract.

The Court finds that they do.

The contract provides that, there shall be no *ex parte* communication with the DRB at any time. §105.23(b)6, Ex. 1 (Part 1) at 4. While CDOT diminishes the importance of these conversations with regard to the contract at issue here as administrative, they are clearly

communications which include topics that any reasonable, objective observer would expect both parties to the contract to be a part of, or at least, made aware that the communications were occurring. For example, a criticism of Mr. Hinton was his allowance of “new information” in hearings and his application of the U. S. Supreme Court’s *Spearin* doctrine which provides that the owner impliedly warrants the accuracy and suitability of the plans and specifications it provides to a contractor. *United States v. Spearin*, 248 U.S. 132 (1918). While Mr. Hinton was sitting as the head of the DRB, CDOT, unbeknownst to Hamon, was threatening to sanction him. Even if only “administrative,” how would Hamon not be alarmed that one of the three persons charged with resolving costly disputes was under threat of sanction by the opposing party? These were not communications about such mundane issues like scheduling, or administrative forms that needed completion. Rather, the communications with Mr. Hinton directly related to the conduct of DRB hearings and contemplated his removal from the DRB approval list if he did not adhere by CDOT guidelines during hearings.

Defendant argues that neither Mr. Straub, nor Mr. Hinton himself believed that their communications were improper or *ex parte*. However, such a subject view of the communications, to the extent it is relevant to a breach of contract claim, does not resolve the issue. The fact is that the communications regarding the handling of DRB hearings occurred without Hamon being informed. An objective view of the

communications casts doubt on the integrity of the dispute resolution process, which includes post-DRB decisions by CDOT to abide by the findings or not. Additionally, as is illustrated by Exhibit 7 of Plaintiff's Motion for Partial Summary Judgment, in March of 2015, in response to very similar communications from CDOT's Mark Straub on an earlier project with a different contractor, Mr. Hinton states, "It is not proper for me to discuss this with you without at least one person from Kiewit also participating. The easiest way to proceed would be for you to set up a conference call where a person from Kiewit can participate." Now arguing that a substantially similar communication was not *ex parte* is simply not credible.

The Court finds that CDOT was in breach of the contract with regard to the DRB process, and that Hamon may seek damages, to be determined at trial. In the Court's view, damages are appropriate, not because a different result would have occurred without the issues discussed above, but rather, as Hamon argues, damages are related to the expense of preparing for and conducting DRB hearings that were compromised before they began.

Declaratory Judgment

For all the above reasons, the Court also grants summary judgment on Hamon's third claim for relief, Declaratory Judgment, and finds that,

based on the above breaches, Hamon is excused from complying with the contract's dispute resolution process in ongoing and future disputes.

Conclusion

Plaintiff's Motion for Partial Summary Judgment is Granted.

The Jury Trial currently scheduled for January of 2022, shall be limited to the issue of damages.

So Ordered: August 5, 2021

BY THE COURT:



Michael J. Vallejos
District Court Judge

cc: Parties via electronic filing