

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 3rd day of October, 2019.

PRESENT: All the Justices

Faneuil, Inc.

Appellant,

against

Record No. 181202

Circuit Court No. CL16-4362

3M Company,

Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Richmond.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the circuit court.

3M Company (“3M”) assumed obligations under a contract with Elizabeth River Crossings Opco, LLC (“ERC”) to assess and collect tolls at facilities in and between the cities of Norfolk and Portsmouth. 3M subcontracted with Faneuil, Inc. (“Faneuil”) to perform the customer services portion of the toll operation, including customer communications, account management, invoicing for tolls, and other functions.

Five provisions of the subcontract are material in this appeal. First, 3M agreed to pay Faneuil \$2,529,775.42 in annual base compensation, divided into equal monthly installments. However, the subcontract allowed 3M to reduce the base compensation paid in a given fiscal quarter if there were fewer tolling transactions than expected during the previous quarter. Second, the subcontract required 3M to reimburse Faneuil for specified, actually-incurred costs, including customer service center rent, postage, printing, and E-ZPass and credit card transaction fees, provided the reimbursement was authorized by ERC. Third, the subcontract included a “pay-when-paid” provision that required 3M to pay Faneuil only after 3M received payment from ERC. Fourth, the subcontract required that any agreed material change to the services specified in the subcontract be stated in a written change order. Finally, the subcontract required that if either party settled claims brought by a third party, such settlement would not bind the other party without its written consent or court approval.

Faneuil began providing services under the subcontract in November 2013. According to Faneuil, soon after the toll operation began in February 2014, defects in 3M's infrastructure hindered Faneuil's ability to perform its obligations under the subcontract. As specific examples, 3M's image capturing system allegedly provided unusable images of vehicle license plates, requiring a manual review by Faneuil to identify whom to bill for tolls (rather than the automated identification 3M was contractually obligated to provide) and a manual selection of vehicle images to include on invoices to support demand for payment.

The manual processing required to replace the defective automated systems for these functions in turn caused increased customer communications and delays in invoicing. As a result, Faneuil began providing additional staff and services that it contends were not required by or compensated under the subcontract. The parties and circuit court referred to these as "Special Services." According to Faneuil, 3M knew of, requested, and agreed to these Special Services and induced Faneuil to provide them by promising additional payment for them. However, 3M repeatedly failed to pay until Faneuil threatened to stop providing them. 3M then made sporadic "good faith" payments that, while insufficient to fully compensate Faneuil for the Special Services, induced Faneuil to continue providing them.

The failures of 3M's system eventually led ERC to withhold payment from 3M. 3M and ERC ultimately reached settlement agreements in January 2015 and May 2016 under which, according to Faneuil, ERC paid 3M for the services Faneuil provided, thereby satisfying the "pay-when-paid" provision.

Faneuil thereafter filed an amended complaint asserting claims against 3M for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and fraud in the inducement. It sought \$3,802,430.96 in compensatory damages,¹ \$350,000 in punitive damages, pre- and post-judgment interest, costs, and attorney's fees. 3M asserted that to the extent that it had failed to pay Faneuil, the failure was excused by the "pay-when-paid" provision because 3M had not been paid by ERC. It also filed a counterclaim asserting that it had overpaid Faneuil for base compensation because it had paid full monthly installments even after fiscal quarters during which there were fewer than projected tolling transactions, despite the

¹ This sum represents \$1,148,310.65 for unpaid base compensation, \$107,564.98 for unpaid reimbursable expenses (after a \$15,127.47 reduction by ERC), and \$2,546,555.33 for the Special Services (after subtracting the "good faith" payments 3M had already paid, which totaled \$1,066,172.58).

provision in the subcontract permitting it to reduce base compensation for that reason. It also alleged inadequate performance by Faneuil, including failure to meet certain performance metrics.

After a bench trial, the circuit court entered an order dismissing both Faneuil's amended complaint and 3M's counterclaim. It ruled that Faneuil could not recover \$3,802,430.96 for the Special Services because the subcontract required that any material change to the services provided be agreed in a written change order, but no written change order had been executed. It ruled that 3M could not recover from Faneuil because the subcontract required 3M to provide a functioning tolling system, that 3M had failed to do so, and that 3M's failure constituted the first material breach of the subcontract. It also ruled that 3M had waived any claim to reduce base compensation payments following fiscal quarters with reduced tolling transaction volume because it had not followed the procedures set forth in the subcontract for such reductions. Finally, it ruled that 3M had also breached the subcontract by settling with ERC without Faneuil's consent.

Faneuil thereafter filed a motion to reconsider, noting that its amended complaint had not sought \$3,802,430.96 solely for Special Services; rather, that sum also included unpaid base compensation and reimbursable expenses, for which no written change order was required. The court denied the motion without a hearing.

Faneuil filed a timely petition for appeal. A panel of this Court granted it in part, limited to the issue of whether the circuit court erred by denying Faneuil's claims for unpaid base compensation and reimbursable expenses. 3M responded with a brief in opposition assigning cross-error, which the panel refused.

The circuit court's ruling that Faneuil could not recover any damages because there was no written change order was manifest error. Faneuil's amended complaint unambiguously sought five types of damages: (1) compensatory damages for unpaid base compensation, (2) compensatory damages for unpaid reimbursable expenses, (3) compensatory damages for unpaid Special Services, (4) punitive damages (arising from the fraudulent inducement claim), and (5) pre-judgment interest.² The circuit court noted that the amended complaint had four claims,

² The amended complaint also sought court costs, attorney fees, and post-judgment interest, which are not damages. See *Lambert v. Sea Oats Condo. Ass'n, Inc.*, 293 Va. 245, 254-56 (2017) (holding that the amount awarded as damages may be considered when determining

which collectively are the source for these five types of damages, but ruled that all four claims were barred by the subcontract's requirement that changes to the services provided be agreed to in a written change order.

The Court has an equal opportunity to consider the language in a contract, so it reviews the circuit court's interpretation of that language *de novo*. *Shareholder Representative Servs., LLC v. Airbus Ams., Inc.*, 292 Va. 682, 693 (2016). The circuit court correctly ruled that there was no written change order authorizing the Special Services, so Faneuil could not recover any damages for them. However, the court erred by relying on the written change order requirement to decline to consider Faneuil's other claims for damages because the subcontract does not apply that requirement to those claims.

3M argues that it nevertheless is not liable to Faneuil because Faneuil's evidence does not establish that ERC paid 3M for Faneuil's services, which is a precondition to 3M's obligation to pay Faneuil under the "pay-when-paid" provision. This argument is without merit.

A "pay-when-paid" provision in a subcontract creates a condition precedent that the general contractor must receive payment from the owner before an obligation to pay a subcontractor accrues. *Galloway Corp. v. S.B. Ballard Const. Co.*, 250 Va. 493, 498-501 (1995). Non-fulfillment of the condition precedent—i.e., failure of the owner to pay the general contractor—is a defense in a breach of contract action brought by the subcontractor against the general contractor for non-payment. *Id.* at 501 (characterizing a "pay-when-paid" provision as a defense); *see also id.* at 506 (describing a "'pay when paid' defense . . . available to a general contractor"). While a plaintiff alleging the breach of a contract that includes a condition precedent to the defendant's performance must make a *prima facie* case that the condition has been fulfilled, once the initial burden has been met, the burden of persuasion then shifts to the defendant to show that it has not. *Erie Ins. Exch. v. Meeks*, 223 Va. 287, 291 (1982); *see also SunTrust Bank v. PS Bus. Parks, L.P.*, 292 Va. 644, 652 (2016) (describing the burden of persuasion, in contrast to the burden of production).

Here, Faneuil adduced evidence that 3M had received a credit from ERC in the May 2016 settlement agreement to offset claims that ERC asserted against 3M. Specifically, that settlement

what award of attorney's fees is reasonable); *Dairyland Ins. Co. v. Douthat*, 248 Va. 627, 632 (1994) (distinguishing between pre-judgment interest, which is a part of damages, and post-judgment interest, which is not).

agreement resolved competing claims between 3M and ERC, whereby 3M agreed that it was liable to ERC for \$4,312,552 “in full and final satisfaction of any and all claims [it] may have against 3M” and ERC agreed that it was liable to 3M for \$4,112,552 “in full and final satisfaction of any and all claims 3M may have against” ERC. Under the express terms of the settlement agreement, application of these cross-liabilities to each other resulted in a net balance due from 3M to ERC of \$200,000, which 3M agreed to pay within seven days.

In the absence of some evidence to the contrary, “full and final satisfaction of any and all claims 3M may have against” ERC includes all payments 3M was required to receive from ERC to satisfy the “pay-when-paid” provision of the subcontract. Thus, Faneuil met the burden of establishing a prima facie case, and the burden shifted to 3M to adduce evidence to rebut it.

However, 3M adduced no such evidence below. Rather, 3M argued, as it does on appeal, that the credit ERC applied to 3M’s liability in the settlement agreement did not constitute payment for the purposes of the “pay-when-paid” provision. It asserts that under the subcontract, an obligation to pay Faneuil accrued only when it “received monies” from ERC, and the credit is not “monies.” This argument is also without merit.

In *El-Amin v. Virginia State Bar*, 257 Va. 608 (1999), this Court considered a similar scenario. In that case, an attorney accepted a client’s car with the client’s permission to sell it and use the proceeds as the attorney’s retainer. Instead, the attorney used the car as a trade-in to purchase a new car for himself. He received a credit of approximately \$4600 for the trade. *Id.* at 616. The Bar suspended the attorney’s license to practice law based in part on a charge that he failed to keep the client’s “funds” in trust.

On appeal, the Court ruled that the trade-in credit came within the meaning of the word “funds” as used in the then-effective disciplinary rule. However, it distinguished the term “funds,” which Black’s Law Dictionary defined as “an asset or group of assets set apart for a specific purpose,” from the terms “money” and “cash.” *Id.* at 618. Nevertheless, “funds” and “monies” are synonymous under the current edition of Black’s Law Dictionary, which defines “monies” to mean “funds; sums of money.” Black’s Law Dictionary 1204, 1206 (11th ed. 2019).

The Court therefore concludes that 3M’s receipt of a credit from ERC for money that it otherwise would have had to pay to ERC is indistinguishable from receiving money from ERC. The difference between the application of credits to cancel out the competing liabilities resolved in the settlement agreement and an agent of 3M delivering \$4,312,552 in Federal Reserve notes

to ERC's agent, only for that agent to turn around and return \$4,112,552, is merely one of convenience to the parties. There is no legal distinction in the context of this case.

Having concluded that 3M failed to meet its burden of persuasion that it had not been paid by ERC to satisfy the "pay-when-paid" provision, the Court need not consider 3M's prevention doctrine argument because that doctrine does not apply under the facts here.³ The prevention doctrine arises only when a condition precedent to performance has not been fulfilled. Because 3M did not meet its burden to show *that* the condition had not been fulfilled, Faneuil had no burden to show *why* it had not been fulfilled.

3M also argues that if it is liable to Faneuil, the amount of damages should be reduced by the \$1,066,172.58 in "good faith" payments 3M already paid Faneuil for the Special Services because the circuit court ruled that Faneuil was not entitled to any payment for them in the absence of a written change order. However, the record is clear that 3M made these payments not to satisfy its obligation under the subcontract to pay base compensation or reimbursable expenses, but to induce Faneuil to continue providing the Special Services. The record establishes that 3M understood when it made the "good faith" payments that they may not have been legally required. However, rather than timely dispute the question through litigation, 3M made the "good faith" payments so that Faneuil would continue to provide the Special Services at a time when they were indispensable to the collection of toll revenue to satisfy 3M's obligations to ERC.

It is well-settled that

[w]here a person with full knowledge of the facts voluntarily pays a demand unjustly made upon him . . . it will not be considered as paid by compulsion, and the party thus paying is not entitled to recover back the money paid, though he

³ Under the prevention doctrine, a party who prevents the fulfillment of a condition precedent to his own obligation to perform under a contract cannot rely on the failure of the condition to excuse his non-performance. *Rastek Constr. & Dev. Corp. v. Gen. Land Commercial Real Estate Co., LLC*, 294 Va. 416, 426 (2017). In other words, if it applied to this case, the prevention doctrine would prohibit 3M from relying on non-payment by ERC to excuse its non-payment to Faneuil if 3M had caused ERC's non-payment.

To successfully assert the prevention doctrine, a party must establish both that the other party intervened by act or omission purposefully to prevent the fulfillment of the condition precedent, and that the condition precedent would have been fulfilled "but-for" the other party's intervention. *Id.* at 428-30. 3M asserts that Faneuil failed to allege or prove that 3M intentionally caused ERC's non-payment, rather than inadvertently causing it through simple incompetence or negligence.

may have protested against the unfounded claim at the time of payment made. Where money has been paid under a mistake of the facts, or under circumstances of fraud or extortion, or as a necessary means to obtain the possession of goods wrongfully withheld from the party paying the money, an action may be maintained for the money wrongfully exacted. *But such action is not maintainable in the naked case of a party making a payment of a demand rather than resort to litigation.*

Williams v. Consolvo, 237 Va. 608, 613 (1989) (quoting *Wessel, Duval & Co. v. Winborne & Co.*, 125 Va. 502, 510 (1919)) (emphasis in *Williams*). Consequently, 3M is not entitled to a credit for the “good faith” payments it made for the Special Services because the payments were made voluntarily while those services were being rendered and to induce their continuation, not from any legal obligation.

The Court therefore reverses the judgment of the circuit court and enters judgment for Faneuil in the amount of \$1,255,875.63 as compensatory damages for unpaid base compensation and reimbursable expenses. Although Faneuil’s amended complaint adequately requested an award of pre-judgment interest, *cf. Devine v. Buki*, 289 Va. 162, 179 (2015), Code § 8.01-382 leaves the assessment of such interest to the discretion of the fact-finder. *Id.* Similarly, while the amended complaint adequately requested an award of reasonable attorney’s fees, *cf. Lambert*, 293 Va. at 261, it does not appear from the record that Faneuil adduced evidence of its attorney’s fees in its case-in-chief. It was not required to do so, *id.* at 259-60, and any attempt to adduce such evidence at a later time was preempted by the circuit court’s ruling denying its claims. This Court therefore remands the case to the circuit court for further consideration in light of this order, and with instructions to consider an appropriate award of pre-judgment interest and to determine reasonable attorney’s fees as both are sought in the amended complaint.

This order shall be certified to the Circuit Court of the City of Richmond.

A Copy,

Teste:


Clerk