

NO. A07-2134

State of Minnesota
 In Court of Appeals

Liberty Mutual Insurance Company,

Respondent,

v.

Northeast Concrete Products, LLC, Hallamore Corporation,
 Hallmark Mechanical Corporation, Brockton Rental Service, Inc.,

Appellants,

and

Northeast Concrete Products, LLC,

Appellant,

vs.

Liberty Mutual Insurance Company,

Respondent.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION.

One of the important points that Liberty ignores in its brief is the reason that it owed NECP and the Indemnitors a duty of good faith. The reason that Liberty owed NECP and the Indemnitors a duty of good faith is because, after the takeover and under the General Agreement of Indemnity ("GAI"), Liberty had the right to resolve claims for compensation for the labor, materials and equipment that NECP provided on the project. With that right, however, came the duty to resolve those claims in good faith. When Liberty decided to settle with Mortenson without regard for the merits of NECP's claims and, subsequently attempted to blackmail NECP into waiving its claim for bad faith, it lost the rights it would otherwise have had under the GAI and exposed itself to damage claims by NECP.

Keeping in mind the reason for Liberty's obligation of good faith, the issue in this case is the trial court's inappropriate granting of summary judgment at a time when virtually no discovery had been conducted and in the face of a detailed Minn. R. Civ. P. 56.06 affidavit setting forth very specific discovery that was necessary to resolve the disputed material factual issues (Appellants' Brief, pp. 28-36).

Recognizing this problem, Liberty inappropriately raises for the first time on appeal, an argument that NECP and the Indemnitors should have conducted the specified discovery earlier (Respondent's Brief, pp. 43-49). Because Liberty failed to raise this argument before the trial court in its Reply Memorandum in Support of its Motion for Partial Summary Judgment or at the oral argument on its motion, the trial court never had the opportunity to address the argument -- and did not do so. In fact, in granting

summary judgment in favor of Liberty, the trial court never mentioned or addressed NECP's request for time to conduct discovery, even though it was the centerpiece of NECP's oral argument in opposition to Liberty's motion.

If this Court decides to consider an issue raised for the first time on appeal, then the notion that NECP lost the right to conduct discovery in opposition to Liberty's motion because it didn't act with greater dispatch is misguided. In this regard, Liberty's summary judgment motion was filed only a month after the Court denied NECP's motion to dismiss the very Complaint that Liberty was seeking summary judgment on. Furthermore, as of the date of the Rule 56.06 Affidavit, no scheduling order had been issued and, therefore, there was no deadline for the parties to amend the pleadings, join additional parties, complete discovery, disclose experts or file motions. The case also had not been set for trial. In other words, it was very early in the case. Under those circumstances, there was no basis for the court to deny NECP and the Indemnitors the right to conduct discovery by granting summary judgment. Liberty's argument that no discovery was necessary because the material facts were not in dispute evidences that Liberty is incapable of recognizing a disputed fact.

II. DISCOVERY WAS NECESSARY TO SHED LIGHT ON THE NUMEROUS DISPUTED MATERIAL ISSUES OF FACT.

A. Whether the "Takeover" was Wrongful is in Dispute.

Liberty mocks NECP's contention that there was a dispute over whether its "takeover" was exercised in bad faith. At the same time, Liberty refused to answer any discovery about its longstanding business relationship with the general contractor,

Mortenson. Apparently, in Liberty's view, it could make a decision to enter into a takeover agreement, not based on the merits, but rather based on a desire to curry favor with a general contractor which paid it millions of dollars a year in premiums. To be fair, whether Liberty improperly considered its business relationship with Mortenson when deciding to enter into the takeover agreement is unknown. However, it is unknown because Liberty wouldn't share the information with NECP and the Court granted Liberty summary judgment before NECP was able to conduct and compel discovery on the issue. In doing so, the Court erred.¹

B. Whether Liberty Waived Millions of NECP's Claims is in Dispute.

One of the clear cut factual disputes in this case is whether Liberty waived any of NECP's claims when it entered into the settlement agreement with Mortenson. Liberty claims that it did not, and puts forth two affidavits (of people who NECP was unable to depose) in support of its contention.² The two affidavits (from Messrs. Funk and Pisarcek), however, are inconsistent with the terms of the settlement agreement Mr. Funk signed with NECP. Specifically, in the settlement with NECP, Mr. Funk signed a settlement agreement which stated, in pertinent part, as follows:

Whereas, Mortenson contends that if the residual Unpaid Subcontract Balance claim is zero, then NECP has no further monetary claim against Mortenson arising out of the project.

¹ The inquiry into this issue is more than a "fishing expedition." NECP always denied that it was in default and its Indemnitors were worth in excess of \$25 million dollars. Thus, there was no legitimate reason for Liberty to agree to enter into the takeover agreement against NECP's desires. Moreover, when Liberty attempted to blackmail NECP, it is precisely this claim it wanted released.

² The fact that Liberty supplied these two affidavits also waives any privilege that otherwise might have attached to these mediated settlement negotiations.

(A.122, 123, Hart Aff., Ex. "T", p. 2). It follows then, that Mortenson understood that all of NECP's claims against it were included in the Subcontract Balance. Otherwise, it makes no sense for Mortenson to contend that if the unpaid Subcontract Balance claim was zero, then NECP would have no further monetary claim against Mortenson with regard to the project.³

At a minimum, Mortenson's representation creates a factual dispute that NECP was entitled to investigate through discovery. What, in fact, were the parties' intentions . . .? NECP should not have been required to take the unchallenged word of Liberty and Mortenson as set forth in cleverly drafted affidavits prepared by Liberty. The affidavit Liberty drafted for Funk to sign is particularly disingenuous. In this regard, Funk's self-serving affidavit states that Mortenson understood that NECP was going to be able to pursue all "arbitrable claims." (A.278, 279, ¶ 4) That is a meaningless statement and it flies in the face of the document Mr. Funk signed in settlement with NECP. The claims that Liberty waived when it stipulated to the Subcontract Balance were no longer "arbitrable," because they had been waived. If Mortenson had, in fact, understood that Liberty did not intend to waive any of NECP's claims when it entered into the settlement agreement, then they easily could have said so. Mortenson also would not have stated, as it did in the settlement with NECP, that if the Subcontract Balance

³ In this regard, the agreed upon definition of the Subcontract Balance is different in the Mortenson/Liberty settlement agreement than when used by NECP in its arbitration brief. In its arbitration brief, NECP made it clear that its Subcontract Balance claim of \$1,839,358, did not include unresolved change orders or the \$2,000,000 in losses based on Mortenson's breaches (R.90). However, in the Liberty/Mortenson settlement, the Subcontract Balance was understood to be the sum total of all of NECP's claims. Otherwise, NECP could still have pursued Mortenson for the non-Subcontract Balance claims even if the Subcontract Balance claim was zero.

claim was zero, then NECP would have no further claim against Mortenson arising out of the project.

The other "evidence" cited by Liberty in support of its no "waiver" argument -- the two damage claims submitted by NECP before the Liberty/ Mortenson settlement and five days after it -- do nothing to eliminate the factual dispute. In this regard, the damage summary submitted five days after the Liberty/Mortenson settlement merely demonstrates that NECP didn't agree that Liberty had the right to waive its claims, particularly if it did so in concert with Mortenson and for improper reasons. The fact that Mortenson demanded a "release" from NECP when it paid it \$400,000, also is significant of only the fact that a dispute existed. Who wouldn't demand a release when paying money intended to buy peace? Mortenson also settled with NECP before the Subcontract Balance became zero. Thus, a release makes perfect sense.

The bottom line is that there is, at a minimum, conflicting evidence about whether or not Liberty waived (or attempted to waive) millions of dollars of NECP's claims when it settled with Mortenson and, if so, why? NECP should have been allowed to conduct discovery on that issue.

C. Whether Liberty Attempted to Blackmail NECP Shouldn't be in Dispute, but, Apparently, is Contested by Liberty.

The fact that Liberty attempted to blackmail NECP should not be in dispute. In the settlement with Mortenson, Liberty stipulated that, if it did not assign its claims to NECP by the start of the scheduled arbitration, then the claims would be zero (A.112 - A.119, Hart Aff., Ex. "G"). Then, Liberty demanded that unless NECP agreed to pay

Liberty \$185,000 (the amount Liberty claimed to have been damaged after crediting the \$175,000 payment from Mortenson) and give Liberty a release of all claims NECP had against Liberty -- including claims for the work NECP performed as a subcontractor to Liberty and for bad faith -- then Liberty would not assign any claims and, based on the stipulation, the Subcontract Balance would be zero (A.112 - A.119 and A.120 - A.121, Hart Aff., Ex. "G" and "H"). Only if NECP would agree to Liberty's "blackmail" would Liberty "assign" the contract balance claim to NECP.

How the trial court determined this conduct does not amount to blackmail is inexplicable. Liberty told NECP that if NECP didn't capitulate to its demands, then it was going to waive all of NECP's claims without regard to the merits or amounts of the claim. That is the definition of bad faith.⁴ The "fact" that Liberty now claims that it was not serious about the threat and tried to negotiate a settlement with NECP is not only disingenuous, it is irrelevant. NECP was not required to negotiate with Liberty (especially in light of its bad faith conduct) and its refusal to do so doesn't let Liberty off the hook.

No matter how hard Liberty tries to twist the facts and distort the truth, it should not be allowed to avoid the consequence of its improper conduct. At a minimum, NECP should have been allowed to conduct discovery on the issue and whether Liberty's attempted blackmail amounted to bad faith should be a jury question.

⁴ Liberty continues to argue that bad faith requires fraudulent intent. Obviously, that is not the case. Whereas fraudulent conduct is bad faith, bad faith can exist without rising to the legal definition of fraud (i.e., misrepresentation of past fact, etc.). (Appellants' Brief, pp. 17-23).

D. Whether Liberty Improperly Settled with Mortenson Because of its Longstanding Business Relationship is in Dispute.

As with the issue regarding Liberty's motives for entering into the "takeover" agreement, there is an issue concerning Liberty's motive for entering into the settlement agreement with Mortenson. If Liberty considered its longstanding business relationship with Mortenson when deciding to settle with it, then that is a factor that the Court should have considered when deciding whether Liberty acted in bad faith. NECP also should have been allowed to conduct discovery on the issue.

III. CONCLUSION.

The trial court's orders granting Liberty summary judgment on its claims and granting summary judgment against NECP and the Indemnitors on their claims was premature, contrary to law and must be reversed and the lawsuits remanded to the trial court.

DATED: January 24, 2008

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