THIRD DIVISION
June 8, 2011

No. 1-10-1414

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GALAXY ENVIRONMENTAL, INC., AN ILLINOIS CORPORATION,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 03 CH 21728
MECCON INDUSTRIES, INC., *et al.,*	)	Honorable Brigid Mary McGrath,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Murphy and Steele concurred in the judgment.

O R D E R

Held: Where the evidence raised a genuine issue of material fact as to whether the contractor defendant waived its contract provision requiring the subcontractor plaintiff to cover it as an additional insured under the subcontract, the circuit court's grant of summary judgment in the plaintiff's favor is reversed.

Plaintiff subcontractor, Galaxy Environmental, Inc. (Galaxy), brought action against defendant general contractor, Meccon Industries, Inc. (Meccon), seeking payment for work performed. Meccon filed a counterclaim against Galaxy for breach of contract, alleging that Galaxy breached the parties' contract by failing to obtain a $5 million per-occurrence insurance policy. The circuit court entered an order granting summary judgment in favor of Galaxy for the balance due under the contract. The circuit court also granted summary judgment in favor of Galaxy on Meccon's count for breach of contract, holding that Meccon waived any breach of contract claim against Galaxy arising out of the failure to obtain the required insurance. Meccon appeals from that decision. For the following reasons, we reverse the circuit court's grant of summary judgment in favor of Galaxy.

I. BACKGROUND

A. Subcontract Agreement

On November 17, 2000, Meccon entered into a written subcontract agreement with Galaxy. Meccon agreed to pay Galaxy $11,900 for certain construction work, including asbestos abatement, at the City of Chicago's Roseland Pumping Station.

Pursuant to the subcontract, Galaxy was required to obtain and maintain certain amounts of liability insurance, naming Meccon as an additional insured. Specifically, Galaxy was required to obtain and maintain an underlying general commercial liability policy with limits of $1 million for each occurrence and $1 million in the aggregate, and an umbrella liability policy with limits of $5 million for each occurrence and $5 million aggregate. The subcontract allowed Galaxy to obtain any combination of insurance coverages it desired, as long as the coverages

provided to Meccon amounted to the equivalent level of coverage as required under the subcontract. The subcontract specifically provided:

> "The Subcontractor shall maintain an Umbrella Liability policy with the same coverages, subject to the same endorsements and with the same Additional insureds as listed in this section, including any special coverage requirements with the following limits of liability:
>
> $5,000,000 each occurrence
>
> $5,000,000 Aggregate
>
> Coverage that is not provided by the underlying insurance but is provided under the Umbrella Liability policy shall be subject to a self-insured retention no greater than $10,000 per occurrence.
>
> The Subcontractor may use any combination of primary and umbrella insurance policies to comply with the insurance outlined above provided the resulting insurance is equivalent to the insurance stated hereunder."

Also, pursuant to the subcontract terms, Galaxy was to provide Meccon with proof that Galaxy had obtained the required insurance, or equivalent coverage, in the form of an insurance certificate. In the event that Galaxy provided a defective, inaccurate, or incorrect certificate, the subcontract provided, in relevant part:

> "FAILURE OF THE CONTRACTOR TO SECURE ANY SUCH CERTIFICATES OF INSURANCE OR COPIES OF ENDORSEMENTS FROM THE SUBCONTRACTOR SHALL NOT RELIEVE THE SUBCONTRACTOR

FROM THE RESPONSIBILITY TO PROVIDE ALL APPLICABLE REQUIRED INSURANCE COVERAGES OR TO FILE CERTIFICATES OF INSURANCE ON BEHALF OF ANY AND ALL TIERS OF SUBCONTRACTORS."

The Subcontract provided Meccon with certain remedies in the event that Galaxy failed to provide properly executed certificates of insurance. Specifically, the Subcontract stated:

"It is understood and agreed that authorization is hereby granted to the Contractor to withhold the issuance of the Notice to Proceed, to deny access to the site of the Work, or to withhold payments until properly executed certificates of insurance providing insurance as required herein are received by the Contractor."

The Subcontract also provided the following obligation for Galaxy to defendant and indemnify Meccon and the following remedies for failure to do so:

"The Subcontractor shall indemnify and save harmless the Contractor and Owner from any and all liens, claims, obligations or liabilities which may be asserted against the Contractor, Owner or their property by reason of or as result of any acts or omissions of the Subcontractor, his employees, representatives, licensees, or Subcontractors, in connection with or related to the performance of this Agreement. In addition to its other remedies, the Contractor may withhold and retain from time to time out of any moneys due the Subcontractor hereunder, amounts sufficient fully to reimburse and compensate himself for any loss or damage which he sustains, or may sustain, as a result of any such liens, claims, obligations or liabilities, or as a result of any damages he incurs, or may incur, due

to inexcusable delays or other default on the part of the Subcontractor in the performance or completion of the work."

The subcontract further provided that payments made under the contract "shall not be construed as the waiver of any breach hereof by the Subcontractor or as an acceptance of defective work or of work not in conformance with the terms and conditions of this Agreement."

B. Certificates of Insurance and Increases to the Subcontract Prior to Melgoza Lawsuit

On November 28, 2000, Galaxy submitted a certificate of insurance to Meccon indicating that Galaxy had procured a commercial general liability policy with limits of $1 million for "each occurrence" and $5 million "general aggregate." The certificate of insurance named Meccon as an additional insured. Galaxy's President testified during his deposition that $5 million in insurance coverage would have cost Galaxy $20,000, which exceeded the $11,900 amount in the initial subcontract.

In November of 2000, Galaxy began work at the Roseland Pumping Station. Meccon subsequently submitted various change orders for additional work to be performed by Galaxy. The change orders increased the amount of the subcontract from $11,900 to nearly $783,000 by October of 2001. Specifically, the change orders increased the subcontract as follows:

(1) On December 26, 2000, Meccon issued a subcontract change order increasing the asbestos abatement work by $28,300.

(2) On March 30, 2001, Meccon issued a subcontract change order increasing the asbestos abatement work by $31,900.

(3) On May 25, 2001, Meccon issued a subcontract change order increasing the asbestos

abatement work by $470.

(4) On June 18, 2001, Meccon issued a subcontract change order increasing the asbestos abatement work by $15,000.

(5) On August 30, 2001, Meccon issued a subcontract change order increasing the asbestos abatement work by $667,600.

(6) On October 11, 2001, Meccon issued a subcontract change order increasing the asbestos abatement work by $28,580.

The subcontract change orders for additional work each contained the following language: "All other terms and conditions of our original Subcontract are to remain unchanged."

As work progressed at the Roseland Pumping Station, Galaxy provided Meccon with updated insurance certificates. Galaxy submitted insurance certificates to Meccon on December 13, 2000, December 15, 2000, and August 7, 2001. Each of these insurance certificates indicated that Galaxy had procured a commercial general liability policy with limits of $1 million for "each occurrence" and $5 million "general aggregate."

In January 2001, Meccon contacted Galaxy's insurance broker, Mesirow Insurance Services (Mesirow), and requested that Mesirow add a "Waiver of Our Right to Recover from Others Endorsements" to Galaxy's insurance coverage to meet Meccon's requirements. Mesirow added the provision then invoiced Galaxy $899 as an additional premium for the endorsements, which Galaxy paid.

C. Conduct of Parties Following the Melgoza Injury Lawsuit

On December 19, 2001, during the course of work at the Roseland Pumping Station, a

Galaxy employee named Aurelio Melgoza was injured. On January 18, 2002, Melgoza filed a lawsuit against Meccon and other contractors working at the site. Meccon tendered the lawsuit to Galaxy's insurance carrier under the terms of Galaxy's policy.

It is undisputed that following the Melgoza lawsuit and after Meccon tendered the claim to Galaxy's insurance carrier, Meccon became aware that Galaxy's insurance policy was defective in that it only afforded $1 million per-occurrence coverage. On February 1, 2002, Meccon contacted Galaxy and demanded that it obtain the insurance required under the terms of the Subcontract.

In addition, on February 4, 2002, following receipt of notice of the Melgoza lawsuit, Meccon sent a letter to Galaxy tendering defense of the Melgoza lawsuit. The letter stated:

> "We are tendering the defense and payments, if any, of Meccon Industries, Inc. and the City of Chicago resulting from the above action to your company and your insurance carrier American Safety Casualty Insurance, Policy Number COL1685007.
>
> This lawsuit is referred to you for protection of our interest not only under the referenced policy, but also under the Contractual Liability insurance coverage of the policy. Since the subcontractor agreement provides that we be held harmless, defended and indemnified in cases such as this.
>
> Please provide written confirmation, as soon as possible that our tender has been accepted under the terms as described above. If we are forced to incur expenses because of delayed response to our tender, we will look to you for reimbursement."

In February 2002, Galaxy increased its insurance limits to $2 million umbrella liability coverage.

The Melgoza litigation continued for several years and Melgoza demanded several million dollars in settlement of his claims. Since Galaxy did not provide Meccon with the required umbrella liability policy and coverage, Meccon tendered Melgoza's claim to its own insurance carriers. The Melgoza lawsuit was settled for $1.7 million and Meccon incurred out-of-pocket expenses in excess of $300,000.

While the Melgoza litigation was pending, on September 2, 2003, Meccon sent a letter to Galaxy concerning a final change order, the final amount of the contract price, and the postponement of final payment by Meccon to Galaxy. In the letter, Meccon stated that the final change order was in the amount of $138,849.59, which brought the total subcontract price to $944,533.70. The letter explained that as of that date, Meccon had paid Galaxy the sum of $815,792.64, leaving an unpaid balance of $128,741.06. Meccon explained that Galaxy had not maintained the required umbrella liability insurance policy providing for $5 million per occurrence and $5 million in the aggregate coverage under the subcontract. Meccon stated that it "will agree to pay the Unpaid Balance to Galaxy within twenty (20) business days after the Melgoza lawsuit has been finally concluded."

D. Trial Court Proceedings

Galaxy subsequently filed suit against Meccon for breach of contract to recover the unpaid balance due under the subcontract. Meccon filed a counterclaim alleging breach of contract based on Galaxy's failure to procure $5 million in umbrella liability insurance, which named Meccon as an additional insured, under the subcontract. Meccon's counterclaim also

included a claim for indemnification, which was later voluntarily dismissed. Both parties filed cross motions for summary judgment. The issue presented in the parties' summary judgment motions was whether Meccon waived its right to hold Galaxy in strict compliance with the insurance requirements under the subcontract.

The trial court entered an order granting summary judgment in Galaxy's favor based on its determination that Meccon waived the insurance requirements under the subcontract as a matter of law. The court found:

> "Here the facts show that the plaintiff demanded proof of insurance on specific forms, that they received the proofs of insurance on several occasions and then on one or two occasions they even tinkered with the insurance provisions themselves.
>
> The fact that they may have misread the forms isn't a defense to the waiver because as a prior court noted, they are presumed to know those things which reasonable diligence on their part would bring to their attention. They had the proof of insurance in hand on the forms that it specified.
>
> This is an unusual situation where the defendant was lulled into a false assurance that strict compliance with a contractual duty will not be required. ***."

Meccon now appeals the grant of summary judgment.

II. ANALYSIS

Whether Galaxy presented sufficient facts establishing that Meccon waived its contractual right to insurance is a question of law. *Solai & Cameron, Inc. v. Plainfield Community Consolidated School District No. 202*, 374 Ill. App. 3d 825, 845 (2007). When the

issue is purely a question of law, the applicable standard of review is *de novo*. *Solai & Cameron, Inc.*, 374 Ill. App. 3d at 845.

"Waiver is an express or implied voluntary and intentional relinquishment of a known and existing right." *Batterman v. Consumers Illinois Water Co.*, 261 Ill. App. 3d 319, 321 (1994). Parties may waive contractual provisions and waiver may be established by conduct indicating that strict compliance with contractual provisions will not be required. *Batterman*, 261 Ill. App. 3d at 321 (citing *Whalen v. K-Mart Corp.*, 166 Ill. App. 3d 339 (1988)). "An implied waiver may arise from either of two situations: (1) an unexpressed intention to waive can be clearly inferred from the circumstances; or (2) the conduct of one party has misled the other party into a reasonable belief that a waiver has occurred." *Batterman*, 261 Ill. App. 3d at 321.

Although waiver may be implied under some circumstances, the actions constituting the waiver must be clear, unequivocal and decisive. *Solai & Cameron, Inc.*, 374 Ill. App. 3d at 845. Waiver must be based on the conduct of the party impliedly waiving a contract. *Solai & Cameron, Inc.*, 374 Ill. App. 3d at 845.

In *Whalen*, a case heavily relied upon by Galaxy, the contract provided that work could not begin until the subcontractor had obtained the required insurance and submitted certificates of insurance to the contractor. *Whalen*, 166 Ill. App. 3d at 341-42. The contract also provided that no payments under the contract would be made until proof of insurance had been provided to the contractor. Despite the contract requirements, the contractor never demanded any proof of insurance and the subcontractor completed work on the project and was paid in full. *Whalen*, 166 Ill. App. 3d at 344. The trial court held, and this court affirmed, that the contractor had

waived its right to insurance by failing to require proof of insurance before the beginning of work and making payments despite the lack of proof of insurance. *Whalen*, 166 Ill. App. 3d at 344. This court explained that a party to a contract "may not lull another into a false assurance that strict compliance with a contractual duty will not be required and then sue for noncompliance." *Whalen*, 166 Ill. App. 3d at 343.

Likewise, in *Geier v. Hamer Enterprises, Inc.*, 226 Ill. App. 3d 372 (1992), the contract provided that work was not to begin until certificates of insurance had been provided to the owner. The owner allowed the work to begin without receiving the certificates of insurance, then paid the contractor in full. This court held that the owner waived its right to insurance.

Both *Whalen* and *Geier* are distinguishable because in those cases the waiving parties allowed the parties to start and finish work, then paid them in full, without ever receiving the required proofs of insurance. Here, Meccon required Galaxy to submit certificates of insurance prior to beginning work. Galaxy's certificates of insurance indicated that it had $5 million in "general aggregate" insurance coverage, which were consistent with the terms of the subcontract allowing Galaxy to use any combination of insurance to comply with the required amounts of insurance. The subcontract also specified that any payments made by Meccon could not be construed as a waiver by Meccon of any breach of the provisions of the subcontract by Galaxy. Following the Melgoza injury, Meccon became aware of the defects in Galaxy's insurance and demanded that Galaxy secure the umbrella insurance coverage required under the subcontract. In addition, on February 4, 2002, Meccon sent a letter to Galaxy explicitly stating that it believed the subcontract, including Galaxy's insurance requirements, remained in full force and effect.

Further, after Galaxy failed to secure the required insurance, Meccon withheld final payment for work performed. Unlike *Whalen* and *Geier*, Meccon did not silently acquiesce until performance under the contract was completed, tender payment, and only later request technical compliance with the insurance requirement.

We find that the facts in this case are more like those presented in *Lavelle v. Dominick's Finer Foods, Inc.*, 227 Ill. App. 3d 764 (1992), *Lehman v. IBP, Inc.*, 265 Ill. App. 3d 117 (1994), and *Batterman*, 261 Ill. App. 3d 319.

In *Lavelle*, the contractor argued that Dominick's had impliedly waived a contract provision requiring the contractor to furnish insurance naming Dominick's as an additional insured. The contractor had provided a certificate of insurance on which Dominick's was not listed as an additional insured. This court held that it could not be clearly inferred from those facts alone that Dominick's intended to permanently relinquish its right to be insured and further held that the contractor had not been misled by the inaction of Dominick's. *Lavelle*, 227 Ill. App. 3d at 770-71.

In *Lehman*, the project owner required the contractor to cover it as an additional insured on the contractor's general liability insurance policy and to provide the project owner with documentation before beginning work. The contractor filed several certificates of insurance, which failed to name the project owner as an additional insured. The project owner mailed a letter to the contractor requesting a renewal certificate of insurance and included a sample certificate naming the project owner as an additional insured. The contractor eventually submitted a certificate naming the project owner as an additional insured. *Lehman*, 265 Ill. App.

3d at 118.

However, prior to the contractor in *Lehman* submitting the certificate naming the project owner as an additional insured, one of the contractor's employees was injured at the work site and sued the project owner. The project owner brought a breach of contract suit against the contractor for failure to name it as an additional insured, as required by the contract and the circuit court granted the contractor's motion to dismiss, finding that the project owner waived its contractual right to insurance. *Lehman,* 265 Ill. App. 3d at 118-119. This court reversed, finding that the project owner expressed its intent to enforce its contract rights by sending the letter to the contractor requesting a renewal certificate that included the project owner as an additional insured. *Lehman*, 265 Ill. App. 3d at 120. This court held that the project owner's actions created a genuine issue of material fact regarding its intention to waive that should be resolved at trial. *Lehman*, 265 Ill. App. 3d at 120.

In *Batterman*, the contractor argued that the utility company had impliedly waived its right to insurance coverage by allowing the contractor to begin construction and by paying the contractor on completion of the project without the contractor having purchased insurance. The contractor had provided the utility with a certificate of insurance but failed to purchase the contractually required insurance. *Batterman*, 261 Ill. App. 3d at 320-21. This court held that it could not be inferred from these facts alone that the utility intended to relinquish its contractual right to insurance and that there was no evidence in the record to show that the contractor was in any way misled by the utility. Therefore, this court reversed the grant of summary judgment in the contractor's favor. *Batterman*, 261 Ill. App. 3d at 322. This court further noted that finding a

waiver in these circumstances would "set a dangerous precedent." This court explained:

> "It would allow a party to a contract to succeed in shirking its contractual responsibilities unless and until the other party to the contract notices the defect in performance. Parties could no longer trust one another to carry out their obligations but instead would be forced to check on one another at each step of the project in order to avoid waiving benefits due them under the contract. Such a situation would only serve to obstruct and complicate business relationships." *Batterman*, 261 Ill. App. 3d at 322.

Similarly, in the case at bar, Meccon expressed its intent to enforce its contractual rights by requiring Galaxy to submit certificates of insurance prior to beginning work. Galaxy's certificates of insurance indicated that it had $5 million in "general aggregate" insurance coverage, which were consistent with the terms of the subcontract allowing Galaxy to use any combination of insurance to comply with the required amounts of insurance. The fact that Meccon did not deny Galaxy access to the work site or withhold payments does not establish an intent to waive insurance because those remedies applied in the event that Galaxy failed to provide "properly executed certificates of insurance." Here, Meccon received Galaxy's certificates of insurance indicating that it had $5 million in general aggregate insurance coverage, which did not provide Meccon with explicit notice that Galaxy's insurance coverage was defective. While Meccon may have been mistaken with respect to Galaxy's insurance coverage under the certificates, an unexpressed intention to waive the contractual insurance requirement cannot be clearly inferred from Meccon's conduct.

After the Melgoza injury, when Meccon became aware that Galaxy had not purchased the required insurance, Meccon demanded that Galaxy secure the umbrella insurance coverage required under the subcontract. In addition, on February 4, 2002, Meccon sent a letter to Galaxy explicitly stating that it believed the subcontract, including Galaxy's insurance requirements, remained in full force and effect. Further, after Galaxy failed to secure the required insurance, Meccon withheld final payment for work performed, as a remedy provided under the subcontract. We find that Meccon's conduct does not indicate a clear intent to waive the insurance coverage and Galaxy had not been misled by Meccon's actions. If more than one inference or conclusion can be drawn from the facts, summary judgment should not be granted. *Lehman*, 265 Ill. App. 3d at 120. Therefore, we conclude that Meccon's actions created a genuine issue of material fact regarding its intention to waive that should be resolved at trial.

III. CONCLUSION

For the above reasons, we reverse the circuit court's grant of summary judgment in Galaxy's favor where the evidence raised a genuine issue of material fact as to whether Meccon waived its contract provision requiring Galaxy to cover it as an additional insured under the subcontract.

Reversed and remanded.