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Case Number 192,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORTH AMERICAN LEASING, INC., a Michigan corporation, DORE & ASSOCIATES CONTRACTING, INC., an Indiana corporation, NASDI, LLC, a Delaware limited liability Company, and YANKEE ENVIRONMENTAL SERVICES, LLC, a Delaware limited liability Company,	)	No. 192,2020
Defendants Below, Appellants.	)	COURT BELOW:
v.	)	COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 2017-0399-KSJM
NASDI HOLDINGS, LLC, a Delaware limited liability company, and GREAT LAKES DREDGE AND DOCK CORPORATION, a Delaware Corporation,	)	
Plaintiffs Below, Appellees.	)	

APPELLANTS' REPLY BRIEF

Dated: September 8, 2020

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The trial court misinterpreted the indemnification provisions in the Agreement as allowing Plaintiffs to seek indemnification for Losses related to bond claims after the Termination Date. The trial court thereby deprived Defendants of the contractual protections they negotiated at arms' length with Plaintiffs. The plain text of the Agreement unambiguously bars indemnification claims—other than for breaches of certain limited representations and warranties—after the Termination Date. At a minimum, the Agreement is open to two reasonable interpretations necessitating discovery prior to entry of partial summary judgment.

The trial court also erred in deeming Defendants' set-off/recoupment defense waived. Plaintiffs, who had the burden of putting Defendants and the trial court on notice of the relief they sought in their motion, only sought partial summary judgment and specifically did not challenge Defendants' set-off/recoupment defense or argue that the amount of damages stated in their Complaint was not subject to reduction based upon that defense. Defendants did not waive that affirmative defense by not briefing it in response. Delaware precedent holds that a defense pleaded in an answer but not raised in response to a summary judgment motion is not waived, and that, by contrast, a moving party ***does*** waive arguments not presented in its opening brief for purposes of deciding the matter at hand. The trial court erred in deeming Defendants' set-off/recoupment defense waived.

Finally, Plaintiffs' answering brief highlights that the trial court erred in entering final judgment in the amounts sought by Plaintiffs, because a substantial factual dispute exists as to whether the termination of NASDI arose pre- or post-closing, and the extent to which the termination arose pre-closing has the potential to reduce Plaintiffs' indemnification damages under the Agreement.

ARGUMENT

I. PLAINTIFFS' STRAINED INTERPRETATION OF THE AGREEMENT'S INDEMNIFICATION AND NOTICE PROVISIONS IS REVEALED BY INTERNAL INCONSISTENCIES.

One crucial issue before this Court is whether the Termination Date is the deadline for giving notice of all indemnification claims (other than for breaches of specifically-listed representations and warranties), or whether any indemnification claim can be brought at any time in the future if notice is provided within a reasonable time after a party learns of the loss. The determination hinges on interpretation of the Agreement, primarily the phrase, ". . . , but in any event before the later of the Termination Date or the survival period provided in Section 9.5 with respect to particular representation or warranty to which the matter applies (the "Applicable Claim Period"), . . . " which follows the general requirement that notice must be provided to the indemnifying party within a reasonable time after a claimant learns of a claim. *See generally* Appellants' Opening Brief ("OB") at 22-31.

In its Order, the trial court ignored the defined term "Applicable Claim Period" and held that "Termination Date or the survival period provided in Section 9.5" both applied only to losses incurred on representations and warranties, and that all other indemnification claims were subject only to the reasonable time period requirement. Ex. A to OB at 11-14. Plaintiffs argue that this holding is confirmed by the placement of commas prior to "but in any event" and after "Applicable Claim

Period," the first of which Defendants omitted in their opening brief due to proper grammar and citation rules, and not for any other purpose. Appellee's Answering Brief ("AB") at 17-19.

A question the Court must answer is whether the "Applicable Claim Period" defined in Section 9.3 of the Agreement applies to: (i) only claims for breaches of representations and warranties (the exception only); or (ii) all claims for indemnification (the general rule as qualified by the exception). Under the logic of the trial court and Plaintiffs, the defined term is completely included within those commas, identifying it as a definition for the exception. *See* AB at 22. Under this line of reasoning, the Termination Date applies only to representations and warranties, and the Applicable Claim Period applies only to the exception for representations and warranties.

Plaintiffs' interpretation of the Applicable Claims Period is not reasonable based on the plain language of Section 9.3. Plaintiffs quote this language themselves:

> …, but in any event before the later of the Termination Date or the survival period provided in Section 9.5 with respect to [a] particular representation or warranty to which the matter applies (the "Applicable Claim Period"), **arising out of or resulting from: *(a) any item Indemnified pursuant to the terms of Section 9.1 or 9.2*[.]**

AB at 23 (emphasis added). Sections 9.1 and 9.2 identify all potential claims for indemnification—essentially every claim that could conceivably be brought for a

breach of the Agreement. Based on the reasoning of the trial court and Plaintiffs, if the "reasonable time" provision applied to all indemnification claims other than representations and warranties, then "arising out of or resulting from: (a) any item Indemnified pursuant to the terms of Section 9.1 or 9.2" would have preceded the "but in any event" exception. That would make more sense if that is what the parties intended—all claims for indemnification under 9.1 or 9.2 must be noticed within a reasonable time, except claims for losses on representations or warranties must be noticed before the termination date or survival period. But the parties drafted this clause differently, so that the "but in any event" provision comes first, and then the Agreement clearly sets forth that everything that came before it applies to all claims.

Section 9.3 continues that "[s]o long as such Notice of Claim is given on or prior to the Applicable Claim Period, no delay on the part of an Indemnitee in giving the Indemnitor a Notice of Claim shall limit or reduce the Indemnitee's right to Indemnity hereunder, nor relieve the Indemnitor from any of its obligations under this ARTICLE 9, unless (and only to the extent that) the Indemnitor is prejudiced thereby[.]" A "Notice of Claim" is defined earlier in Section 9.3 to include claims for ***any*** Losses for which a party claims indemnity: it is not restricted to claims on representations and warranties. But if the Applicable Claim Period applies only to representations and warranties, this language is incoherent: if claims unrelated to representations and warranties are not time-limited other than to an unspecified

"reasonable time," there is no "on or prior to" date by which notice would be required. Thus, there is neither an end date when notice of an indemnification claim must be given, nor penalty for violating the illusive "reasonable time" requirement so long as prejudice does not result. In other words, as held by the trial court and argued by Plaintiffs, notice of an indemnification claim other than for breach of specific representations and warranties could be made at any time, provided the indemnifying party is not prejudiced by the delay. This interpretation is not reasonable. A reasonable reading of Section 9.3 would interpret the Applicable Claim Period as applying to ***any*** Claim for indemnification, and that except for certain representations and warranties that expressly survive, all indemnification claims must be brought before the Termination Date.

Moreover, Plaintiffs' and the trial court's interpretation turns most of Section 9.3 into surplusage. If all indemnification claims could be brought within a "reasonable time," that time would presumably be limited only by the statute of limitations applicable to the type of claim. But that would be the time limit for bringing a claim even if Section 9.3 did not exist. There was no need for the parties to negotiate a contract for what Delaware law already provides. This Court should reject such an interpretation. *See Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.,* 206 A.3d 836, 839 (Del. 2019) (holding that contracts should not be interpreted in a manner that renders any of their terms surplusage).

Plaintiffs' explanation for the trial court rendering Section 9.7 surplusage is unavailing. *See* AB at 23-25. There is no indication that the Parties intended to provide belts and suspenders for bond claims. The only rational reason for the Parties to make indemnification the sole remedy was to enforce the time limitations of the Termination Date in Section 9.3's notice provision. Sections 9.1 and 9.2 include every conceivable loss under or related to the Agreement. If those claims can be brought any time within the statute of limitations, Section 9.7 provides no "exclusive remedy." All of Section 9, except for Section 9.5, which indicates when representations and warranties terminate, becomes superfluous.

Section 9.7 allows the Parties to seek "to specifically enforce post-Closing covenants" at any time. Without a temporal limitation on all claims, not just certain representations and warranties, the Parties would not suffer any restriction from bringing a claim for specific performance. Section 9.7 also exempts common-law fraud and "any rights of subrogation the Parent or any Subsidiary of the Parent may have under or with respect to [bond obligations]" from the sole remedy of the indemnification provision. There would be no need to exempt equitable subrogation claims on bond claims if indemnification claims could be brought within a reasonable time after those losses were incurred. The only reason an exemption is necessary and not redundant is if the indemnification clause bars some indemnification claims for losses on the bonds.

Plaintiffs contend, and the trial court erroneously found, that Section 7.7 dictates the deadlines for claims related to surety bonds, and the claims for indemnification arising from bonds can be filed at any time while the bonds remain outstanding. *See* OB, Ex. A at 12; AB at 16-17. The problems with this position are twofold: (i) Section 7.7 says nothing whatsoever about the time to file a claim for Losses related to a bond; and (ii) Section 9.7 provides that other than equitable subrogation claims related to bonds, the indemnification provisions in Article 9 are the exclusive remedy. The trial court erroneously read language into the Agreement that is not there.

For all these reasons and those set forth in the Defendants' opening brief, the Court should reverse the trial court's Order Granting Partial Summary Judgment to Plaintiffs.

II. PLAINTIFFS' ANSWERING BRIEF DOES NOT DISPUTE THAT THE TRIAL COURT SHOULD HAVE DEEMED THE CONTRACT AMBIGUOUS IF IT IDENTIFIED TWO REASONABLE INTERPRETATIONS.

Conspicuously absent from Plaintiffs' answering brief is any response to Defendants' argument that the trial court erred by failing to allow discovery as to the parties' intent to resolve apparent ambiguities in the Agreement. *See generally* AB § I; *cf.* OB at 28-30. On appeal, Plaintiffs do not argue that Defendants' interpretation of the Agreement is ***unreasonable***—they simply argue that it is incorrect, primarily based on their interpretation of the placement of "but in any event" in Section 9.3 of the Agreement. *Id.* That is not enough to demonstrate that the Agreement is unambiguous in the manner Plaintiffs claim. *See, e.g., Sunline Commercial Carriers, Inc.,* 206 A.3d at 847-849 (reversing trial court's summary judgment grant regarding interpretation of a commercial contract because the clauses of that contract could reasonably be read in two different ways). The *Sunline* Court held that even though one party's position "relies on one clause read in isolation and seemed strained … we cannot rule it out as a possible reading of the Term Agreement's text because we must give credit to each clause in the contract. And although [the other party's] reading is a reasonable one, it still is in arguable tension with the [other provision at issue.]" *Id.* at 849.

Here, Plaintiffs' interpretation of the Agreement undeniably creates discrepancies between: (i) the Applicable Claims Period and the requirement to

bring claims within a reasonable time; and (ii) the provision of equitable subrogation as an exemption from indemnification as the sole remedy for bond-related claims after the Termination Date. Plaintiffs argue that the Applicable Claims Period only applies to representations and warranties, but if that were so it creates tension with Section 9.7's provision that equitable subrogation is an exception to Article 9 as the "sole remedy" for bond-related obligations. If Section 9.3's Termination Date did not limit the time for bond indemnification claims as long as they were made within a "reasonable time," it is unclear why the parties would draft Section 9.7 to specify that "nothing in this Agreement shall limit" a party's equitable subrogation rights for claims that were already unlimited. Further, requiring a Notice of Claim to be provided on or before expiration of the Applicable Claim Period—under Plaintiffs' interpretation—is at odds with their claim that there is no defined Applicable Claim Period for most indemnification claims other than an unspecified "reasonable time." *See* AB at 8.

Moreover, ***Plaintiffs themselves rely on the parties' supposed intent in drafting the Agreement to support their interpretation***, but without any discovery in the trial court there was no way to ascertain the parties' intent. *See* AB at 18-19. Because Plaintiffs do not explain or even assert in their answering brief that Defendants' interpretation is unreasonable—and because the trial court failed to allow discovery before entering partial summary judgment—this Court, at a

minimum, should deem the Agreement ambiguous, reverse the trial court's Order granting partial summary judgment, and remand for discovery as to the parties' intent.

III. PLAINTIFFS, NOT DEFENDANTS, WAIVED CHALLENGES TO THE SET-OFF/RECOUPMENT DEFENSE BY NOT ADDRESSING THEM IN THEIR OPENING BRIEF ON THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT.

A party does not waive an affirmative defense raised in its answer to a complaint simply because it does not brief the issue in response to a motion for summary judgment. *Smyrna Hospitality, LLC v. Petrucon Const., Inc.,* 2014 WL 1267459, at *2 (Del. Super. Ct. Feb. 26, 2014). Even when a party delays in asserting an affirmative defense and a court believes that party should have raised that defense in response to a summary judgment motion, that defense is not deemed waived where it was not properly at issue within the scope of the summary judgment briefing. *Clarkson v. Goldstein,* 2006 WL 2329381, at *1-2 (Del. Super. Ct. June 30, 2006).

In *Clarkson,* defense counsel withdrew at the same hearing where the court granted summary judgment in plaintiffs' favor. Several months later, defendants' new counsel filed a motion to set aside judgment to allow defendants to assert affirmative defenses. While Judge Johnston found "it would have been prudent and far preferable for [d]efendants to have argued the defense in conjunction with the summary judgment briefing" she held that "[d]efendants were not legally obligated to raise the defense at that time." *Clarkson,* 2006 WL 2329381, at *2.

By contrast, ***"[i]t is well-settled in Delaware that 'the failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim in***

connection with a matter under submission to the court." *In re Asbestos Litig.*, 2007 WL 2410879, at *4 (Del. Super. Ct. Aug. 27, 2007) (citations and quotations omitted) (emphasis added). Further, "***[m]oving parties must provide adequate factual and legal support for their positions in their moving papers in order to put the opposing parties and the court on notice of the issues to be decided***." *Id.* (emphasis added).

When Plaintiffs filed their motion for partial summary judgment, they had the option of seeking summary judgment on all Defendants' affirmative defenses. Defendants had no reason to think that Plaintiffs were seeking the trial court's ruling on any issues other than those presented in Plaintiffs' partial summary judgment brief. As the above-cited case law demonstrates, Delaware law puts the onus on the moving party to present its grounds for a ruling in its favor, not on the non-moving party to predict every possible argument the moving party might have made but chose not to include in its opening brief. When Plaintiffs decided not to seek summary judgment on set-off/recoupment, they waived arguments attacking that defense for purposes of the briefing on that motion. Nor did Plaintiffs' motion for partial summary judgment put Defendants on notice that Plaintiffs were seeking judgment in the amount of a sum certain—in particular because Plaintiffs did not challenge Defendants' one affirmative defense that relates solely to damages. *See generally* OB at 31-35.

Plaintiffs cite no Delaware case holding that when one party files a motion for partial summary judgment, the non-moving party must brief all of its defenses—including affirmative defenses that the motion does not address. *See* AB at 30-31:

Emerald Partners v. Berlin, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003)	Party deemed to have waived argument it never advanced before, "including in its answering brief on remand." Court concluded that party cannot raise anew on remand an issue that it ***failed to pursue on appeal***.
In re Crimson Exploration Inc. Stockholder Litig., 2014 WL 5449419, at *26 (Del. Ch. Oct. 24, 2014)	Plaintiffs deemed to have waived arguments in response to Rule 12(b)(6) motion which they did not mention in their opposition brief.
Naughty Monkey LLC v MarineMax Northeast LLC, 2010 WL 5545409 n. 35 (Del. Ch. Dec. 23, 2010)	Affirmative defense deemed waived because it was not addressed in a brief ***after a bench trial***. The opinion cites a case where the party seeking leave to amend its complaint shortly before trial was deemed to have waived three new affirmative defenses because that party did not brief them in seeking leave to amend.
Jenkins v. Delaware State University, 2014 WL 4179958 n. 69 (Del. Ch. Aug. 22, 2014)	Defendants deemed to have waived affirmative defenses they did not brief after agreeing to submit the case on a paper record ***in lieu of trial***.

Plaintiffs seek to portray the procedural status of the above-listed cases as "equivalent" to their motion for partial summary judgment, but obviously there is nothing equivalent about opposing a motion for partial summary judgment and: (i) seeking to litigate an issue on remand not raised on appeal; (ii) failing to raise a defense in response to a Rule 12 motion to dismiss an entire case; or (iii) submitting

a case to a bench trial/trial on the paper record and omitting an argument or defense. Of note, the *Crimson Exploration* case involved a motion to dismiss the entire case for failure to state a claim, not partial dismissal as to liability on specific issues. *See* 2014 WL 5545409, at *1. Further, in both *Crimson Exploration* and *Jenkins*, the courts addressed the merits of the affirmative defenses and rejected them, even though they also concluded they had been waived. *Id.* at *26; *Jenkins,* 2014 WL 4179958 at n. 69. Here, there is no statement by the trial court that Defendants' set-off/recoupment defense lacks merit in addition to supposedly being waived.

In sum, the weight of authority shows that the trial court erred by deeming Defendants' set-off/recoupment defense waived. Accordingly, this Court should reverse the trial court's order granting Plaintiffs' motion for final judgment.

IV. PLAINTIFFS CONFIRM THAT A SIGNIFICANT FACTUAL DISPUTE EXISTS AS TO WHETHER NASDI'S TERMINATION BY THE GENERAL CONTRACTOR WAS A PRE- OR POST-CLOSING EVENT.

The terms of the Agreement could not be clearer: Plaintiffs, not Defendants, are responsible for indemnification for Losses that ***arise*** pre-closing. *See* OB at 11. Plaintiffs argue that NASDI's termination by the General Contractor in February 2017 was a post-closing event because there were four stages of work on NASDI's subcontract with the General Contractor, and NASDI was terminated after completing its first two stages and before it re-mobilized its workers and equipment to conduct active demolition work on Stage 4. AB at 38-39. Plaintiffs (and the trial court) ignore copious evidence that: (i) the plain terms of the subcontract include Stages 1, 2 and 4 as part of the same job, not separate pieces of work that were independently contracted (A768-772); (ii) both the General Contractor and NASDI were aware that events during Stages 1 and 2 while Plaintiffs owned NASDI impacted NASDI's prospective ability to perform Stage 4, in particular without NASDI losing millions of dollars (A806-885; A961-979); and (iii) NASDI was indeed "on the job" immediately prior to its termination, as shown by extensive meeting minutes throughout 2016 of NASDI personnel meeting with the General Contractor and other Project stakeholders attempting to coordinate how NASDI would perform Stage 4 under circumstances significantly different from those in the bid documents (A999-1047). Simply put, Defendants' evidence shows that the

circumstances which ultimately led to NASDI's termination were already in the works well before the General Contractor kicked NASDI off the job – and before Plaintiffs sold NASDI to Defendants. *See* A1949; A1340-1342.

The trial court disregarded this evidence by erroneously deeming Defendants' set-off/recoupment defense waived. But the trial court could not properly determine Defendants' liability and damages without considering evidence as to whether NASDI's termination and the ensuing bond draw ***arose*** pre- or post-sale. Indeed, Plaintiffs corroborate this by raising factual contentions in their answering brief regarding the nature and sequencing of the Project. *See* AB at 38-39. If the grounds for the General Contractor's bond draw arose entirely before NASDI's sale, Defendants owe Plaintiffs nothing, and if the bond draw arose partly under Plaintiffs' ownership and partly under Defendants' ownership, Plaintiffs' damages would need to be proportionately reduced under the plain terms of the Agreement. *See* OB at 37-38. Accordingly, the trial court erred by entering final judgment without considering any of this evidence, and this Court should reverse and remand.

CONCLUSION

For the forgoing reasons, and those set forth in Defendants' opening brief, Defendants respectfully request that this Court: (i) reverse the trial court's order granting Plaintiffs' motion for partial summary judgment; (ii) reverse the trial court's order granting Plaintiffs' motion for entry of final judgment on breach of contract claim in the full amount Plaintiffs sought on their breach of contract claim; and (iii) remand this action to the trial court for discovery and other proceedings consistent with reversal of the aforementioned orders.

Dated: September 8, 2020

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