

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, ACTING BY AND)
THROUGH ITS DEPT OF)
ADMINISTRATION=,)
)
Plaintiff,)
vs.)
)
MURDOCK & SONS CONSTRUCTION,)
INC=,)
GOHEEN GENERAL)
CONSTRUCTION, INC=,)
AETNA CASUALTY AND SURETY) CAUSE NO. IP99-1723-C-T/G
COMPANY=,)
SMITH, CURRIE & HANCOCK,)
ATTORNEYS=,)
UNITED STATES INTERNAL REVENUE)
SERVICE=,)
MILLER EADS CO INC.,)
INTERVENING PARTY PUR NOTICE OF)
11/30/00,)
)
Defendants.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MURDOCK & SONS
CONSTRUCTION, INC.,

Plaintiff,

vs.

IP 99-1723-C-T/F

GOHEEN GENERAL
CONSTRUCTION, INC.; THE AETNA
CASUALTY AND SURETY
COMPANY; and THE STATE OF
INDIANA, acting by and through its
Department of Administration,

Defendants.

STATE OF INDIANA, acting by and
through its Department of
Administration,

Interpleader-Plaintiffs,

vs.

MURDOCK & SONS
CONSTRUCTION, INC.; GOHEEN
GENERAL CONSTRUCTION, INC.;
the AETNA CASUALTY AND
SURETY COMPANY; SMITH, CURRIE
& HANCOCK attorneys, and the
UNITED STATES INTERNAL
REVENUE SERVICE,

Interpleader-Defendants.

Entry on Motion to Reconsider¹

Plaintiff, Murdock & Sons Construction, Inc. ("Murdock"), filed a Motion To Reconsider Entry Of Summary Judgment As To Count I, seeking reconsideration of the court's Entry on Summary Judgment Motions with respect to the ruling on its acceleration claim. A familiarity with that entry is presumed. Defendant Goheen General Construction, Inc. ("Goheen") objects to reconsideration.

I. Background

The court repeats only those facts pertinent to the motion to reconsider. Section 8.3.1 of the Prime Contract between Goheen and the State of Indiana provides in pertinent part:

If the Contractor is delayed at any time in the progress of the work . . . by labor disputes . . . or any causes beyond the Contractor's control, . . . or by any other cause which the Designer determines may justify the delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Designer may determine.

¹ This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

(Goheen Aff. ¶ 3 & Ex. 1 at 13.) Section 8.3.2 of the Prime Contract states that: “Any claim for extension of time shall be made in writing to the Designer not more than twenty days after the commencement of the delay; otherwise it shall be waived.” (*Id.*)

Section 5.3.1 of the Prime Contract states in pertinent part:

By an appropriate written agreement, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Sub-Contractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and the Designer. Said agreement shall preserve and protect the rights of the Owner and the Designer under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the Contractor-Subcontractor Agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by these Documents, has against the Owner.

(Murdock Surreply, Ex. AE.)

Murdock began working on the Project in January 1992 and advised Goheen of a production problem by the masons on the Project--the masons were not producing at the anticipated production rates. Murdock continued to inform Goheen on a regular basis from January through August and thereafter about the low level of production by the masons. Goheen communicated to Murdock its concern with how far Murdock was falling behind in the Project several times a month from January 1992 forward. Goheen, at the State's insistence, instructed that Murdock add more masonry workers and equipment to the Project.

Murdock first notified Goheen in writing of the problems with the low levels of production by the union masonry workers by letter dated August 5, 1992. The letter requested that Goheen extend the time for completion of the masonry work and make an adjustment in the Subcontract amount. Goheen forwarded Murdock's letter to the Designer, invoking Sections 8.3.1 and 12.2.1 of the Prime Contract and formally requesting an adjustment in the contract amount and contract time.

II. Discussion

Count I of the Complaint alleges that Goheen constructively accelerated the work under the Subcontract. In moving for summary judgment on Count I, Goheen argued that Murdock was not entitled to an extension for excusable delay from Goheen and the delay was not excusable. Murdock responded that its delay was excusable and that it had the right under the Prime Contract to pursue its acceleration claim against Goheen.² The court resolved the motion on a different basis—given the undisputed facts, Murdock could not prove that it properly requested an extension of time and, therefore, could not prevail on its acceleration claim.

Because entry of judgment has not been made, Rule 54(b) of the Federal Rules of Civil Procedure authorizes reconsideration of the court's Entry On Summary Judgment Motions. Fed. R. Civ. P. 54(b) ("any order or other form of decision, however designated,

² In the Entry on Summary Judgment Motions the court accepted the positions of Goheen and Murdock that the Prime Contract applied to Murdock. Murdock has not sought reconsideration of that conclusion.

which adjudicates fewer than all the claims . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”); see *Fisher v. Nat’l R.R. Passenger Corp.*, 152 F.R.D. 145, 149 (S.D. Ind. 1993) (“[I]t is well established that a district court has the inherent power to reconsider interlocutory orders and reopen any part of a case before entry of final judgment.”) (citing *Marconi Wireless Tel. Co. v. United States*, 320 U.S. 1, 47-48 (1943)). Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

As no reported Indiana decision addresses the elements of an acceleration claim, the court looks to the decision in *Sherman R. Smoot Co. v. Ohio Department of Administrative Services*, 736 N.E.2d 69 (Ohio Ct. App. 2000), upon which both Murdock and Goheen rely. One element of a constructive acceleration claim is that the party bringing the claim properly request an extension of time. See *id.* at 78.

Section 8.3.2 defines what a proper request for an extension of time is under the Prime Contract. Under that section, claims for extensions of time were to be made in writing “not more than twenty days after the commencement of the delay; otherwise it shall be waived.” Murdock argues that section 8.3.2 is silent as to the meaning of “commencement of delay” and suggests that section 8.3.1 defines that phrase. Section 8.3.1, however, does not explain or define “commencement of delay.” Rather, the section

addresses what happens when a contractor's progress is delayed by a cause beyond the contractor's control—the contract time is extended for a reasonable time as determined by the Designer.

Murdock contends that a jury could determine that a delay commences when the contractor recognizes that the cause for a delay is excusable under section 8.3.1 rather than when the delay actually begins. This is an argument regarding construction of the Prime Contract. The construction of a written contract, however, is a question of law for the court, not the jury. See *Smith v. Cincinnati Ins. Co.*, 769 N.E.2d 599, 602 (Ind. Ct. App. 2002). And, unless ambiguous, contract terms are given their plain and ordinary meaning. See *Ogle v. Ogle*, 769 N.E.2d 644, 647 (Ind. Ct. App. 2002). The clear and unambiguous language of section 8.3.2 plainly states that a claim for extension shall be made “not more than twenty days after the commencement of the delay; otherwise it shall be waived.” The undisputed facts establish that low masonry production rates caused a delay in production as early as January 1992, and Murdock's first written request for an extension of time based on that delay was made by letter dated August 5, 1992. Thus, Murdock's request was not within twenty days of the commencement of the delay and was untimely as a matter of law.³

³ Given this conclusion, the court need not reach the alternative ground argued by Goheen in opposition to the motion to reconsider, *i.e.*, that Goheen lacked any authority to extend the contract time, though it seems that this argument may be well-taken.

Accordingly, summary judgment is appropriate in favor of Goheen and against Murdock on Murdock's acceleration claim in Count I, and Murdock's motion for reconsideration is denied.

III. Conclusion

Murdock's motion for reconsideration is DENIED for the foregoing reasons.

By separate notice the court will set a telephone conference for the purpose of setting a trial date.

ALL OF WHICH IS ORDERED this 8th day of July 2002.

John Daniel Tinder, Judge
United States District Court

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