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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KANAWHA COUNTY CIRCUIT COURT

MULTIPLEX, INC.

Plaintiff,

v.

Civil Action No.: 09-C-2075

RALEIGH COUNTY BOARD OF
EDUCATION and SCHOOL BUILDING
AUTHORITY OF WEST VIRGINIA,

Defendants.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
PROPOSED ORDER GRANTING MOTION OF RALEIGH
COUNTY BOARD OF EDUCATION TO ENFORCE RELEASE
IN FULL OF ALL CLAIMS AND TO DISMISS PLAINTIFF'S COMPLAINT**

Defendant, Raleigh County Board of Education ("Raleigh County BOE"), by counsel, Kenneth E. Webb, Jr. and the law firm of Bowles Rice McDavid Graff & Love LLP, submits the Raleigh County BOE's Findings of Fact, Conclusions of Law and Proposed Order Granting the Raleigh County BOE's Motion to Enforce the Release in Full of All Claims and to Dismiss Plaintiff's Complaint.

Findings of Fact

1. Defendant, Raleigh County BOE was and is the owner of the improvements made at the Independence High School Project ("the Project").
2. Plaintiff, Multiplex, Inc. ("Multiplex"), is a contractor who provided construction services on the Project.
3. During Multiplex's work on the Project, a dispute arose between Multiplex, the Raleigh County BOE and the School Building Authority of West Virginia ("SBA"). The dispute concerned allegations that the Raleigh County BOE delayed Multiplex's work on the Project.
4. As a result of the dispute, Multiplex hired attorney Ancil Ramey to file suit against the Raleigh County BOE and SBA. On August 28, 2006, Multiplex, through attorney

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Ramey, instituted a civil action in the Circuit Court of Kanawha County against the Raleigh County BOE and SBA related to Multiplex's work on the Project. A copy of the August 28, 2006 Complaint is attached hereto as Exhibit A.

5. In the August 28, 2006 Complaint, Multiplex alleged that the Raleigh County BOE delayed the project by more than six months and Multiplex sought damages for the delay. (See Exhibit A at ¶¶ 11, 16, 17 and 23.)

6. Ultimately, the lawsuit filed by Multiplex on August 28, 2006 against the Raleigh County BOE and the SBA was settled by and between Multiplex and the Raleigh County BOE. The settlement is memorialized in a written Release in Full of All Claims executed by the President of Multiplex – Mr. Art Poff – on April 25, 2007. A copy of the April 25, 2007 Release in Full of All Claims is attached hereto as Exhibit B.

7. In exchange for the payment of One Hundred Eighty-Three Thousand Dollars and no cents (\$183,000.00), Multiplex expressly agreed to “. . . release and forever discharge the Board of Education of the County of Raleigh . . . from all claims . . . plaintiff may have, including past, present and future, both known and unknown, of whatever kind or nature, . . .” related to the conduct complained of in the Complaint. Additionally, the Release provides that:

It is expressly understood and agreed that this Release is intended to extend to any and all claims, injuries and damages sustained by Multiplex, Inc., without exception arising out of the alleged wrongful acts set forth in the aforementioned Complaint, including claims for ~~loss of service, business opportunities, past or future expense or losses~~ of any kind, past and future lost wages or earning capacity, punitive damages, and any and all other forms of recoverable compensation or damages, even to the extent that such injuries or damages may not be known or apparent at this time.

(See Exhibit B at pg. 2).

8. The settlement draft was tendered to Multiplex in a check dated May 10, 2007. A copy of the May 10, 2007 check is attached hereto as Exhibit C.

9. In spite of entering into the Release in Full of All Claims with the Raleigh County BOE on April 25, 2007, Multiplex filed the instant lawsuit on November 4, 2009 making allegations of delay similar to the allegations made against the Raleigh County BOE and SBA in the

earlier suit and seeking additional damages. A copy of the instant Complaint is of record in the Court's file.

10. In the November 4, 2009 Complaint, Multiplex again alleged that the actions of the Raleigh County BOE delayed the project for more than six months and Multiplex again sought delay damages from the Raleigh County BOE. (See Complaint filed herein at ¶¶ 13, 16, 17 and 19.)

11. The Raleigh County BOE contends in its Motion to Enforce and Dismiss that the language used in the April 25, 2007 Release in Full of All Claims expressly applies to any subsequent claims made by Multiplex against the Raleigh County BOE for delay type damages so that the instant complaint should be dismissed with prejudice as a matter of law.

Conclusions of Law

1. Rule 12(b)(6) of the West Virginia Rules of Civil Procedure allows the defending party to move for the dismissal of allegations which "fail to state a claim for which relief can be granted." Rule 12(b)(6), WVRCPC. The purpose of a Rule 12(b)(6) motion is to "test" the legal sufficiency of the complaint. See, e.g., *Collia v. McJunkin*, 358 S.E.2d 242 (W.Va. 1987). To warrant dismissal under Rule 12(b)(6), it must appear beyond doubt from the allegations of the Complaint that plaintiff can prove no set of facts in support of his claims that would entitle him to relief. See, e.g., *Garrison v. Thomas Mem. Hosp. Ass'n*, 438 S.E.2d 6 (W.Va. 1993). Finally, when matters outside the pleadings are presented and considered in a Rule 12(b)(6) motion to dismiss, the motion may be converted to one for summary judgment under Rule 56 and similarly disposed of by this Court. See, e.g., *Gunn v. Hope Gas, Inc.*, 402 S.E.2d 505 (W.Va. 1991).

2. A valid settlement between Multiplex and the Raleigh County BOE from the August 28, 2006 that, by its clear and unambiguous terms, includes within the operative release language the delay allegations made in the November 4, 2009 suit is subject to dismissal by enforcement of the April 25, 2007 Release In Full of All Claims. As one Court has stated, "[t]he entire fabric of civil litigation is dependent upon the willingness of parties to settle cases. . . [and] parties and their attorneys must act in good faith in this respect . . ." *Hildick v. Hildick*, 1990 WL 1657 (Del.Fam.Ct. 1990). To be sure, contracts of compromise and settlement of lawsuits are to be

construed and enforced like any other contract. *Fortuna v. Queen*, 363 S.E.2d 472 (W.Va. 1987); *Floyd v. Watson*, 254 S.E.2d 687 (W.Va. 1979).

3. The law favors settlement contracts and has a policy upholding them if they are fairly entered into and not in conflict with any public policy. *Accord v. Chrysler Corp.*, 399 S.E.2d 860 (W.Va. 1990); *State ex rel Vapor Corp. v. Narik*, 320 S.E.2d 345 (W.Va. 1984). In keeping with this general policy, the Court has the authority to enforce the settlement agreement entered into by the parties in this case, and to dismiss the instant Complaint based upon the settlement agreement. Such authority arises from a trial court's inherent equity power to summarily enforce a settlement agreement when the practical effect is to enter a judgment by consent. *Millner v. Norfolk & W. R.R. Co.*, 643 F.2d 1005 (4th Cir. 1981).

4. As the undisputed facts material to resolution of the earlier civil action indicate, Multiplex entered into a written Release in Full of All Claims with the Raleigh County BOE on April 25, 2007 that broadly released claims related to the allegations made in the August 28, 2006 Complaint and Multiplex's work on the Project.

5. The allegations of Multiplex against the Raleigh County BOE in the August 28, 2006 Complaint allege that delay to the Project caused by the Raleigh County BOE damaged Multiplex.

6. The April 25, 2007 Release In Full of All Claims expressly releases the Raleigh County BOE from all claims related to the allegations of the August 28, 2006 Complaint – including all allegation of delay – whether Multiplex knows of all the events causing delay or not. The Release specifically states:

It is expressly understood and agreed that this Release is intended to extend to any and all claims, injuries and damages sustained by Multiplex, Inc., without exception arising out of the alleged wrongful acts set forth in the aforementioned Complaint, including claims for loss of service, business opportunities, past or future expense or losses of any kind, past and future lost wages or earning capacity, punitive damages, and any and all other forms of recoverable compensation or damages, even to the extent that such injuries or damages may not be known or apparent at this time.

(See Exhibit B at pg. 2) (emphasis added).

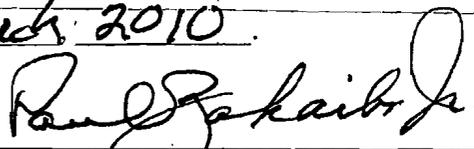
7. As such, under the broad but clear and unambiguous meaning of the word used to describe the scope of the release provided to the Raleigh County BOE, a settlement between Multiplex and the Raleigh County BOE was struck as to all claims related to owner caused delay on the Project that is binding and enforceable against Multiplex.

8. Multiplex cannot repudiate a settlement after it is made. Long held and universally recognized principals of contract law provide that: "[o]nce an offer of compromise is accepted, . . . the offeror is bound by the terms of the compromise and is powerless to withdraw his offer, and if he refuses to perform such formalities, such a refusal is ineffective as a withdrawal of his offer." 15A Am Jur 2d, Compromise and Settlement, § 9.

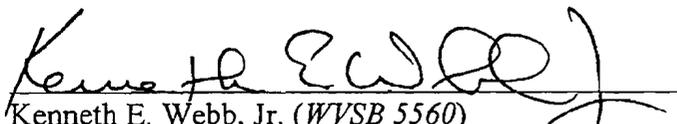
9. Similarly, the language used in the April 25, 2007 Release In Full of All Claims covers the owner caused delay allegations made by Multiplex in the present case. Despite Multiplex's subsequent attempt to repudiate the settlement, a settlement of the additional owner caused delay allegations made against the Raleigh County BOE in the instant case exists. Because it is the law in West Virginia to encourage the resolution of controversies by contracts of settlement and to uphold and enforce such contracts if fair and not contrary to public policy, the settlement agreement between the parties should be enforced by the Court and the instant Complaint should be dismissed.

Accordingly, this Court hereby DISMISSES Plaintiff's Complaint against the Raleigh County BOE for the reasons more specifically stated herein.

ENTERED this 24th day of March, 2010.


Paul Zakaib, Jr., Circuit Judge

Prepared by:


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