NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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June 28, 2018

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Re: *M&C Hauling and Construction, Inc. v. Wilbur Hale, et al.*, CL-2018-1632

Dear Counsel:

This matter came before the Court on June 15, 2018 for argument on Defendant Hauling Unlimited's Plea in Bar. At the end of the hearing, the Court took the matter under advisement. The dispositive issue before the Court is whether the contract in question is a written contract for the purposes of Virginia Code § 8.01-246.

BACKGROUND

Defendant William Hale d/b/a Mulch, Topsoil and Stone, LLC (MTS) secured as general contractor a construction project contract for construction work to be performed at Joint Base Andrews in Prince George's County, Maryland. In June 2014, MTS contracted with Defendant Hauling Unlimited (HU) for HU to provide truck hauling services relative to that same project. HU then subcontracted with Plaintiff M&C Hauling and Construction, Inc., (M&C) for those same services.

The contract price was $75.00 per hour. From around June 2014 to July 2014, M&C hauled debris for the project, providing a total of 2,020.25 hours of hauling services. Written

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sales tickets were generated daily, and these tickets reflected the day's date and the hours worked on that date. The sales tickets were on HU letterhead signed by a project manager with MTS. The price term of $75.00 was not on the daily sales tickets, but it was committed to writing in an invoice dated August 9, 2014. This invoice reflected hours worked by M&C and was billed to MTS.

M&C filed its complaint alleging breach of contract on February 1, 2018. The complaint alleges that MTS and/or HU have failed to pay M&C $86,456.23 for 1,152.75 hours of labor under the hauling contract from June and July of 2014. Defendant Hauling Unlimited filed a plea in bar in response to the complaint. The Court heard oral argument on the plea in bar on June 15, 2018 and subsequently took the matter under advisement.

STANDARD OF REVIEW

"A plea in bar is a defensive pleading that reduces the litigation to a single issue... which, if proven, creates a bar to [a] plaintiff's right of recovery." *Cooper Indus., Inc, v. Melendez*, 260 Va. 578, 594 (2000) (quoting *Kroger Co. v. Appalachian Power Co.*, 244 Va. 560, 562 (1992); *see also Tomlin v. McKenzie*, 251 Va. 478, 480 (1996)). A plea in bar condenses the litigation by narrowing it to a discrete issue of fact that bars a plaintiff's right of recovery when proven. *Tomlin*, 251 Va. at 480. The burden of proof on the dispositive fact rests on the moving party. *Id.*

The dispositive issue before the Court is whether the statute of limitations bars the claim in question. This requires a determination of which statute of limitations the claim is subject to, and this determination rests on whether the agreement is a written contract for the purposes of Virginia Code § 8.01-246.

ANALYSIS

The Defendant argues that the Plaintiff's claim is based on the breach of an unwritten and/or unsigned contract and is thus subject to a three-year statute of limitations under § 8.01-246(4) of the Virginia Code. Although all the terms of the agreement are committed to writing in the daily sales tickets and invoice attached to the complaint, the Defendant does not concede that these materials suffice to form a written contract. Further, the Defendant argues that even if these materials are a written contract, the Plaintiff still does not have a written contract for the purposes of § 8.01-246(4) because the Defendant never signed any of the tickets or the invoice. Although a project manager of Defendant MTS signed the tickets, no one from Defendant HU ever signed. The Defendant concludes that the Plaintiff's claim, filed more than three years after when the claim accrued, is thus outside of the applicable statute of limitations and should be barred.

In response, the Plaintiff argues that the claim is based on the breach of a written contract and is thus subject to a five-year state of limitations under § 8.01-246(2) of the Virginia Code. In their argument, the Plaintiff relies primarily on the Supreme Court of Virginia case *Dixon v. Hassell & Folkes, P.C.* In *Dixon*, the court was addressing the issue of whether the contract in question was written or unwritten for the purposes of § 8.01-246. *Dixon v. Hassell & Folkes, P.C.*, 283 Va. 456, 458, 723 S.E.2d 383, 383 (2012). Within the context of deciding this issue, the court defined what constitutes a written contract, saying that "an unsigned agreement all the terms of which are embodied in a writing, *unconditionally* assented to by both parties, is a

written contract." *Dixon*, 283 Va. at 460, 723 S.E.2d at 385 (quoting *Simmons & Simmons Construction Co. v. Rea*, 155 Tex. 353, 286 S.W.2d 415 (1995) (emphasis in *Simmons*)).

The Plaintiff also argues that the sales tickets and the invoice embody all the terms of the agreement. Further, the Plaintiff argues that the court's holding in *Dixon* makes it clear that a written instrument does not require a signature to be a valid written contract. Having satisfied this definition from *Dixon*, the Plaintiff concludes that the contract is a written one and thus should be subject to the five-year statute of limitations under § 8.01-246(2).

In this case, the Court is faced with different interpretations of § 8.01-246(2), and specifically what is required for a contract to be governed by this provision. Regarding the statute of limitations in actions on written contracts, the Virginia Code states in relevant part: "in actions on any contract which is not otherwise specified and which is in writing and *signed by the party to be charged thereby*, or by his agent, within five years." Va. Code Ann. § 8.01-246(2) (2018) (emphasis added). Regarding the statute of limitations in actions on unwritten contract, the Code states: "in actions upon any unwritten contract, express or implied, within three years." Va. Code Ann. § 8.01-246(4) (2018). The statute's plain language suggests that only a contract signed by the party being charged with breach can serve as a written contract for the purposes of the statute of limitation.

The Virginia's Supreme Court's application of the statute in *Dixon* departs from this understanding. The definition of a written contract in *Dixon*, "an unsigned agreement all the terms of which are embodied in a writing, *unconditionally* assented to by both parties," seems to remove the signature requirement and allow for a five-year statute of limitations for written but unsigned instruments. *Dixon*, 283 Va. at 460, 723 S.E.2d at 385. The holding in *Dixon* does complicate this rule somewhat, since the court ultimately found that the unsigned writing was not a written contract. *Id.* at 461, 723 S.E.2d at 385. The defendant in *Dixon* made the existence of a written contract conditional upon receipt of a signed copy of the writing. *Id.* at 460, 723 S.E.2d at 385. Twice in the terms of the writing, the defendant expressed this condition; consequently, plaintiff's failure to sign the writing meant that the writing was not a written contract. *Id.*

The ultimate holding in *Dixon* does not contradict the definition the court gave for a written contract. The decision emphasized the fact that the parties had not unconditionally assented to the written terms, but that the signature was a condition upon which the writing would become a written contract. In fact, the opinion in *Dixon* seems to suggest that, hypothetically, if an agreement was written and signed, but one party had expressed some other condition to fulfill before the writing would be a written contract, the writing would not be a written contract so long as that condition was unfulfilled.

Therefore, the court reached its decision in *Dixon* on a distinction that does not apply in every case, or in the immediate case. If the lack of signature makes a contract unwritten per se, it seems unlikely that the court in *Dixon* would rest its decision on the fact that the existence of a written contract was conditional upon the plaintiff's signature. Thus, considered by itself, the logic of *Dixon* leaves open the possibility that an unsigned writing could be a valid written contract.

Another wrinkle in how the Virginia Supreme Court has applied § 8.01-246 comes in the form of an unpublished opinion, *Dunavant v. Bagwell*. In that case, the court upheld the circuit court finding that a written instrument existed, but that its lack of the defendant's signature meant that it was not a written contract for the purposes of § 8.01-246. *Dunavant v. Bagwell*,

2016 Va. Unpub. LEXIS 5 (Va. 2016). The Court sought to harmonize this holding with *Dixon*, writing:

> *Dixon* is completely consistent with this conclusion. Dunavant is indeed correct in pointing out that in *Dixon*, involving a dispute over the applicability of Code § 8.01-246(4), we cited with approval *Simmons & Simmons Constr. Co. v. Rea*, 286 S.W.2d 415 (Tex. 1995) for the following proposition: " 'An unsigned agreement all the terms of which are embodied in a writing, unconditionally assented to by both parties, is a written contract... unless the parties have made [their signatures] necessary at the time they express their assent.' " *Dixon*, 283 Va. at 460, 723 S.E.2d at 385 (quoting *Simmons*, 286 S.W. 2d at 418). As we proceeded to make clear in *Dixon*, however, recognition of an unsigned agreement as a written contract under this rationale would not bring the contract within the purview of Code § 8.01-246(4) because of the statute's requirement that the "contract be signed ... by the party charged with breach." *Id.* at 460, 723 S.E.2d at 385.

Dunavant v. Bagwell, 2016 Va. Unpub. LEXIS 5 (Va. 2016).

The opinion in *Dixon* does distinguish between the formation of a contract (which of course does not require an executed writing) and the formation of a written contract. *Dixon*, 283 Va. at 459, 723 S.E.2d at 384. Nowhere in *Dixon* does the court create a category of written contracts that are subject to § 8.01-246(2), and a category of written contracts that are not. The authority of *Dunavant* is merely persuasive. Therefore, the rule in *Dixon* should control this case.

In the immediate facts, although there was no signature by Defendant Hauling Unlimited, the parties did not make their signatures a condition of the contract being a written one. All the terms of the agreement between the Plaintiff and Defendant, including the rate and the hours worked, were committed to writing in the daily sales tickets and the invoice. These terms were unconditionally assented to by the parties. Thus, under the rule in *Dixon*, this contract is a written contract to which § 8.01-246(2) applies. The statute of limitations to bring an action for breach of a written contract is five years, so the statute of limitations does not bar the Plaintiff's complaint. Defendant's Plea in Bar is **overruled.**

CONCLUSION

For the reasons stated above, Defendant's Plea in Bar is overruled.

Very truly,

[redacted]

Bruce D. White

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