

101 Mass.App.Ct. 1123

Unpublished Disposition

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NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass.

App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale.

Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

Appeals Court of Massachusetts.

STARR CAPITAL PARTNERS, LLC, & others ¹

v.

TOLL BROTHERS, INC., & another. ²

21-P-930

|

Entered: November 3, 2022

By the Court (Lemire, Singh & Englander, JJ. ³)

MEMORANDUM AND ORDER
PURSUANT TO RULE 23.0

*1 This action concerns an agreement for the sale of real property that gave the seller -- the plaintiffs, Starr Capital Partners, LLC, Smith Legacy Partners Series, LLC, Smith Legacy Partners II, LLC, 505-507 Common Street, LLC, and 527 Common Street, LLC, (collectively, Starr) -- the option to buy back the retail portion of the mixed-used development that the buyer -- the defendants, Toll Brothers, Inc., and Belmont Residential, LLC, (collectively, Toll) -- intended to build following environmental remediation of the property. After a dispute arose regarding whether the agreement gave Starr approval rights over increases to the remediation costs, a portion of which Starr was required to pay in order to exercise the retail option, Starr initiated this action. A Superior Court

judge granted summary judgment in favor of Toll on all claims.

Starr appeals, arguing that (1) the motion judge erroneously concluded that the agreement was unambiguous and extrinsic evidence supports Starr's interpretation, (2) Toll breached the agreement by failing to obtain Starr's approval to change the scope of remediation (including, but not limited to, the costs of same), (3) Toll improperly billed Starr for costs that Starr was not obligated to pay, and (4) the motion judge failed to consider evidence supporting Starr's claims for breach of the covenant of good faith and fair dealing, violation of G. L. c. 93A, and misrepresentation. For the reasons that follow, we vacate so much of the judgment as dismissed the claims for breach of contract and breach of the implied covenant of good faith and fair dealing, as well as the requests for declaratory relief related to those claims, and we remand for further proceedings consistent with this memorandum and order. We otherwise affirm.

Background. We recite the material facts in the light most favorable to Starr, reserving certain details for later discussion. See Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016).

1. Property. Starr owned eight parcels of land in the Cushing Square area of the town of Belmont (town). The property had a history of environmental issues, including those arising from the operation of a gasoline station and a dry cleaning business on the premises. Specifically, the soil and groundwater were contaminated by multiple releases of oil and hazardous material. Those releases had been reported to the Massachusetts Department of Environmental Protection (DEP).

As a result of the contamination, Starr's environmental consultants performed remediation work on the property in compliance with the Massachusetts Contingency Plan (MCP), 310 Code Mass. Regs. §§ 40.0000. In 2012, the property achieved "remedy operation status" in compliance with the MCP. However, to redevelop the property, additional remediation work was required for the property to meet "permanent solution status" under the regulations. See 310 Code Mass. Regs. §§ 40.0006, 40.1040, 40.1041.

In July 2013, Starr obtained a special permit from the town to build a mixed-use development on the property consisting of approximately 115 residential units, 37,500 square feet of retail space, and a parking garage. Starr initially

looked to form a partnership or joint venture to develop the property, with Starr maintaining an ownership interest. After those attempts were unsuccessful, Starr began to negotiate a deal for Toll to purchase the property and the related development rights. By that time, Starr had spent over \$11 million on the development project, including over \$2 million in environmental costs.

*2 2. Agreement. On March 14, 2016, the parties entered into an agreement for Toll to purchase the property and development rights for more than \$14 million. The parties executed further amendments to the agreement on April 13, 2016, and September 2, 2016. Section 26 of the agreement, as amended, provided that as “a material inducement for [Starr’s] agreement to sell the Property,” Starr was granted an option to purchase the retail unit of the mixed-use development from Toll following its construction.

Section 26(a) specified that to exercise the option, Starr was required to pay Toll “the actual cost incurred by [Toll] of delivering the Retail Unit to [Starr]” plus a fee of an additional one and one-half percent of the actual cost. “Actual costs” were defined to include a pro rata share of “the costs of Remediation of the Existing Environmental Conditions” as well as a pro rata share of “the costs of remediation of any Unknown Conditions,” with all remediation costs “documented to [Starr’s] reasonable satisfaction.”

Pursuant to section 26(b), the parties mutually agreed to a remediation budget of \$1.31 million;⁴ however, Starr expressly “acknowledge[d] that costs of the Remediation of the Existing Environmental Conditions for the Project may exceed the mutually agreed Remediation budget.” Sections 26(b)(1) through (3) set forth provisions for calculating Starr’s share of those remediation costs. Specifically, the actual cost that Starr was required to pay to exercise the option included: fifty-two percent of all the remediation costs up to \$1.441 million (i.e., the “remediation overruns threshold”) as part of the purchase price; all costs to remediate existing environmental conditions in excess of \$1.441 million, as part of the purchase price; and all costs to remediate existing environmental conditions and any unknown conditions in excess of \$2.5 million (i.e., the “upset threshold”), as the costs were incurred and billed to Starr by Toll. If Starr failed to pay remediation costs exceeding \$2.5 million as billed by Toll, Starr forfeited its right to exercise the option.

Section 26(b)(4) of the agreement further provided:

“Seller and Buyer agree that the budget for the Remediation of the Existing Environmental Conditions is ... \$1,310,000. Seller and Buyer further agree that during the Due Diligence Period a mutually approved scope of work for the Remediation (with the intended goal of obtaining ‘Permanent Solution Status without Conditions’) will be established. Any changes in the scope for work for the Remediation will be subject to the parties’ mutual approval, not to be unreasonably withheld or delayed” (emphasis added).

As part of the second amendment to the agreement, the parties executed exhibit C, which defined the “Remediation Scope” as:

“All costs associated with the onsite, or offsite cleanup or remediation associated with the property, including but not limited to the cost, fees and requirements of MCP filings, including but not limited to the [release abatement measure plan (RAM plan)], insurance costs, testing, Brownfield Tax Credit filing and consultant fees, consultants, attorneys, agency satisfaction of site status, insurance and reporting” (emphasis added).

3. Dispute over remediation costs. The parties closed the sale of the property in October 2016. In early 2017, Toll informed Starr that it anticipated remediation costs would exceed the remediation overruns threshold of \$1.441 million. Starr objected to certain costs, expressed its desire to reach a “consensus/compromise, [to] expeditiously reach mutual approval on a modified remediation scope,” and maintained that it had “reasonable grounds for withholding ... consent” to the cost increases under section 26(b)(4) of the agreement given the “significant scope/budget changes being contemplated.” In March 2017, Toll sent Starr “a comparison of the contract environmental budget to the proposed [budget of Sage Environmental, Inc. (Sage), Toll’s environmental consultant], as well as, a Scope Comparison sheet which indicates differences in scope between the [Starr] scope of work and the Sage Scope of work.”

*3 In late April 2017, Toll notified Starr that it expected remediation costs in excess of \$4 million. Around the same time, Toll’s project manager sent an e-mail to Sage, asking Sage to identify “any costs that have increased due to scope creep and/or have been added.” Starr again expressed specific concerns in response to the increased costs, requested additional information, and indicated it did not consent to the “scope change.” In early May 2017, Toll responded to Starr,

asserting Toll's view that "Starr did not reserve approval rights over costs." Toll further explained that "the Remediation costs in certain categories have exceeded the Remediation budget, and are anticipated to exceed in others, but such excess costs are within the mutually agreed upon scope of work" in exhibit C to the agreement.

Starr initiated this action in September 2017, alleging that Toll breached the agreement by changing the scope of the remediation work without Starr's approval as required under section 26(b)(4) of the agreement, breached the implied covenant of good faith and fair dealing, violated ^{22a}G. L. c. 93A, § 11, and made misrepresentations to Starr to induce Starr to execute the agreement. Starr also sought a declaration of the fair and reasonable remediation costs.

On April 2, 2018, while the Superior Court action was pending, Toll sent Starr an invoice for \$2,211,016.65, the amount Toll alleged it spent through January 2018 in actual remediation costs over the \$2.5 million upset threshold.⁵ Starr sought a preliminary injunction to enjoin Toll from demanding payment. In support, Starr submitted an affidavit from James Curtis, P.E., LSP, Starr's environmental remediation expert, who detailed "numerous errors, mistakes, and ... unsupported, ineligible, and incorrect charges" that he contended resulted in a total of \$3,696,158.86 in excessive costs in the April 2018 invoice (Curtis affidavit). The request for an injunction was denied, but a judge extended the deadline for Starr to make payment on the April 2018 invoice.⁶ After Starr did not pay by that deadline, Toll sent Starr notice that Starr had forfeited the option under the terms of the agreement. As of December 2020, Toll alleged that it spent approximately \$10 million on remediation costs.

Toll moved for summary judgment on all claims before the Superior Court. A different judge allowed the motion, concluding that the unambiguous terms of the agreement did not create approval rights for Starr over increases to the remediation costs and only required that Toll document such costs to Starr's reasonable satisfaction. The judge further explained that where the parties broadly defined the "scope" of remediation in exhibit C to the agreement, "Starr has not demonstrated that it will be able to prove at trial that Toll changed the scope of remediation without Starr's approval." Specifically, the judge noted that the "scope" of remediation included all costs associated with the RAM plan that was filed with DEP and the objected-to work completed by Toll was

contemplated under that plan. Judgment entered dismissing Starr's complaint. This appeal followed.

Discussion. "We review a grant of summary judgment de novo, construing all facts in favor of the nonmoving party."

¹Miller v. Cotter, 448 Mass. 671, 676 (2007). "Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Boelter v. Selectmen of Wayland, 479 Mass. 233, 237 (2018), quoting ¹Boazova v. Safety Ins. Co., 462 Mass. 346, 350 (2012). "We may consider any ground supporting the judgment." ¹Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991).

*4 1. Breach of contract claim. Starr argues that Toll was not entitled to summary judgment on Starr's breach of contract claim because the contract was ambiguous as to whether Starr had approval rights over changes to the remediation costs, and extrinsic evidence supported Starr's interpretation. Starr further contends that Toll breached the agreement by failing to obtain Starr's approval to change the scope of remediation and by improperly billing Starr for nonremediation costs.

a. Contract interpretation. The interpretation of a contract, including whether an ambiguity exists, is a question of law, subject to a de novo review. James B. Nutter & Co. v. Estate of Murphy, 478 Mass. 664, 667 (2018). To determine whether an ambiguity exists, "the court must first examine the language of the contract by itself, independent of extrinsic evidence concerning the drafting history or the intention of the parties." ¹Bank v. Thermo Elemental Inc., 451 Mass. 638, 648 (2008). "Contract language is ambiguous where 'an agreement's terms are inconsistent on their face or where the phraseology can support reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken.'" Suffolk Constr. Co. v. Lanco Scaffolding Co., 47 Mass. App. Ct. 726, 729 (1999), quoting ¹Fashion House, Inc. v. K Mart Corp., 892 F.2d 1076, 1083 (1st Cir. 1989). "Once a contractual ambiguity emerges, the meaning of the uncertain provision becomes a question of fact for the trier." ¹Browning-Ferris Indus., Inc. v. Casella Waste Mgt. of Mass., Inc., 79 Mass. App. Ct. 300, 307 (2011). "The fact finder may then consult extrinsic evidence including the circumstances of the formation of the agreement and the intentions and objectives of the parties." Id.

On the issue whether Starr retained approval rights over remediation costs, we agree with the motion judge that the unambiguous terms of the agreement provided Starr with no such rights. In the agreement, Starr expressly acknowledged that remediation costs for the existing environmental conditions may exceed the mutually agreed on remediation budget of \$1.31 million. Moreover, the parties agreed that “[u]pon Closing, [Toll] shall assume responsibility, at [Toll’s] cost, for remediation of the Existing Environmental Conditions” (emphasis added). Importantly, the agreement also set forth the intended goal of the “remediation” -- to obtain “Permanent Solution Status without Conditions” under the regulations.

The agreement thus expressly contemplated that Toll would accomplish the remediation, that Toll would pay for it (at least initially), and that the cost was not then known and might increase. Tellingly, whereas the agreement does not speak of approval rights for Starr over increases in costs, it does reserve mutual approval rights over changes to the “scope for work.” In contrast, the agreement provides only that the remediation costs “be[] documented to [Starr’s] reasonable satisfaction.” As such, the unambiguous language of the agreement provided Starr with approval rights only over the scope of the remediation work, not the costs associated with same.

Starr’s arguments to the contrary are unavailing. Although exhibit C begins the definition of “Remediation Scope” with “[a]ll costs associated with the onsite, or offsite cleanup or remediation associated with the property” (emphasis added), we do not read the words “all costs” in that definition as indicating that Starr had approval rights over costs when the agreement, read as a whole, demonstrates that Starr expressly acknowledged that the remediation budget may increase and remediation costs were only required to be “documented” to Starr’s satisfaction. See *James B. Nutter & Co.*, 478 Mass. at 669 (“we construe a contract as a whole, so as ‘to give reasonable effect to each of its provisions’ ” [citation omitted]). Taken to its logical end, Starr’s interpretation would permit it to review and approve any of Toll’s remediation-related contracts, where nothing in the parties’ agreement suggests that Starr retained that level of control over the remediation. This is particularly so where Toll assumed all responsibility for the remediation work including the cost thereof, and Starr was only obligated to pay a portion of those costs if it elected to exercise the retail option. In sum, Starr did not have approval rights over remediation costs under the agreement as a matter of law.

*5 We are left then with the issue of what approval rights Starr did retain under the agreement -- i.e., what is meant by the clause providing that “[a]ny changes in the scope for work for the Remediation will be subject to the parties’ mutual approval.” On this point, the agreement is ambiguous. As set forth above, exhibit C defined “Remediation Scope” as “[a]ll costs associated with the onsite, or offsite cleanup or remediation associated with the property,” and included a nonexhaustive list of work including that associated with MCP filings such as the RAM plan. Relying on the language of that exhibit, the motion judge concluded that the parties had agreed that the scope of remediation work was very broad and included any and all work contemplated in the RAM plan.

In our view the judge erred in reading exhibit C as unambiguously stating that any and all work included in Toll’s RAM plan was included in the scope of the remediation, even if the work to be performed under the RAM plan was not reasonably necessary to achieve permanent solution status without conditions. To the contrary, section 26(b) (4) states that the scope of remediation work would have the goal of achieving permanent solution status, and suggests (implicitly if not explicitly) that the scope of work was limited to achieving that goal.⁷ To the extent the work specified in exhibit C (i.e., portions of the RAM plan) exceeds that necessary to achieve permanent solution status without conditions, exhibit C and section 26(b)(4) are inconsistent on their face. Therefore, we conclude that the definition of the scope of the remediation work pursuant to the terms of the agreement is ambiguous as a matter of law, and that extrinsic evidence may be adduced to help elucidate the intended scope of work. See *Suffolk Constr. Co.*, 47 Mass. App. Ct. at 729.

b. Extrinsic evidence. Starr points to extrinsic evidence surrounding the parties’ negotiations, including those during the due diligence period concerning the parties’ contractual obligation under section 26(b)(4) to establish a mutually agreed-on scope of remediation work. Those discussions ultimately resulted in the execution of exhibit C as part of the second amendment to the agreement. This “[e]xtrinsic evidence bear[s] upon the background and purpose of the parties, as well as their understanding of the meaning of particular language used in the contract, [and] may be considered ... in the construction of ambiguous contract language.” *USM Corp. v. Arthur D. Little Sys., Inc.*, 28 Mass. App. Ct. 108, 116 (1989). See *Seaco Ins. Co. v. Barbosa*, 435 Mass. 772, 779 (2002). See also *Kobayashi*

v. Orion Ventures, Inc., 42 Mass. App. Ct. 492, 496 (1997) (extrinsic evidence permissible to elucidate meaning of ambiguous term in fully integrated contract).⁸

*6 c. Factual disputes. Starr also argues that summary judgment on its breach of contract claim was not proper because disputes of fact exist whether Toll included certain costs in the April 2018 invoice that were unrelated to the goal of achieving permanent solution status without conditions. We agree. Notably, in support of this argument, Starr provided the Curtis affidavit detailing certain expenses in the invoice that allegedly did not constitute remediation costs, as well as other charges that Starr's expert contends were not proper for various reasons. This evidence is sufficient to raise a genuine issue of material fact whether Toll invoiced Starr for charges outside of the permitted scope of that work. For the reasons stated above, Toll was not entitled to summary judgment on the breach of contract claim.

2. Breach of the covenant of good faith and fair dealing claim. Starr argues that Toll breached the covenant of good faith and fair dealing implied in the agreement by charging Starr excess remediation costs and otherwise changing the scope of remediation, thereby destroying Starr's ability to exercise the option. Because the parties' contractual rights and obligations with respect to the remediation scope are issues to be resolved at trial, we cannot decide on this record whether "the parties remain[ed] faithful to the intended and agreed expectations of the parties in their performance." Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385 (2004). Therefore, summary judgment was not proper on the good faith and fair dealing claim.⁹

3. Chapter 93A claim. Starr alleges that Toll violated c. 93A by inflating remediation costs so that Starr could not exercise the option, informing Starr that it had mutual approval rights over cost increases only to later advise Starr that it did not, and ignoring Starr's cost cutting proposals and objections to remediation work.¹⁰ Considering the evidence in the light most favorable to Starr, the record here does not support the contention that Toll engaged in "immoral, unethical, oppressive, or unscrupulous" behavior. Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 563 (2008). Rather, the record shows that the parties engaged in discussions and that Toll responded to Starr's concerns, providing documentation for the budget increases (for which Toll would be responsible).¹¹ The record also demonstrates

that Toll was uncertain whether Starr's approval of costs was required and sought to determine whether Starr or Toll had "final say on costs."¹² Moreover, as set forth above, while Starr maintained approval rights over the "scope" of remediation work, the agreement is ambiguous on the issue of what work permissibly fell within the scope of remediation.

*7 At most, Starr may be able to show Toll's reliance on "a plausible, although ultimately incorrect, interpretation of [the agreement]," Boston Symphony Orch., Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 15 (1989), and a disagreement over the necessary remediation costs and scope; such conduct does not amount to unfair or deceptive conduct sufficient to demonstrate a violation of G. L. c. 93A.¹³ See Aggregate Indus.-Northeast Region, Inc. v. Hugo Key & Sons, Inc., 90 Mass. App. Ct. 146, 152 (2016) ("Ordinary contract disputes ... typically fall outside of the reach of the statute").

4. Misrepresentation claim.¹⁴ Starr's misrepresentation claim is premised on an oral assurance from Toll's senior development manager that the parties would not change the budget without mutual approval.¹⁵ "At a minimum, a plaintiff alleging fraud must particularize the identity of the person(s) making the representation, the contents of the misrepresentation, and where and when it took place." Equipment & Sys. For Indus., Inc. v. Northmeadows Constr. Co., 59 Mass. App. Ct. 931, 931-932 (2003). Here, Starr failed to present sufficient evidence to meet this standard.

In his deposition, Starr's managing member testified as follows:

Q. "And in that conversation, did Bill [Toll's senior development manager] say that? Did Bill say that any costs above the budget number would be subject to mutual approval? Did he tell you that in the conversation?"

A. "It was in the agreement."

Q. "I am not asking about that; I am asking about the conversation."


A. "Yes, I believe he did."

Q. "What did he say?"

A. "He said that we weren't going to change the budget unless we had mutual approval."

Q. "He said those words?"

A. "I don't know, verbatim, what he said. That was the absolute most important thing for me, out of this agreement, was that there was a budget that we agreed to and that, if it changed, that we would have to agree to it."

As the motion judge noted, although not entirely clear, it appears that this discussion took place prior to the execution of the second amendment to the agreement that included exhibit C in September 2016. The statement that Starr "believe[d]" Toll made that representation, although Starr was not sure what was said "verbatim," is not sufficiently definite to demonstrate that Toll made "a false representation of a material fact."  Masingill v. EMC Corp., 449 Mass. 532, 540 (2007), quoting Kilroy v. Barron, 326 Mass. 464, 465 (1950). Further, because we conclude that the unambiguous language of the agreement did not give Starr approval rights over remediation costs, it would be unreasonable as a matter

of law for Starr to rely on prior oral representations that are specifically contradicted by the terms of the agreement. See Masingill, *supra* at 541. Therefore, Starr's misrepresentation claim fails.

*8 Conclusion. We vacate so much of the judgment as dismissed the claims for breach of contract and breach of the implied covenant of good faith and fair dealing, as well as the requests for declaratory relief related to those claims, and remand for further proceedings consistent with this memorandum and order. We otherwise affirm the judgment.

So ordered.

Affirmed in part; vacated in part and remanded

All Citations

Slip Copy, 101 Mass.App.Ct. 1123, 2022 WL 16641905 (Table)

Footnotes

- 1 Smith Legacy Partners Series, LLC; Smith Legacy Partners II, LLC; 505-507 Common Street, LLC; and 527 Common Street, LLC.
- 2 Belmont Residential, LLC.
- 3 The panelists are listed in order of seniority.
- 4 The budget was originally prepared by Starr, shared with Toll during the seven-month due diligence period, and mutually agreed to by both parties.
- 5 Toll has not billed Starr for remediation costs associated with any unknown conditions. All costs related to remediation of "Existing Environmental Conditions."
- 6 The Superior Court judge denied Starr's motion for reconsideration and a single justice of this court affirmed the order on the motion for a preliminary injunction.
- 7 We recognize that the RAM plan is described elsewhere in the agreement as "defining the Remediation process which will be pursued by [Toll] with the goal of prosecuting the Remediation of the Existing Environmental Conditions to achieve Permanent Solution status without conditions as defined in the MCP." However, nothing in that provision precludes Toll from including work in the RAM plan beyond that necessary to achieve permanent solution status without conditions, and Starr has offered evidence that Toll in fact did include work in the RAM plan that was not associated with remediation or required to achieve permanent solution status. For example, Starr claims that Toll included the costs of removing uncontaminated soil that was part of Toll's ordinary construction work.

- 8 Given our conclusion that the agreement is ambiguous, we cannot resolve Toll's argument that Starr forfeited its option by failing to pay the April 2018 invoice. At trial, a fact finder could conclude that Toll breached the agreement first by failing obtain Starr's approval over "changes in the scope of work for the Remediation." See Ward v. American Mut. Liab. Ins. Co., 15 Mass. App. Ct. 98, 100 (1983) ("It is well established that a material breach by one party excuses the other party from further performance under the contract").
- 9 Starr's potential recovery under its claims for breach of contract and breach of the covenant of good faith and fair dealing is limited by section 26(j) of the agreement, the limitation of liability clause. See Costa v. Brait Bldrs. Corp., 463 Mass. 65, 78 (2012) (waiver of consequential damages incorporated into construction contract enforceable). Compare H1 Lincoln, Inc. v. South Washington St., LLC, 489 Mass. 1, 26 (2022) ("willful and knowing misconduct is not entitled to contractual protection from c. 93A, § 11, liability"). See also Uno Restaurants, Inc., 441 Mass. at 385 ("covenant [of good faith and fair dealing] may not ... be invoked to create rights and duties not otherwise provided for in the existing contractual relationship"). In relevant part, section 26(j) provides:

"in the event a party defaults on its obligations set forth in this Section, ... [Starr's] sole remedy shall be to pursue specific performance and recover its costs of enforcement, including reasonable attorney's fees; provided however that if specific performance is unavailable due to the intentional and wrongful actions of [Toll] (i.e. sale to a third party), then [Starr] shall be entitled to pursue an action for damages, provided in all events [Toll] shall not be liable for punitive, special or consequential damages."

- 10 Most notably, Starr points to a \$679,633 "delay claim" charge from Nauset Construction that was included in the April 2018 invoice; Starr disputes this charge, noting that Toll ultimately never paid it. Toll represents that, in its opposition to Starr's motion for preliminary injunction, it agreed to remove the charge because it was in the process of negotiating the remediation-related delay with Nauset. Starr, of course, was free to challenge this charge under the terms of the agreement, which provided any remediation costs had to be documented to Starr's reasonable satisfaction.
- 11 For instance, in January 2014, an e-mail from Sage reflects that Sage was preparing "what we'll need to push back at Starr" after Starr raised objections to the remediation cost estimate.
- 12 This information is reflected in a handwritten note from a March 2017 call between Toll and Sage that indicated Toll's in-house counsel was tasked with "look[ing] @ who has final say on costs."
- 13 Our conclusion that Toll's alleged conduct is not sufficient to support a violation of c. 93A is not inconsistent with our decision on the breach of the covenant of good faith and fair dealing claim given the record here. See Frostar Corp. v. Malloy, 63 Mass. App. Ct. 96, 109 n.26 (2005) (breach of covenant of good faith and fair dealing does not compel finding of violation of c. 93A).
- 14 In its complaint, Starr alleged that Toll made either intentional or negligent misrepresentations. Because the agreement included a clause that the written agreement constituted "the entire agreement between [the parties] and there are no other terms, obligations, covenants, representations, statements or conditions, oral or otherwise, of any kind whatsoever," any claim for negligent misrepresentation fails. See Sound Techniques, Inc. v. Hoffman, 50 Mass. App. Ct. 425, 432-433 (2000) (merger or integration clause precludes

liability based on negligent misrepresentation). For this reason, we treat Starr's claim as one for fraudulent misrepresentation.

- 15 Because we do not have before us the parties' briefing on summary judgment, we consider the deposition testimony cited by the motion judge in his discussion of Starr's misrepresentation claim.

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