No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BLUESTONE ENERGY SALES CORP., SOUTHERN COAL CORP., AND JAMES C. JUSTICE, II,

Applicants,

v.

XCOAL ENERGY & RESOURCES,

Respondent.

APPLICATION TO THE HONORABLE SAMUEL A. ALITO, JR., FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Rule 29.6 Statement

1. Bluestone Energy Sales Corp. is a privately owned corporation that has no parent. No publicly held company owns 10% or more of its stock.

2. Southern Coal Corp. is a privately owned corporation that has no parent. No publicly held company owns 10% or more of its stock.

In accordance with Supreme Court Rules 13(5), 22, and 30(3), Bluestone Energy Sales Corp., Southern Coal Corp., and James C. Justice, II ("Applicants") respectfully request a 60-day extension of time, up to and including January 13, 2023, to file a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review that court's decision in *Xcoal Energy & Resources v. Bluestone Energy Sales Corp., et al.*, No. 21-2926 (attached as Exhibit A). Unless an extension is granted, the deadline for filing the petition for certiorari will be November 14, 2022, as the Third Circuit denied Applicants' petition for panel rehearing on August 16, 2022. This application is timely insofar as it is submitted more than ten days prior to the date on which the time for filing the petition for certiorari is set to expire. *See* SUP. CT. R. 13(5).

In support of this request, Applicants state as follows:

1. Applicants intend to file a joint petition pursuant to Supreme Court Rule 12(4), seeking review of the Third Circuit's judgment. This Court has jurisdiction in conformance with 28 U.S.C. § 1254(1).

2. This case merits certiorari review in that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). The Third Circuit in this instance affirmed a judgment entered by the United States District Court for the District of Delaware against Applicants for which they are liable in excess of $10 million, giving operation and effect to a liquidated damages clause in their Coal Supply Agreement

with Respondent Xcoal Energy & Resources, without proof that Respondent suffered any actual damages.

3. Under analogous circumstances, ***two*** judges on a Ninth Circuit panel took the uncommon step of urging Supreme Court consideration of whether such liquidated damages provisions should be scrutinized to ensure compliance with the Constitution. *See In re Late Fee & Over-Limit Fee Litig.*, 741 F.3d 1022, 1028 (9th Cir. 2014) (Reinhardt, Circuit Judge, concurring in the judgment, joined by Nelson, Senior Circuit Judge). The high Court's evolving jurisprudence applying the Fourteenth Amendment to invalidate state-court punitive damage awards spurred the judges to say that constitutional review of penalty clauses "deserves further exploration and analysis," and that extension of the doctrine announced in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and its progeny "should eventually become the law under the Due Process Clause." *Late Fee*, 741 F.3d at 1028. The instant matter provides the Court with that opportunity.

4. Judge Reinhardt and Judge Nelson explicitly recognized that "if due process is violated when courts award disproportionate punitive damages in the tort context," then, under appropriate circumstances, "due process is equally violated" when inequitable penalty clauses in contracts are enforced. *Late Fee*, 741 F.3d at 1028. Judge Reinhardt noted further one Justice's observation in the punitive damages context that "there is something 'jarring to one's constitutional sensibilities' about a court sanctioning any sort of punishment in a civil case when that punishment vastly exceeds the harm done by the party being punished." *Id.* at 1030

(quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (Breyer, J., concurring)).

5. Applicants' counsel, Raymond S. Franks II, was not involved in the proceedings before the district court or the court of appeals, and he has only recently been assigned to prepare the petition for a writ of certiorari. Counsel is immersing himself in the records of the proceedings below, but there is much to process, absorb, and research to properly present the petition in the light that it deserves and that this Court expects.

6. Moreover, counsel is charged with preparing the briefing before the Intermediate Court of Appeals of West Virginia in the consolidated appeals of *PITA, LLC, and Milan Puskar Revocable Trust Restated 9/28/11 v. Scott S. Segal*, No. 22-ICA-4 and 22-ICA-46, another complex matter involving a multi-million dollar judgment, and for which Mr. Segal's opening brief is due on November 21, 2022, only one week following the current deadline in this Court for the petition. Follow-up briefing in the *Segal* matter will continue at intervals throughout the holiday season, concluding on January 5, 2023. Nonetheless, counsel is confident that if this Court sees fit to grant Applicants' request for an extension of 60 days, through January 13, 2023, the additional time will afford him sufficient opportunity to competently fulfill his responsibilities in both cases.

WHEREFORE, for the foregoing reasons, Applicants request that an extension of time up to and including January 13, 2023, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,

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EXHIBIT A

2022 WL 2870153
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United States Court of Appeals, Third Circuit.

XCOAL ENERGY & RESOURCES
v.
BLUESTONE ENERGY SALES CORPORATION; Southern Coal Corporation; James C. Justice, II, Appellants

No. 21-2926
|
Submitted Under Third Circuit L.A.R. 34.1(a) July 15, 2022
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On Appeal from the United States District Court for the District of Delaware (District Court Civil No. 1-18-cv-00819), District Judge: Honorable Leonard P. Stark

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BEFORE: GREENAWAY, JR., MATEY, and NYGAARD, Circuit Judges

OPINION [*]

NYGAARD, Circuit Judge.

***1** After a bench trial, the United States District Court for the District of Delaware entered a judgment in favor of Xcoal Energy & Resources ("Xcoal") on its claims and against Bluestone Energy Sales Corporation ("Bluestone"), Southern Coal Corporation, and James C. Justice, II (collectively "the Bluestone Parties") on their counterclaims. The Bluestone Parties appealed, and now argue it was error for the District Court to conclude the Coal Supply Agreement ("the Agreement") between Xcoal and Bluestone was ambiguous, that Bluestone breached said Agreement, and that the liquidated damages provision in the Agreement was enforceable under Delaware law. Seeing no error, we will affirm.

As we agree with the District Court's findings of fact, we need not labor over them and instead refer the reader to the District Court's able description of the record in its opinion. On appeal from a bench trial, "we review the District Court's factual findings, and mixed questions of law and fact, for clear error, and we review the Court's legal conclusions *de novo.*" *Alpha Painting & Constr. Co. v. Del. River Port Auth.*, 853 F.3d 671, 682-83 (3d Cir. 2017). We review a District Court's holding that an affirmative defense has been waived for abuse of discretion. *In re Frescati Shipping Co., Ltd.*, 886 F.3d 291, 313 (3d Cir. 2018).

Under Delaware law, whether a contract is ambiguous is a question of law. *Rhone-Poulenc Basis Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992). "[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Id.* at 1196. Here, the Bluestone Parties contend the Agreement unambiguously obligated Xcoal to provide the empty railcars onto which the coal at Bluestone's mining site would be loaded. We disagree.

The plain terms of the Agreement render it ambiguous. True, as the Bluestone Parties posit, the Agreement contains language which a reasonable person could interpret as obligating Xcoal to provide the empty rail cars, such as the reference to "Buyer's railcar" in Article 3.5. At the same time, however, a reasonable person could interpret numerous provisions in the Agreement to go the other way. For instance, Article 3.5 provides "Buyer shall designate to Seller the scheduling, routing and method of Shipments of Coal purchased under the Agreement." Appx. at 873. The plain meaning of designate is "to indicate and set apart for a specific purpose, office, or duty." *Merriam-Webster's Online Dictionary*, https://www.merriam-webster.com/dictionary/designate (last visited June 28, 2022); *see also Designate*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining designate as "[t]o

choose (someone or something) for a particular job or purposes."). Applying this plain meaning, Article 3.5 could reasonably be understood to mean "Buyer shall indicate and set apart Seller to handle the specific duties of scheduling, routing, and method of Shipments of Coal purchased under the Agreement." Moreover, as the District Court found, a reasonable person could conclude Articles 2.1, 2.2, and 3.5 together obligate Bluestone to provide the empties, since Articles 2.1 and 3.5 require Bluestone to sell, deliver, and load the coal, and Article 2.2 provides title passes to Xcoal after the coal is loaded.

***2** Because the provisions within the four corners the Agreement are reasonably susceptible of different interpretations, we agree with the District Court's conclusion that the Agreement is ambiguous and reject the Bluestone Parties' argument that the District Court found ambiguity only by improperly relying on extrinsic evidence. For the same reasons, we agree the District Court was correct to rely on extrinsic evidence of the parties' course of performance and industry practice to resolve this ambiguity. [1] *See In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 57 (Del. 2019).

Our review of this extrinsic evidence also leads us to conclude it was Bluestone who bore responsibility for providing the empty cars. Xcoal's Chief Executive Officer testified during the bench trial that "Xcoal's actions to get empty railcars delivered ends with the permitting process ... once Xcoal permits the trains, Norfolk Southern coordinates the placement of those empty railcars with Bluestone." Appx. at 201. Furthermore, Mark Hamilton, a former employee of the company from which the empty railcars were ordered, explained it is typically "the producer's responsibility to order the empties when they were ready for them." Appx. at 303. Lastly, Bluestone's own correspondence established Bluestone believed it had the responsibility to order the railcars. Appx. at 666 (email from Bluestone employee to Xcoal employee stating "Please submit the loading dates going forward to Alice Ann and me as well. We do the scheduling."); Appx. 773-84 (emails showing Bluestone made multiple requests for empty railcars from Norfolk Southern without copying Xcoal). In light of this evidence, we conclude, as the District Court did, that Bluestone was required to provide the empty railcars, and it breached the Agreement by failing to do so.

Having determined that Bluestone breached the Agreement, the sole issue remaining is whether the District Court erred by concluding Xcoal was entitled to the damages provided for by Article 10.3 of the Agreement. The Bluestone Parties contend Article 10.3 is unenforceable as a matter of public policy under Delaware law since it allows Xcoal to recover both actual and liquidated damages and thus constitutes an impermissible penalty.

The District Court rejected this argument on two grounds. First, the District Court concluded the Bluestone Parties waived this argument, because they raised it in a motion to dismiss at trial without first raising, or even suggesting, this argument in their proposed pretrial order. Second, the District Court found this argument lacked merit since Delaware law did not allow for recovery of both actual and liquidated damages, and Article 10.3 only allowed recovery for liquidated damages "in addition to other damages available at law." Appx. at 61, 883. We agree with the District Court.

We discern no abuse of discretion in the District Court's waiver holding. While Federal Rule of Civil Procedure 12(h)(2)(C) allows a party to raise a motion to dismiss for failure to state a claim at trial, they must still comply with a District Court's pretrial order under Federal Rule of Civil Procedure 16(d). Here, the District Court's form pretrial order made clear the Court would preclude a party from seeking relief based on claims and defenses not described in the draft pretrial order. Thus, because the Bluestone Parties failed to raise, let alone mention, this defense in their proposed pretrial order, this defense was waived. [2]

***3** Even if the Bluestone Parties had not waived this argument, however, we agree with the District Court that it lacks merit. The Bluestone Parties have neither established that the damages from Bluestone's breach are capable of accurate calculation, nor that the damages provided for by Article 10.3 are an unreasonable estimate of damages. Thus, the Bluestone Parties have failed to establish the damages contemplated by Article 10.3 constitute an impermissible penalty under Delaware law. *Delaware Bay Surgical Services, P.C. v. Swier*, 900 A.2d 646, 651 (Del. 2006). The Bluestone Parties nevertheless maintain Article 10.3 is unenforceable because it allows Xcoal to obtain actual and liquidated damages. But as the District Court correctly found, Article 10.3 is self-limiting and only allows for the recovery of damages "available at law." Appx at 61. Because a party cannot recover both actual and liquidated damages under Delaware law, *see Gilbane Bldg. Co. v. Nemours Found.*, 666 F. Supp. 649, 652 (D. Del. 1985), actual damages were thus

not available at law and could not be recovered under Article 10.3.

The Bluestone Parties further contend this reading of the Agreement goes against Delaware's black-letter law, since it would eliminate Xcoal's recovery of actual damages, and actual damages are a common law remedy that will not be taken away unless that result is "imperatively required." Appellant's Brief at 27 (quoting *Gotham Partners, LP v. Hallwood Realty Partners, LP*, 817 A.2d 160, 176 (Del. 2002)). But such result is required here to enforce the voluntary agreement of the sophisticated parties in this case—another of Delaware's important public policies regarding the freedom of contract. *NACCO Industries, Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009). Reading out actual damages would also comport with the severability provision in Article 14.2 of the Agreement.

Altogether, we are unpersuaded by the Bluestone Parties' arguments that Article 10.3 is unenforceable, as well as their arguments regarding the ambiguity of the Agreement. So we will affirm.

All Citations

Not Reported in Fed. Rptr., 2022 WL 2870153

Footnotes

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1 We find no merit in the Bluestone Parties' argument that any ambiguity in the Agreement should be resolved by resorting to 6. Del. Code § 2-503(1)(b). Section 2-503(1)(b) applies when a contract is silent. Silence is not the same as ambiguity, however. 11 *Williston on Contracts* § 30:4 (4th ed. 2020). Further, a contract must be construed to mean "what a reasonable person in the position of the parties would have thought it meant." *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). Here, such meaning can be found through the parties' course of performance and the practices of the industry.

2 Because we also agree with the District Court that Article 10.3 is not against Delaware's public policy, we disagree with the Bluestone Parties' contention that their argument cannot be waived because the contract is void ab initio.