

No. 09-20155

**In the United States Court of Appeals
for the Fifth Circuit**

ADDICKS SERVICES, INC.,

Plaintiff-Appellant,

v.

GGP-BRIDGELAND, L.P., formerly known as Rouse-Houston, L.P.;
BRIDGELAND GP, LLC; SAFECO INSURANCE COMPANY OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 4:06-CV-3478

Stephen W. Smith, United States Magistrate Judge, Presiding

REPLY BRIEF OF APPELLANT ADDICKS SERVICES, INC.

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ARGUMENT

I. BRIDGELAND DOES NOT DISPUTE ANY OF THE CRITICAL SUMMARY JUDGMENT EVIDENCE.

Although Bridgeland professes to be “dissatisfied with portions of [Addicks’] Statement of Facts (Appellees’ Brief (“Br.”) at 2), the only thing remarkable about Bridgeland’s rendition of the facts is the tremendous number of critical facts that Bridgeland does not dispute. The following facts, each of which is set forth in Addicks’ Appellant’s Brief and each of which is supported by competent summary judgment evidence, are undisputed:

- The Project was to follow the typical construction sequence and Addicks was to have unfettered access to the site (RE.7.1743);
- After Addicks began work, GGP-Bridgeland issued new plans and a unilateral change order that increased the amount of work and contract price, but did not allow for extra time for Addicks to perform the extra work (RE.7.1743; R.1767);
- The Project was plagued with heavy rains and flooding that interfered with Addicks’ ability to work (RE.7.1743);
- GGP-Bridgeland refused to grant time extensions to Addicks, and scheduled other contractors to perform ahead of Addicks, making Addicks’ work more difficult (RE.7.1743; R.2064);
- GGP-Bridgeland directed Addicks to perform extra work, often before a written change order was issued (RE.7.1744-45, 1751-55; R.2005-06, 2059, 2060; *see* Table at pp. 11-12 in Appellant’s Brief);
- GGP-Bridgeland was aware that Addicks would be requesting payment for the extra work GGP-Bridgeland directed it to perform (RE.7.1751-55);

- Between January and November 2005, Addicks repeatedly submitted Requests for Information, Requests for Change Orders, change order logs, and invoices advising of Addicks' claims for extra work and reserving Addicks' rights with respect to that work and its right to make a claim for delay and disruption costs (*see* Table at pp. 11-12 in Appellant's Brief; *see, e.g.*, R.1874);
- As a condition precedent to receiving monthly progress payments for "Work" as defined by the Contract, Addicks had to submit a written pay estimate and an executed Waiver and Release of Lien Upon Progress Payment (RE.6.1963; RE.8.1985-86);
- Addicks was only allowed to include items on the pay estimates that GGP-Bridgeland allowed it to include, and GGP-Bridgeland refused to allow Addicks to include pending claims for extra-contractual work on the pay estimates (RE.7.1747);
- The only items on the pay estimates were those within the Contract's definition of "Work," which did not include extra work outside the scope of the Contract. (RE.6.1959, 1962-65, 1967; RE.7.1747; RE.8.1985-86);
- On numerous occasions, GGP-Bridgeland paid Addicks for extra work performed prior to the date of the Lien Releases long after Addicks had executed the Lien Releases (RE.7.1748-49; *see* Exhibit A to Appellant's Brief);
- GGP-Bridgeland promised Addicks that it would be paid for the extra work, and Addicks continued to perform extra work and bill GGP-Bridgeland separately for that work in reliance on those promises (RE.7.1746; R.2008);
- The first time Bridgeland claimed the Lien Releases barred Addicks' claims for extra work was in connection with this litigation (RE.7.1746).

This ample and uncontroverted summary judgment evidence raises material fact issues with respect to the parties' interpretation of the subject language of the Lien Releases as well as Addicks' claims of waiver and promissory estoppel. The district court erred in granting summary judgment.

A. The Testimony of George Joiner Is Incompetent and Inconclusive Summary Judgment Evidence.

Unable to controvert virtually any of Addicks' summary judgment evidence, Bridgeland leans heavily on the vague and incompetent testimony of a former Addicks employee, George Joiner. Joiner worked on the Project for just a few weeks before he was transferred to another project and replaced by Nelson Barfield. RE.7.1744. Nelson Barfield served as Addicks' Project Manager through the duration of the Project and is the person who signed the Lien Releases. *Id.* Joiner was not the Project Manager at the time the claims at issue arose, and he lacks personal knowledge of what Addicks understood the Lien Releases to mean at the time they were executed on behalf of Addicks. *Id.*

Bridgeland argues that "Joiner acknowledged in his deposition that, except for what was specifically noted on the [Lien Release], all claims up through the date of the [Lien Release] were being released upon signing." Br. at 4. This is inaccurate and misleading. The Lien Release as to which Joiner was testifying was a blank one that he had seen when Addicks was first bidding on the Project. R.1699-1700. Joiner never testified with respect to any of the executed Lien

Releases at issue here. Nor could he—he had never seen the executed Lien Releases, had no knowledge of their contents or the work they covered, nor did he have any personal knowledge of either Addicks’ or Bridgeland’s intent with respect to the executed Lien Releases. R.2044-45. Specifically, Joiner testified:

Q: After the decision was made to remove you as project manager on Bridgelands, did you have any involvement in the Bridgelands project?

A: Not again.

Q: Okay. And by “involvement in the Bridgelands project,” that would include – or, excuse me, let me – let me – let me rephrase that.

When I asked you if after the decision was made to remove you as project manager you no longer had any involvement in the Bridgelands project, that would extend to preparing pay applications, for instance?

A: (Witness shaking head negatively.)

Q: You were not –

A: No.

Q: Involved in that?

A: No.

Q: Okay. You were not involved in any preparation of any change order requests?

A: No.

Q: Okay. *Not involved in the process of executing, releasing lien waivers in return for payment, for instance? Wouldn't have been involved in that?*

A: No.

Id. (emphasis added).

Joiner's testimony that the releases were "pretty much standard" is similarly incompetent. Notably, Joiner's testimony lacks any foundation. He was not offered as an industry expert, nor is there any testimony as to the basis for his speculative conclusions. There is no evidence in the record that any other owner or contractor anywhere uses such expansive and onerous language in their lien releases. Bridgeland's reliance on Joiner's testimony to attempt to "conclusively" establish the contrary is disingenuous.

Addicks objected strenuously to Joiner's inadmissible testimony. R.1725-28. Although the district court inexplicably denied Addicks' motion to strike Joiner's testimony, it declared that "*the court does not agree with Bridgeland that Joiner's testimony 'conclusively negates' Addicks' mistake defense.* There is no evidence that Joiner shared his understanding with Barfield, who signed the most significant release, the last one signed on November 25, 2005. In any event, the court's decision does not depend on the testimony of Joiner." R.2468-69 at n.21 (emphasis added). Joiner's testimony establishes nothing, is controverted by the record evidence, and should be disregarded.

B. Bridgeland Misrepresents that It Made No Payments After the Date of the last Lien Release.

Bridgeland's assertion that Addicks "does not dispute that GGP-Bridgeland has not made a single payment following the execution of the final Waivers & Releases on November 25, 2005" (Br. at 20), contains two misrepresentations. First, the November 25, 2005 Lien Release was not a "Waiver and Release of Lien Upon *Final* Payment" as contemplated by the Contract. *See* R.1553. Rather, it was a "Waiver and Release of Lien Upon *Progress Payment*," no different than the other Lien Releases at issue in this case. *Id.* Second, the assertion that GGP-Bridgeland did not make any payments after November 25, 2005 is patently false.

Payments made after November 25, 2005 were not at issue during the summary judgment proceedings. Bridgeland requested summary judgment on all claims through November 25, 2005. R.1409. In any event, Bridgeland paid Addicks \$235,450.56 as Change Order No. 17 in June 2006, long after the November 25, 2005 Lien Release was executed. R. 659; R.476 at #17.

C. Securing Subsequent Lien Releases for Claims Reduced to Change Orders Supports Addicks' Interpretation of the Lien Releases.

Bridgeland repeatedly argues that "even though GGP-Bridgeland may have paid previously released claims in connection with a later executed change order, such payments were made only upon securing another subsequent release that released the claims related to the change order." Br. at 17; *see also id.* at 8, 20.

Bridgeland, however, does not explain how this supports its position that it did not waive its right to rely on the Lien Releases to bar Addicks' claims for extra-contractual work.

In fact, the subsequent Lien Releases relating to the change orders cut against Bridgeland's position. If the Lien Releases actually applied to "previously released claims," there would be no need to secure a second release of the same claims, and to do so would be redundant. It is only because the parties understood that the extra work claims that previously had not been reduced to change orders were not covered by the prior Lien Releases that GGP-Bridgeland needed to obtain a Lien Release expressly applicable to each change order.¹ The Lien Releases executed in connection with the change orders were each supported by separate consideration relating to the extra work claim for which the change order was issued. *See* Appellant's Br. at 33. Bridgeland acknowledges as much, conceding that the words "progress payment" in the title of the Lien Releases "describe[s] the consideration given in return for the release." Br. at 12. In other words, there was no consideration supporting the broad release of all claims in the Lien Releases, only those claims for Contract Work encompassed in the approved pay estimates and change orders.

¹ Even Bridgeland does not adopt or even attempt to explain the district court's puzzling conclusion that the Lien Releases were "serially modified" by the subsequent Lien Releases. *See* RE.4.2464; Appellant's Br. at 32.

Bridgeland devotes two pages of its brief to Addicks' \$48,250 extra work claim for additional water pumping after the 2004 flood to support its position that (1) its conduct was not inconsistent with enforcing a claimed right, and (2) Addicks is attempting to recover the full value of claims after agreeing to accept payments for lesser amounts. Br. at 18-19. Neither of these arguments is legally or factually supportable.

First, Bridgeland either misunderstands the facts or deliberately misstates them. Bridgeland correctly notes that Addicks performed extra work from December 2004 through February 2005 to pump flood waters off site after heavy rains inundated the Project. R.1845-47. Addicks signed Lien Releases in exchange for progress payments in March and April. R.1472, 1482. On April 20, 2005, Addicks submitted its claim for this extra pumping in the amount of \$48,250. R.1845-47. Addicks continued to sign Lien Releases for each progress payment from May through July of 2005. R.1492, 1503, 1514. Then, on July 28, 2005, Bridgeland unilaterally decided to pay 10%, or \$4,825.00, of the extra pumping claim, had Addicks sign Change Order No. 12 and a Lien Release in connection with the progress payment, placed the 10% initial payment on the official pay application, and paid Addicks \$4,825 of its \$48,250 claim. R.1527, 1538, 1846-47, 1772.

In accepting this initial payment, Addicks did not release its claim to the remaining \$43,425. In fact, Bridgeland paid the remaining \$43,425 to Addicks in June 2006 as part of Change Order No. 17. R.659 at item #7; R. 476 at #17. Addicks is not attempting to recover the remainder of the pumping claim. As evidenced by the accounting Bridgeland filed in the district court, Bridgeland already paid Addicks the remaining \$43,425 for extra pumping long after the Lien Release signed in connection with Change Order No. 12 that included the initial \$4,825 payment for this extra pumping claim. *Id.*

II. BRIDGELAND WAIVED ANY RIGHT IT HAD TO RELY ON THE LIEN RELEASES.²

As described above, Bridgeland does not dispute any of the evidence supporting Addicks' waiver argument. *See* Br. at 17-26. Nor does Bridgeland make any real effort to address the many cases Addicks cites for the proposition that intentional conduct that is inconsistent with a claimed right will result in a

² Presumably, Bridgeland chose to respond to Addicks' arguments out of order based on its misunderstanding of the legal arguments presented in Addicks' brief. According to Bridgeland, "most of [Addicks'] arguments raised in its [brief] are contingent upon this Court's overruling the District Court's finding that the [Lien Releases] are unambiguous." Br. at 7-8. Addicks' defenses of waiver and promissory estoppel apply with equal force to Bridgeland's release defense, whether or not the Court determines the Lien Releases to be unambiguous. Indeed, if the Court accepts Addicks' arguments regarding waiver or estoppel, it need not reach the ambiguity issue.

waiver of that right.³ See Appellant’s Br. at 25-30. And although Bridgeland argues that there is no Texas law supporting Addicks’ interpretation of the applicable provisions of the Texas Property Code, Bridgeland offers no alternative interpretation.⁴

Bridgeland’s response to Addicks’ waiver argument relies almost exclusively on the fact that Addicks executed the Lien Releases and did not list any claims for extra work on the spaces in the Lien Releases. See Br. at 18-26. As explained in detail in Addicks’ brief, the uncontroverted summary judgment evidence raises material fact issues as to whether Bridgeland waived any right it may have had to rely on the Lien Releases to bar Addicks’ claims for extra work.

³ Bridgeland attempts to sweep these compelling authorities under the carpet in a footnote, predictably noting irrelevant contract language distinctions in parentheses. See Br. at 23. The only case Bridgeland discusses in any detail is *Kay-R Electric Corp. v. Stone & Webster Construction Co.*, 23 F.3d 55, 57-58 (2d Cir. 1994), a case in which the contractor, unlike Addicks, did not submit its claims for extra-contractual work until “months after the last requisition form was submitted.” The case is irrelevant to the determination of whether a party’s inconsistent conduct in paying claims for extra work presumably covered by a release will result in a waiver of the right to claim release as a bar to the other party’s claims for extra work.

⁴ Addicks pointed out that the *statutory authorization* to *require* a lien release only extends to the extent of the indebtedness paid. Appellant’s Br. at 43. Thus, although a party cannot *require* a broader release, parties are nevertheless free to *negotiate* for a broader release supported by adequate consideration, which did not happen here—the Lien Releases were not negotiated, and there is no consideration supporting a release of all claims for extra-contractual work.

III. BRIDGELAND IS ESTOPPED FROM CLAIMING ADDICKS RELEASED ITS CLAIMS FOR EXTRA WORK.

As with Addicks' waiver argument, Bridgeland does not dispute any of the evidence supporting Addicks' estoppel argument. *See* Br. at 26-30. Instead, Bridgeland attempts to characterize the parties' ongoing discussions and promises relating to payment for extra work as "an agreement to agree." Br. at 27. Bridgeland's characterization of this evidence as promising to agree on payment in the future is consistent with Addicks' evidence demonstrating that GGP-Bridgeland was aware of Addicks' claims for extra work, repeatedly assured Addicks that payment would be forthcoming, and that Addicks continued to perform in reliance on these promises. *See* Appellant's Br. at 40-42. The undisputed summary judgment evidence raises material issues of fact as to whether Bridgeland is estopped from asserting release as a defense to Addicks' claims for extra work.

IV. NONE OF THE FACTORS THAT THE TEXAS SUPREME COURT CONSIDERS TO BE OF PARAMOUNT IMPORTANCE IN ENFORCING RELEASES IS PRESENT IN THIS CASE.

Recently, in *Forest Oil Corporation v. McAllen*, 268 S.W.3d 51, 58 (Tex. 2008), the Texas Supreme Court reiterated the "paramount principle" that "Texas courts should uphold contracts negotiated at arm's length by 'knowledgeable and sophisticated business players' represented by 'highly competent and able legal counsel.'" (quoting *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 180 (Tex. 1997)). None of these factors are present here. The terms of the Lien

Releases were not negotiated at arm's length. In fact, Addicks had no bargaining power—its only choices were to sign the Lien Releases or not get paid for the contract work it had done. Addicks, although an experienced contractor, was not a sophisticated business player. Addicks was not represented by counsel during the time GGP-Bridgeland required it to execute the Lien Releases. Additionally, the language in the Lien Releases was not clear. *See id.* at 60. No compelling reason exists to accept Bridgeland's interpretation of the Lien Releases, and to do so would violate the spirit and intent of the applicable provisions of the Texas Property Code.

CONCLUSION

For all of the foregoing reasons and those set forth in Addicks' Appellant's Brief, Addicks respectfully requests that this Court reverse the district court's erroneous summary judgment in favor of Bridgeland, and remand the case for trial.

Dated: July 14, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 2,761 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: July 14, 2009

Cynthia A. Holub

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of Appellant Addicks Services, Inc. was filed with the Court by Federal Express and in electronic format, on the 14th day of July, 2009, and two copies of the brief and an electronic copy of the brief were served on all counsel of record, as listed below, by Federal Express on the same date:

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