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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2017-02659

STARR CAPITAL PARTNERS, LLC & others[1]

vs.

TOLL BROTHERS, INC. & another[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Starr Capital Partners, LLC, Smith Legacy Partners Series, LLC, Smith Legacy Partners II, LLC, 505-507 Common Street, LLC, 527 Common Street, LLC (collectively, "Starr") commenced this action against defendants Toll Brothers, Inc. and Belmont Residential, LLC (collectively, "Toll") alleging contract and tort claims arising out of an alleged option to purchase certain commercial property located in Belmont, Massachusetts. This case is before the court on Toll's motion for summary judgment. For the following reasons, Toll's motion is **ALLOWED**.

BACKGROUND

The court takes the following facts, viewed in the light most favorable to Starr as the nonmoving party, from the summary judgment record.[3] The court reserves additional facts for discussion.

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[1] Smith Legacy Partners Series, LLC; Smith Legacy Partners II, LLC; 505-507 Common Street, LLC; 527 Common Street, LLC

[2] Belmont Residential, LLC

[3] Except where noted, all exhibits referenced herein are from the Joint Appendix.

The property at issue in this case consists of eight parcels of land located on Common Street and Horne Road in the Cushing Square area of Belmont, Massachusetts ("Property"). Exhibit 1 to Complaint ("Description of Property" is exhibit A to Agreement for Sale). A gas station and a dry cleaner were located at the Property at one time, causing releases of oil and hazardous materials over the years, as reported to the Massachusetts Department of Environmental Protection ("DEP"). See Exhibit F, at 4-6 (description of releases); Exhibit LLL at 5-7 (same); Exhibit Q, Table 1 (description of releases and links to relevant DEP files); Exhibit FF, at 1-2 (description of releases from dry cleaners). Starr resolved some, but not all, of these releases. See Exhibit F, at 4-6; Exhibit FF, at 1-5.

In July 2013, Starr received a special permit from the Town of Belmont ("Town") to build a mixed-use development at the Property which would consist of 115 residential units, over 38,000 square feet of retail space, and a parking garage ("Project"). See Exhibit H, at 12-13 (Planning Board Decision); Exhibit M (Planning Board Extension, extending special permit to December 2016 as long as Starr met certain Project benchmarks). By January 2016, Starr had spent over $11,000,000 on the Project, $2,000,000 of which was for environmental costs. See Exhibit K (listing development costs paid as of January 2016).

Starr and Toll had discussions regarding the sale of the Property in early 2015, but they did not progress beyond the preliminary stage. Although the parties dispute the reasoning for the sale,[4] it is undisputed that Starr did eventually agree to sell the Property to Toll, and on March

[4] Toll contends that Starr was having financial difficulties, and that the Town was pressuring Starr to make progress on the Project after deadlines were missed or extended. See Exhibit L, pars. 4-5 (William Lovett's affidavit); see Exhibit M (conditioning one-year extension of special permit on Starr's meeting certain benchmarks on Project); Exhibit N (email from Chris Starr to William Lovett referencing Starr's "cash flow needs" and stating Starr was "tight on cash"). Starr disputes these reasons, asserting that Starr's preference had been to obtain a construction loan that would leave Starr owning the Project, Exhibit E, at 87 (Chris Starr's deposition testimony), and that after speaking with William Lovett of Toll and "run[ning] the numbers," Toll had offered a "pretty reasonable deal" in

14, 2016, they entered into an Agreement of Sale ("Agreement") pursuant to which Starr sold and Toll purchased the Property. They executed a First Amendment on April 13, 2016, a Second Amendment on September 2, 2016, and a Third Amendment on September 28, 2016. The purchase price was $14,260,000 and included the "development approvals" that Starr had obtained. See Exhibit 1 to Complaint, § 2. During their negotiations, Starr represented to Toll that the expected remediation costs were $1,310,000, and this amount was included in the Agreement as the remediation budget. Exhibit D, § 26(b).

The parties closed the sale in October 2016. See Exhibit NNN (Closing Settlement Statement). After closing, pursuant to the Agreement, Toll "assume[d] responsibility, at [Toll's] cost, for remediation of the Existing Environmental Conditions (the 'Remediation')." Exhibit 1 to Complaint, § 17(b).

Also after closing and after the "completion of the Retail Unit . . . and provided [Starr] [was] not in default under th[e] Agreement, [Toll] [was to] notify [Starr] in writing of [Starr's] right to purchase the Retail Unit . . . which notice [was to] be sent no earlier than the date that [was] one (1) month following the date [Toll] receive[d] its temporary certificate of occupancy for the Retail Unit portion of the Property" ("Option"). Exhibit D, § 26 (titled Retail Unit Purchase Right). This Option was "a material inducement for [Starr's] agreement to sell the Property to [Toll]." Id. "The purchase price (the 'Retail Price') to be paid by [Starr] to [Toll] for the Retail Unit [was to] be equal to the sum of (1) the actual cost incurred by [Toll] of delivering the Retail Unit to [Starr], plus (2) a fee of 1.5% of the actual cost under (1) . . . ." Exhibit D, § 26(a). The "actual cost" included,

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which Starr would "buy[] [the Property] back at cost." Exhibit E, at 87-88. Chris Starr testified, however, that he did not remember why Starr decided to enter into the deal with Toll. See Exhibit E, at 88.

"without limitation, all soft costs (approvals, permits, design and engineering), hard costs (materials and labor), management costs and fees (costs of construction management and general contractor . . .), insurance costs, financing costs . . ., all costs under the Existing Leases . . ., *a prorata share of the costs of Remediation of the Existing Environmental Conditions* including the costs of the so-called 'cost cap' environmental insurance and any deductibles thereunder (which proration of Remediation costs will be fifty two percent . . . of the Remediation costs being paid by [Starr] and forty-eight percent . . . of the Remediation costs being paid by [Toll] . . .), and a prorata share of the costs of remediation of any Unknown Conditions with the same remediation proration formula (52% to 48%) being applied to the costs of remediating any Unknown Conditions . . ., *with all of the foregoing costs being documented to [Starr's] reasonable satisfaction*."

Id. (emphasis added).

Starr

"acknowledge[d] that costs of the Remediation of the Existing Environmental Conditions for the Property may exceed the mutually agreed Remediation Budget of . . . [$1,310,000]. In addition, if there [were] Unknown Conditions which are not fully covered by the Environmental Insurance Policy . . ., then there may be additional remediation costs in connection with the Project ('Remediation Costs – Unknown Conditions'). In regards to these elements, the parties agree[d] as follows:

(1) all costs of remediation (whether for Remediation of Existing Environmental Conditions or for remediation of Unknown Conditions) [were to] be components of determining the 'actual costs' . . . of delivering the Retail Unit . . . .

(2) if the cost of Remediation of the Existing Environmental Conditions for the Project exceed[ed] . . . [$1,441,000], then all such excess costs [were] herein referred to as 'Remediation Overruns – Known Conditions'. If [Starr] exercise[d] its right to purchase the Retail Unit then [Starr] [was to] be responsible for one hundred percent . . . of the Remediation Overruns – Known Conditions, not simply the prorata portion thereof attributable to the Retail Unit.

(3) if the cost of Remediation of Existing Conditions and any Unknown Conditions exceed[ed] . . . [$2,500,000] (the 'Upset Threshold') . . ., then [Starr] [was to] pay the actual amount of all such Remediation costs in excess of the Upset Threshold as such costs are incurred and billed to [Starr] by [Toll] (not as an increase in the Retail Price, but to be paid irrespective of whether [Starr]

elect[ed] to purchase the Retail Unit), failing which [Starr] [would] forfeit its right to purchase the Retail Unit under this Section 26.

(4) [Starr] and [Toll] agree[d] that the budget for the Remediation of the Existing Environmental Conditions [was] . . . [$1,310,000]. [Starr] and [Toll] further agree[d] that during the Due Diligence Period[5] a mutually approved scope of work for the Remediation (with the intended goal of obtaining 'Permanent Solution Status without Conditions')[6] [was to] be established. Any changes in the scope of work for the Remediation [was to] be subject to the parties' mutual approval, not to be unreasonably withheld or delayed."

Exhibit D, § 26(b)(1)-(4); see Exhibit L, par. 12 (Affidavit of Toll's William Lovett, explaining that, "[e]ssentially, Toll was willing to split the costs of the environmental remediation if [Starr's] budget [i.e., $1,310,000] was accurate; but, if it was not accurate, Toll was not going to be the party to bear the burden of those expenses in the event that [Starr] chose to exercise the Option and enjoy the benefits of Toll's remediation").

As of February 2017, Starr and Toll were still negotiating the remediation scope, and Starr stated that while "the areas where [they] are not in agreement are in the minority, [Starr] ha[d] deep concerns in a few areas." Exhibit QQ (email from Chris Starr to William Lovett). On March 3, 2017, William Lovett of Toll emailed Chris Starr a budget comparison, showing the differences between the budget that Starr proposed and the budget that Toll proposed. Exhibit

[5] The Agreement defined the Due Diligence Period as "the period of time . . . commencing upon the execution of this Agreement and expiring on the later of (A) sixty (60) days thereafter, and (B) thirty-five (35) days after receipt by [Toll] from [Starr] of" certain studies. Exhibit 1 to Complaint, § 13. If Starr was "unable to obtain one or more of the . . . [studies] by July 15, 2016, then [Toll] agree[d] that the Due Diligence Period [would] be deemed to expire no later than August 19, 2016, irrespective of whether [Starr] ha[d] obtained the . . . [studies] by August 19, 2016." Id. The Due Diligence Period ended on September 2, 2016. Exhibit U, par. 18 (Complaint).

[6] This status is achieved pursuant to the Massachusetts Contingency Plan, set forth at 310 Code Mass. Regs. § 40.000. See 310 Code Mass. Regs. § 40.1041(1) (explaining when "Permanent Solution with No Conditions shall apply"). "An eligible person shall be exempt from liability to the commonwealth or to any other person . . . for any release of oil or hazardous material at the site or portion of a site owned or operated by said eligible person, as delineated in a waste site cleanup activity opinion, for which a permanent solution or remedy operation status exists and is maintained or has been achieved and maintained in accordance with such opinion, provided that all of the requirements of this section are met." G.L. c. 21E, § 5C(a).

NN; see Exhibit PP (Budget Analysis). The Environmental Cost Summary, dated April 26, 2017, shows the total projected cost for remediation was $4,090,691.49. Exhibit UU.

In an email dated April 28, 2017, Chris Starr informed Toll of Starr's "serious reservations on the approach [with respect to environmental issues] being taken by Toll. [His] fear [was] that [Toll's] current approach could easily add an additional $750,000 or more to the [P]roject cost." Exhibit AAA, at TOLL064630. One issue that Chris Starr raised was the soil disposal for which Toll had allocated $1,929,150. See id.; Exhibit UU. Chris Starr wrote that in September 2016, he and William Lovett had agreed that soil disposal was not included in the cost, explaining that "it is not reasonable that [Starr] pay for all of the soil removal at the site as it would be done regardless of whether or not the site was contaminated. Only incremental cost should be considered remediation cost." Exhibit AAA, at TOLL064631. Further, Toll's scope did not include a "soil reuse component" and Chris Starr "request[ed] that on-site soil reuse be integrated back into the remediation plan, as [they] agreed in September." Id.

Sage Environmental Inc. ("Sage") was the licensed site professional that Toll retained to oversee remediation of the Property. At a meeting in June 2017 between Toll, Sage, and Starr, Toll informed Starr that the costs would exceed not only the mutually-agreed-upon remediation budget of $1,310,000, but also the Remediation Overrun of $1,410,000. See Exhibit D, § 26(b)(2).

In a letter dated April 2, 2018, Toll informed Starr that, pursuant to § 26(b)(3) of the Agreement, "the cost of Remediation of Existing Environmental Conditions and any Unknown Conditions exceed[ed] the $2,500,000 Upset Threshold . . . . If [Starr] fail[ed] to pay the actual amount of all Remediation costs in excess of the Upset Threshold as such costs [were] incurred and billed to [Starr], [Starr] [would] forfeit its right to purchase the Retail Unit under Section 26

of the Agreement." Exhibit V. Toll included an invoice with this letter itemizing the amounts ("Invoice"). See id. Starr disputes that all of the amounts listed in the Invoice are costs of remediation. See Exhibit WW, pars. 10-11, 19-32, 65-86 (affidavit from Starr's licensed site professional noting, in part, that excessive costs listed on Invoice total $3,696,158.86, $1,434,325.85 of which were total non-remediation costs).

Rather than pay the Invoice, Starr filed a motion for a preliminary injunction on April 27, 2018, seeking to enjoin Toll from demanding payment of the $2,211,016.65 that Toll sought in its April 2018 letter. Exhibit W (Starr's motion for preliminary injunction). In a decision dated May 15, 2018, this court (Billings, J.) allowed Starr's motion only insofar as it extended the deadline for payment of the $2,211,016.65 to May 31, 2018, otherwise it denied the motion. Exhibit X, at 6. Starr's motion for reconsideration of the decision and its appeal to a single justice pursuant to G.L. c. 231, § 118, were both unsuccessful. See Exhibit Z; Exhibit AA; Exhibit BB. In a letter dated June 4, 2018, Toll informed Starr that, as Starr had "failed to make payment by the deadline . . ., pursuant to Section 26(b)(3) of the Agreement, [Starr] ha[d] forfeited its right to purchase the Retail Unit. . . . [and] any option to purchase that [Starr] had under the Agreement [was] hereby terminated." Exhibit CC.

To date, Toll has spent approximately $10,000,000 in environmental remediation costs.

DISCUSSION

I. Standard of Review

Summary judgment is granted where there are no genuine issues of material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively

demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 808-809 (1991); Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989); see Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). The court considers the evidence presented in the light most favorable to the nonmoving party. Mass. R. Civ. P. 56(c); Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991); Parent v. Stone & Webster Eng'g Corp., 408 Mass. 108, 113 (1990); Flynn v. Boston, 59 Mass. App. Ct. 490, 491 (2003). The nonmoving party, however, cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. LaLonde v. Eissner, 405 Mass. 207, 209 (1989). "[B]are assertions and conclusions . . . are not enough to withstand a well-pleaded motion for summary judgment." Polaroid Corp. v. Rollins Envtl. Servs., Inc., 416 Mass. 684, 696 (1993).

II. **Analysis**

The entirety of Starr's action against Toll rests on the interpretation of Section 26(b) of the Agreement, specifically the terms concerning the "budget" and "scope" of the remediation of the Property. Starr contends and Toll disputes that the language in § 26(b)(4) concerning scope approval means that Starr had the right to approve all changes in remediation *costs*, and Starr points to exhibit C to the Second Amendment as support. Despite their lack of agreement over the meaning of the terms of the Agreement, Starr and Toll agree, as does the court, that the terms are unambiguous, thus this matter is one of law appropriate for resolution on summary judgment. See Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779 (2002) ("If a contract . . . is unambiguous, its interpretation is a question of law that is appropriate for a judge to decide on summary judgment."); see also Balles v. Babcock Power Inc., 476 Mass. 565, 571 (2017) ("When contract language is unambiguous, it must be construed according to its plain meaning."); Boland v.

George S. May Int'l Co., 81 Mass. App. Ct. 817, 825 (2012) ("'The construction of a written contract which is plain in its terms and free from ambiguity presents a question of law for the court.'" (citation omitted)); Suffolk Constr. Co., Inc. v. Illinois Union Ins. Co., 80 Mass. App. Ct. 90, 94 (2011) ("The mere existence of a disputed interpretation by the parties does not create an ambiguity.").

The court starts with an examination of § 26. See Balles, 476 Mass. at 571 ("[W]hen the language of a contract is clear, it alone determines the contract's meaning . . . ."). Section 26(a) defined the purchase price for the Option as the "actual cost" Toll incurred in delivering the Retail Unit to Starr plus 1.5% of that actual cost. The "actual cost," in turn, consisted of a number of costs, including a prorata share of the costs of Remediation of the Existing Environmental Conditions and a prorata share of the costs of remediation of any Unknown Conditions. All of these costs were to be "*documented* to [Starr's] reasonable satisfaction." (Emphasis added). This language does not create a right of approval of the costs themselves; rather, Starr must be satisfied by Toll's documentation of those costs. Starr does not argue that Toll's documentation was unsatisfactory.

Section 26(b) discussed the Remediation cost portion of the Option's "actual cost" in more detail. In the introductory paragraph to that section, Starr acknowledged, first, "that costs of the Remediation of the Existing Environmental Conditions for the Property may exceed the mutually agreed Remediation Budget of" $1,310,000, and second, that "there may be additional remediation costs in connection with the Project" if there are "Unknown Conditions which are not fully covered by the Environmental Insurance Policy . . . ." Section 26(b)(1) stated that "all costs of remediation (whether for Remediation of Existing Environmental Conditions or for remediation of Unknown Conditions)" were "components of determining the 'actual costs' . . . of

delivering the Retail Unit . . . ." Similarly, these provisions do not create a right of approval of remediation costs; rather, Starr agreed not only that the previously agreed-upon budget amount of $1,310,000 could increase, but also that "Unknown Conditions" could arise that, inferentially, could contribute to an increase in the budget amount.

Subsections (b)(2) and (b)(3) concerned those two different scenarios which Starr acknowledged could increase the budget amount. First, if the cost of Remediation of the Existing Environmental Conditions exceeded not merely $1,310,000 but also $1,441,000, then Starr was responsible for 100% of those excess costs if it exercised the Option, "not simply the prorata portion thereof attributable to the Retail Unit." Second, if the cost of Remediation of Existing Environmental Conditions "and any Unknown Conditions" exceeded $2,500,000, then Starr was responsible for the costs in excess of $2,500,000 as Toll incurred and billed those costs to Starr. Neither of these subsections indicated that Starr had any right of approval over the remediation costs.

Finally, in § 26(b)(4), the parties reiterated their agreement that "the budget for the Remediation of the Existing Environmental Conditions" was $1,310,000 and that, during the pre-closing Due Diligence Period, they would establish "a mutually approved scope of work for the Remediation (with the intended goal of obtaining 'Permanent Solution Status without Conditions') . . . ." The parties further agreed that "*[a]ny changes in the scope of work for the Remediation [would] be subject to the parties' mutual approval*, not to be unreasonably withheld or delayed." (Emphasis added). The "the mutually approved scope of work for the Remediation" is set forth in exhibit C to the Second Amendment to the Agreement. Exhibit C, § 5. That exhibit defined the "Scope of Work for Remediation" as "[a]ll costs associated with the onsite, or offsite cleanup or remediation associated with the [P]roperty, including but not limited

to the cost, fees and requirement of [Massachusetts Contingency Plan] filings, including but not limited to the [Release Abatement Measure] Plan,[7] insurance costs, testing, Brownfield[s] Tax Credit[8] filing and consultant fees, consultants, attorneys, agency satisfaction of site status, insurance and reporting." Exhibit C, ex. C.

Starr relies on the above-italicized language in § 26(b)(4), as well as the definition of the remediation scope of work in exhibit C to the Second Amendment, for its argument that it has a right of approval of all remediation-related costs. This argument fails.

The parties mutually agreed that the scope of the remediation broadly included "[a]ll costs associated with the onsite, or offsite cleanup or remediation associated with the [P]roperty . . . ." If that scope were to change, then both parties had to agree to the change. Starr's argument appears to be that it disagrees with the characterization of certain aspects of Toll's work as "remediation" such that the inclusion of these aspects in the total amount that Toll sought for the Option changed the scope. Given the broad definition of the remediation scope, however, Starr has not demonstrated that it will be able to prove at trial that Toll changed the scope of remediation without Starr's approval.

Notably, the "mutually approved scope of work for the Remediation" included the Release Abatement Measure Plan, or RAM Plan. The RAM Plan is defined in § 17(b) of the Agreement. Under that provision, Toll was required to have its licensed site professional, here, Sage, file with the DEP a RAM Plan "defining the Remediation process which will be pursued

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[7] The Massachusetts Contingency Plan at § 40.0441 through § 40.0449 sets forth "the requirements and procedures for conducting Release Abatement Measures." 310 Code Mass. Regs. § 40.0440.

[8] The Brownfields Tax Credit provides a business corporation with a tax credit on certain "net response and removal costs" if, in pertinent part, the corporation "achieves and maintains a permanent solution . . . ." G.L. c. 63, § 38Q(a); G.L. c. 62, § 6(j); see Northeastern Univ. v. Commissioner of Revenue, 92 Mass. App. Ct. 1120, 2017 WL 6612896 at *1-2 (2017) (Rule 1:28 decision) (discussing Brownfields Tax Credit).

by [Toll] with the goal of prosecuting the Remediation of the Existing Environmental Conditions to achieve Permanent Solution status without conditions . . . ." Exhibit A, § 17(b). Sage did file this RAM Plan with the DEP in March 2017, and the plan left open the possibility that all soil would be removed from the Property and discussed the dewatering process on the Property, see Exhibit F, at 45-46, 48-49, Appendix F (Soil Management Plan), Appendix G (Construction Dewatering and Groundwater Management Plan), Appendix H (Focused Method 3 Human Health Risk Assessment), two major issues that Starr raises with the Invoice. See Exhibit 7 to Complaint (Starr's June 2017 demand letter to Toll); see, e.g., Exhibit WW, pars. 21, 22 (Starr's licensed site professional's affidavit averring that Toll and Starr "had agreed long ago that the costs related to dewatering were to be considered construction [and not remediation] costs" and that "soil did not have to be removed 'for the purpose of achieving a Permanent Solution under [G.L.] c. 21E' and costs related to that soil are not Remediation Costs").

The Agreement did not provide Starr with any right of approval as to any aspect of this RAM Plan. Rather, Starr agreed, pursuant to the plain terms of the Agreement, that all costs associated with the RAM Plan were within the scope of the remediation. Therefore, Starr cannot now challenge aspects of the Project that fell within the RAM Plan component of the scope over which it had no right of approval.[9] Moreover, Starr expressly acknowledged that the "costs of the Remediation . . . may exceed the mutually agreed Remediation budget" of $1,310,000; the plain terms of the Agreement did not provide Starr with the right to approve the costs that

[9] In a February 2017 email to William Lovett, Chris Starr wrote that he "was lead [sic] to believe that [Starr] would see the RAM plan prior to its submission to the DEP . . . . What [Starr] got instead was an incomplete RAM plan . . . . [that] lacked the most important section – the Soil Management Plan." Exhibit QQ. Pursuant to the Agreement, however, Toll was solely responsible for the RAM Plan, which Starr agreed was included within the scope of remediation.

exceeded the budget. Consequently, Toll is entitled to summary judgment on Count I, alleging breach of contract.[10]

It follows that Starr's other claims against Toll also do not survive summary judgment. First, Starr alleges that Toll breached the implied covenant of good faith and fair dealing by engaging in a recurring pattern of excluding Starr from the decision-making process regarding the remediation scope and its associated costs. As concluded above, however, Starr had no right of approval over the costs, and Starr had no right of approval over the components of the scope which Starr now challenges, as they were solely Toll's responsibility. See Chokel v. Genzyme Corp., 449 Mass. 272, 276 (2007) ("'The scope of the covenant is only as broad as the contract that governs the particular relationship.' . . . The covenant does not supply terms that the parties were free to negotiate, but did not, . . . nor does it 'create rights and duties not otherwise provided' for in the contract . . . ." (alteration and citations omitted)); Uno Rests., Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 388 (2004) ("[T]he covenant of good faith and fair dealing does not serve to impute greater rights or impose impractical duties not contemplated in the contractual relationship . . . ."); see also T.W. Nickerson, Inc. v. Fleet Nat'l Bank, 456 Mass. 562, 574 (2010) ("There is a presumption that all parties act in good faith, and the plaintiff bears the burden of presenting evidence of bad faith or an absence of good faith."). Toll is therefore also entitled to summary judgment on Count II.

Second, Starr bases its misrepresentation claim on William Lovett's alleged oral statement to Chris Starr that Toll needed Starr's approval to exceed the $1,310,000 remediation budget. See Exhibit E, at 347 (Chris Starr's deposition testimony). To recover on a claim for

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[10] The court notes that if Starr's breach of contract claim survived summary judgment and Starr thereafter prevailed on this claim, Starr would be limited to specific performance pursuant to § 26(j) of the Agreement.

misrepresentation, the plaintiff "must establish [1] that the defendants made a false representation of material fact, [2] with knowledge of its falsity, [3] for the purpose of inducing the plaintiffs to act on this representation, [4] that the plaintiffs reasonably relied on the representation as true, and [5] that they acted upon it to their damage." Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc., 455 Mass. 458, 471 (2009). Even if Starr could prove the first three elements at trial, as well as the fact that they were damaged by having acted on William Lovett's representation, Starr cannot demonstrate that its reliance on the representation was reasonable. See id. at 474 ("Although usually a question for the jury, whether the plaintiffs' reliance was reasonable and justifiable can be a question of law where the undisputed facts permit only one conclusion."). As established above, the plain terms of § 26 did not provide Starr with the right to approve changes to the remediation budget or costs. "[A] plaintiff's reliance on oral statements in light of contrary written statements is unreasonable as a matter of law." Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 59 (2004). Starr has not demonstrated that it will be able to prove at trial that any reliance on William Lovett's purported representation was reasonable. Toll is therefore entitled to summary judgment on Count IV.[11]

Third, in Count III, Starr alleges that Toll acted unfairly and deceptively in violation of G.L. c. 93A, § 11, by changing the scope and increasing the costs of the remediation without Starr's approval and in order to prevent Starr from exercising the Option. For the same reasons that Starr's breach claims and misrepresentation claim fail, this claim fails as well. Moreover, as

[11] Although it is not clear, it appears from Chris Starr's deposition testimony that William Lovett allegedly made this representation prior to the September 2016 execution of the Second Amendment to the Agreement. See Exhibit E, at 343-347. To the extent that this representation is considered prior to or contemporaneous with the Agreement and its amendments, it would be parol evidence that could not vary or contradict the Agreement because, as Starr and Toll agree, the Agreement is unambiguous. See Winchester Gables, Inc. v. Host Marriott Corp., 70 Mass. App. Ct. 585, 591 (2007). The court notes, however, that the operative version of § 26 that the parties agreed to as part of the Second Amendment to the Agreement is, in all relevant respects, unchanged from the original § 26 appearing in the Agreement executed in March 2016. See Marram, 442 Mass. at 59.

Toll points out, Starr has not demonstrated that it will be able to prove at trial that that Toll acted unfairly or deceptively where the "massive amount of discovery in this case" has not revealed "a single email exchange, internal Toll document, or piece of direct testimony evidencing or suggesting that" Toll engaged in a scheme to prevent Starr from exercising the Option.[12] See Defendant's Memorandum in Support of Motion for Summary Judgment, at 15. Toll is thus entitled to summary judgment on Count III.[13, 14]

Finally, in Count V, Starr asks the court to declare that Toll is liable for breach of contract, breach of the implied covenant of good faith and fair dealing, misrepresentation, and violation of G.L. c. 93A, § 11, and to declare the fair and reasonable remediation and construction costs. The court **DECLARES** that Toll is not liable under those claims, and that, consequently, the court need not make a declaration as to the fair and reasonable remediation and construction costs. See 146 Dundas Corp. v. Chemical Bank, 400 Mass. 588, 589 n.4 (1987)

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[12] In an email dated June 19, 2018, Toll's project manager, Otto Weiss responded, "Giddy up" to the information that, if Toll had "8 million in expenses[,]" then the "protentional percentage tax credit" for Toll "[w]ithout the AUL [activity and use limitation]" would be $4,000,000. Exhibit DDD; see G.L. c. 63, § 38Q (providing corporation with "[a] credit of 50 per cent" of "the net response and removal costs" if corporation "achieves and maintains a permanent solution or remedy operation status in compliance with chapter 21E and the Massachusetts contingency plan provided in 310 [Code Mass. Regs.] 40.0000 which does not include an activity and use limitation"); 310 Code Mass. Regs. § 40.0006 (defining "activity and use limitation" as "a Grant of Environmental Restriction or Notice of Activity and Use Limitation recorded, registered or filed in accordance with 310 [Code Mass. Regs.] 40.1070 through 310 [Code Mass. Regs.] 40.1099"). The court cannot infer unfair or deceptive conduct from Otto Weiss's response merely because this email exchange occurred after Toll terminated Starr's Option in a letter dated June 4, 2018. See Exhibit CC. This inference is further unreasonable in light of the extensive discovery that, as noted above, has not revealed any scheme to run up the remediation costs in order to impede Starr's ability to exercise the Option.

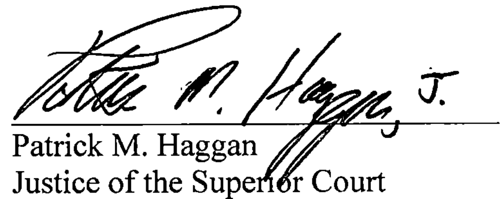
[13] The court also notes that, to the extent that this claim is duplicative of Starr's breach of contract claim – which it is, at least in part – it would not survive summary judgment even if it had survived on its merits because the damages limitation provision set forth at § 26(j) would preclude Starr from recovering. See Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 374, 377, 379 (1990) (holding that damage limitation provision between "sophisticated business entities . . . is a reasonable business practice" and that it could bar remedies under G.L. c. 93A where G.L. c. 93A claim is duplicative of another claim and where "the dispute is a purely commercial one that does not affect the public interest").

[14] Count VI seeks "Injunctive Relief – Temporary Restraining Order/Preliminary Injunction" pursuant to G.L. c. 93A, § 11. As Starr's G.L. c. 93A claim fails, its claim for injunctive relief under that statute fails as well.

("Although the judge's determination can be viewed as a declaration of rights, [the Supreme Judicial Court has] remind[ed] litigants and judges that, under G.L. c. 231A, the judge should declare the rights of the parties, even on motions for summary judgment."); Molly A. v. Commissioner of Dep't of Mental Retardation, 69 Mass. App. Ct. 267, 288-289 (2007) ("When a complaint requests declaratory relief, the judge must declare the rights of the parties, even when relief is denied, . . . and even on motions for summary judgment . . . .").

ORDER

For the foregoing reasons, Toll's motion for summary judgment is **ALLOWED**, and the court **DECLARES** that Toll is not liable under Starr's complaint, and that, consequently, the court need not make a declaration as to the fair and reasonable remediation and construction costs.



Patrick M. Haggan
Justice of the Superior Court

DATE: August 5, 2021