**ACME ABATEMENT CONTRACTOR, INC. *vs.* S&R CORPORATION.**

**14-P-257**

**APPEALS COURT OF MASSACHUSETTS**

***88 Mass. App. Ct. 1102*; *36 N.E.3d 78*; *2015 Mass. App. Unpub. LEXIS 855***

**August 20, 2015, Entered**

**NOTICE:** SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *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 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, 881 N.E.2d 792 (2008)*.

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**JUDGES:** Kafker, C.J., Meade & Maldonado, JJ.

**OPINION**

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

The plaintiff, **Acme Abatement** Contractor, Inc. (**Acme)**, appeals from the dismissal of its action following an order allowing the summary judgment motion of the defendant S&R Corporation (S&R) and denying **Acme's** motion for summary judgment.

The parties entered into a subcontract, whereby S&R employed the services of **Acme,** an asbestos removal contractor, for work under S&R's contract with the town of Weymouth to demolish structures at the Great Pond Water Treatment Plant and bleachers at Logan Field. In dispute is the scope of work **Acme** needed to perform under the subcontract to remove paint from stadium bleachers. **Acme** contends that the subcontract required it to remove only asbestos-containing materials, and that because the paint on the bleacher risers contained no asbestos, it did not fall within the scope of work required under the subcontract with S&R. S&R makes two counter arguments. It contends its subcontract with **Acme** included the removal of paint from the risers because the subcontract assumed the riser paint contained asbestos. It also argues that, even if **Acme** disputed removal of the riser paint, **Acme** was required under a further provision of the subcontract to remove the paint from the area in dispute and litigate the scope of the work later. We agree with the latter argument and uphold the decision of the motion judge.

*Discussion*. *Standard of review*. "We review the disposition of a motion for summary judgment de novo." *Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group, 469 Mass. 800, 804, 17 N.E.3d 1056 (2014)*. "Summary judgment is appropriate where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." *Ibid.*

*Breach of contract*. **Acme** asserts the subcontract, which required it to remove only asbestos-containing material from the bleachers and did not specify the removal of paint from the risers, is ambiguous at best. Because we conclude **Acme** breached paragraph 21 of the "Terms and Conditions" of the subcontract, we need not

and do not resolve **Acme's** challenge to the scope of the work.

Paragraph 21 provides relevantly as follows:

> "In the event of any dispute, controversy or claim between the Contractor [(S&R)] and the Subcontractor [(**Acme)**], the Subcontractor agrees to proceed with the Work[1] or extra work without delay and without regard to such dispute, controversy, claim or the tendency [*sic*] of any proceeding in relation to the same. The failure of the Subcontractor to comply with the provisions of this paragraph shall constitute a material breach of this agreement . . . ."

**Acme** does not dispute that it refused to comply with S&R's request to remove the paint from the bleacher risers, violating paragraph 21. Nevertheless, **Acme** contends that S&R acted in bad faith, breaching the implied covenant of good faith and fair dealing and rendering paragraph 21 unenforceable, when it insisted that **Acme** remove the riser paint. **Acme** makes this argument for the first time on appeal; therefore, we deem it waived and we do not address it. See *Carey v. New England Organ Bank, 446 Mass. 270, 285, 843 N.E.2d 1070 (2006)*.[2]

> 1 The "Work" is defined as "[a]ll the materials and equipment to be furnished and labor, work, and other services to be performed and completed by the Subcontractor pursuant to [the] subcontract."
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> 2 Neither a transcript of the arguments presented at the summary judgment hearing, nor the briefs filed in support of that motion, appear in the record appendix, and **Acme** does not refute S&R's claim that **Acme** did not present this argument to the judge below. Rather, **Acme** makes a claim in its reply brief, which we also reject, that "the trial court judge should have recognized, as a matter of law," that S&R could have acted in bad faith. See *Carey, 446 Mass. at 285* ("The plaintiffs never put the judge on notice that they opposed summary judgment on this theory").

*Quantum meruit*. **Acme** contends that, even if it breached the subcontract, it is still entitled to payment in equity for having "substantial[ly] perform[ed]" the requirements of its subcontract with S&R.[3] *J.A. Sullivan Corp. v. Commonwealth, 397 Mass. 789, 793, 494 N.E.2d 374 (1986)*. Recovery under a theory of quantum meruit is available when "there is an honest intention to go by the contract, and a substantive execution of it, but some comparatively slight deviations as to some particulars provided for." *Hayward v. Leonard, 24 Mass. 181, 7 Pick. 181, 187 (1828)*. **Acme** bears the burden of proof. *J.A. Sullivan Corp., supra at 796*.

> 3 **Acme** does not argue here that it is entitled to payment under the remedies provisions of the subcontract. Because the argument was not raised, it is waived. See *Mass.R.A.P. 16(a)(4)*, as amended, 367 Mass. 921 (1975); *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co., 469 Mass. 813, 833 n.22, 17 N.E.3d 1066 (2014)*.

**Acme's** deviations from the subcontract here were not comparatively slight. Paragraph 21 of the subcontract effectively required **Acme** to perform immediately and argue later. **Acme** intentionally failed to comply, and, in doing so, forced S&R to seek and hire another contractor to complete the disputed work on the risers, so as not to be in breach of its master contract with the town. This additional work cost S&R either $36,900 or $47,161.40, which amounted to either one-quarter or one-third, respectively, of the total subcontract price.[4] Compare *ibid.* (balance of remaining work was only $32,000 out of a $5.7 million contract). Furthermore, while **Acme** claims ambiguity as to the scope of the work required under the subcontract, it claims no such ambiguity as to paragraph 21 and does not dispute breaching that provision. Accordingly, where **Acme** "intentional[ly] depart[ed] from the contract in a material matter without justification or excuse," its claim for recovery under quantum meruit is precluded. *Divito v. Uto, 253 Mass. 239, 243, 148 N.E. 456 (1925)*.[5]

> 4 The parties dispute the amount expended in completion of the work. **Acme** claims S&R paid $36,900, while S&R claims it paid $47,161.40. The total **Acme** subcontract price was $144,500.
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> 5 In light of our discussion of the breach of contract and quantum meruit claims, there was similarly no basis for **Acme** to recover under *G. L. c. 93A*, and that claim properly was dismissed.

*Judgment affirmed*.

By the Court (Kafker, C.J., Meade & Maldonado, JJ.[6]),

> 6 The panelists are listed in order of seniority.

Entered: August 20, 2015.