

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

In the Matter of the Liquidation of the Home Insurance Company

No. 03-EQ-106, 2008-HICIL-34

**ORDER**

The claimant, Swan Transportation Company ("Swan"), filed a motion to recommit and requests this court review the decision of the referee enforcing a settlement between Home Insurance Company ("Home") and Swan. Swan alleges the referee erred in upholding an agreement between the parties instead of reviewing its proof of claim as submitted. Swan further alleges the referee essentially allowed the liquidator of Home to amend its proof of claim by relying on a void settlement between Swan and Home. The Liquidator objects. Because Swan has sustained its burden of showing the settlement agreement was not enforceable by Home, its motion to recommit is GRANTED.

Home issued two \$15,000,000 general liability policies to Swan. Swan faced liability based on injuries to individual claimants from exposure to asbestos, silica and/or mixed dust that exceeds the policy limits and resulted in Swan's bankruptcy. Swan was entitled to indemnification for these claims that would involve Home paying up to the \$30,000,000 combined policy limits. On or about November 27, 2001, Swan and Home entered into a settlement agreement. At the time, Swan's bankruptcy and Home's liquidation were both imminent. To each party, the settlement represented a significant bargain: Swan would release Home from any future claims under its policies in exchange for a \$500,000 immediate payment upon Swan fulfilling certain conditions.

On January 13, 2004, Swan submitted a confirmation order, evincing compliance with the conditions of the settlement. Under the terms of the settlement, Home was obligated to pay the entire \$500,000 amount within ten days. Home did not pay; rather it notified Swan that it could not pay because it had undergone liquidation. Home directed Swan to the liquidator. In June of 2004, Swan filed a proof of claim with the liquidator. The liquidator allowed the claim for the full \$500,000 settlement but categorized the settlement as a class II claim. The effect of this categorization was that the \$500,000 would be distributed on a percentage basis to Swan's claimants over time, just as the liquidator pays other insurance-related claims. Swan objected as this procedure did not give Swan its bargained for consideration. Swan asserts that it only agreed to settle its claims because it needed the funding immediately. If Swan would have to wait for funding just like any other insured, then it seeks the opportunity to prove the full extent of its claims just like any other insured.

RSA 402-C:44, II defines policy related claims as "all claims by policyholders, including claims for unearned premiums in excess of \$50, beneficiaries, and insureds arising from and within coverage of and not in excess of the applicable limits of insurance policies...." The liquidator categorized the 2001 settlement as a class II claim because it related to insurance coverage. A settlement, although a contract, can be interpreted this way when it relates to claims under a policy. Here, because Swan was willing to release all claims under its two policies in exchange for the settlement amount, the liquidator properly interpreted the settlement as relating to policy-related claims and thereby categorizing it as a class II claim. RSA 402-C:44, II. Nonetheless, in transforming the settlement into a class II claim, the liquidator unilaterally and materially altered the terms of the settlement by postponing payment and otherwise altering payment procedures. Home never notified Swan that it would be unable to perform before Swan tendered its perfor-

mance. Once liquidated, Home never sought to assume or rescind the settlement contract pursuant to RSA 402-C:25, XI. The liquidator never sought to renegotiate the terms of the settlement with Swan. In fact, Home pursued Swan's Proof of Claim as it would any other insured's claim in scheduling percentage payments. This decision constitutes a material breach of the settlement contract.

Neither party disputes the validity of the settlement contract; their argument is directed at the consequences of Home's non-performance caused by the liquidation. Swan argues that because Home materially breached the contract, Swan should be entitled to treat the contract as void and submit its proof of claim to the liquidator. A breach of contract claim requires:

(1) the existence of a valid, enforceable contract; (2) performance of the contract by the plaintiff; (3) a breach by the defendant; and (4) damages caused by the defendant's breach. A valid, enforceable contract exists where offer, acceptance, and consideration are present. In addition, there must be a meeting of the minds in order to form a valid contract.

*The Sunapee Difference, L.L.C. v. State*, Merrimack County Superior Ct., No. 07-E-458, (Order of April 17, 2009) (citation and quotations omitted). Further:

Not every breach of duty by one party to a contract discharges the duty of performance of the other. Only a breach that is sufficiently material and important to justify ending the whole transaction is a total breach that discharges the injured party's duties. Whether a delay in payments is a material breach is a question for the trier of fact to determine from the facts and circumstances of the case.

*Fitz v. Coutinho*, 136 N.H. 721, 725 (1993) (citation omitted). There are a number of factors to consider in whether a breach is material:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979).

Considering these factors in reverse order, Home cites as its reason for this breach, that it had undergone liquidation some seven months before Swan's notice letter, and it was not entitled to fulfill the contract. The liquidator defends this action, arguing that under the liquidation statute, the only action Home could take was to classify the settlement agreement as class II and schedule percentage payments. In other words, the liquidator argues that it was bound by the liquidation statute to act as it did.

The court disagrees. Even if a proper reading of the statute supports Home's interpretation that it could not have accepted or rejected the settlement contract because it was not executory, the course of action Home chose was not its only option. Home could have renegotiated the settlement terms with Swan when it became apparent Home would otherwise be forced to breach the agreement due to its liquidation. Once liquidated, the liquidator could have then petitioned the superior court for permission to engage in an alternative settlement or to enforce the settlement already negotiated. Instead, Home ignored Swan's 2004 proof of claim for \$30,000,000 and approved the claim for the settlement amount established in 2001. Swan then filed its objection with the referee.

The liquidator made arguments to the referee directed at the enforceability of the settlement despite Home's non-performance. Home—and now the liquidator—caused substantial delay. Swan has been waiting for payment for over five years. Although “[t]ime is generally not of the essence in a contract, unless the contract specifically so states, even if a particular time schedule is specified[,]” where the initial settlement contemplated an almost-immediate payment, this long delay can be considered prejudicial to Swan's interest. *Fitz*, 136 N.H. at 725. Further, at the September 2011 hearing on this motion, the court attempted to ascertain whether Swan could

be made whole with some amount of monetary damages. Swan explained that the lapse in time resulted in more than monetary damages. The significance of such a long time lapse further demonstrates the materiality of the breach.


The referee did not rule on Swan's proof of claim; instead, the referee relied on Home's representations regarding the settlement agreement and denied Swan's petition on that basis. This was error. A settlement agreement—even one related to insurance claims—is inherently a contract. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979). As such, contract principles govern. Home materially breached the contract when it failed to perform within ten days of receiving Swan's proof of compliance. Because Home breached and the breach was material, Swan had a number of remedies available. The remedy that Swan requested is that it be put back in the position it would have been in had it never settled with Home—in other words, that Home make a determination made based on its policies, rather than an unenforceable settlement. This is the appropriate remedy given the circumstances of this case. *See, Mooney v. Nationwide Mut. Ins. Co.*, 149 N.H. 355, 357(2003); *Patch v. Arsenault*, 139 N.H. 313, 317–18 (1995), (“equitable rescission and restitution is a complete remedy which restores the injured party to the position occupied before the transaction.”).

The terms of the 2001 settlement provide that Swan would release Home from liability only after Home paid the \$500,000 settlement amount. Because Home never paid, Swan's release never became effective. Swan's Home policies are still in effect. As such, Swan is entitled to resubmit its proof of claim, and the liquidator is obligated to treat it as any other insurance-related claim—not as a settlement. It was improper for the referee to rely on the validity of the settlement contract in rejecting Swan's proof of claim. Swan must be treated just like any other

insured, and its policies remain an open question for the referee. As such, Swan's motion to re-commit is GRANTED.

So ORDERED.

Date: October 20, 2011

  
LARRY M. SMUKLER  
PRESIDING JUSTICE