UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	
SB MULTIFAMILY FUND 10 LIMITED PARTNERSHIP,	BKY 4-92-4266
Debtor.	
MOLLY T. SHIELDS, THE TRUSTEE OF THE BANKRUPTCY ESTATE OF SB MULTIFAMILY FUND 10 LIMITED PARTNERSHIP,	
Plaintiff,	ADV 4-93-206
-v.-	
BOR-SON BUILDING CORPORATION, ROLFSHUS ASSOCIATES, STUDIO FIVE ARCHITECTS, ERICKSEN, ROED/JOHNSTON-SAHLMAN ASSOCIATES, INC., AND UNITED STATES FIDELITY AND GUARANTY COMPANY,	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING TRUSTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT
Defendants.	

At Minneapolis, Minnesota, .

The motion of Molly T. Shields, the trustee ("trustee") of the Bankruptcy Estate of SB Multifamily Fund 10 Limited Partnership ("SB") came on for hearing before the Court on October 28, 1993. Appearances were as follows: Robert G. Hensley for the trustee; and David Hammargren and Christopher Elliott for the defendant, Bor-Son Building Corporation ("Bor-Son"). Other appearances were noted in the record.

The Court, having considered the pleadings in the action, memoranda of law, all affidavits, and the arguments of counsel, concludes that the trustee's motion for partial summary judgment should be granted, and makes the following:

FINDINGS OF FACT

1. SB is a Minnesota limited partnership formed to develop, own, and manage a 166 unit multifamily rental housing project located in Chaska, Minnesota, known as Hazeltine Shores Rental Townhomes. The general partner to SB is Sherman-Boosalis Corporation. Bor-Son, Nicholas Boosalis ("Boosalis"), and George Sherman are limited partners. SB began development of the project in 1988. Construction of the project was originally financed by a mortgage loan from ABG Financial Services, Inc. ("ABG") to SB, co-insured by the United States Department of Housing and Urban Development ("HUD"), pursuant to the provisions of section 244 and 221(d)(4) of the National Housing Act. Integrated Funding is the current mortgage holder.

2. Bor-Son is a Minnesota Corporation engaged in the business of general building construction. Bor-Son signed a construction contract with SB on November 17, 1988, and commenced construction of the project in 1988.

3. During the course of construction, fifteen change orders

were issued in connection with the project. A number of the change orders involved extra work by Bor-Son. In the spring of 1990, SB owed Bor-Son approximately $200,000 for change orders already issued. SB needed even more change order work done. Bor-Son refused to do further change order work until the parties resolved the manner in which Bor-Son would be paid for such work.

4. On April 27, 1990, the parties entered into a Letter Agreement ("Letter Agreement") which detailed the foregoing existing situation with respect to change orders and recited that:

> In order to pay for the existing five change orders, and those contemplated for construction buildings Y and Z, the owner estimates $250,000 in soft cost savings exist and can be transferred and used for payment of construction cost. The estimated $70,000 in construction savings would also be applied to provide a total funding source of approximately $340,000. (emphasis added)

The agreement also reflected that ABG had agreed that "soft cost savings" could be used to pay for change order work and such were to be the "primary means of funding" that work. Further, the parties agreed:

> In the event that these savings cannot be applied to construction costs or the "soft cost" savings are not realized, SB Multifamily Fund 10 Limited Partnership and Sherman-Boosalis Corporation, hereby agree and guarantee to BOR-SON payment for the existing change orders 1-5 ($201,000), and additional change orders to finish buildings Y and Z (estimated $143,000) less an estimated $70,000 in construction savings, to the extent that these costs are "cost certifiable" under the terms of the construction contract as amended.

Bor-Son also agreed to commence construction on Buildings Y and Z "upon written authorization from ABG Financial."

5. On May 22, 1990, ABG advised SB that the eight change orders then pending would be processed only if funds were placed in escrow or if Bor-Son agreed to execute an agreement providing:

> (a) That the partnership will have no obligation to pay for the change order there are mortgage proceeds available at the time of final endorsement, resulting from soft cost savings as determined upon cost certification and approved by ABG at such time; and
>
> (b) That if, upon cost certification, soft cost savings are not achieved, Bor-Son will not have any claim and will not later assert any claim against either the partnership, or the project, or the proceeds of the coinsured mortgage loan, or any reserve or deposit held by ABG or any other depository in connection with the coinsured mortgage loan, or against the rents or other income from the

project, or against ABG, for the cost of the change orders; and

(c) That Bor-Son will indemnify and hold the partnership and the project harmless from any and all mechanics' and materialmen's lien claims, if any, arising from subcontractors and suppliers in connection with the change orders.

6. In response, SB and Bor-Son executed two documents dated May 30, 1990:

(a) A letter on Bor-Son stationery ("May 30, 1990 Letter"), signed by both SB and Bor-Son and directed to ABG, in which Bor-Son and SB agreed that "with respect to pending change orders #1-8 currently being processed by ABG," the three specific items outlined by ABG in its May 22 letter were accepted; and

(b) A further amendment to the Letter Agreement of April 27, 1990 ("Amendment") in which the parties agreed to the terms pursuant to which interest on delayed payment for change orders would be made. The Amendment recited:

> The owner and Sherman-Boosalis Corporation now estimate the potential savings to be $400,000 per Exhibit A (attached). The owner and Sherman-Boosalis Corporation will ensure that the interim income and interest savings will be considered "soft cost" savings as required by the lender and that these funds shall not be committed to other obligations prior to BOR-SON being paid in full. (emphasis added)

7. While the May 30, 1990 Letter referred only to the source of funds to cover pending change orders 1-8, each of the 15 change orders issued for the project was issued under a cover sheet, AIA Document G701 ("Cover Sheet"). The Cover Sheet provides in part:

> This work and the associated values described herein are to be completed as a "no cost change order." Reimbursement to the contractor for these additional costs as acknowledged by the owner shall be made as follows:
>
> 1. By the deduction for any actual construction cost savings as determined by a final audit at the completion of the work and/or;
>
> 2. By the deduction from any interest savings incurred by the owner and/or;
>
> 3. By other change orders.

The Cover Sheet also makes clear that Bor-Son would be paid for the change order work only if there are "soft cost savings". Each of the 15 change orders was signed by Bor-Son. Both parties have filed affidavits acknowledging that the terms of the May 30, 1990 Letter and the Amendment were intended to cover all change orders.

8. "Soft cost savings" were understood by both the parties

to mean savings generated by decreased interest costs on the project. ABG asserts, and the parties agree, that there were no excess mortgage proceeds available at the conclusion of the project resulting from soft cost savings.

9. SB never paid for the change order work. It subsequently defaulted on its mortgage and filed a petition for relief under chapter 11 of the Bankruptcy Code on June 15, 1992.

10. Bor-Son filed a Proof of Claim on October 13, 1992, asserting claims against the estate totalling $785,786.43, $397,719.98 of which represents an unsecured claim attributable to change order work.

11. As a result of the alleged construction defects, on June 17, 1993, the trustee commenced this action against Bor-Son, United States Fidelity and Guaranty Company (the bonding company), Rolfshus Associates and Studio Five Architects (the architects), and Ericksen, Roed/Johnston-Sahlmen and Associates, Inc. (the engineers) alleging breach of contract and breach of warranty. In Count Three of the Complaint, the trustee requested a declaratory judgment determining that Bor-Son waived and relinquished any payment for the change order work. It is Count Three which is the subject of the trustee's motion for partial summary judgment.

CONCLUSIONS OF LAW

1. Summary Judgment Standard

Summary judgment is governed by Federal Rule of Civil Procedure 56, made applicable to this adversary proceeding by Bankruptcy Rule 7056. Federal Rule 56 provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party on summary judgment bears the initial burden of showing that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The burden then shifts to the non-moving party to produce evidence that would support a finding in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52 (1986). This responsive evidence must be probative, and must "do more than simply show that there is some metaphysical doubt as to the material fact." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

2. Bor-Son waived its claim for payment of change order costs

A waiver is an intentional relinquishment or abandonment of a known right or privilege. State ex rel. Thomas v. Rigg, 255 Minn. 227, 236, 96 N.W.2d 252, 258 (1959) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). To establish waiver, it must be proved that the party charged with waiver knew of the right and intended to relinquish it. Local 1142 v. United Elec. Radio & Mach. Workers, 247 Minn. 71, 77, 76 N.W.2d 481, 484 (1956). Waiver is generally a question of fact, but becomes a question of law when the facts and circumstances relating to the waiver are admitted or clearly established. Engstrom v. Farmers & Bankers Life Ins. Co., 230 Minn. 308, 312, 41 N.W.2d 422, 424 (1950). When only one inference can be drawn from the facts, the question becomes one of law. Id.

It is evident that Bor-Son waived its right to payment of the change order costs. The May 30, 1990 Letter and the Amendment clearly indicate that the parties intended to modify their initial

Letter Agreement dated April 27, 1990. This modification was a direct result of the May 22, 1990 letter from ABG outlining the conditions under which it would process the change orders.

The terms of the modification are also clear. The May 30, 1990 Letter and Amendment explicitly provided that Bor-Son relinquished its right to absolute payment for change order work in favor of an agreement that provided Bor-Son be paid on a contingent basis only if there were soft cost savings.

This is the only reasonable conclusion that can be inferred from the documents. Assuming that SB was obligated to pay for change order work in spite of the May 30, 1990 Letter to ABG, then both Bor-Son and SB fraudulently induced ABG to approve the change order payments. Neither party, however, has asserted such and there are no facts to support this. Therefore, it is apparent that the parties modified their initial agreement on May 30, 1990.

Gene Wagner ("Wagner"), president of Bor-Son, indicated in his affidavit that Bor-Son did not intend to supersede or modify the Letter Agreement, and that payment was not intended to be contingent upon the existence of soft cost savings. These statements are inadmissible parol evidence. Where the language used in a contract is plain and unambiguous, the meaning is to be ascertained from the writing alone, not from what was intended to be written. Carl Bolander & Sons, Inc. v. United Stockyards Corp., 215 N.W.2d 473, 476 (Minn. 1974). The May 30, 1990 Letter and the Amendment were both clear on their face.

Further, SB's Financial Statements and Independent Auditor's Report as of December 31, 1991 support the conclusion that Bor-son waived its right. These indicate that SB is disputing Bor-Son's request for change order costs, and that the Bor-Son debt is considered a liability.

Finally, Bor-Son contends that Boosalis' two affidavits are inconsistent as to whether the May 30, 1990 Letter relates to all change orders, or just some. I see no inconsistency. Besides, Wagner stated in his affidavit that "one of the reasons for the amendment was to clarify that the agreement would apply to all change orders." Wagner affidavit, 6 10.

3. Bor-Son has not presented evidence of fraudulent inducement

Bor-Son argues that, even if it waived the right to payment, such a waiver was fraudulently induced. In his affidavit, Wagner asserts that SB expressly represented to Bor-Son that: (1) there were between $250,000 to $400,000 in soft cost savings; (2) SB would "ensure" that the interim income and interest savings would be considered soft cost savings; and (3) the soft cost savings would not be committed to other obligations. According to Bor-Son, it relied on these statements when it entered into the May 30, 1990 Letter and Amendment and went forward with the change order work.

To avoid a contract based on fraud, there must be a false representation of a past or existing fact that is material to the agreement. Proulx v. Hirsch Bros., 279 Minn. 157, 162-63, 155 N.W.2d 907, 911 (1968). The representation must have been made with knowledge of its falsity or at least with an absence of knowledge of its truth. Id. Finally, there must have been an intention to induce the party to rely on the representation, or justifiable reliance on the other party. Id.

SB did not make a false representation of an existing fact. Bor-Son has proffered no evidence that $250,000 and $400,000 of soft cost savings did not exist from April 27, 1990 through May 30, 1990. Bor-Son has only presented evidence that there were no soft cost savings at the end. Thus, there is no evidence suggesting

that SB misrepresented an existing fact.

Even if SB falsely stated that soft cost savings existed at the time of the agreement, such a statement is not material. Soft cost savings, as everyone agrees, is a fluid concept. It changes end. Both parties must, therefore, have anticipated that the soft cost savings could either be more or less at the end of the project.

Further, both statements concerning the amount of soft cost savings were clearly estimates. An estimate is not a statement of fact, but is at best an opinion as to what might happen in the future. Accordingly, SB did not make a statement of fact that was either false or material. Moreover, Bor-Son has made absolutely no attempt to establish that SB, at the time of the representations, knew and failed to disclose the fact there would be no soft cost savings.

Likewise, Bor-Son has failed to meet its burden of proof with respect to SB's statement that it would "`ensure' that the interim income and interest savings would be considered soft cost savings." There is no evidence that SB did not consider this calculation when it made its final determination. There is only the bare assertion that there were no soft cost savings. The nonexistence of soft cost savings does not in and of itself prove anything else but the fact that there were none in the end.

Finally, both Wagner's and Maribeth Stahl's affidavits insinuate that SB directed HUD funds away from the soft cost savings towards other uses. Again, neither party has demonstrated how this occurred. Nor is there any foundational basis for this knowledge. Instead, the statements are assumptions and conclusions and are inadmissible as evidence. Even if SB diverted HUD funds, there is no evidence to support the assertion that the diversion affected the soft cost savings. Essentially, this argument is a "red herring."

4. SB is not estopped from asserting that Bor-Son waived its right to payment

Lastly, Bor-Son contends that, because of SB's allegedly misleading conduct, SB should be estopped from arguing that Bor-Son waived its right to payment. Equitable estoppel prevents a party from asserting rights against another person who has in good faith relied upon the party's conduct, and such reliance leads to a change in position for the worse. Moberg v. Commercial Credit Corp., 230 Minn. 269, 276, 42 N.W.2d 54, 58 (1950).

According to Bor-Son, four different acts justify the equitable remedy of estoppel: (1) SB fraudulently induced Bor-Son to agree to the "no cost change order" arrangement; (2) SB's conduct caused the soft cost savings to evaporate; (3) Boosalis and his partners misappropriated funds dedicated to the project, which in turn led to nonpayment of the change order work; and (4) SB consistently acknowledged to Bor-Son throughout the project that it would pay for the change order work.

The first three acts are identical to the acts that Bor-Son previously asserted as grounds for fraudulent inducement, and are subject to the same response. These "acts" are simply assertions and are accorded no evidentiary weight. Accordingly, the first three acts are not grounds to equitably estop SB.

Likewise, the fourth act is unsupported. The assertion that SB "consistently acknowledged" that Bor-Son would be paid is a conclusory statement, and cannot serve as a basis for equitable estoppel.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The trustee's motion for partial summary judgment against Bor-Son on Count Three of the Complaint is GRANTED; and

2. The trustee shall have judgment declaring that Bor-Son waived any claim for change order work and is therefore not entitled to assert a claim for $397,719.98.

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Nancy C. Dreher
United States Bankruptcy Judge