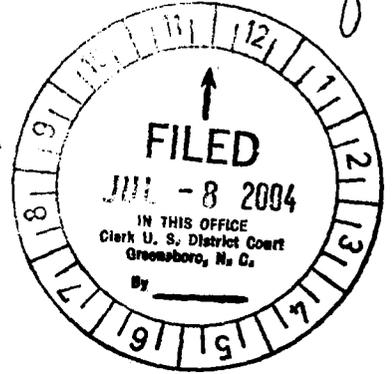


125.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



ABD ASSOCIATES LIMITED)
PARTNERSHIP, a North Carolina Limited)
Partnership,)

Plaintiff,)

v.)

THE AMERICAN TOBACCO COMPANY,)
a Delaware corporation, and AMERICAN)
BRANDS, INC., a Delaware corporation)

Defendants.)

1:91CV415

MEMORANDUM OPINION

TILLEY, Chief Judge

This matter is before the Court on the following motions: (1) Brown & Williamson Tobacco Company's (BWTC)¹ Motion to Enforce the Settlement and Escrow Agreements [Doc. #107]; (2) Capitol Broadcasting Company's (Capitol)² Motion for Leave to File Supplemental Affidavits [Doc. #115]; (3) Capitol's Motion Requesting a Status Conference [Doc. #116]; and (4) Capitol's Motion to Strike Portions of the Reply Brief in support of BWTC's Motion to Enforce the Settlement and Escrow Agreements [Doc. #119].

¹Brown & Williamson Tobacco Company is the successor-in-interest to Defendants American Tobacco Company and American Brands, Inc.

²Capitol Broadcasting Company, Inc. is a successor-in-interest to Plaintiff ABD Associates Limited Partnership.

For the reasons stated below, conclusions of law regarding BWTC's Motion to Enforce the Settlement and Escrow Agreements are provided; however, a hearing will be set to address the portion of BWTC's Motion not resolved by this Opinion. Therefore, Capitol's Motion for a Status Conference will be DENIED with respect to the issues addressed in this Memorandum Opinion, but GRANTED with respect to remaining issues. Both Capitol's Motion for Leave to File Supplemental Affidavits and its Motion to Strike Portions of the Reply Brief will be DENIED.

I.

The dispute at hand involves the terms of a settlement agreement entered into by Plaintiff ABD Associates Limited Partnership ("ABD") and Defendant The American Tobacco Company ("American Tobacco") in 1995. The facts leading up to and surrounding that settlement agreement are summarized below.

In 1988, ABD purchased a piece of property ("the Property") from American Tobacco. In 1991, ABD brought suit against American Brands, Inc., and its wholly owned subsidiary, American Tobacco, seeking indemnification for the costs of removing asbestos and lead-based paint from buildings on the Property. On February 28, 1995, while litigation was still pending, American Tobacco merged into BWTC. At this time, BWTC assumed all rights and obligations of the former American Tobacco.

On July 3, 1995, ABD and BWTC reached settlement in the lawsuit pending at the time. The parties' settlement was represented in two documents: (1) the

"Settlement Agreement and Release of All Claims," and (2) the "Escrow Agreement" (collectively, "the Agreement"). Each document explicitly incorporated the other by reference. On July 31, 1995, this Court accepted and filed a Stipulation and Order of Dismissal with Prejudice that had been executed by both parties. The Stipulation and Order incorporated by reference the Settlement Agreement and the Escrow Agreement and retained jurisdiction to enforce the terms of these documents.

BWTC paid \$1,338,750 into the escrow account ("the Escrow") established by the Agreement. In general, the purpose of the Escrow was to provide funds that ABD could withdraw and use to remove and remediate asbestos and lead-based paint from the Property or to demolish buildings on the Property. From 1995 until early 2002, no disbursements were made from Escrow,³ and the funds grew to approximately \$1,729,000.

The events giving rise to the current dispute over the terms of the Agreement began in 2002 and are summarized as follows. On April 13, 2002, ABD sold the Property to the A.J. Fletcher Foundation ("AJFF"). As part of this sale, AJFF took assignment of ABD's interest in the Escrow established by the parties' 1995 Agreement. AJFF entered into a long-term lease of the Property with

³No disbursements were made from Escrow during this period with the exception of fees properly charged by the Escrow Agent.

Capitol. Capitol and its several subsidiaries⁴ began to renovate the Property with the plan of converting the buildings into office, retail, and residential spaces.

In executing its renovation plans, Capitol hired a developer, The Keith Corporation ("Keith"), and a general contractor, Bovis Land Lease, Inc. ("Bovis"). CCS, Inc. a/k/a CCS General Contractors ("CCS") was also involved in the project. Further, Capitol hired LVI Services of North Carolina, Inc. ("LVI")⁵ to perform the required environmental remediation. LVI engaged the services of EI, Inc. ("EI"), an engineering and design firm qualified to oversee asbestos abatement.

Beginning in early 2002, Capitol requested a series of disbursements from Escrow to cover various renovation costs. In July 2002, the Escrow Agent stopped disbursing the amounts requested due to objections from BWTC that some of the requests were improper under the Agreement.⁶ Therefore, some of the disputed invoices have been paid and some remain unpaid. Pursuant to the terms of the Escrow Agreement, the Escrow terminated on July 28, 2002.

⁴American Campus, LLC; American Campus, II, LLC; and American Campus, III, LLC.

⁵LVI is an accredited, full-service environmental hazard abatement and demolition company.

⁶One of Capitol's substantive arguments is that BWTC waited too long to object to the disbursement requests that it contends are improper. However, there is no contractual provision limiting the time within which a party may object to a disbursement request. As Capitol cites no other authority which would suggest that BWTC's voicing of its objections or its filing of this suit was untimely, this Court finds there to be no issue of untimeliness and does not further address Capitol's argument as to this issue.

On February 13, 2003, BWTC, as the successor-in-interest to Defendant American Tobacco, filed a Motion to Enforce the Settlement and Escrow Agreement in this Court. [Doc. #107]. BWTC contends that the Settlement and Escrow Agreements permit the Escrow funds to be used to cover only three types of costs: (1) asbestos removal or remediation by qualified contractors; (2) lead-based paint removal or remediation by qualified contractors; and (3) the cost of complete demolition of one or more of the buildings on the Property. BWTC argues that Capitol has requested and received disbursement from Escrow for costs that do not fall within the three permissible categories.

Specifically, BWTC contends that the following disbursement requests were improper: (1) any portion of the \$1,229,304.53 requested for work performed by LVI that was for work other than asbestos remediation or removal; (2) the entire \$92,960 requested for work done by Keith;⁷ (3) the entire \$306,785 requested for work done by Bovis;⁸ and (4) the entire \$45,180 requested for work done by CCS. BWTC does not contest the \$89,376.19 requested for work done by EI. Based on these disbursement requests, BWTC contends that Capitol has breached the terms of the Agreement, and BWTC requests appropriate relief from this Court.

⁷Keith's work involved the "management, design, supervision, and oversight of asbestos removal work."

⁸Bovis' work also involved the "management, design, supervision, and oversight of asbestos removal work."

On March 31, 2003, Capitol filed a Response to BWTC's Motion. [Doc. #111]. The Response included an Affidavit from Thomas L. Tingle, Project Manager for Keith during the relevant time period. On April 28, 2003, BWTC filed a Reply to Capitol's Response. [Doc. #114].

In addition, Capitol has filed three motions in this matter. On April 30, 2003, Capitol filed a Motion for Leave to File Supplemental Affidavits. [Doc. #115]. On May 5, 2003, Capitol filed a Request for a Status Conference to address the pending motions in this matter. [Doc. #116]. On May 9, 2003, Capitol filed a Motion to Strike Portions of BWTC's Reply. [Doc. #119]. Each motion is addressed in turn below.

II.

Capitol's Motion for Leave to File Supplemental Affidavits will be DENIED. Pursuant to Rule 7 of the Federal Rules of Civil Procedure and to Local Rule 7.3(g), Capitol's Motion requests an ex parte order allowing it to file affidavits in support of its Response to BWTC's Motion to Enforce. Specifically, Capitol wishes to file additional affidavits which confirm and supplement the Tingle Affidavit it filed along with its Response.

Capitol has cited no authority which would support its claimed right to file further affidavits. Capitol argues that it was not a party in the original action. However, this is of no consequence as Capitol is the assignee of the rights of AJFF, the successor-in-interest to the rights of ABD, a party to the original action.

Through assignment, Capitol took no more and no less than the rights and responsibilities of ABD under the Agreement.

Capitol cites to Local Rule 7.3(g) as support for its Motion. However, Rule 7.3(g) does not apply to this situation. Rule 7.3(g) provides that an ex parte order may be entered “specifying the time within which supporting documents may be filed . . . if it is shown that such documents are not available or cannot be filed contemporaneously with the motion or response.” Further, Local Rule 7.3(f) states that a respondent opposing a motion must file a response and brief within 20 days of service of the motion, and that “[i]f supporting documents are not then available, the respondent may move for an extension of time in accordance with section (g) of this rule.” (emphasis added). The language of Rule 7.3(f) & (g) make it clear that Rule 7.3(g) is intended to be used before or at the time the response is due and requires a showing that the documents are not currently available.

Here, Capitol’s Motion for Leave to File Supplemental Affidavits was filed on April 30, 2003, one month after Capitol filed its Response⁹ to BWTC’s Motion. Further, its Motion includes no specific showing as to why the affidavits were not available at the time it filed its Response. In short, Capitol’s Motion is not supported by Rule 7.3(g), and will be DENIED.¹⁰

⁹Capitol filed its Response [Doc. #111] on March 31, 2003.

¹⁰It appears that these affidavits would not apply to the interpretation of the Agreement as addressed in this Memorandum Opinion anyway.

III.

The Court is not able to resolve completely BWTC's Motion to Enforce the Settlement and Escrow Agreements with the information currently before it. Therefore, this Memorandum Opinion construes the disputed terms of the Agreement, but further issues and any necessary application will be addressed at a hearing.

A.

As a matter of policy, settlement agreements are favored. Chappell v. Roth, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001). When a settlement is reached in a case pending before it, a trial court has the authority to enforce the terms of that settlement. Petty v. Timken Corp., 849 F.2d 130, 132 (4th Cir. 1988); see also State ex rel. Howes v. Ormond Oil & Gas Co., 128 N.C. App. 130, 136-37, 493 S.E.2d 793, 797 (1997).

A settlement agreement is governed by principles of contract law. Chappell v. Roth, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001). Therefore, the terms of a settlement agreement are construed through application of standard contract construction principles. When construing a contract, "[a]ll contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken." Carolina Place Joint Venture v. Flamers Charburgers, Inc., 145 N.C. App. 696, 699, 551 S.E.2d 569, 571 (2001) (citations omitted). Further, the parts of a

contract should be construed together—contract provisions should only be construed as conflicting if “no other reasonable interpretation is possible.” Internet E. v. Duro Communications, Inc., 146 N.C. App. 401, 407, 553 S.E.2d 84, 88 (2001) (citations omitted).

Once the instruments forming the contract are determined, the language of the contract must be examined. Specifically, words in a contract should be given their ordinary meanings. Id. at 405-06, 553 S.E.2d at 87. However, the exception to this general principle is that words with special meanings or terms of art should be given their technical meanings. S. Furniture Co. of Conover, Inc. v. Dep’t of Transp., 133 N.C. App. 400, 403, 516 S.E.2d 383, 386 (1999).

Under North Carolina law, it is well-recognized that “when the language of a contract is clear and unambiguous, the court must interpret the contract as written” Corbin v. Langdon, 23 N.C. App. 21, 25, 208 S.E.2d 251, 254 (1974). Contract language “plain and unambiguous on its face” can be interpreted as a matter of law. Taha v. Thompson, 120 N.C. App. 697, 701, 463 S.E.2d 553, 556 (1995) (citations omitted). However, interpretation of an ambiguous contract requires the resolution of issues of fact, and reference to extrinsic evidence is necessary. State ex rel. Util. Comm’n v. Thrifty Call, Inc., 154 N.C. App. 58, 63, 571 S.E.2d 622, 626 (2002). A contract is ambiguous if the differing constructions asserted by the parties are both reasonably supported by the language of the contract. Id.; Taha, 120 N.C. App. at 701, 463 S.E.2d at 556.

B.

Here, it is undisputed that the Settlement Agreement and the Escrow Agreement, each specifically incorporating the terms of the other, combine to form a valid contractual agreement. As part of the Agreement, the parties nominated an Escrow Agent but chose to make the Agent simply a repository for holding funds and paying invoices submitted. The Escrow Agent is permitted to act in reliance upon any writing it believes to be genuine and is to be indemnified and held harmless by the parties in the event of any suit upon any claim. (See Escrow Agreement ¶¶ 4d., e., f., g., & i.) In this system, the Escrow Agent was authorized to accept and pay any invoices submitted. Instead of expressing their agreement regarding allowable payment for specific work in terms of what invoices the Escrow Agent should credit and pay, then, the parties chose to couch their agreement in terms of limiting the invoices that ABD could submit to the Escrow Agent. (Settlement Agreement ¶ 7.)

While it is undisputed that the Agreement is a valid contract, at issue is the interpretation of certain terms of the two documents comprising the Agreement. Therefore, application of the contract construction principles discussed above is necessary. Both parties claim that the terms of the Agreement are clear and unambiguous. However, each asserts a different interpretation of those terms. As stated above, BWTC contends that, under the Agreement, disbursement requests from Escrow may only be submitted to cover three types of work: (1) asbestos

removal or remediation by qualified contractors; (2) lead-based paint removal or remediation by qualified contractors; and (3) the cost of complete demolition of one or more of the buildings on the Property. It is undisputed that no lead-based paint removal work has been performed on the Property. However, asbestos remediation and demolition work has been performed, and disbursement requests for these two types of work are at issue. The following two sub-sections will address the portions of the Agreement relevant to these two topics.

1.

The parties seem to disagree on two main issues regarding asbestos removal or remediation under the Agreement, namely: (1) whether invoices could be submitted for work done by contractors who were not "qualified asbestos remediation contractor[s]" as that term is defined in paragraph 5 of the Settlement Agreement, and (2) exactly the type of work performed by those contractors for which invoices could be submitted. Paragraphs 5 and 7 of the Settlement Agreement address these issues.

Paragraph 5 provides as follows:

If ABD elects, in its sole discretion, to remove or otherwise remediate asbestos containing materials on the Property, ABD will retain the services of a qualified asbestos remediation contractor to remove or otherwise remediate such asbestos in accordance with all applicable federal, state and local statutes, rules and regulations. For purposes of this clause, "qualified asbestos remediation contractor" shall mean any person or firm who meets the licensing and other qualifications, if any, specified by the laws and regulations of the United States, the State of North Carolina and City and County of Durham, North Carolina.

The parties agree that a “qualified asbestos remediation contractor” under this provision is a contractor who is properly licensed under law to perform asbestos remediation work.

Paragraph 7 of the Settlement Agreement provides what invoices may be submitted to Escrow under the Agreement. This section, quoted in relevant part below, refers only to an “asbestos remediation contractor” and not a “qualified asbestos remediation contractor.”

ABD shall submit to Escrow Agent original invoices from demolition contractors, asbestos remediation contractors or lead-based paint remediation contractors for payment. Each invoice shall be accompanied by a written certificate signed by the contractor that all work reflected on the invoice has been completed in accordance with all applicable federal, state and local statutes, rules and regulations. Asbestos and lead-based paint removal or remediation costs which may be submitted for payment out of escrow shall include the costs of removal or remediation, as well as costs of such surveys, specifications preparation and monitoring as may be necessary to plan and implement a removal or other remediation program, but shall not include sums expended or obligations incurred for the cost of asbestos or lead-based paint surveys or specifications preparation performed prior to the execution of this Settlement Agreement.

Capitol argues that paragraph 7 is unambiguous and provides that invoices from a non-qualified contractor who performed asbestos-related work at the Property may be submitted to Escrow. Capitol places great reliance on two facts: (1) that paragraph 5 used the adjective “qualified” and paragraph 7 did not, and (2) the definition of “qualified asbestos remediation contractor” in paragraph 5 was modified with the language, “for purposes of this clause.” Further, Capitol argues that paragraph 7 allows the following types of asbestos-related costs to be

submitted to Escrow: (1) removal and remediation; (2) surveys; (3) specifications; (4) preparation; and (5) monitoring.

BWTC also contends that paragraph 7 is unambiguous, but disagrees with Capitol's construction of the terms. BWTC argues that invoices for asbestos-related work submitted to Escrow must be from a qualified asbestos remediation contractor. Further, BWTC argues that when paragraph 7 is read with the proper punctuation,¹¹ it is clear that the asbestos-related costs that can be submitted to Escrow are limited to (1) removal and remediation; (2) surveys; (3) specifications preparation; and (4) monitoring.

The contract provisions at issue are unambiguous, and this Court agrees with BWTC's construction of the terms. First, as to what asbestos-related costs may be submitted to Escrow, the absence of a comma between "specifications" and "preparation" means that costs for "specifications preparation" are allowed, but not costs for any "specifications" and any "preparation."

Second, the delineation of what types of contractor invoices ABD (or its successors or assignees) might submit to Escrow for payment for asbestos-related work is also unambiguous. The language of the Agreement shows that the parties'

¹¹Capitol's Response argued that paragraph 7 stated that the additional costs that would be allowed were "the costs of such surveys, specifications, preparation and monitoring." However, as discussed by BWTC in its Reply, the actual language of the Settlement Agreement does not include the second comma. Without that comma, "specifications" becomes an adjective modifying "preparation." This poses an entirely different meaning than if "specifications" and "preparation" were separated by a comma and each acting as a noun.

intention when the Agreement was executed was for the submission to Escrow only of invoices for asbestos-related work performed by “qualified” contractors. Paragraph 5 defines a qualified asbestos remediation contractor as a contractor who is properly licensed under applicable law to perform asbestos remediation. The requirement for hiring a qualified contractor in paragraph 5 would be surplusage if that contractor were not to be the one performing asbestos removal and remediation. Further, a non-qualified contractor could not have provided the written certification required by paragraph 7.

The relevant law governing asbestos remediation work is found in North Carolina Gen. Stat. §§ 130A-444 to -453.¹² Specifically, § 130A-449 prohibits a person from engaging in asbestos abatement without a permit from the State of North Carolina.¹³ “Abatement” is defined as “work performed to repair, maintain, remove, isolate, or encapsulate asbestos containing material.” N.C. Gen. Stat. § 130A-444(4). Further, § 130A-447(a) states that “[n]o person shall commence or continue to perform asbestos management activities unless he has been accredited by the Department.” (emphasis added). Section 130A-444(6) defines “management” as “all activities related to asbestos containing material, including

¹²These statutory sections were in effect at the time the Agreement was formed, July 1995, and remain in effect presently.

¹³Asbestos abatement jobs involving less than 35 cubic feet, 160 square feet, or 260 linear feet of asbestos containing material are excepted from the permit requirement. Neither party has claimed that this exception applies to any of the jobs in question.

inspections, preparation of management plans, abatement project design, abatement, project overview, and taking of samples.”

A contractor would have to be accredited by the State of North Carolina to be a qualified asbestos remediation contractor as defined in paragraph 5 of the Settlement Agreement. Under the statutory sections cited above, a contractor must be accredited not only to perform the actual removal or remediation of asbestos, but also to engage in asbestos management activities, broadly defined by § 130A-444(6). Again, the plain language of the Agreement indicates an intent that only invoices from qualified asbestos remediation contractors be submitted to Escrow. The relevant North Carolina law supports the conclusion that the parties did not contemplate that a non-qualified contractor would even legally be able to perform any of the asbestos-related work delineated in paragraph 7, that is, removal or remediation, and any surveys, specifications preparation, and monitoring necessary to plan and implement a removal or remediation. This list of asbestos-related work certainly appears to overlap with the definition of “asbestos management activities” in the North Carolina statutes.

Further, the fact that the adjective “qualified” does not appear in paragraph 7 does not change the clear meaning of the language of the Agreement as a whole. Paragraph 7 states that invoices can be submitted from “asbestos remediation contractors.” It is already clear from paragraph 5 that only qualified contractors

may do any asbestos removal or remediation work at all.¹⁴ With that fact already established, “asbestos remediation contractors” may be construed as synonymous with the phrase “qualified asbestos remediation contractors.” This is because, for purposes of the Agreement, there is no such thing as an unqualified asbestos remediation contractor— only qualified contractors are doing any asbestos remediation at all.

Moreover, the written certification required under paragraph 7 could not have been provided properly unless “the contractor” doing the work was permitted and accredited under North Carolina law. Again, this is because the applicable North Carolina statutes mandate a permit for “work performed to repair, maintain, remove, isolate or encapsulate asbestos containing material” and an accreditation for asbestos management activities that include “all activities related to asbestos containing material, including inspections, preparation of management plans, abatement project design, abatement, project overview, and taking of samples.”

In summary, this Court interprets as a matter of law the portions of the Agreement addressing asbestos remediation and removal as allowing only the following costs to be submitted to Escrow: costs from qualified asbestos remediation contractors for asbestos removal or remediation, including those

¹⁴Again, paragraph 5 provides in part: “ABD will retain the services of a qualified asbestos remediation contractor to remove or otherwise remediate such asbestos . . . ” (emphasis added). The word “such” refers to all asbestos to be removed or remediated.

contractors' costs for surveys, specifications preparation, and monitoring necessary to plan and implement a removal or remediation.

2.

As to the demolition sections of the Agreement, the parties disagree as to what costs may be submitted to Escrow. BWTC contends that only costs for demolition of entire buildings may be submitted. Capitol contends that any demolition costs, including partial demolition of a structure, may be submitted.

Several portions of the Agreement address demolition costs. Paragraph 3 of the Settlement Agreement states that "ABD, at its sole discretion, will determine which buildings on the Property, if any, shall be demolished, and which buildings shall be retained." Paragraph 4 expands upon this provision as follows: "Buildings which ABD selects for demolition shall be demolished by a qualified demolition contractor in compliance with all applicable federal, state and local statutes, rules and regulations." Paragraph 8 provides that the "Escrow Agent shall be authorized to release escrowed funds for the payment of . . . the costs of demolition of buildings on the Property" Further, paragraph 9 states how the Escrow Agent is to disburse funds "[u]pon the completion of the demolition of a building" and refers to Schedule A of the Escrow Agreement which limits Escrow disbursements on a building-by-building basis.¹⁵

¹⁵Paragraph 9 of the Settlement Agreement provides as follows:

Upon completion of the demolition of a building and delivery to

Again, both parties claim that the Agreement provisions are unambiguous. However, they assert different interpretations. Capitol claims that the word "complete" is never used in connection with "demolition," nor is it ever explicitly stated that partial demolition of a building is not payable from Escrow. In contrast, BWTC contends that it is irrelevant that the word "complete" is never used because "demolition" always appears in the phrase "demolition of a building" and that the plain meaning of that phrase includes only complete, and not partial, demolition.

The contract language is plain and unambiguous and indicates that the parties' intent was to include only complete demolition of a building. The ordinary meaning of the word "demolish" itself contemplates complete demolition.¹⁶ The

Escrow Agent of the documentation set forth in the Escrow Agreement, Escrow Agent shall calculate the total of all invoices for asbestos removal or other remediation, lead paint removal or other remediation and demolition paid and authorized to be paid for that building by Escrow Agent; compare the total of all invoices with the amount set forth for that building in Column 1 of Schedule A attached hereto, and, if the total of invoices is less than the amount set forth in Column 1 of Schedule A, escrow agent shall be authorized to pay over and deliver to ABD from the escrowed funds the difference between the total of the invoices and the amount set forth in Column 1 of Schedule A, under the terms and conditions set forth in the Escrow Agreement.

Schedule A lists thirteen buildings on the Property by name along with two columns of corresponding values, Column 1 and Column 2.

¹⁶The Webster's Ninth New Collegiate Dictionary defines demolish as "1(a): tear down, raze (b): to break to pieces: smash 2(a): to do away with: destroy . . ."

first reference to demolition in the Agreement is found in paragraph 3 which states that ABD may select which buildings shall be demolished. There is no language in this paragraph that even suggests that partial demolition of a building was contemplated. This interpretation is supported by the language in paragraphs 4, 8, and 9, all of which focus on "demolition of a building" and not demolition in general. Because these provisions are clear and unambiguous on their face, the Agreement can be construed as a matter of law and there is no need to resort to extrinsic evidence.

In summary, this Court construes the portions of the Agreement addressing demolition as allowing only the costs of "demolition of a building" to be submitted to Escrow. Therefore, costs representing partial demolition of a building are not properly payable from Escrow.

C.

Having construed the disputed terms of the Agreement, the particular disbursement requests at issue must be examined to determine if they were permissible under the Agreement. However, the Court has several questions regarding the application of its interpretation of the Agreement as stated above. Therefore, further issues and any necessary application will be addressed at a hearing. Therefore, Capitol's Motion for a Status Conference will be DENIED with respect to the motions and issues already addressed in this Memorandum Opinion, but GRANTED with respect to remaining issues.

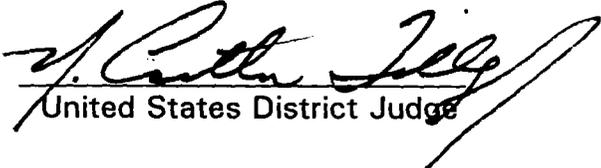
IV.

Finally, Capitol's Motion to Strike Portions of BWTC's Reply will be DENIED. Capitol contends that BWTC's Reply Brief was not "limited to discussion of matters newly raised in the response" as required by Local Rule 7.3(h). However, this Court holds that BWTC's Reply complies with the requirements of Rule 7.3(h). Therefore, Capitol's Motion to Strike will be DENIED.

V.

In conclusion, Capitol's Motion for Leave to File Supplemental Affidavits will be DENIED. Conclusions of law have been provided regarding BWTC's Motion to Enforce the Settlement and Escrow Agreements; however, this Motion will be resolved further at a hearing. Therefore, Capitol's Motion Requesting a Status Conference will be GRANTED IN PART AND DENIED IN PART. Specifically, the hearing will address only the issues remaining and necessary to resolution of BWTC's Motion to Enforce the Settlement and Escrow Agreements. Finally, Capitol's Motion to Strike Portions of the Reply Brief will be DENIED.

This the 8th day of July, 2004.


United States District Judge