IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

SILVERBOW CONSTRUCTION, INC., Appellant, v. STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, Appellee.	)	**FILED IN CHAMBERS** STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY: GLB ON: _____ Case No. 1JU-12-802 CI

ORDER REVERSING GRANT OF SUMMARY ADJUDICATION

The Alaska Department of Administration, Division of General Services withheld the final payment due under a construction contract to Silverbow Construction. Silverbow filed a contract claim with General Services's contracting officer. The contracting officer denied the claim. Silverbow appealed the contracting officer's decision to the Alaska Commissioner of Administration.

A hearing officer was appointed to hear Silverbow's contract claim on behalf of the commissioner. Before a hearing on Silverbow's claim was held, the hearing officer granted General Services's motion for summary adjudication. The Commissioner of the Department of Transportation and Public Facilities adopted the hearing officer's grant of summary adjudication as the final administrative decision on the matter. Silverbow now appeals the commissioner's final decision to the superior court for review.

Because the court finds Silverbow identified several genuine issues of material fact, the order granting summary adjudication is REVERSED and REMANDED for a hearing on the matter.

BACKGROUND

The Alaska Department of Administration, Division of General Services ("General Services") awarded Silverbow Construction ("Silverbow") a contract to upgrade two elevators in the Court Plaza Building in Juneau. Prior to its bid for the upgrade contract, Silverbow was required to conduct a pre-bid inspection of the condition of both elevators to ensure it could meet the contract requirements. A relevant portion of the contract provides:

> 2. Operating Qualities: Elevator Consultant will judge the riding quality of car and enforce the following requirements. Make all necessary adjustments as requested.
>
> a. Acceleration and Deceleration: Starting and stopping shall be smooth and comfortable, without any obvious steps of acceleration. Slowdown, stopping and leveling shall be without jars or bumps. Stopping upon operation of emergency stop switch shall be rapid but not violent.
>
> 1 Vertical Acceleration: Maximum of 4 ft per second squared, Maximum jerk 8 ft per second cubed.
>
> 2) Full speed Riding: Free from vibration and sway

Silverbow completed the majority of the work on the project by May 2010 at which time General Services accepted Silverbow's work as substantially complete. In January 2011, however, General Services notified Silverbow that there was excess vibration in both elevator cars. Five months later, General Services informed Silverbow that it was withholding the final $30,000 payment due under the contract until Silverbow "remove[d] the vibrations felt in the elevator during normal travel of each elevator."

The parties agree that both elevator cars vibrate while in motion to some degree. General Services's elevator consultant, Paul Pitfield, was not satisfied with the vibration level in either elevator car. Silverbow's subcontractor, ThyssenKrupp Elevator, conducted its own

investigation and reported an increase in vibration levels even though typically the upgrade project would yield a decrease in vibration levels.

ADMINISTRATIVE CONTRACT CLAIM

Silverbow filed a contract claim under AS 36.30.620 with General Services's contracting officer on October 12, 2011, to determine whether Silverbow was entitled to its final payment. Silverbow argued that the work had been satisfactorily completed because the vibration was due to a pre-existing condition that was not apparent at the time of the site visit by its bidders, and the vibration of the elevator cars was acceptable and reasonable within the meaning of the contract.

The contracting officer denied the claim on January 10, 2012. The contracting officer "determined that the vibration issue that all parties agreed exists . . . is the result of work performed by Silverbow during the upgrade project." Thus, the contracting officer held, "the responsibility for performing the work necessary to provide satisfactory ride quality – as determined by the Elevator Consultant – is within the scope of this contract and lies with [Silverbow]."

Silverbow subsequently appealed the contracting officer's decision under AS 36.30.630. The Alaska Office of Administrative Hearings appointed Jeffrey Friedman, an administrative law judge, as the hearing officer under AS 36.30.670. The hearing officer scheduled hearing dates for Silverbow's contract claim on July 18 and 19, 2012.

On June 18, 2012, General Services filed a motion for summary adjudication moving for a ruling denying Silverbow's claim in its entirety without a hearing, arguing that the contract terms clearly required Silverbow to deliver upgraded elevators that had no level of

vibration. Silverbow's reply to General Services's motion for summary adjudication argued that it was only required to provide elevators that did not have unreasonable levels of vibration and that the ride quality test was an objective test of reasonableness.

The hearing officer granted General Services's motion for summary adjudication on June 29, 2012. The hearing officer made six rulings in his decision and order on summary judgment that the parties generally agree exist[1]: 1) General Services made a *prima facie* case that the vibration level was excessive; 2) the "objective man" test for whether the vibration levels of the elevator cars were reasonable or not is not required because the contract specifically provides for a different method of determining satisfaction which is Mr. Pitfield's judgment; 3) Mr. Pitfield exercised good faith in making his judgment; 4) even under an objective test, Mr. Pitfield was qualified to determine whether there was excess vibration because of his experience; 5) Silverbow failed to meet its burden to show that the amount of vibration was not unreasonable; and 6) Silverbow was required to correct any excessive pre-existing vibration under the terms of the contract.

The Alaska Commissioner of Transportation and Public Facilities adopted the hearing officer's decision and order on summary adjudication on August 8, 2012. Silverbow filed this

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[1] The court identifies the hearing officer's six findings as framed by Silverbow in its appellant brief. The "Discussion" section of the hearing officer's decision and order on summary adjudication was divided into two separate analysis sections entitled "Excessive Vibration" and "Pre-existing Condition." Within these two headings, Silverbow and General Services generally agree that the hearing officer made six separate rulings. Silverbow's appellant brief and statement of points on appeal identify the six rulings as the basis of its judicial appeal. General Services identified essentially the same six rulings in the "Statement of the Case" section of its appellee brief.

judicial appeal to the court on August 31, 2012. With briefing on this matter complete, the court held oral argument on May 10, 2013.

Silverbow's Points on Appeal

1. Whether the hearing officer erred when he ruled that General Services made a *prima facie* case that the elevator car vibration was unreasonable by relying on evidence that is inadmissible for purposes of summary judgment.

2. Whether the hearing officer erred when, in reference to the question of reasonable vibration levels, he ruled that the "objective test" of the reasonable man as set out by the Alaska Supreme Court is not required in this matter.

3. Whether the hearing officer erred when, in reference to the question of reasonable vibration levels, he ruled that, even if the objective test is applied, Paul Pitfield, General Services's elevator consultant, can assume the role of the "reasonable man."

4. Whether the hearing officer erred when he ruled that General Services and Mr. Pitfield acted in good faith in this matter even though neither informed Silverbow that Mr. Pitfield had in fact accepted the ride quality of one of the elevators.

5. Whether the hearing officer's ruling to the effect that Silverbow, in its response to General Services' motion for summary adjudication, had the burden to put forth evidence rebutting General Services' claim that "the amount of vibration was not reasonable" violated Silverbow's right to due process.

6. Whether the hearing officer erred when he ruled that if any condition of the elevator system that pre-existed the award of the contract, whether related to the work called for in the contract or not, is the cause of any elevator vibration judged by General Services elevator consultant to be excessive, then the contract requires Silverbow to correct, or repair, that condition.

DISCUSSION

The hearing officer held that summary adjudication in an administrative proceeding is the equivalent of summary judgment in a civil matter. Accordingly, the court will review the hearing officer's grant of summary adjudication under a summary judgment standard.

An appellate court reviews the grant or denial of summary judgment *de novo* to determine whether there are any genuine issues of material fact and whether the moving party

is entitled to judgment as a matter of law on the established facts.[2] The reviewing court draws all reasonable inferences of fact against the moving party and in favor of the non-moving party.[3]

I. The Order and Decision on Summary Adjudication is Reversed Because Genuine Issues of Material Fact Exist

General Services sought summary adjudication as a matter of law arguing the clear and unambiguous language of the contract required Silverbow to render the elevators free from vibration. The contract provides that General Services's "Elevator Consultant will judge the ride quality of car and enforce the following requirements . . . 2) Full speed Riding: Free from vibration and sway." General Services states that this language authorizes Mr. Pitfield, General Services's elevator consultant, to determine whether the elevators are free from vibration.

Furthermore, General Services argues the plain language of the contract requires that "[a]ny [w]ork, materials or equipment that may reasonably be inferred from the Contract Documents as being required to produce the intended result will be supplied, without any adjustment in Contract Price or Contract Time, whether or not specifically called for." General Services states that this provision requires Silverbow to perform any work not specifically called for in the contract to provide elevators free from vibration without further compensation.

General Services also disputes Silverbow's argument, initially made before the contracting officer, that the vibrations are caused by an undisclosed pre-existing condition.

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[2] *See Era Aviation, Inc. v. Seekins*, 973 P.2d 1137, 1139-40 (Alaska 1999).
[3] *See Providence Wash. Ins. Co. v. Fireman's Fund Ins. Cos.*, 778 P.2d 200, 203 (Alaska 1989).

General Services argues that despite this factual dispute Silverbow is still required to perform any work necessary to deliver vibration-free elevators under the unambiguous terms of the contract.

As stated above, grants of summary judgment are reviewed *de novo*.[4] The goal of contract interpretation is to give effect to the reasonable expectations of the parties.[5] In pursuit of this goal, the reviewing court considers the contract's language as well as relevant extrinsic evidence—including subsequent conduct of the parties.[6] While contract interpretation is generally a matter of law,[7] and thus appropriate for summary judgment, factual questions may arise with respect to extrinsic evidence or the parties' intent.[8] Summary judgment is appropriate only if, after making all reasonable inferences about such open factual questions in favor of the nonmoving party, the moving party is still entitled to judgment as a matter of law.[9]

General Services's argument is simply that Silverbow bound itself to deliver upgraded elevators free from vibration under the plain terms of the contract and, thus, Silverbow is not entitled to the final payment, or any additional compensation, until it performs. As the party moving for summary judgment, General Services had "the initial burden of offering admissible evidence showing both the absence of any genuine dispute of fact and the legal right to a judgment."[10] General Services offered the relevant contract terms requiring Silverbow to

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[4] *Monzingo v. Alaska Air Group, Inc.*, 112 P.3d 655, 658–59 (Alaska 2005).
[5] *Stepanov v. Homer Elec. Ass'n*, 814 P.2d 731, 734 (Alaska 1991).
[6] *See Leisnoi, Inc. v. Stratman*, 956 P.2d 452, 454 (Alaska 1998).
[7] *Norville v. Carr–Gottstein Foods Co.*, 84 P.3d 996, 1000 n.1 (Alaska 2004).
[8] *See Sprucewood Inv. Corp. v. Alaska Hous. Fin. Corp.*, 33 P.3d 1156, 1161 (Alaska 2001).
[9] *Norville*, 84 P.3d at 1000 n. 1.
[10] *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

provide elevators free from vibration and documentary proof that Mr. Pitfield and ThyssenKrupp, Silverbow's own subcontractor, determined there was a measureable level of vibration as evidence that General Services was entitled to summary judgment.

Moreover, General Services argued the factual dispute between the parties on whether the cause of the vibration was an undisclosed pre-existing condition is immaterial because the plain terms of the contract required Silverbow to provide elevators free from vibration regardless of any pre-existing condition. While open questions of fact are to be construed in favor of Silverbow, General Services is correct that the pre-existing condition issue would not be a material issue of fact if the contract requires Silverbow to provide vibration-free elevators regardless of any pre-existing condition. Accordingly, General Services met its initial summary judgment burden.

Silverbow must have produced admissible evidence reasonably tending to dispute or contradict General Services's evidence in order to prevent the entry of summary judgment.[11] Silverbow argued against General Services's strict interpretation of the contract based on two principles: 1) that a reasonable meaning is preferred to an unreasonable meaning;[12] and 2) that extrinsic evidence of a course of performance can be an aid in interpreting the meaning of a contract.[13]

Regarding the first principle, Silverbow maintains that the contract only requires the elevators to be free from unreasonable levels of vibration. Silverbow claims that it would be unreasonable to believe the language stating the elevators shall be "[f]ree from vibration and

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[11] *See id.*
[12] *See Estate of Polushkin v. Maw*, 170 P.3d 162, 172 (Alaska 2007).
[13] *See id.*

sway" would require Silverbow to completely eliminate any measured level of vibration in the elevators. Also, Silverbow argues that it would be unreasonable to install an entirely new isolation system should General Services think this would achieve a zero level of vibration, since the project called for the car sling and platform to be used in their original condition.

Regarding the second principle, Silverbow introduced evidence showing that General Services viewed the contract as setting "acceptable" and "within acceptable industry standards" levels of vibration, rather than General Services's current claim that any level of vibration is contrary to the terms of the contract and unacceptable.[14] Silverbow also introduced evidence showing that Mr. Pitfield accepted the ride performance of one elevator because it "did not have the same degree of vibration" as the other elevator. Silverbow asserts this evidence tends to show that during its course of conduct, neither General Services nor Mr. Pitfield was expecting Silverbow to produce elevators completely devoid of any measurable level of vibration.

The court agrees with Silverbow. The mere fact that two parties disagree as to the interpretation of a contract term does not necessarily imply that an ambiguity exists in the contract.[15] Rather, an ambiguity exists only when the contract, taken as a whole, is reasonably subject to differing interpretations.[16]

Silverbow put forth evidence tending to show that the pertinent contract terms could be subject to varying interpretations. General Services's motion for summary adjudication states the "contract plainly does identify a specific vibration level – no vibration is permitted." Thus, General Services argued for application of a strict interpretation of the contract – that under the

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[14] *See* Paul Pitfield's 9/3/10 memo to Thyssenkrupp; Becky Reiche's 1/21/11 email; Becky Reiche's 4/19/11 letter to Silverbow; and Paul Pitfield's 7/8/11 email to Becky Reiche.
[15] *Kincaid v. Kingham*, 559 P.2d 1044, 1047 (Alaska 1977).
[16] *Id.*

plain meaning of the contract terms, Silverbow was required to deliver elevators free from vibration. Meanwhile, Silverbow argues that it would be unreasonable for General Services to completely eliminate any measured level of vibration. In other words, that it would be unreasonable to apply a strict interpretation to the ride quality provision because any measured level of vibration would be in violation of the contract.

More importantly, however, Silverbow offers evidence tending to show that during the course of the parties' conduct, General Services was not requiring Silverbow to eliminate all measures of vibration. This was best exemplified by the fact that Mr. Pitfield accepted the ride quality of one elevator even though it still had an obvious degree of vibration.

Where interpretation of a written instrument turns on the acceptance of extrinsic evidence, the process of weighing such evidence should be for the trier of fact. This is the case at bar. It was error for the hearing officer to grant the motion for summary adjudication because of the existence of genuine issues of material fact surrounding the course of the parties' conduct and questions of law surrounding the interpretation of the contract requirements.

Silverbow advanced six different points on appeal. Those six points on appeal essentially attack the six findings the hearing officer made in his decision and order on summary adjudication. Because Silverbow is appealing the hearing officer's grant of summary adjudication, and because the law requires the court to review the grant of summary adjudication *de novo*, the court will not address each of Silver bow's point on appeal because the court finds that genuine issues of material fact exist to defeat summary adjudication. Thus, the hearing officer's grant of summary adjudication is reversed and remanded for a full hearing on the merits of Silverbow's claim.

II. Silverbow's Request for a Trial *De Novo*

Silverbow requests the court conduct a trial *de novo* because the court is quite familiar with the issues that need to be resolved. Silverbow also argues that it would not make a whole lot of sense to send this matter back to the hearing officer only to possibly find this case back before the court on appeal. Meanwhile, General Services states that a trial *de novo* is inappropriate because there is no claim that certain issues are not within the expertise of the reviewing body, the record is inadequate, or the administrative body's procedures are inadequate.

The court agrees with General Services. A court normally reviews an agency's decision on the record.[17] While Appellate Rule 609 affords the superior court discretion to conduct a trial *de novo*,[18] it is rarely warranted.[19] There is no serious suggestion of inadequate procedure or bias. There is no argument that the hearing officer lacks expertise. There is an issue of inadequate record but that is only because there was no hearing on the merits in this matter. Thus, Silverbow request for a trial *de novo* is DENIED. The hearing officer shall conduct a full hearing on the matter.

Entered at Juneau, Alaska this 26th day of November, 2013.

Signed
Louis J. Menendez
Superior Court Judge

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[17] *See City of Fairbanks Mun. Utils. Sys. v. Lees*, 705 P.2d 457, 460 (Alaska 1985).
[18] Alaska R. App. P. 609(b)(1).
[19] *See Sw. Marine, Inc. v. State, Dep't of Transp. & Pub. Facilities, Div. of Alaska Marine Highway Sys.*, 941 P.2d 166, 179 (Alaska 1997).

CERTIFICATION OF SERVICE

I certify that I served the following parties on the 27th day of November, 2013.

Jack McGee	L. Anmei Goldsmith
☒ Via U.S. Mail	☒ Via U.S. Mail

Signed
Gavin L. Berkey
Judicial Assistant to Judge Menendez

[This document has been modified to conform to the technical standards for publication.]