Associated Engineering Sciences, Inc., Plaintiff vs. Robert J. Hodges, Defendant, Franklin County Branch Civil Action - Law No. A.D. 1995-496

Associated Engineering Sciences, Inc. v. Hodges

Breach of contract; proceeding with due diligence within a reasonable time.

1. Where no time for performance is specified in a contract, performance should be done within a reasonable time depending upon the nature of the business.

2. The trier of fact must consider the intent of the parties in entering into the contract as revealed by the surrounding circumstances, the situation of the parties and the purpose of the undertaking.

3. Where a contract to perform engineering services provides that the contractor and owner of a subdivision project must pay the engineering firm only upon the sale of a particular number of lots, but does not state a deadline for such sale, the engineering firm, which drafted the contract and knew that the contractor was working with limited financial resources, takes the risk that the sale and therefore its receipt of payment might take longer than it originally envisioned.

Robert E. Graham, Jr., Esq., Counsel for Plaintiffs
D. L. Reichard, II, Esq., Counsel for Defendants

OPINION AND VERDICT

Herman, J., September 10, 1998:

INTRODUCTION

The plaintiff Associated Engineering Sciences, Inc. filed an action for breach of contract against the defendant Robert J. Hodges. A non-jury trial was held before the undersigned on April 6 and 7, 1998. counsel submitted memoranda to the court shortly thereafter. This matter is ready for decision.

The parties entered into two contracts under which the plaintiff would perform design and engineering services for the defendant on two real estate subdivisions. The first contract signed May 28, 1991 involved Deerwood Mountain Estates, a 70-lot subdivision. (Plaintiff's exhibit #8). The second contract was signed on March 18, 1992 and pertained to both the Deerwood and Findlay Park projects. (Plaintiff's exhibits #3 and #4). That contract contained a contingency clause which provided that the plaintiff would be entitled to payment only upon the sale of designated lots:

> We [Associated Engineering] understand that you [Robert Hodges] will pay a lump sum of $10,000.00 of the balance of the Deerwood project fees as shown below upon closing and settlement of sales for five (5) lots in the Deerwood Mountain Estates subdivision plan. Remainder of the balance will be paid upon closing and settlement of sales of three (3) more lots. All outstanding amounts shall be paid upon any sale of the entire parcel...You will pay the entire fee for the Findlay Park planning and initial survey phase ($11,500.00) upon closing and settlement of sales of a total to twenty (20) lots in the Deerwood Mountain Estates development. You will also pay the fees for subsequent engineering work performed on Findlay Park Development in accordance with our invoicing and payment procedures as stated in that contract. This payment arrangement covers both projects and this letter will be included as a portion of the contract for both projects. This arrangement is made with the understanding that A.E.S.I. and Robert Hodges will enter into a contract to complete the design of the Findlay Park Development project and is contingent upon that occurring.

The plaintiff contends that since the spring of 1993 the defendant has failed to proceed on the projects within a reasonable time and that this failure constitutes a default, rendering the entire fee due and payable. The defendant's position is that the unambiguous terms of the contract do not establish a firm time table under which he is required to proceed and that payment is triggered only by the actual sale of lots. The issue for decision is what constitutes a "reasonable time" in which the defendant should have completed Deerwood and sold lots.

Where no time for performance is specified in a contract, performance should be done within a reasonable time depending upon the nature of the business. *Field v. Golden Triangle Broadcasting, Inc.*, 305 A.2d 689 (Pa. 1973), *cert. denied*, 414 U.S. 1158, 94 S.Ct. 916, 39 L.Ed.2d 110; *Francis Gerard Janson, P.C. v. Frost*, 618 A.2d 1003 (Pa.Super. 1993). The trier of fact must consider the intent of the parties in entering into the contract as revealed by the surrounding circumstances, the situation of the parties and the purpose of the undertaking.

Lubrecht v. Laurel Shipping Co., 127 A.2d 687 (Pa. 1956); *Baker v. Peters*, 13 D&C 3d 319 (1980).

REVIEW OF THE EVIDENCE

Richard Reichenbaugh was chief engineer at Associated Engineering when the contracts were signed. The contract was renegotiated and amended because an unforeseen need arose to conduct a wetlands survey and an archaeological study pursuant to a new regulation promulgated by the Department of Environmental Regulation. The plaintiff also renegotiated in order to allow the defendant, who was having difficulty paying his invoices, a more liberal payment schedule. Mr. Reichenbaugh conceded the payment contingency clause is a highly unusual feature of the contract according to industry practice.

The plaintiff had delineated Findlay Park's boundaries, completed topographical and wetlands surveys and mapped the location of the power poles when the defendant asked it to stop work on Findlay and instead concentrate on Deerwood. The plaintiff then delineated Deerwood's boundaries, performed topographical and wetlands surveys and obtained bids for the archaeological study. The plaintiff obtained DER permits for the subdivision's infrastructure including a wastewater collection system and the erection of the wastewater treatment plant. Those permits were supplied to the defendant on or about October 12, 1993. The plaintiff told the defendant on October 29, 1993 that he also needed to obtain a storm water management permit from DER. (Plaintiff's exhibit #5). In May of 1994 the defendant requested assistance in completing the storm water management application form. The plaintiff provided the necessary information on August 18, 1994. (Plaintiff's exhibit #1; defendant's exhibit #1). The defendant could not recall exactly when DER approved the storm water management application.

Two bonds were needed for the project. Bond #1 contained two parts and was for the infrastructure, which included the sewer lines, utilities installation, construction and maintenance of roads, and the erection of the wastewater treatment plant. Bond #2 was for the maintenance and operation of the wastewater treatment plant.

In September 1993 the plaintiff sent to the Montgomery Township supervisors and their engineering contractor Nassaux-Hemsley, Inc. construction cost estimates to assist the Township in determining the bond figures. The defendant received informal approval to begin construction but final, formal approval was contingent upon him obtaining bond #1. The plaintiff argues that once the defendant received all the permits he should have proceeded to complete all construction and to sell the Deerwood lots.

The defendant was under-capitalized and could not produce the money required for bond #1. He attempted to raise capital using various methods. In the fall of 1993 he listed his home property which encompasses 81 acres for sale with Crest Realty, Inc. If it had sold it would have provided the funds he needed to complete the Deerwood project. He also listed his parents' home for sale to generate funds. By the spring of 1993 he was unable to secure bank funding because conditions in the real estate market had deteriorated, interests rates were high and banks refused to grant him a loan or other financing. The plaintiff did not dispute the fact that even experienced builders were having trouble getting financing at that time.

The defendant tried to obtain venture capital, mortgage financing or a partnership for the project. He advertised the lots through the newspaper and radio mostly between March and July of 1993. (Defendant's exhibits #3 and #4). He signed a contract with Crest Realty, Inc. on October 12, 1993 to sell his home property. Dean Smuro, a licensed real estate broker for commercial and investment properties with Crest and in the business for 26 years, testified that the defendant was a very motivated seller who was willing to do almost anything to sell the properties in order to generate capital for the Deerwood project. (Defendant's exhibits #7, 8 and 9). Even after the contract expired on October 12, 1994, the defendant maintained a verbal, informal agreement with Mr. Smuro to sell his home property.

The defendant entered into a finder's fee agreement with Attorney Bill Cramer, Esquire on September 30, 1993 to locate an investor or purchaser of either Deerwood or Findlay Park. He signed a finder's fee agreement on April 19, 1996 whereby

Olympus Mortgage Corporation would assist Attorney Cramer in that undertaking. (Defendant's exhibit #6). Attorney Cramer credibly testified about the defendant's efforts to obtain the money to secure the infrastructure bonding. Several potential investors and banks have expressed interest in the project since October 1993. One such was D. L. Martin, a local construction company which negotiated for approximately nine months before deciding against participation in December of 1997. Another potential investor, BWI, expressed an interest in the project in March of 1995. It turned out to be a sham corporation, however, and the defendant never received the promised capital. Three other potential investors have been identified and their proposals were being reviewed as of the time of trial.

The plaintiff began demanding payment in the summer of 1994 because it believed the project should have been done and lots sold by that time. The construction did not actually begin until August of 1994. Without an outside source of funding, the defendant and his family began laying sewer lines and manholes in the spring of 1995. There was credible testimony that all the income generated from the defendant's family contracting business went into the Deerwood project.

There was credible testimony that the defendant stopped work on Deerwood in August of 1995 because he became ill with heat exhaustion while excavating the sewer lines trenches. The family recommenced work in early 1996 upon his recovery. Virtually all the infrastructure work was substantially completed by the end of 1996 and beginning of 1997. The defendant tested all utilities and received approvals for these in late summer or early fall of 1997. The construction of the treatment plant remains to be done and should take approximately three weeks. The road work is done except for a few days' worth of blacktopping.

The plaintiff continued to demand payment for services rendered. In 1995 the defendant offered to the plaintiff his Lincoln motor vehicle valued at between $25,000.00 and $28,000.00. The offer was rejected. In early 1996 the defendant offered to take out a second mortgage on a piece of land he owned worth $25,000.00 at 8%. This would almost have satisfied the plaintiff's bill. That offer was also rejected. The defendant also

offered the plaintiff a piece of real estate he owns in Virginia. The plaintiff rejected that offer a few months before trial.

Bond #2, which pertained to the operation and maintenance of the waste water treatment plant, also presented problems. According to the credible testimony of Attorney Cramer, the Montgomery Township supervisors had never been confronted with a plant maintenance bond of the kind contemplated for Deerwood and were apprehensive about how to structure such a bond. To the frustration of both the defendant and Attorney Cramer, the Township failed to communicate final figures for Bond #2 between October of 1993 and March of 1997. After many discussions with the Township Solicitor and a meeting with the Township supervisors and their engineer Nassaux-Hemsley, Inc., Attorney Cramer was given additional information necessary for the Township to arrive at final bonding figures. Attorney Cramer submitted that information to the Township for final review in September of 1997. The defendant's personal residence is collateral for the bond. Attorney Cramer spoke with the Solicitor in January of 1998. As of the time of trial, however, no final approval has been received from the Township.

DISCUSSION

The plaintiff contends the defendant did not move with due diligence to complete the projects after the DER permits were issued and provided to the defendant on or about October 12, 1993. In evaluating that claim, we note the following: The plaintiff itself initiated the contract amendation and drafted the March 18, 1992 contract, including the highly unusual contingency provision which did not require the defendant to proceed within any set time and imposed no deadlines for completion of the project and sale of the lots. The plaintiff knew the defendant was having trouble paying his invoices on the Findlay project and was in general working with very limited financial resources. It allowed the defendant a more flexible time table because it wanted to be awarded the Findlay Park project. The plaintiff included the contingency provision in the contract as part of their deliberate strategy to secure additional work form the defendant. In addition, the plaintiff knew in 1992 that interest rates were high and that the real estate market was generally

depressed. The defendant's project costs increased substantially because of the unanticipated need to conduct archaeological and wetland surveys.

The defendant worked steadily in some form on the project since March 18, 1992. He tried to raise money to complete the project by selling his own property, selling the lots themselves and bringing in a venture capitalist, investor or bank. Unable to obtain an outside source of capital, he used the income from his general contracting business and his own labor and that of his family to gradually fund the construction.

It is evident to the court, and no doubt to the parties themselves, that the defendant bit off more than he could chew in undertaking these projects. Nevertheless, the plaintiff left itself vulnerable by agreeing to no specific deadline for Deerwood's completion and sale of the lots. The plaintiff thereby took a calculated risk because it desired to be awarded the entire Findlay Park project in addition to Deerwood. As the defendant notes, "[T]here is certainly no evidence that the Defendant abandoned this project, merely that the work had not proceeded with the speed the Plaintiff would have preferred." That is indeed the key to this court's finding that the defendant acted diligently and reasonably to fulfill his contractual obligations.

The plaintiff has not proven by a preponderance of the evidence that the defendant failed to proceed with due diligence to complete his obligations under the contract within a reasonable time. An appropriate Verdict will be entered as part of this Opinion.

VERDICT

NOW THIS 10th day of September 1998, this breach of contract action having come before the court, and the court as the trier of fact having considered the evidence presented at trial, arguments of counsel and the relevant law, hereby finds in favor of the defendant, Robert J. Hodges and against the plaintiff, Associated Engineering Sciences, Inc. in so far as the defendant has proceeded with due diligence and the fees sought by the plaintiff under the contract are not due and payable until the specified number of lots in Deerwood Mountain Estates are sold.

IT IS FURTHER ORDERED that the Prothonotary is directed to serve written notice of the entry of this Verdict on the parties' attorneys of record. The notice shall include a copy of the Verdict pursuant to Pa.R.C.P. 236.