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Franklin County Legal Journal

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**Aeron Alberti t/d/b/a Benchmark Contracting Services, Plaintiff vs.
Gerard Tibbs and Cynthia Tibbs, Defendant**

Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Civil Action No. 2018-596

HOLDING: Defendants’ First Preliminary Objection for demurrer due to Plaintiff’s failure to comply with the Fictitious Names Act, 54 Pa. C.S.A. § 301 et seq. is **OVERRULED**. Defendants’ First Preliminary Objection for lack of capacity to sue due to Plaintiff’s failure to comply with the Fictitious Names Act, 54 Pa. C.S.A. § 301 et seq. is **SUSTAINED**. Plaintiff shall file an Amended Complaint within twenty (20) days of the date of this Order which sets forth factual averments which may establish that the Defendants had actual knowledge of the party with whom they were contracting such that the Court may find substantial compliance under §331(c) of the Fictitious Names Act. Defendants’ First Preliminary Objection for demurrer for failure to state a claim is **OVERRULED**. Defendants’ Second Preliminary Objection for insufficient specificity is **OVERRULED**.

- a. Where Plaintiff has set forth legally sufficient allegations as to breach of contract, but admits to failing to register the contracting entity’s fictitious name under the Fictitious Names Act, the Court will deny demurrer because failure to register does not automatically void contracts entered into by that entity.
- b. Where the pleadings fail to aver facts regarding the Defendants’ actual knowledge of who comprised the unregistered entity with which the Defendants contracted, the Court cannot determine whether there has been substantial compliance with the Fictitious Names Act, and therefore cannot determine whether the Plaintiff has standing to proceed with his breach of contract action.
- c. Pleading breach of contract for failure to pay is effectively identical to pleading a claim for failure to pay under the Pennsylvania Contractor and Subcontractor Payment Act because said Act only sets forth one type of violation – failure to pay a contractor in strict compliance with the parties’ contract.
- d. Where Pennsylvania Contractor and Subcontractor Payment Act only provides for one type of violation (failure to pay a contractor in strict compliance with the parties’ contract), and where cursory review of that Act would apprise the Defendants of the claims against them, the Court cannot find that merely referring to “relevant portions” of that Act is insufficiently specific.

HEADNOTES

Preliminary Objections: Demurrer

1. “A demurrer, which results in the dismissal of a suit, should be sustained only in cases that are free and clear from doubt and only where it appears with certainty that the law permits no recovery under the allegations pleaded.” Allegheny Sportsmen’s League v. Ridge, 790 A.2d 350 (Pa. Cmwlth. 2002) (internal citations omitted).
2. When making this determination, “the Court must accept as true all well-pleaded allegations of material fact as well as all reasonable inferences deducible therefrom.” Allegheny Sportsmen’s League, 790 A.2d at 354.
3. Failure to register a fictitious name under the Fictitious Names Act, 54 Pa. C.S.A. § 301 et seq. does not automatically invalidate a contract made with that unregistered entity. 54 Pa. C.S.A. §331(a).

4. Failure to register a fictitious name under the Fictitious Names Act, 54 Pa. C.S.A. § 301 et seq. does not automatically negate the existence of an entity.
- Preliminary Objections: Lack of Capacity to Sue Under the Fictitious Names Act, 54 Pa. C.S.A. § 301 et seq.*
5. An entity with an unregistered fictitious name will not “be permitted to maintain any action in any tribunal of this Commonwealth until such entity [complies] with the provisions of this chapter.” 54 Pa. C.S.A. §331(a).
6. Although an unregistered entity is incapable of bringing a lawsuit in Pennsylvania under a contract which it has entered into, “[t]he failure of any entity to register a fictitious name as required by this chapter shall not impair the validity of any contract or act of such entity and shall not prevent such entity from defending any action in any tribunal of this Commonwealth.” 54 Pa. C.S.A. §331(a).
7. If an unregistered entity under the Fictitious Names Act brings a lawsuit in any Pennsylvania Court to recover damages for breach of a contract entered into by that entity, the unregistered entity must pay a civil penalty of \$500 to the Department of State of the Commonwealth, unless “there has been substantial compliance in good faith with the requirements of this chapter. . .” 54 Pa. C.S.A. §331(b)-(c).
8. The Pennsylvania Superior Court has accepted that the purpose of the Fictitious Names Act was “to protect person giving credit in reliance on the assumed or fictitious name, and to definitely establish the identity of the individuals owning the business, for the information of those who might have dealings with the concern.” Ross v. McMillan, 93 A.2d 874, 875 (Pa. Super. 1953); see also George Stash & Sons v. New Holland Credit Co., LLC, 905 A.2d 541 (Pa. Super. 2006).
9. If a defendant in a breach of contract action brought by an unregistered entity admits that he had full knowledge of the actual identity of the person who comprises the unregistered entity with which he has contracted, that defendant cannot thereafter deny that unregistered entity’s right to recover from a breach of that contract. Ross v. McMillan, 93 A.2d 874, 875 (Pa. Super. 1953).
- Preliminary Objections: Insufficient Specificity*
10. To determine whether a complaint is sufficiently specific, the Court must evaluate “whether [it] is “sufficiently clear to enable the defendant to prepare his defense” or “whether [it] informed the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense.” Rambo v. Green, 906 A.2d 1232, 1235 (Pa. Super. 2006) (quoting Ammlung v. City of Chester, 302 A.2d 491, 498 n.36 (Pa. Super. 1973)).
11. Section 504 of the Pennsylvania Contractor and Subcontractor Payment Act states, “Performance by a contractor or a subcontractor in accordance with the provisions of a contract shall entitle the contractor or subcontractor to payment from the party with whom the contractor or subcontractor has contracted.” 73 P.S. §504.
12. Section 505 of the Pennsylvania Contractor and Subcontractor Payment Act obligates the owner of the home on which the contractor or subcontractor is performing its contracted work to makes payments “strictly in accordance with terms of the construction contract.” 73 P.S. §505.
13. Section 512 of the Pennsylvania Contractor and Subcontractor Payment Act states, “If arbitration or litigation is commenced to recover payment due under this act and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this act, the arbitrator or court shall award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was wrongfully withheld.” 73 P.S. §512(a).

14. The prevailing party in litigation under the Pennsylvania Contractor and Subcontractor Payment Act shall be awarded reasonable attorney's fees. 73 P.S. §512(b).

Appearances:

Joseph A. Hudock, Esquire *for the Plaintiff*

Andrew J. Benchoff, Esquire *for Defendants*

OPINION

Before Meyers, J.

PROCEDURAL HISTORY

The Plaintiff Aeron Alberti t/d/b/a Benchmark Contracting Services [hereinafter “Alberti”] initiated the instant action on February 15, 2018, by filing a Complaint against the Defendants Gerald Tibbs and Cynthia Tibbs [hereinafter “the Tibbses”], as husband and wife. Alberti’s Complaint alleged breach of contract and violation of the Pennsylvania Contractor and Subcontractor Payment Act, 73 P.S. §501 *et seq.*

The Tibbses filed Preliminary Objections on March 7, 2018. The Tibbses filed their Brief in Support of Preliminary Objections on March 20, 2018. This Court listed the matter for oral argument on May 3, 2018. However, on May 3, 2018, Alberti filed a Motion to Continue Argument because counsel was already scheduled to be in a civil trial in federal court on that date, and counsel averred he would file an Amended Complaint. On May 7, 2018, the Court issued an Order granting Alberti’s request and re-scheduling oral argument for July 12, 2018.

Alberti has not filed an Amended Complaint. Counsel for Alberti did not appear at oral argument held before this Court on July 12, 2018.

This matter is now ripe for decision before this Court.

FACTUAL HISTORY

Alberti is an individual living in Maryland who works as a home remodeling contractor doing business as Benchmark Contracting Services [hereinafter “Benchmark”]. Plaintiff’s Complaint at ¶¶1-2. The Tibbses own a home and live in Waynesboro, PA. *Id.* at ¶¶3-5. On or around April 18, 2017, a fire in the Tibbses’ home caused significant property damage. *Id.*

at ¶6. On or around June 9, 2017, Alberti, doing business as Benchmark, allegedly entered into a contract with the Tibbses “to perform the necessary cleaning, repair, restoration, installation and/or replacement of damaged items.” *Id.* at ¶7. Alberti attached a copy of this Contract to his Complaint as Exhibit A [hereinafter “Contract A”]. *Id.* at Ex. A. This Contract provided the build would cost \$39,222.27, and accounted for a balance due of \$29,222.27 at the Tibbses’ initial \$10,000.00 deposit. *Id.*

On or around July 16, 2017, the parties modified Contract A, and entered into a new Contract which is attached to Alberti’s Complaint as Exhibit B [hereinafter “Contract B”]. *Id.* at ¶8, Ex. B. Contract B contained the same cost of the build and accounted for the Tibbses’ deposit. *Id.* Alberti avers that he performed all work which was promised under this Contract. *Id.* at ¶9. The Defendants even allegedly executed a Certificate of Satisfaction confirming their satisfaction with Alberti’s work. *Id.* at ¶10, Ex. C.

However, Alberti avers that despite requesting payment of the remaining \$29,222.27 balance plus interest accruing due to their failure to pay. *Id.* at ¶11.

DISCUSSION

I. APPLICABLE STANDARD: PRELIMINARY OBJECTIONS

The standard for evaluating preliminary objections, including demurrer, is laid out in Allegheny Sportsmen’s League v. Ridge:

[W]hen ruling upon preliminary objections, the Court must accept as true all well-pleaded allegations of material fact as well as all reasonable inferences deducible therefrom. The Court is not required to accept as true any conclusions of law or expressions of opinion. In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by refusal to sustain them. A demurrer, which results in the dismissal of a suit, should be sustained only in cases that are free and clear from doubt and only where it appears with certainty that the law permits no recovery under the allegations pleaded.

790 A.2d 350, 354 (Pa. Cmwlth. 2002) (internal citations omitted). Preliminary objections must state specifically the grounds upon which relief should be granted. See Foster v. Peat Marwick Main & Co., 587 A.2d 382 (Pa. Cmwlth. 1991).

II. ANALYSIS

A. FIRST PRELIMINARY OBJECTION: *Demurrer and Lack of Capacity to Sue for Failure to Register with the Fictitious Names Act*

The Tibbses' First Preliminary Objection asserts that Benchmark does not exist in Pennsylvania and therefore cannot enter into a valid contract or thereafter sue for damages under such an invalid contract. Specifically, the Tibbses claim Alberti lacks capacity to sue under 15 Pa. C.S.A. §4141 because it is a Maryland entity which does not have a certificate of authority to conduct business in Pennsylvania. As to these specific grounds for relief, the Tibbses' argument must fail because this section of the Pennsylvania Consolidate Statutes was repealed effective July 1, 2015, by 2014, Oct. 22 PL. 2640, No. 172, §25.

The Tibbses also claim that Alberti lacks standing to sue under the Pennsylvania Fictitious Names Act, 54 Pa. C.S.A. §301 et seq. because the fictitious name Benchmark is not properly registered with the Pennsylvania Department of State.¹ Under this Act, any entity which conducts business in this Commonwealth by use of a fictitious name must register that fictitious name with the Department of State of the Commonwealth. 54 Pa. C.S.A. §303(b)(1). An unregistered entity will not "be permitted to maintain any action in any tribunal of this Commonwealth until such entity [complies] with the provisions of this chapter." 54 Pa. C.S.A. §331(a). This same section also states that "[t]he failure of any entity to register a fictitious name as required by this chapter shall not impair the validity of any contract or act of such entity and shall not prevent such entity from *defending* any action in any tribunal of this Commonwealth." Id. (emphasis added). However, before *initiating* a civil action in any court of this Commonwealth, the unregistered entity must pay a civil penalty of \$500 to the Department of State of the Commonwealth, unless "there has been substantial compliance in good faith with the requirements of this chapter. . ." 54 Pa. C.S.A. §331(b)-(c).

In his Motion to Continue Argument, Alberti effectively admits that the fictitious name under which he contracted with the Tibbses, Benchmark, was in fact not registered in Pennsylvania at the time the contract was entered or when the action was initiated in Pennsylvania. Plaintiff's Motion to Continue Argument at ¶3. Notably, Alberti averred in his Motion to Continue that after registering the fictitious name Benchmark, he would file an Amended Complaint which would render this Preliminary Objection

¹ Although no appellate Court has ruled on the issue of whether the Fictitious Names Act may serve as a basis for lack of standing to sue such that it may be addressed at the Preliminary Objection stage, Courts of Common Pleas in Pennsylvania have held that it does establish a basis for a valid Preliminary Objection. See Smith Atwell v. Billigen Home Improvements, Inc., 34 Pa. D. & C.3d 578, 581 (C.P. Beaver Cty. July 12, 1984) ("Thus, it is clear that, when registration [under the Fictitious Names Act] has not occurred, an impediment exists. Such an impediment is properly raised by preliminary objection."); Johnson v. Laureland Builder, 11 Pa. D. & C.4th 271, 273-74 (C.P. Blair Cty. July 1, 1991) (overruling preliminary objection for demurrer for failure to register under Fictitious Name Act because entity substantially complied within the meaning of §331(c) of that act).

moot. However, no such Amended Complaint has been filed, and there has been no indication in the record that Alberti has in fact accomplished registration of the fictitious name in Pennsylvania.

Contrary to the Tibbses' averments, failure to register under the Fictitious Names Act does not void a contract entered into by that entity. Rather, §331(a) of that act states that failure to register a fictitious name "*shall not impair the validity of any contract or act of such entity.*" (emphasis added). Since the failure to register an entity does not void contracts entered into by that entity, the Tibbses' arguments as to demurrer due to the "nonexistence" of Benchmark must fail. Alberti has pled and attached contracts by which Alberti performed services. Alberti has also pled that he has not been paid in accordance with the terms of that contract, resulting in a breach of said contract. Accepting all of Alberti's factual averments as true, this Court cannot find that Alberti would be barred from relief as a matter of law. To this extent, the Tibbses' First Preliminary Objection for demurrer for failure to register under the Fictitious Names Act is **OVERRULED**.

On the other hand, even though Alberti has set forth a *prima facie* cause for breach of contract such that he survives demurrer, it is still unclear to this Court based on the facts pled in the Complaint whether Alberti in fact has standing to bring this action. The Pennsylvania Superior Court has accepted that the purpose of the Fictitious Names Act was "to protect person giving credit in reliance on the assumed or fictitious name, and to definitely establish the identity of the individuals owning the business, for the information of those who might have dealings with the concern." Ross v. McMillan, 93 A.2d 874, 875 (Pa. Super. 1953); see also George Stash & Sons v. New Holland Credit Co., LLC, 905 A.2d 541 (Pa. Super. 2006). Based on the legislative purpose of the Fictitious Names Act, the Superior Court has held that if a defendant admits that he had full knowledge of the actual identity of the person who comprises the unregistered entity with which he has contracted, that defendant cannot thereafter deny that unregistered entity's right to recover from a breach of that contract. Id. ("We hold, therefore, that where a defendant admits that he had full knowledge of the true identity of the persons who comprise an entity which is subject to, but not registered under [the Fictitious Names Act], he is estopped from denying their right to sue or recover. If the fine has not been paid, plaintiffs will pay it or the Commonwealth will undoubtedly collect it.")² See also George Stash & Sons, 905 A.2d at 543 ("[T]hose who deal with an unregistered party and accept the benefits of the business transactions, having full knowledge of the party's true identity notwithstanding the fictitious name, are estopped to deny the party's capacity to sue.").

² The Superior Court was addressing the same question presently before this Court, but under a previous version of the Fictitious Names Act in place in 1917 and 1945, which contains the same provisions as the current Fictitious Names Act effectuated in 1982.

Despite Alberti admitting his failure to comply with the registration requirements of the Fictitious Names Act in his Motion to Continue, Alberti's Complaint and the Tibbses' Preliminary Objections fail to address the actual knowledge of the Tibbses at the time they entered the contract such that this Court may determine whether Alberti and Benchmark were in "substantial compliance" under §331(c) of the Fictitious Names Act. If the Tibbses were actually aware of whom they were dealing with, namely Alberti, then this Court would find in accordance with the preceding caselaw that Benchmark had substantially complied with the objectives of the Fictitious Names Act and may disregard its failure to register. Also, if the Court finds substantial compliance with the Fictitious Names Act, it may disregard the \$500.00 penalty imposed by §331(b) of that Act. Wherefore, this Court is of the opinion that since neither party has addressed in their pleadings whether there is a factual basis for assuming that the Tibbses had actual knowledge of the persons comprising Benchmark, Alberti should be given an opportunity to amend his Complaint to assert a factual basis for substantial compliance with the Fictitious Names Act. If Alberti fails to file an Amended Complaint within twenty (20) days of the date of this Order, his Complaint will be dismissed. If Alberti files an Amended Complaint, the Tibbses may raise this same objection on subsequent preliminary objections.

Defendants' First Preliminary Objections is SUSTAINED as to lack of capacity to sue for Plaintiff's failure to comply with the Fictitious Names Act, 54 Pa. C.S.A. § 301 et seq. Plaintiff shall file an Amended Complaint within twenty (20) days of the date of this Order which sets forth factual averments which may establish that the Defendants had actual knowledge of the party with whom they were contracting such that the Court may find substantial compliance under §331(c) of the Fictitious Names Act.

B. FIRST PRELIMINARY OBJECTION: Demurrer for Failure To State A Claim

The Tibbses also claim in their First Preliminary Objection that Alberti has failed to state a claim because Contract B, under which Alberti seeks relief, states that Gerald Tibbs is the customer, but is signed by "C. Tibbs." Defendants' Preliminary Objections ¶13; Plaintiff's Complaint at Ex. B. For this reason, the Tibbses assert that a valid contract between them and Benchmark has not been established. However, at this stage, the Court must accept all of Alberti's averments of fact as true. If Alberti says there was a contract between Benchmark and both the Tibbses, the Court must accept that statement as true for purposes of disposing of preliminary objections. To this extent, the alleged inconsistencies in the Contract itself merely create an issue of fact as to who may or may not have been a party

to Contract B. Since this Court cannot say as a matter of law that Alberti is barred from relief due to any inconsistencies in Contract B's execution, the Tibbses' First Preliminary Objection for demurrer for failure to state a claim is OVERRULED.

C. SECOND PRELIMINARY OBJECTION: Insufficient Specificity Under Pa. R.C.P. 1028(a)(3)

The Tibbses' Second Preliminary Objection claims that Alberti's claim under the Pennsylvania Contractor and Subcontractor Payment Act, 73 P.S. §501 et seq., is insufficiently specific under Pa. R.C.P. 1028(a)(3).³ To determine whether a complaint is sufficiently specific, the Court must evaluate "whether [it] is "sufficiently clear to enable the defendant to prepare his defense" or "whether [it] informed the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense." Rambo v. Green, 906 A.2d 1232, 1235 (Pa. Super. 2006) (quoting Ammlung v. City of Chester, 302 A.2d 491, 498 n.36 (Pa. Super. 1973)).

The Pennsylvania Contractor and Subcontractor Payment Act contains only sixteen sections. Section 504 states, "Performance by a contractor or a subcontractor in accordance with the provisions of a contract shall entitle the contractor or subcontractor to payment from the party with whom the contractor or subcontractor has contracted." 73 P.S. §504. Section 505 obligates the owner of the home on which the contractor or subcontractor is performing its contracted work to makes payments "strictly in accordance with terms of the construction contract." 73 P.S. §505. Section 512 states,

If arbitration or litigation is commenced to recover payment due under this act and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this act, the arbitrator or court shall award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was wrongfully withheld.

73 P.S. §512(a). This section also states that the prevailing party in litigation shall be awarded reasonable attorney's fees. 73 P.S. §512(b). Therefore, since the act generally obligates the owner to pay the contractor the amount due in a contract, and punishes the owner for failure to comply with the payment requirements of the owner's contract with the contractor, pleading breach of contract for failure to pay effectively pleads a claim under the Contractor and Subcontractor Payment Act.

³ Although Paragraph 19 of the Tibbses' Preliminary Objections states that "there are insufficient facts pled to support the legal conclusion," the Tibbses are not seeking a demurrer of the PA Contractor and Subcontractor Payment Act claim. The Tibbses seek only a more specific pleading as to this claim.

Alberti's Complaint avers only that "[p]ursuant to the *relevant provisions* of the Contractor and Subcontractor Payment Act, defendants are in default and are liable for interest in the amount of 1% per month and attorney's fees." Plaintiff's Complaint at ¶14 (emphasis added). However, this legislation is not so extensive and is so clear in its plain meaning such that the Tibbsses are on notice of the claims brought against them, namely that they have not paid Benchmark the amount due under Contract B. The mere due diligence of reading this short piece of legislation informs the Tibbsses explicitly that they are accused of committing the only violation set forth in this Act, which is failure to pay Benchmark in accordance with the provisions of Contract B. For these reasons, this Court cannot find that Alberti's claim is insufficiently specific. The Tibbsses' Second Preliminary Objection is **OVERRULED**.

CONCLUSION

Defendants' First Preliminary Objection for demurrer due to Plaintiff's failure to comply with the Fictitious Names Act, 54 Pa. C.S.A. § 301 et seq. is **OVERRULED**. Defendants' First Preliminary Objection for lack of capacity to sue due to Plaintiff's failure to comply with the Fictitious Names Act, 54 Pa. C.S.A. § 301 et seq. is **SUSTAINED**. Plaintiff shall file an Amended Complaint within twenty (20) days of the date of this Order which sets forth factual averments which may establish that the Defendants had actual knowledge of the party with whom they were contracting such that the Court may find substantial compliance under §331(c) of the Fictitious Names Act. Defendants' First Preliminary Objection for demurrer for failure to state a claim is **OVERRULED**. Defendants' Second Preliminary Objection for insufficient specificity is **OVERRULED**.

ORDER OF COURT

AND NOW THIS 30th day of July, 2018, upon review of the record,

IT IS HEREBY ORDERED that

1. Defendants' First Preliminary Objection for demurrer due to Plaintiff's failure to comply with the Fictitious Names Act, 54 Pa. C.S.A. § 301 et seq. is **OVERRULED**.

2. Defendants' First Preliminary Objection for lack of capacity to sue due to Plaintiff's failure to comply with the Fictitious Names Act, 54 Pa. C.S.A. § 301 et seq. is **SUSTAINED**. **Plaintiff shall file an Amended**

Complaint within twenty (20) days of the date of this Order which sets forth factual averments which may establish that the Defendants had actual knowledge of the party with whom they were contracting such that the Court may find substantial compliance under §331(c) of the Fictitious Names Act.

3. Defendants' First Preliminary Objection for demurrer for failure to state a claim is OVERRULED.

4. Defendants' Second Preliminary Objection for insufficient specificity is OVERRULED.

This Order is pursuant to the attached Opinion

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order; including a copy of this Order; to each party; and shall note in the docket the giving of such notice and the time and manner thereof.