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D.L. George v. Hodges

D.L. GEORGE & SONS CONSTRUCTION CO., Plaintiff,

v. ROBERT J. HODGES AND ANNE M. HODGES, His Wife, Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,

Franklin County Branch
Civil Action - Law, No. 2000-1769

Motion to Amend Complaint to Add a Claim under Contractor and Subcontractor Payment Act, 73 P.S. Section 501 et seq.

(1) The Contractor and Subcontractor Payment Act applies to improvements to real property which consist of more than six residential units under construction simultaneously.

(2) Where the Act does not limit the interpretation of "residential unit" to the construction of buildings, a contractor who does preparatory work on an undeveloped subdivision is entitled to the benefit of the Act even though his work involves only the land on which the buildings will eventually sit and not the buildings themselves.

(3) The Act applies to any large-scale construction project where contractors make a substantial investment of time, labor, risks and materials, regardless of whether those contractors erect dwellings or do the infrastructure work which makes those dwellings possible, such as laying roads and excavating trenches and ditches in order to install utilities and drainage systems.

(4) An action brought under the Act is not barred by the two-year statute of limitations where the Act does not specify a limitations period, and analogous case authority indicates that limitations period applies only to actions based on a statute for a civil penalty and where the damages available under the Act are remedial, not penal in nature.

(5) In looking beyond semantics and terminology, courts use a three-part test to determine whether a statute is intended to be remedial as opposed to penal: is the statute's purpose to redress individual wrongs or more general wrongs to the public; does recovery under the statute run to the harmed individual or to the public; and is the recovery allowed under the statute wholly disproportionate to the harm suffered.

(6) Despite the Act's provisions for relief in the form of 1% interest and reasonable attorney fees, its purpose is not to punish those who fail to pay contractors, but is meant simply to compensate contractors for their investment in large-scale projects.

Appearances:

Stephen E. Patterson, Esq., *Counsel for Plaintiff*

Richard L. Webber Jr., Esq., *Counsel for Defendants*

OPINION

Herman, J., November 27, 2001

Introduction

Before the court is plaintiff's motion to amend the complaint. Defendants oppose the motion. Counsel submitted briefs to the court and argument was held on September 6, 2001. This matter is ready for decision.

Background

Plaintiff, a construction company, alleges in its complaint that defendants, Robert Hodges and his wife Anne Hodges, breached an oral contract whereby they were to pay plaintiff for labor and materials provided in connection with the development of real estate in Montgomery Township, Franklin County, known as Deerwood Estates. Plaintiff alleges it completed the work but that defendants refuse to pay the outstanding balance of $110,660.19. The work included the excavation of trenches and ditches for sewers and utility lines, as well as the laying and grading of roads to service the development. Plaintiff also asserts claims in the alternative based on quantum meruit and promissory estoppel.

Defendants deny plaintiff completed the agreed-upon work. Defendants also maintain that the contract provided that payment was contingent upon the eventual sale of certain lots.

Discussion

Can plaintiff assert a claim under the Contractor and Subcontractor Payment Act given the Act's failure to define the term "residential unit"?

Plaintiff seeks to amend its complaint to add a claim under the Contractor and Subcontractor Payment Act, 73 P.S. section 501 et seq.[1] The Act provides as follows:

> Section 503(a). Number of residential units.-- This act shall not apply to improvements to real property which consists of six or fewer residential units which are under construction simultaneously.

Section 504: Performance by contractor or subcontractor: Performance by a contractor or 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.

Section 505. Owner's payment obligations

> (a) Construction contract.-- The owner shall pay the contractor strictly in accordance with the terms of the construction contract.
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> (b) Absence of payment term.-- In the absence of a construction contract or in the event that the construction contract does not contain a term governing the terms of payment, the contractor shall be entitled to invoice the owner for progress payments at the end of the billing period. The contractor shall be entitled to submit a final invoice for payment in full upon completion of the agreed-upon work.
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> (c) Time for payment.- Except as otherwise agreed by the parties, payment of interim and final invoices shall be due from the owner 20 days after the end of a billing period or 20 days after delivery of the invoice, whichever is later.
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> (d) Interest.- Except as otherwise agreed by the parties, if any progress or final payment to a contractor is not paid within seven days of the due date established in subsection (c), the owner shall pay the contractor, beginning on the eighth day, interest at the rate of 1% per month or fraction of a month on the balance that is at the time due and owing.

An "improvement" is defined in section 502 as: "(1) All or any part of a building or structure; (2) The erection, alteration, demolition, excavation, clearing, grading or filling of real property; (3) Landscaping, including the planting of trees and shrubbery, and constructing driveways and private roadways on real property."

Defendants argue the Act does not apply to this case because plaintiff's work was not done to property consisting of six or more residential units under construction simultaneously as required by section 503(a). Specifically defendants point out the work was not done to structures or buildings but only to the land. Plaintiff does not dispute its work pertained solely to the land and that no residential structures were as yet being erected. The issue is whether preparatory infrastructure work on an undeveloped subdivision constitutes an improvement to "residential units." Unfortunately the Act does not define "residential unit" and there is no appellate guidance interpreting this aspect of the statute.

According to defendants, in the absence of a clear definition of "residential unit," the statute should be interpreted to apply only to the construction of apartment buildings, townhouses or multiple individual houses, and not to the development of the vacant land on which those structures will eventually sit. Defendants contend that interpreting "residential unit" to encompass land preparation extends the protection of the statute to contractors whom the legislature did not intend to benefit. We disagree.

As the court, under a different set of facts, noted in Richardson v. Sherman, 26 D.&C. 4th193 (1996) (Court of Common Pleas, Allegheny County), "[t]he purpose of the [Act] is to provide protection to contractors. Contractors require the greatest protection when they perform work on major construction projects." Id. at 197. We find this applies with equal force where a contractor undertakes a large-scale site preparation project. Even though such a contractor's work consists only of the infrastructure improvements, those improvements will make it possible for a building contractor to later construct dwellings suitable for human habitation. Contractors who lay roadways and excavate large-scale trenches and ditches in order to install utilities, and storm and sewer drainage systems, invest a substantial amount of labor and materials in those activities. Insofar as the Act specifically includes work done to the land under the definition of "improvements" and focuses on large-scale projects, common sense dictates the purpose of the Act was to give all contractors an added incentive for undertaking such costs by ensuring they are paid in full and in a timely manner. There is no persuasive justification for depriving a contractor who makes infrastructure improvements of the statute's benefits. Consequently we will grant plaintiff's motion to amend the complaint to include a claim under the Act.

Is plaintiff's claim under the Act barred by the two-year statute of limitations in 42 Pa.C.S.A. section 5524(5)?

Plaintiff sent defendants its invoice on February 20, 1998. Under section 505(c) of the Contractor and Subcontractor Payment Act, payment is due no later than 20 days from the end of the billing period or from the delivery of the invoice, whichever is later. Assuming a 3-day mail time, the 20-day period expired on or about March 14, 1998. This action was filed on May 24, 2000.

The time limit in section 5524(5) applies to "an action upon a statute for a civil penalty or forfeiture." Plaintiff concedes this action was brought beyond the two-year time period but argues section 5524(5) does not apply to this action and instead the applicable period is four years under section 5525 of the Judicial Code.[2] The Act provides for special damages above and beyond those recoverable for breach of contract and is not meant to be a substitute for a claimant's right to pursue and receive compensatory damages otherwise available for such a breach. For example section 505(d) of the Act provides for 1% interest per month on unpaid invoices. Also section 512 entitled "Penalty and attorney fee" provides:

> (a) Penalty for failure to comply with act.- If arbitration or litigation is commenced to recover payment due under this act and it is determined that an owner...has failed to comply with the payment terms of the 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...
>
> (b) Award of attorney fee and expenses.- Notwithstanding any agreement to the contrary, the substantially prevailing party in any proceeding to recover any payments under this act shall be awarded a reasonable attorney fee in an amount to be determined by the court or arbitrator, together with expenses.

(Underlining supplied.) We agree with plaintiff that the reference in section 512(a) to "other damages" is to compensatory damages recoverable for any underlying claim such as breach of contract. Any damages to which a contractor is specifically entitled under the Act are not the result of an independent action for recovery. Those damages are in addition to the normal compensatory damages recoverable under a contract claim or any other appropriate action. This is so because the purpose of the Act is to give special recognition and protection to those involved in large-scale construction projects. This conclusion is bolstered by the fact that the Act does not feature its own separate statute of limitations period for claims brought under its provisions.

Given the Act's silence as to what the statute of limitations is for claims brought under its provisions, we must look to analogous causes of action for guidance. Such cases focus on whether the recoverable damages are remedial as opposed to penal. Plaintiff argues it is not subject to the two-year filing period under section 5524(5) because this action is not "based upon a statute for a civil penalty." (Emphasis supplied.) According to plaintiff, the damages available to a successful plaintiff under section 512 are not forfeitures and/or penalties, but are strictly remedial in nature. Defendants on the other hand stress the plain language of section 512 which contains the word "penalty" and allows for interest and attorney fees. Section 505(d) also grants a successful claimant 1% interest on unpaid balances. In defendants' view, the Act imposes punishment beyond remediation and therefore the statute of limitations is two years.

Plaintiff cites Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78 (3rd Cir. 2000). The plaintiff in that case was a car dealership franchise which sued Chrysler for, among other things, violations of the Board of Vehicles Act.[3] The BVA allows actions for legal and equitable relief. It also allows for punitive damages where a defendant is found to have engaged in continued multiple violations of that Act. In looking beyond semantics and terminology, the court utilized a three-part test to determine whether the statute was intended to be remedial as opposed to penal: (1) is the statute's purpose to redress individual wrongs or more general wrongs to the public; (2) does recovery under the statute run to the harmed individual or to the public; and (3) is the recovery allowed under the statute wholly disproportionate to the harm suffered. Mike Smith Pontiac v. Mercedes-Benz of North America, Inc., 32 F.3d 528, 534, fn.3 (11th Cir. 1994). The court concluded after reviewing the legislature's changes to the statute since the suit was first filed that the BVA was remedial and not penal, despite the provision allowing for recovery of punitive damages. The mere fact that the legislature retained the provision allowing for punitive damages did not negate this conclusion. Insofar as the BVA was remedial in nature, the plaintiff's claim was not barred by the two-year limit in section 5524(5).

Although we are deprived of explicit legislative history to guide us on this matter, we find after applying the above three-part test to the Act as a whole that the statute is not penal in nature. Rather its purpose is to ensure that contractors doing large-scale construction projects involving substantial investments of time, labor, risks and materials are fully and promptly paid for their work. There is no logical support for the idea that the provisions allowing for recovery of interest at a very modest rate (1%) and for reasonable attorney fees inure to the benefit of the public at large or are meant to redress any public wrongs. Also if the legislature intended to allow for damages wholly disproportionate to the harm suffered (factor #3), it certainly could have provided for a higher rate of interest, as well as actual and not merely reasonable counsel fees. The legislature could also have specifically allowed for the recovery of punitive damages, though even that would not necessarily compel the conclusion that the Act was designed to be a penal one. Northview, supra. We find the Act is remedial and therefore the action falls under section 5525 and was timely filed thereunder.

Can plaintiff amend the complaint to add allegations with regard to defendant Anne Hodges?

The complaint names Anne Hodges as a defendant under the breach of contract claim and also under the alternate theories of quantum meruit and promissory estoppel. Plaintiff now seeks to expand and clarify those original theories with regard to Anne Hodges. Defendants stipulate to these clarifications but oppose plaintiff's desire to add a count against Mrs. Hodges under the Contractor and Subcontractor Payment Act based on the same reasons we discussed above. Insofar as we already found plaintiff is entitled to proceed under the Act, the complaint may be amended to include a claim under the statute against Anne Hodges.

ORDER OF COURT

Now this 27th day of November 2001, the court grants the plaintiff's motion to amend the complaint consistent with the attached Opinion. The amended complaint will be filed no later than twenty days from receipt of this Order.

ebruary 17, 1994, P.L. 73, No. 7.

.S.A. section 5525:

upon an express contract not founded upon an instrument in writing.

upon a contract implied in law...

section 818.1 et seq.