IN THE COMMONWEALTH COURT OF PENNSYLVANIA

F. Zacherl, Inc.	:	
	:	
v.	:	No. 1904 C.D. 2011
	:	No. 530 C.D. 2012
Flaherty Mechanical	:	Argued: April 16, 2013
Contractors, LLC,	:	
West Allegheny School District	:	
and International Fidelity	:	
Insurance Company	:	
	:	
Appeal of: West Allegheny School	:	
District	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: May 6, 2013**

Appellant West Allegheny School District (the District) appeals from two orders of the Court of Common Pleas of Allegheny County (trial court), dated September 9, 2011, and March 19, 2012. By the order dated September 9, 2011, the trial court, in part, granted summary judgment in favor of Appellee F. Zacherl, Inc. (Zacherl) and against the District and Appellee International Fidelity Insurance Company (the Surety). The trial court also scheduled a hearing to determine whether Zacherl was entitled to an award of a penalty or attorney's fees. By the order dated March 19, 2012, the trial court disposed of motions for post-trial relief and entered judgment in favor of Zacherl, which included a penalty and attorney's fees to be paid by the District. We now reverse the trial court's order to the extent

that it granted summary judgment in favor of Zacherl and against the District and remand the matter to the trial court for further proceedings.

At issue in this matter are claims for payment, a penalty, and attorney's fees by Zacherl, arising from a construction contract for additions and alterations to West Allegheny High School (the Project). Appellee International Fidelity Insurance Company (the Surety) issued both payment and performance bonds for the Project. The District selected Flaherty Mechanical Contractors, LLC (Flaherty) as a prime contractor for the Project, pursuant to the Separations Act, Act of May 1, 1913, P.L. 155, *as amended,* 53 P.S. § 1003. The prime contract between the District and Flaherty provided that Flaherty would be responsible for the installation of heating, ventilation, and air conditioning equipment. Flaherty subcontracted the necessary sheet metal work to Zacherl. Pursuant to its contract with the District, Flaherty was responsible for payments to any subcontractors it engaged for portions of its prime contract, including payments to Zacherl. (Reproduced Record (R.R.) at 260, 265, 302, 308.) The Surety's payment bond ensured that payments made by the District to Flaherty reached contractors as required by Section 756 of the Pennsylvania School Code, Act of March 10, 1949, 24 P.S. § 7-756.[1]

Throughout the course of the work on the Project, the District made various timely payments to Flaherty for work performed, but Flaherty failed to make timely payments to its subcontractors, including Zacherl. (R.R. at 181-91, 243, 326-33.) On several occasions, Zacherl and other subcontractors requested

[1] This Section was repealed in part to the extent it is inconsistent with the Act of December 20, 1967, P.L. 869, 8 P.S. § 200.

that the District assist them in getting payments from Flaherty, which the District successfully did. (*Id*.) In August 2009, Zacherl again sought assistance from the District regarding non-payment by Flaherty, but this time the District was not able to resolve the non-payment matter. (R.R. at 192.) Zacherl issued a notice of claim to the Surety and a notice of possible work stoppage to Flaherty. (R.R. at 194-95.) The District, aware that the payment problems were not being corrected, notified Flaherty that payment applications would not be processed without proof of payment to the subcontractors. (R.R. at 196.) Ultimately, as a result of the non-payment issues and Flaherty's inability to complete satisfactorily the contracted work, the District terminated Flaherty's prime contract on October 26, 2009. (R.R. at 242, Joint Stipulation of Facts (Stip.) ¶ 14.) The next day, Flaherty terminated its contract with Zacherl. (*Id*., Stip. ¶ 15.)

Following the termination of the contracts, the parties notified the Surety and sought enforcement of the payment and performance bonds. The Surety issued a "stop payment" order to the District, demanding that "no further funds be released under the [Flaherty] contract without the written consent and direction of [the Surety]." (R.R. at 960.) Shortly thereafter, the Surety notified the District that the District had a duty to mitigate damages. (R.R. at 963.) In order to allow work to continue, the Surety stated that it would review expeditiously any requests for funds. (*Id.*)

In order not to delay further completion of the Project with the search for a replacement sheet metal contractor, the District requested that Zacherl return to the Project to complete the sheet metal work that it originally agreed to perform under its subcontract with Flaherty. In response, Zacherl sent a letter, dated November 16, 2009, setting forth the sub-contract amount, amount billed to date,

amount paid to date, amount due as of that date, amount remaining to bill, and the total unpaid amount. (R.R. at 198.) According to that letter, Zacherl calculated that it was owed $288,458.82, for work performed under its contract with Flaherty. (*Id.*) By way of a verbal agreement, Zacherl agreed to complete the work on the Project, provided that the District paid it $147,591.90, which represented an amount equal to Zacherl's outstanding June and July invoices. (R.R. at 244, Stip. ¶ 22; 331; and 339.) On November 17, 2009, the District issued payment to Zacherl in the amount of $147,591.90. (R.R. at 199; 244, Stip. ¶ 23.) Despite the fact that Zacherl completed the work on the Project, the District made no further payments to Zacherl. (R.R. at 244, Stip. ¶ 24.)

Zacherl filed a civil action in the trial court against Flaherty,[2] the District, and the Surety, asserting breach of contract counts against Flaherty and the District, unjust enrichment counts against Flaherty and the District, counts of anticipatory breach of contract against Flaherty, the District, and the Surety, and a count for breach of payment bond against Flaherty and the Surety. (R.R. at 1-20.) Zacherl sought damages in the amount of $116,263.35 for work it performed under its contract with Flaherty; $59,842.22 for additional work performed after October 26, 2009, pursuant to the verbal agreement between Zacherl and the District, for which it invoiced the District and did not receive payment; and $53,404.27 for work performed on the Project after October 26, 2009, for which it has not billed the District. Zacherl also sought interest, costs, a penalty, and attorney's fees.

[2] Flaherty filed a voluntary petition for bankruptcy on September 24, 2010, in the United States Bankruptcy Court for the Western District of Pennsylvania. (R.R. at 244, Stip. ¶ 24.)

The parties submitted motions for summary judgment, and the trial court issued an order, dated September 9, 2011. (R.R. at 432-36.) The trial court ordered the Surety to pay Zacherl $116,263.35 for the work performed under Zacherl's contract with Flaherty. The trial court ordered the District to pay Zacherl $113,246.39 for all work that Zacherl performed on the Project subsequent to the District's termination of the prime contract with Flaherty. The trial court also scheduled a hearing to address Zacherl's claim for a penalty, attorney's fees, and interest.

Believing the trial court's order, dated September 9, 2011, to be a final order as to the merits of the claims, the District filed a notice of appeal.[3] The trial court, however, deemed the appeal untimely (*i.e.*, premature) and, citing Pa. R.A.P. 1701(b)(6),[4] proceeded with a hearing to determine whether the District acted in bad faith. (R.R. at 469.) Following the hearing, the trial court concluded that the District acted in bad faith, and the trial court awarded Zacherl an additional $41,130.31 in attorney's fees and interest, pursuant to what is commonly referred to as the Prompt Pay Act, 62 Pa. C.S. §§ 3931-3939.[5] (R.R. at 511-15.) Following

[3] This Court docketed that appeal as 1904 C.D. 2011. The Surety also filed an appeal, docketed with this Court at 1992 C.D. 2011, which it withdrew following the trial court's determination that Zacherl did not seek attorney's fees against the Surety.

[4] Pa. R.A.P. 1701(b)(6), relating to the authority of a trial court or agency after appeal, provides that after an appeal is taken, the trial court may "[p]roceed further in any matter in which a non-appealable interlocutory order has been entered, notwithstanding the filing of a notice of appeal or a petition for review of the order."

[5] As we discussed in *Clairton Slag, Inc. v. Department of General Services*, 2 A.3d 765 (Pa. Cmwlth. 2010), *appeal denied*, 612 Pa. 700, 30 A.3d 489 (2011), "the clear intent of the Prompt Pay Act is to level the playing field between contractors and subcontractors when they are working on public projects. The Prompt Pay Act requires contractors on public projects to honor their contractual obligations and pay subcontractors for all items satisfactorily completed."
(Footnote continued on next page…)

the filing of post-trial motions, by order dated March 19, 2012, the trial court modified the recovery by increasing the award for attorney's fees and interest. The total award against the District increased to $199,282.22. The District again filed a notice of appeal.[6] We consolidated the District's first and second appeals, which are now before the Court for disposition.

On appeal,[7] the District raises several issues. First, the District argues that the trial court erred in applying the Prompt Pay Act to the claims against the District for the post-October 26, 2009 work, because the work was not put out for a bid and the agreement was not reduced to writing. Second, the District argues that the trial court erred when it failed to apply the terms of the construction contract and/or payment bond to require the Surety to compensate the District for the payments the District made to Zacherl for work it performed before the District

(continued…)

Clairton Slag, 2 A.3d at 783 (citations omitted). "Section 3935 of the Prompt Pay Act allows for a penalty award for payments withheld in bad faith. That same provision permits an award of attorney's fees if the governmental agency, contractor, or subcontractor acted in bad faith." *Id.*

The parties mistakenly refer to the provisions set forth in the Prompt Pay Act as being part of the Commonwealth Procurement Code (Procurement Code), 62 Pa. C.S. §§ 101-2311. In reality, the Prompt Pay Act provisions are contained in Title 62, Part II (relating to general procurement provisions), Chapter 39 (relating to contracts for public works), whereas the provisions of the Procurement Code are solely within Part I of Title 62.

[6] This Court docketed the second appeal filed by the District at 530 C.D. 2012.

[7] "Our scope of review on appeal from a grant of summary judgment is limited to a determination of whether the trial court committed an error of law or abused its discretion. Summary judgment is a question of law based upon findings of fact." *Wetzel v. City of Altoona*, 618 A.2d 1219, 1221 n.5 (Pa. Cmwlth. 1992) (citations omitted). "For courts to enter summary judgment, the record must demonstrate that no genuine issue of material fact exists after an examination of the record in a light most favorable to the non-moving party." *Bacon v. City of Chester*, 564 A.2d 276, 277 (Pa. Cmwlth. 1989).

terminated Flaherty's prime contract. Third, the District argues that the trial court erred in concluding that the District acted in bad faith in refusing to issue additional payments to Zacherl for work performed after the District terminated its contract with Flaherty. Finally, the District argues that the trial court erred when it awarded summary judgment when there was a lack of evidence demonstrating the elements of a breach of contract claim and/or the existence of material issues of fact.[8]

First, we will address the District's argument that the trial court erred in applying Sections 3934[9] and 3935[10] of the Prompt Pay Act to the claims against

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[8] The District also argues that the trial court's order dated September 9, 2011, constituted an appealable order, notwithstanding the outstanding claim for attorney's fees and interest. The District bases its argument on *Samuel-Bassett v. Kia Motors America, Inc.*, 613 Pa. 371, 34 A.3d 1 (2011), wherein the Supreme Court held that following the filing of an appeal, a trial court may proceed with a petition for attorney's fees pursuant to Pa. R.A.P. 1701, because the petition for attorney's fees is "ancillary to the appeal from the judgment on the merits." *Samuell-Bassett*, 613 Pa. at 451, 34 A.3d at 49. We note, however, that this Court did not quash the first appeal *sua sponte*, despite the trial court's position that the appeal was premature, and there is no pending motion to quash now before the Court. We also note that the District raised in its appeal of the trial court's order dated March 19, 2012, all of the issues that it raised in its appeal of the trial court's order dated September 9, 2011, along with new issues that arose solely out of the trial court's order dated March 19, 2012. Thus, regardless of whether the trial court's order dated September 9, 2011, was a final order or an interlocutory order, the District preserved all the issues now before this Court for review. Thus, we need not address the propriety of each of the appeals, as the issues are all properly before the Court.

[9] Section 3934 of the Prompt Pay Act, relating to the withholding of payment for good faith claims, provides:

> (a) When government agency may withhold payment.--The government agency may withhold payment for deficiency items according to terms of the contract. The government agency shall pay the contractor according to the provisions of this subchapter for all other items which appear on the application for payment and have been satisfactorily completed. The contractor may withhold payment from any subcontractor responsible for a deficiency item.

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> The contractor shall pay any subcontractor according to the provisions of this subchapter for any item which appears on the application for payment and has been satisfactorily completed.
>
> (b) Notification when payment withheld for deficiency item.--If a government agency withholds payment from a contractor for a deficiency item, it shall notify the contractor of the deficiency item within the time period specified in the contract or 15 calendar days of the date that the application for payment is received. If a contractor withholds payment from a subcontractor for a deficiency item, it must notify the subcontractor or supplier and the government agency of the reason within 15 calendar days of the date after receipt of the notice of the deficiency item from the government agency.

[10] Section 3935 of the Prompt Pay Act, relating to penalty and attorney fees, provides:

> (a) Penalty.--If arbitration or a claim with the Board of Claims or a court of competent jurisdiction is commenced to recover payment due under this subchapter and it is determined that the government agency, contractor or subcontractor has failed to comply with the payment terms of this subchapter, the arbitrator, the Board of Claims or the court may award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious. An amount shall not be deemed to have been withheld in bad faith to the extent it was withheld pursuant to section 3934 (relating to withholding of payment for good faith claims).
>
> (b) Attorney fees.--Notwithstanding any agreement to the contrary, the prevailing party in any proceeding to recover any payment under this subchapter may be awarded a reasonable attorney fee in an amount to be determined by the Board of Claims, court or arbitrator, together with expenses, if it is determined that the government agency, contractor or subcontractor acted in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious.

the District for the post-October 26, 2009 work, because the work was not put out for a bid and the agreement was not reduced to writing. We agree with the District that those provisions do not apply to the post-October 26 work, but not for all the reasons set forth by the District.

The Prompt Pay Act applies "to contracts entered into by a government agency[11] *through competitive sealed bidding or competitive sealed proposals*." 62 Pa. C.S. § 3901 (emphasis added). Here, the Prompt Pay Act is inapplicable because the contract entered into between the District and Zacherl for post-October 26, 2009 work was a verbal agreement that was not entered into through a competitive process. The trial court, therefore, erred in applying the Prompt Pay Act to the agreement for post-October 26 work to assess a penalty and attorney's fees based on bad faith.[12]

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[11] The term "government agency" is defined as "[a]ny Commonwealth agency, any transportation authority or agency created by statute or any political subdivision or municipal or local authority, or agency of any political subdivision or local authority." 62 Pa. C.S. § 3102.

[12] Because we conclude that the Prompt Pay Act is inapplicable for the reasons stated above, we need not address the District's contention that Section 3902 of the Prompt Pay Act, 62 Pa. C.S. § 3902, required the agreement between the District and Zacherl to be in writing. In addition, we reject the District's contention that Section 103 of the Procurement Code, 62 Pa. C.S. § 103, also required the agreement to be in writing. The Procurement Code applies generally to the "expenditures of funds . . . by *Commonwealth agencies* under any contract." Section 102 of the Procurement Code, 62 Pa. C.S. § 102 (emphasis added). The term "Commonwealth agency" is defined as "[a]n executive agency, an independent agency or a State-affiliated entity," none of which include a school district. *See* Section 103 of the Procurement Code, 62 Pa. C.S. § 103. Thus, the District is not a Commonwealth agency, and the Procurement Code does not apply to agreements that the District enters into with entities that are not Commonwealth agencies. The Procurement Code, therefore, does not apply to the agreement between the District and Zacherl.

Next, we will address the District's argument that the trial court erred when it failed to apply the terms of the construction contract and/or payment bond to require the Surety to compensate the District for the payments the District made to Zacherl for pre-October 26, 2009 work, which Zacherl performed before the District terminated Flaherty's prime contract. Of primary importance to our disposition of this matter is the fact that the District did not properly assert a cross-claim against the Surety. Pursuant to Pa. R.C.P. No. 1031.1, relating to cross-claims, "[a]ny party may set forth in the answer or reply under the heading 'Cross-claim' a cause of action against any other party to the action that the other party may be (1) solely liable on the underlying cause of action or (2) liable to or with the cross-claimant." Where a defendant fails to assert a cross-claim below, seeking recovery or a particular remedy against another defendant, it is barred from pursuing that cross-claim on appeal. *Larry Pitt & Assoc. v. Long*, 716 A.2d 695, 702 (Pa. Cmwlth. 1988). Our review of the pleadings reveals no properly pled cross-claim by the District against the Surety. At most, the District averred in its answer with new matter in response to Zacherl's complaint that "[t]o the extent [Zacherl] may be due any payments for work completed on the [P]roject, such payments are the responsibility of [Flaherty and/or the Surety]." (R.R. at 47.) We agree that the trial court correctly confined its rulings to what was owed to Zacherl, when it explained in its Pa. R.A.P. 1925 Opinion, as follows:

> At argument, the Surety pointed out the damages *to the District* from Flaherty's non-performance were distinct from the damages at issue in this action, *to [Zacherl]*, which are covered by a *payment* bond (*not* a performance bond) and (as far as the Surety's obligation here is concerned) involved only the damages suffered by Flaherty's subcontractors, such as [Zacherl]. We agreed with the Surety on this point and ruled that the obligations of the Surety under the payment bond ceased

> as of October 26, 2009, the day Flaherty's contract was terminated. . . . We took no position regarding the performance bond as that was the subject of a cross-claim in a separate action.

(R.R. at 891 (emphasis in original).) In the absence of a properly asserted cross-claim, the trial court did not err in refusing to order the Surety to compensate the District for the payments the District made to Zacherl for pre-October 26 work.

Finally, we will address the District's argument that the trial court erred when it awarded summary judgment when there was a lack of evidence demonstrating the elements of a breach of contract claim and/or the existence of material issues of fact. The District's argument is two-fold. First, the District contends that the trial court erred in failing to conclude that the District's payment of $147,591.90 to Zacherl on November 17, 2009, should be credited to the pre-October 26, 2009 work Zacherl performed. The District appears to be arguing that the purpose of the payment is a material issue of fact in dispute. Second, the District contends that the trial court erred in granting summary judgment when Zacherl failed to provide evidence of the terms of an enforceable agreement between Zacherl and the District.

As to the District's contention that a genuine issue of material fact exists as to whether its payment of $147,591.90 to Zacherl was for pre-October 26, 2009 work, we conclude that the District's argument is disingenuous. The District does not dispute that when the District terminated its contract with Flaherty, Zacherl was owed money for work performed prior to the termination of the prime contract on October 26, 2009. (R.R. at 243-44.) The District also does not dispute that Zacherl required that it be paid for its last two invoices, which not so coincidentally totaled $147,591.90, before Zacherl would return to the job to complete the sheet metal work. (R.R. at 244, 331, and 339.) The District does not

even dispute the existence of a verbal agreement with Zacherl regarding the performance of sheet metal work subsequent to the District's termination of its prime contract with Flaherty. Moreover, the District never previously disputed that its payment on November 17, 2009, was for work Zacherl performed prior to the termination of the prime contract, for which Zacherl never received payment from Flaherty. The District also never previously asserted that the money it paid was an "advance" for work to be performed by Zacherl in the future, and such an assertion makes little sense, because the amount paid on November 17, 2009, exceeded the cost of the remaining work to be performed by Zacherl by more than $82,000. Given these circumstances, we agree with the trial court that no genuine dispute existed—the District's November 17, 2009 payment to Zacherl was for work performed by Zacherl prior to the termination of the prime contract, and the District paid the money as an inducement for Zacherl to return to the Project. The District's self-serving and illogical re-characterization of the payment at this late juncture cannot alter a previously undisputed fact. Thus, we reject the District's argument on this point.

We agree with the District, however, that the trial court erred in entering summary judgment based upon breach of contract, where the evidence presented fails to address any of the terms of the verbal agreement between Zacherl and the District, other than that Zacherl agreed to return to the Project to complete the sheet metal work after it received a payment for two earlier invoices for which it had not received payment from Flaherty. In order to demonstrate a breach of contract, a plaintiff must establish: "(1) the existence of a contract between the plaintiff and defendant, including its essential terms; (2) a breach of duty imposed by the contract; and (3) damages resulting from that breach of duty." *Boyd v.*

Rockwood Area Sch. Dist., 907 A.2d 1157, 1165 (Pa. Cmwlth. 2006), *appeal denied*, 591 Pa. 717, 919 A.2d 959 (2007). As the District points out, among the essential terms which have not been considered are the duties of the parties, the means of payment, and the necessity of payment in the event of disputes, including disputes regarding the quality of work performed. The District also contends that a question exists as to whether defects existed in Zacherl's work, such that payment for certain work was not required.[13]

For the reasons set forth above, we conclude that the trial court erred in granting summary judgment in favor of Zacherl and against the District, because material issues of fact exist regarding the terms of the verbal contract between the District and Zacherl for the performance of post-October 26, 2009 work. Also, the trial court erred in applying the Prompt Pay Act as the basis for awarding a penalty and attorney's fees.[14]

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[13] Zacherl argued before this Court that, based upon affidavits it presented to the trial court, it established the key term of the verbal agreement—specifically that the District agreed to pay Zacherl for the work it performed for the District after the District terminated its contract with Flaherty. We reject this argument based upon the *Nanty-Glo rule*. Under the *Nanty-Glo rule*, "summary judgment may not be had where the moving party relies exclusively upon oral testimony, through affidavits or depositions, to establish the absence of a genuine issue of material fact; no matter how clear and indisputable such proof may appear, it is the province of the jury to decide the credibility of the witnesses." *Kee v. Pa. Turnpike Comm'n*, 743 A.2d 546, 550 (Pa. Cmwlth. 1999). Thus, to the extent that Zacherl may have presented affidavits or other oral testimony to the trial court to establish a disputed term of its verbal agreement with the District, such testimony is insufficient as a matter of law to support the granting of a motion for summary judgment.

[14] Because we conclude that the trial court erred in entering summary judgment in favor of Zacherl, based, in part, on the trial court's erroneous application of the Prompt Pay Act (which provides for an award of a penalty and attorney's fees when bad faith is established), we need not consider the District's argument that the trial court erred in concluding that the District acted in

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Accordingly, the trial court's orders dated September 9, 2011, and March 19, 2012, are reversed to the extent that they granted summary judgment in favor of Zacherl and against the District and awarded damages in the amount of $199,282.22 for work performed by Zacherl after October 26, 2009, and the matter is remanded to the trial court for further proceedings.[15]

P. KEVIN BROBSON, Judge

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bad faith in refusing to issue additional payments to Zacherl for work performed after the District terminated its contract with Flaherty.

[15] On remand, the trial court may consider all of the causes of action asserted by Zacherl against the District, including claims for a penalty and attorney's fees, to determine whether Zacherl may otherwise be entitled to that relief, notwithstanding the inapplicability of the Prompt Pay Act.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

F. Zacherl, Inc.	:	
	:	
v.	:	No. 1904 C.D. 2011
	:	No. 530 C.D. 2012
Flaherty Mechanical	:	
Contractors, LLC,	:	
West Allegheny School District	:	
and International Fidelity	:	
Insurance Company	:	
	:	
Appeal of: West Allegheny School	:	
District	:	

O R D E R

AND NOW, this 6th day of May, 2013, the orders of the Court of Common Pleas of Allegheny County (trial court), dated September 9, 2011, and March 19, 2012, are reversed to the extent that they granted summary judgment in favor of Appellee F. Zacherl, Inc. (Zacherl) and against Appellant West Allegheny School District (the District) in the amount of $199,282.22 for work performed by Zacherl after October 26, 2009, and the matter is remanded to the trial court for further proceedings.

Jurisdiction relinquished.

P. KEVIN BROBSON, Judge