NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

MERIDIEN ENERGY, LLC, Appellant v. HOCKRAN EXCAVATING D/B/A H&H ENTERPRISES D/B/A H&H ENTERPRISES, INC., Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1203 WDA 2013

Appeal from the Judgment entered July 23, 2013,
Court of Common Pleas, Washington County,
Civil Division at No. 2009-10043

BEFORE: DONOHUE, OTT and MUSMANNO, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED JULY 23, 2014**

Meridien Energy, LLC ("Contractor") appeals from the July 23, 2013 judgment entered by the Washington County Court of Common Pleas in favor of Hockran Excavating d/b/a H&H Enterprises d/b/a H&H Enterprises, Inc. ("Subcontractor") in this breach of contract action. After careful review, we vacate the judgment and remand for a new trial.

The trial court summarized the facts of the case as follows:

> [Contractor] is a contractor that constructs gas pipelines for utility companies. It was hired by Equitrans, LP, a division of Equitable Gas, to install a portion of pipeline along Route 19 in Peters Township, Washington County, Pennsylvania. [Contractor] hired [Subcontractor], an excavation contractor, to install a portion of the pipeline by a method known as horizontal directional drilling ('HDD'), via a June 1, 2009[] contract, which specified that the HDD location would be 'along the

existing pipeline right of way.' The contract also provided that acceptance of the gas line installation would be at the discretion of Equitrans, and that [Contractor] would make no compensation to [Subcontractor] for any portion of the installation that was rejected by Equitrans.

In June 2009, [Subcontractor] began work, and upon completing a pilot hole, [Contractor] tendered a progress payment to [Subcontractor] for 40% of the completed project, being $285,360, per the contract. The balance of $428,040 was due to [Subcontractor] upon successful completion of the project. [Subcontractor]'s vice president and co-owner, Jason Hockran, testified that he interpreted [Contractor]'s progress payment as 'confirmation to me that the pilot hole was where they wanted per the terms of the contract.'

[Subcontractor] proceeded to complete the HDD and install the steel pipe into the hole. On July 16, 2009, [Subcontractor] submitted an invoice to [Contractor] for the completed work, seeking the remaining $428,040. However, the invoice was not paid, as Equitrans had by then indicated to [Contractor] that 'the pipe was off the right of way and perhaps under houses.' Mr. Hockran testified that his company installed the pipeline within the right of way and should have been accepted. Moreover, he blamed [Contractor] for Equitrans rejecting [Subcontractor]'s line:

> [T]hey gave us information to drill the original drill with, we utilized that information, we installed the pipe based on that information, but then after we had the pilot hole done and the pipe installed, they came back and said that there is new information that we have to not accept this line.

Even so, [Subcontractor] began to devise alternative solutions, because, pursuant to the contract, it would

not receive payment until Equitrans accepted the work.

On August 5, 2009, [Subcontractor] proposed an amendment to the original contract which permitted it to complete the project by way of an intersect drill 'for the original contract sum,' but [Subcontractor] would 'not accept any financial responsibility for any costs incurred by' [Contractor] or Equitrans. [Contractor] rejected this proposed amendment. In an effort to reach an agreement to complete the project to Equitrans['] satisfaction, representatives of both parties – Bob Joyce and J.J. Connor for [Contractor] and Thomas Hockran for [Subcontractor] – met at the Italian Fisherman restaurant in Bemus Point, New York on August 9, 2009.

[Contractor]'s agents indicated it 'would incur costs and back charges' if it permitted [Subcontractor] to attempt the intersect drill. Mr. Hockran asked Mr. Connor for a cost estimate, and Mr. Connor testified that he replied, 'It's going to be $200,000, $250,000 minimum. It's going to be a big number.' There is significant disagreement over who would be responsible for any back charges. Mr. Joyce and Mr. Connor testified that Mr. Hockran agreed that [Subcontractor] would cover [Contractor]'s back charges if permitted to attempt the intersect drill. Conversely, Mr. Hockran testified that he never agreed for [Subcontractor] to pay [Contractor]'s costs. Instead he insisted that each party pay its own additional costs related to the intersect drill. A new or amended agreement was never executed, but the intersect drill was completed under the terms of the June 9, 2009[] contract.

Soon after the meeting at the Italian Fisherman, [Subcontractor] began work on the intersect drill[] and completed the project, which Equitrans accepted. On September 4, 2009, [Contractor] billed [Subcontractor] for $711,208.76 in back charges, but claimed that it only sought $283,168, as it had

> credited [Subcontractor] with $428,040 for completing the project. [Subcontractor] disputed [Contractor]'s back charges[] and[] on October 1, 2009, [Subcontractor]'s attorney sent a letter demanding the balance of $428,040, as well as $817,125 for costs related to the intersect drill.

Trial Court Opinion, 11/4/13, at 1-3 (record citations omitted).

On November 9, 2009, Contractor filed a complaint sounding in breach of contract, unjust enrichment and quantum meruit against Subcontractor. Subcontractor filed preliminary objections to the complaint on December 2, 2009. The trial court entered an order on May 24, 2010, granting in part and overruling in part Subcontractor's preliminary objections. Contractor filed an amended complaint on June 10, 2010 raising breach of contract and unjust enrichment. On July 1, 2010, Subcontractor filed an answer, new matter, and counterclaim raising breach of contract, a violation of the contractor and subcontractor payment act, and quantum meruit. Subcontractor sought to recover the amount due on the original contract ($428,040.00), or, in the alternative, the amount due on the original contract plus costs incurred when completing the corrective work on the pipeline ($1,245,165.00). On August 12, 2010, Contractor filed a reply to Subcontractor's new matter and answer to the counterclaim.

Pursuant to the trial court's order, the parties filed joint proposed jury instructions on April 22, 2013. Although the trial court also ordered the filing of motions *in limine* by April 1, 2013, Contractor filed several motions

in limine, authored on May 13, 2013 and presented to the trial court on May 14, 2013, the first day of trial.[1] Of relevance to the appeal before us, Contractor sought to exclude evidence challenging Equitrans' rejection of the original pipeline installed by Subcontractor. According to Contractor, this "testimony and evidence is precluded under Pennsylvania law, absent very limited circumstances," because the contract required that acceptance of the work performed was at Equitrans' discretion, and that Equitrans' decision is binding. Plaintiff's Motion in Limine on the Exclusion of Evidence Challenging the Rejection of the Original Pipeline, 5/17/13, at ¶¶ 5-6. Subcontractor filed an answer to this motion *in limine* on May 14, 2013, asserting that it was not introducing this evidence to show that Equitrans should have accepted the original pipeline, but to show that Subcontractor performed as the terms of the contract required "and that the rejection by Equitrans was for other reasons." Answer to Plaintiff's Motion in Limine on the Exclusion of Evidence Challenging the Rejection of the Original Pipeline, 5/17/13, at ¶ 2. As the trial court received the motion on the day trial began, it deferred its ruling. There is nothing in the record indicating that the trial court formally ruled on Contractor's motion *in limine*.

A three-day jury trial occurred thereafter. Subcontractor was permitted, over Contractor's objection, to present testimony that it did not

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[1] The motions *in limine* and Subcontractor's response thereto were not filed of record until May 17, 2013, which was the last day of trial.

breach the contract and that Equitrans' rejection of the originally drilled pipeline was erroneous and based on inaccurate information.

On May 16, 2013, the final day of testimony, Contractor submitted supplemental proposed jury instructions to the trial court.[2] The trial court found that the supplemental instructions were not timely and denied Contractor's request.

On May 17, 2013, the jury returned a verdict in favor of Subcontractor. Specifically, the jury found that Subcontractor had not breached the contract but that Contractor had, and that Subcontractor was entitled to $428,040.00 – the outstanding amount originally contracted for by the parties – in damages.

Contractor filed a post-trial motion on May 22, 2013, which the trial court denied on June 27, 2013. Contractor filed a praecipe for the entry of judgment on July 23, 2013 and its notice of appeal on July 25, 2013. Contractor raises the following issues for our review:

> 1. Whether the [t]rial [c]ourt erred in failing to exclude evidence by allowing [Subcontractor] to introduce evidence that it did not breach its contract with [Contractor] where: (a) the contract delegated to Equitrans [] discretion to reject [Subcontractor]'s performance; (b) Equitrans['] representatives testified unequivocally that [Subcontractor] had breached its contract by installing the pipeline

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[2] Subcontractor stated on the record that it received the proposed supplemental points of charge on May 13, 2013, the day before trial began. N.T., 5/16/13, at 182. The document does not appear to have been filed, as it is not contained in the certified record on appeal or on its docket.

> outside of the marked right-of-way and underneath several homes; and (c) the decision by Equitrans rejecting [Subcontractor]'s performance was based upon the exercise of sound discretion without bad faith, caprice or collusion?
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> 2. Was the jury's verdict that [Subcontractor] did not breach its contract with [Contractor] to correctly install the pipeline and that it was [Contractor] which [*sic*] breached the contract contrary to the law and against the weight of the evidence?

Contractor's Brief at 4.

We begin with the first issue raised. Contractor contends that the trial court abused its discretion by allowing Subcontractor to present evidence that its initial drill was within the right-of-way, confirmed by Subcontractor through GPS technology, and that Equitrans' contrary conclusion was incorrect and based upon inaccurate analysis and drawings. Contractor's Brief at 12. Contractor further asserts that the court should have disallowed testimony that Equitrans and Contractor failed to instruct Subcontractor that the pipeline could not be under houses, that this constituted a "new requirement" not originally called for in the contract, and that Subcontractor was not in breach. ***Id.*** According to Contractor, the admission of this testimony was an abuse of discretion because the contract between Contractor and Subcontractor provided that the decision of whether to accept or reject Subcontractor's performance was left to Equitrans' discretion, and Subcontractor failed to prove that Equitrans' rejection of the

pipeline as originally drilled was made with bad faith, caprice or collusion. ***Id.*** at 12-13.

The trial court found that the above-referenced testimony was relevant, as Subcontractor's defense was, despite the rejection by Equitrans of the originally drilled pipeline, "it behaved at all times in conformity with the contract." Trial Court Opinion, 11/4/13, at 6. The trial court stated that because Contractor presented evidence that the contract required Subcontractor to drill within the right-of-way and that it failed to do so, "[i]t is disingenuous, then, to claim [Subcontractor]'s testimony in defense of a specifically-alleged breach is irrelevant." ***Id.***

At its core, Contractor challenges the trial court's failure to grant its motion *in limine* and exclude evidence that Equitrans erroneously rejected Subcontractor's original pipeline. We review this issue according to our well-settled standard:

> Generally, a trial court's decision to grant or deny a motion *in limine* is subject to an evidentiary abuse of discretion standard of review. The term discretion imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the

> action is a result of partiality, prejudice, bias or ill will.

Schmalz v. Manufacturers & Traders Trust Co., 67 A.3d 800, 802-03 (Pa. Super. 2013) (citation omitted).

Contractor states that the admission of this evidence was contrary to applicable law. Contractor's Brief at 14-15, 24-28. In support of its argument, Contractor relies on a series of cases that state if a contract requires a party's performance be to the satisfaction of another person or entity, the question of whether performance was adequate is not whether the other person or entity should have been satisfied, but whether they were in fact satisfied, as long as the rejection of performance is not capricious, made in bad faith, or the product of collusion. ***Jenkins Towel Serv., Inc. v. Tidewater Oil Co.***, 223 A.2d 84, 86 (Pa. 1966); ***see also John Conti Co. v. Donovan***, 57 A.2d 872, 874-75 (Pa. 1948) ("where the contract provides the work be performed subject to the approval of an architect, before the builder has a right to recover compensation on his contract, such provision is binding on the parties, and, either expressly or impliedly, makes a decision of an architect a condition precedent to the right of the builder to recover compensation on his contract"); ***Morgan v. Gamble***, 79 A. 410, 414 (Pa. 1911) ("The contract provides that the contractor shall furnish all the materials and perform all the work to the satisfaction of the owner […] and that is the standard by which the sufficiency of the work is to be

tested."); ***Howard v. Smedley***, 21 A. 253, __ (Pa. 1891) (*per curiam*) (where the plaintiff agrees that it will not be paid until the owner is satisfied, absent a showing of caprice in the owner's judgment, the plaintiff is bound by the owner's decision).

Subcontractor asserts that the above cases are factually distinguishable from the case at bar, as those cases all involved contracted-for projects that were not completed to the satisfaction of the person named in the contract, whereas here, Subcontractor ultimately installed the pipeline and obtained Equitrans' approval. Subcontractor's Brief at 17-20. Instead, Subcontractor points us to an apparent exception to the rule espoused in the above-listed cases. ***See*** Subcontractor's Brief at 15-17 (citing ***Com. Dep't. of Trans. v. W.P. Dickerson & Son, Inc.***, 400 A.2d 930 (Pa. Cmwlth. 1979) ("***Dickerson***")). In ***Dickerson***, the Commonwealth Court held, based on Supreme Court precedent, that "a contractor who performs according to ***detailed plans and specifications*** is not responsible for defects in the result," rendering unnecessary a determination of whether the rejection of the contractor's work was arbitrary or capricious. ***Dickerson***, 400 A.2d at 932 (emphasis added) (citing ***Canuso v. Philadelphia***, 192 A. 133 (Pa. 1937); ***Filbert v. Philadelphia***, 37 A. 545 (Pa. 1897)).[3]

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[3] Although decisions of the Commonwealth Court are not binding authority for cases before the Superior Court, we are bound by holdings of the Pennsylvania Supreme Court. ***Peter Daniels Realty, Inc. v. N. Equity Investors, Grp., Inc.***, 829 A.2d 721, 723 (Pa. Super. 2003).

Dickerson, ***Canuso***, and ***Filbert*** all involved contracts that had very detailed specifications regarding how the worker was to carry out the job. In ***Dickerson***, for example, the Department of Transportation specified which materials must be used, the composition and procedure for mixing the concrete used, the tests to be run on each batch of concrete, the conditions under which the concrete must be poured and cured, and provided for its own team of inspectors to monitor the pouring and formation of the concrete beams. ***Dickerson***, 400 A.2d at 932; ***see also Canuso***, 192 A. at 134 (referring to the "[d]etailed specifications and plans [] included in the contract"); ***Filbert***, 37 A. at 546 ("The general agreement, and the plans and specifications which were made a part thereof, together contain the most elaborate details as to the kind of work to be done and the materials to be furnished."). The ***Dickerson***, ***Canuso***, and ***Filbert*** Courts found that the failure to obtain the owner's satisfaction as required by the contract was excused by the workers' adherence to the very specific and detailed terms of the contracts. ***See Canuso***, 192 A. at 136; ***Filbert***, 37 A. at 546-47; ***Dickerson***, 400 A.2d at 932.

The record in the case at bar reflects that the contract between Contractor and Subcontractor contained very few specifications and little detail regarding Subcontractor's required performance. The only specifications included in the contract between the parties are that Subcontractor will perform an HDD installation to accommodate a 16-inch

diameter, .375 thick welded steel pipe within the right of way; the work will commence the week of June 1, 2009; and that Subcontractor will comply with all laws, ordinances, codes, and regulations that govern the performance of the work being conducted and the terms of the contract between Equitrans and Contractor. Contract, 6/1/09, at 1. There are no "detailed plans and specifications" in the contract at issue in this case. ***See Dickerson***, 400 A.2d at 932. We therefore disagree that ***Dickerson*** and its predecessors are applicable to the case before us.

In the contract at issue, Subcontractor agreed that "[a]cceptance of the directionally drilled gas line installation shall be at the discretion of [Equitrans]. Contractor shall make no compensation to Subcontractor for any portion of the directionally drilled gas line installation that is rejected by [Equitrans]." Contract, 6/1/09, at 2-3, ¶ 17. It is uncontested that Equitrans rejected the first HDD installation performed by Subcontractor. ***See*** N.T., 5/16/13, at 34. In its response to Contractor's motion *in limine* for the exclusion of testimony challenging Equitrans' rejection of the drill originally performed by Subcontractor, Subcontractor asserted that such testimony was relevant because Subcontractor "performed according to the terms of the contract and [] the rejection by Equitrans was for other reasons." Answer to Plaintiff's Motion in Limine on the Exclusion of Evidence Challenging the Rejection of the Original Pipeline, 5/17/13, at ¶ 2. To the extent the objected-to evidence shows that Equitrans' rejection of the

originally drilled pipeline was capricious, made in bad faith, or the product of collusion with Contractor, the evidence would be relevant and admissible. ***See*** Pa.R.E. 401 (defining relevant evidence as that which has a tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence). Otherwise, the evidence would be inadmissible because pursuant to the general rule stated in ***Jenkins Towel Service*** and the cases preceding it, absent a showing of bad faith, capriciousness or collusion, the fact that Equitrans rejected the originally drilled pipeline placed Subcontractor in breach of the contract as a matter of law, as Subcontractor's performance was conditioned upon Equitrans' approval, they failed to obtain it, and Contractor suffered damages in the form of additional costs to complete the drill as a result. ***See McShea v. City of Philadelphia***, 995 A.2d 334, 340 (Pa. 2010) ("The necessary material facts that must be alleged for such an action are simple: there was a contract, the defendant breached it, and plaintiffs suffered damages from the breach.").

Furthermore, if Subcontractor is unable to show that Equitrans' rejection of Subcontractor's original performance was capricious, in bad faith, or the product of collusion, Contractor is entitled to recover whatever costs it can prove it incurred as a result of Subcontractor's breach, less the amount owed to Subcontractor on the original contract. Section 13.1 of the contract states that Subcontractor is responsible for costs incurred by

Contractor "for non-completion of the contracted work by the Subcontractor." Contract, 6/1/09, at ¶ 13.1. While the project was ultimately completed with the assistance of Contractor, Subcontractor agreed to complete the contract to the satisfaction of Equitrans at a cost to Contractor of $428,040.00. According to Contractor, the costs it incurred to see the job to completion following Equitrans' rejection of the pipeline originally drilled by Subcontractor was $711,208.76. Pursuant to the agreement, if Equitrans' rejection was not in bad faith, capricious or collusive, contractor is entitled to recover the difference between the actual cost and the original contract price from Subcontractor.

Based upon the record before us, we cannot determine whether the complained-of evidence was relevant and properly admitted. The question of whether Equitrans' rejection of the originally drilled pipeline was capricious, made in bad faith, or the product of collusion with Contractor was for the jury to determine. The record reflects, however, that the court did not instruct or direct the jury to make this finding.[4] Rather, in its charge to the jury, the trial court provided the following instruction over Contractor's objection:

> Where the contract breach required work to be performed to the satisfaction of the owner, it must be shown that the work was so performed. However, if you find that the work was performed in

[4] This is the instruction Contractor requested in its supplemental points of charge. ***See*** N.T., 5/16/13, at 202-03.

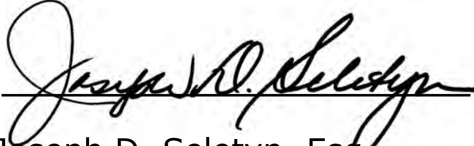
> accordance with the plans, specifications or instructions by or on behalf of the owner, then [Subcontractor] may not be held liable for any defects in the work or dissatisfaction by the owner.

N.T., 5/17/13, at 30; ***see also*** N.T., 5/16/13, at 200-04 (Contractor's objection to the second sentence of the instruction). As the trial court recognized, the second sentence of this instruction is based on the holding in ***Dickerson***. Pa. SSJI (Civ) 19.250; N.T., 5/16/13, at 201-02. As stated above, the portion of the holding in ***Dickerson*** upon which the instruction is based has no application to the case before us. Furthermore, the verdict slip only asked whether Contractor and/or Subcontractor were in breach of contract and if so, the amount of damages owed. Jury Verdict Slip, 5/17/13.

We are therefore constrained to vacate the judgment entered and remand the case for a new trial consistent with this decision. On remand, on the issue of Subcontractor's breach of the agreement, the trial court shall only permit evidence challenging Equitrans' rejection of the pipeline as originally drilled by Subcontractor if it tends to show that the rejection was capricious, in bad faith, or collusive.

Judgment vacated. Case remanded for a new trial. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/23/2014