NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RAINBOW ROOFING CO., INC. Appellee v. PERROTTO BUILDERS, LTD AND INTERNATIONAL FIDELITY INSURANCE COMPANY Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 337 MDA 2013

Appeal from the Judgment Entered January 29, 2013
In the Court of Common Pleas of Lancaster County
Civil Division at No(s): CI-11-04904

BEFORE: GANTMAN, J., ALLEN, J., and MUNDY, J.

MEMORANDUM BY GANTMAN, J.: **FILED OCTOBER 03, 2013**

Appellants, Perrotto Builders, Ltd. ("Perrotto"), and International Fidelity Insurance Company ("Fidelity"), appeal from the summary judgment entered in the Lancaster County Court of Common Pleas in favor of Appellee, Rainbow Roofing Co., Inc. ("Rainbow Roofing"), in this breach of contract action. We affirm.

The trial court summarized the relevant facts and procedural history as follows.

> On May 9, 2011, [Appellee] Rainbow Roofing initiated the instant action for payment alleged due to a subcontract for roofing work entered into with [Appellant] Perrotto. [Appellee] averred that Perrotto entered into a performance and payment bond with Fidelity, thereby guaranteeing [Appellee] to payment pursuant to the subcontract. Perrotto, the general contractor, had entered

> into a contract with Lancaster County (the "County") for general construction work on a County administration building. Rainbow Roofing's work was completed in accordance with its subcontract. The full value of Perrotto's subcontract with Rainbow Roofing was $477,618.63. Perrotto has paid Rainbow Roofing $453,737.70 under its subcontract. Rainbow Roofing sued for the unpaid balance of $23,880.93.
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> [Rainbow Roofing] filed a request for arbitration as the amount in controversy was less than $50,000. On April 3, 2012, [Perrotto and Fidelity] filed their timely notice of appeal to [the trial court] from the award of arbitrators. A pre-trial conference was held on July 23, 2012. At the conference, the parties agreed that there were no material factual issues in dispute. The parties agreed that the matter should be submitted to the [trial court] on cross-motions for summary judgment. Accordingly, the parties subsequently filed a joint stipulation of undisputed facts and cross-motions for summary judgment.

(Trial Court Opinion, filed April 17, 2013, at 1-2). The stipulated facts included:

JOINT STIPULATION OF FACTS

1. This case involves a claim for breach of contract and a claim for payment pursuant to a payment bond as a result of work performed by [Rainbow Roofing] for [Perrotto], on the Lancaster County Administration Offices at 150 North Queen Street (the "Project").

2. Perrotto entered into a contract with the County on December 11, 2006, for the general construction work on the Project that included the General Conditions (GCs) and Supplemental Conditions of Contract (SCs) that are attached hereto as Exhibit A, which are authentic and admissible in this proceeding.

3. The full value of Perrotto's contract with the County is in excess of $14,000,000, with change orders.

4. Perrotto entered into a Sub-Contract Agreement with Rainbow Roofing dated February 3, 2007, for roofing work on the building, a true and correct copy of which is attached hereto as Exhibit B, which the parties agree is authentic and admissible in this proceeding.

5. At all times relevant hereto, [Fidelity] issued a Payment and Performance Bond in connection with the Project, a true and correct copy of which is attached hereto as Exhibit C, which the parties agree is authentic and admissible in this proceeding.

6. The full value of Perrotto's contract with Rainbow Roofing was $477,618.63.

7. Rainbow [Roofing] submitted its final invoice to Perrotto on September 18, 2008, a true and correct copy of which is attached hereto as Exhibit D, which the parties agree is authentic and admissible in this proceeding.

8. As of this date Perrotto has paid Rainbow Roofing $453,737.70 under its contract, leaving a contract balance of $23,880.93, as indicated on the Subcontract Detail attached hereto as Exhibit E, which the parties agree is authentic and admissible in this proceeding.

9. The $23,880.93 represents 5% of the full value of the Rainbow Roofing contract.

10. By letter dated September 27, 2010, the Project Owner's architect, Greenfield Architects, Ltd., identified certain outstanding issues in connection with the project that included a $5,000.00 charge related to insulation installed by Rainbow [Roofing]. A true and correct copy of Greenfield Architect's September 27, 2010 letter is attached hereto as Exhibit F, which the parties agree is authentic and admissible in this proceeding.

11. [Rainbow Roofing's] work under its contract was performed in accordance therewith, and that the

> County had no basis for claiming it was due $5,000.00 credit in connection with [Rainbow Roofing's] work on the Project.
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> 12. During the summer of 2011, Rainbow [Roofing] sent an employee to the County building, opened up the roof, and established that the proper insulation had been installed.
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> 13. On or about March 16, 2011, the County filed a lawsuit against Perrotto with [the trial court] at docket number 11-02547 setting forth certain affirmative claims against Perrotto in connection with the Project, a true and correct copy of which is attached hereto as [Exhibit F (sic)], which the parties agree is authentic and admissible in this proceeding.
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> 14. On or about April 28, 2011, the County filed a Petition to deposit $559,155.18 with [the trial court], which amount represented what the County believed to be the outstanding balance under its contract with Perrotto (the "Escrow Funds").
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> 15. On or about August 2, 2011, [the trial court] entered an [o]rder accepting the Escrow Funds to be held by the [trial court] pending the outcome of the litigation between the County and Perrotto.
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> 16. The litigation between the County and Perrotto is currently pending, and as of this date the Escrow Funds have not been released to Perrotto.
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> 17. The parties will file cross motions for summary judgment based on the stipulations set forth herein on or before November 15, 2012, with reply briefs being due consecutively on or before November 30, 2012.

(Perrotto/Fidelity's Motion for Summary Judgment, Exhibit A, filed 11/15/12; R.R. at 18a-20a). The trial court opinion continued:

> Oral argument on the cross motions was held on January 25, 2013. After thoroughly considering the cross-motions as well as the arguments of counsel, the [trial court] entered its [summary judgment order] of January 29, 2013, finding that the relevant subcontract provision was a "pay when paid" agreement and granting summary judgment in favor of [Rainbow Roofing]. [Perrotto and Fidelity] timely filed their appeal on February 20, 2013.

(Trial Court Opinion at 2). On February 25, 2013, the trial court ordered Perrotto/Fidelity to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and they timely complied.

Perrotto/Fidelity raise the following issues for our review:

> THE AGREEMENT AT ISSUE CONTAINS A "PAY-IF-PAID," RATHER THAN A "PAY-WHEN-PAID" CLAUSE.
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> > A PAY-IF-PAID CONTRACT CLAUSE EXISTS WHERE ONE'S DUTY TO PAY ANOTHER IS CONDITIONED UPON PAYMENT FROM A THIRD PARTY. THE AGREEMENT HERE PROVIDES THAT PERROTTO'S DUTY TO PAY RAINBOW ARISES "ONLY IF" PERROTTO HAS BEEN PAID BY LANCASTER COUNTY. THE TRIAL COURT HELD THIS LANGUAGE FAILED TO CONSTITUTE A PAY-IF-PAID CLAUSE AND GRANTED SUMMARY JUDGMENT AGAINST PERROTTO. SHOULD THE TRIAL COURT'S DECISION BE REVERSED?
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> PERROTTO HAS NOT BEEN PAID THE REMAINING 5% OF ITS CONTRACT BALANCE WITH THE COUNTY.
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> > UNDER THE RELEVANT CONTRACT, PERROTTO'S DUTY TO PAY RAINBOW AROSE "ONLY IF" PERROTTO HAS BEEN PAID BY LANCASTER COUNTY. THE COUNTY ACCEPTED RAINBOW'S WORK, BUT WITHHELD 5% OF THE MONEY DUE TO PERROTTO AS RETAINAGE. PERROTTO, IN TURN, HAS WITHHELD 5% OF RAINBOW'S CONTRACT, AS WAS CONTRACTUALLY PERMITTED. THE TRIAL COURT HELD THAT THE COUNTY PAID PERROTTO BY

> DEPOSITING ITS CONTRACT BALANCE WITH LANCASTER COUNTY COURT OF COMMON PLEAS, AND THAT PERROTTO MUST THEREFORE PAY RAINBOW THE REMAINING 5% OF ITS CONTRACT, EVEN THOUGH THE COUNTY'S MONEY HAS NEVER BEEN TURNED OVER TO PERROTTO. SHOULD THE TRIAL COURT'S DECISION BE REVERSED?

(Perrotto/Fidelity's Brief at 4).

Initially, we observe:

> Our scope of review of an order granting summary judgment is plenary. [W]e apply the same standard as the trial court, reviewing all the evidence of record to determine whether there exists a genuine issue of material fact. We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered. All doubts as to the existence of a genuine issue of a material fact must be resolved against the moving party.
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> Motions for summary judgment necessarily and directly implicate the plaintiff's proof of the elements of [his] cause of action. Summary judgment is proper if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. In other words, whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense, which could be established by additional discovery or expert report and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Thus, a record that supports summary judgment either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense.

> Upon appellate review, we are not bound by the trial court's conclusions of law, but may reach our own conclusions. The appellate Court will disturb the trial court's order only upon an error of law or an abuse of discretion.
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> > Judicial discretion requires action in conformity with law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason. Similarly, the trial court abuses its discretion if it does not follow legal procedure.
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> Where the discretion exercised by the trial court is challenged on appeal, the party bringing the challenge bears a heavy burden.
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> > [I]t is not sufficient to persuade the appellate court that it might have reached a different conclusion if…charged with the duty imposed on the court below; it is necessary to go further and show an abuse of the discretionary power. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused.
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> * * *

Glaab v. Honeywell Intern., Inc., 56 A.3d 693, 696-97 (Pa.Super. 2012) (quoting ***Chenot v. A.P. Green Services, Inc.***, 895 A.2d 55, 60–62 (Pa.Super. 2006) (internal citations and quotation marks omitted)).

For disposition purposes, we combine the issues. Initially, Perrotto/Fidelity argue that Article 5 of the subcontract agreement between Perrotto and Rainbow Roofing is a "pay-if-paid" clause rather than a "pay-when-paid" clause. Perrotto/Fidelity submit the plain meaning of Article 5, which includes the phrase "only if," conditions Perrotto's obligation to pay Rainbow Roofing on the County's payment to Perrotto. Perrotto/Fidelity further claim that, by relying on the Restatement (Second) of Contracts Section 227 and interpreting Article 5 to be a timing mechanism, the trial court read into the Agreement a provision which simply is not there.

Next, Perrotto/Fidelity assert the County has not paid Perrotto for Rainbow Roofing's work. Perrotto/Fidelity aver again that the plain language of Article 5 makes clear Perrotto's duty to pay Rainbow Roofing is related to the County's payment, not merely the County's acceptance of Rainbow Roofing's work. Moreover, Perrotto/Fidelity insist the concept of retainage is broader than Rainbow Roofing's work; so it is irrelevant that the County accepted Rainbow Roofing's work. Rather, Perrotto/Fidelity contend the only condition that triggers the duty to pay Rainbow Roofing in full is the County's **full** payment to Perrotto. Because the County has not paid Perrotto/Fidelity in full, Perrotto/Fidelity need not pay Rainbow Roofing in full; and the parties agreed to this "pay-if-paid" clause. Perrotto/Fidelity conclude the trial court erred in granting summary judgment in favor of Rainbow Roofing. We disagree.

Contract construction and interpretation is a question of law for the court to decide. ***Profit Wise Marketing v. Wiest***, 812 A.2d 1270, 1274 (Pa.Super. 2002); ***J.W.S. Delavau, Inc. v. Eastern America Transport & Warehousing, Inc.***, 810 A.2d 672, 681 (Pa.Super. 2002), *appeal denied*, 573 Pa. 704, 827 A.2d 430 (2003) (reiterating: "The proper interpretation of a contract is a question of law to be determined by the court in the first instance"). In construing a contract, the intent of the parties is the primary consideration. ***Tuscarora Wayne Mut. Ins. Co. v. Kadlubosky***, 889 A.2d 557, 560 (Pa.Super. 2005).

> When interpreting agreements containing clear and unambiguous terms, we need only examine the writing itself to give effect to the parties' intent. The language of a contract is unambiguous if we can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends. When terms in a contract are not defined, we must construe the words in accordance with their natural, plain, and ordinary meaning. As the parties have the right to make their own contract, we will not modify the plain meaning of the words under the guise of interpretation or give the language a construction in conflict with the accepted meaning of the language used.
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> On the contrary, the terms of a contract are ambiguous if the terms are reasonably or fairly susceptible of different constructions and are capable of being understood in more than one sense. Additionally, we will determine that the language is ambiguous if the language is obscure in meaning through indefiniteness of expression or has a double meaning.

Profit Wize Marketing, supra at 1274-75 (internal citations and quotation marks omitted).

> Where there is any doubt or ambiguity as to the meaning of the covenants in a contract or the terms of a grant, they should receive a reasonable construction, and one that will accord with the intention of the parties; and, in order to ascertain their intention, the court must look at the circumstances under which the grant was made. It is the intention of the parties which is the ultimate guide, and, in order to ascertain that intention, the court may take into consideration the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject-matter of the agreement.

Giant Food Stores, LLC v. THF Silver Spring Development, L.P., 959 A.2d 438, 448 (Pa.Super. 2008), *appeal denied*, 601 Pa. 697, 972 A.2d 522 (2009) (internal citations and quotation marks omitted). In either event, "[T]he court will adopt an interpretation which under all circumstances ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished." ***E.R.Linde Const. Corp. v. Goodwin***, 68 A.3d 346, 349 (Pa.Super. 2013).

"Pennsylvania courts…construe clauses that condition payment to the subcontractor on the general contractor's receipt of payment from the owner as pay-if-paid clauses." ***Sloan & Co. v. Liberty Mut. Ins. Co.***, 653 F.3d 175, 179-80 (3rd Cir. 2011) (citing ***C.M. Eichenlaub Co., Inc. v. Fidelity & Deposit Co. of Maryland***, 437 A.2d 965, 967 (Pa.Super. 1981); ***Cumberland Bridge Co. v. Lastooka***, 8 Pa. D. & C.3d 475, 482 (Pa.Com.Pl. 1977)). These cases recognize, "[E]xpress language of [a] condition is sufficient to establish a pay if paid condition precedent." ***Sloan & Co., supra*** at 180. "[N]o particular words are required to create a

condition." ***O'Brien & Gere Engineers, Inc. v. Taleghani***, 540 F.Supp. 1114, 1116 (E.D.Pa. 1982), *affirmed*, 707 F.2d 1394-95 (3d Cir. 1983). In contrast, "a pay-when-paid clause does not establish a condition precedent, but merely creates a timing mechanism for the general contractor's payment to the subcontractor." ***Sloan & Co., supra*** at 180 (citing ***United Plate Glass Co. Div. of Chromalloy Am. Corp. v. Metal Trims Industries, Inc.***, 525 A.2d 468, 471 (Pa.Cmwlth. 1987)). "When certainty is lacking…Pennsylvania courts tend to interpret payment provisions as pay-when-paid clauses." ***Sloan & Co., supra***.

Although the parties may, through express agreement, make "any event a condition precedent to either party's performance…[i]t is a question of interpretation whether the parties have agreed that particular language creates a condition." ***O'Brien, supra*** at 1116. "Where the issue before the court is whether a term of a contract is a condition, the court will examine the language of the term itself." ***Id.*** If the language in question is not free from doubt, however, "certain conventions of contract interpretation may guide the court." ***Id.***

One interpretative convention is the Second Restatement of Contracts ("Restatement"), which provides:

> In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.

United Plate Glass, supra at 470 (quoting Restatement (Second) Contracts § 227(1)). The Comment to Section 227 further provides:

> [T]he agreement of the parties should be honored even though forfeiture results. When, however, it is doubtful whether…the agreement makes an event a condition of an obligor's duty, an interpretation is preferred that will reduce the risk of forfeiture. For example, under a provision that a duty is to be performed "when" an event occurs, it may be doubtful whether it is to be performed only if that event occurs, in which case the event is a condition, or at such a time as it would ordinarily occur, in which case the event is referred to merely to measure the passage of time. In the latter case, if the event does not occur some alternative means will be found to measure the passage of time, and the non-occurrence of the event will not prevent the obligor's duty from becoming one of performance.

Id. (quoting Restatement (Second) of Contracts § 227, Comment b).

Instantly, the trial court summarized its discussion of the issues as follows:

> [Perrotto/Fidelity] claim the provision language at issue is "unmistakably a pay-if-paid clause" and cite to ***Sloan, supra***, to support their contention. However, the provision at issue in ***Sloan***, unlike here, explicitly provided that certain events "shall be conditions precedent to such final payment." ***See Sloan, supra*** at 179. The provision at issue in this case lacks such unequivocal language. Reviewing the plain language of Article 5 of the subcontract, the [c]ourt is not persuaded that the provision makes payment by the County to Perrotto a condition precedent to Perrotto's obligation to pay Rainbow Roofing. The [c]ourt finds the language in Article 5 more akin to that of provisions that other federal and state courts have found to be a timing mechanism to govern payment. ***See, e.g., O'Brien, supra***; ***United Plate Glass, supra***;….

(Trial Court Opinion at 4-5). Notwithstanding the disputed language in Article 5 of the subcontract, "only if," the federal court has held in ***O'Brien, supra***, that no particular words are necessary to create a condition. ***O'Brien, supra*** at 1116. Given the doubt surrounding the nature of the disputed language, Section 227 of the Restatement encourages courts to resolve the issue by interpreting the language in a way to reduce the Rainbow Roofing's (the obligee) risk of forfeiture. ***See also Sloan & Co., supra***. Therefore, taking the language of Article 5 into consideration in conjunction with Section 227 of the Restatement, the language can reasonably be interpreted as a "paid-when-paid" clause.

The trial court opinion continued:

> Alternatively, even if the provision at issue were a pay-if-paid clause, Perrotto has been paid by the County. Rainbow Roofing's work was accepted by the County and approved by the Architect. The retainage amount paid by the County to the Court is related to alleged mismanagement or breach of the general contract with Perrotto and has nothing to do with the subcontract or the work of Rainbow Roofing.

(Trial Court Opinion at 5). Article 5 of the subcontract does not state that, in order for Rainbow Roofing to receive payment, the County must pay Perrotto "in full." Rather, the provision at issue merely states that payment to Rainbow Roofing will become due "only if" Perrotto receives "payment" from the County. Although the County is withholding 5% in retainage from Perrotto, according to the Joint Stipulation of Facts, ***supra***, the County has both accepted and paid Perrotto for Rainbow Roofing's work. Therefore,

Perrotto/Fidelity is contractually required to pay Rainbow Roofing the remaining balance on the subcontract because the County paid for that work. Accordingly, we affirm the summary judgment in favor of Rainbow Roofing.

Judgment affirmed.

Judgment Entered.

Mary A. Hoyle

Deputy Prothonotary

Date: 10/3/2013