NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

SCUNGIO BORST & ASSOCIATES, Appellants v. SHURS LANE DEVELOPERS, LLC AND KENWORTH II, LLC., Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2493 EDA 2012

Appeal from the Order Entered September 30, 2010
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 946 November Term, 2008

BEFORE: BENDER, J., BOWES, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, J. **FILED OCTOBER 04, 2013**

Scungio Borst & Associates (SBA) appeals from the September 30, 2010 order that granted summary judgment in favor of Robert DeBolt (DeBolt), a fifty percent shareholder in 410 Shurs Lane Developers, LLC (410 SLD).[1] After review, we vacate the order granting summary judgment and remand the case for further proceedings.

Judge McInerney provided the following factual and procedural history of the case:

---

* Retired Senior Judge assigned to the Superior Court.

[1] The Honorable Albert W. Sheppard, Jr., passed away following his issuance of the September 30, 2010 order at issue in this case. The Honorable Patricia A. McInerney prepared the Pa.R.A.P. 1925(a) opinion in conjunction with this appeal.

> [SBA] acted as general contractor on a condominium construction project, which was owned by defendant 410 Shurs Lane Developers, LLC ("410 SLD"). Mr. DeBolt was a principal of 410 SLD. [SBA] performed its construction services pursuant to a written contract between it and 410 SLD. [SBA] also performed $2.6 million in additional work under the contract as directed by 410 SLD and Mr. DeBolt. [SBA] was not paid for approximately $1.5 million in additional work, so it filed this lawsuit against 410 SLD, Mr. DeBolt, and others.[1]
>
> [1]The claims against the other parties were either dismissed, settled, tried, or discontinued, and they are not at issue in this appeal.
>
> In its Fourth Amended Complaint, [SBA] asserted claims against 410 SLD and Mr. DeBolt for breach of contract, for violation of the Contractor and Subcontractor Payment Act ("CASPA"), [73 Pa.C.S. §§ 501-516,] and for unjust enrichment. Mr. DeBolt filed a Motion for Summary Judgment as to those claims, which Judge Sheppard granted. The remaining claims against 410 SLD and another defendant[2] were tried before this court, and [SBA] obtained a judgment against both of those defendants for approximately $1.9 million.
>
> [2]The other entity is Kenilworth II, LLC, which purchased the condominium property at sheriff's sale. It is also owned by Mr. DeBolt.

Trial Court's Opinion, 12/14/12, at 1-2.

On July 12, 2012, a final order was issued in the case, entering judgment in favor of SBA and against 410 Shurs and Kenworth II, LLC (Kenworth) for $1,979,341. SBA's appeal only concerns the court's grant of summary judgment in favor of DeBolt.

In its appeal, SBA raises the following issue for our review:

> 1. Did the lower court commit an error of law or abuse its discretion in granting summary judgment to DeBolt under CASPA, where:

> (a) CASPA makes the owner (410 [SLD]) and the "agent of the owner acting with the owner's authority" (DeBolt) liable to contractors such as SBA,
>
> (b) DeBolt is a fifty percent owner of 410 [SLD],
>
> (c) SBA consistently dealt with DeBolt and received his authorizations for change orders, and
>
> (d) SBA never received payment for the change orders?

SBA's brief at 3.

> "Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion." ***Universal Health Services, Inc. v. Pennsylvania Property and Casualty Insurance Guaranty Assoc.***, 884 A.2d 889, 892 (Pa. Super. 2005) (citation omitted).
>
> > The entry of summary judgment is proper whenever no genuine issue of any material fact exists as to a necessary element of the cause of action. The moving party's right to summary judgment must be clear and free from doubt. We examine the record, which consists of all pleadings, as well as any depositions, answers to interrogatories, admissions, affidavits, and expert reports, in a light most favorable to the non-moving party, and we resolve all doubts as to the existence of a genuine issue of material fact against the moving party.
>
> ***LJL Transp., Inc. v. Pilot Air Freight Corp.***, 599 Pa. 546, 962 A.2d 639, 647 (Pa. 2009) (citations omitted).

Krapf v. St. Luke's Hospital, 4 A.3d 642, 649 (Pa. Super. 2010), *appeal denied*, 34 A.3d 831 (Pa. 2011).

SBA argues that the trial court erred in granting summary judgment in favor of DeBolt, because under CASPA the term "owner" is defined to include

"agents of the owner acting within their authority." SBA's brief at 10. SBA also argues that with DeBolt being a 50% owner and a key decision maker, DeBolt should be liable for all the unpaid work. ***Id.*** As a factual basis for this claim, SBA asserts that the parties entered into the construction contract on September 2, 2005, with SBA to receive $3.8 million dollars for the labor and materials it supplied to the project. SBA claims it was directed to submit all bills to 410 SLD and DeBolt and was paid by Sovereign Bank. However, at the end of June 2006, SBA stopped receiving payments, but was assured by DeBolt that payment would be forthcoming. Based upon these assurances, SBA continued its performance until November 8, 2006, when SBA was informed that the contract was terminated. At that time, SBA was owed $1,544,161 plus interest and costs, an amount that related to "change orders" or "cost events" that were authorized by DeBolt. SBA acknowledges that the contract included language, indicating that "[a] Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect…." Contract, § 7.2.1. However, contrary to 410 SLD's position that oral change orders were not valid, SBA asserts that it was often the practice that DeBolt would verbally authorize change orders and would not sign them.

We begin by discussing CASPA, which is at the heart of the issue raised on appeal. In ***Zimmerman v. Harrisburg Fudd I, L.P.***, 984 A.2d 497 (Pa. Super. 2009), this Court explained that CASPA is:

> a comprehensive statute enacted in 1994 to cure abuses within the building industry involving payments due from owners to contractors, contractors to subcontractors, and subcontractors to other subcontractors. "The underlying purpose of [CASPA] is to protect contractors and subcontractors . . . [and] to encourage fair dealing among parties to a construction contract." ***Ruthrauff, Inc. v. Ravin, Inc.***, 914 A.2d 880, 890 (Pa. Super. 2006). The statute provides rules and deadlines to ensure prompt payments, to discourage unreasonable withholding of payments, and to address the matter of progress payments and retainages. Under circumstances prescribed in the statute, interest, penalty, attorney fees and litigation expenses may be imposed on an owner, contractor or subcontractor who fails to make payment to a contractor or subcontractor in compliance with the statute.

Id. at 500-01.

In arguing that DeBolt is an "agent of the owner" and thus liable to SBA for the sums due, SBA cites section 502 of CASPA, which defines "owner" as "[a] person who has an interest in the real property that is improved and who ordered the improvement to be made. The term includes successors in interest of the owner and *agents of the owner acting with their authority*." 73 Pa.C.S. § 502 (emphasis added). SBA also cites the definition of "construction contract" which provides that it is an agreement, "whether written or oral." ***Id.*** Thus, SBA claims that the verbal authorizations for change orders are encompassed in the agreement and that DeBolt is individually liable.

SBA also cites the Wage Payment and Collection Law (WPCL), 43 Pa.C.S. §§ 260.1 et seq., claiming that it is analogous to CASPA and supports SBA's interpretation of the term "agent of the owner." SBA's brief

at 12 (stating, "[u]nder the WPCL, an 'agent' of an employer is an individual with decision[]making authority, and such 'agents' are liable for the employer's unpaid wages. CASPA treats 'agent' in the same manner as the WPCL. Thus, individual 'agents' with decision[]making authority such as DeBolt are liable under CASPA for a contractor's unpaid work."). In further support of this proposition, SBA quotes ***Hirsch v. EPL Technologies, Inc.***, 910 A.2d 84 (Pa. Super. 2006), which states:

> "To hold an 'agent or officer' personally liable for unpaid wages, 'evidence of an active role in decision making is required.'" ***Int'l Ass'n of Theatrical Stage Employees., Local Union No. 3 v. Mid-Atl. Promotions, Inc.***, 856 A.2d 102, 105 (Pa. Super. 2004) (citing ***Mohney v. McClure***, 390 Pa. Super. 338, 568 A.2d 682 (Pa. Super. 1990), *affirmed per curiam*[,] 529 Pa. 430, 604 A.2d 1021 (1992)). In that case, a panel of this Court found that "[t]o sustain its case against Appellee as an "employer" under the WPCL, Appellant had to show Appellee was actively involved in corporate policy-making, such as corporate decision-making or corporate advisement on matters of pay or compensation." ***Mid-Atl. Int'l Ass'n of Theatrical Stage Employees., Local Union No. 3 v. Promotions, Inc.***, 856 A.2d at 106.

Id. at 88. Therefore, relating this concept to the instant case, SBA argues that because DeBolt was in an active role in decision making and authorizing the change orders, he should be considered an agent of the owner and subject to liability pursuant to CASPA.

SBA further contends that a construction contract may be modified orally despite the contract provision that requires change orders to be in writing. To support this contention, SBA relies on ***Universal Builders, Inc.***

v. Moon Motor Lodge, Inc., 244 A.2d 10 (Pa. 1968), wherein the Supreme Court stated:

> [I]t appears undisputed that the contract can be modified orally although it provides that it can be modified only in writing. E.g., ***Wagner v. Graziano Construction Co.***, 390 Pa. 445, 136 A.2d 82 (1957); 4 Williston on Contracts, § 591 (3d ed. 1961); 6 Corbin on Contracts, § 1295 (1962); Restatement, Contracts, § 407 (1932). Construction contracts typically provide that the builder will not be paid for extra work unless it is done pursuant to a written change order, yet courts frequently hold that owners must pay for extra work done at their oral direction. ***See generally*** Annot., 2 A.L.R. 3d 620, 648-82 (1965). This liability can be based on several theories. For example, the extra work may be said to have been done under an oral agreement separate from the written contract and not containing the requirement of a written authorization. 3A Corbin on Contracts, § 756 at p. 505 (1960). The requirement of a written authorization may also be considered a condition which has been waived. 5 Williston on Contracts, § 689 (3d ed. 1961).

Id. at 15. The Supreme Court further stated:

> [T]he effectiveness of a non-written modification in spite of a contract condition that modifications must be written depends upon whether enforcement of the condition is or is not barred by equitable considerations, not upon the technicality of whether the condition was or was not expressly and separately waived before the non-written modification.
>
> In view of these equitable considerations underlying waiver, it should be obvious that when an owner requests a builder to do extra work, promises to pay for it and watches it performed knowing that it is not authorized in writing, he cannot refuse to pay on the ground that there was no written change order. ***Focht v. Rosenbaum***, 176 Pa. 14, 34 A. 1001 (1896). When Moon directed Universal to "go ahead" and promised to pay for the extras, performance of the condition requiring change orders to be in writing was excused by implication. It would be manifestly unjust to allow Moon, which mislead [sic] Universal into doing extra work without a written authorization, to benefit from non-performance of that condition.

Id. at 16.

Despite the law as outlined above, SBA also references deposition testimony taken during the discovery period, which is most telling. Notably, the two principals of SBA, Scungio and Borst, related what occurred when DeBolt gave verbal instructions directing changes, *i.e.*, cost events or change orders. ***See*** Scungio's Deposition, 2/17/10; Borst's Deposition, 3/3/10. Scungio's and Borst's descriptions of conversations directing changes during construction are contrary to DeBolt's statements in his affidavit in support of his summary judgment motion. Specifically, DeBolt averred that "I never approved the work, orally or otherwise, for which [SBA] seeks payment" and "I never executed the change orders upon which [SBA] bases its claims." DeBolt's Affidavit, 3/31/10, ¶¶ 10, 11. Furthermore, the essence of DeBolt's position is that he is not a party to the construction contract and that CASPA does not entitle SBA to recover damages from him individually as an agent of 410 SLD.

After reviewing the record in a light most favorable to the non-moving party, SBA, we conclude that genuine issues of material fact exist. These factual issues necessitate findings as to what actually occurred at the building site or elsewhere concerning DeBolt's directions about change orders, *i.e.*, what a fact finder would find credible regarding the actual communications about DeBolt's directions and the compliance with these

directions by SBA despite the lack of written change orders. More importantly, an issue of material fact exists in connection with DeBolt's capacity/authority relating to 410 SLD that compelled SBA's representatives to comply with DeBolt's oral change orders. As a result of the existence of these unanswered questions, we determine that the trial court erred as a matter of law when it granted summary judgment in favor of DeBolt. Noting the law quoted above, we recognize that the existence of these material facts raises doubts that must be resolved against the moving party. Accordingly, we are compelled to vacate the order granting summary judgment in DeBolt's favor and remand the matter to the trial court for further proceedings consistence with this memorandum.

Order vacated. Case remanded for further proceedings. Jurisdiction relinquished.

Judge Bowes files a dissenting memorandum.

Judgment Entered.

Prothonotary

Date: 10/4/2013