IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

CARSON CONCRETE CORPORATION	:	December Term, 2015
	:	Case No. 01952
Plaintiff	:	
	:	
v.	:	
	:	
ERNEST BOCK & SONS, INC.	:	Commerce Program
	:	
Defendant	:	

ORDER

AND NOW, this 23rd day of December, 2019, after a trial held on October 23, 2019, and consistent with the **FINDINGS-OF-FACT AND CONCLUSIONS-OF-LAW** filed simultaneously herewith, it is **ORDERED** that a **FINDING IS ENTERED** in favor of plaintiff Carson Concrete Corporation and against defendant Ernest Bock & Sons, Inc., in the amount of $19,908.00.

BY THE COURT,

GLAZER, J.

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COMMERCE PROGRAM

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FINDINGS OF FACT

1. Defendant Ernest Bock & Sons, Inc. is a corporation with an address in Philadelphia, Pennsylvania.

2. On January 13, 2011, Ernest Bock & Sons, Inc. entered into a "Construction Agreement" with the County of Bucks, Pennsylvania (the "Owner"), for the erection of a courthouse.[1] Under the Construction Agreement, Ernest Bock & Sons, Inc. agreed to act as a general contractor for the construction work. Hereinafter, Ernest Bock & Sons, Inc. shall be identified as the "General Contractor."

THE PURCHASE ORDER.

3. On October 31, 2011, the General Contractor entered into a subcontract with herein plaintiff, Carson Concrete Corporation (the "Subcontractor"). Pursuant to this agreement, which is identified hereinafter as the "Purchase Order," Subcontractor agreed to pour and erect the structural concrete necessary to complete the construction project.[2]

4. The Purchase Order contained a "pay-if-paid" provision. Under this provision, the General Contractor was required to pay for work performed by the Subcontractor only if the Owner had paid for such work.[3] The pay-if-paid clause was amended to include additional, hand-written words. [4]

5. In addition, the Purchase Order comprised a number of exhibits and enclosures, including a section titled GENERAL CONDITIONS OF THE CONTRACT FOR

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[1] Standard Form Agreement Between Owner and EBS/General Contractor, Trial Exhibit 2 of EBS.
[2] Purchase Order, Trial Exhibit 1 of defendant/General Contractor, Job Description.
[3] Id., ¶ 5.
[4] Id.

CONSTRUCTION (the "General Conditions"). The General Conditions defined the term "Change Order" as a—

> written instrument prepared by the Construction Manager and signed by the Owner, Construction Manager, Architect and Contractor, stating their agreement upon the following:
>
> .1 a change in the Work;
> .2 the amount of the adjustment in the Contract Sum, if any; and,
> .3 the extent of the adjustment in the Contract Time, if any.[5]

6. The Purchase Order also included a document identified as a "Progress Schedule."[6] The Progress Schedule contemplated the erection of a temporary hoist beginning on May 25, 2012, and the removal thereof by March 28, 2013, for a period 214 days.[7] Under the terms of the Progress Schedule, the Subcontractor was required to suspend its work and leave the concrete job unfinished while the temporary hoist remained in place, but was required to resume and complete its work after the hoist had been dismantled.[8]

THE WORK.

7. After the temporary hoist was installed, the construction project experienced significant delays.

8. On April 8, 2014, more than one year after the temporary hoist had been scheduled to be dismantled, a superintendent on behalf of the General Contractor sent the following e-mail to the Subcontractor:

> Guys,

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[5] Id., at General Conditions, Trial Exhibit 3 of defendant/General Contractor, ¶ 7.2
[6] Progress Schedule—First Update, November 2011, at p.1, Trial Exhibit 4 of defendant/General Contractor.
[7] Id., at p. 21.
[8] Id., at p. 76.

> The temp[orary] hoist will be completely dismantled from the building [and will be] off the site by the end of the day tomorrow. Everyone has to be ready to start the enclosure work starting Thursday this week. Per our original temp[orary] hoist infill meeting minutes[,] the work sequencing and durations was discussed and agreed to between the trade disciplines as outlined in the attached meeting minutes....[9]

9. The temporary hoist was finally dismantled "sometime in April 2014."[10]

10. Subsequently, the Subcontractor re-mobilized its work-force, equipment, and materials, and satisfactorily completed the concrete work.[11]

11. Subcontractor issued to the General Contractor an invoice, COR # 73, by which Subcontractor claimed $19,908.00 for the work completed after the temporary hoist had been dismantled. COR # 73 was attached to the following cover letter:

> Per our conversation we are scheduled to come back to the site to construct the wall and curbs which were left out due to ... [your] request, this caused ... [us] additional expenses.
>
> We have included a detailed breakdown for the additional expenses which consist of the following:
>
> - Permits/Hauling for a mobile crane
> - Hauling Formwork, unloading & Loading
> - Labor for the above.
>
> These additional expenses would have been avoided if the work was performed while ... [we] had cranes, forms, tools, and lumber on-site.[12]

12. On April 14, 2014, the Owner, by letter addressed to the General Contractor, rejected COR # 73.[13]

13. On March 2, 2015, after the project had been completed, the Owner reaffirmed

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[9] E-mail dated April 8, 2014 from General Contractor to Subcontractor, Trial Exhibit 4 of Subcontractor.
[10] Trial testimony of Mr. David J. Gill, vice president of General Contractor, p. 116: 10-19.
[11] Id., p.99: 13-18.
[12] Change Order # 73 dated April 10, 2014, Trial Exhibit 5 of plaintiff/Subcontractor
[13] Letter rejecting COR # 73 dated April 15, 2015, Trial Exhibit 5 of defendant/General Contractor.

via e-mail its rejection of COR # 73.[14]

14. As a result of the Owner's rejection of COR # 73, the General Contractor refused to pay Subcontractor for the completed work, pursuant to the "pay-if-paid" clause in the Purchase Order.

15. In the course of trial in this action, no evidence was presented to show that the Owner of the project had rejected the work completed by the Subcontractor.

THE SETTLEMENT BETWEEN OWNER AND GENERAL CONTRACTOR.

16. On May 24, 2016, Owner and General Contractor entered into a SETTLEMENT, RELEASE, AND INDEMNIFICATION AGREEMENT (the "Settlement").

17. Under the terms of this Settlement, the Owner paid $3.975 million to the General Contractor, and in exchange the General contractor agreed to release the Owner from any "causes of action, suits, claims, counterclaims, cross-claims, third-party claims and demands of any type whatsoever, past, present and future."[15]

18. The Settlement also contained an indemnification provision. Under this provision, the General Contractor agreed to defend, indemnify, and hold harmless the Owner from any actions and any "claims or suits" brought by the subcontractors, "including, but not limited to any demand, claim or suit brought by ... [the herein Subcontractor] for deflection and project delay."[16]

The Instant Action.

19. The Subcontractor commenced the instant action on December 21, 2015, and filed its second amended complaint on March 21, 2017. The second amended

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[14] E-mail from Owner to General Contractor dated March 2, 2015, Trial Exhibit 6 of defendant/General Contractor.

[15] SETTLEMENT, RELEASE, AND INDEMNIFICATION AGREEMENT, at ¶ 4, Trial Exhibit 8 of plaintiff/Subcontractor.

[16] Id., at ¶ 5.

complaint asserted against the General Contractor five counts sounding in breach-of-contract, violation of the Contractor and Subcontractor Payment Act, (73 Pa. C.S.A. § 501 *et seq.*), conversion, unjust enrichment, and fraud. Count VI of the second amended complaint asserted a prayer for punitive damages.

20. On December 17, 2017, the General Contractor filed a motion for partial summary judgment. This court granted the motion in part, and dismissed, *inter alia*, the Subcontractor's claim asserting violation of the Contractor and Subcontractor Payment Act.[17]

21. Also on December 17, 2017, the General contractor filed a motion for partial judgment on the pleadings. On January 11, 2018, this court granted-in-part the motion for partial judgment on the pleadings, and dismissed from the action the Subcontractor's request, in the amount of $267,363, for additional materials, labor and equipment which were allegedly needed to off-set deflection during certain specific operations involving the pouring of concrete. The remainder of the motion for partial judgment on the pleadings was denied.

22. On February 19, 2019, the General Contractor filed a second motion for summary judgment against the Subcontractor. On March 29, 2019, this court granted the motion in part, and struck from the second amended complaint a claim under a specific Change Order, which was identified as COR # 72. The remainder of the motion for summary judgment was denied, and the claim asserted by Subcontractor under COR # 73 was allowed to survive. In the footnote to the Order dated March 29, 2019, this court framed the issues to be determined at

[17] Order dated January 11, 2018.

trial:

> [t]he only remaining claim is for money owed under COR # 73. [The Contractor] bases its motion for summary judgment on a pay-if-paid clause in the Subcontract. [The Contractor] alleges that because the property owner rejected [the Subcontractor's] change order, the express condition precedent to [the Contractor's] obligation to make payment ... did not occur. In its response, [the Subcontractor] alleges that the pay-if-paid provision is ambiguous and is qualified by the handwritten language that states the [S]ubcontractor is entitled to no compensation only if work compleated [*sic*] by [the Subcontractor] is unaccepted by [O]wner.
>
> There remain issues of fact as to whether the work was accepted, whether the pay-if-paid provision was ambiguous, and thus whether or not [the Subcontractor] is entitled to reimbursement for COR # 73.[18]

23. Trial in this case was held on October 23, 2019. Subsequently, the parties submitted their proposed Findings-of-Fact and Conclusions-of-Law.

CONCLUSIONS OF LAW

THE "PAY-IF-PAID" CLAUSE.

24. The law on contract-interpretation is well settled:

> [i]n interpreting a contract, the ultimate goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement....
>
> The task of interpreting a contract is generally performed by a court rather than by a jury. The goal of that task is ... to ascertain the intent of the parties as manifested by the language of the written instrument....[19]

In addition—

> [w]here the language of the contract is clear and unambiguous, a court is required to give effect to that language.... [Conversely,] [c]ontractual language is ambiguous if it is reasonably susceptible of different

[18] Order dated March 29, 2019.
[19] Humberston v. Chevron U.S.A., Inc., 75 A.3d 504, 510 (Pa. Super. 2013).

> constructions and capable of being understood in more than one sense....
>
> This is not a question to be resolved in a vacuum. Rather, contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.[20]

25. The "pay-if-paid" clause within the Purchase Order states as follows:

> **Payment by Owner to General Contractor for the work/materials invoiced by the Subcontractor/Supplier shall be a condition precedent to General Contractor's obligation to pay Subcontractor/Supplier. Accordingly Subcontractor/Supplier agrees and understands that it shall bear the risk of non-payment by the Owner and shall be entitled to no compensation from the General Contractor in the event of non-payment by the Owner for its work/materials.**[21]

26. The above-quoted language is clear and un-ambiguous: if the Owner refused or failed to pay the General Contractor for the work/materials invoiced by the Subcontractor, then the General Contractor was not required to pay the Subcontractor for such invoiced work/materials, and the Subcontractor bore the risk of such non-payment.

27. During negotiations, however, General Contractor and Subcontractor penned-in the following additional language to the afore-quoted clause:

> (*ONLY IF WORK COMPLETE (sic) BY CARSON [herein Subcontractor] IS UNACCEPT (sic) BY OWNER*).[22]

28. This penned-in addition is also clear and un-ambiguous: its language shows that the parties intended to replace the "pay-if-

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Allstate Fire & Cas. Ins. Co. v. Hymes, 29 A.3d 1169, 1172 (Pa. Super. 2011).

[20] Allstate Fire & Cas. Ins. Co. v. Hymes, 29 A.3d 1169, 1172 (Pa. Super. 2011).

[21] Purchase Order, ¶ 5, Trial Exhibit 1 of defendant/General Contractor.

[22] Id.

paid" condition precedent with an altogether different condition precedent –namely, one that would excuse the General Contractor from paying the Subcontractor only if the Owner refused or failed to accept the "work," as completed by the Subcontractor.[23]

29. The law on breach of contract is equally well-settled: a "breach of contract is a non-performance of any contractual duty."[24] In addition—

> To prove a breach of contract, a party must establish the following:
>
> (1) the existence of a contract, including its essential terms,
> (2) a breach of duty imposed by the contract, and
> (3) resultant damages.[25]

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[23] This conclusion-of-law is bolstered by an admission of Mr. David Joseph Gill, vice-president of General Contractor. Specifically, the Trial Transcript at pp. 87: 18-23, 88:12-15 shows the following exchange between an attorney and Mr. Gill:

> Q. And then there's a handwritten portion that states "only if work completed by [Subcontractor] is unaccepted by the owner," and appears to say "Okay...." Who added that handwritten portion?
>
> A. I did. It's my handwriting.
>
> * * *
>
> Q. Okay. So what scenarios would ... [the General Contractor] be required to pay ... [to Subcontractor] under this—
>
> A. If their [Subcontractor's] work was accepted by the owner.

The court additionally notes that under the Purchase Order, the term "work" is described as the—

> *necessary labor, material and equipment to deliver and install the Structured Concrete Package ... on the above-referenced project....*
>
> ***All work** must be completed in strict accordance with all Plans and Specification.*
>
> (See, Purchase Order, p. 1 of Trial Exhibit 1 of defendant/General Contractor) (emphasis supplied).

[24] Barnes v. McKellar, 644 A.2d 770, 775 (Pa. Super. 1994).
[25] Gamesa Energy USA, LLC v. Ten Penn Ctr. Assocs., L.P., 181 A.3d 1188, 1192, appeal granted, 191 A.3d 749 (Pa. 2018), and appeal granted, 191 A.3d 749 (Pa. 2018), and aff'd, 217 A.3d 1227 (Pa. 2019).

30. In this case, there is no doubt that the General Contractor and Subcontractor entered into a validly written contract titled Purchase Order. Moreover, this court has determined that the parties modified the Purchase Order by replacing the "pay-if-paid" condition precedent with another condition precedent. The new condition precedent exempted the General Contractor from paying the Subcontractor only if the Owner rejected the Subcontractor's completed work. However, no evidence was offered at trial that the Owner had rejected the concrete work as completed by the Subcontractor. Therefore, this court finds that the General Contractor breached the Purchase Order by failing to perform its contractual duty to pay the Subcontractor. For this reason, a finding in the amount of $19,908.00 is entered in favor of Subcontractor and against the General Contractor.

BY THE COURT,

GLAZER, J.