

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

| | |
|---|---|
| THE PIETRINI CORPORATION t/a PIETRINI & SONS, INC | : JANUARY TERM, 2003 |
| v. | : No. 0442 |
| AGATE CONSTRUCTION CO., INC., and NATIONAL FIRE INSURANCE CO. OF HARTFORD | : (Commerce Program) : Superior Court Docket : No. 1388 EDA 2005 |

.....

OPINION

Albert W. Sheppard, Jr., J. July 5, 2005

This Opinion is submitted relative to the plaintiff’s appeal of this court’s Order of April 21, 2005, which denied plaintiff’s request for penalty, interest and attorney’s fees under the Pennsylvania Procurement Code 62 Pa. C.S.A. §§3931-3935 (the “Act”).¹

For the reasons discussed this court’s Order should be affirmed.

¹ The claim was made under the “Prompt Payment Schedules” provisions of the Act.

BACKGROUND

This case involved a construction subcontract dispute arising from the construction of foundations to support a tram across the Delaware River. The owner of the project, the Delaware River Port Authority (“DRPA”), hired Turner Construction (“Turner”) as the general contractor. Turner contracted with defendant, Agate Construction Co., Inc. (“Agate”), to construct the tower foundations and Agate entered into a subcontract with plaintiff, Pietrini Corporation (“Pietrini”), pursuant to which Pietrini was to do a portion of the foundation work (the “Subcontract”).

Disputes arose concerning a number of change orders Pietrini submitted seeking payment for extra work it performed. Agate submitted these requests to Turner. Turner rejected certain of the change orders when Turner and Agate closed out the project. Pietrini refused to accept these decisions of Turner and Agate and brought this lawsuit.

As between Agate and Pietrini the amount that was **not** in dispute totaled approximately \$100,000., and the amount in dispute amounted to an additional \$108,000. Pietrini demanded payment. But, Agate took the position that Article 5 of the Subcontract required that the subcontractor submit a release before payment had to be made. Pietrini would not provide a release, concerned that to do so would mean giving up the disputed claims. Agate, as a consequence, refused to pay any of the overall claim, including the undisputed amount. It was in this context that the case went to trial before a jury.

The disputed items only were tried before a jury in a three day trial. Pietrini’s claims of \$108,508.53 were submitted to the jury. The jury returned a verdict for Pietrini in the amount of \$60,103.18.

A hearing was held on April 19, 2005 relative to Pietrini's claims for interest, penalty and attorney's fees under the Act. After a review of the testimony presented at this hearing and the respective briefs, this court denied those claims in the Order appealed here.

DISCUSSION

The crux of Pietrini's argument is that Agate's withholding of payment of the undisputed sums unless a release was provided by Pietrini constituted bad faith entitling Pietrini to the relief requested under the Prompt Payment Act. Agate on the other hand cites the subcontract as its authority to so act - - namely: Article 5.1.1c and Article 5.12.

Specifically, Article 5 provides:

5.1.1 Additional Requirements. Before the Contractor [Agate] shall be required to forward the Subcontractor's [Pietrini's] application for final payment to Owner, Subcontractor shall submit to Contractor: ...
(iii) Owner's General Release form

x x x x

5.1.2 [] With its application for final payment, Subcontractor shall submit a Final Release in form as reasonably required by Contractor.

Exhibit (D-1).

The "Act" provides that a bad faith withholding is one that is "arbitrary and vexatious". 62 Pa. C.S.A. §3935(a) and (b). Both parties suggest that application of the decision in Cummins v. Atlas R.R. Construction Co., 814 A.2d 742 (Pa. Superior Ct. 2002) to these facts should resolve the issue. This court agrees.

In essence, the court submits that Pietrini should be held to the contract it agreed to. The position taken by Agate in requiring a release before making final payment had a basis in the Subcontract, Article 5. Admittedly, it was a harsh negotiating tactic, but one permitted under the

Subcontract. This court, however, does not believe this conduct constituted “arbitrary and vexatious” conduct. Thus, it denied a recovery under the Act.

CONCLUSION

For these reasons, it is respectfully submitted that this court’s Order should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.