

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

DOCKETED

JAN 16 2012

C. HART
CIVIL ADMINISTRATION

PENCOYD IRON WORKS,	:	March Term, 2010
	:	
<i>Plaintiff</i>	:	Case No. 000814
	:	
v.	:	
	:	
AXIS CONSTRUCTION SERVICES, LLC,	:	Commerce Program
AXIS CONSTRUCTION MANAGEMENT, LLC, AND	:	
GRASSO HOLDINGS	:	Control Nos. 11090133,
	:	11090169, 11090290
<i>Defendant</i>	:	

ORDER

And Now, this 18th day of January, 2012, upon consideration of the Motions for Summary Judgment filed respectively by defendants Axis Construction Services, LLC, Axis Construction Management, LLC, and Grasso Holdings Acquisitions, LLC, the Responses in Opposition filed by Plaintiff, Pencoyd Iron Works, the Respective memoranda of law, and the Reply Briefs filed by each defendant, it is **Ordered**:

- I. The Motion for Summary Judgment of defendant Axis Construction Services, LLC is **Granted** in its entirety;
- II. The Motion for Summary Judgment of defendant Axis Construction management, LLC is **Granted** in its entirety;
- III. The Motion for Summary Judgment of defendant Grasso Holdings Acquisitions, LLC is **Denied**

By The Court,


Arnold L. New, J.

Pencoyd Iron Works Vs A-ORDOP



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OPINION

Three motions for summary judgment require this Court to determine whether plaintiff may maintain the claims of breach-of-contract, unjust enrichment, and violation of the Contractor and Subcontractor Payment Act, 73 Pa. § 501 *et seq.*, asserted against each defendant. For the reasons below, plaintiff may not maintain such claims against two defendants, Axis Construction Services, LLC, and Axis Construction Management, LLC.

Background

Plaintiff, Pencoyd Iron Works (“Pencoyd,”) is a Pennsylvania corporation that provides structural steel to construction projects. Defendant, Axis Construction Services, LLC (“Axis Construction,”) is a Pennsylvania Corporation engaged in the business of managing construction projects. Defendant, Axis Construction Management, Inc. (“Axis Management,”) is a Pennsylvania corporation. Defendant, Grasso Holdings Acquisitions, LLC (“Grasso Holdings,”) is a company based in Philadelphia, Pennsylvania. At all times relevant to this action, Pencoyd provided steel

work at a construction project named Lofts at Bella Vista (the “Lofts.”)

On September 16, 2005, Axis Construction and Pencoyd entered into an Agreement respectively as contractor and sub-contractor (the “First Contract.”)

Pursuant to the First Contract, Pencoyd agreed to install a structural steel canopy and a steel tower at the Lofts.¹ This contract identified an entity named 11th & Washington Associates, LP (“Washington Associates,”) as owner of the Lofts.² Washington Associates is not a party to this action. The First Contract between Axis Construction and Pencoyd contained a “pay-if-paid” clause which stated:

ARTICLE 11 PROGRESS PAYMENTS

* * *

§ 11.2. The period covered by each application for payment shall be one calendar month ending on the last day of the month, or as follows:

Provided the Subcontractor’s rate of progress and general performance are satisfactory ... the Contractor will make monthly payments to the Subcontractor in the amount equal to 90% of the value of the work. **Payment from Owner to Contractor is a condition precedent to payment from the Contractor to the Subcontractor.**

§ 11.3. * * *

Subcontractor acknowledges that **in the event that payment is not made to the Contractor from the Owner for any reason ... Subcontractor shall look exclusively to the Owner for payment** of any and all funds under this Subcontract. ³

On January 18, 2007, Axis Construction and Pencoyd entered into a second agreement (the “Second Contract.”) Pursuant to the Second Contract, Pencoyd agreed to perform additional structural steel work, which included installation of a guardrail

¹ Standard Form Agreement Between Contractor and Subcontractor dated September 21, 2005, Exhibit 4 to the Complaint—Scope of Work, ¶ 19.

² Standard Form Agreement Between Contractor and Subcontractor dated September 21, 2005, Exhibit 4 to the Complaint, p. 1.

³ Standard Form Agreement Between Contractor and Subcontractor dated September 21, 2005, Exhibit 4 to the Complaint, Article 11.2, (emphasis supplied).

around the perimeter of the Lofts.⁴ This contract identified Grasso Holdings, defendant herein, as owner of the Lofts.⁵ As in the First Contract, the Second Contract also contained a “pay-if-paid” clause which tracked word-by-word the language of the “pay-if-paid” provision from the First Contract. Thus, the “pay-if-paid” clause in the Second Contract stated: **“Payment from Owner to Contractor is a condition precedent to payment from the Contractor to the Subcontractor” ... “[I]n the event that payment is not made to Contractor from Owner for any reason ... Subcontractor shall look exclusively to the Owner for payment....”**⁶

On March 4, 2010, Pencoyd filed suit against Defendants Axis Construction and its alleged successor-in-interest, Axis Management, and against Grasso Holdings as owner of the Lofts.⁷ The Complaint asserts that neither Axis Construction, nor Axis Management, paid the balance, in excess of \$130,000, owed to Pencoyd under the First and Second Contracts.⁸ The Complaint also asserts that Defendant Grasso Holdings, owner of the Lofts, received assignment of the First and Second Contracts from Axis Construction or Axis Management, and failed to pay the balance owed on the contracts.⁹ In its Complaint, Pencoyd asserts against each Defendant the claims of breach-of-contract, unjust enrichment, and violation of the Contractor and Subcontractor Payment Act, 73 P.S. § 501 *et seq.*

On June 1, 2011, Mr. Gerald Gallagher, an employee of Defendant Grasso Holdings, was deposed on behalf of his employer. Mr. Gallagher testified that Grasso

⁴ Standard Form Agreement Between Contractor and Subcontractor dated January 18, 2007, Exhibit 3 to the Complaint—Scope of Work, ¶ 19.

⁵ Standard Form Agreement Between Contractor and Subcontractor dated January 18, 2007, Exhibit 3 to the Complaint, p. 1.

⁶ Standard Form Agreement Between Contractor and Subcontractor dated January 18, 2007, Exhibit 3 to the Complaint, Article 11, §§ 11.2, 11.4b (emphasis supplied).

⁷ Complaint, ¶¶ 12, 14.

⁸ Complaint, ¶ 26.

⁹ Complaint, ¶ 20.

Holdings took over “day-to-day” management operations at the Lofts from Axis Construction.¹⁰

On June 23, 2011, the principal of Pencoyd, Mr. James Heldring, was deposed on behalf of his company. Mr. Heldring testified as follows:

Q. Did ... anybody from what you consider to be the owner ever say to you Axis [Construction] has been paid the money you’re claimed—that you claim is due and owing?

A. No.

* * *

Q. I didn’t see anywhere in your complaint where you made an allegation that Axis Construction ... had been paid by the owner.

Sitting here today, do you have any evidence that Axis Construction ... was paid by the owner for the work that you are claiming you were owed for?

A. I have no physical evidence.

* * *

Q. Well ... you’ve already testified that ... you have no information or evidence to suggest that Axis has been paid by the owner of the work—for the money you claim is due and owing?

A. I am not privy to owner-to-contract –general contractor payments. I’m not privy to that.

Q. So when you say you’re not privy to that, you have no evidence to establish that Axis has been paid—

A. No knowledge whatsoever.¹¹

Discovery closed on June 21, 2011, and Defendants Axis Construction, Axis Management and Grasso Holdings, timely filed their motions for summary judgment. The motions are ripe for a ruling.

Discussion

The [Pennsylvania] Rules [of Civil Procedure] instruct in relevant part that the court shall enter judgment whenever there is no genuine issue of any material fact as to a

¹⁰ Deposition of Gerald Gallagher, Exhibit 1 to Pencoyd’s Response in Opposition to the Motion for Summary Judgment of Defendant Axis Construction, pp. 19-20.

¹¹ Deposition of James Heldring, principal of Pencoyd, Exhibit B to the motion for summary judgment of Axis Construction, pp. 30, 35, 39.

necessary element of the cause of action or defense that could be established by additional discovery. Under the Rules, a motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. For purposes of summary judgment, the record includes any pleadings, interrogatory answers, depositions, admissions, and affidavits. In considering the merits of a motion for summary judgment, a court views 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. Finally, the court may grant summary judgment only where the right to such a judgment is clear and free from doubt.¹²

I. **Plaintiff may not maintain the claim of breach-of-contract against Axis Construction and Axis Management.**

In Pennsylvania,

[t]he interpretation of a contract is a question of law.¹³

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.... Where ... the language of the contract is clear and unambiguous, a court is required to give effect to that language.¹⁴

In this case, the First and Second Contracts clearly and unambiguously state that “Payment from Owner to Contractor is a condition precedent to payment from the Contractor to the Subcontractor.” The record shows that Pencoyd executed the First and Second Contracts and assumed the risks therein, including the risk of receiving no payment from Contractor until Contractor received payment from Owner for the work specifically performed by Pencoyd. Thus, Pencoyd may maintain the claim of breach-of-

¹² Scalice v. Pa. Emples. Benefit Trust Fund, 584 Pa. 161, 171-172, 883 A.2d 429, 435 (Pa. 2005) (citing Pa.R.C.P. 1035.2(1); Note to Pa.R.C.P. 1035.2.; Pa.R.C.P. 1035.1.

¹³ Respa of Pa. v. Skillman, 2001 Pa. Super 30, P12; 768 A.2d 335, 340 (Pa. Super. 2001).

¹⁴ Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606; 735 A.2d 100, 106 (Pa. 1999).

contract against Axis Construction and Axis Management only if it can show that either one or the other received full payment from Owner specifically for the work performed by Pencoyd.

In the Response in Opposition, Pencoyd asserts that a disputed issue of fact exists as to whether Owners fully paid Axis Construction or Axis Management for the work performed by Pencoyd. Pencoyd cites the deposition testimony of Owners' employee, Mr. Gallagher, who asserted that Owners "felt" they had overpaid Axis Construction or Axis Management for significant charge-overs.¹⁵ Pencoyd then implies that since the Owners overpaid Axis Construction or Axis Management, such overpayment covered also the work specifically performed by Pencoyd. Unfortunately, Pencoyd omitted to cite the full statement made by Mr. Gallagher in the course of his deposition. The full statement reads as follows:

- Q. * * * **Did 1101 Associates [Washington Associates] or GH [Grasso Holdings] ever pay Axis in full for the work that was performed by Pencoyd?**
- A. **No.**
- Q. Why not?
- A. At the point we felt like we had paid Axis more than was in the contract. We had all these significant charges over and above because of the defective work. The water, the sound issue, and panel systems, those were the three major items.¹⁶

This testimony clearly and unambiguously states that Owners, Washington Associates or Grasso Holdings, **did not** fully pay Axis Construction or Axis Management for the work performed by Pencoyd. Although the Owners "felt" that they had overpaid Axis Construction or Axis Management for defective work which included

¹⁵ Deposition of Gerald Gallagher, Exhibit 1 to Pencoyd's Response in Opposition to the Motion for Summary Judgment of Axis Construction, p. 26.

¹⁶ Deposition of Gerald Gallagher, Exhibit 1 to Pencoyd's Response in Opposition to the Motion for Summary Judgment of Axis Construction, p. 26.

water, sound and panel systems work, Mr. Gallagher specifically stated that the Owners did not pay the Contractors for the work of Pencoyd. Pencoyd may not maintain the claim of breach-of-contract against Axis Construction and Axis Management because the condition precedent for payment to Pencoyd was not satisfied.

II. Plaintiff may not maintain the claim of unjust enrichment against Axis Construction and Axis Management.

The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.... In determining if the doctrine applies, we focus not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.¹⁷

In this case, Pencoyd has shown no evidence suggesting that Axis Construction or Axis Management received any benefit conferred by Pencoyd, or that they retained from Owners payment which was destined to Pencoyd. Pencoyd cannot prove a necessary element of unjust enrichment, and may not maintain that claim against either defendant.

III. Plaintiff may not maintain the claim of violation of the Contractor and Subcontractor Payment Act.

The pertinent section of the Contractor and Subcontractor Payment Act, 73 P.S. § 501 *et seq.*, reads as follows:

§ 507. Contractor's and subcontractor's payment obligations

* * *

(c) Time of payment.—When a subcontractor has performed in accordance with the provisions of the contract, a contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to the subcontractor's subcontractors, the full or proportional amount received for each such subcontractor's work

¹⁷ Braun v. Wal-Mart Stores, Inc., 2011 Pa. Super 121; 24 A.3d 875 (Pa. Super. 2011).

and materials, based on work completed or service provided under the subcontract, 14 days after receipt of each progress or final payment or 14 days after receipt of the subcontractor's invoice, whichever is later....¹⁸

In this case, Axis Construction and Axis Management have **not received** from Grasso Holdings any balance for the work performed by Pencoyd. Since Axis Construction and Axis Management have not received any balance for the work performed by Pencoyd, they have no obligation under the Contractor and Subcontractor Payment Act toward Pencoyd. Pencoyd may not maintain against Axis Construction and Axis Management the claim of Violation of the Contractor and Subcontractor Payment Act.

By The Court,



Arnold L. New, J.

¹⁸ Purdon's Statutes: 73 P.S. § 507(c)