IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SALAH & PECCI LEASING CO., INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 07C-05-137 MMJ
	)	
GBC CHRISTIANA LANDING, LLC, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

Submitted: July 24, 2009
Decided: October 23, 2009

OPINION

DECISION FOLLOWING NON-JURY TRIAL

Joanne P. Pinckney, Esquire, Pinckney & Harris, LLC, Wilmington, Delaware, Attorneys for Plaintiff

James F. Harker, Esquire, Eric J. Monzo, Esquire, Cohen Seglias Pallas Greenhall & Furman P.C., Wilmington, Delaware, Attorneys for Defendants The Berlin Steel Construction Company and Western Surety Company

Daniel F. Wolcott, Jr., Esquire, Potter Anderson & Corroon LLP, Wilmington, Delaware, Attorneys for Structural Services, Inc.

JOHNSTON, J.

PROCEDURAL CONTEXT

On May 11, 2007, Salah & Pecci Leasing Co., Inc. ("S&P") filed a complaint against GBC Christiana Landing, LLC ("GBC"); Berlin Steel Construction Company ("Berlin"); Structural Services, Inc. ("Structural"); J&J Crane and Rigging, Inc. ("J&J"); and Western Surety Company ("Western Surety"), alleging breach of contract, bad faith and unjust enrichment.

The events underlying the litigation began on November 22, 2005, when GBC, the construction manager of the Christiana Landing construction project (the "Project"), executed a written subcontract agreement with Berlin (the "Subcontract Agreement"). On December 1, 2005, in connection with the Subcontract Agreement, Berlin, as principal, and Western Surety, as surety, entered into a Labor and Material Payment Bond with GBC, as obligee, in the amount of $4,037,000 (the "Bond"). The Bond provides in pertinent part:

> (1) A claimant is defined as one having a direct contract with the Principal or with a Subcontractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the contract. Labor and material being construed to include that part of ... rental of equipment ... directly applicable to the subcontract.
>
> (2) The above-named Principal and Surety hereby jointly and severally agree with the Obligee that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant,

> may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon.

Berlin then contracted with Structural, who contracted with J&J, to perform services in connection with the Subcontract Agreement. On April 25, 2006, J&J leased a crane from S&P at the monthly rate of $25,000, in addition to mobilization costs of $10,310 (the "Lease"). S&P delivered the crane in early May 2006. J&J, Structural and/or Berlin used the crane to perform work on the Project from May 15, 2006 through August 31, 2006.

The original Lease payment due was $100,982. In March 2007, Structural made a partial payment which reduced that amount to $63,582. S&P claims that it performed all obligations under the Lease and that S&P is still owed $63,582.

On January 18, 2008, S&P moved for summary judgment. S&P claimed that under the Bond, Berlin and Western Surety are jointly and severally liable for payments due to S&P. S&P contended that any ambiguous contract language should be construed against the drafter; that S&P is a proper claimant under the Bond; that there is no privity requirement for recovery; and that S&P is an intended third-party beneficiary of the Bond.

In their cross-motion for summary judgment, Berlin and Western argued: that S&P is not a proper claimant under the Bond; that S&P's claims are barred by

payment and a valid waiver and release; and that S&P cannot recover on a theory of unjust enrichment.

At the conclusion of oral argument, the parties agreed that resolution of one legal issue would determine the cross-motions for summary judgment. The issue was one of first impression in Delaware.

The Court considered the following language in the Bond: "A claimant is defined as one having a direct contract with the Principal or with a Subcontractor of the Principal...." The question was whether the undefined term "Subcontractor" includes all subcontractors who provided services or materials on the Project; or whether "Subcontractor" is limited to those entities who entered into subcontract agreements directly with Berlin, the principal. If "Subcontractor" encompasses all subcontractors, S&P is a "claimant" and Western is liable to pay S&P pursuant to the Bond for any amounts still outstanding. If "Subcontractor" is limited to direct subcontractors, such as Structural, S&P cannot recover under the Bond.

By Opinion dated June 5, 2008, the Court found that S&P is a claimant under the Bond. Where a surety for a contractor in a construction contract guarantees payment of the contractor's obligation to pay for labor and materials, those parties providing labor and materials are third-party beneficiaries of the surety contract. In the absence of a specific disclaimer of liability in the surety

agreement, the surety's assumption of the contractor's responsibility to pay for material and labor extends to sub-subcontractors.[1]

The Court granted S&P's Motion for Summary Judgment and denied Berlin's and Western Surety's Cross-Motion for Summary Judgment. Berlin and Western Surety moved for regargument.

By Order dated September 17, 2008, the Court denied the Motion for Reargument. The Court held that defendants failed to demonstrate that the Court overlooked a precedent or legal principle that would have a controlling effect, or that is misapprehended the law or the facts in a manner affecting the outcome of the decision.

Trial, without a jury, was held on May 29, 2009. The parties submitted post-trial briefing. Following is the Court's decision.

FINDINGS OF FACT

Berlin hired Structural to perform services in connection with the Project. Structural leased a 250-ton crane with luffer and operator from J&J. S&P owned the crane and leased it to J&J.

Berlin paid Structural in full. Structural paid J&J in full. J&J ***did not*** make any payments to S&P.

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[1]*See Royal Indemnity Co. v. Alexander Industries, Inc.*, 211 A.2d 919, 921 (Del. 1965).

Western Surety issued a labor and materials payment bond to Berlin to secure Berlin's payment to its subcontractors. Berlin is required to indemnify Western Surety for claims made under the bond. S&P filed a claim against the Western Surety payment bond, and against Berlin, Structural, and the construction manager (GBC). GBC was dismissed as a defendant prior to trial. If the Court finds that S&P is entitled to recovery on the payment bond, Berlin and Western claim that they are entitled to indemnification from Structural.

S&P claims that it is owed $63,582.00 on unpaid invoices, plus interest at the rate of 1 ½ percent per month. The original total owed by J&J to S&P was $100,082.00. However, S&P agreed that $36,500, paid by Structural to S&P, should be credited to that total.

ORAL AGREEMENT

S&P moved pre-trial to bar any presentation at trial of the alleged oral agreement between Structural and S&P. The Court deferred resolution of the motion. Having heard the evidence at trial, the Court has determined to deny the motion in limine, and will consider the proferred evidence concerning the oral agreement.

Structural representative Jim Benzing testified that in March 2007, he spoke with Dick Troup, a salesman for S&P, about making additional payments. At that

time, Structural needed a crane for another project in Norristown, Pennsylvania. Benzing testified that Troup spoke with Tom Salah (of S&P), and Salah thought that the additional payments by Structural to help cover J&J's obligation would be a good arrangement. Salah denied that any such agreement was made. No contemporaneous writing memorializes an oral agreement.

It is undisputed that Structural paid S&P $24,500, in $7,000.00 monthly installments. Structural argues that these payments were for the purpose of making S&P whole for the Christiana Landing Project. Structural asserts that it agreed to pay more than the market price for the Norristown job crane, so that the extra amounts would be credited against the J&J debt to S&P for the Christiana Landing Project.

Structural and S&P entered into a lease for the Norristown Project equipment. This leasing agreement establishes a rental rate of $37,000 per month, and does not allocate any amount to the Christiana Landing Project.

S&P claims that $37,000 per month accurately represents market price for the Norristown job because: S&P leased the crane for $25,000; subleased the crane to Structural for $27,500; the luffing jib added $9,500; and S&P was required to maintain insurance. S&P produced evidence demonstrating that its net profit for the Norristown job was $2,500 per month, making it economically

infeasible to apply $7,000 per month from the Norristown Project to the Christiana Landing Project debt.

A valid contract is a "bargain in which there is manifestation of mutual assent to the exchange and consideration." In other words, there must be a meeting of the minds.[2] "Overt manifestations of assent rather than subjective intent control contract formation."[3] The acceptance be identical to the offer. To be enforceable, the contract must contain all material terms. "If terms are left open or uncertain, this tends to demonstrate that an offer and acceptance did not occur."[4]

Having heard all of the testimony and reviewed the submissions of the parties, the Court finds that there is no enforceable oral agreement whereby extra payments from the Norristown Project should be applied to the debt owed by J&J to S&P for the Christiana Landing Project. There simply is insufficient evidence of a meeting of the minds. There is no documentary evidence supporting an agreement between Structural and S&P about financial terms. The witnesses'

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[2] *Quinones v. Access Labor*, 2008 WL 2410170, at *5 (Del. Super.).

[3] *Ramone v. Lang*, 2006 WL 905347, at *10 (Del. Ch.); *Wood v. State*, 2003 WL 168455, at *1-2 (Del.), *citing Restatement (Second) of Contracts* § 18 (1981).

[4] *Ramone*, 2006 WL 905347, at *11 (citing RESTATEMENT (SECOND) OF CONTRACTS §33(3) (1981)).

testimony demonstrates that at most, there was some discussion leading to an understanding too ambiguous and uncertain to be legally enforceable.

INDEMNIFICATION

Berlin, as principal, and Western Surety, as surety, entered into a Labor and Material Payment Bond with GBC, as obligee. The Bond provides that

> The above-named Principal and Surety hereby jointly and severally agree with the Obligee that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon.

S&P made a claim under the Bond. Western Surety seeks indemnification from Berlin. Berlin asserts that, in turn, it is entitled to indemnification from Structural.

The purpose of the bond is to protect the owner, the general contractor, and the construction manager. If a subcontractor defaults on an obligation, the bond insures that the project will be completed, and protected against mechanic's liens.

After Structural finished its work on the Project, Structural submitted a claim to Berlin for extra work not covered by the original contract. After several meetings, Berlin agreed to pay Structural an additional $280,000. Essentially, the

agreement between Berlin and Structural was renegotiated to compensate Structural on the basis of time and materials.

Berlin faxed Structural "Change Order No. 1." Change Order No. 1 set forth the agreed amount, as well as a requirement that Structural indemnify Berlin from any claims by S&P. Structural disputed that indemnification was part of the discussions leading to the amount of additional payment. In response, Berlin representative Dave Hunt stated that it was unlikely that indemnity would be necessary. Structural reluctantly signed Change Order No. 1, understanding that the indemnification provision was a condition precedent to payment.

Change Order No. 1 includes the following indemnification requirement:

> Additionally, Structural Services, Inc. agrees to indemnify and hold harmless Berlin Steel against any and all debts and creditors, specifically but not limited to J&J Crane and Rigging or Tom Salah or any of his connected enterprises. Berlin shall have the right to set aside or withold payments due on other contracts with Structural Services for any judgement against Berlin Steel relative to any debt or creditor claim belonging the Structural Services.

The indemnification provisions of Berlin's Subcontract Agreement with GBC provide:

> ARTICLE 12
> INDEMNIFICATION
>
> 12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall defend,

> indemnify and hold harmless, the Contractor (including the affiliates, parents and subsidiaries, their agents and employees) and other contractors and subcontractors and all of their agents and employees and when required of the Contractor by the Contract Documents, the Owner, the Architect, Architect's consultants, agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontract....

Berlin asserted a cross-claim against Structural for indemnification. Structural argues that Change Order No. 1 does not create an indemnification obligation in connection with sums owed to S&P. Rather, the reference to "indemnify and hold harmless" refers to Structural's "performance of the Subcontract."

There are no allegations that Structural failed to properly perform under the contract or that Structural breached any warranties. Structural also claims that the indemnity provision fails for lack of consideration. At the time Change Order No. 1 was executed, Structural had completed all of its work at the Project.

There is no dispute that Berlin paid Structural in full; that Structural paid J&J in full; and that J&J did not pay S&P. Neither Berlin nor Structural are in breach of any obligation to S&P.

The underlying issue is whether Berlin is required to indemnify Western Surety, even though Berlin has fulfilled all of its contractual and financial obligations to the subcontractor making a claim under the bond.

The Court already has ruled that the surety bond is in place to protect the principals from claims for non-payment by subcontractors down the line. Subcontractors are third-party beneficiaries of the bond to the extent that the bond guarantees payment to every subcontractor and sub-subcontractor. It would be unconscionable for a subcontractor who has paid its sub-subcontractors to be liable for double payment to the surety.

In granting S&P's Motion for Summary Judgment, the Court found that S&P is a proper claimant under the bond and that Western Surety is liable for any amounts still outstanding. By failing to pay S&P's claim, Western Surety is in breach of its contractual obligations to S&P, a third-party beneficiary.

In Change Order No. 1, Structural agreed to hold Berlin harmless for claims "arising out of any and all work, labor and materials furnished by or through the undersigned." The problem arose because of non-payment. The parties agree that there are no deficiencies (relevant to this case) in the work, labor or materials furnished by Structural or S&P.

Further, Structural agreed "to indemnify and hold harmless Berlin Steel against any and all debts and creditors specifically, but not limited to, J&J Crane and Rigging or Tom Salah or any of his connected enterprises." Berlin is not indebted to S&P. Structural does not owe S&P anything for the Christiana Landing Project. J&J is the debtor. S&P has a judgment against J&J. Under the terms of Change Order No. 1, Structural is not required to indemnify Berlin for any financial obligation Berlin may have to Western Surety. Because Berlin is not a creditor of J&J or S&P, the Change Order does not mandate indemnification by Structural.

Berlin also argues that S&P failed to mitigate its damages by failing to provide prompt and reasonable notice to Western Surety of its claim under the bond. S&P's first invoice to J&J was sent on May 30, 2006. Berlin first received notice of non-payment by J&J in late October 2006. By letter dated December 6, 2006, S&P first notified Western Surety in writing that it was initiating a claim on the bond.

Berlin argues: "If S&P had provided timely notice of no payment by J&J, appropriate action could have been taken. It is always appropriate to withhold payment to a subcontractor when that subcontractor has not appropriately paid its

lower-tier contractors. S&P's failure to act reasonably in its collection efforts should not cause those who have already paid to pay twice."

Although there was a delay of a few months by S&P in sending its written claim to Western Surety, this relatively short delay, in the context of the sequence of events, is not unreasonable. S&P presented evidence that at least a portion of the delay was because there was some difficulty in identifying the contact information for the bond issuer. There is no specific evidence that Western Surety or Berlin have been prejudiced in any way by the delay. S&P made certain efforts to collect the debt from J&J. S&P acted in the best interests of the other parties by allowing the crane to remain on the job site, instead of removing the equipment before the work was completed. The Court finds that the evidence presented at trial, in support of the argument that S&P failed to mitigate its damages, is unpersuasive.

CONCLUSION

The Court finds that S&P is entitled to recovery against the Western Surety bond, in the amount of $62,582; plus prejudgment interest at the contract rate of 1 ½ percent per month, commencing 30 days after the first invoice became due; and costs. No attorneys' fees are awarded.

Berlin's cross-claim for indemnification against Structural is hereby denied.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston