IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Consolidated Rail Corporation, Appellant	:	
v.	:	No. 238 C.D. 2006
	:	Argued: December 10, 2007
City of Harrisburg and The Harrisburg Authority	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: January 18, 2008

The Pennsylvania Supreme Court has remanded this matter for us to determine whether the City of Harrisburg (City)[1] committed an anticipatory breach of an agreement (1941 Agreement) entered into with Consolidated Rail Corporation

[1] The Harrisburg Authority (Authority) is also named in this matter. As we explained in *Consolidated Rail Corporation v. City of Harrisburg and The Harrisburg Authority*, (No. 238 C.D. 2006, filed October 5, 2006) (*Conrail 1)*, "The 1941 Agreement was binding upon the successors and assigns of the parties to the contract…The City sold its water system to the Authority, but the City maintained sole responsibility for all claims, lawsuits or judgments arising in connection with the operation and maintenance of the water system prior to the effective date of the sale that was memorialized by a management agreement dated February 1, 1992." (*Id.*, Slip op. at 2.)

(Conrail)[2] requiring the City to relocate its water line to another location at its sole cost and expense. We hold that the City unequivocally breached the 1941 Agreement by steadfastly refusing to perform the relocation of the water line at its own cost and expense or by paying Conrail for the costs associated with the relocation. We again hold that the City is responsible for $461,501.70 of Conrail's expenses in relocating the City's water line under property owned by Conrail.

To recount and simplify the facts that were before this Court in *Conrail 1*, Conrail and the City were parties to the 1941 Agreement that dealt with a 12-inch iron water pipe under and across property owned by Conrail near Maclay Street in the City. The agreement imposed no charges or fees on the City for locating its water line on railroad property, but the City was responsible for all costs associated with the pipe, including its relocation. The relevant portion of the agreement stated:

> **If, as and when requested by the Railroad Company so to do, the *city shall at its sole cost and expense, promptly change the location of so much of said facilities as are over, upon or in the private property of the Railroad company to another location* to permit and accommodate changes of grade or alignment of, and improvements** in additions to, the facilities of the Railroad Company upon land now or hereafter owned or used by it, to the intent that said facilities shall at all times comply with the terms and conditions of the agreement with respect to the original construction thereof. (Emphasis added.)

[2] Conrail is the successor to the 1941 Agreement. The Pennsylvania Railroad Company was the original signor of the 1941 Agreement; it sold its interest to Penn Central Transportation Company which sold its interest to Conrail.

On August 10, 1994, Conrail filed an application seeking approval from the Pennsylvania Public Utility Commission (Commission) to lower six tracks and remove one track under the Maclay Street Bridge for the purpose of increasing clearance in a number of places to allow for double-stack container traffic. This work was going to impact the water line which was subject to the agreement by requiring its relocation. The City was notified of the application and participated before the Commission. After a field conference with Conrail and the City in attendance, the Commission ordered Conrail to perform the work at its own cost and expense with the right to recover all costs incurred "in accordance with any lawful agreement between it and any other party." (Reproduced Record at 145a.) The City made it clear that it was not going to perform the relocation or pay for the associated costs. Work began on the relocation in November 1994 and was completed in December 1995.[3] Throughout the entire process, Conrail kept the City informed of the work. Upon completion, Conrail presented the City with a bill for $461,501.70, but it refused to reimburse Conrail.

After multiple proceedings before the Commission, the trial court, this Court, and then our Supreme Court,[4] our Supreme Court issued a remand order, and

[3] *See* Plaintiff's Request for Admissions, paragraph 3, stating, "It is admitting that the track lowering work performed at the Maclay Street crossing from November 1994 through December 1995…" Defendant's response does not dispute these dates. (Reproduced Record at 251a.)

[4] Initially, Conrail filed a complaint with the Commission seeking relocation costs from the City pursuant to the agreement. An administrative law judge found Conrail responsible for all of the relocation costs. Conrail filed exceptions with the Commission which were denied. Conrail then filed a civil action with the trial court against the City for breach of contract requesting relocation costs pursuant to the agreement. The City filed a motion for summary judgment arguing that the trial court lacked subject matter jurisdiction. The trial court denied the motion finding that it had jurisdiction. We granted the City permission to appeal the interlocutory order and affirmed

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the City filed a motion for summary judgment with the trial court which was granted. The trial court determined that all of the work had been performed by Conrail, and the City had not been given the opportunity to perform the work or have its contractors perform the work. Had it been given such an opportunity, Conrail would have had to comply with the Third Class City Code,[5] which would have required public bidding on the job; the Prevailing Wage Act,[6] which would have required a public body to determine what the prevailing wage rate was for the type of work being performed; and the Steel Products Procurement Act,[7] which would have required that a public body ensured that the steel used in the project was manufactured in the United States. However, because Conrail was on a timetable to complete the work, it did not allow the City the opportunity to do the work.

Conrail appealed to us, and we reversed the trial court because the 1941 Agreement specified that it was the responsibility of the City at its *sole cost* to pay for any relocation of the water line when asked to do so by Conrail. We stated that there was no evidence that Conrail would not allow the City to perform the work. We

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(continued…)

the trial court's order. *See City of Harrisburg v. Consolidated Rail Corporation* (Pa. Cmwlth., No. 1909 C.D. 2002, filed February 26, 2003.) The parties then appealed to our Supreme Court which affirmed our order agreeing with the trial court that it had jurisdiction to act on a contract matter. The matter was then remanded to the trial court for a determination on the merits.

[5] Act of June 3, 1931, P.L. 932, *as amended,* 53 P.S. §§35101 – 39701.

[6] Act of August 15, 1961, P.L. 987, 43 P.S. §§165-1 – 165-17.

[7] Act of March 3, 1978, P.L. 6, 73 P.S. §§1881 – 1887.

noted that just because Conrail undertook the work itself, that did not equate with any attempt on its part to circumvent the Third Class City Code, the Prevailing Wage Act and the Steel Products Procurement Act, "[A]s the mitigating party, Conrail does not step into the shoes of the City and the Authority and become obligated to follow laws that are unique to governmental entities." (Slip op. at 9.) We then vacated and remanded the matter to the trial court to enter an appropriate order and judgment against the City in favor of Conrail for the costs of relocating the water line.

The City filed a petition for allowance of appeal, which our Supreme Court granted and issued a remand order limited to the following issue:[8]

[8] Allocatur was denied as to the remaining issues appealed:

> - Whether this Court improperly ignored the plain language of Section 2702(a) of the Pennsylvania Public Utility Code, 66 Pa. C.S. §270(a), which requires an order of the Commission before a public utility such as Conrail may alter a rail crossing;
> - Whether this Court improperly ignored the plain language of Section 5614 of the Municipal Authorities Act, 53 Pa. C.S. §5614, which requires public, competitive bidding prior to the use of any public funds, notwithstanding whether there is evidence of conspiracy;
> - Whether this Court improperly considered Conrail's time constraints on a contract to which neither the City, nor the Authority was a party as a basis for noncompliance with the Municipal Authorities Act public bidding mandates;
> - Whether this Court improperly determined that statutory duty and public policy can be overridden by Conrail's unilateral action; and
> - Whether this Court's order is improper where there remain genuine issues of material fact precluding judgment in favor of Conrail.

> Whether the Commonwealth Court improperly determined that the City, or the Authority, committed an anticipatory breach of the 1941 Agreement?

That is the sole issue which is presently before this Court.

In *2401 Pennsylvania Avenue Corporation v. Federation of Jewish Agencies of Greater Philadelphia*, 507 Pa. 166, 172, 489 A.2d 733, 736 (1985), our Supreme Court explained that "the requisite elements of an anticipatory breach were established by this Court in *McClelland v. New Amsterdam Casualty Co.*, 322 Pa. 429, 185 A. 198 (1936). This Court, following the standards set out by the U.S. Supreme Court in *Dingley v. Oler*, 117 U.S. 490, 6 S.Ct. 850, 29 L.Ed. 984 (1886), stated that to constitute anticipatory breach under Pennsylvania law "**there must be an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so**."[9] (Emphasis added.)

Conrail contends that, without question, the City committed an anticipatory breach of the 1941 Agreement because from the time the project was proposed and presented, the City repeatedly refused to pay for the work and never

[9] The Court went on to explain:

> The rationale behind the rule of anticipatory repudiation is the prevention of economic waste. An obligee/plaintiff should not be required to perform a useless act as a condition of his right to recover for a breach when the obligor has demonstrated an absolute and unequivocal refusal to perform.

Id. at 174, 489 A.2d at 737.

intended to perform the work at its sole cost and expense. We agree because throughout the proceedings, the City absolutely made it clear that it was not going to relocate its water line.

After Conrail filed its application with the Commission on August 10, 1994, to lower the tracks necessitating the relocation of the City's water line, Stephen Reed, the City's Mayor, stated in an interoffice memorandum to the City's engineer, Joseph V. Link (Link), dated August 23, 1994, that the City had no intention to pay for the work because Conrail had performed similar work in other cities and the City was not going to utilize its "limited monies to support a non-city based operation." (Reproduced Record at 139a.)

Again, after the Commission approved the application on October 4, 1994, with the understanding that Conrail would initially pay the relocation costs but could later file to recover its costs incurred pursuant to any lawful agreement, the City wrote a letter to the Commission on October 17, 1994, objecting to the Commission's order that allowed Conrail to seek reimbursement from the City for costs it incurred to relocate the City's utility that crossed under the tracks at the Maclay Street below-grade crossing, again stating, "The City has no funds to pay for that work [the relocation work]." (Reproduced Record at 146a.) Moreover, in a letter to Michael Hoey, Conrail's construction manager, dated November 3, Link stated that:

> **The City wishes to be consulted during the selection process of a consultant and to review and approve the design**. We strongly urge Conrail to direct the consultant

> chosen to examine all replacement alternatives to insure that the least cost method is chosen.
>
> **It must be noted that the city has no funds to <u>undertake or</u> to <u>reimburse</u> Conrail for this project. All costs must be borne by Conrail per PUC order issued October 4, 1994**.

(Reproduced Record at 148a.) (Emphasis added.)

Finally, at Link's deposition in 2001, he testified that the City never intended to pay for the costs after the work was completed. When Link was asked the question, "So if Conrail would have said, okay, we want you, the city, to do the work, but you have to pay for it, would you have done the work?" Link responded, "I think you'd still be sitting here waiting for the work to be done." (April 5, 2001 Deposition of Link at 38.) In all of its dealings with Conrail, the City made it unequivocally clear that it had no intention to have any part in this project because it had no money available to perform or pay for the relocation of its own water line.[10]

[10] Subsequently, when Conrail attempted to recoup the funds it spent relocating the City's water line, the City first argued that it did not refuse to perform because it had no funds but rather because if it were to perform the work, it "would have had to perform the work under the Third Class City Code and the Authority would have had to perform the work under the Municipality Authorities Act. By doing so, the bid provisions of the respective applicable statutes would have been invoked and the Prevailing Wage Act would also have been invoked. Each were unacceptable to Conrail and its timeframe for ensuring that operations were available to it and its timeframe required under the Track Clearance Agreement of May 7, 1993." (Plaintiff's Request for Admissions, Reproduced Record at 253a.) Interestingly, these arguments were never raised in the City's August 23, 1994 memo; its October 17, 1994 letter to the Commission; or its November 3, 1994 letter to Conrail, but only after the trial court found that Conrail had not allowed the City and the Authority the opportunity to perform the work. In any event, our Supreme Court did not grant allocatur relative to the issues on bidding, the Third Class City Code and the Municipality Authorities Act.

Moreover, the City equated *performing* the work with *paying* for the work, and the reason it could not perform the work was because it had limited funds in its budget, which was also made clear in its communications.

Because Conrail did not begin working on the relocation of the City's water line until November 1994, long after the City decided it was not going to perform the work prior to any work being performed by Conrail, there was an anticipatory breach of the 1941 Agreement by the City prior to any work being performed by Conrail.[11] Accordingly, we affirm our previous order, and the City is required to repay Conrail $461,501.70 in costs for relocating the City's water line plus interest from July 2, 1996, when the amount owed became liquidated and fixed.

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DAN PELLEGRINI, JUDGE

[11] The City argues that Conrail proceeded without the benefit of a "prior Commission order" pursuant to Section 2702 of the Public Utility Code, 66 Pa. C.S. §2702, which states that "No public utility, engaged in the transportation of passenger or property, shall, '*without prior order*' of the Commission, construct its facilities… and without like order, no such crossing, heretofore or hereafter constructed shall be altered, relocated, suspended or abolished." (Emphasis added.) Although it contends that no order of the Commission ever required the City to pay for Conrail's improvements, it still fails to acknowledge that no order of the Commission was required because what controlled the outcome of this matter was the 1941 Agreement.

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City of Harrisburg and The Harrisburg Authority	:	

O R D E R

AND NOW, this 18th day of January, 2008, the City of Harrisburg is in breach of the 1941 Agreement and is ordered to repay Consolidated Rail Corporation $461,501.70 in costs for relocating the City's water line, plus interest from July 2, 1996, when the amount owed became liquidated and fixed.

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DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE KELLEY FILED: January 18, 2008

I respectfully dissent. The majority holds that the City of Harrisburg committed an anticipatory breach of the 1941 Agreement entered into between the City and Consolidated Rail Corporation (Conrail). However, I believe that there could not be an anticipatory breach because the issue that must first be decided is whether the language of paragraph 6 of the 1941 Agreement applies to the facts of this case. In other words, it must first be decided whether the total relocation of the water line due to the lowering and removal of certain tracks is the type of action that was contemplated in paragraph 6 of the 1941 Agreement. Specifically, does the lowering of the tracks for the sole benefit of applicant constitute a change of grade or alignment? Until this question is answered, the question of whether the City committed an anticipatory breach cannot be answered. As such, I would remand to the trial court for a finding on this issue. If the lowering of the tracks by Conrail was

not contemplated in the language of the 1941 Agreement, then the City rightfully refused to reimburse Conrail for the relocation costs of the water line.

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JAMES R. KELLEY, Senior Judge