

2013 PA Super 313

GARY J. SHAMIS AND PATRICIA SHAMIS,
H/W,

Appellants

v.

JAMES MOON C/O GEPPERT BROTHERS,
INC., AND GEPPERT BROTHERS, INC.
AND TISHMAN CONSTRUCTION AND
MACK K. TRUCKS, INC.,

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2926 EDA 2012

Appeal from the Order Entered September 19, 2012
in the Court of Common Pleas of Philadelphia County
Civil Division, at No(s): 3413 Feb Term, 2010

BEFORE: PANELLA, J., OLSON, J., and STRASSBURGER, J.*

CONCURRING OPINION BY STRASSBURGER, J.: **FILED DECEMBER 04, 2013**

I agree with the Majority’s analysis of the merits of the issues before this Court. I write separately to opine that Geppert Brothers should be estopped to raise the borrowed servant doctrine based upon its abuse of the process of Minority Business Enterprise (MBE) participation in the contract.

It is the policy of this Commonwealth “to increase the utilization of minority and women-owned businesses and other disadvantaged businesses in all competitive contracting opportunities.” 4 Pa. Code § 1.453. Various governments within the Commonwealth have sought to achieve this goal by establishing “procurement polic[ies] that will give consideration, when possible and cost effective, to contractors offering to utilize minority and

*Retired Senior Judge assigned to the Superior Court.

women-owned businesses and disadvantaged businesses in the selection and award of contracts.” **Id.** at § 1.453(1).

The evidence of record indicates that Geppert Brothers subcontracted with M.L. Jones, a minority-owned company, in order to comply with city MBE participation requirements on the Convention Center job. **See** Deposition of Gary Patrick, 4/19/2010, at 20 (“It’s all part of city requirements, participation, minority participation on city jobs.”). Geppert Brothers then arranged for its own employees to be transferred to M.L. Jones to perform the contracted work. **See** Deposition of William Hawthorne, 5/31/2012, at 15-16 (“I think at one point I was paid by Geppert in the very beginning... I do remember there being a swap out for the minority aspect of the job.”); **see also id.** at 12-13 (“I believe -- I think we were -- I recall we were paid under ML Jones as minority outfit. ... I don’t know if all the employees were under her for the minority aspect of the job or just some of us, but I was -- my paycheck was from ML Jones”). Indeed, Geppert Brothers’ foreman indicated that Plaintiff Shamis had worked regularly for Geppert Brothers for years “depend[ing] on the minority participation jobs....” Deposition of Gary Patrick, 4/19/2010, at 21.

Geppert Brothers secured its contract upon the representation that M.L. Jones would be participating in this construction project as an independent business owned by an African-American woman. Geppert

Brothers should be bound by its representation. Accordingly, I would hold that Geppert Brothers is estopped to deny that Shamis was an M.L. Jones employee at the time he was injured. **See, e.g., Titus v. Mapel-Sterling Coal Co.**, 167 A. 229, 230 (Pa. 1933) (“One of the purposes of estoppel is to prevent a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him.”).