

Plaintiff's Counts I (Breach of Contract); II (Breach of Implied Covenant of Good Faith and Fair Dealing); and, III (Quantum Meruit) (*further see* Order dated May 14, 2018).

Because the Orders referred to above did not provide for full relief (*inter alia*), they essentially provided that such defenses were not available to Defendants but left open the question of damages for Plaintiff with respect to the various counts of its Complaint (wherein summary judgment was granted as aforesaid). Here, the State seeks relief from the referenced Orders as well as from an Order of this Court dated December 11, 2017 *nunc pro tunc* to October 13, 2017 dealing with the Court's refusal to grant the State's motion to withdraw certain admissions deemed admitted by the State. That motion was dated October 3, 2017. (The State essentially argues that the various summary judgments herein referred to all flowed directly from the admissions which it says the Court wrongfully declined to permit the State to withdraw). Also, this Decision deals with an Order entered herein on November 10, 2017 (the Administrative Claims Order) granting Plaintiff an extended time to file a claim with the State.

Further, the Court is asked by the State to determine that the Court is without jurisdiction of the subject matter of this case because, the State, as sovereign, enjoys immunity from suits of this nature and has not waived such immunity. In connection with that belatedly raised issue (*see* the State's motion dated July 20, 2018), the Court notes that initially this suit was commenced by Plaintiff on September 28, 2016, almost two full years before the State saw fit to raise the jurisdictional issue, and then only after a trial date had been established. The Court acknowledges that the issue of subject matter jurisdiction can be raised at any time.

If the State's jurisdictional issue is meritorious, then as a matter of law the Court would have to treat all of the proceedings before it (described in seven pages of docket entries) as

nullities. Accordingly, the Court will take up that issue first before, if ever, dealing with the other issues referred to above or otherwise pending before the Court at this time.

Sovereign Immunity

On July 20, 2018, the State, purporting to act “pursuant to Rule 12(b)(1) of the Rhode Island Superior Court Rules of Civil Procedure, move[d] to dismiss the Complaint and all counts of the within action on the grounds that the Court lacks jurisdiction over the subject matter of the Complaint.”

In the battle of paper that ensued (together with oral arguments), it became obvious that Plaintiff relies on its compliance with G.L. 1956 § 37-13.1-1(a) as the basis for its claim that the General Assembly, through that provision, has specifically authorized actions of the nature pending before the Court so long as such action is brought in the Superior Court sitting in Providence County. That section of our General Laws reads as follows:

“§ 37-13.1-1. Suits allowed – Jurisdiction – Statute of limitations -- Procedure.

(a) Any person, firm, or corporation which is awarded a contract subsequent to July 1, 1977, with the state of Rhode Island, acting through any of its departments, commissions, or other agencies, for the design, construction, repair, or alteration of any state highway, bridge, or public works other than those contracts which are covered by the public works arbitration act may, in the event of any disputed claims under the contract, bring an action against the state of Rhode Island in the superior court for Providence county for the purpose of having the claims determined, provided notice of the general nature of the claims shall have been given in writing to the department administering the contract in accordance with the contract specifications set forth for the specific contract. No action shall be brought under this section later than one year from the date of the acceptance of the work by the agency head as so evidenced; provided, however, that no action shall be brought under this section on any contract awarded prior to July 1, 1977. Acceptance of an amount offered as final payment shall preclude any person, firm, or corporation from bringing a claim under this section. The action shall be tried to the court without a jury. All legal defenses

except governmental immunity shall be reserved to the state. Any action brought under this section shall be privileged in respect to assignment for trial upon motion of either party.”

A thorough analysis of the arguments advanced by the parties leads the Court to conclude that the parties would undoubtedly agree that the referenced section of the General Laws indeed is the controlling statutory provision and that compliance or non-compliance with the provisions thereof is the determinative factor as to whether this Court has jurisdiction of the case presently pending before it.

The statute, of course, recognizes that unless complied with by a plaintiff the ancient doctrine of sovereign (or governmental) immunity, that is to say the king can do no wrong, still protects the state from suit. In popular jargon it is said that compliance with the statute leads to appropriate waiver of sovereign immunity. There is no basic disagreement between the parties with respect to this point—even going further the parties would agree that Plaintiff, a corporation, was awarded a contract after July 1, 1977 by the State for the “design, construction, repair or alteration” of the 1290-foot bridge and ramp structure. The parties also would agree that this case was brought and presently is pending in the Providence County Superior Court.

The parties however are not in agreement as to several key issues which are additional criteria which must be satisfied by a plaintiff to successfully claim under the statute that governmental immunity properly has been waived.

Plaintiff, citing to many of its letters sent to the State and its agents, as well as to periodic meeting minutes, together with (3) top level conferences between principals of Plaintiff and the Director and others at the Department of Transportation, and even to a settlement agreement conditionally reached between the parties— however the condition was not satisfied—asserts

that its claims are disputed within the contemplation of the statutory requirement and that it gave appropriate notice of the general nature of its claims.

The State of course argues to the contrary because of the lack of administrative finality (failure of Plaintiff to exhaust its administrative remedies).

Clearly, in the absence of any statutory definition of what is meant by “any disputed claims under the contract,” this Court finds under all of the facts and the differing contentions of the parties that without question Plaintiff’s claims here are disputed by the State. Accordingly, Plaintiff has satisfied that portion of the quoted section of our General Laws which requires “disputed claims.”

While the State seeks to avert the waiver of sovereign immunity by claiming the lack of a “disputed claim,” an assertion which the Court has just rejected—that is not the only impediment to waiver advanced by the State. The State further says that Plaintiff is not entitled to the benefit of the provisions of § 37-13.1-1 because it did not provide notice of the general nature of its claims, in writing, in accordance with the contract specifications set forth in the specific contract.

Here, there is no question but that Plaintiff in fact had in various ways the letters, meeting notes and top-level conferences let the State know of its claims with respect to site and delay claims—further, there is no question but that the initial suit here was brought for an amount which “is likely in excess of \$4 million.” Acting pursuant to the Administrative Claims Order, Plaintiff now asserts the amount of its claim exceeds \$20 million. There is no question but that the State could have and should have known based on the frequent meetings and minutes of those meetings and averments by the Plaintiff that the magnitude of the claims likely would substantially increase as the work continued—whether the amounts of those claims are meritorious presently is not before the Court.

The State, here, argues that full and complete adherence to the strict provisions of the contract did not occur. Our Supreme Court in *Clark-Fitzpatrick, Inc./Franki Found. Co. v. Gill*, 652 A.2d 440, 447 (R.I. 1994) found that “the trial justice noted that form should not be made superior to substance and found that the lack of formal notice under Section 105.17 was not a waiver in this instance. We agree.” This Court finds that *Clark-Fitzpatrick* stands for the proposition that in State construction contract cases substantial compliance rather than strict compliance with contract requirements as to notice (is the standard to be applied) so that form will not trump substance. Here, the facts demonstrate that Plaintiff substantially complied with the notice requirements. Accordingly, the Court finds that the pending litigation is appropriate, and that sovereign immunity here has been waived so as to permit Plaintiff to bring the present proceeding. No. 578.

State’s Motion to Reconsider, Vacate and/or Clarify Interlocutory Orders

The State here also has filed and pressed a motion styled as above by which it asks the Court, if it denies the State’s motion predicated upon sovereign immunity, to reverse or otherwise modify its Orders of: (1) December 11, 2017 (*nunc pro tunc* to October 13, 2017) denying the State’s motion to withdraw certain deemed admissions; (2) December 29, 2017 granting Plaintiff’s partial summary judgment motion as to exhaustion of administrative remedies by Plaintiff or waiver thereof by Defendants; (3) May 14, 2018 granting Plaintiff’s second partial summary judgment motion; and (4) the Administrative Claims Order allowing Plaintiff an extended time to file a claim with the State with respect to work done on the Providence Viaduct Southbound Bridge No. 578.

The State contends that this Court wrongfully denied its request to withdraw certain deemed admissions by the first Order referred to above and that that Order affectively served as

the basis for the second and third Orders granting the partial summary judgments as referred to above. The State argues that but for the first Order, neither the second nor the third Order would have been granted.

The State suggests that the Court erred in its Decision relative to the first Order because the Court found that the State was subject to a diligence requirement with respect to its request to withdraw the deemed admissions, even though the pertinent language of Rule 36(b) of our Rules of Civil Procedure as presently in effect does not contain a diligence provision. Our Rules (as to this issue) were modified in 1995. Since that rule change, our Supreme Court has on at least two occasions dealt with the very issue of whether diligence is to be considered in dealing with Motions to Withdraw or Amend Admissions. In those two cases, our Court has specifically considered “diligence” (or the lack thereof) in reaching its conclusion. *See Kelley v. K & H Realty Trust*, 717 A.2d 646, 648 (R.I. 1998) and *In re McBurney Law Services, Inc.*, 798 A.2d 877 (R.I. 2002).¹ At page 883 of *McBurney*, Justice Goldberg for the majority wrote: “in light of our well-settled rule that an admission that has been conclusively established may be withdrawn only ‘(1) if the admitting litigant has acted diligently, (2) if adherence to the admission might cause a suppression of the truth; and (3) if the withdrawal can be made without prejudice to the party who made the request.’” While *McBurney* dealt with an evidentiary stipulation rather than with a Rule 36 admission, this Court perceives no reason for a differing result. This Court, in its decision denying the State’s Motion to Withdraw, found a total lack of diligence on the part of the State in seeking to withdraw the deemed admissions. In the face of Rhode Island Supreme Court precedent, it is not for this Court to deviate from what seems to be a (“well-settled rule”) in Rhode Island. Accordingly, the Court must and hereby does deny the State’s motion as to the

¹ Indeed, this Court previously has followed *McBurney* in *282 County Road, LLC v. AAA Southern New England*, PB-2009-7447 (R.I. Super. Ct. Aug. 25, 2014).

Court Orders of (1) December 11, 2017, (2) December 29, 2017), and (3) May 14, 2018 essentially denying Defendants' motion to withdraw admissions; granting Plaintiff partial summary judgment; and, further granting partial summary judgment all as more specifically set forth in said Orders.

The State seeks an Order vacating the Administrative Claims Order or, in the alternative, making that Order inapplicable to any claims referenced in that Order in excess of the claim and amounts originally prayed for in the Complaint and permitting the assertion by the State of its defenses based upon any applicable procurement regulations.

Essentially, the State's position is based upon the fact that it says no motion was filed and no hearing was held by the Court on the record in connection with the Administrative Claims Order. The Court notes that that Order was entered during a chambers conference at which the State was represented by multiple attorneys—was entered over the State's objection—and was of record and in the possession of the State when acted upon by Plaintiff some eight months or more before the current motion attacking that Order was filed. In fact, it appears that the enhanced claim was apparently delivered to the State on or about the same day as the Administrative Claims Order was entered.

The chambers conference at which the Order was entered, however, was not the first time that the issue of such an Order was raised. More than a month preceding the entry of the Administrative Claims Order, the issue which resulted in the entry of the Order was discussed by counsel for the parties and the Court on the record. *See* Hr'g Tr. 17:4-18:12, Sept. 19, 2017; *see also* 42:6-43:11.

It is clear to the Court that with knowledge of the issue the State participated in a chambers conference, voiced its objection to the proposed Order, and then sat for many months after receiving the enhanced claim without attempting to do anything about it.

State's Motion for Tolling of Pre-Trial Deadlines, Continuance of Trial Date and Entry of Stay Pending Supreme Court Review

Following this Court's grant of the second partial summary judgment motion, new counsel in June entered their appearance on behalf of the State. Shortly thereafter, the various motions which are the subject matter of this Decision were filed, briefed and argued to the Court. The passage of time alone has of course obviated the thrust of the motion mentioned above, save only for the request for the stay pending the State's seeking certiorari from our Supreme Court.

While the Court recognizes the reluctance of our Supreme Court to intervene prior to a final determination below, this Court believes that two unique issues in the case at bar cry out for the issuance of a stay by this Court so as to permit the State to attempt to obtain a further stay from the Supreme Court pending its determination of whether certiorari ought to issue. The two issues which this Court finds to militate for a stay are: (1) Under the circumstances here presented, has there been a waiver of sovereign immunity, and (2) should this Court have allowed the State's motion to withdraw the deemed admissions? (Is there a requirement that an attempt to withdraw or modify deemed admissions under Super. R. Civ. P. 36(b) be undertaken diligently?) The Court will stay the affect of the Order to be entered consistent with this Decision for thirty (30) days so as to enable the State to seek certiorari or a further stay from the Supreme Court.

Plaintiff's Motion to Compel Payment

Manafort, on August 23, 2018, filed with the Court its motion to compel the Release and/or Payment of the Project Retainage allegedly amounting to \$2,234,823.36.

Manafort asserts that pursuant to the Contract specifications, because *inter alia*, (1) the Project is complete and (2) Plaintiff performed and completed all obligations under the Contract it is entitled to be paid by Defendant the Contract Retainage. Further, Plaintiff claims that the State wrongfully withholds and refuses to pay such Retainage to it.

The State, responding to Plaintiff's motion, suggests that procedurally Plaintiff cannot under the circumstances simply ask for a Court order (as it has) directing payment of the Retainage to Plaintiff. The State maintains that pursuant to the provisions of G.L. 1956 § 37-13.1-1 discussed above, it is entitled to a bench trial on the question of whether its withholding of the Retainage constitutes a breach of contract or as to whether pursuant to the Contract it by retaining said Retainage has acted in accord with the Contract's provisions. Further, the State points out that the proper course for Manafort to follow is to seek a judgment (the Court speculates that either following a bench trial pursuant to the provisions of the referenced statute or possibly using the admissions seeking a summary judgment pursuant to the provisions of Rules of Civil Procedure 56).

Plaintiff here essentially seeks a mandatory equitable Order requiring the State to pay the Retainage to Manafort. One of the requirements for the grant of equitable relief (as here) is the lack of an available legal remedy—here, money damages would be available—perhaps not as quickly as equitable relief might be, but available nevertheless. Accordingly, the Court denies Plaintiff's motion to compel payment. This denial is without prejudice to Plaintiff's pursuing its appropriate legal remedies.

Conclusion

Predicated on the reasoning set forth above, the Court will enter an Order:

1. Denying Defendants' motion to dismiss for lack of subject matter jurisdiction filed July 20, 2018;
2. Denying Defendants' motion to reconsider, vacate and/or clarify interlocutory orders filed July 20, 2018;
3. Granting as hereinafter set forth so much of Defendants' motion for tolling of all pretrial deadlines, creating a trial date and entry of stay pending Supreme Court review as shall stay further proceedings in this matter for thirty (30) days following the entry of this Order or until further Order of this Court or another court of competent jurisdiction; and
4. Denying Plaintiff's motion to compel the release and/or payment of the Project Retainage.

Prevailing counsel shall prepare and present an order consistent with the above.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Manafort Brothers, Inc. v. State of Rhode Island, Rhode Island Department of Transportation

CASE NO: PC-2016-4542

COURT: Providence County Superior Court

DATE DECISION FILED: June 24, 2019

JUSTICE/MAGISTRATE: Silverstein, J. (Ret.)

ATTORNEYS:

For Plaintiff: John A. Donovan, III, Esq.

For Defendant: William M. Dolan, Esq.