STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 8, 2019]

ATSALIS BROTHERS PAINTING CO.,	**:**	
Plaintiff,	**:**	
v.	**:**	**C.A. No. PC-2018-1076**
	:	
AETNA BRIDGE COMPANY and	**:**	
WESTERN SURETY COMPANY,	**:**	
Defendants.	**:**	

DECISION

SILVERSTEIN, J. (Ret.) This matter pends before the Court for Decision on the motion of Defendants Aetna Bridge Company (Aetna) and Western Surety Company (Western) pursuant to the provisions of Rhode Island Rules of Civil Procedure 12(b)(6) to dismiss Count I (Material Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing) and Count IV (Intentional Misrepresentation) of Plaintiff's First Amended Complaint.

Aetna entered into a $39 million Contract Agreement (Prime Contract) with the Rhode Island Turnpike and Bridge Authority (RITBA) to perform certain rehabilitation work on the Claiborne Pell Bridge (Project). Western, in connection with the Prime Contract, served as Aetna's surety and issued both payment and performance bonds with respect to the Project.

The agreement between Aetna and RITBA incorporated into it *inter alia* the Rhode Island Department of Transportation, Division of Public Works – standard specifications for road and bridge construction (the Blue Book) and other supplemental materials. Aetna entered into a $26 million contract (Subcontract) with Atsalis Brothers Painting Co. (Atsalis) as subcontractor to perform approximately two-thirds of the work on the Project called for by Prime Contract. The

Subcontract contained a provision which made the Prime Contract documents between Aetna and RITBA, including the Blue Book, a part of the Subcontract.

Included in the Blue Book as Section 105.18 is a requirement that claims made must be certified in writing, be made under oath and must in essence provide that:

> "1. The claim is made in good faith;
>
> 2. Supportive data is accurate and complete to the Contractor's best knowledge and belief.
>
> 3. The amount of the claim accurately reflects the actual cost incurred by the Contractor."

Counts I and IV, which are the subject of the pending motion, respectively deal with (a) a claimed material breach of the Subcontract by Aetna in that it failed in a number of specifics to comply with the terms of the Subcontract and also that Aetna breached its duty of good faith and fair dealing to Atsalis by *inter alia* acting in its own self-interest and in a wrongful manner so as to exclude rightful claims of Atsalis; and (b) alleged intentional material misrepresentations made by Aetna to Atsalis during the performance of the work as to Aetna's willingness at the conclusion of the Project to reconcile payments and time extensions which were intended to and allegedly did induce Atsalis to its detriment to refrain from submitting contemporaneous paperwork.

Turning first to the Defendants' motion as it is directed at Count I of the First Amended Complaint, Defendants ask this Court to hold that Atsalis has failed to state a claim upon which relief can be granted because in what it has referred to as its Claim No. 1, it failed to include a certificate representing "that the claim was made in good faith." Aetna asserts that such a representation is required under the provisions of Section 105.18 of the Blue Book and Section 2(e) of the Subcontract. Section 2(e) provides *inter alia* that in the event a claim not in strict

compliance with the provisions of the operative documents is made that the parties seeking to make the claim are bound to the following:

> "Subcontractor agrees that it will not make claim for extra payment, extension of time, and/or for damages for delay against the Contractor unless such claim is in strict compliance with, and in the manner provided for in the Principal Contract for the Contractor making claims upon the Owner, and, further that in any case, any changes, modifications, alterations or amendments of the Subcontract Agreement will be considered null and void unless the same are in writing and signed by an officer of Contractor and, if extra payment is sought, approved for payment as an extra to the Principal Contract by the Owner. Work performed without compliance with these terms and conditions will be at the sole expense of the Subcontractor."

Put simply, Defendants ask this Court to hold that Plaintiff has failed to state a claim upon which relief can be granted because despite the provisions of Section 105.18 of the Blue Book and despite the provisions of the Subcontract which Aetna says clearly imposes the Blue Book requirements upon Atsalis, Plaintiff in what it referred to as its Claim No. 1 failed to include a certificate "that the claim was made in good faith."

Careful review of the provisions of the referenced Section 105.18 of the Blue Book (formally numbered as 105.17) shows that these requirements trace their origin to federal statutes and the interpretation and application thereof by federal courts and boards. In the absence of substantial controlling Rhode Island jurisprudence, this Court feels free to turn to the federal tribunals which have vast experience with issues of this nature.

The Court notes pursuant to the Federal statutes the requirement for a certificate embodying the issues of (1) good faith, (2) accurate and complete supportive data to the best knowledge and belief of the Contractor, and (3) the fact that the claim accurately reflects actual costs to the Contractor formerly was a jurisdictional requirement in order for the Board and/or the Court to act. Subsequent statutory enactments as well as tribunal and Court decisions

modified the undue harshness imposed by the earlier approach. Here, of course, the Court is not asked to deal with this matter through a motion addressing subject matter jurisdiction but rather through the vehicle of a 12(b)(6) motion questioning whether Plaintiff's Complaint (in the absence of specific, direct or even indirect representation as to good faith on the part of the claimant as evidenced by its certificate) has stated a cognizable cause of action. Courts have differed in the manner in which they deal with this issue. This Court believes that the better view is that demonstrated by a number of cases such as *Trafalgar House Construction., Inc. v. United States*, 73 Fed. Cl. 675 (2006) and indeed, which is the approach taken by our Supreme Court in the case of *Clark-Fitzpatrick, Inc./Franki Foundation Co. v. Gill,* 652 A.2d 440 (R.I. 1994). In that case the Court agreed with the trial court below when it found that the "trial justice noted that form should not be made superior to substance and found that the lack of formal notice under 105.17, now renumbered as 105.18, was not a waiver in this instance. We agree." During oral arguments on this matter, Defendants' counsel referred to "the required formality of . . . claim made in good faith." Tr. 4:17-19, July 23, 2018. The Court distinguished that case from *Rhode Island Turnpike and Bridge Authority v. Bethlehem Steel Corp.*, 119 R.I. 141, 379 A.2d 344 (1977) which dealt with a failure to comply or even allege compliance with the provisions of the Blue Book provision in question.

As stated above, this Court recognizes that some courts do require strict compliance with the mandates of the Blue Book. However, this Court believes that the draconian result of a dismissal of claims because of the lack of a specific statement as to good faith presents merely a technical failure on its face and would honor form over substance. The Court does not believe that the drastic result militated for by defendants is appropriate where the plaintiff, if it can,

should be permitted to amend its claim to make an appropriate representation as to good faith, assuming that in fact and in good faith such a representation can be made.

The Court of Federal Claims noted that under federal legislation the failure to file an accurate certificate prior to litigation cannot be cured where the defect is substantive—however, in that case the Court noted that although the defect in the certification consisted of the omission of two of the necessary three elements required for proper certification, such defects were technical in nature and thus the Court permitted the litigation to continue noting that it could be cured by the filing of an amendatory certification prior to judgment. It is worth noting that the *Trafalgar* case questioned the very jurisdiction of the tribunal to deal with the matter because of the lack of a complying certification. The Court did give Plaintiff thirty days following its Decision to file a corrected certification.[1]

While it is clear that the approach taken by the *Trafalgar* Court is not universally accepted, *see, e.g., IPS Elec. Servs., LLC v. University of Toledo*, No. 15AP-207, 2016 WL 594499 (Ct. App. Ohio Feb. 2, 2016), where the Court adopted a draconian approach and prevented the case from proceeding in the absence of a complete certification.

Consistent with the foregoing and because this Court finds that the lack of certification of good faith is a formal defect which under the better view can easily be rectified, the Court will in its Order hereon permit Plaintiff to file an amended certificate so as to set forth its "good faith" in making Claim No. 1 if in fact and in good faith Plaintiff can so state. The Order shall provide

[1] Recently this Court issued a decision in a case involving a somewhat related issue—*i.e.*, strict compliance with Blue Book and contract terms involving state highway and bridge contracts. In that decision, this Court held that as to "substantial compliance rather than strict compliance with contract requirements as to notice so that form will not trump substance" is the standard to be applied in state construction contracts. *See Manafort Brothers, Inc. v. State*, PC-2016-4542 (June 26, 2019) (Petition for Certiorari filed July 17, 2019, Rhode Island Supreme Court SU-2019-0246-MP).

that Plaintiff shall have fifteen (15) days following the entry of such Order to so amend in which case Defendants' motion as to Count I shall be denied. If no such amendment is filed within the applicable time period, Defendants' motion as to Count I shall be granted except insofar as Plaintiff's claims with respect to construction retainage (approximately $1.2 million) and for the assessment of liquidated damages wrongfully against it (approximately $620,000) shall not be impacted by such Order.

If such amended certificate is filed as aforesaid, Plaintiff shall promptly notify the Court—if such amended certificate is not filed strictly in accordance with the provisions of said Order, Defendants shall, on the 16th day, so notify the Court.

Count IV

Defendants further ask this Court to dismiss Count IV of Plaintiff's First Amended Complaint which purports to assert a cause of action against Defendants for intentional misrepresentation. In a nutshell, Plaintiff complains to the Court that Aetna repeatedly promised Plaintiff that it would be paid for matters which should have been covered by change orders—but directed Plaintiff not to take the time to process the change orders required and further to accelerate Plaintiff's work effort by promising that at the end of the Project appropriate adjustments would be worked out with respect to compensation and time.

Plaintiff claims that these promises were false when made in that Aetna while making these promises was being paid by the owner for its increased work while it intended to reject Plaintiff's claim for additional work on the same project which Aetna was being compensated for.

Defendants, in their argument to the Court, refer to this Court's Decision in *Stanley Weiss Associates, LLC v. Energy Management Inc. EMI*, No. Civ.A. 02-1794, 2004 WL 877540 (R.I.

Super. Apr. 7, 2004) *see* Tr. at 13, July 23, 2018, "[a]n assertion must relate to something that is a fact at the time the assertion is made in order to be a misrepresentation." Defendants tell the Court here that the statements (which Defendants deny making) relate to future action, *i.e.*, at the end of the job. Here, it appears to the Court that Plaintiff, in paragraph 74 of its First Amended Complaint, complains of what it pleads to be factual statements that it claims were false when made, that is to say, its claim (to be proven at trial) was that Aetna's state of mind was that it would not settle up at the end of the job.

In *Edlow v. RBW, LLC*, Civil Action No. 09-12133-RGS, 2010 WL 2034772 (D. Mass. 2010), the Court stated:

> "[u]nder Massachusetts law, only statements of a factual nature that are false when made give rise to a cause of action for deliberate or negligent misrepresentation. Statements of a promissory nature (and predictions regarding future events) are not 'false when made' unless it can be shown that the maker never intended to carry out the promise (that is, misrepresented his intent at the time the promise was made), or knew that the predictions were false or that the promise was impossible to perform."

While purporting to be predicated upon Massachusetts law, this Court finds nothing in our law which causes it not to apply the foregoing language and the substantive law stated therein to the case at bar.

In *State v. Letts*, 986 A.2d 1006, 1011 (R.I. 2010), a case arising under G.L. 1956 § 11-41-4 (a criminal statute as to false pretenses), our Supreme Court wrote:

> "[u]nder the statute, a false pretense may be a misrepresentation of a past or existing fact. A promise to perform a future act may also constitute a false pretense. [I]n an action for deceit intention not to meet a future obligation is a question of fact to be submitted to the jury and that misrepresentation of a present state of mind as to such intention is a false representation of an existing fact. Therefore, 'the rule in this state is that a misrepresentation with regard to a *future transaction*, no less than when relating to an *existing fact*, is

> a false pretense within the meaning of § 11-41-4." (internal citations omitted) (emphases in original).

Accordingly, Defendants' motion is as to Count IV denied.

Prevailing counsel shall submit an order consistent herewith to be settled after due notice to other counsel of record.

ARHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Atsalis Brothers Painting Co. v. Aetna Bridge Company and Western Surety Company
CASE NO:	PC-2018-1076
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 8, 2019
JUSTICE/MAGISTRATE:	Silverstein, J. (Ret.)
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