

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

CROSSING CONSTRUCTION COMPANY, INC.,	:	July Term 2003
	:	
Plaintiff,	:	No. 2699
v.	:	
DELAWARE RIVER PORT AUTHORITY and MICHAEL BAKER, JR., INC.,	:	Commerce Program
	:	
Defendants.	:	
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DEGUSSA CORPORATION,	:	June Term 2004
	:	
Plaintiff,	:	
v.	:	No. 4451
RAMPART HYDRO SERVICES, INC.	:	
<i>et. al.</i> ,	:	Commerce Program
	:	
Defendants.	:	
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MICHAEL BAKER, JR., INC.,	:	July Term 2004
	:	
Plaintiff,	:	
v.	:	No. 2305
DELAWARE RIVER PORT AUTHORITY,:	:	Commerce Program
	:	
Defendant.	:	Control Number 041401
	:	

ORDER

AND NOW, this 27th day of December 2005, upon consideration of Degussa Corporation's Motion for Summary Judgment, the responses in opposition, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion filed of record, it is **ORDERED** that Degussa's Motion is **Granted, in part, and Denied, in part**, as follows:

1. Degussa Corporation's Motion for Summary Judgment is **Granted** as to Rampart Hydro Services, Inc. and judgment is entered in favor of Degussa Corporation and against Rampart Hydro Services, Inc. in the amount of \$446,312.03, plus pre-judgment interest at a rate of 9% per

year from December 7, 2002 to the date of this Order, and post judgment interest at a rate of 9% per year from the date of this Order until the judgment is paid in full.

2. Degussa's Motion for Summary Judgment as to Fidelity and Deposit Company of Maryland is **Denied**.
3. Degussa's Motion for Summary Judgment as to Liberty Mutual Insurance Company is **Denied** and all claims asserted by Degussa Corporation against Liberty Mutual Insurance Company (Count III) are dismissed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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Plaintiff,	:	No. 2699
v.	:	
DELAWARE RIVER PORT AUTHORITY And MICHAEL BAKER, JR., INC.,	:	Commerce Program
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Defendants.	:	

DEGUSSA CORPORATION, Plaintiff,	:	June Term 2004
	:	
v.	:	No. 4451
RAMPART HYDRO SERVICES, INC. ET. AL.,	:	Commerce Program
	:	
Defendants.	:	

MICHAEL BAKER, JR., INC., Plaintiff,	:	July Term 2004
	:	
v.	:	No. 2305
DELAWARE RIVER PORT AUTHORITY,;	:	Commerce Program
	:	
Defendant.	:	Control Number 041401

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OPINION

Albert W. Sheppard, Jr., J. December 27, 2005

This matter arises from a dispute over payment owed to Degussa Corporation (“Degussa”) for materials supplied to Rampart Hydro Services, Inc. (“Rampart”) for the construction project known as the Commodore Barry Bridge Deck Rehabilitation Project (“Project”). Presently before the court is Degussa’s Motion for Summary Judgment against Rampart, Rampart’s bonding company, Fidelity and Deposit Company of Maryland (“F&D”), and Liberty Mutual Insurance Company (“Liberty Mutual”), the bonding company for the contractor on the Project. The crux of the Motion involves a

dispute as to when Rampart is obligated to pay Degussa. For the reasons discussed, Degussa's Motion for Summary Judgment should be granted, in part, as to Rampart and denied as to the two bonding companies.

BACKGROUND

In July 2001, Crossing Construction and the Delaware River Port Authority ("DRPA") entered into a contract to rehabilitate the Commodore Barry Bridge Deck. In accordance with the terms of the contract, Crossing Construction purchased a payment bond from Liberty Mutual. On August 13, 2001, Crossing Construction entered into a subcontract agreement with Rampart for provision of hydrodemolition and water proofing materials for the Project. In accordance with the terms of the subcontract agreement, Rampart purchased performance and payment bonds from F&D for the Project.

Thereafter, Rampart contracted with Degussa to supply the corrosion inhibitor for the bridge deck. Degussa shipped the corrosion inhibitor to Rampart on November 28, 2001, June 28, 2002, October 25, 2002 and November 6, 2002 and invoiced Rampart for payment on December 4, 2001, July 1, 2002, November 4, 2002 and November 7, 2002. On the face of the respective invoices, payment was due within thirty days after receipt of the goods. Rampart received the corrosion inhibitor supplied by Degussa and applied those materials to the bridge deck in performing its work on the Project. Presently, an unpaid balance in the amount of \$446,312.03 remains outstanding.

Degussa instituted suit against Rampart for breach of contract (Count I) and F&D and Liberty Mutual for payment under the respective payment bonds (Counts II and III). By order of the court, Degussa's action was coordinated and consolidated with related

actions instituted by Crossing Construction and Michael Baker, Jr., Inc. On June 7, 2005, the court denied Rampart's Motion for Summary Judgment against Liberty Mutual finding that genuine issues of material fact exist which precluded the entry of summary judgment.

Degussa has now filed its Motion for Summary Judgment.

DISCUSSION

I. Legal Standard

The law pertaining to motions for summary judgment is settled. Once the relevant pleadings have closed, any party may move for summary judgment. Pa. R.C.P. 1035.2. "Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law." Rausch v. Mike-Mayer, 783 A.2d 815, 821 (Pa. Super. 2001). Furthermore, "[a] proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to the jury." McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. 1998). The moving party bears the burden of proving that no genuine issues of material fact exist. Rausch, 783 A.2d at 821. The trial court then must view the record in the light most favorable to the non-moving party and resolve all doubts against the moving party. *See id.* "Only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment." Id.

II. Degussa is entitled to Summary Judgment on its claim against Rampart.¹

Count I of Degussa's Complaint makes a claim for breach of contract against Rampart for its failure to pay the outstanding balance for the corrosion inhibitor. Rampart admits that it contracted with Degussa to supply corrosion inhibitor to use on the Project. (Rampart's response to Mt. for SJ ¶ 5). Rampart also admits that there is an unpaid balance on its contract with Degussa in the amount of \$446,312.03. (Id. ¶ 18). Notwithstanding the foregoing admissions, Rampart disputes that the balance is presently due and owing and maintains that it is not obligated to pay Degussa until after it is paid by Crossing. The record, however, does not support Rampart's contention.

Rampart relies upon two documents to support its position of "pay when paid". Those documents however fail to demonstrate an agreement between the parties that Degussa agreed to wait for payment until Rampart was paid by Crossing. On the contrary, the documents support Degussa position that payment was due within thirty days after delivery.² In responding to a motion for summary judgment, the adverse party

¹ The Terms of Sale set forth on the reverse side of the invoices contain the following governing law provision, "the validity, interpretation and performance of this contract shall be governed and construed in accordance with the laws of the State of New York." (Exhibit "E" to Degussa's Mt. for SJ.). It is settled Pennsylvania law that "if the parties have designated that the law of a particular state should apply to their agreement, then Pennsylvania courts typically will apply that choice of law provision." University Mechanical & Engineering Contractors, Inc. v. Ins. Co. of North America, 2002 Phila. Ct. Com. Pl. LEXIS 41(2002) (Sheppard, J.). Although Pennsylvania generally respects the parties' choice of law, "Pennsylvania conflict of law rules direct that a Pennsylvania court apply Pennsylvania's procedural laws when it is serving as the forum state regardless of which state's substantive law applies." Branca v. Conley, 2001 Phila. Ct. Com. Pl. LEXIS 9 (2001) (Herron, J.) Therefore, the court will look to New York substantive law in interpreting and enforcing the contract and Pennsylvania procedural law will apply to the conduct of the action. See Boise Cascade Corporation v. Sonoco Products Company, 2003 Phila. Ct. Com. Pl. LEXIS 18 (2003)(Cohen, J.).

² Exhibit "1" to Rampart's response is a letter or e-mail from Ed McGettigan of BSM Products to Jacqueline Johnson of Degussa which sets forth a conversation with Pat Winkler of Rampart that a 10% retainage would be withheld on the invoice amount for each purchase until the end of the project, that the warranty would be withheld until the amount was paid in full and that the 90% would be paid in terms (most likely 45 days). Id. The actual invoices do reflect withholding of 10% retainage. However since the project ended the full amount of the invoice is now due and owing.

may not rest upon mere allegations or denials of the pleading but must come forward with evidence in the record controverting the evidence cited in support of the motion or identify evidence in the record establishing the facts essential to its defense. *See* Pa. R. Civ. P. 1035.3. Here, Rampart fails to come forward with any evidence to support its defense of “pay when paid.”

The record however does support Degussa’s position that payment was due within thirty days. The invoices specifically provide on their face “Net 30 Days”. Even assuming that the parties agreed to a 45 day term as Exhibit “1” suggests, the payment is nonetheless presently due and owing.

Moreover, in addition to the invoices which specifically and unambiguously set forth the payment terms between Rampart and Degussa, section 3 of the subcontract agreement between Rampart and Crossing states “Subcontractor (Rampart) shall promptly pay amounts due subcontractors, laborers and materialmen for work performed or labor or material supplied on the Project.” (Exhibit “A” to Exhibit “B” to Plts. Mt. for SJ.).

In a further attempt to defeat Degussa’s Motion, Rampart invokes the equitable powers of the court when it argues that it would be placed in “an untenable position of having to pay Degussa more that \$400,000.00 before it has been paid by Crossing.” (Introduction to Rampart’s Mt. for SJ.). Although the court recognizes that hardship will likely be imposed upon Rampart, the record does not support Rampart’s “pay when paid” defense.

(Footnote 2 – continued)

Exhibit “2” is a letter dated February 21, 2002 from Rampart Construction to Sivento, Inc. which encloses a payment for \$99,965.98. This payment was made toward Degussa’s invoice 599002 dated 12/4/01.

Rampart also argues that the transaction is not governed by the UCC since the Complaint makes a general claim for “labor and material”. This court disagrees.

New York courts have consistently held that the UCC does not apply to contracts which are predominately for the rendition of work, labor and services rather than for the sale of goods. Amendola v Basement Waterproofing Co., 203 A.D.2d 403, 610 N.Y.S.2d 313 (N.Y. App. Div. 2d Dep’t 1994). To determine whether a contract is one for services or for the sale of goods, it is necessary to look to the essence of the agreement between the parties to see if services predominate over any sale of goods aspect. See Manes Org. Inc. v Standard Dyeing & Finishing Co., 472 F. Supp. 687 (S.D. N.Y. 1979); see also Levine v Sears Roebuck & Co. 200 F. Supp. 2d 180 (E.D.N.Y. 2002).

It appears from the record that the transaction at issue was predominately for goods. The invoices are for 55 gallon drums of corrosion inhibitor. Although the Complaint makes a claim for labor and material, Degussa in its papers solely requests judgment based on the goods delivered to Rampart which Rampart admits receiving and applying to the bridge deck. (Rampart’s response to Mt. for SJ ¶ 17). Additionally, the parties have failed to direct the court to any evidence that the outstanding balance includes a sum for services or that the services were predominately provided. Based on the forgoing, this court submits that the transaction constituted the sale of goods. Therefore the UCC governs the transaction.

Further, Rampart does not dispute the price of the goods, the fact that the corrosion inhibitor was ordered, delivered and used and that Rampart never remitted payment. Accordingly, this court concludes that the evidence of record supports the

entry of summary judgment in favor of Degussa and against Rampart in the amount of \$446,312.03.

The court also finds that Degussa is not entitled to interest, penalties or attorney fees under the Public Works Act, 62 Pa. C.S.A. § 3933 *et. seq.* since the Project is not a Public Works Project. Moreover, the court finds that Degussa is not entitled to interest, penalties or attorney fees under the Contractors and Subcontractors Payment Act, 73 P. S. section 501 *et. seq.* since it failed to make a claim for same in its Complaint. However, statutory prejudgment interest is awardable as of right in a breach of contract action. *See* New York CPLR § 5001.³ The statutory rate of interest in New York is fixed at 9% per annum. *See* New York CPLR § 5004.

Similarly, Degussa is entitled to interest on the judgment for a specific sum of money from the date of the verdict. *See* New York CPLR § 5002. Again, the statutory rate of interest in New York is fixed at 9%. *See* New York CPLR § 5004.

Accordingly, the court will award Degussa pre-judgment interest from December 7, 2002 to the date of this order at a rate of 9% per year and post judgment interest from the date of the order to the date the outstanding balance is paid in full at a rate of 9% per year.

The court will however deny Degussa request for attorneys' fees since a prevailing party cannot recover attorney's fees under New York law unless there is express statutory authorization, a clear agreement of the parties or some other established exception. *See* New York Cooling Towers, Inc. v. Eric Goidel, Esq., 2005 N.Y. Misc. LEXIS 2054

³ Degussa is granted pre and post judgment interest pursuant to New York law. *See* Valley Juice LTD., v. Evian Waters of Fr., Inc., 87 F.3d 604,614 (2nd Cir. 1996); *see also*, Paine Webber Jackson & Curtis, Inc. v. Winters, 579 A.2d 545, 551-53 (1990)(noting that New York CPLR § 5001 is a rule of substantive law).

(2005). Since Degussa has failed to provide any basis for its demand for attorney fees, its request will be denied.

III. Degussa is not entitled to Summary Judgment on its claim against F&D.

Degussa also seeks summary judgment against Fidelity and Deposit Company of Maryland (“F&D”). The court submits that genuine issues of material fact exist as to whether Degussa satisfied the condition precedents under the bond. Accordingly, Degussa’s Motion for Summary Judgment as it pertains to F&D is denied.

IV. Degussa is not entitled to summary judgment on its claim against Liberty Mutual.

Similarly, the court will deny Degussa’s Motion for Summary Judgment against Liberty Mutual. Pursuant to the express terms of the Labor and Material Payment Bond issued by Liberty Mutual, Degussa does not have a valid payment bond claim against Liberty Mutual. The Liberty Mutual payment bond is solely for the benefit of subcontractors, materialmen or labors with direct contractual relationships with Crossing Construction. Degussa did not have a direct contractual relationship with Crossing Construction. Hence, it is precluded from seeking payment under the bond. Consequently, Degussa’s Motion for Summary Judgment as to Liberty Mutual is denied and Count III of the Complaint is dismissed.

CONCLUSION

Based on the foregoing, Degussa’s Motion for Summary Judgment is granted as to Rampart Hydro Services, Inc. and judgment is entered in favor of Degussa Corporation and against Rampart Hydro Services, Inc. in the amount of \$446,312.03 plus pre-judgment interest at a rate of 9% per year from December 7, 2002 to the date of this order

and post judgment interest at a rate of 9% per year from the date of the order until judgment is paid in full.

Degussa's Motion for Summary Judgment is denied as to Fidelity Deposit and Company of Maryland and Liberty Mutual and Count III is dismissed against Liberty Mutual.

An Order consistent with this Opinion will be filed of record.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.