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

ALLIED CONSTRUCTION SERVICES II, INC.,	:	MARCH TERM, 2004
Plaintiff,	:	NO. 02271
v.	:	COMMERCE PROGRAM
ROMAN RESTORATION, INC.,	:	
Defendant,	:	
v.	:	
KEN BECKSTED t/a KEN BECKSTED MASONRY,	:	
Add'l Defendant.	:	

OPINION

Defendant Roman Restoration, Inc. ("Roman") appeals from this court's Order entered May 4, 2006, and its Judgment entered September 13, 2006, in favor of plaintiff Allied Construction Services II, Inc. ("Allied") and against Roman in the amount of $97,147.84 plus attorneys fees of $72,340.46. Roman also appeals from this court's Order entered May 4, 2006, and its Judgment entered October 2, 2006, in favor of Roman and against additional defendant Ken Becksted t/a Ken Becksted Masonry ("Becksted") in the amount of $97,147.84. For the reasons that follow, this court's findings should be affirmed on appeal.

The court held a two day non-jury trial of this matter on April 18-19, 2006. The following facts were proved at trial. Allied was the general contractor on a project to construct housing for the elderly known as Elders Place II (the "Project"). On April 16, 2002, Allied entered into a subcontract with Roman (the "Subcontract") under which Roman was to receive

$310,000 to perform certain masonry work on the Project.[1] The Subcontract between Allied and Roman contains the following terms which are relevant in this action:

> [Roman] agrees . . . to pay for all labor, materials and all taxes under any contract with its subcontractors, or material suppliers[.][2]

> If [Roman], at any time during the progress of the work shall, in the opinion of [Allied], refuse, fail whether by reason of a labor dispute or otherwise, or neglect to finish and supply a sufficiency of materials and workmen, or either, or refuse to do the work in a satisfactory manner in the sole opinion of [Allied], [Allied] shall, after forty-eight (48) hours written notice to [Roman] requiring [Roman] to supply more materials and workmen, have the right to procure the materials required, and to secure the necessary number of workmen and mechanics to carry forward the said work. If [Allied] exercises its discretion to perform some or all of [Roman's] work, the cost of the work performed by [Allied] shall be deducted from any balance due and owing to [Roman]. For purposes of this paragraph, [Allied's] costs shall include its overhead, profit, and all other costs resulting from its performance of [Roman's] work. In the event that [Allied] exercises its discretion to perform some or all of [Roman's] work, [Allied] may, in its sole discretion, declare [Roman] to be in default of this Subcontract. If [Roman] is declared in default, [Allied] may complete the Subcontract Work, or portions of that work, by whatever methods [Allied] deems desirable, and deduct the costs of that work from the payment then and thereafter to become due to [Roman]. In the event that [Roman] is declared in default, [Allied] may take possession of the work and of all materials, equipment, tools, construction equipment and machinery owned by [Roman]. If the cost to [Allied] of finishing the work exceeds any unpaid balance owed to [Roman], [Roman] shall pay the difference to [Allied].[3]

> [Roman] shall be responsible and liable for all costs, disbursements, and expenses, including attorneys' fees, incurred by [Allied] as a result of [Roman's] breach of this Subcontract[.][4]

All subcontractors on the Project, including Roman, were required to pay their workers, at a minimum, "prevailing wages" as determined by the federal government.[5]

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[1] Plaintiff's Ex. 1.

[2] Id., ¶6(b).

[3] Id., ¶17.

[4] Id., ¶18.

[5] N.T. 4/18/06, pp. 41-42, 177.

On April 17, 2002, Roman entered into a sub-sub-contract with Becksted Masonry under which Becksted would be paid $260,000 to perform all of Roman's work under its Subcontract with Allied.[6] As a result, Becksted employees, and not Roman employees, appeared at the Project site and performed masonry work under the Subcontract.[7]

On December 11, 2002, Allied sent a letter to Roman putting Roman on notice of certain deficiencies in its work on the Project:

> Despite numerous assurances over the last few weeks, your group has failed to complete the outstanding masonry work on the roof regarding the elevator shaft and trash chute.
> As a result, our roof work cannot continue, and this in turn is delaying numerous other trades.
> The critical path of the project is being delayed as a result of your unfinished work, and this letter is intended to serve you written notice that you need to properly man the project immediately and finish your work, or Allied will take whatever measures necessary to do so.
>
> * * *
>
> Also, glass block and associated mortar samples need to be forwarded A.S.A.P., and this work also needs to begin.[8]

During the winter of 2002, a representative of the Laborers Union approached Allied about hiring union laborers for the Project.[9] Allied requested that Roman hire some union laborers because Roman needed additional labor, but Roman did not have a contract with the union that would enable it to do so.[10] On January 17, 2003, Allied wrote to Roman and Becksted as follows:

> We need to continue a dialogue with the Laborers union for this Project.
> With all of the curve balls that have been thrown as us on this job, we simply cannot afford a picket at this time.

[6] Defendant's Ex. 2. N.T. 4/19/06, pp. 7-8, 11, 36.

[7] N.T. 4/18/06, p. 44. N.T. 4/19/06, pp. 8, 49-51, 122-124, 137.

[8] Plaintiff's Ex. 3.

[9] N.T. 4/18/06, pp. 54-56.

[10] N.T. 4/18/06, p. 56.

* * *

> As we have discussed, Allied is more than willing to provide union laborers through the on site carpentry group that we have subcontracted to (G. Uliano Carpentry).[11]

On February 5, 2003, Roman wrote to Allied as follows:

> We are still awaiting a response on the union issue. We are not authorizing any deals without our involvement.[12]

From February 4 though May 2, 2003, while Becksted was working on the Project, Allied had another of its subcontractors, G. Uliano Contracting, LLC ("Uliano") hire union laborers to assist Becksted in performing the Subcontract work, including the clean-up of Becksted's debris which made the Project site unsafe.[13] Becksted's on-site supervisor agreed to the hiring of union laborers and supervised their labors.[14] He also signed the daily work tickets that listed the laborers hired and what they did.[15]

From April 21, through May 12, 2003, Allied issued five Change Orders to Roman in which it decreased the price due to Roman under the Subcontract by the amounts Uliano incurred hiring laborers to do Roman's work.[16] Upon receipt of the first Change Orders, Roman complained to Allied about the cost of the union laborers.[17] Allied and Roman met, and Allied agreed that Roman would be charged the lesser "prevailing wage" rate for the union laborers.[18]

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[11] Defendant's Ex. 3.

[12] Defendant's Ex. 4.

[13] N.T. 4/18/06, pp. 54-57, 109, 143.

[14] Plaintiff's Ex. 28. N.T. 4/18/06, pp. 57-58.

[15] Plaintiff's Ex. 28. N.T. 4/18/06, pp. 125-129, 149.

[16] Plaintiff's Exs. 7, 8, 10-12.

[17] N.T. 4/18/06, pp. 52, 63.

[18] N.T. 4/18/06, pp. 103-104, 145, 153, 184-186.

On May 20, 2003, Allied issued a Change Order increasing the Subcontract amount by the difference between the hourly rate for the union laborers that was charged to Roman and the lower prevailing wage rate.[19] The net total deducted from the Subcontract price through the Change Orders was $34,840.75.[20]

In late April, Becksted stopped working on the Project.[21] On April 25, 2003, Allied sent Roman another letter:

> Please consider this letter 24 hour notice to properly man the project and complete your work.
> Again, we need to ask you to forward submittals for glass block and associated mortar A.S.A.P.
> Finally, regarding your recent labor question, please be advised your on-site personnel have regularly acknowledged in writing the use of all labor to date.[22]

The notes from the construction meeting between Allied and its subcontractors held on May 2, 2003, at which no representative of Roman appeared, contain the following observations:

> There is a tremendous amount of masonry debris around the project (i.e. pallets, brick, block, mortar, etc.) Allied has directed Roman's on-site personnel to clean up their refuse several times, but no action has been taken. Allied is now performing the masonry clean up directly.
> Roman Restoration has stopped work on the brick in-fill panels, and has left the site. Allies [sic] has given Roman (24) hours notice to return to the project and complete their outstanding work.[23]

Allied terminated the Subcontract by letter to Roman dated June 23, 2003.[24]

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[19] Plaintiff's Ex. 13.

[20] Plaintiff's Ex. 26

[21] N.T. 4/18/06, pp. 13, 27. N.T. 4/19/06, pp. 14, 24.

[22] Plaintiff's Ex. 5.

[23] Plaintiff's Ex. 6, ¶¶ 12, 13.

[24] Plaintiff's Ex. 21. N.T. 4/19/06, p. 27.

In late May, Allied learned that Roman had not paid certain of its suppliers for materials they supplied to the Project:

1. Fraco Products, Inc. ("Fraco") claimed that $24,354.14 was due to it for scaffolding.[25]

2. Church Brick Company ("Church") claimed that it was owed $19,102.43 for materials.[26]

Allied settled Fraco's claim for $20,000 and Church's claim for $15,000, both of which Allied paid in December, 2003.[27]

At the time that Becksted ceased work on the Project, Allied had paid Roman $254,700 under the Subcontract and $55,300 was still due.[28] In order to complete and correct Roman's work under the Subcontract, Allied hired Joseph Dugan ("Dugan") on a time and materials basis.[29] Allied was unable to find anyone to do the remaining Subcontract work for the amount still due under the Subcontract or for any lump sum amount.[30] Allied paid $72,716.35 to Dugan, $1,281.00 to Uliano and $1,100.00 to Villano Paving to complete and correct Roman's work.[31] Allied also incurred $7,509.74 in overhead costs to complete and correct Roman's work under the Subcontract.[32] Allied further incurred $72,340.46 in attorneys' fees prosecuting this action against Roman.[33]

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[25] Plaintiff's Ex. 15.

[26] Plaintiff's Ex. 16.

[27] Plaintiff's Exs. 19, 21, 26.

[28] Plaintiff's Ex. 26. N.T. 4/18/06, pp. 23, 77.

[29] Plaintiff's Ex. 22. Defendant's Ex. 7. N.T. 4/18/06, pp. 72. A representative of Dugan testified as to the extent of the work Dugan completed and corrected as set forth in Plaintiff's Ex. 22. N.T. 4/18/06, pp. 160-166.

[30] N.T. 4/18/06, pp. 71-72, 131.

[31] Plaintiffs' Exs. 23, 24, 26. N.T. 4/18/06, pp. 22, 75-77, 86.

[32] Plaintiff's Ex. 26.

[33] Plaintiff's Ex. 27.

The Subcontract required Allied to provide written notice of any deficiencies in Roman's work or manpower and to give Roman at least 48 hours in which to correct any such deficiency. On December 11, 2002, Allied provided notice to Roman that Roman was not properly manning or cleaning the Project site. Allied gave Roman much more than 48 hours to correct this problem. Almost two months later, after Roman failed to solve the problem, Allied did so by having Uliano hire union laborers to do Roman's work. Roman's agent, Becksted's supervisor, acknowledged and accepted the laborers on behalf of Roman. Allied then issued Change Orders in which it back charged Roman for the laborers, as it was permitted to do under the terms of the Subcontract.

Roman subsequently breached the Subcontract when its agent, Becksted, ceased work on the Project. The damages suffered by Allied as a result of Roman's breach are equal to the sum of 1) the amount of unpaid Change Orders, 2) the amounts paid to complete and correct Roman's work, and 3) the amounts paid in settlement of Roman's material men's claims, minus the amount still unpaid under the Subcontract. The net amount due from Roman to Allied is $97,147.84. Furthermore, the same amount is owed by Becksted to Roman due to Becksted's breach of its sub-sub-contract with Roman.

Roman is also responsible for paying Allied's attorneys' fees in this action. Under the American Rule, the losing party is not liable for the prevailing party's attorneys fees unless there is an express statutory or contractual obligation to pay such fees.[34] The Subcontract between Allied and Roman contains a clause requiring the loser to pay the winner's attorneys' fees, so Roman is required to reimburse Allied for the fees it incurred in prosecuting this action. The

[34] Mosaica Academy Charter School v. Commonwealth Dept. of Education, 572 Pa.191, 206-7, 813 A.2d 813, 822 (2002).

sub-sub-contract between Roman and Becksted does not contain any express reference to the payment of attorneys' fees, so Becksted is not obligated to pay Roman's fees.

Roman filed a Post-Trial Motion in which it raised seven points of alleged error. The court denied Roman's Post-Trial Motion. Roman then filed an appeal from the court's Judgment in favor of Allied. In its 1925(b) Statement, it alleged eight issues, three of which had not been presented in its Post-Trial Motion. None have merit. First, Roman claims that the court's finding that Roman was liable for the labor back charges in the Change Orders is against the weight of the evidence. The court found that Allied's witness, Joe Zajaczkowski, who was present on the site, was more credible on this issue than Roman's witnesses, Ronald Roman and Greg Davone, who were not present on the site. Becksted's employees, who were Roman's only on-site representatives, did not testify at trial.

Second, Roman claims that the court should have found that Allied, not Roman, was the first to breach the Subcontract by hiring union laborers without Roman's permission. The exhibits and the testimony of Allied's agent established that Roman breached first by failing to provide enough manpower to clean up its own debris. Allied was justified under the terms of the parties' Subcontract in providing additional necessary labor. Furthermore, Roman clearly breached the Subcontract when its agent Becksted walked off the site without completing the Subcontract work.

Third, Roman claims that the court should have awarded attorneys' fees to Roman against Becksted. As set forth above, the sub-sub-contract does not expressly require Becksted to pay such fees, so the court may not award fees to Roman.

Fourth, Roman complains that the amount Allied paid to Dugan to complete Roman's work under the Subcontract was excessive. However, the testimony of Allied's witness, Joe

Zajaczkowski, was credible on this issue. He testified that he could not find another contractor to complete and correct the Subcontract work for a lump sum, especially for the small amount remaining due under the Subcontract, so he was compelled to accept Dugan's offer to complete and correct Roman's work on a time and materials basis. He and a representative of Dugan, Steve Salvatelli, both testified that Dugan did the work for which it was paid and for which Allied sought reimbursement from Roman and that such work was Roman's responsibility under the Subcontract.

Fifth and sixth, Roman claims that the court should have drawn an adverse inference from Allied's failure to call Tom Glaze and Leo Baiocco to testify. Neither claim was raised in Roman's Motion for Post-Trial Relief. They have been waived for appeal.[35] Baiocco was Roman's agent. Allied read portions of his deposition into evidence without objection by Roman's counsel. Baiocco was equally available to both parties and, in fact, had been Roman's agent was Roman's agent. Because Baiocco was available to Roman, no inference may be drawn against Allied based on its failure to call him as a live witness at trial.[36] Glaze was Allied's agent, but there is no allegation that he was unavailable to Roman. In addition, his evidence would have been cumulative of that given by Allied's other witnesses, so no inference may be drawn against Allied.[37]

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[35] Sahutsky v. H. H. Knoebel Sons, 566 Pa. 593, 599, 782 A.2d 996, 1000 (2001) ("Issues not raised in post-trial motions are waived.").

[36] Bennett v. Sakel, 555 Pa. 560, 562-563, 725 A.2d 1195, 1196 (1999) ("An opposing party is not entitled to have the jury instructed that it may draw an adverse inference when a litigant fails to call a witness who presumably would support his allegation, when the witness is equally available to both parties. . . . The inference is permitted only where the uncalled witness is peculiarly within the reach and knowledge of only one of the parties.").

[37] Commonwealth v. Moore, 453 Pa. 302, 305, 309 A.2d 569, 570 (1973) (An inference may not be drawn if the potential witness is available to both parties, or the witness has no special information material to the issue, or the witness' testimony would be merely cumulative.).

Seventh, in its 1925(b) Statement, Roman raises the issue of "whether the court erred in overruling [defense counsel's] objection to inaccurate testimony provided by Joe Zajaczkowski." Roman did not raise this claim in its Post-Trial Motion, so it is waived on appeal. It was waived at trial also because Roman did not make this objection when the testimony was elicited.[38] Furthermore, the truth or falsity of testimony relates to the credibility, not the admissibility, of evidence.

Finally, Roman complains that Allied's attorneys fees award was excessive. The exhibits demonstrated that all such fees were actually incurred and are reasonable. Allied's claims arose from a complicated construction Project involving many parties. The fees awarded were not excessive.

For the foregoing reasons, this court's Order and Judgment in favor of Allied and against Roman and its Order and Judgment in favor of Roman and against Beckstead should be affirmed on appeal.

Dated: June 19, 2007

MARK I. BERNSTEIN, J.

[38] Roman's counsel only objected that a single question asked on re-direct was outside the scope of the testimony elicited during direct and cross-examination.