

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

DIAMOND-HUNTBACH	:	
CONSTRUCTION CORP.	:	OCTOBER TERM 2004
	:	
v.	:	NO: 002186
	:	
LOVETT, INC., a/k/a	:	CONTROL NO: 070807
LOVETT CONTRACTING a/k/a	:	
LOVETT HAULING, INC.	:	COMMERCE PROGRAM

ORDER

AND NOW, this 28th day of November, 2005, upon consideration of plaintiff Diamond-Huntbach Construction Corp.'s Motion for Partial Summary Judgment, and response thereto, and in accordance with the Court's contemporaneously filed Opinion, it is hereby ORDERED and DECREED that said Motion is DENIED.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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LOVETT HAULING, INC.	:	COMMERCE PROGRAM

OPINION

Before the Court is plaintiff Diamond-Huntbach Construction Corporation’s Motion for Partial Summary Judgment against defendant Lovett Inc a/k/a Lovett Contracting a/k/a Lovett Hauling, Inc. For the reasons set forth below, the said Motion is denied.

Background

Plaintiff Diamond-Huntbach Construction Corp. (“Diamond-Huntbach”) is a subcontractor who has allegedly acted as such for defendant Lovett, Inc a/k/a Lovett Contracting a/k/a Lovett Hauling, Inc. (“Lovett”).¹ (Plaintiff’s MPSJ at ¶ 1). Diamond-Huntbach engages in contracting and demolition services and specializes in asbestos removal and disposal. (Plaintiff’s MPSJ at ¶ 2). Diamond-Huntbach alleges that on or around September 23, 2002, it entered into multiple agreements with Lovett for construction, demolition, asbestos removal and additional services needed for those

¹ Lovett denies that it traded as Lovett, Inc. or Lovett Hauling but rather that it is known as Lovett Landscaping, Inc. t/a Lovett Contracting. (Defendant’s Response to Plaintiff’s Motion for Partial Summary Judgment (“MPSJ”) at ¶ 1).

projects. (Plaintiff's MPSJ at ¶ 3). In its Motion for Partial Summary Judgment, Diamond-Huntbach summarizes the projects that the two parties worked together on and labels them as Projects #1 through #4. Project #1 concerned work done at 1930 Chestnut Street, Philadelphia, PA; Project #2 was work done at 4200 Mitchell Street (Sykes Building), Philadelphia, PA; Project #3 was work done at 227 South 6th Street (Lippencott Building), Philadelphia, PA; and Project #4 was work done at 6000 Atrium Way (Atrium Mall), Mt. Laurel, NJ. (Plaintiff's MPSJ at ¶ 8).² Diamond-Huntbach alleges that although it has satisfactorily completed the work on Project #1, it has not been paid in full for this project. (Plaintiff's MPSJ at ¶ 6). Diamond-Huntbach is seeking \$72,375.50 as principal for Projects #1 through #3, along with costs and interest due under the agreement. (Plaintiff's MPSJ at ¶ 6).³ Further, Diamond-Huntbach is seeking interest, penalties, and attorney's fees under the Contractor and Subcontractor Payment Act ("CSPA"). (Plaintiff's MPSJ at ¶ 6).

Summary Judgment Standard

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure states:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

² The Court notes that while four projects are listed in the Motion for Partial Summary Judgment as work done by Lovett, only damages for three of these projects, Project #1, Project # 2, and Project #3, are being sought in this motion. Further, the Court notes that Diamond-Huntbach did not set forth claims in their Amended Complaint concerning Project #2 and therefore the Court will only concern itself with the two remaining projects, Project #1 and Project #3.

³ Damages for Project #2 will not be considered because they are not supported by the pleadings. Therefore, the principal amount that Lovett is claiming would be reduced to reflect the absence of this claim. Although invoices #870 & #871 are attached as exhibits to Diamond-Huntbach's amended complaint, they are not related to the subject of the pleadings. Rather, the invoices concern Project #2 and will not be considered. Additionally, invoices #710 & #837 will not be considered because they concern Project #4 which was not included in Diamond-Huntbach's MPSJ. (Plaintiff's Amended Complaint Exhibit "A").

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2. In order for a motion for summary judgment to be granted the moving party has the burden of proving to the Court that there is no genuine issue as to any material fact. Rausch v Mike-Mayer, 783 A.2d 815, 821 (Pa. Super. 2001). Further, the Court must view the record in the most favorable light for the non-moving party and “only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment.” Id. The conclusion that no genuine issue of a material fact is present must be supported by pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Merriweather v. Philadelphia Newspapers, Inc., 684 A.2d 137, 140 (Pa. Super. 1996).

Discussion

Breach of Contract

Diamond-Huntbach is seeking Summary Judgment on its breach of contract claim against Lovett. Because the terms of the agreement, the amount owed, and the due date of the amount due are disputed, and are all material to the claim, the Motion for Summary Judgment on the breach of contract claim must fail.

First, Diamond-Huntbach claims that according to the terms of the agreement, Lovett is past due on the amounts owed for Projects #1 and #3 and is liable for costs and interests due under their agreement. (Plaintiff's MPSJ at ¶¶ 14, 22). Diamond-Huntbach alleges in its verified Motion for Partial Summary Judgment that the terms of the agreement included "no contingencies and called for interest for all amounts unpaid after the expiration of thirty [30] days from the invoice due date at the rate of 1.5% per month." (Plaintiff's MPSJ at ¶ 13). However, in an Affidavit, Lovett avers that the two parties specifically agreed that payment to Diamond-Huntbach would be due "after receipt of payment from the owners or general contractors" to Lovett. (Lovett's Affidavit at ¶¶ 10, 12). Further, Lovett alleges in the sworn Affidavit that the amount owed is not yet due because it has not yet been paid to Lovett by the owner of the project. (Lovett's Affidavit at ¶¶ 13, 15). Because there is a genuine issue of material fact as to the terms of the agreement, Summary Judgment cannot be granted on the breach of contract claim.

Further, the amount due to Diamond-Huntbach from Lovett is disputed. Diamond-Huntbach is seeking principal in the amount of \$72,357.50, plus costs and interests. (Plaintiff's MPSJ at ¶ 6). In its verified Motion for Partial Summary Judgment, Diamond-Huntbach breaks down the amount owed for Projects #1 and #3, including interest and costs, as \$77,150.50 and \$7,233.99, respectively. (Plaintiff's MPSJ at ¶¶ 17, 25). In contrast, Lovett states in its Answers to Interrogatories that \$46,060 is owed for Project #1. (Defendant's Answers to Interrogatories at ¶ 10). Further, Lovett alleges that \$4,397.50 is owed for Project #3. (Defendant's Answers to Interrogatories at ¶ 65). Because the parties are in dispute over the amount owed, the Motion for Summary Judgment on the breach of contract claim must fail.

Finally, the parties are in dispute as to when the amount owed is due. Diamond-Huntbach alleges in its verified Motion for Partial Summary Judgment that the amount owed for Project # 1 was due on March 17, 2003 and the amount owed for Project #3 was due on August 14, 2003. (Plaintiff's MPSJ at ¶¶ 14, 22). However, Lovett alleges in its sworn Affidavit that the amount is not yet due because it has not been paid by the general contractor or owner. (Affidavit at ¶¶ 13, 15). Therefore, because the due date on which the amounts owed is disputed, the Motion for Summary Judgment must fail.

In conclusion, because there is a dispute between the parties concerning the terms of the agreement, the amount, and the date on which the amount is due, Diamond-Huntbach has not met its burden of proving that there are no genuine issues of material fact. Therefore, Diamond-Huntbach's Motion for Partial Summary Judgment on the breach of contract claim is denied.

Costs and Interest Owed Under the CSPA

Diamond-Huntbach is also seeking costs and interest under the CSPA.

Section 507(c) of the CSPA states:

Time for payment.- When a subcontractor has performed in accordance with the provisions of the contract, a contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to the subcontractor's subcontractors, the full or proportional amount received for each such subcontractor's work and materials, based on work completed or service provided under the subcontract, 14 days after receipt of each progress or final payment **or** 14 days after receipt of the subcontractor's invoice, **whichever is later**. Payment shall be made under this section unless it is being withheld under section 11.

73 P.S. §507(c) (emphasis added). Lovett alleges in its sworn Affidavit that it has not yet been paid for these projects. (Affidavit at ¶¶13, 15). Diamond-Huntbach has failed to

refute this allegation by way of a counter affidavit or in any other verified document. Therefore, the amount has not yet become due under the CSPA because it has not been paid to Lovett by the owner. Thus, Diamond-Huntbach's Motion for Summary Judgment for interest and costs under its CSPA claim must also fail.

Conclusion

For these reasons, Diamond-Huntbach's Motion for Partial Summary Judgment is denied.

BY THE COURT,

HOWLAND W. ABRAMSON, J.