

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

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|---------------------------------|------------------------------|
| KLEINKNECHT ELECTRIC COMPANY, : | September Term 2003 |
| INC., : | |
| Plaintiff, : | No. 4997 |
| v. : | |
| JEFFREY M. BROWN ASSOCIATES, : | COMMERCE PROGRAM |
| INC. and FEDERAL INSURANCE : | |
| COMPANY, : | Control Number 111085/111122 |
| Defendant. : | |

ORDER

AND NOW, this 10th day of April 2006, upon consideration of Plaintiff Kleinknecht Electric Company Inc.'s Partial Motion for Summary Judgment and Defendants Jeffrey M. Brown Associates, Inc. and Federal Insurance Company's Motion for Summary Judgment, all responses in opposition, Memoranda and in accord with the opinion to be filed with this order, it hereby is ORDERED that

1. Plaintiffs' Partial Motion for Summary Judgment to Counts I and III is Granted and judgment is entered in favor of Plaintiff and against Defendants in the amount of \$942,731.00.
2. Defendants Motion for Summary Judgment is Granted as to Counts II, IV, and V, Granted in part and Denied in part as to Count VI and denied as to Counts I, III and VII.

The case is scheduled for a Pre Trial Conference on June 2, 2006 at 9:30 a.m. in 532 City Hall, Philadelphia, Pa.

BY THE COURT,

MARK I. BERNSTEIN, J.

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| INC. and FEDERAL INSURANCE : | |
| COMPANY, : | Control Number 111085/111122 |
| Defendant. : | |

OPINION

BERNSTEIN, J.

This matter involves a construction claim by an electrical contractor, Plaintiff Kleinknecht Electric Company, Inc. (“Kleinknecht”), against a general contractor, Defendant Jeffrey M. Brown Associates, Inc. (“Jeffrey Brown”) and a surety for Defendant Jeffrey Brown, Defendant Federal Insurance Company.

On or about May 10, 2001, Jeffrey Brown and Kleinknecht entered into a Subcontract Agreement (“Subcontract”) to perform electrical work at a construction project in Jersey City, New Jersey known as Harborside Financial Center Plaza 19 (“the Project”). Under the terms of the Subcontract, Kleinknecht agreed to perform all necessary electrical work and Jeffrey Brown agreed to pay Kleinknecht six million eighty-seven thousand dollars (\$6,087,000.00). Over the course of the Project, this Subcontract price increased because of changes requested by Jeffrey Brown or Kleinknecht.

As a condition for payment under the Subcontract, Kleinknecht agreed to provide Jeffrey Brown a partial or final release and/or waiver of liens as Jeffrey Brown required.¹ During the course of the Project, Kleinknecht signed twenty five partial releases from April 2001 through September 2002.

Kleinknecht alleges that during the course of the Project, Jeffrey Brown engaged in wrongful conduct which rendered the work Kleinknecht was required to perform for the electrical construction of the Project more costly. This is Kleinknecht's "cost of impact" claim. On March 22, 2002 Kleinknecht submitted a cost of impact claim in Change Order 43 for \$1,350,595.00 subsequently amended by Change Order 43A which increased the cost of impact to \$2,809,729.00.

On May 12, 2003, Jeffrey Brown submitted to the Owner its final requisition for payment which included electrical cost for the work performed by Kleinknecht in the amount of \$7,192,138.00. Jeffrey Brown has been paid the full amount requested, \$7,192,138.00. Kleinknecht has been paid \$6, 249,407.00. Kleinknecht demands payment for the balance of the Subcontract as well as change orders including its cost of impact claim. Jeffrey Brown has refused to pay.

Kleinknecht instituted this action for breach of contract (Counts I and III), violation of the Pennsylvania Contractor Subcontractor Payment Act, 73 Pa. C. S. § 501 et.seq. (Counts II and V), unjust enrichment (Count IV) and enforcement of a construction lien (Count VII). Kleinknecht also seeks payment for its impact claim (Count VI). Currently before the court are the parties' respective motions for summary judgment. For the reasons discussed below, the motions for summary judgment are granted in part and denied in part.

¹ Subcontract ¶ 4.6.

DISCUSSION

I. Standard of Review

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.² The moving party has the burden of proving that no genuine issues of material fact exist. In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Thus, summary judgment is proper only when the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. In sum, only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment.

II. Kleinknecht is entitled to summary judgment on its outstanding contract balance, approved and executed change orders and approved and unexecuted change orders.

Kleinknecht moves for partial summary judgment on Counts I and III of the Complaint for Jeffrey Brown's failure to pay the adjusted contract balance, the approved and executed change orders and the accepted but unexecuted change orders³.

Kleinknecht is entitled to the entry of partial summary judgment on these claims.

² Rudy v. A-Best Prods. Co., 870 A.2d 330 (Pa. Super. 2005).

³ Change orders are to be approved and accepted by all parties. In this instance, approved but unexecuted change orders are those change orders that have been approved by Jeffrey Brown and the Owner but have not been executed by Kleinknecht. (Exhibit "D" to Dfts Mt. for SJ.).

In its final requisition to the Owner, Jeffrey Brown represented to the Owner that Kleinknecht is due \$7,192,138.00 as the “legitimate adjusted contract amount”. Jeffrey Brown stated “...the legitimate adjusted contract amount for KEC consists of the following:

| | |
|---------------------------------------|------------------------------|
| KEC Base Contract Amount | \$6,087,000 |
| Approved and Executed Change Orders | \$ 455,164 |
| Approved but Unexecuted Change Orders | \$ <u>649,974</u> |
| Total adjusted KEC Contract Amount | \$7,192,138...” ⁴ |

Accordingly, Jeffrey Brown admits that Kleinknecht is owed \$7,192,138.00 and has billed it. Indeed, Jeffrey Brown has been paid \$7,192,138.00 by the Owner based on its representation that Kleinknecht is owed \$7,192,128.00.⁵

Despite admitting that Kleinknecht is owed \$7,192,128.00 as the legitimate adjusted contract balance and receiving payment from the Owner for this amount, Jeffrey Brown has not paid Kleinknecht. Jeffrey Brown claims Kleinknecht is not yet entitled to payment since it has not signed a final release, waiver of lien and other closeout documents as required by the Subcontract. Reasons exist why these documents should not be signed at this time. Additional claims remain to be decided beyond the issues presented to the court in these papers. If Kleinknecht were to sign final releases, waiver of lien and the other close out documents, all other claims could be extinguished. Indeed, Kleinknecht’s impact claim is dismissed for just that reason. Hence, until all the remaining issues are resolved, the documents cannot be executed. This is not a reason to withhold payment.

⁴Exhibit “D” to Dfts. Mt. for SJ.

⁵ Dfts response to Plts. Mt. for SJ p. 37; Exhibit “H” to Plts. Mt. for SJ p. 99; Exhibit “L” to Plts. Mt. for SJ p. 142, 147-148, 180-181; Dfts. response to Plts. Mt. for Summary Judgment p. 16.

Kleinknecht has been paid \$6,249, 407.00⁶. Kleinknecht is entitled to recover \$942, 731.00, the difference between the adjusted subcontract balance and the amount paid Kleinknecht to date. Kleinknecht's Partial Motion for Summary Judgment is granted in the amount of \$942,731.00.

III. The Pennsylvania Contractor and Subcontractor Payment Act Does not Apply.

Counts II and V of the complaint concern Kleinknecht's claim that Defendants violated the Pennsylvania Contractor and Subcontractor Payment Act (the Act)⁷ by failing to pay Kleinknecht in a timely manner. The Act does not apply.

The Act is limited in application to construction contracts. 73 P.S. § 502 plainly and unambiguously defines a construction contract as "[a]n agreement ... to perform work on any real property located within this Commonwealth." This construction contract was performed in New Jersey. Therefore, the Act does not apply.

Kleinknecht attempts to use the Subcontract's choice of law provision which states "The law of the Commonwealth of Pennsylvania shall be applicable to this Contract and shall be used to decide any dispute related to this Contract" to analogize to the Pennsylvania Wage Payment and Collection Law ("WPCL").⁸ Kleinknecht claims by analogy that the Contractor and Subcontractor Payment Act is applicable. The Legislature clearly intended the scope of the WPCL to be far broader. The Legislature did not intend the scope of the Pennsylvania Contractor and Subcontractor Payment Act to be as broad and clearly limited its scope to only construction contracts performed on property within the Commonwealth. The object of all interpretation and construction of

⁶ Exhibit "B" to Plts. Mt. for SJ ¶ 15; Plts. Mt. for SJ Exhibit "E" No. 24.

⁷ 73 P. S. § 501 et. seq

⁸ 43 P.S. § 260.2a et. seq.

statutes is to ascertain and effectuate the intention of the General Assembly. The best indication of legislative intent is the plain language of a statute.⁹ The words of the Pennsylvania Contractor and Subcontractor Payment Act are clear. It only applies to construction contracts performed on real property in the Commonwealth. Applying Pennsylvania law as required by the choice of law provision in the Subcontract, the Pennsylvania Contractor and Subcontractor Payment Act does not govern New Jersey construction. Summary Judgment is granted and Counts II and V of the complaint are dismissed.

IV. An Express Written Contract Governs the Relationship Between the Parties.

In Count IV of the complaint Kleinknecht seeks to recover \$693, 282.00 on a theory of unjust enrichment or *quantum meruit*. The equitable doctrine of unjust enrichment does not compel payment where an express contract exists.¹⁰ The express written contract governs the relationship between Jeffrey Brown and Kleinknecht and any recovery is limited by the contract. Jeffrey Brown's Motion for Summary Judgment as to Count IV is granted.

V. Kleinknecht's Cost of Impact Claim in Change Orders 43 and 43 A is Barred.

In Count VI of the complaint, Kleinknecht alleges that Jeffrey Brown made its work more costly by changing the planned scope and sequence of work and delaying change order approvals and design decisions. Having signed partial releases these claims are barred.

⁹ Commonwealth v. Gilmour Mfg Co., 822 A.2d 676, 679 (Pa. 2003).

¹⁰ Mitchell v. Moore, 729 A.2d 1200 (Pa. Super. 1999).

“The courts of Pennsylvania have traditionally determined the effect of a release using the ordinary meaning of its language and interpreted the release as covering only such matters as can fairly be said to have been within the contemplation of the parties when the release was given.”¹¹ Releases are to be strictly construed so as not to bar the enforcement of a claim which had not accrued before execution of the release. Claims that have not accrued were not within the contemplation of the parties.¹²

Here, the releases signed by Kleinknecht contain the following provision:

5. In addition to the foregoing, this instrument shall constitute a partial release of all rights, claims and demands of the undersigned against the contractor arising out of or pertaining to the above referenced project. If partial, all rights and claims on the project are released up to and including the _____.(Subcontractor to insert the month ending date (month, day and year) on the line above for the current payment period).¹³

The releases do not limit the terms or reserve its right to bring a claim in the future.¹⁴ Each partial release released Jeffrey Brown from all claims it had at the time it signed the release.

The cost of impact claim accrued prior to the signing of the applicable partial release. The cost of impact claim was submitted on March 27, 2002 in Change Orders 43 and on August 22, 2002 in 43A. In Change Order 43A, Kleinknecht claims

“Throughout the course of this project, progress has been detrimentally affected by factors beyond the control of KEC. These factors include, but are not limited to, changes to the planned scope of work, changes to the sequence of work, delayed approvals on equipment submittals and/or shop drawings, delayed approvals on change order requests, and delayed design decisions and

¹¹ Vaughn v. Didizian, 648 A.2d 38, 40 (Pa. Super. 1994).

¹² Restifo v. McDonald, 230 A.2d 199 (Pa. 1967).

¹³ Dfts. Mt. for SJ Exhibit “9”.

¹⁴ Dfts. Mt. for SJ Exhibit “9”.

implementation of work by others. Ultimately, KEC was delayed in the performance of a substantial portion of our scope of work.”¹⁵

The events that disrupted Kleinknecht’s work on the Project occurred between May 2001 and December 2001.¹⁶ Kleinknecht had actual knowledge that the alleged disruptions and delays were impacting its performance as the events were occurring. Nonetheless, Kleinknecht executed partial releases without in any way limiting the scope of the release or reserving any right to bring a cost of impact claim. The final partial release signed before the submission of the cost of impact claim was in January 2002.¹⁷ Kleinknecht’s partial release on January 2002 discharges Jeffrey Brown from liability.

Kleinknecht’s inability to ascertain the actual cost of impact at the time the events occurred does not preserve the impact claim. Kleinknecht was fully aware that its work performance was being negatively affected at the time it signed the partial releases. The partial releases were not a mere formality. Except for the September 2002 release for which Kleinknecht never received payment, consideration was given by Jeffrey Brown for Kleinknecht’s execution. A party cannot evade the clear language of a release by contending that it did not subjectively intend to release a claim in dispute. Beginning May 3, 2002, Kleinknecht did make reservations to bring a cost of impact claim on various change orders submitted to Jeffrey Brown.¹⁸ These subsequently submitted reservations are ineffective to preserve the instant claim. For the reservations to be effective they should have been made at the time the events occurred, contemporaneous with the signing of the partial releases. Kleinknecht’s *ex post facto* attempt to preserve a

¹⁵ Exhibit “8”- Dfts Mt. for SJ Change Order 43A.

¹⁶ See Dfts. Mt. for SJ Exhibit “7” letters from Kleinknecht notifying Jeffrey Brown of the impacts to its performance.

¹⁷ Dfts. Mt. for SJ Exhibit “9”.

¹⁸ Dfts Exhibit “10”.

claim months after it became aware of the impact and after it signed partial releases is ineffective to revive a claim that has already been barred.

Kleinknecht's claim of economic duress is also dismissed. The elements of economic duress are the existence of circumstances which compels the injured party to involuntarily execute an agreement which results in economic loss and the injured party does not have an immediate legal remedy.¹⁹ Additionally, the party against whom the defense of duress is asserted must have placed the contracting party in the position which eliminated the party's exercise of free will.

Kleinknecht has failed to present any evidence of financial reliance. The Subcontract explicitly provided that Kleinknecht was required to sign partial releases. Consequently, Kleinknecht was on notice well before there were any allegations of economic duress that it might be required to execute such a release.

It is clear that Kleinknecht's cost of impact claim identified in Change Orders 43 and 43A is barred.²⁰

VI. Kleinknecht's Construction Lien is not Willfully Exaggerated.

Count VII of seeks enforcement of a construction lien under New Jersey Construction Lien Law, N.J.S.A. section 2A:44A-1 et. seq. ("CLL"). Jeffrey Brown argues that the lien is willfully misstated and should be dismissed.

The CLL directs that any contractor, subcontractor or supplier who provides work, services, material or equipment pursuant to a contract, shall be entitled to a lien for the value of the work or services performed, or materials or equipment furnished in

¹⁹ Nat'l Auto Brokers Corp. v. Aleeda Dev. Corp., 364 A.2d 470 (1976).

²⁰ This Order and Opinion does not address any impact claim arising subsequent to the submission of Change Orders 43 and 43A for which Kleinknecht may have reserved its right to make.

accordance with the contract and based upon the contract price.²¹ The lien is the "total amount of the contract price . . . less any payments made."²² The amount remaining unpaid on the contract is the measure of the fund.

The amount of this lien is \$1,114,002. Since the legitimate adjusted contract price is \$7,192,138.00, Kleinknecht has been paid \$6,249, 407.00 while still owed \$942, 731.00 and that several change orders remain outstanding, the lien claim may not be dismissed. Jeffrey Brown's Motion for Summary Judgment is denied.

CONCLUSION

For the foregoing reasons, the parties' respective motions for summary judgment are granted in part and denied in part as follows: Kleinknecht's partial motion for summary judgment is granted and judgment is entered in favor of plaintiff and against defendants in the amount of \$942, 731.00, Jeffrey Brown's motion for summary judgment is granted as to Counts II, IV, V, and granted in part and denied in part as to Count VI and denied as to Counts I, II and VII.

BY THE COURT,

MARK I. BERNSTEIN, J.

²¹ N.J.S.A. 2A:44A-3.

²² N.J.S.A. 2A:44A-10.

