

Pennsylvania Supreme Court Dismisses Appeal of Attorney Fee Award Under the Contractor and Subcontractor Payment Act

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In late December, the Supreme Court of Pennsylvania dismissed, as improvidently granted, the appeal in *Waller Corporation v. Warren Plaza, Inc.*, No. 6 WAP 2015 (December 21, 2015). As a result, the Superior Court's holding in that case that there is no good faith exception to the attorney fee provision of the Pennsylvania Contractor and Subcontractor Payment Act (CASPA), 73 P.S. §§ 501-516, remains intact.

In its decision in *Waller*, 95 A.3d 313 (Pa. Super. 2014), the Superior Court considered if there was a "good faith" exception to the interest and penalties provision of CASPA, 73 P.S. § 512(a), and whether there was a similar good faith exception to the attorney fee provision of the statute, 73 P.S. § 512(b). The court held that while an award of interest and penalties under § 512(a) could be denied if a party had a good faith basis for withholding payments due under a construction contract, no such exception exists for an award of attorney fees under § 512(b). Rather, an award of attorney fees is appropriate for the "substantially prevailing party" under a CASPA claim, and a claimant can be the substantially prevailing party even if the other party withheld payments in good faith.

The Superior Court held that the application of the good faith exception depended upon the actual language of the statute. It noted that Section 512(a) of CASPA states:

(a) Penalty for failure to comply with act. – If arbitration or litigation is commenced to recover payment due under this act and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this act, the arbitrator or court shall award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was wrongfully withheld. An amount shall not be deemed to have been wrongfully withheld to the extent it bears a reasonable relation to the value of any claim held in good faith by the owner, contractor or subcontractor against whom the contractor or subcontractor is seeking to recover payment.

73 P.S. § 512(a).

Thus, the good faith exception to an award of penalties is expressly found in the language of this section of the Act, and the Superior Court held that "a party (owner, contractor, subcontractor) who has withheld payment *in bad faith* can be subjected to a 1% monthly penalty." 95 A.3d at 316 (emphasis in the original). The Superior Court also noted that in that case, the trial court "factually found that Warren had a good faith basis to withhold payment, and, accordingly, declined to impose a penalty under section 512(a) of the CSPPA." *Id* at 319.

By contrast, the attorney fee provision of CASPA contains no language regarding "good faith" or amounts "wrongfully withheld." That provision of the statute reads as follows:

(b) Award of attorneys fee and expenses. – Notwithstanding any agreement to the contrary, the substantially prevailing party in any proceeding to recover any payment under this act shall be awarded a reasonable attorney fee in an amount to be determined by the court or arbitrator, together with expenses.

73 P.S. § 512(b).

Thus, the Superior Court held:

While an owner's good faith belief in withholding payment is certainly relevant to determining whether payment may be withheld for deficiency items under the statute, or whether interest and punitive damages under the CSPA are warranted, there is no statutory language to support such an exception for the award of attorney's fees under Section 512(b). See 1 Pa.C.S.A. § 1903(a) (court must construe words of statute according to plain meaning).

Id. 95 A.3d at 319.

Rather, the Court held, the analysis centers on whether a party asserting a claim for attorney fees under § 512(b) is the substantially prevailing party in the proceeding, and that question "is one left to the trial court's discretion based upon the evidence." *Id.*, citing *Bridges PBT v. Chatta*, 821 A.2d 590 (Pa. Super. 2003). The Court expressly rejected the appellant's contention that the Superior Court's prior decision in *Zimmerman v. Harrisburg Fudd I, L.P.*, 984 A.2d 497 (Pa. Super. 2009) had to be interpreted to mean that in order to recover attorney's fees as a "substantially prevailing party" under Section 512(b) of CASPA, a claimant must also prove that the defendant withheld prompt payment without a good faith reason for doing so.

With the dismissal of the appeal in *Waller Corporation v. Warren Plaza, Inc.*, the Supreme Court of Pennsylvania has still not considered the interest, penalties, and attorney fee provisions of the Pennsylvania Contractor and Subcontractor Payment Act, and issues arising out of that statute continue to be litigated in Pennsylvania's lower state and federal courts.

White and Williams' Construction and Surety Practice Group can assist parties with any questions about this statute or any other construction or surety related issues. For more information, please contact William J. Taylor (215.864.6305; taylorw@whiteandwilliams.com).

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