

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ESHBACH BROTHERS, INC.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
NORTHWESTERN HUMAN SERVICES, INC.,	:	
T/B/A NORTHWESTERN SERVICES	:	
CORPORATION AND CONTRACTING	:	
SYSTEMS, INC. T/B/A CONTRACTING	:	
SYSTEMS, INC., CSI,	:	
	:	
Appellee	:	No. 2315 EDA 2005

Appeal from the Judgment entered August 16, 2005
 In the Court of Common Pleas of Northampton County
 Civil at No.: C0048CV20020045848

ESHBACH BROTHERS, INC.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
NORTHWESTERN HUMAN SERVICES, INC.,	:	
T/B/A NORTHWESTERN SERVICES	:	
CORPORATION	:	
CONTRACTING SYSTEMS, INC. T/B/A	:	
CONTRACTING SYSTEMS, INC., CSI,	:	
	:	
APPEAL OF: CONTRACTING SYSTEMS,	:	
INC. T/B/A CONTRACTING SYSTEMS,	:	
INC., CSI,	:	
	:	
Appellee	:	No. 2420 EDA 2005

Appeal from the Judgment entered August 16, 2005
 In the Court of Common Pleas of Northampton County
 Civil at No.: C0048-CV-2002004584

BEFORE: STEVENS, GANTMAN, and KELLY, JJ.

MEMORANDUM:

FILED SEPTEMBER 12, 2006

This is an appeal and cross-appeal from the judgment entered on August 16, 2005, in the Court of Common Pleas of Northampton County following the grant of summary judgment in favor of Northwestern Human Services, Inc. (Northwestern Human Services) and a non-jury trial verdict in favor of Contracting Systems, Inc. (CSI). On appeal, Eshbach Brothers, Inc. (Eshbach Brothers) contends (1) the trial court erred in concluding the written contract between Eshbach Brothers and CSI expressly provided that CSI's obligation to pay Eshbach Brothers was conditioned upon Northwestern Human Services paying CSI, (2) the trial court erred in concluding that Section 507(c) of the Contractor and Subcontractor Payment Act¹ created a pay-if-paid clause in the contract entered into by Eshbach Brothers and CSI, (3) the trial court erred in failing to find CSI did not waive the pay-if-paid clause allegedly created by Section 507(c) of the Contractor and Subcontractor Payment Act and/or the parties' written contract, (4) assuming the trial court was correct in concluding there existed a pay-if-paid clause, the trial court erred in failing to award Eshbach Brothers its *pro rata* share of the \$1,000,000.00 payment made by Brookridge Funding Corporation to CSI, and (5) the trial court erred in granting summary judgment in favor of Northwestern Human Services.² CSI, as cross-

¹ 73 P.S. §§ 501-516.

² We have renumbered Eshbach Brothers' claims for ease of discussion.

appellant, raises a single issue, namely, whether the trial court erred in failing to award attorneys' fees pursuant to 73 P.S. § 512(b). We affirm.

The relevant facts and procedural history are as follows:

1. Northwestern Human Services, [which is a nonprofit organization,] is the owner of certain land located in Williams Township.

2. On December 15, 1998, Federal Development Corporation, acting as an agent for Northwestern Human Services, entered into an agreement with CSI for the construction of a baseball stadium on said property.

3. On January 6, 1999, Eshbach Brothers submitted a quote to CSI to perform masonry work on the stadium construction project.

4. CSI entered into a written agreement with Eshbach Brothers, which was titled "Subcontract Agreement," and which was drafted by CSI. The agreement was dated February 1, 1999, and was personally signed by John W. Clarke, on behalf of CSI, on February 24, 1999, and by Kenneth Eshbach, on behalf of Eshbach Brothers, on February 12, 1999.

5. Eshbach Brothers performed work on the stadium construction project. The total value of the work performed by Eshbach Brothers was \$756,844.73.

6. Eshbach Brothers submitted invoices to CSI for work it performed on the stadium construction project on the following dates and sought payment in the following amounts:

a. March 1, 1999	-	\$10,350.00
b. March 22, 1999	-	\$108,000.00
c. April 30, 1999	-	\$324,000.00
d. May 28, 1999	-	\$166,590.00
e. June 22, 1999	-	<u>\$72,220.26</u>
Total:		\$681,160.26

7. The invoices submitted by Eshbach Brothers reflected a 10% retainage.

8. The invoices submitted by Eshbach Brothers were approved by CSI, Northwestern Human Services, and the architect for the property.

9. It was the practice of CSI to send an invoice to Northwestern Human Services after receiving invoices from its subcontractors.

10. CSI was paid by Northwestern Human Services on the following dates and in the following amounts:

a. April 1, 1999	-	\$500,000.00
b. May 1, 1999	-	\$400,000.00
c. June 1, 1999	-	\$900,000.00
d. June 7, 1999	-	<u>\$300,000.00</u>
Total:		\$ 2,100,000.00

11. CSI paid Eshbach Brothers and other subcontractors from the funds paid to it by Northwestern Human Services.

12. CSI paid Eshbach Brothers a total of \$118,350.00, in satisfaction of the invoices submitted by Eshbach Brothers on March 1, 1999 and March 22, 1999. CSI did not receive any other funds from Northwestern Human Services for work performed by Eshbach Brothers or for materials used by Eshbach Brothers.

13. On June 21, 1999, CSI entered into an agreement with Brookridge Funding Corp. (Brookridge), which was titled "Accounts Receivable Purchase Agreement." Thereafter, CSI transferred its right to receive payment from Northwestern Human Services on two invoices to Brookridge. The first invoice was for \$1,425,112.60 and the second invoice was for \$1,333,911.83. CSI received \$1,000,000.00 from Brookridge, which amount was approximately 70% of the value of the first invoice.

14. Eshbach Brothers ceased performing work on the baseball stadium project on July 17, 1999 for reason of non-payment.

15. All work ceased on the stadium construction project in July of 1999 due to slow payment by Northwestern Human Services to CSI.

Trial Court Opinion filed 6/7/05 at 1-3.

Eshbach Brothers filed a complaint and amended complaint against Northwestern Human Services and CSI seeking to be paid for all of the work it had completed pursuant to the parties' agreement. Specifically, Eshbach Brothers asserted breach of contract and *quantum meruit* claims. In its answer and amended answer, CSI alleged it was not obligated to pay

Eshbach Brothers the outstanding amount since CSI was never fully paid by Northwestern Human Services. CSI specifically argued that the parties' agreement contained a "pay-if-paid" clause, which rendered Northwestern Human Services' payment to CSI a condition precedent to CSI's duty to pay Eshbach Brothers. CSI also included in its answer and amended answer a cross-claim alleging Northwestern Human Services was solely or jointly and severally liable to Eshbach Brothers due to Northwestern Human Services' failure to fully pay CSI.

Northwestern Human Services subsequently filed a motion for summary judgment. Regarding Eshbach Brothers' breach of contract claim, Northwestern Human Services alleged it did not enter into a contract with Eshbach Brothers and it was not an agent for CSI, who did enter into a contract with Eshbach Brothers. Regarding Eshbach Brothers' *quantum meruit* claim, Northwestern Human Services argued it received no benefit from Eshbach Brothers' work in that Northwestern Human Services incurred the expense of removing the partially-erected stadium from the land. Following Eshbach Brothers' filing of an answer to Northwestern Human Services' motion for summary judgment, by order entered on June 9, 2004, the trial court granted Northwestern Human Services' motion and entered summary judgment in its favor.

Eshbach Brothers' claims against CSI proceeded to a non-jury trial on March 7, 2005, and in an opinion and order filed on June 7, 2005, the trial

court found no merit to Eshbach Brothers' claims and ruled in favor of CSI.³ Eshbach Brothers filed a timely post-trial motion, and CSI filed a post-trial motion seeking attorneys' fees. By order entered on August 4, 2005, the trial court denied both parties' post-trial motions, and on August 16, 2005, judgment was entered in favor of CSI. Eshbach Brothers filed a timely appeal to this Court, and CSI filed a timely cross-appeal. By order filed on September 9, 2005, the trial court ordered Eshbach Brothers to file a Pa.R.A.P. 1925(b) statement, which Eshbach Brothers filed on September 14, 2005. Moreover, by order filed on September 19, 2005, the trial court ordered CSI to file a Pa.R.A.P. 1925(b) statement, which CSI filed on September 23, 2005. The trial court filed responsive Pa.R.A.P. 1925(a) opinions.⁴

Eshbach Brothers first contends it is entitled to JNOV or, in the alternative a new trial, since the contract entered into by Eshbach Brothers

³ After making extensive findings of fact, the trial court determined that resolution of this case was not controlled by the trial court's interpretation of the parties' written contract. Rather, following the bench trial, the trial court *sua sponte* applied the Contractor and Subcontractor Payment Act in determining CSI was not obligated to pay Eshbach Brothers in the absence of payment from Northwestern Human Services. Trial Court Opinion filed 6/7/05 at 4-5. For the reasons discussed *infra*, we are affirming on a different basis than that provided by the trial court. **See *Boyer v. Walker***, 714 A.2d 458 (Pa.Super. 1998) (holding this Court may affirm the trial court's decision on any ground regardless of the reasons relied upon by the trial court).

⁴ We have received *amicus curiae* briefs from The Masonry Contractors Association of Central Pennsylvania, The American Subcontractors Association, and The American Subcontractors Association of Central Pennsylvania, Inc., and we have considered the arguments presented therein.

and CSI did not contain a “pay-if-paid” clause. That is, Eshbach Brothers argues the contract did not contain a provision that CSI (the general contractor) had no obligation to pay Eshbach Brothers (the subcontractor) unless Northwestern Human Services (the owner) first paid CSI, who had an unconditional obligation to Eshbach Brothers for the work it had satisfactorily completed. We conclude the parties’ contract expressly indicated that Northwestern Human Services’ paying CSI was a condition precedent to CSI paying Eshbach Brothers, and therefore, the trial court did not err in denying Eshbach Brothers’ request for JNOV or a new trial.

Our Supreme Court has stated that the standard of review for an order “granting or denying [JNOV]...[is] whether there was sufficient competent evidence to sustain the verdict.” We must view the evidence in the light most favorable to the verdict winner. JNOV should be entered only in a clear case, where the evidence is such that no reasonable minds could disagree that the moving party is entitled to relief. Review of the denial of JNOV has two parts, one factual and one legal:

Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded evidence at trial, we will not substitute our judgment for that of the finder of fact.

We review the decision of a trial court in a non-jury case to determine “whether the findings of the trial court are supported by competent evidence, and whether the trial court committed error in the application of law.” We also note that the factfinder’s conclusions must be based upon competent evidence and reasonable inferences therefrom:

The [factfinder] may not be permitted to reach its verdict merely on the basis of speculation and conjecture, but there must be evidence upon which logically its conclusion may be based. Therefore, when a party who has the burden of proof relies upon circumstantial evidence and inferences reasonably deducible therefrom, such evidence, in order to prevail, must be adequate to establish the

conclusion sought and must so preponderate in favor of that conclusion as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith.

Brown v. Progressive Insurance Company, 860 A.2d 493, 497-498

(Pa.Super. 2004) (footnote, citations, and quotations omitted).

Regarding our standard of review with regard to a motion for a new trial:

We will reverse a trial court's decision to deny a motion for a new trial only if the trial court abused its discretion. We must review the court's alleged mistake and determine whether the court erred and, if so, whether the error resulted in prejudice necessitating a new trial. If the alleged mistake concerned an error of law, we will scrutinize for legal error. Once we determine whether an error occurred, we must then determine whether the trial court abused its discretion in ruling on the request for a new trial.

Capoferri v. Children's Hospital of Philadelphia, 893 A.2d 133, 136

(Pa.Super. 2006) (*en banc*) (quotation omitted).

"The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties." ***Chester Upland School District v. Meloney***, 2006 WL 1644666, *2 (Pa.Super. filed June 15, 2006) (quotation marks and quotation omitted). "Interpretation of a contract...poses a question of law. In construing a contract,...the court will adopt an interpretation which under all circumstances ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished." ***Tuscarora Wayne Mutual***

Insurance Company v. Kadlubosky, 889 A.2d 557, 560 (Pa.Super. 2005)

(quotations omitted).

The intent of the parties to a written agreement is embodied in the writing itself. Courts do not assume a contract's language was chosen carelessly, nor do they assume the parties were ignorant of the meaning of the language employed. When contractual language is clear and unequivocal, its meaning must be determined by its contents alone. We may not modify the plain meaning of the contract under the guise of interpretation.

Crawford Central School District v. Commonwealth of PA, --- Pa. ---, 888 A.2d 616, 623 (2005) (citations omitted).

Here, the parties' contract contains two provisions, which CSI argued supported its theory that it was not liable to pay Eshbach Brothers unless and until Northwestern Human Services first paid CSI. Specifically, the parties' contract provided, in relevant part, the following:

Article 4. PAYMENT TO SUBCONTRACTOR.

4.2 Progress Payments. Subcontractor shall present to the Contractor invoices in triplicate exactly five (5) working days prior to the date contractor is to submit requisitions to owner as specified in the agreement between Owner and Contractor (the "Requisition Date")....Approval of any invoice shall be subject to verification by Contractor, Owner and Architect, and *payment shall be within thirty (30) days of the date Contractor is to submit Requisitions to Owner subject to the condition precedent that Owner has paid Contractor such amounts.* Acceptance by Subcontractor of a progress payment shall constitute a release of Contractor by Subcontractor of and from any and all claims and causes of actions pertaining to Subcontractor's work and the project which subcontractor may have as of the date of the invoices(s) for such payment(s).

4.3 Retainage. Contractor may retain out of any or all payments which Contractor may make to Subcontractor prior to final completion and acceptance of Subcontractor's work an amount

equal to ten (10%) percent of the amount which has been approved for payment, *until final completion and acceptance of the Subcontractor's work and payment of retainage by Owner and/or Bank.*

4.6 Final Payment. Payment of the retained amount ("Final Payment") shall be made following inspection, approval, and acceptance of Subcontractor's work by Contractor, the Architect, and Owner, *and subject to the following conditions precedent: (a) upon receipt of the Owner's waive of all known claims related to the Subcontractor's work; and (b) within seven (7) days after receipt by the Contractor of final payment from the Owner for such Subcontractor's work.*

(bold in original and italics added).

The parties' contract, by its plain terms, indicates that Northwestern Human Services' payment to CSI was a condition precedent to CSI paying Eshbach Brothers, in full or in part. The language is clear and unequivocal, and, therefore, we conclude Eshbach Brothers was not entitled to JNOV or a new trial as to this issue.⁵

However, this does not end our inquiry since Eshbach Brothers argues CSI either waived its defense under the parties' contract or the condition precedent was satisfied when CSI received \$1,000,000.00 from Brookridge pursuant to an Accounts Receivable Purchase Agreement (the Agreement).

⁵ We have reviewed the cases cited by Eshbach Brothers in support of its argument that the contractual provisions discussed *supra* "merely set forth a timing mechanism from which payment should be made, and do not create an absolute condition precedent for payment at any time." Appellant's Brief at 14. We note that we are bound by neither federal nor Pennsylvania Commonwealth Court cases, particularly unpublished memorandums. In addition, we conclude the cited cases are distinguishable from the present case in that none of the cases contain the contractual language presented in the case *sub judice*.

Specifically, in its third and fourth issues, Eshbach Brothers argues CSI is obligated to pay Eshbach Brothers even though CSI was not paid by Northwestern Human Services since CSI received \$1,000,000.00 from Brookridge when it sold its accounts receivables, which included the unpaid invoices Eshbach Brothers submitted to CSI, resulting in CSI being paid the money which is now due to Eshbach Brothers. CSI acknowledges it received \$1,000,000.00 against its accounts receivables from Brookridge pursuant to the Agreement; however, CSI argues the testimony and the Agreement reveal the \$1,000,000.00 was a loan and not a transaction whereby CSI sold its accounts receivables to Brookridge in consideration of \$1,000,000.00. CSI also argues that since the \$1,000,000.00 was a loan, Brookridge, who was unable to collect from Northwestern Human Services on the accounts receivables, has demanded repayment of the loan from CSI. Therefore, CSI indicates it did not waive its defense under the parties' contract and the condition precedent has not been satisfied. After reviewing the agreement and testimony presented at trial, we conclude the evidence supports CSI's allegations that the money it received from Brookridge was a loan and not consideration for the accounts receivable.

For instance, Section eight of the Agreement contains a recourse provision which provided that if Northwestern Human Services did not pay Brookridge on the outstanding accounts receivables, then Brookridge could seek full recourse against CSI to recover the \$1,000,000.00, plus fees.

Moreover, John Clarke, the President of CSI, testified that Northwestern Human Services was having difficulties paying for the construction of the stadium, and at one point, CSI secured a loan from Brookridge against CSI's assets of accounts receivables. N.T. 3/7/05 at 8. Specifically, on June 21, 1999, Brookridge loaned CSI \$1,000,000.00, and CSI pledged its accounts receivables valued at \$2,744,000.00 and other company assets as collateral. N.T. 3/7/05 at 9. CSI used the \$1,000,000.00 to pay the subcontractors who were necessary to keep the stadium project moving so that Northwestern Human Services would have additional time to receive funding; the money was insufficient to pay all outstanding invoices. N.T. 3/7/05 at 7, 19. The agreement between Brookridge and CSI was that Northwestern Human Services would pay \$2,744,000.00 to Brookridge, who would then give all of the money to CSI, minus the \$1,000,000.00 loan. N.T. 3/7/05 at 15. Since Northwestern Human Services never paid Brookridge, CSI received no further money from Brookridge, who in turn has filed a federal lawsuit against CSI and Mr. Clarke in his individual capacity demanding the return of the \$1,000,000.00 it loaned to CSI. N.T. 3/7/05 at 15-17.

Based on all of the aforementioned, and applying our standard of review, we conclude the trial court did not err in denying Eshbach Brothers' request for JNOV or a new trial on this basis. *See Capoferri, supra; Brown, supra.* Simply put, the evidence does not support Eshbach

Brothers' contention that CSI was obligated under the parties' written contract to pay Eshbach Brothers a portion of the loan proceeds, which CSI secured from Brookridge.⁶

Eshbach Brothers' final claim is that the trial court erred in granting summary judgment in favor of Northwestern Human Services as to Eshbach Brothers' breach of contract claim. Specifically, Eshbach Brothers contends there exists a genuine issue of material fact as to whether CSI was an agent for Northwestern Human Services when CSI entered into the written contract with Eshbach Brothers,⁷ and, therefore, summary judgment should not have been entered in favor of Northwestern Human Services.⁸

Our review of an order granting summary judgment is well-established:

⁶ Having concluded Northwestern Human Services' paying CSI was a condition precedent expressly established by the parties' written contract, and the condition precedent was not waived or satisfied, we find it is unnecessary for us to address Eshbach Brothers' second issue regarding the trial court's application of the Contractor and Subcontractor Payment Act. The parties never argued during trial that the provisions of the Contractor and Subcontractor Payment Act at issue were incorporated into the parties' written contract, contrary to the parties' contract, or negated the condition precedent established in the contract. Therefore, we find any argument with regard thereto to be waived. **See** Pa.R.A.P. 302(a).

⁷ The trial court also granted summary judgment in favor of Northwestern Human Services as to Eshbach Brothers' *quantum meruit* claim, **see** Trial Court Order filed 6/9/04 at 5-7; however, Eshbach Brothers has developed no argument on appeal regarding that portion of the trial court's order.

⁸ Eshbach Brothers also presents an undeveloped claim that the trial court erred in entering summary judgment on the basis of evidence which was not made a part of the record. We decline to address Eshbach Brothers' one paragraph argument, which is unsupported by relevant authority. **See** Pa.R.A.P. 2119.

[A] trial court's order granting summary judgment will not be reversed unless it is established that the court committed an error of law or clearly abused its discretion. Summary judgment may be entered only in those cases where the record clearly demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

Abrams v. Pneumo Abex Corporation, 2006 WL 1575015, *1 (Pa.Super. filed June 9, 2006) (quotation omitted).

After a thorough review of Eshbach Brothers' summary judgment claim, we rely on the well-reasoned order filed by the Honorable William F. Moran on June 9, 2004, and adopt it as our own. **See** Trial Court Order filed 6/9/04 at 1-5.

Having addressed the appellate claims presented by Eshbach Brothers, we now turn to CSI's sole appellate claim presented on cross-appeal. Specifically, CSI argues the trial court erred in denying CSI's motion for attorneys' fees pursuant to Section 512(b) of the Contractor and Subcontractor Payment Act. We find no error.

73 P.S. § 512(b), provides the following:

(b) Award of attorney 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 the amount to be determined by the court or arbitrator, together with expenses.

(bold in original and italics added).

As the clear, express language of Section 512(b) indicates, a prevailing party shall be awarded attorneys' fees, provided the recovery of any payment was sought under the Contractor and Subcontractor Payment

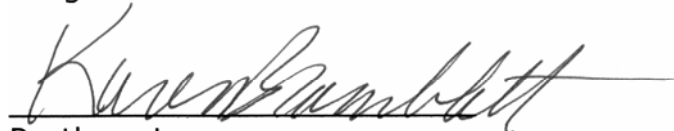
Act. As the trial court indicated, the parties never argued the Contractor and Subcontractor Payment Act was applicable, and the proceedings below were not based on the Act. Rather, the matter was presented to the trial court for an interpretation of the parties' written contract. Therefore, we conclude the trial court did not abuse its discretion in denying CSI's request for attorneys' fees. ***See Pietrini Corporation v. Agate Construction Co., Inc.***, 2006 WL 1605232 (Pa.Super. filed June 13, 2006) (holding that this Court's standard of review in determining whether the trial court should have awarded attorneys' fees under the procurement code was an abuse of discretion standard).

Affirmed.

KELLY, J., FILES A CONCURRING AND DISSENTING

MEMORANDUM.

Judgment Entered.



Prothonotary

Date: _____