In The

Court of Special Appeals of Maryland

No. 1924
September Term, 2008

BOARD OF EDUCATION OF WORCESTER COUNTY,

Appellant,

v.

BEKA INDUSTRIES, INC.,

Appellee.

On Appeal from the Circuit Court for Worcester County
(Hon. Robert L. Karwacki, Judge)

BRIEF OF *AMICUS CURIAE* AMERICAN SUBCONTRACTORS ASSOCIATION, THE AMERICAN SUBCONTRACTORS ASSOCIATION OF BALTIMORE, AND THE D.C. METROPOLITAN SUBCONTRACTORS ASSOCIATION

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STATEMENT OF THE CASE

The American Subcontractors Association, the American Subcontractors Association of Baltimore, and the D.C. Metropolitan Subcontractors Association (collectively, the "Subcontractor Associations" or "ASA") support the Statement of the Case set forth in the brief filed by the Appellee, BEKA Industries, Inc. ("BEKA"), which brief is incorporated and adopted by reference, herein.

QUESTIONS PRESENTED

I. May a Maryland county school board may assert the doctrine of sovereign immunity in defense of claims exceeding $100,000 that arise out of a written contract?

II. Given the actions of the Board of Education of Worcester County, is the "no damages for delay" clause in BEKA's contract enforceable?

STATEMENT OF FACTS

ASA supports the Statement of Facts set forth in the brief filed by Appellee, BEKA, which Statement of Facts is incorporated and adopted by reference herein pursuant to Maryland Rule 8-503(f). In addition, ASA states that the Subcontractor Associations are state and national organizations representing the interests of approximately 5,000 subcontractor members who provide labor and materials on construction projects throughout the country. Approximately 345 businesses located in Maryland and the Metropolitan D.C. area, and 270 businesses located in the State of Maryland alone, are members of the ASA. ASA's primary focus is the equitable treatment of subcontractors in the construction industry. ASA has acted in the interest of all subcontractors by promoting education and legislative action and by intervening in significant legal actions that affect the industry at large.

The questions at issue in the above-captioned appeal have the potential to adversely impact the members of the Subcontractor Associations, namely: (1) whether a school board can invoke the doctrine of sovereign immunity in defense of a claim arising out of a written contract; and (2) the scope and enforceability of "no damages for delay clauses" in construction contracts. As

such, ASA can assist the Court in understanding the policy issues raised by this appeal by addressing the experience of numerous subcontractors in Maryland and other states as well as the importance and social desirability of affirming the decision of the Circuit Court for Worcester County.

ARGUMENT

I.A. The Board of Education of Worcester County may not raise the doctrine of sovereign immunity in defense of BEKA's claim because it arises out of a written contract.

Section 12-201(a) of the State Government Article of the Maryland Annotated Code provides that the State of Maryland and its units may not raise the doctrine of sovereign immunity in defense of a claim that arises out of a written contract, as follows:

> Except as otherwise expressly provided by a law of the State, the State, its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee.

See Md. Code Ann. State Gov't § 12-201(a). Code counties, such as Worcester County, and their agencies and boards, such as the Board of Education of Worcester County (the "Board"), are similarly barred by § 13A(a) of Article 25B of the Maryland Annotated Code from raising the doctrine of sovereign immunity in defense of a claim that arises out of a written contract:

> Unless otherwise specifically provided by the laws of Maryland, a code county, and every officer, department, agency, board, commission, or other unit of county government may not raise the defense of sovereign immunity in the courts of this State in an action in contract based upon a written contract executed on behalf of the county, or its department, agency, board, commission, or unit by an official or employee acting within the scope of his authority.

See Md. Ann. Code art. 25B § 13A(a). *See also*, Md. Ann. Code art. 23A § 1A(a) (barring municipal corporations from raising the doctrine of sovereign immunity in defense of claims arising out of written contracts); Md. Ann. Code art. 25 § 1A(a) (barring non-charter non-code counties from raising the doctrine of sovereign immunity in defense of claims arising out of written contracts); and Md. Ann. Code art. 25A § 1A(a) (barring charter counties from raising the doctrine of sovereign immunity in defense of claims arising out of written contracts).

The Legislature enacted the aforementioned statutory provisions in recognition of the "moral obligation on the part of any contracting party, including the State or its political subdivisions, to fulfill the obligations of a contract." *See Baltimore County v. RTKL Associates, Inc.*, 380 Md. 670, 676, 846 A.2d 433, 436 (2004). However, counties and municipalities had been subject to suit in contract actions long before the Legislature passed Md. Ann. Code art. 25B § 13A(a) and its counterparts. In *American Structures, Inc. v.*

City of Baltimore, 278 Md. 356, 359-60, 364 A.2d 55, 57 (1976), the Court of Appeals noted that, from as early as 1862,

> municipalities and counties have been regularly subject to suit in contract actions, whether the contracts were made in performance of a governmental or proprietary function, as long as the execution of the contract was within the power of the governmental unit.

American Structures, at 359-60, 364 A.2d at 57. Thus, Md. Ann. Code art. 25B § 13A(a) and its counterparts merely codified the long established practice of permitting suits against a county for claims arising out of contracts with the county.

It is noteworthy that both the Board, in its appellant's brief, and the Maryland Association of Boards of Education ("MABE"), in its *amicus* brief, ignore the provisions of Md. Ann. Code art. 25B § 13A(a). Rather, the Board and MABE focus on the provisions of Md. Code Ann. State Gov't § 12-201, and argue that Md. Code Ann. State Gov't § 12-201 does not apply to boards of education because, pursuant to *Chesapeake Charter v. Anne Arundel Board of Education*, 358 Md. 129, 747 A.2d 625 (2000), they are not "units" of the State for state procurement purposes. Whether there exists some legal equivalence between being a unit of the State for procurement purposes and being a unit of the State for sovereign immunity purposes is highly suspect. This is especially so when one considers that boards of education have their own procurement scheme which existed prior to the establishment of the

centralized State procurement system and the re-codification of the State procurement laws in the State Finance and Procurement Article of the Maryland Annotated Code. *See generally*, *Chesapeake Charter* at 140, 143-44, 474 A.2d at 631, 633. Nevertheless, it is undisputed that the Board is a county "board." As such, the Board is subject to the provisions of Md. Ann. Code art. 25B § 13A(a), which expressly prohibit "a code county, and every ... board... [from raising] the defense of sovereign immunity ... in an action in contract based upon a written contract executed on behalf of the ... board, ... by an official or employee acting within the scope of his authority." *See* Md. Ann. Code art. 25B § 13A(a). Therefore, the Board is barred by the provisions of Md. Ann. Code art. 25B § 13A(a) from raising the doctrine of sovereign immunity in defense of BEKA's contract claims.

I.B. The interests of governmental and public policy dictate that county boards of education should be barred from raising the doctrine of sovereign immunity in defense of contract claims.

The legislative history behind the general assembly's decision to bar the State, its counties, and their related subsidiaries, from raising the doctrine of sovereign immunity in defense of contract claims indicates that the general assembly was concerned about the ability of governmental entities to enter into contracts absent such a bar. As Judge Willner noted in his dissent in *Stern v. Board of Regents, University System of Md.*, 380 Md. 691, 846 A.2d 996 (2004), the prohibition of invoking the doctrine of sovereign

immunity in defense of contract claims was intended "to correct what the Legislature regarded as the injustice of allowing the State and its agencies, with impunity, to breach solemn contracts that they had made." *Id.* at 731, 846 A.2d at 1019.

This injustice is a sword that cuts both ways as it places the government on a different playing field than private industry. The ability of a governmental entity to breach solemn contracts would serve as a disincentive for private industry to contract with the government. This would severely impair the government's ability to procure essential goods and services from private industry. In the rare event that private industry would deign to conduct business with the government, the conditions that would be established by private industry to restore equilibrium would be stifling. The only ways for private industry to level the playing field under these conditions would be to require full payment from the government up-front, or to greatly increase the cost of the goods and services being provided in an attempt to offset the additional risk incurred by virtue of doing business with the government.

Of course, if the government was required to pay in full up front, the government would lose all control over the quality of the goods and services procured, and the effectiveness of its recourse in the event that non-conforming goods and services are provided would be greatly diminished.

Moreover, if the government would be required to pay a significant premium to offset the risk private industry would be undertaking by doing business with the government, the government's resources would be quickly depleted. In short, the ability of the government to avoid its contractual obligations by invoking the doctrine of sovereign immunity would significantly impact its ability to efficiently conduct the business of government, to the ultimate detriment of the taxpayers.

The disincentive created by the government's ability to invoke the doctrine of sovereign immunity to avoid its contractual obligations would harm private industry as a significant portion of private industry is devoted to doing business with the government. And the business that private industry conducts with the government is not limited to the construction field. According to the Board's FY 2010 Budget, at least $9,327,304, or over 10% of the total budget, is allocated to pay for goods and services procured from outside contractors.[1] *See* The Board's FY 2010 Budget, http://www.worcesterk12.com/media/Budget_Book_FY10.pdf.[2]

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[1] Included in this amount is $222,338 for administration; $153,928 for instructional support services; $1,840,111 for textbooks and classroom supplies; $762,330 for other instructional costs; $404,300 for special education; $2,675 for pupil services; $15,611 for health services; $4,960,690 for pupil transportation; $575,283 for operation of plant; $287,843 for maintenance of plant; $2,225 for capital planning; and $100,000 for capital improvements.

[2] A copy of the Board's FY 2010 Budget is included in the attached Appendix of Statutes and Rules for this Honorable Courts's reference.

While some contractors may be able to offset the risk of the government invoking sovereign immunity by imposing up-front payment terms or by greatly increasing the cost of the goods and services which are to be provided, many contractors, especially those in the construction industry, will be unable to offset that risk.

Like many states, and following the lead of the federal government, Maryland enacted a Little Miller Act to protect construction contractors performing work on public property and who are therefore unable to obtain mechanics' liens on the public property. Maryland's Little Miller Act is codified at Md. Code Ann. State Fin. & Proc. § 17-101, *et seq*. Maryland's Little Miller Act requires contractors who perform work for a "public body"[3] to provide payment and performance securities, most often in the form of bonds, prior to the award of contracts exceeding $100,000[4]. Md. Code Ann. State Fin. & Proc. § 17-103(a). The payment security is provided "to

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[3] The term "public body" is defined in Md. Code Ann. State Fin. & Proc. § 17-101(d) as "the State; a county, municipal corporation, or other political subdivision; a public instrumentality; or any governmental unit authorized to award a contract." *See* Md. Code Ann. State Fin. & Proc. § 17-101(d)(1)-(4). While, pursuant to the holding in *Chesapeake Charter*, boards of education are not "units" of the State, as that term is defined in Md. Code Ann. State Fin. & Proc. § 11-101(x), they "are considered State agencies for most purposes," *see* MABE's *amicus* brief at p. 5, n. 3 and the Board's appellant's brief at p. 6, citing *Zimmer-Rubert v. Board of Education of Baltimore County*, 179 Md. App. 589, 603, 947 A.2d 135, 143 (2008), and, in any event, are certainly a part of county government. *See Chesapeake Charter* at 139-40, 747 A.2d at 631. As such, county boards of education are public bodies pursuant to Md. Code Ann. State Fin. & Proc. § 17-101(d)(2) and are subject to the Little Miller Act.

[4] Md. Code Ann. State Fin. & Proc. § 17-104(b) provides the public body with the option to require payment and performance security for construction contracts that exceed $25,000 but do not exceed $100,000.

guarantee payment for labor and materials ... under a contract for construction," Md. Code Ann. State Fin. & Proc. § 17-101(b), and the performance security is provided "to guarantee the performance of a contract for construction." Md. Code Ann. State Fin. & Proc. § 17-101(c).

If a contractor fails to timely pay subcontractors for the labor or materials provided to the public construction project, Md. Code Ann. State Fin. & Proc. § 17-108 establishes the means and methods for commencing an action against the security. Consistent with the provisions of the Maryland Little Miller Act, the Board's contract with BEKA in the instant case required BEKA to provide payment and performance bonds. E. 510 at § 11.5.1 (mandating that BEKA's payment and performance bonds conform to the requirements of the Maryland Little Miller Act). Thus, in order to perform any significant construction work in the State of Maryland, a contractor must be able to obtain payment and performance securities.

Among the factors sureties evaluate when considering whether to issue bonds on a particular project are the flexibility of the terms and conditions of the construction contract and whether the contractor is provided with the ability to seek recourse from the owner of the project. If county boards of education are entitled to invoke the doctrine of sovereign immunity in defense of claims arising out of the contract, no surety would issue bonds for the project because, in that case, the surety would be liable to the

subcontractors and suppliers who provided labor and materials for the project, and neither the contractor nor the surety would have the ability to recover the amounts paid from the project owner.

The devastating consequence of this would be that construction contractors would be unable to obtain the statutorily required bonds or would be forced to pay an unreasonable premium for them. This would effectively cause virtually all significant school construction and renovation to grind to a halt, harming both the construction industry and the schools. Therefore, this Honorable Court should affirm the verdict of the Circuit Court for Worcester County.

II.A. To the extent that a portion of BEKA's damages are determined to be delay damages, given the actions of the Board in managing the project, the "no damages for delay" clause should be disregarded.

The Board argues that the "no damage for delay" clause in its contract with BEKA prohibits BEKA's recovery of "delay" damages, and that the Circuit Court for Worcester County erred in awarding "delay" damages in favor of BEKA. As ASA is primarily focused on ensuring the equitable treatment of subcontractors in the construction industry, ASA is against the enforceability of "no damages for delay" clauses, in general,[5] and supports the

[5] A number of states have enacted statutes severely limiting or outright barring the enforceability of "no damage for delay clauses" in construction contracts. *See e.g.*, Ariz. Rev. Stat. 41-2617 (1987); Cal. Pub. Cont. Code § 7102 (1984); Colo. Rev. Stat. § 24-91-103.5(1)(a) (1989); Louisiana Rev. Stat. § 38.2216 (1990); Vernon's Ann. Missouri Stat. §

exceptions to the enforceability of "no damages for delay" clauses that numerous courts, including this Honorable Court and the Court of Appeals, have recognized. Pursuant to Maryland Rule 8-503(f), ASA incorporates and supports the arguments set forth by BEKA in its brief regarding characterization of its damages as disruption as opposed to delay damages. Nevertheless, should it be determined that the damages were delay damages, ASA submits the following for this Honorable Court's consideration in support of the Circuit Court for Worcester County's damages award.

In *State Highway Administration v. Greiner Engineering Sciences, Inc.*, 83 Md.App. 621, 577 A.2d 363 (1990), this Honorable Court analyzed whether "no damage for delay" clauses would be enforceable in Maryland. After reviewing the relevant case law from across a number of states, this Honorable Court concluded that such clauses were enforceable but were subject to a number of exceptions:

> We apply the above principles to the case *sub judice* and hold that the "Delays and Extensions of Time" clause in the contract clearly and unambiguously precludes recovery of delay damages by the appellee. The "not contemplated by the parties" exception is not recognized by the courts of this State. ***This is not to say that unambiguous no-damage-for-delay clauses will be enforced in every case***. The better reasoned approach does not enforce the exculpatory clause where there is "intentional wrongdoing or gross negligence," [citation omitted] "fraud or

34.058.2 (1990); North Carolina Gen. Stat. § 143-134.3 (1997); Virginia Code Ann. § 2.2-4335 (2001); Wash. Rev. Code Ann. § 4.24.360 (1979).

> misrepresentation," [citation omitted] on the part of the agency asserting the clause.

Greiner at 639, 577 A.2d at 372 (emphasis added).

The exceptions recognized by this Honorable Court in *Greiner* are justified by the fact that blind application of "no damages for delay clauses" to the detriment of a contractor, who may have had no part in causing the delay, operates as a forfeiture, which is abhorred by the law. *See e.g., Volos v. Sotera*, 264 Md. 155, 170, 286 A.2d 101, 109 (1972) (commenting that, where there is doubt whether the subjective or objective test of contract interpretation applies, "the Courts will prefer a construction that the objective test applies inasmuch as this test is more likely to prevent a forfeiture.") (citations omitted); 11 *Williston on Contracts* § 32:11 (4th ed.) ("[S]ince neither law nor equity favors forfeitures, contracts will be most strongly interpreted against the existence of a forfeiture."); 14 *Williston on Contracts* § 42:3 (4th ed.) (same).

II.B. Equity dictates that the Board's "no damage for delay clause" should be unenforceable against BEKA.

It is manifestly inequitable for a contractor who neither caused nor contributed to a project delay to be penalized by being precluded from recovering the damages it suffered as a result of the delay. In *Eastern Heavy Constructors, Inc. v. Fox*, 231 Md. 15, 188 A.2d 286 (1963), the Court of Appeals applied this sort of equitable analysis to allow a subcontractor to

recover retention that had not yet been paid to the general contractor due to a dispute between the general contractor and the owner, unrelated to the subcontractor. This Honorable Court should apply a similar analysis to "no damages for delay" clauses in Maryland, and allow a party who has been delayed, whether a contractor or subcontractor, to recover delay damages when the causes of the delay are unrelated to the party who was delayed.

In *Eastern Heavy*, the subcontract provided that 10% retainage was to be withheld and would not be paid to the subcontractor until the general contractor received final payment from the owner. The subcontractor substantially completed its portion of the work and requested a final payment, including retainage. However, due to a conflict between the owner and the general contractor, the owner refused to issue the final payment to the general contractor, and the general contractor refused to pay the subcontractor its retainage. Consequently, the subcontractor filed suit against the general contractor seeking payment of the 10% retainage.

Affirming the judgment of the trial court, the Court of Appeals held that the general contractor was required to pay the subcontractor's retainage notwithstanding the fact that the general contractor did not receive final payment from the owner, as follows:

> The reason for the non-payment by the owner was some conflict between the owner and the [general contractor]. [The trial court] felt that this was something which had nothing to do with the

> [subcontractor] and that he should not be injured by non-payment due to a dispute not concerning him. ... Appellee has substantially performed his part of the contract in question. His remuneration should not depend upon a dispute between the owner and the contractor as to matters not concerning him. We, therefore, sustain the court below on this point.

Eastern, at 20, 188 A.2d at 288 (relying upon *Rumsey v. Livers*, 112 Md. 546, 552, 77 A.2d 295, 297 (1910) which held that "the payment of compensation [the subcontractor] had earned from the [general contractor] could not be perpetually postponed merely because [the owner] refrained from paying its debt to the [general contractor] ...."). Thus, because of the inequity that would result from the subcontractor not receiving payment due to a dispute unrelated to its work, the Court of Appeals ignored the express contractual provision conditioning the subcontractor's final payment on final payment from the owner to the general contractor, and affirmed the trial court's judgment in favor of the subcontractor against the general contractor.

From a contract interpretation perspective, there is no difference between the contract provision at issue in *Eastern* and a "no damage for delay" clause. Both are express provisions in a contract to which the parties agreed. Nevertheless, because of the inequity of withholding payment from a subcontractor due to issues beyond his control, the Court of Appeals in *Eastern* affirmed the trial court's decision disregarding the contractual

provision conditioning final payment to the subcontractor upon the general contractor's receipt of final payment from the owner.

It is submitted that, even in the event this Honorable Court determines that the damages sought by BEKA were "delay" damages, as opposed to disruption damages, this Honorable Court should decline to enforce the "no damage for delay" clause in the Board's contract because of the inequitable effect it has BEKA, who neither caused nor contributed to the delay, and affirm the judgment of the Circuit Court for Worcester County.

CONCLUSION

For the foregoing reasons, ASA respectfully requests this Honorable Court to affirm the decision of the Circuit Court of Worcester County.

Pursuant to Maryland Rule 8-504(a)(8), this brief was prepared using the 13 point Century Schoolbook font.

APPENDIX OF STATUTES AND RULES

Statutes

Ariz. Rev. Stat. 41-2617 (1987)

Cal. Pub. Cont. Code § 7102 (1984)

Colo. Rev. Stat. § 24-91-103.5 (1989)

Louisiana Rev. Stat. § 38.2216 (1990)

Md. Ann. Code art. 23A § 1A

Md. Ann. Code art. 25 § 1A

Md. Ann. Code art. 25A § 1A

Md. Ann. Code art. 25B § 13A

Md. Code Ann. State Fin. & Proc. § 11-101

Md. Code Ann. State Fin. & Proc. § 17-101

Md. Code Ann. State Fin. & Proc. § 17-103

Md. Code Ann. State Fin. & Proc. § 17-104

Md. Code Ann. State Fin. & Proc. § 17-108

Md. Code Ann. State Gov't § 12-201

North Carolina Gen. Stat. § 143-134.3 (1997)

Vernon's Ann. Missouri Stat. § 34.058.2 (1990)

Virginia Code Ann. § 11-56.2 (1997)

Wash. Rev. Code Ann. § 4.24.360 (1979)

Rules

Maryland Rule 8-503(f)

Treatises

11 Williston on Contracts § 32:11 (4th ed.)

14 Williston on Contracts § 42:3 (4th ed.)

Other Material

Board of Education of Worcester County's FY 2010 Budget