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Pennsylvania Decision Provides New Incentive for Prompt Payment

By Matthew Whipple

It can seem like few options exist when a contractor faces an owner that fails to make payments for work performed. The contractor may file a lawsuit to recover the amount due, but typically parties to litigation must bear their own attorney's fees and court costs.

Every dollar spent on legal fees is one dollar taken from the contractor's final recovery. For contractors performing small to medium-sized jobs, the cost of pursuing a claim can quickly overtake the amount they are actually owed. A contractor may simply forgo filing a lawsuit, or settle its claim for a fraction of the amount due.

In 1994, the Pennsylvania state legislature passed the Contractor and Subcontractor Payment Act (CASPA) to curtail abuses within the construction industry involving nonpayment. The underlying purpose of CASPA is to encourage fair dealing among parties to a construction contract, ensure prompt payments and discourage unreasonable withholding of funds.

CASPA accomplishes these goals by mandating an interest penalty if payment is not made within 20 days of when amounts are due, and by awarding attorney's fees and litigation expenses to the "substantially prevailing party" in any lawsuit. Potential liability for interest, penalties and litigation costs incentivizes parties to make prompt payments.

On Oct. 19, 2009, the Pennsylvania Superior Court decided in favor of unpaid contractors that bolstered the penalty sections of CASPA. In *Zimmerman v. Harrisburg Fudd I, L.P.*, the court addressed a claim by Zimmerman, a contractor that had performed floor and wall improvements for a new restaurant Fudd was building. Fudd failed to pay Zimmerman \$10,109, the amount due under their contract. As a result, Zimmerman filed suit.

In November 2006, the trial court entered a stipulated award of \$21,674, consisting of the original contract claim plus \$11,656 in interest, penalties and attorney's fees under CASPA.

However, Fudd again failed to pay. When Zimmerman attempted to foreclose on the judgment by garnishing Fudd's bank account, Fudd filed motions to block the execution of the judgment. The trial court denied Fudd's motions, and Fudd appealed. In April 2008, more than two years after Zimmerman's original attempt to execute on the judgment, the Superior Court denied Fudd's appeal.

Zimmerman's ability to recover on the judgment was delayed by Fudd's post-trial procedural wrangling. Moreover, in battling Fudd's post-trial motions and appeals, Zimmerman incurred additional attorney's fees.

Zimmerman, therefore, filed a motion to recover the extra fees and to calculate interest and penalty interest under CASPA to the date of actual payment. The trial denied Zimmerman's motion to increase the award, and Zimmerman appealed.

In addressing the appeal, the Superior Court sided with Zimmerman. Section 505(d) of CASPA mandates the payment of statutory interest until the date of payment to the contractor, absent a good faith reason for withholding by the owner. The Superior Court held that interest continues to accrue through the post-award period until the contractor is actually paid. The court similarly held that the trial court was obligated to award Zimmerman penalty interest under Section 512(a) of CASPA until the date of payment.

The Superior Court also addressed Zimmerman's claim for attorney's fees and costs. Section 512(b) of CASPA provides that the substantially prevailing party in any dispute may be awarded attorney's fees and expenses. Past precedent indicates that if a plaintiff only recovers a partial judgment, or if the defendant asserted a good faith defense, the plaintiff may not be considered a substantially prevailing party. The Superior Court found that because Zimmerman recovered the entire claim, the firm substantially prevailed.

Significantly, the court affirmed that Zimmerman was entitled to any reasonable attorney's fees spent in collecting judgment. The Superior Court observed that the purpose of CASPA is "to make a contractor whole when failure to be paid promptly forces it to resort to litigation to collect a just debt."

The court further held that Zimmerman was entitled both to fees spent in collecting the judgment, including defending against Fudd's post-trial motions, and fees expended in pursuing Zimmerman's own appeal. The Superior Court remanded the case to the trial court to determine reasonable attorney's fees; ultimately, Fudd was forced to pay about \$42,000 for a claim originally estimated at \$10,000.

The outcome of this case is important for contractors on small and medium-sized projects. The cost of litigation may act as a deterrent to filing a claim, but now, contractors may be encouraged to pursue lawsuits with the expectation that their costs will be recovered as part of the final award. Of course, a contractor's ultimate recovery will depend on the particular circumstances of the case, including whether it is a substantially prevailing party.

In the battle to recover payment for completed construction work, CASPA remains one of the most potent weapons for unpaid contractors. The Pennsylvania Superior Court's decision in *Zimmerman v. Harrisburg Fudd I, L.P.* has upgraded their arsenal.

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