SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

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Re: ***DDP Roofing Services, Inc. v. Indian River School District***
C.A. No. S09C-01-035 RFS

Submitted: October 18, 2010
Decided: November 16, 2010

Dear Counsel:

Plaintiff, DDP Roofing Services, Inc. ("DDP") recovered a judgment after a jury trial in the amount of $29,656.65 against Defendant, Indian River School District ("Indian River"). DDP performed roofing systems work on two schools costing $1,501,000.00. Indian River withheld $29,656.65 from the last payment. This sum is reflected in the verdict. The parties asked the Court to decide whether DDP can recover prejudgment interest and attorneys fees under the Delaware

Construction Prompt Payment Act ("the Act").[1]

The Act provides that interest and legal fees may be awarded where payments are not made promptly. A contractor should be paid for "satisfactory performance under the contract within 30 days of the end of the billing period."[2] Interest is due under a contractual penalty clause for untimely payments. It accrues the day after the due date and ends at time of payment. Where payment is withheld, the owner "must provide written notice to the contractor within 7 days of the date required for payment to the contractor."[3] Attorneys fees may be awarded if money was withheld without good faith for reasonable cause.[4]

Here, final payment applications for the two schools were submitted on July 15, 2008. Payment was due from Indian River on August 14, 2008. The issues are whether Indian River gave adequate written notice to DDP within 7 days, and, whether Indian River had a good faith basis for reasonable cause to withhold payments. If not, DDP is entitled to prejudgment interest and legal expenses.

The parties signed a standard contract prepared by the American Institute of Architects ("AIA"). Applications are submitted to the architect. Under it, the

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[1] 6 *Del.C.* § 3506.

[2] *Id.*(a)(1).

[3] *Id.*(d).

[4] *Id.*(e).

architect is given administrative authority to review payment applications and, if appropriate, submit certificates of payment to the owner. The architect evaluates the applications because when the certificates are issued, representations are made that performance conforms with contract requirements. The architect has power to interpret contract requirements. Obviously, this authority should be exercised reasonably and not in an arbitrary or capricious way; the architect is not liable for results in interpretations or decisions made in good faith.[5]

Patrick Ryan ("Ryan") of French and Ryan, Inc. was the architect. In addition to various AIA forms, Ryan prepared a Project Manual, including roofing specifications, and an addendum. They were incorporated into the contract. For warranty protection from defects in the roofing work, DDP gave a general warranty of good quality and materials. Additional warranty protection was also required. Concerning metal roof panels, the specifications stated:

> 1. 10 Warranty
>
> A. Special Warranty: Manufacturer's standard form in which manufacturers agree to repair or replace metal roof panel assemblies that fail in material or workmanship within specified warranty

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[5] *Commonwealth Construction Co. v. Cornerstone Fellowship Baptist Church*, 2006 WL 2567916 at *4-*7 (Del. Super.). AIA General Conditions sections 4.2.1, 4.2.7 as supplemented, 4.2.12, 9.4.2, 9.5.

periods.

1. Failures include, but are not limited to, the following:

    a. Structural failures including rupturing, cracking, perforation or puncturing due to normal atmospheric conditions and peak wind speeds of 115 mph for a period of twenty years . . .

2. Warranty Period: Twenty years from date of substantial completion.

(Emphasis mine.)

Further, an addendum stated that products would be provided by: a. AEP-Span - 2" Span LOL System.

DDP purchased the roof systems from AEP-Span ("AEP"). When the work was finished, DDP tendered warranties from AEP titled "AEP- SPAN 20 YEAR STANDARD FULL SYSTEM WEATHERTIGHTNESS LIMITED WARRANTY AGREEMENT" for both schools. Each warranty was for a 20-year period and provided for repair, restoration or replacement of defective materials or work that caused leaks. Warranty responsibilities for AEP and DDP were limited, and Indian River was required to sign them to obtain coverage.

There were exclusions where DDP and AEP would not have liability or responsibility for any leakage or damage caused by or associated with:

> D. Damage to all or any part of the roof system caused by acts of God or unspecified natural disasters such as, but not limited to, lightning, hail, fire, explosion, earthquake, winds in excess of those specified, accidents, vandalisms, falling objects, civil commotions, terrorism, acts of war, or any other cause outside the direct control of AEP. (Emphasis mine.)

The costs and expenses were limited. During the first two years DDP had sole responsibility. Thereafter, AEP's exposure was reduced over 20 years as follows: 2 but less than 5, 100%; 5 but less than 6, 90%; 6 but less than 7, 80%; 7 but less than 8, 70%; 8 but less than 9, 60%; 9 but less than 10, 50%; 10 but less than 12, 40%; 12 but less than 14, 30%; 14 but less than 17, 20%; 17 but less than 20, 10%.

The trial issue concerned ambiguity in the contract language in both the special warranty and AEP's limited warranty agreement.[6] Principally, Ryan felt the 115 mph wind speed requirement should be mentioned. He objected to the reduced financial responsibilities over the 20-year period. The following basic questions were explored at trial: What was intended by the language in section 1.10 - "Special Warranty: Manufacturer's Standard Form?" How did it fit with the

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[6] *Hillcrest Country Club v. N.D. Judds Co.*, 461 N.W.2d 55, 64 (Neb. 1990). On the meaning of a special warranty in a construction claim for a roofing defect: "There is a dearth of enlightening case law on the subject." The *Hillcrest* court found that a special warranty arose from project specifications distinguished from a general warranty which applied in any construction contract. The warranty of good quality and materials expressed in § 3.5 of the AIA contract would be an example of a general as distinct from a special warranty.

requirement of a failure to include peak wind speeds of 115 mph and with a 20-year warranty period that did not provide for reductions of financial responsibilities?

DDP presented evidence that AEP's warranty was standard in the trade. The title of the agreement used the word "standard." The practice was to limit financial expenses over time. If Indian River desired a rider to be more extensive, then it would be its responsibility to pay extra costs. Further, although not stated in the AEP warranty, AEP advised Indian River that its product was designed to tolerate wind speeds of up to 115 mph.

On the other hand, Ryan testified from his experience in construction projects. For Ryan the AEP warranty would have to protect against a failure identified in the specification concerning wind speed. AEP's warranty excepted coverage for "winds in excess of those specified." The agreement should not have left this subject for conjecture. AEP's position was that its warranty covered failures from weathertightness and that wind speed was a separate question. On that point, DDP felt that coverage for failure by leaks or winds would be a legal issue between AEP and Indian River. Ryan expected full coverage over 20 years from his work on other projects. If additional expenses were required, Ryan felt DDP would have responsibility.

The parties deadlocked on these essential points. The jury determined that the AEP warranty was satisfactory. It accepted the argument that wind speed was included by inference in warranty coverage, and that prorations were the industry standard. Given the verdict, Indian River breached the contract by failing to pay the retainage on August 14, 2008. Under the measure of damages rule, for breach of contract, DDP is entitled to prejudgment interest from August 14, 2008.[7] Under the Act, Indian River was required to give timely and specific notice as to why payment was withheld.

While Ryan wrote a letter dated August 12, 2008 on closeout materials, it did not explicitly discuss the proration subject. Therefore, the August 12th letter is not sufficient under the Act. In my view, the Act provides an additional remedy consistent with the general rule that interest is awarded from time of breach of contract. Therefore, DDP will receive prejudgment interest from August 14, 2008.[8]

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[7] *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del.1992) (prejudgment interest is awarded as a matter of right from the payment date under the contract).

[8] Indian River argues that interest should be suspended because DDP obtained a continuance of the trial date from July 19, 2010 until September 7, 2010. It was a short delay, and it was not opposed (consistent with the experience of this Court and the civility of the Bar). The delay is not so egregious or unreasonable for DDP to forfeit its compensation for the lost time value of its money. The case was concluded within recognized time standards under the Superior Court's Civil Case Management Plan.

On the attorney's fee question, the positions expressed at trial and in the opening and answering memoranda assumed that Ryan acted on behalf of Indian River.[9] Did he act in good faith for reasonable cause when he recommended that retainage be withheld?

Good faith is used in many contexts, and "it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness, or reasonableness."[10] In prompt payment disputes, the phrase is understood to mean that substantial and justifiable reason existed to withhold payments.[11] Because good faith is the opposite of bad faith, it is often discussed to measure a questioned decision.

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[9] In the reply, DDP suggests for the first time that Indian River had an independent duty. There may be a question whether Ryan had the status of an independent contractor in his role as interpreter of the contract rather than as an agent. *See Prichard Brothers, Inc. v. The Grady Company*, 436 N.W.2d 460, 464 (Minn.Ct.App. 1989) (architect was not agent of school concerning his alleged negligence in interpreting contract documents and shop drawings). Regardless, the factors relied upon by Ryan would be substantially the same for Indian River to consider in withholding payment. Further, an owner should be able to reasonably rely upon an architect's recommendation absent collusion.

[10] Restatement of the Law Contracts 2d. § 205.

[11] *City of Independence for the Use of Briggs v. Kerr Construction Paving Co.*, 957 S.W.2d 315, 321 (Mo.Ct.App. 1998) (bad faith under Missouri Prompt Payment Act could be shown by pattern of manipulation, by coercive efforts to intimidate a party to accept less than the contract price, by attempts to offset claims on other jobs, and by using insulting language).

Jerry Bennett Masonry, Inc. v. Crossland Construction Co., Inc., 171 S.W.2d 81, 89-94 (Mo. App. 2005) (good faith for reasonable cause existed to withhold payment where architect believed job was not adequately staffed to timely complete project).

Bad faith implies that " . . . there is some kind of dishonest motive or purpose . . . that the defendant had a dishonest purpose or a state of mind affirmatively operating with furtive design or ill will. . . . Bad judgment by itself is not equivalent to a sinister motive or purpose."[12] Under the Act, the entity withholding payment, Indian River, has the burden of proof to show it was done in good faith for reasonable cause.[13]

In hindsight, Ryan made a mistake but his decision to withhold payment was not deceitful nor made without substantial reason. His conduct was not calculated to leverage DDP from its retainage. The jury resolved the ambiguity in the contract language in favor of DDP, i.e., that a standard form warranty was supplied, and that Indian River's expectations should have been more clearly defined.

DDP argues that Ryan drafted the specifications and was simply trying to hide his errors. I disagree. A fair argument existed that the wind speed should have been stated in AEP's warranty; this concern was serious considering AEP's position that speed and weathertightness were distinct issues. Reasonable people

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[12] *Nason Construction, Inc. v. Bear Trap Commercial LLC*, 2008 WL 4216149 at * 6-*8 (Del. Super.).

[13] *Id.*

could disagree about that subject and about the prorations.[14] Although the positions taken by Ryan and Indian River were rejected by the jury, Ryan's decision, albeit mistaken, was made in good faith for reasonable cause.

Considering the foregoing, DDP is awarded pre and post judgment interest at the contract rate but is not granted attorneys fees.[15]

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary

[14] Under the terms of AEP's agreement, DDP was included in the limited warranty. If signed by Indian River, DDP's express warranty obligation of good quality and materials in § 3.5 could be adversely affected. This general warranty is not as restricted as the limited warranty in terms of recoverable damages and potentially is as long as the general 3-year statute of limitations, 10 *Del.C.* § 8106, if not the 4-year statute of limitations for Uniform Commercial Code sales warranty claims, 6 *Del.C.* § 2-725. By contrast, AEP's limited warranty reduces DDP's responsibility for 2 years. All express warranties are disclaimed.

[15] When suit was filed on January 30, 2009, DDP demanded payment of $79,204.05. On March 12, 2009, $49, 548.00 was credited against this amount. Thus, prejudgment interest is awarded from August 14, 2008 - March 12, 2009 on $79,204.05 and from March 12, 2009 forward on $29,656.65. The rates will be at the annualized rate of interest provided for in the contract.