

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947
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November 7, 2014

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**RE: A.P. Croll & Son, Inc., a Delaware Corporation vs. Clark's
General Contractors, Inc., a Delaware Corporation**
C.A. No.: S13C-07-022 RFS

Date Submitted: September 2, 2014

Dear Counsel:

The Motion for Summary Judgment filed by Plaintiff is denied. Material facts are disputed, and judgment cannot be entered as a matter of law.

The verified answer provides support for material issues in dispute that preclude summary judgment. There are details set forth in the verified answer and

the accompanying affidavit and documents that show potential timely responses to demand(s), possible back charges, and plausible deductible payments to reduce Plaintiff's claim. Perhaps, the information in paragraphs 7 and 8 of the verified answer should have been displayed differently to demonstrate a set off response. However, sufficient notice was evident for modern pleading purposes. Plaintiff knew these matters were in play and maintained the action. There is no waiver, and Defendant may present evidence about the alleged deductions pled in paragraphs 7 and 8.

The trial issues concern the scope of work, the course of performance between the parties, the demand for releases of liens before payment, the timeliness of objections to demand(s) and the applicability of the Construction Prompt Payment Act (Act) under 6 *Del.C.* § 3506. Questions may arise concerning reciprocal obligations of good faith and fair dealing. Should the Act apply, the question of good faith is factually driven concerning alleged overdue payments. *DDP Roofing Services v. Indian River School District*, 2010 WL 4657161 (Del.Super. Ct 2010); on reargument 2011 WL 61646; *Rodman Const. Co., Inc., v. BPG Prudential Partners V, LLC*, 2013 WL 656176 (Del.Super., 2013).

Plaintiff contends that Defendant's default in answering requests of admissions within the normal thirty day period requires the granting of summary

judgment. This is not correct. The Court's Order of July 18, 2014 permitted the later filing of responses. There was good cause to give relief given the health problems of the defense counsel and other reasons that required Mr. Clark to assume the defense. Default admissions are never appropriate for summary judgment on ultimate issues. *R.C. Fabricators, Inc. v. West Dover Professional Park, LLC* 2009 WL 5177150 (Del.Super., 2009). Nor has Defendant suffered any prejudice.

At trial, the parties should be prepared to argue whether the Act includes demolition projects. This is an unresolved legal question. Trial will start at 9:00 a.m. on Wednesday, November 19, 2014. By close of business Monday, November 17, the parties shall submit a letter memorandum of no more than two pages on the application of the Act. If more than one day is required for trial please notify Alan Barraclough, our civil case manager, immediately.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary
Alan Barraclough, Civil Dept.