IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SC&A CONSTRUCTION, INC.,	)	
	)	
Petitioner/Appellant,	)	
	)	
v.	)	
	)	
DEPARTMENT OF LICENSES AND INSPECTIONS OF THE CITY OF WILMINGTON and DONALD L . GOUGE, JR., GLADYS B. SPIKES and MAMIE J. BAYARD, constituting the BOARD OF LICENSE AND INSPECTION REVIEW,	)	C.A. No. N13A-08-001 CEB
	)	
Respondents/Appellees.	)	

Date Submitted: February 7, 2014
Date Decided: April 11, 2014

MEMORANDUM OPINION.

Upon Consideration of
Appellant's Writ of Certiorari.
REVERSED and REMANDED.

Donald L. Logan, Esquire and Victoria K. Petrone, Esquire, LOGAN & PETRONE, LLC, New Castle, Delaware. Attorneys for Petitioner/Appellant.

Brenda James-Roberts, Esquire, CITY OF WILMINGTON LAW DEPARTMENT, Wilmington, Delaware. Attorney for Respondents/Appellees.

BUTLER, J.

I. INTRODUCTION

This action was initiated by Petitioner SC&A Construction, Inc. ("SC&A") pursuant to the filing of a writ of *certiorari* challenging a decision of the Board of License and Inspection Review ("Board"). The Board affirmed an order of the Department of Licenses and Inspections ("L & I"), which required SC&A to obtain an upgraded permit to include work beyond its original contract permit and to conduct additional inspections for the completed work. For the reasons set forth below, the Board's decision is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

II. FACTUAL BACKGROUND

On September 30, 2010, a tree fell in the yard of a residence owned by Charles and Velda Potter ("homeowners"), causing substantial damage to the house. The Potters retained SC&A to perform construction services to repair the damage. On March 11, 2011, SC&A applied to the City of Wilmington ("City") for a building permit to perform repairs to the homeowners' roof based on a total contract valuation of $74,000.

Although the permit recites that a copy of the contract between SC&A and the homeowners is attached, the attachment has not survived in this record. The City issued the permit. For reasons again not clear in this record, the scope of the work under the original permit and contract expanded. In May 2011, SC&A and

the homeowners entered into a new, American Institute of Architects' (AIA) contract in the amount of $214,367. SC&A readily concedes that it never upgraded the March 11th permit with the City or pulled a new permit to reflect the increased contract valuation.

Over the next several months of construction, there were numerous change orders, delays, and (apparently) concerns by the homeowners. The homeowners contacted L & I, which responded by issuing an Assessment Report dated September 28, 2012. In that Report, L & I noted that SC&A had failed to obtain the upgraded permit and had failed to request the "required inspections" during the construction process. Although L & I had, in fact, performed several inspections, its Assessment Report required SC&A to obtain both an upgraded permit and to allow for a thorough inspection of all completed work. SC&A appealed the Assessment Report to the Board, and the Board[1] convened a hearing.

At the hearing before the Board, the City took a somewhat different tack. The City now claimed that the value of the contract was actually $280,516.42, not the $214,367 in the original AIA contract. The City's reasoning was that certain items of work performed by other contractors (and paid for separately by the homeowners) should be added to the SC&A contract valuation. These separate contracts covered work on the chimney, water/mold remediation, and some

[1] The Board was composed of appellees Donald L. Gouge, Jr., Gladys B. Spikes, and Mamie J. Baynard.

electrical work. The City also contended that additional inspections were needed. SC&A argued that the additional work was outside the scope of the amended contract and not subject to the additional permit fees or inspections. However, it conceded that the contract price had risen from the original $74,000 figure and it had not gone back to the City to amend the permit.

One area receiving more attention than it deserved was SC&A's change order seeking some $14,000 in "supervision fees" which was never paid by the homeowners. Whether that fee should be included within the permit valuation calculation was the subject of considerable testimony.

The Board issued a written order denying SC&A's appeal, with two of the three members finding that all of the work that was performed on the premises by other contractors should be included in the valuation of the SC&A contract and consequent permit valuation. One member in the majority felt that SC&A's permit valuation should exclude the $14,000 permit valuation, but the remaining items should all be included. In addition, the majority of the Board ruled that the additional work performed on the premises required inspection. SC&A filed a Notice of Appeal and Petition for Writ of *Certiorari* and this Court agreed to hear the petition.

III. CONTENTIONS OF THE PARTIES

A. Petitioner's Contentions

Despite the complexity of the record, SC&A has but one argument before the Court: it contends that because some of the additional work was contracted for and paid for directly by the homeowners, the additional work was not within the original signed contract for $214,367. Therefore, SC&A should not be required to pay increased permit fees based upon work performed under separate agreements between the homeowners and subcontractors, nor should SC&A be required to conduct further inspections.

B. Respondents' Contentions

In response the City argues that the SC&A was hired in part to supervise subcontractors and that the homeowners' payment directly to the subcontractors was made merely as a convenience to SC&A. The City says when properly added to the contract valuation, the value was actually $280,516.42. The City concedes, however, that SC&A is entitled to a credit for the original permit fee on the $74,000 contract, thus leaving SC&A's balance owed to the City based on a contract valuation of $206,516.42. To support their contention, the City references the original signed contract which states that modifications such as change orders are to be included as part of the contract documents; therefore, they should be included in the assessment for the upgraded permit.

Finally, the City urges that pursuant to §§ 105.4.1, 108.2.1, and 108.3 of the city code, L & I's inspector was within his authority to determine the total value of the work performed based on the estimates submitted, the contract between the parties, and his knowledge of the industry and scope of the work actually performed.

IV. DISCUSSION

This Court reviews the actions of the Board by way of *certiorari*.[2] As such, the Court's role is limited to a review of the record below to determine whether the Board "exceeded its jurisdiction, committed errors of law, or proceeded irregularly."[3] The Court is not permitted to review the record on its merits or to consider the sufficiency of the evidence.[4] With those parameters in mind, this Court reviews the Board's denial of SC&A's appeal.

This rather baffling dispute is about $266. The chair of the Board below states that this reflects the difference in the permit valuations asserted by the two parties. Of course, no one really believes that. The Court is aware, for example,

[2] *Goldberg v. Wilmington*, C.A. No. 91A-10-19, 1992 WL 114074, at* 1 (Del. Super. Ct. May 22, 1992).

[3] *Adjile, Inc. v. City of Wilmington*, CIV.A.07A-08-009WCC, 2008 WL 2623938, at *1 (Del. Super. Ct. June 30, 2008), *aff'd*, 968 A.2d 491 (Del. 2009).

[4] *Shoemaker v. State*, 375 A.2d 431, 437 (Del.1977).

that a mechanic's lien action[5] was filed in the Superior Court – a case about which the Court has scant information since it was ordered into binding arbitration under the terms of the AIA contract at issue. The Board chair put it rather nicely: "I kind of can't help that we're, as Board members, we're kind of pawns between a bigger event here that's going on in the mechanic's lien action, so I kind of feel like we're caught in the middle of this for whatever reason…"[6]

Further complicating the Court's review is its limited nature: the Court could spend many pages reviewing every change order, every piece of testimonial evidence, and each finding by the two different groups (L & I and the Board) that have reviewed the matter already. But this is a *certiorari* case, and, as such, the Court is not invited to review the evidence on either side. Rather, the Court is limited to an inquiry into 1) whether the Board exceeded its jurisdiction – a claim not made by either party, 2) whether the Board committed errors of law, or 3) proceeded irregularly.

As to the "regularity" of proceedings, it appears the Board conducted a properly noticed and recorded hearing that lasted some three hours, where each side was permitted to present its witnesses, evidence, and argument. Nothing about the record suggests anything unfair, nefarious, or "irregular," excepting, perhaps, its length and detail, neither of which are a cause for reversal.

[5] Civ. Action No. N12L-090-022 FSS

[6] Board Tr., 000068, June 3, 2013.

This leaves the issue of whether the Board committed errors of law. Here, unfortunately, is where the Court has considerable difficulty, which stems from the basic premise of judicial review: that the record below is sufficiently detailed and clear to permit review.

The Board, in its written decision of July 19, 2013, had this to say:

> The Board, by a majority vote, denied the appeal. Board Chair, Donald L. Gouge, Jr. believes that based upon the wording of the City Code, the work performed outside of the scope of the contract between the parties is not subject to permit fees or inspections. Board Member Mamie Baynard believes the $14,016 for supervision of the project should not be included in the overall contract for permit fees purposes, but the other items should be counted towards it. Vice Chair Gladys Spikes voted to reject the appeal in its entirety.

This is not the introduction, executive summary, or highlight of this decision: it is the full decision. Each member's vote is duly announced, but their rationale is not explained anywhere. The Court understands that Chairman Gouge would reverse "based upon the wording of the City Code," but he did not indicate what wording he was referring to. Thus, the City argues in its response to the petition that the city code permits the L & I inspector to assign any contract value he chooses based upon his own experience, while SC&A argues that the Code assesses the permit fee on the value of the signed contract between the parties. The L & I inspector testifying before the Board agreed that the contract price controls the value and that the contract price is the code provision; however, he then testified that work done by other contractors must be included in the permit

valuation. The Court is thus left in the dark as to what "wording of the City Code" the Chair would rely upon in affirming.

The vote of member Gladys Spikes cannot be reviewed for any error of law, because there is simply no explanation at all as to why she "voted to reject the appeal in its entirety." Perhaps the appeal should have been rejected in its entirety – an issue upon which the Court takes no opinion. But the hallmark of the Court's jurisprudence, indeed of due process itself, is an explanation that is capable of judicial review. This serves not only to facilitate a review sufficient to satisfy appellate courts that all is proper in executive boards and agencies, but also to give citizens confidence that the process by which a dispute is being resolved is subject to logical, deductive reasoning and the decision, even if unfavorable, was arrived at by due deliberation on the issue.

A simple vote, without explanation, carries with it an overtone that the voter need not explain himself, that logic and reasoning are unnecessary, and the parties are somehow undeserving of a full and fair consideration of their grievance. This is not to suggest that is what happened here – indeed the vote may have come only after a great deal of thought. But the failure to articulate any rationale is fatal to this decision.

The vote of member Mamie Baynard at least articulates that she would exclude the $14,000 supervision fee but that the "other items should be counted towards it."

This reviewer is left without a clue as to what "other items" member Baynard is referring to or what the "it" is that these items should be counted towards.

In order to create an adequate record to allow for limited *certiorari* review,[7] there must be a fair statement of the Board's conclusions and the material facts supporting these conclusions.[8] This analysis requires an individual determination based on the record of each case.[9]

In *Drake v. Board of Parole*,[10] Judge Herlihy surveyed the Delaware case law regarding a lower tribunal's failure to adequately create a reviewable record.[11] The Court concluded that a record is insufficient if it fails to adequately support its findings with material facts or if it fails to provide reasons for its decision.[12] Mere conclusory statements will not permit the reviewing Court to conduct a meaningful *certiorari* review.[13]

The Court is not inclined to reject the hard work done by the Board below in hearing substantial testimony on such a modest claim. The Court is confident the

[7] *Reise v. Bd. Of Bldg. Appeals of the City of Newark*, 746 A.2d 271, 274 (Del. 2000).

[8] *395 Assocs.*, 2006 WL 2021623, at *5.

[9] *Drake v. Bd. of Parole*, CIV.A. 10A-09-015JOH, 2011 WL 5299666, at *3 (Del. Super. Ct. Oct. 25, 2011).

[10] *Id.*

[11] *Id.* at *3-4.

[12] *Id.*

[13] *Id.* at *4.

Board was operating in good faith and with an unbiased hand in weighing the evidence. But in light of the absence of a reviewable record, the Court is constrained to reverse this matter and remand it to the Board for further proceedings consistent with this opinion. The Court expresses again that it has no opinion what the contract valuation should be, what inspections should be ordered, or who presented the better case below. *Certiorari* review would not permit such an inquiry. But it does require some limited review of the record below, a review that is impossible given the scant basis for the decision articulated by the Board.

V. CONCLUSION

For the reasons set forth above, the Board's decision is **REVERSED** and **REMANDED**.

IT IS SO ORDERED.

/s/ Charles E. Butler
Charles E. Butler, Judge

Original to Prothonotary