

CLIENT SUCCESS

Third Circuit Affirms Kilpatrick's Recovery of CASPA Penalties and Attorneys' Fees Award in *C.J. Hughes v. EQM*

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Kilpatrick attorneys secured a significant decision for contractors and subcontractors performing work in Pennsylvania. The Third Circuit Court of Appeals affirmed District Court Judge William S. Stickman's award of penalties, attorneys' fees, and expenses under the Pennsylvania Contractor and Subcontractor Payment Act (CASPA) to C.J. Hughes Construction Company. The case arose from a dispute over payment owed to C.J. Hughes for its work constructing segments of a natural gas pipeline.

In issuing its ruling, the Third Circuit offered greater clarity on the scope and application of CASPA. The Third Circuit confirmed CASPA does not contain a formal invoicing requirement, its attorney's fees provision does not require a showing that the non-prevailing party lacked good faith in its failure to pay amounts due, and the penalty provision in the pre-amendment version of CASPA is not waivable.

What is the Pennsylvania Contractor and Subcontractor Payment Act (CASPA)?

CASPA was enacted to ensure prompt payment to contractors and subcontractors for construction projects within the state of Pennsylvania. CASPA applies to all construction contracts with limited exceptions, providing a framework for payment terms, invoicing, and the resolution of payment disputes.

CASPA facilitates prompt payment by requiring that contractors and subcontractors be paid in accordance with the terms of their contracts, or, if the contract does not specify, within a set statutory timeframe. To accomplish its goal of getting contractors paid, CASPA:

- **Prescribes Penalties for Non-Payment:** If a party wrongfully withholds payment, CASPA imposes a penalty of 1% per month of the amount withheld upon the party refusing to pay.
- **Provides Attorneys' Fees to the Party the Successfully Collects:** CASPA provides that the substantially prevailing party in any proceeding to recover payment under CASPA is entitled to reasonable attorneys' fees and expenses.

While parties to a construction contract have great latitude in defining the terms of their relationship, CASPA prohibits the waiver of certain of its provisions by contract, ensuring that its protections cannot be contractually circumvented.

Case Background

Plaintiff C.J. Hughes is a West Virginia corporation offering various construction services, including the construction of natural gas pipelines. Defendant EQM Gathering OPCO, LLC (EQM) is in the business of constructing natural gas pipelines. In 2015, EQM solicited bids for the construction of the MAKO pipeline, awarding contracts for Segments A and D to C.J. Hughes. Over the course of the project, C.J. Hughes was required to install more pipeline components (fittings) on Segments A and D than EQM had represented would be required. Additionally, C.J. Hughes had to perform additional and unanticipated welding because the average length of pipe joints that were furnished and delivered by EQM were shorter than agreed upon in the contract, requiring more welds to connect the joints.

Following the completion of the pipeline, C.J. Hughes sought payment for the additional welds and fittings. EQM refused to pay. C.J. Hughes filed suit, bringing claims for breach of contract and for interest, a penalty, and attorneys' fees and expenses under CASPA.

A jury trial held between October 25 and November 9, 2021, resulted in a verdict favoring C.J. Hughes, awarding over \$5.8 million. EQM filed a Motion for Judgment as a Matter of Law or for a New Trial which was denied. The District Court further awarded \$3,867,227.40 as a CASPA penalty on November 16, 2022, plus prejudgment interest and attorneys' fees and expenses under CASPA for a total judgment of \$13,319,075.86. The judgment also provided that the penalty and post-judgment interest would continue to accrue until C.J. Hughes was paid.

The Third Circuit Court of Appeals affirmed the District Court's interpretation of CASPA. In so doing, the Third Circuit clarified the scope and application of CASPA.

CASPA Does Not Contain a Formal Invoicing Requirement

EQM argued on appeal that CASPA is limited solely to amounts withheld against formal invoices. EQM claimed C.J. Hughes is not entitled to CASPA's penalty and attorneys' fees remedies because its claims for the additional welding and fittings were not invoiced.

C.J. Hughes responded first by pointing out that it had submitted invoices for its work. CASPA contains no definition of the term "invoice," and C.J. Hughes had submitted requests for payment that would fall within the definition of term "invoice" as defined by its everyday meaning. More importantly, C.J. Hughes argued that the statute entitles a contractor to submit invoices and dictates what an owner must do when it receives an invoice, but nowhere in the plain text of CASPA is its application limited to amounts included on an invoice.

The Third Circuit agreed with the District Court and C.J. Hughes in holding that CASPA is not limited to amounts included on an invoice. Instead, the Court held CASPA is contingent upon whether payment is being sought for work that was within a contract's scope, "an assessment that depends on the terms of the contract, not the issuance of an invoice."

CASPA's Attorneys' Fees Provision Does Not Contain a "Good-Faith Requirement"

The District Court awarded C.J. Hughes its attorneys' fees pursuant to the attorneys' fees provision of CASPA. The attorneys' fees provision in CASPA provides that, "[n]otwithstanding any agreement to the contrary, the substantially prevailing party in any proceeding to recover any payment under this act shall be awarded a reasonable attorney fee in an amount to be determined by the court or arbitrator, together with expenses." 73 P.S. § 512(b). EQM argued that C.J. Hughes could not recover attorneys' fees because it was not the "substantially prevailing party," alleging C.J. Hughes had not proven that EQM lacked good faith when it withheld payment.

EQM based its lack of good faith argument on the Pennsylvania Superior Court's decision in *Zimmerman v. Harrisburg Fudd I, L.P.*, 984 A.2d 497 (Pa. Super. 2009). In *Zimmerman*, which cites a decision of the Eastern District of Pennsylvania (which itself cites a decision of the Third Circuit), the Pennsylvania Superior Court stated that "to qualify as a substantially prevailing party, the subcontractor [] needed, not only to recover on its claim, but also to prove the contractor, *without good faith reason*, failed to comply with CASPA's mandate of prompt payment." *Id.* at 503 (emphasis added). Based on this language, EQM argued CASPA requires a party to affirmatively prove payment was withheld "without good faith reason" to recover attorneys' fees.

In response, C.J. Hughes pointed to the plain text of Section 512(b), noting that any language related to "good faith" is absent from its text. Thus, the statute does not contain a "good faith requirement," and the Pennsylvania Superior Court in *Zimmerman* incorrectly interpreted CASPA. C.J. Hughes also cited to another, more recent, opinion of the Pennsylvania Superior Court in support: *Waller Corp. v. Warren Plaza, Inc.*, 95 A.3d 313, 319 (Pa. Super. 2014).

In *Waller Corp.*, the Pennsylvania Superior Court revisited 73 P.S. 512(b) and its holding in *Zimmerman*. The Court in *Waller Corp.* held that Section 512(b), by its plain text, does not contain a "good faith requirement." The Court concluded that the *Zimmerman* Court had misinterpreted the Eastern District of Pennsylvania and Third Circuit cases upon which it relied. This misinterpretation led the *Zimmerman* court to the erroneous conclusion that a claimant must affirmatively prove a lack of good faith to recover attorneys' fees under CASPA.

Thus, there are competing opinions from the Pennsylvania Superior Court. A federal court sitting in diversity must apply the substantive law of the state as interpreted by the state's highest court. Where a state's highest court has not ruled on an issue, federal courts ruling on issues of state law must try to predict how a state's highest court would decide the issue. To date, the Supreme Court of Pennsylvania has not addressed the interpretation of Section 512(b), so, both the District Court and Court of Appeals had to predict how the Supreme Court of Pennsylvania would decide the issue.

The District Court held that the court in *Waller Corp.* was correct to revisit its prior holding in *Zimmerman*, and that Section 512(b) does not contain a good faith requirement. The District Court went on to say it would "apply the holding of *Waller* as an enunciation of Pennsylvania law." *Id.* The Third Circuit came to same conclusion, predicting after review of the conflicting decisions that the Pennsylvania Supreme Court would follow *Waller* over *Zimmerman* because the plain text of the attorney fees provision provides no good-faith exception and because the Court found that *Zimmerman* appears to misconstrue the caselaw on which it relies. So, although the Supreme Court of Pennsylvania has not weighed in on the question, the Third Circuit has held that a party seeking recovery of attorneys' fees is not required to show the withholding party withheld payment without good faith reason.

The CASPA Penalty Provision in Effect at the Time of the Contract was Not Contractually Waivable

The Third Circuit also clarified that under the pre-amended (pre-2018) version of CASPA, parties cannot contractually waive the penalties provision.

The Parties entered into their agreement in 2016. The contract contained a provision whereby the Parties agreed to waive the application of CASPA "[t]o the extent permitted by law." In the 2016 version of CASPA, the interest provision expressly stated that parties could contract around it, while the attorney fees provision provided it applied regardless of what the parties might agree to. However, the penalty provision did not contain language clarifying if it could or could not be waived. EQM contended the penalty provision was waivable and had been waived because the contract waived CASPA to the fullest extent permitted by law. EQM also argued that a 2018 amendment to CASPA, which now provides that waiver of any provision of CASPA is prohibited unless waiver of one of its provisions was specifically authorized by the statute, is evidence that the penalty provision could be waived prior to the amendment.

C.J. Hughes argued that the penalty provision's silence does not mean it could be waived and that allowing the central provision of CASPA to be contractually waived would defeat the purpose of CASPA. C.J. Hughes cited the Pennsylvania Superior Court's decision in *John B. Conomos, Inc. v. Sun Co.* (R&M), 831 A.2d 696 (Pa. Super. 2003), where the Pennsylvania Superior Court expressly held that the penalties provision of CASPA could not be waived. C.J. Hughes also argued that the 2018 amendment to CASPA did not establish that the amendment was a change to the law, as amendments may be enacted to clarify existing law, to correct misinterpretations, or to overrule wrongly decided cases.

While the District Court and Court of Appeals were again in the position of predicting how the Supreme Court of Pennsylvania would decide this question, here, *Conomos* is the sole court case on the issue. EQM argued *Conomos* should be disregarded because of supposed flaws in its rationale and because it was a panel decision. The District Court held that *Conomos* was the best prediction of how the Supreme Court of Pennsylvania would decide the issue. Further, the District Court noted that *Conomos* is binding on Pennsylvania's trial courts, had been binding for the 15 years prior, and was the law of the state when the Parties contracted.

While the case was pending on appeal, another case from the Pennsylvania Superior Court, *E. Allen Reeves, Inc. v. Old York, LLC*, 293 A.3d 284, 294 (Pa. Super. 2023), affirmed *Conomos* and its holding that the penalties provision is not waivable. In making its arguments to the Third Circuit, C.J. Hughes relied on both *Conomos* and *Old York*. The Third Circuit recognized the Pennsylvania Superior Court's decisions in *Conomos* and *Old York* and concluded there is no persuasive reason to disregard them. The penalty provision is not waivable in the pre-2018 version of CASPA.

Other Arguments on Appeal

In addition to the CASPA arguments raised on appeal, EQM also raised various arguments concerning the jury's findings on the timing of the accrual of C.J. Hughes's claims. The Third Circuit affirmed the District Court's denial of EQM's Motion for Judgment as a Matter of Law or for a New Trial because EQM failed to carry its burden to prevail on its affirmative limitations defense. EQM also sought certification of certain questions related to its CASPA arguments to the Pennsylvania Supreme Court. The Third Circuit denied EQM's request, finding that none of the factors that support certification are present.

Conclusion

The Kilpatrick team was successful in defeating EQM's attacks on the judgment in favor of C.J. Hughes and in recovering the amounts owed to C.J. Hughes, including the amounts awarded by the jury, plus the CASPA penalty, pre- and post-judgment interest, and attorneys' fees. As a result, the Third Circuit and the Western District of Pennsylvania have clarified important questions about the interpretation of CASPA.