SCRIBBLES SQUIBS #46 (May 3, 2016)***

GC LOSES 7 FIGURE CLAIMS DUE TO FRAUDULENT WAGE CERTIFICATIONS

By Attorney Jonathan Sauer

I. INTRODUCTION.

With a title such as the above, one of the most important things that can be said about this case is that although some state and some federal monies were involved with the project at issue, this case is *not* a prevailing wage case and it was not decided with reference to MGL C. 149, s. 26 and 27 – Massachusetts' prevailing wage statutes. More on this later.

A general contractor had a variety of claims against a state agency. They totaled about fourteen million dollars, a sizeable amount of money. The general contractor had submitted a number of 'Certifications' accompanying its requisitions – a contractually-required form - indicating that a variety of subcontractors had been properly paid to date when, in fact, they had not been so paid. But, by the time this case became ripe for decision as to the general contractor's claims, the subcontractors were fully paid.

The defendant state agency didn't want to pay for *any* of the fourteen million dollars, claiming that in making the false certifications as to the payment of subcontractors, the general contractor materially breached the contract. And, that under Massachusetts law, a party which materially breaches a contract is not entitled to *any* recovery whatsoever under that contract.

The case was before the court on the Defendant's motion for summary judgment, a pretrial procedure where one party tries to end the case before trial by alleging that 'there is no general issue of material fact and it is entitled to a judgment as a matter of law.' (**ED.** Our experience has been that these motions are rarely granted in construction cases as, theoretically, all that an opposing party has to do is to introduce into evidence *one* material fact issue and the court is supposed to deny the motion.)

The name of the case is G4S Technology LLC v. Massachusetts Technology Park Corporation, a decision dated March 29, 2016. If anyone would like a copy of the decision, send us an email and we'll send it along.

II. THE FACTS AND DECISION.

For a design-build project, the Plaintiff general contractor was to design and construct a fiber optic network in western Massachusetts, a state project with some federal funding.

In this suit, the general contractor had claims of in excess of fourteen million dollars. The Defendant state agency counterclaimed for more than the amount of money retained and also asserted a claim under C. 93A for multiple damages and unfair and deceptive trade practices.

The case came before the Court on Defendant's motion for summary judgment, which argued that the Plaintiff was not entitled to be paid for anything on its claims because it intentionally breached its own contractual obligations.

The Court found that because of federal requirements, the following paragraph was included in the general contract:

> "Design Builder will pay Design Consultants and Subcontractors, in accordance with its contractual obligations to such parties and subject to any provisions of such contracts regarding the withholding of sums from any subcontractor or design consultants for their non-compliance with or non-performance of their contracts, all the amounts Design-Builder has received from Owner on account of their work."

As a contract requirement, the general contractor had to include with its requisitions a payment certification which included the following language:

> "all subcontractors, suppliers and equipment providers of the undersigned have been paid in full all amounts due to them up to the date of this Certification, and that sums received in payment for the Amount Requested shall be used to forthwith pay in full all amounts due to such subcontractors, suppliers and equipment providers up to the date hereof."

The Contract also included provisions stating that the general contractor had to comply with all applicable state and federal laws, including both state and federal False Claims Acts. The federal False Claims Act makes it unlawful to knowingly make a false statement in order to get a claim for payment approved where the federal government provides some portion of that reimbursement.

As the Project progressed, the general contractor submitted numerous requisitions accompanied by the above-referenced Certifications. In each of these submissions, the general contractor certified that all of its subcontractors had been paid the amounts due them at the time the Certifications were executed. The Court said: "It is undisputed that this was not true." And, the Court said that the record for summary judgment shows that the general contractor knew at the time that these Certifications were submitted that this conduct was in violation of the

Contract. And, that 'This was not limited to a handful of occasions but was repeated and continuous conduct that spanned more than a year."

There was evidence of this through deposition testimony and through emails. There was evidence that payments were held up until after the general contractor's quarterly financial statements came out, apparently to demonstrate greater cash on hand than would otherwise be the case. A general contractor project manager said in an internal email: "How can we tell subs that they aren't getting paid so our books look better? There's something wrong with that." One subcontractor had past due invoices of $358,275. Various subcontractors threatened to pull off the job for non-payment. A general contractor contract manager told one subcontractor in December of 2013 as to its outstanding invoices that "all subcontract payments are on hold until after the first of the year." The Court recited the evidence "that G4S repeatedly withheld past due payments from at least some of its subcontractors at the same time that it sent Certifications to MTPC representing and warranting that these same subcontractors had been paid all amounts due them."

Issues as to claimed delays and disruptions as between the general contractor and the owner arose, with the owner withholding monies because of them, which led to this suit's being filed in September of 2014.

The owner contended in the summary judgment filing that because of the undisputed evidence that the general contractor intentionally failed to perform its contractual obligations, it was not entitled to recover its contract claims at all. In response, the general contractor said that to preclude it from pursuing its multimillion dollar claims would be grossly disproportionate to the harm that flowed from its failure to pay subcontractors and would be manifestly unfair. It claimed that its various breaches were "*de minimus"* (**ED**. minor, minimal).

The Court said: "After a careful examination of the applicable law, this Court concludes that G4S is indeed prevented from seeking recovery on its own claims as a consequence of its intentional breaches of the Contract." It recited various case holdings that said a party suing on a contract "cannot recover on the contract itself without showing complete and strict performance of all its terms." It further said: "An intentional departure from contractual requirements is not consistent with good faith and will bar even a *quantum meruit* recovery unless the departure is *de minimis*." **(ED:** *quantum meruit* roughly translated from the Latin as meaning "what one has earned" or the "reasonable value of services")***

The Court referenced the fact that the Plaintiff was a publicly-traded company that "deliberately withheld these payments not for any legitimate reason but instead for the purpose of showing higher cash balances on its periodic financial statements."

The Court made these holdings even where G4S submitted (nearly identical) affidavits from six of the seven subcontractors involved which said that they "did not consider payments made after the expiration of the (period for payment) to be a breach of the Subcontract" **(ED.** Confucius is believed to have said something to the following effect: "When submitting important affidavits from subcontractors testifying to a certain factual issue in a hotly-contested

case between a general contractor and an owner in Massachusetts litigation, it is quite possible a court might reasonably infer that these are neither true evidence nor even legitimate affidavits when their wording makes one think that the subcontractors (or their lawyers) must have been able to literally read each other's minds or, quite possibly, the general contractor's mind.")****

One of the general contractor's best arguments was that this result should not obtain because any breaches of contract were cured by this point in the litigation because all of the subcontractors had been paid in full. The Court was not persuaded by this point saying:

> "That the subcontractors were eventually paid what they were owed, however, does not change the fact that G4S made inaccurate representations to MTPC in its Certifications. In order to cure <u>that</u> breach, G4S would have had to inform MTPC of the error at or near the time the statements were made, before MTPC was induced to make any payment. It did no such thing."

The Court felt that the general contractor's strongest argument was that this is not the kind of conduct that would support the very large forfeiture that would occur here, the right to collect millions of dollars from the Owner, which the general contractor contended were wrongfully withheld. But, in rejecting it, the Court referenced an oft-repeated principle of contract law:

"In the absence of special exculpating circumstances, an intentional departure from the precise requirements of the contract is not consistent with good faith in the endeavor fully to perform it, and unless such departure is so trifling as to fall within the *de minimis* rule, it bars all recovery."

The Court did not find that the general contractor's conduct was insignificant enough to satisfy that rule. As some of the monies were ARRA monies (the American Recovery and Reinvestment Act of 2009)*****, the Court referenced the purpose of that federal program as "intended to improve the lot of everyone hurt by the 2008 financial crisis, not just those at the top."

The case was to continue after this decision for the purposes of evaluating the Owner's claims against the general contractor.

III. DISCUSSION AND CONCLUSION.

Subcontractors and material suppliers would most likely say this is an appropriate decision. That the general contractor got what it deserved. That, possibly, a general contractor 'should not do the crime, if it cannot do the time.' General contractors might counter with a line from the famous Gilbert and Sullivan comic opera, Mikado: "Let the punishment fit the crime." And, in the grand scheme of things, assuming that the general contractor's claims for fourteen million dollars had merit, it's not right that the Owner should reap a windfall due to this one particular failing, which didn't cost the Owner *anything*.

For most general contractors, losing fourteen million dollars on one project will fatally impact not only its own business but its ability to pay subcontractors on other projects, which could fatally impact them, as well. Why should the subcontractors on other projects be hurt by a failing of the general contractor on *this* project? They didn't do anything wrong. Do two wrongs make a right?

Even though there was public money involved, this case was not decided on prevailing wage rate principles. Perhaps, for public works subcontractors and general contractors, that makes this holding all the more *scary*.

How so? It is more scary because adding prevailing wage rate principles into the mix would only make this type of result even tougher.

One starts with the possibility of real trouble with the state for prevailing wage violations as to public work. The following is a portion of MGL C. 149, s. 27C, which is applicable to public work:

> " (a)(1) Any employer, contractor or subcontractor, or any officer, agent, superintendent, foreman, or employee thereof, or staffing agency or work site employer who willfully violates any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H, 148, 148A, 148B or 159C or section 1A, 1B or 19 of chapter 151, shall be punished by a fine of not more than $25,000 or by imprisonment for not more than one year for a first offense, or by both such fine and imprisonment and for a subsequent willful offense a fine of not more than $50,000, or by imprisonment for not more than two years, or by both such fine and such imprisonment."

Now, in my own practice, I have never seen this happen. At the same time, this statutory provision is out there as a possibility for a sanction, along with several other potential sanctions. Open shop contractors seem to receive more intense scrutiny of their prevailing wage compliance from the state.****** Or, at least they *think* they do.

There are further sanctions for prevailing wage violations contained within other portions of this same statutory section:

> "(3) Any contractor or subcontractor convicted of willfully violating any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H or 148B shall, in addition to any criminal penalty imposed, be prohibited from contracting, directly or indirectly, with the

commonwealth or any of its agencies or political subdivisions for the construction of any public building or other public works, or from performing any work on the same as a contractor or subcontractor, for a period of five years from the date of such conviction."

And:

"Any contractor or subcontractor convicted of violating any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H or 148B shall, in addition to any criminal penalty imposed, be prohibited from contracting, directly or indirectly, with the commonwealth or any of its agencies, authorities or political subdivisions for the construction of any public building or other public works or from performing any work on the same as a contractor or subcontractor, for a period not to exceed six months from the date of such conviction for a first offense and up to three years from the date of conviction for subsequent offense."

Employees who have not actually received the prevailing wage rate can sue their employers and collect triple damages and actual attorneys' fees pursuant to MGL C. 149, s. 27:

"An employee claiming to be aggrieved by a violation of this section may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees."

Perhaps the scariest part of the above statutory section is the award of reasonable attorneys' fees. Those reading *Squibs* regularly know that, ordinarily, winners in civil litigation do not get collect their attorneys' fees in the Commonwealth of Massachusetts. (For those who didn't see this, see *Squibs* # 26: The Recovery of Attorneys' Fees in Massachusetts Litigation on our website.)

I say that this is the scariest part of this law because of what the numbers might look like. Say Joe Employee was shorted five thousand dollars on prevailing wages, a figure that is probably on the high side. So, he would get an award of triple damages or fifteen thousand dollars. True, a serious 'ouch'.

However, the reasonable attorneys' fees could be twenty-five thousand dollars or more. Massachusetts has a number of cases which have held, for example, that a successful subcontractor which pursues a claim against the general contractor's public payment bond can recover an amount of attorneys' fees in excess of the amount of the claim, sometimes in an amount that is a multiple of that award. Since the payment of prevailing wages represents public policy in Massachusetts, it's not hard to imagine that such an award is possible, even probably, in this type of case. So, now a five thousand dollar matter has sudden become a forty thousand dollar matter. If you have an attorney representing your company – a legal requirement as to corporations in Massachusetts - then adding his/her fee onto the triple damages and the employee's attorneys' fee turns a five thousand dollar matter into a case worth sixty-five thousand dollars. And, that's before we even start our discussion of interest and court costs. Scary enough?

And, one knows what the inevitable future description of many of your current employees is. That would be 'ex-employee'. 'Loyalty' under the best of circumstances is a quality that is often seldom to be found. And, he** hath no fury like an employee scorned. Or laid-off. Or fired.

Why I began writing *Squibs* some time ago – and ***Scribbles***, the magazine, for a period of twenty years before this - was because I believe that 'forewarned' is 'forearmed'. At Sauer & Sauer, we try to help our clients stay out of trouble rather than just dealing with the trouble when our clients are in the soup or, possibly, in something of a darker and more malodorous substance. Our slogan following each *Squib* is 'Knowledge is money in <u>your</u> pocket. It really is!'

Going back to the case under review, based on my understanding of contract law, the Court's decision was based on correct legal principles. Still, a Draconian result, at best.

It is hard to imagine that this decision will not go up on appeal at the appropriate time. When a final decision is reached, ***Scribbles*** will report on that.*******

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* A *'squib'* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a '*squib'* as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses." ** In case you have ever wondered if there actually is rhyme or reason as to the frequency of *Squibs,* we write these when we have some downtime or comparative downtime from the practice of law. Our principal job is as working lawyers and we work each and every day at assisting our contractor clients with the various problems they have to deal with.***Squib#*49 will consist of a comprehensive test of our readers' ability to read, write and *think* in Latin. Those with a grade of less than 90% will receive a visit for remedial purposes from one of my litigation associates, which would be either Rocco or Luigi. If it were *me*, I'd *really* study. ****Okay. It *is* true that Massachusetts, even as the earliest of the thirteen colonies, may not *actually* have had cases argued in its courts by Confucius. Some might cite, however, Biblical references to the effect that a rabbi's employment of *slight* factual exaggerations is an acceptable literary technique in order to teach a certain point. And, who am I to go against Biblical authority? Besides, maybe the subcontractors *could* read each others' minds or the general contractor's mind because they were related. Like twins. Or, like the Duggars. With that many kids who look alike, you just *know* that there have to be *some* twins in there *somewhere.****** This most likely from somewhere in the borrowed trillions, the repayment of which nary a single serious apparent thought has been given.******Perhaps, ironically, the only times I have actually participated in debarment procedures for failing to file certified payroll reports were with two union subcontractors. Fortunately, I was able to get both of them reinstated without even having to file litigation. ******* Those wearied by the litigation process might argue that there is no such thing under the law as a 'final decision'. Unfortunately, for many litigants, a 'final decision' is achieved when they can no longer afford to feed the meter. The statue of Lady Justice, hearkening back to various Egyptian and Greek deities, is most often depicted with a set of scales suspended from her left hand, upon which she (theoretically) balances the respective strengths and weaknesses of each party's claims and defenses in any particular case. Some might argue, however, that she has a blindfold over her eyes because in some cases she simply can't bear to look at what results from the process.

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