IN THE

Supreme Court of Virginia

RECORD NO. 111067

ENVIRONMENTAL STAFFING
ACQUISITION CORPORATION,

Appellant,

V.

B & R CONSTRUCTION MANAGEMENT, INC.,

Appellee.

BRIEF OF APPELLANT

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Assignments of Error

1. The trial court misinterpreted Virginia law by failing to hold that Va. Code § 2.2-4337 (B) requires that Environmental Staffing Acquisition Corporation is a third party beneficiary of the contract between PRHA and B & R Construction Management, Inc. (Transcript of May 7, 2010 hearing at p. 19, l. 17 through p. 21, l. 22 (J. A. pp. 129 through 131),[1] Objections to November 1, 2010 Order (J. A. p. 100) and Appellant's May 3, 2010 Response to B & R Demurrer (J. A. 70 through 76))
2. The trial court erred when it held that the provisions of the PRHA/B & R Construction Management contract requiring a payment bond did not make Environmental Staffing Acquisition Corporation an intended third party beneficiary. (Id.)
3. The trial court erred when it determined that language limiting third party action against PRHA or HUD precludes third party action against B & R Construction Management, Inc. (Id.)
4. The trial court erred when it sustained Appellee's Demurrer and dismissed Count III of the Amended Complaint.[2] (Id.)

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[1] References to the Joint Appendix will be made with the notation "J. A." followed by the appropriate page numbers.

[2] Appellant only seeks reversal of the Circuit Court's ruling regarding Count III of the Amended Complaint and concedes that the Circuit Court was correct regarding Count IV of the Amended Complaint.

Question Presented

Does Virginia's "Little Miller Act," Va. Code § 2.2-4337 (B), coupled with a contractual provision requiring a general contractor to provide a payment bond for the protection of subcontractors and suppliers to a construction project, make a supplier a third party beneficiary to the owner/general contractor contract?

Statement of the Nature of the Case

On August 31, 2009 Appellant Environmental Staffing Acquisition Corporation ("En-Staff") filed its Complaint seeking recovery under Va. Code § 2.2-4337 against Defendant/Appellee B & R Construction Management, Inc. ("B & R") and Defendant Genesis Capital Corporation ("Genesis").[3] Upon learning that Genesis was no longer in existence and that Genesis was not authorized to write bonds in the Commonwealth of Virginia, En-Staff filed its Amended Complaint on December 21, 2009 (J. A. pp. 4 through 63).

Appellee filed an Answer and Demurrer to the Amended Complaint with Memorandum in Support of Demurrer to the Counts III and IV of the Amended Complaint on May 7, 2010 (J. A. pp. 64 through 69 and 77 through

[3] The Amended Complaint also sought damages for breach of contract against defendant Beamon Enterprises, Inc. however this portion of the Complaint and subsequent Amended Complaint are not at issue in the present appeal.

82). Appellant filed its Response to Demurrer To Amended Complaint By B & R Construction Management, Inc. on May 4, 2010. (J. A. pp. 70 through 76))

After a hearing on May 7, 2010 during which the Court heard legal argument but took no evidence (J. A. pp. 110 through 134), the Circuit Court issued an Order & Opinion dated October 5, 2010 in which it granted B & R's Demurrer and dismissed Counts III and IV of the Amended Complaint (J. A. pp. 83 through 98). The Circuit Court then entered an interlocutory order implementing the October 5, 2010 rulings (J. A. pp. 99 through 101). After further proceedings, the Circuit Court entered a final order disposing of all remaining claims on March 14, 2011(J. A. pp. 102 through 104).[4] Appellant filed its Notice of Appeal on March 16, 2011(J. A. pp. 105 through 109).

This appeal follows.

[4] Genesis was held to be in default and judgment entered against it by orders dated May 7, 2010 and March 14, 2011. The parties did not include these Orders in the Joint Appendix because they have no bearing on this appeal.

Statement of Facts[5]

On or about March 25, 2009 B & R entered into a contract for the demolition of the Jeffry Wilson housing project in Portsmouth, VA (the "PRHA Contract"). (Exhibit 5 to the Amended Complaint; J. A. pp. 21 through 62). The PRHA Contract provides that "Contractor shall provide at a minimum. . . (b) performance and payment bonds in the full amount of the Contract lump Sum and remaining in place for the entire term of the agreement. . ." (Exhibit 5 to the Amended Complaint § 4; J. A. p. 25). On or about August 24, 2009, Appellant entered into an "Agreement for the Provision of Temporary Technical Personnel by Environmental Staffing" ("Staffing Agreement") with Beamon Enterprises, Inc. ("Beamon") (J. A. p. 5). The Appellant provided the required staffing pursuant to the Staffing Agreement but Beamon did not pay En-Staff in full (J. A. p. 5). Beamon breached the Staffing Agreement when it refused to pay En-Staff $199,680.42 for the provision of labor to the PRHA demolition project (J. A. pp 6 through 7).

Unfortunately for En-Staff, B & R chose to procure a payment bond from a company (Genesis) that was neither solvent nor authorized to do business in the Commonwealth of Virginia (J. A. pp. 8 through 10). The

[5] Because the Circuit Court dismissed the case upon a Demurrer, the facts will be taken from the Amended Complaint.

Appellee did so in direct violation of Va. Code §2.2-4337 et. seq. The Appellee chose to violate Virginia's "Little Miller Act" and breach the terms of the PRHA Contract despite the existence of an easily accessible list of bonding companies that would meet the criterion of the Virginia Code (Amended Complaint at ¶¶ 38 and 39, J. A. p. 7).

The Appellee's reckless failure to meet its contractual obligations left En-Staff without effective recourse under the Little Miller Act and effectively limited En-Staff's possible recovery except through exercise of its rights as a third party beneficiary to the PRHA Contract.

Argument

ENVIRONMENTAL STAFFING ACQUISITION CORPORATION IS A THIRD PARTY BENEFICIARY OF THE PRHA CONTRACT BECAUSE BOTH VIRGINIA'S "LITTLE MILLER ACT" AND THE PRHA CONTRACT EXPLICITLY REQUIRE SUCH A RESULT

Summary of Argument

This appeal presents a question of first impression to this Court. The appeal also provides the Court with an avenue to interpret Virginia's "Little Miller Act" in a manner that is both in line with the plain language of the statute and that gives proper "teeth" to the clear intent of the General Assembly to protect subcontractors and suppliers on Virginia owned

construction projects through the use of payment bonds. Va. Code § 2.2-4337(B).

"The essence of a third party beneficiary's claim is that others have agreed between themselves to bestow a benefit upon the third party but one of the parties to the agreement fails to uphold his portion of the bargain." Copenhaver v. Rogers, 238 Va. 361, 367, 384 S.E.2d 628, 634 (1989). "Like a party to an agreement, a third party beneficiary is entitled to enforce the terms of the agreement. . ." First Security Federal Savings Bank, Inc. v. McQuilken, 253 Va. 110, 114, 480 S.E.2d 485, 488 (1997); See, Va. Code §55-22. Furthermore, the third party need not be named in the agreement. Ogunde v. Prison Health Services, Inc, et. al., 274 Va. 55, 62-63, 645 S.E.2d 520, 525 (2007) (finding that all prisoners were third party beneficiaries of a health provider contract with the Virginia Department of Corrections); Aetna Cas. And Sur. Co. v. Fireguard Corp., 249 Va. 209, 215, 455 S.E.2d 229, 232 (1995).

In the present matter, the plain language of Virginia's "Little Miller Act" and the PRHA Contract unequivocally create a third party beneficiary relationship between B & R and its subcontractors and suppliers of which En-Staff is one. The Amended Complaint properly alleges that En-Staff was a proper third party beneficiary of the PRHA Contract. Therefore, based upon

statute, contract, and the facts alleged in the Amended Complaint, the Portsmouth Circuit Court erred when it determined that En-Staff is not a proper third party beneficiary to the PRHA Contract.

This Court must therefore reverse the Circuit Court's ruling found in its November 1, 2010 order and remand this case for further proceedings.

Standard of Review

The standard by which the Court must evaluate Appellee's Demurrer is well settled in Virginia:

> The purpose of a demurrer is to test the legal sufficiency of a pleading. A demurrer admits the truth of all properly pleaded material facts. All reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading.

Fuste v. Riverside Healthcare Ass'n, Inc., 265 Va. 127, 131-132, 575 S.E.2d 858, 861 (2003) (citations omitted); see also Caudill v. County of Dinwiddie, 259 Va. 785, 529 S.E.2d 313 (2000) (stating that the factual allegations in the Complaint are accepted as true in the face of a demurrer). Consequently, "the trial court is not permitted on demurrer to evaluate and decide the merits of the allegations set forth in a bill of complaint, but only may determine whether the factual allegations of the bill of complaint are sufficient to state a cause of action." Riverview Farm Assocs. Virginia Gen. P'ship v. Bd. of

Sup'rs of Charles City County, 259 Va. 419, 427, 528 S.E.2d 99, 103-104 (2000) (citations omitted).

As noted by this Court, "with increasing frequency, we are confronted with appeals of cases in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits." Renner v. Stafford, 245 Va. 351, 352, 429 S.E.2d 218, 219 (1993).

Furthermore, because the Court's review of the Circuit Court's decision sustaining Appellee's Demurrer addresses the same legal question presented to the Circuit Court, this Court should review the Circuit Court's judgment *de novo*.[6] Filak v. George, 267 Va. 612, 617-18, 594 S.E.2d 610, 613 (2004). This standard of review applies to all four assignments of error addressed herein.

Here, Appellant made sufficient allegations in its Amended Complaint to state a claim that it is an intended third party beneficiary of the PRHA Contract. Given the adequacy of Appellant's pleadings, this Court should not allow the Circuit Court to "short circuit" this litigation, but rather should permit the parties to proceed on the merits of Appellant's claims.

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[6] This standard of review applies to all arguments of error encompassed in this Petition. Where a different or clarified standard of review is necessary, Appellant will state the applicable standard.

The trial court misinterpreted Virginia law by failing to hold that Va. Code § 2.2-4337 (B) requires that Environmental Staffing Acquisition Corporation is a third party beneficiary of the contract between PRHA and B & R Construction Management, Inc.

The Plain Language of the Little Miller Act Requires Reversal of the Trial Court.

This Court must look to the plain language of the Little Miller Act, and no further, to determine the Act's meaning. Com. Office of Comptroller v. Barker, 275 Va. 529, 530, 659 S.E.2d 502, 504 (2008). Virginia's "Little Miller Act," Va. Code § 2.2-4337, requires that any general contractor provide a bond "*[f]or the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded*, or to any subcontractors, in furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance of the work." (emphasis added). The Little Miller Act also requires that "Each of the bonds shall be executed by one or more surety companies selected by the

contractor *that are authorized to do business in Virginia*." Va. Code §2.2-4337 (B) (emphasis added).[7]

In adopting this particular language, the Virginia General Assembly effectively imposed a contractual term between a public owner and its general contractor with the intent to confer a benefit upon the class of subcontractors and suppliers that provide labor and material to the construction and improvement of public construction projects.[8] Thomas Somerville Co. v. L.R. Broyhill, 200 Va. 358, 362, 105 S.E.2d 824, 828 (1958). As such, any parties to such a contract must be presumed to contemplate protection of the "downstream" subcontractors and suppliers when they enter into it regardless of whether the specific subcontractor or supplier is named in the contract between the owner and general contractor. Ogunde at 274 Va. at 62-63, 645 S.E.2d at 525.

Additionally, those acting in the Commonwealth of Virginia are presumed to know the statutory and legal framework under which they

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[7] The 2011 changes to Va. Code § 2.2-4337 were not in effect at the time of the breach of contract by B & R. In any event, these changes did nothing to change the plain language and intent of the Little Miller Act. In fact, the General Assembly made its intent to protect third party beneficiaries such as B & R more clear through its amendments.

[8] As argued below, even without such a statutorily imposed contractual term, the PRHA Contract itself explicitly contemplates the protection of subcontractors and suppliers by requiring a payment bond of the type described in the Little Miller Act.

operate. Macgruder v. Commonwealth, 275 Va. 283, 294, 657 S.E.2d 113, 124 (2008) (stating that everyone is presumed to know the law). As such, this Court can and should impute the knowledge of the requirements of the Virginia Code, specifically those found in Va. Code §2.2-4337(B), to the parties to the PRHA Contract, one of which was B & R.

Here, the Portsmouth Circuit Court misread the plain language of the Virginia Code when it determined that En-Staff was not an intended beneficiary of the Little Miller Act. Instead of reading and enforcing the plain language of the Little Miller Act (Va. Code § 2.2-4337)[9], the Circuit Court went out of its way to conjure up other less obvious and tenuous interpretations of the legislature's intent in passage of this plainly worded statute (J. A. pp. 89 through 91). In doing so, the Circuit Court ignored language used by the General Assembly that clearly required it to enforce the statutory rights of En-Staff as a third party beneficiary of the PRHA Contract.

Because the plain language of the Little Miller Act requires the conclusion that En-Staff is a third party beneficiary of the PRHA Contract, this Court must reverse the decision of the Circuit Court.

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[9] Language properly interpreted in sustaining the demurrer to Count IV of the Amended Complaint (JA p. 92)

The Clear Policy of the Little Miller Act Requires that this Court Reverse the Portsmouth Circuit Court.

Furthermore, should this Court affirm the decision of the Circuit Court this Court will thwart the General Assembly's clear intent in passing the Little Miller Act: namely, to provide protection for those that supply labor and materials to public construction projects. Absent the ability for those such as En-Staff to enforce this protection against those that refuse to comply with the Little Miller Act, those such as B & R who either intentionally refuse to meet the requirements of the Act or merely decide that a simple investigation is too much to ask will be left unpunished. Therefore, the Circuit Court's decision creates a perverse incentive *against* compliance with Virginia law that cannot stand.[10]

This perverse incentive will encourage those inclined to save money through the use of fly by night bonding companies to seek out those non-qualified and licensed bonding and insurance companies.[11] In doing so, these companies would leave subcontractors and suppliers like En-Staff out in the cold with no recourse against a worthless payment bond. Furthermore,

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[10] The Appellant was unable to explore the reasons for B & R's failure to procure a proper payment bond because the Portsmouth Circuit Court short circuited the discovery process through its incorrect holding and order.

[11] This desire to save money in such a manner will be even stronger given the economic pressures that the present economy places on Virginia contractors.

absent this Court's reversal of the Circuit Court, general contractors could do so without fear of financial repercussions.

Not only would such a decision by this Court incentivize negligent or willful failure to comply with the Little Miller Act, it would leave suppliers like En-Staff without effective recourse should a general contractor or other "downstream" subcontractor go out of business. The consequences of such a ruling could range from the inability to find qualified suppliers and subcontractors on public projects to rampant fraud relating to such projects because of the lack of enforcement of this key provision.[12]

This Court must reverse the Circuit Court's November 1, 2010 Order because of the potentially disastrous policy and procurement implications of the Circuit Court's failure to recognize that En-Staff is in fact a third party beneficiary of the PRHA Contract.

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[12] This nightmare scenario is made even more likely by the "low bid" rules for public procurement that require cost cutting by those providing services to the Commonwealth and its subdivisions.

The trial court erred when it held that the provisions of the PRHA/B & R Construction Management contract requiring a payment bond did not make Environmental Staffing Acquisition Corporation an intended third party beneficiary.

This Court must review the Circuit Court's interpretation of the PRHA Contract *de novo* and need not give any deference to the Circuit Court's interpretation of the PRHA Contract. Pocahontas Mining, LLC v. CNX Gas Co., LLC, 276 Va. 346, 352, 666 S.E.2d 527, 531 (2008).

Virginia Code §55-22 states as follows:

> [I]f a covenant or promise be made for the benefit, *in whole or in part*, of a person with whom it is not made, or with whom it is made jointly with others, such person, *whether named in the instrument or not*, may maintain in his own name any action thereon which he might maintain in case it had been made with him only and the consideration had moved from him to the party making such covenant or promise. (emphasis added).

Contracts are to be given their ordinary meaning in a manner that gives effect to their provisions. The Delmarva Power, LLC v. N.C.P. of Virginia, LLC, 263 Va. 116, 557 S.E.2d 199 (2002); Fireguard Corp., 249 Va. at 215, 455 S.E.2d at 232. As such, this Court should give full meaning to the unambiguous terms of the PRHA Contract.

As stated above, the PRHA Contract required B & R to provide a payment bond for the protection of those that provide labor and materials to the PRHA project. Clearly the parties to the PRHA contract, including B & R, entered into this provision while clearly considering the protection and benefit of those like En-Staff. While En-Staff is not specifically named in the PRHA Contract, it need not be mentioned by name to be considered a proper third party beneficiary. Va. Code §55-22; Ogunde, Id.

The Circuit Court's determination that this unambiguous language found in the PRHA contract was not included for the benefit of those like En-Staff "in whole or in part" (Va. Code §55-22) is clearly in error. The fact that the Circuit Court could come up with a theory as to why there is a payment bond requirement aside from the protection of subcontractors and suppliers is of no moment.[13] The Appellant need only show that the bond requirement was at least partially for its benefit. Ogunde, Id. One would be hard pressed to logically argue that a payment bond requirement in a construction contract

[13] The Court even cites to the lack of evidence of intent found in the Amended Complaint (J.A. p. 91). This statement, found in its October 5, 2010 Order clearly shows that the Court improperly short circuited the trial process when searching high and low for its reasons to sustain B & R's Demurrer.

such as the PRHA Contract was not in any way meant to protect those that supply labor and material to the project.[14]

Therefore the Circuit Court erred when it determined that the PRHA Contract did not contemplate En-Staff as a third party beneficiary and for this reason the Court should reverse the Circuit Court on this point and remand the matter for further proceedings.

The trial court erred when it determined that language limiting third party action against PRHA or HUD precludes third party action against B & R Construction Management, Inc.

The Circuit Court clearly erred when it determined that language found in Section 4 of the PRHA Contract and Section 2.4 of the Standard Addendum to that contract precludes an action *against B & R*. The plain unambiguous language quoted by the Circuit Court states as follows (with emphasis added):

[14] While En-Staff may not be the only third party beneficiary of the PRHA Contract, it is one of the third party beneficiaries. The fact that the Circuit Court could posit other secondary benefits of this contract clause does not change the nature of the relationship between En-Staff and the PRHA Contract.

> Nothing in the Contract Documents shall be deemed to create a joint venture or partnership between the PRHA and Developer and Contractor or any direct or indirect contractual relationship *between the PRHA and any of the contractors, subcontractors or subsubcontractors* nor shall anything contained in the Contract documents be deemed to give any third party any claim or right of action *against PRHA or HUD*; not shall anything in the Contract Documents be deemed to cause the Contractor to become the agent of PRHA or HUD. (Exhibit 5 to the Amended Complaint (J. A. p. 57))

As the above quoted language makes obvious, the limitation found in the PRHA Contract only applies to third party actions *against PRHA and HUD.* In the action before the Circuit Court, En-Staff sought damages against B & R, the general contractor for the PRHA project. As such, En-Staff was not seeking damages against any party listed in the above quoted provision. Had the parties to the PRHA Contract wished to preclude third party action against B & R, they would have included B & R in the limiting language. The parties' failure to do so unequivocally shows that they intended to exclude B & R from this ban on third party actions.

The Circuit Court's expansion of this language to encompass an action against a party not listed in this limiting language is clearly unwarranted because the Circuit Court ignored the language italicized above which limited

the bar against third party action to those actions against PRHA and HUD.[15] In doing so, the Circuit Court effectively rewrote this provision to include persons that were explicitly left out of the written language. This it cannot be allowed to do. Landmark HHH, LLC v. Gi Hwa Park, 277 Va. 50, 54, 671 S.E.2d 143, 147 (2009) (Reiterating the long standing rule in the Commonwealth of Virginia that a court will not add terms that the parties themselves did not include).

Therefore the Court should uphold its long standing rule of contractual construction and reverse the Circuit Court's holding that the PRHA Contract's limiting language precludes En-Staff's third party beneficiary claim. As such, the Court should reverse the Circuit Court's determination regarding Count III of the Amended Complaint and remand this matter for further proceedings.

The trial court erred when it sustained Appellee's Demurrer and dismissed Count III of the Amended Complaint.

For the reasons stated in a more detailed fashion above, the Circuit Court erred when it granted B & R's Demurrer as to Count III of the Amended Complaint because it misinterpreted both the PRHA Contract and Virginia

[15] The Appellant concedes, as it must, that it has no third party beneficiary claim against PRHA or HUD. However, such a claim was not before the Circuit Court and is not before this Court in the present appeal.

statute when it refused to allow En-Staff to proceed with its third party breach of contract action against Appellee B & R.

Because of this error on the part of the Portsmouth Circuit Court, this Court must reverse the holding encompassed in the November 1, 2010 Order and remand this case for further proceedings.

Conclusion

For the reasons stated herein, Appellant Environmental Staffing Acquisition Corporation requests that this Court reverse that part of the trial court's November 1, 2010 order sustaining B & R's Demurrer to Count III of the Amended Complaint, direct the Circuit Court to reinstate Count III of the Amended Complaint, and remand this matter to the Circuit Court for further proceedings relating to the third party breach of contract claim against B & R.

ENVIRONMENTAL STAFFING
ACQUISITION CORPORATION

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Certificate

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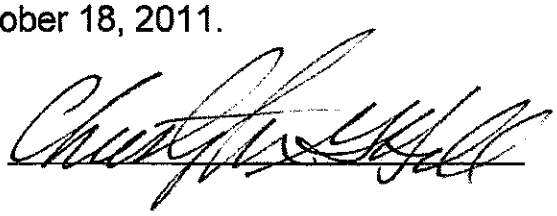
2. This Brief of Appellant complies with Rule 5:26 of the Rules of the Supreme Court of Virginia.

3. Counsel for Appellant wishes to present oral argument as to why the relief requested herein should be granted.

4. Counsel for Appellant certifies that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Opening Brief of Appellant, and one electronic copy (via CD) have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies, and one electronic copy, have been mailed postage prepaid to counsel of record identified above on October 18, 2011.