

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LOBAR, INC.,	:	NO. 02-02,299
Plaintiff	:	
	:	
vs.	:	
	:	CIVIL ACTION - LAW
LYCOMING MASONRY, INC.,	:	
Defendant	:	
	:	
vs.	:	
MURRAY ASSOCIATES ARCHITECTS,	:	
P.C.,	:	
Additional Defendant	:	Cross-motions for Summary Judgment

OPINION AND ORDER

Before the Court are cross-motions for summary judgment filed by Defendant on March 18, 2004, and by Plaintiff on April 13, 2004. Argument on the motions was heard July 8, 2004.

Plaintiff is a general contractor which, in the process of itself bidding on a job, obtained a bid for the masonry work from Defendant, a masonry subcontractor. Plaintiff used Defendant's number in calculating its own bid and upon being awarded the contract, informed Defendant it was choosing Defendant to perform the masonry work. Plaintiff sent a written sub-contract agreement to Defendant but Defendant refused to sign such. Plaintiff then rebid the masonry work and entered a subcontract agreement with another masonry subcontractor, at a much higher cost. Plaintiff brought the instant action to recover the difference in what it had to pay the other subcontractor over what Defendant bid to do the job, based on both a breach of contract claim and a claim of promissory estoppel.

In its motion for summary judgment, Defendant contends the facts support neither theory. Specifically, Defendant contends no contract was entered because the terms of the subcontract agreement sent to it by Plaintiff differed substantially from the terms of the bid, thus constituting a counter-offer, rather than an acceptance of the bid. With respect to the theory of promissory estoppel, which provides that a promise will be enforced where the

promisee reasonably relied on such and injustice can be avoided only by enforcement, Defendant contends Plaintiff cannot show reliance inasmuch as it rejected the offer (bid) by returning a counter-offer and, further, that the doctrine of promissory estoppel has been rejected by the courts in Pennsylvania in the context of contractor/subcontractor agreements. In its motion for summary judgment, Plaintiff contends that indeed a contract was formed and further, that promissory estoppel should be applied to support a judgment in its favor.

Although the issue presented by the facts of the instant case has never been directly addressed by the appellate courts of this Commonwealth, the Court believes application of the doctrine of promissory estoppel best serves the interests of justice while avoiding any legal gymnastics required to apply the traditional contract principles of offer and acceptance. The Court also believes this application is consistent with the precedent in this jurisdiction which skirts but does not directly address the issue.

The parties do agree that Defendant's bid was an offer. Plaintiff contends such offer was accepted by its use of Defendant's bid in submitting its own bid to the owner. Defendant contends, however, that since the subcontract agreement sent to it by Plaintiff contained terms substantially different from the terms of the bid, Plaintiff did not accept its offer but instead returned a counter-offer. Defendant is correct in its recitation of the general principle that an acceptance which differs materially from the offer is not an acceptance at all but instead a counter-offer. The problem with this analysis, however, is that it ignores the reality of industry custom: the bid is not, nor do the parties expect that it is, a complete offer, the simple yes or no acceptance of which forms the complete contract. The bid is simply an offer to perform a certain job with certain materials for a certain price. The details of performance, such as terms of payment, insurance and bonding requirements, consequences of breach, etc., are left to be included in the final agreement, which is not signed until after the general contractor has already committed itself to the owner.¹ While the use of the bid could be considered an acceptance of the terms of the bid, and a contract formed with respect to only those terms, that

¹ The evidence submitted by the parties in this case supports such a conclusion. Defendant and Plaintiff have entered into similar (as far as the details of performance) subcontract agreements in the past, with the expectation at the time of bidding that such written agreements would follow the bidding process.

leaves the details of performance to be negotiated separately, but the terms of performance cannot be meaningfully separated from the performance itself: should the parties fail to later agree on the terms of performance, the contract to perform is of little use to either. The general contractor has already committed itself at that point, however, based on that limited contract. The Court cannot help but conclude that traditional contract principles simply do not work in this situation.

The doctrine of promissory estoppel, on the other hand, appears to fit nicely into the general contractor/subcontractor bidding scenario.² When a general contractor relies on a subcontractor's bid in committing itself to an owner, considering that the subcontractor not only knew his bid might be used but actually wanted his bid to be used, the subcontractor should be held to answer to the general contractor for his refusal to follow through. Further, the doctrine allows the Court to examine the individual circumstances surrounding both the bidding process and the post-bid negotiations, to ensure the subcontractor's promise is enforced only where justice requires. Where the general contractor's reliance on the bid is not reasonable, enforcement is not necessary. When the general contractor is at fault in post-bid negotiations, the subcontractor's refusal to follow through may be excused.

Promissory estoppel also addresses the alleged incongruity Defendant points to in the fact that while a subcontractor is being required to honor its promise (bid) to the general contractor, the general contractor is under no obligation to award the subcontract to the subcontractor even where the general contractor relies on that bid in submitting its own bid to the owner.³ Under traditional contract principles, one would be hard pressed to explain how use of the bid by the general contractor could form a contract and yet that contract is not enforceable against the general contractor. Under promissory estoppel, the answer is simple: the subcontractor has not detrimentally relied on any promise of the general contractor and has incurred no liability to anyone by submitting a bid to the general contractor. No injustice is done, therefore, by not requiring the general contractor to award the job to the subcontractor.

² In fact, the doctrine has been applied to similar fact patterns in other jurisdictions: Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (Sup. Ct. 1958); B. A. Coronis Associates v. M. Gordon Construction Co., 216 A.2d 246 (N.J. Super. 1966).

³ The parties do not appear to dispute that this is so. In fact, Defendant repeatedly points out that on a prior occasion, Plaintiff did not award a subcontract to it even though Plaintiff had used its bid in obtaining a job.

As noted above, although the Pennsylvania Supreme Court has adopted the doctrine of promissory estoppel as recited in the Restatement (2d) of Contracts, Section 90, Murphy v. Burke, 311 A.2d 904 (Pa. 1973), no appellate court in the Commonwealth has applied it to the general contractor/subcontractor bidding process, and Defendant argues that the case of Hedden v. Lupinsky, 176 A.2d 406 (Pa. 1962), actually prevents this Court from doing so. Hedden also involved a subcontractor's refusal to sign a post-bid agreement proposed by the general contractor after being awarded a job based in part on the use of the subcontractor's bid. In finding in favor of the subcontractor, the Court therein stated: "[the general contractor's] contention that the doctrine of promissory estoppel applies here is without merit." Id. at 408. The Court believes Hedden is distinguishable, however, since the post-bid agreement proposed by the general contractor in that case differed materially from the actual specifications upon which the subcontractor relied in formulating its bid.⁴ Thus, the Court there could easily find the post-bid agreement to constitute a counter-offer rather than an acceptance with respect to the bid itself. Indeed, the Court opined "[u]nder the facts of this case, the question of [the subcontractor's] liability can be decided properly and finally on contractual principles of offer and acceptance." Id. (emphasis added). The Court does not believe Hedden forbids the application of promissory estoppel in the proper situation.⁵

Turning to the facts of the instant case, while rejecting Defendant's request for summary judgment, the Court finds it must also reject Plaintiff's request for summary judgment, as there remain issues of material fact. It is undisputed Plaintiff used Defendant's bid in submitting its bid to the owner, and the Court finds as a fact it "relied" on that bid, despite Defendant's argument to the contrary.⁶ It is also undisputed that Plaintiff's insistence

⁴ As noted above, in the instant case, the differences alleged by Defendant to make Plaintiff's acceptance actually a counter-offer lie in details of performance not contained in the bid itself. The sub-contract agreement made no changes to the specifications relied on in formulating the bid.

⁵ Indeed, it is quite probable that had the Hedden Court gone on to analyze the facts before it under a theory of promissory estoppel it would have reached the same conclusion. Promissory estoppel is to be applied to enforce a promise only where injustice cannot be avoided otherwise. Where a general contractor changes the terms upon which a subcontractor relied in formulating his bid, the general contractor should not be heard to complain when the subcontractor objects, as he has put the subcontractor in the very same position he seeks to escape: having made a promise to someone else based on another's promise to him.

⁶ Defendant's argument that Plaintiff cannot have relied on its bid because it rejected that bid misconstrues the facts. Plaintiff did not reject the bid: it informed Defendant it had used its bid and attempted to enter a subcontract agreement with Defendant, fully intending that Defendant perform the work according to its bid.

Defendant use a certain type of Concrete Masonry Units, much more expensive than the type Defendant hoped to use, played a large part in Defendant's refusal to follow through on its bid, and the Court finds as a fact that this insistence was actually the only reason.⁷ Further, there is no dispute the written specifications for the project upon which Defendant relied required the use of the more expensive type of Concrete Masonry Units, and Defendant was fully aware of this fact. On the other hand, Defendant claims the architect orally modified the specifications by approving the use of the less expensive type of units in a pre-bid meeting, and in fact has joined the architect as an additional defendant. Plaintiff claims the architect specifically did not approve use of the less expensive units. Defendant has also raised an issue of the reasonableness of Plaintiff's reliance on its bid, and the Court is unable at this point to draw a conclusion one way or the other. Therefore, although the contract claim may be disposed of summarily, the claim based on promissory estoppel must proceed to trial.⁸

ORDER

AND NOW, this 20th day of July 2004, for the foregoing reasons, Defendant's Motion for Summary Judgment is hereby granted with respect to Count I of Plaintiff's Complaint, and that count is hereby dismissed. The motion is denied as to Count II.

Plaintiff's Motion for Summary Judgment is hereby denied.

BY THE COURT,

Dudley N. Anderson, Judge

⁷ While Defendant contends in the instant litigation this was only one factor, arguing the differences in the terms of the subcontract agreement led to its refusal to perform, other circumstances belie this contention: Defendant has signed the same subcontract agreement more than once in the past, and, in fact, when Plaintiff re-bid the work in this particular matter, Defendant submitted a new bid knowing full well the same subcontract agreement would follow, yet never mentioned any disagreement with any of the terms of such.

⁸ Defendant has also moved to dismiss Plaintiff's claim for attorney's fees. Since the matter is proceeding to trial, the Court will defer ruling on this motion until the time of trial.

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