COMMONWEALTH OF PENNSYLVANIA

LEHIGH VALLEY BUILDING SYSTEMS, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF GENERAL SERVICES	:	DOCKET NO. 2050

OPINION

Lehigh Valley Building Systems, Inc. ("LVBS") filed a complaint on January 3, 1996, alleging breach of contract by defendant, Commonwealth of Pennsylvania, Department of General Services ("Department") and alleging damages of sixty-two thousand two hundred twenty dollars ($62,220.00) plus costs and interest. On February 13, 1996 the Department filed its answer with new matter. LVBS replied to the new matter on February 21, 1996.

Plaintiff and defendant have each filed a motion for judgment on the pleadings. Most facts in the complaint are not contested. The parties agree that plaintiff bid and was awarded a contract by defendant to construct a new gym roof at Eastern State School and Hospital. Plaintiff completed construction and defendant refused to pay any money due under the contract. Defendant argues that no money is due because of the set-off clause in Paragraph 63.38(B) of the contract (attached to the Complaint as Exhibit A). Defendant contends that this clause entitles it to withhold all monies it owes to LVBS because another Commonwealth agency, the Department of Labor and Industry, State Workmen's Insurance Fund ("SWIF"), has a pending claim exceeding $62,220.00 against LVBS in connection with an earlier dispute over workers' compensation insurance

premiums. Plaintiff contends that the language of the contract should be interpreted not to allow any set-off and the contract amount should be paid in full.

In considering the motions for judgment on the pleadings in this action, the Board must accept each non-moving party's pleadings as true. Judgment on the pleadings may only be granted where no material facts are in dispute and trial would be a fruitless exercise. Toner v. Nationwide Insurance Co., 415 Pa. Super. 617, 620, 610 A.2d 53, 55 (1992).

The only issue to be decided is an issue of law regarding the interpretation of the language in the contract's set-off clause. In order to determine whether or not the Department is liable to pay LVBS any money, the Board must determine whether LVBS has "contested on appeal" the money claimed by SWIF. The set-off clause contained in Paragraph 63.38(B) of the contract states:

> (B) The contractor, by execution of the contract certifies that it has no outstanding tax liability to Pennsylvania; authorizes the Department of Revenue to release information related to its tax liability to the Department of General Services; and, authorizes the Commonwealth to set off any State and local tax liabilities of the contractor or any of its subsidiaries, as well as any other amount due to the Commonwealth from the contractor, not being contested on appeal by the contractor, against any payment due to the contractor under a contract with the Commonwealth. (emphasis added) Contract p. 16, Exhibit A to the Complaint.

The single legal issue to be decided by the present motions is whether the prior dispute regarding insurance premiums between LVBS and SWIF ("SWIF Claim") qualifies as an exception to a set-off under the contract's terms. For the purpose of deciding a motion for judgment on the pleadings the Board can take judicial notice of the pleadings and orders on file in the SWIF Claim because they are public documents. Bykowski v. Chesed Co., 425 Pa. Super. 595, 625 A.2d 1256 (1993); Reese v. Moshanno Coal Co., 8 D&C 3d 743 (1977) aff'd per curiam 261 Pa. Super. 641, 396 A.2d 842 (1978).

On May 27, 1993, LVBS filed the SWIF Claim with this Board, Docket No. 1722, against the State Workmen's Insurance Fund. From July 15, 1990 through July 15, 1991, LVBS had maintained its workmen's compensation insurance with SWIF pursuant to the terms of an insurance contract. The SWIF Claim sets forth four causes of action including breach of contract, bad faith conduct, contract of adhesion and unconscionability.

SWIF filed preliminary objections to the complaint contending that the Board lacked jurisdiction and that LVBS must exhaust its administrative remedies by either filing an appeal with the Insurance Commissioner pursuant to 40 P.S. §814(b) or by filing a refund petition with the Board of Finance and Revenue pursuant to 72 P.S. §503. The Board denied the preliminary objections and held that it had jurisdiction. The SWIF Claim is still pending on this date.

The Department argues that Paragraph 63.38(B) of the contract means that LVBS has agreed to a set-off of the SWIF Claim amount against the $62,220.00 due under this contract. LVBS claims that the amount owed to SWIF is being vigorously contested because the matter is being litigated before the Board of Claims and a broad reading of the contract language "contested on appeal" would encompass the SWIF Claim. The Board must decide which interpretation is appropriate in the context of the contract. No definition is set forth in the contract document.

The Department's basic argument is that the money at issue can not be "contested on appeal" unless LVBS has moved the litigation against SWIF to an appellate court, more specifically the Commonwealth Court or the Supreme Court. To support its position, the Department cites the definition of "appeal" in Black's Law Dictionary:

> "[r]esort to a superior (i.e. appellate) court to review the decision of an inferior (i.e. trial) court or administrative agency. There are two stages of appeal in the federal and many state court systems: to wit, appeal from trial court to intermediate appellate court and then to Supreme Court. There may also be several levels of appeal within an administrative agency; e.g. appeal from decision of Administrative Law Judge to Appeals Council in social security case. In addition, an appeal may be taken from an administrative agency to a trial court. . ."

However, Webster's Ninth New Collegiate Dictionary, 1988 edition, is not cited by the Department and it states several meanings for the word "appeal":

> (1) a legal proceeding by which a case is brought from a lower to a higher court for rehearing; . . .
> (3) an application (as to a recognized authority) for corroboration, vindication or decision.

Under Webster's first definition the Department would prevail because the Board of Claims is not an appellate court "rehearing" a case denied by an agency, but has four entirely new causes of action before it. Under the third definition LVBS would win because in filing the SWIF Claim LVBS has applied to a recognized authority, the Board of Claims, for a decision on whether or not it owes any money to SWIF.

The second argument made by the Department is that the SWIF Claim is not an "appeal" because the litigation before the Board is not on appeal from a prior decision. The Department relies for its argument on the case of Commonwealth of Pennsylvania, Department of Public Welfare v. Divine Providence Hospital, 101 Pa. Commw. 248, 516 A.2d 82 (1986). It argues that the holding and language in the Divine mandate that the SWIF Claim can not be considered an "appeal" under Paragraph 63.38(B). We find no such holding or inference in Divine.

In Divine the Commonwealth Court held that the Board of Claims had jurisdiction over a breach of contract action involving a provider agreement. It recognized that appellant DPW had sole jurisdiction to establish appellate procedure for provider claims, but found that that did not prohibit the hospital from pursuing other causes of action, such as breach of contract, before other forums, such as the Board of Claims. Divine, supra, 516 A.2d at 85. Basically the Court explained that separate causes of action could be pleaded involving the same set of facts and therefore the hospital could have utilized different forums. It found that because of the differing causes of action, a breach of contract suit before this Board is not an appeal from a DPW determination.

However, the issue before us is the interpretation of contract language which was not at issue in Divine and so Divine is not dispositive of this case. The contract language before us states not that a particular cause of action must be appealed, rather it says that "any amount" claimed to be owed to the Commonwealth must be "contested on appeal". The amount claimed by SWIF at the agency level is definitely the same amount at issue in the SWIF Claim even thought the cause of action before the agency was different than the breach of contract action filed with the Board. Thus, Divine does not decide the issue before us.

If we look outside of the contract, there is some evidence to assist the Board with the interpretation of the set-off clause. The purpose of this clause in the contract is to assist the collection of its just debts and to protect the Commonwealth from paying out money to those who are already in its debt. The language in the clause makes an exception from the penalty of off-set for those who contest on appeal the amount claimed by the Commonwealth. The reason for the exception is that the state should not gain the unfair advantage of collection of an alleged debt if the debt is challenged and may not be owed. Therefore, it makes sense to interpret "contested on appeal" broadly to mean that LVBS must go before another forum to dispute the payment of the money claimed. It should not really matter which of the available forums it chooses.

In the earlier discussion of the history of the SWIF Claim we noted that there were at least three statutes which provided alternative procedures which could be used by plaintiff LVBS to contest the amount claimed by SWIF. First, under 40 P.S. §814 LVBS could take various steps if it disagreed with the decision of the Insurance Commissioner. If LVBS did not agree with the amount of the premiums, it could "obtain a review" under 40 P.S. §814(b) before the Commissioner.

Under 40 P.S. §814(c), that determination of the Commissioner "may be appealed" before the "assigning bureau". If still aggrieved, LVBS "may obtain further review thereof by filing an appeal with the Insurance Commissioner". After such a hearing, any order made by the Insurance Commissioner "shall be appealable to the Commonwealth Court". Thus, under this one statutory scheme, LVBS could contest a determination of premiums numerous times. Several of these reviews are specifically called "appeals" including two which occur before the claim even leaves the administrative agency level.

Two other avenues of review were also open to LVBS. Under Section 503(a) of the Fiscal Code, 72 P.S. §503(a), LVBS could have contested the premiums by filing a petition with the Board of Finance and Review. It could have then appealed that decision to the Commonwealth Court. Finally, LVBS could have and did contest the amount of premiums SWIF claimed by filing a breach of contract action with the Board of Claims pursuant to 72 P.S. §4651-4.

By pursuing any one of these available avenues of review, LVBS would demonstrate that was contesting the amount owed.[1] Since LVBS is legally entitled under these statutes to seek review in any of these forums, we find no logical reason why one type of review would qualify as an "appeal" under the terms of the set-off clause and another would not. LVBS has been vigorously litigating the SWIF claim before the Board for over three years. Would it be fair to interpret the contract to mean that filing an action with the Board of Claims does not come within the clause

[1]In its answer to the complaint, the Department even admits that for the purpose of paragraph 63.38(B), the amount claimed in the SWIF is contested by LVBS in Docket No. 1722 before this Board. Answer, Para. 27.

while a mere "appeal" to the Insurance Commissioner under 40 P.S. §814(c) would be considered sufficient to avoid set-off simply because the magic word "appeal" is used in the statute?

A plaintiff often has little control over the pace at which litigation proceeds from one level to the next. An appeal to the Commonwealth Court could take many years to occur in order to come within the defendant's definition of "contested on appeal". It is obvious from the language in the statute that before the matter ever leaves the agency level it could already qualify as an "appeal" under this set-off clause. From the context of the contract, the only meaning of "contested on appeal" which makes sense, is a broad meaning which would include any pursuit of further legal review of the amount claimed by the agency.

We also find that the "contested on appeal" language in the contract is ambiguous. Pennsylvania contract law states that in the event of an ambiguity the contract will be construed against the party responsible for the selection of the words used. Associated Discount Corp. v. Gresinger, 103 F.Supp. 705 (E.D. 1952); Burns Manufacturing Co., Inc. v. Boehm, 467 Pa. 307, 356 A.2d 763 (1976). In this case the sole drafter of the contract was the Department.

Another rule of contract law also dictates that we rule against the Department. It states that any provision of an agreement which is intended to diminish the legal rights which normally accrue as a result of a given legal relationship or transaction is strictly construed against the party seeking its protection. Galligan v. Arowitch, 421 Pa. 301, 219 A.2d 463 (1966). Here the Department sought to have LVBS give up its right to be paid for the work done under certain circumstances. Following Galligan, the Board finds there is an ambiguity regarding the right to set-off which must be strictly construed against the Department.

For the reasons set forth in this opinion, the Board grants the plaintiff's motion for judgment on the pleadings and denies defendant's motion. Plaintiff is awarded $62,220.00 plus 6% interest per annum from the date of filing and costs of $50.00.

ORDER

AND NOW, this day of upon consideration of the motion for judgment on the pleadings filed by plaintiff, Lehigh Valley Building Systems, Inc., and the motion for judgment on the pleadings filed by defendant, Commonwealth of Pennsylvania, Department of General Services, it is hereby **ORDERED** and **DECREED** that plaintiff's motion is **GRANTED** and defendant's motion is **DENIED**.

Further, it is **ORDERED** that plaintiff is **GRANTED** judgment against defendant in the amount of sixty-two thousand two hundred twenty dollars ($62,220.00) plus interest at six percent (6%) per annum from the date of filing and cost of fifty dollars ($50.00).

Upon receipt of said award, plaintiff shall forthwith file with the Board of Claims a praecipe requesting that the matter be marked settled, discontinued and ended with prejudice.

Each party to bear its own costs and attorneys' fees.

BOARD OF CLAIMS

December 23, 1996

_____

David C. Clipper
Chief Administrative Judge

_____

Louis G. O'Brien, P.E.
Engineer Member

_____

James W. Harris
Citizen Member