

COMMONWEALTH OF PENNSYLVANIA

SWANK ASSOCIATED COMPANIES, INC., : BEFORE THE BOARD OF CLAIMS
SWANK CONSTRUCTION COMPANY, LLC., :
SAFETY GROOVING & GRINDING, LP :
 :
 :
VS. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF TRANSPORTATION : DOCKET NO. 4146

OPINION

On June 24, 2016, the Plaintiffs Swank Associated Companies, Inc. (“SAC”), Swank Construction Company LLC (“SCC”), and Safety Grooving & Grinding, LP (“SGG”) (collectively “Swank”) filed a Statement of Claim (“Complaint”) against Pennsylvania Department of Transportation (“PennDOT”) alleging breach of contract. On July 22, 2016, PennDOT filed preliminary objections. On August 19, 2016, Swank filed a response opposing the preliminary objections. The matter is now ready for decision.

Factual and Procedural Background

On March 26, 2004, SAC and PennDOT entered into a contract for renovation project ECMS 21580 (the “Contract”). Cmp. ¶¶ 12-16, Ex. D. The Contract’s terms included Publication 408-Construction Specifications. Id. PennDOT designed and drew the plans for the project including the laying of rumble strips along Route 30. Id. SAC was the general contractor for the project, and it hired subcontractors to install the rumble strips. Id. Upon completion of the project, PennDOT conducted two final inspections for different sections of the work and issued an Acceptance Certificate to SAC on March 9, 2005. Cmpl. Ex. G.

On or about September 23, 2012, Dwight Scarborough and his wife filed tort claims against Swank, PennDOT and certain other defendants in the Court of Common Pleas of Dauphin County. Cmpl. Ex. B. In that litigation, the Scarboroughs allege, inter alia, that Swank negligently installed rumble strips during the road renovation project on Route 30 which caused Dr. Scarborough to be injured when he fell from his bike. Id. This tort action now resides in the Court of Common Pleas of Bedford County and, as yet, there has been no resolution of any of the Scarboroughs' claims.

As part of its response to the Scarboroughs' claims in the Bedford County case, Swank filed a cross-claim against PennDOT asserting that, under the terms of the Contract, PennDOT is obligated to defend and hold harmless Swank from the claims in that litigation. Cmpl. Ex. C. For this cross-claim, Swank relied on the terms stated in Section 110.08 of the Contract's Specifications, Publication 408 (2003 edition) which provide, in pertinent part:

110.08 FINAL INSPECTION, ACCEPTANCE, AND FINAL PAYMENT

(a) Final inspection.

...

The Contractor will be relieved of responsibility for further physical work, maintenance, and third party liability only for work items which are satisfactorily completed at the time of, or subsequent to, the final inspection.

Cmpl. Ex. E, § 110.08, p. 5.

PennDOT responded to the cross-claim in Bedford County by denying any liability to Swank. Cmpl. Ex. H.

On June 24, 2016, Swank filed its Complaint with the Board in which it alleges a single count of breach of contract and asks the Board to order PennDOT to defend Swank in the Scarborough litigation and hold it harmless. Cmpl. ¶¶ 24-27. With regard to this case before the Board, Swank alleges it sent PennDOT a letter on February 17, 2016, which it calls its

administrative claim pursuant to 62 Pa. C.S. § 1712.1(b). Cmpl. ¶ 5, Ex. A. In that letter, Swank states:

The underlying lawsuit with the Scarboroughs is ongoing. Therefore, the full value of Swank's claim against PennDOT is unknown. The value of this claim would include but not be limited to any award entered against Swank for monetary damages and the calculation of attorney's fees and expenses incurred to defend this case. Because Swank's damages have not yet been calculated, PennDOT may believe that Swank's claim has not yet accrued. However, PennDOT's obligations and Swank's rights under the contract are ascertainable and Swank's damages are on-going.

Cmpl. Ex. A, p. 2.

Swank states the PennDOT contracting officer did not issue a final determination of this administrative claim letter within 120 days of its receipt. Cmpl. ¶ 5.

PennDOT has filed preliminary objections to the Complaint on three grounds: 1) demurrer because the contract language does not support Swank's claim for indemnity; 2) no jurisdiction over the claims brought by SCC and SAG because these entities were not parties to any contract with PennDOT and the claims are barred by sovereign immunity; and 3) demurrer because SCC and SAG are not parties or third party beneficiaries to any contract with PennDOT and therefore they lack the capacity to sue for breach of contract. Swank opposes each preliminary objection.

Legal Standard

PennDOT has filed several preliminary objections. Although none allege a lack of subject matter jurisdiction, the Board has the power to raise the issue of jurisdiction *sua sponte*. Mazur v. Trinity Area School District, 961 A.2d 96 (Pa. 2008) (jurisdictional issues may be raised at any time by the parties or by the court *sua sponte*). When there is an issue regarding Board jurisdiction, it may be addressed during the preliminary objection phase by application of the law and, if necessary, by taking evidence to resolve any material issues of fact relevant to the challenge. Pa.

R.C.P. 1028(b)(2); see also Ferguson Elec. Co. v. Dep't of Gen. Servs., 3 A.3d 681, 688 (Pa. Cmwlth. 2010).

We have looked at the facts presented by the parties in the verified pleadings and exhibits on file. In the case before us, we consider these factors sufficient to determine that the Board lacks jurisdiction over this claim without the necessity of a fact hearing.

Discussion

The issue to be decided is whether the Board has jurisdiction over the claims presented in Swank's Complaint. The Board's jurisdiction is governed by the Procurement Code, 62 Pa. C.S. § 101 *et seq.*, particularly in 62 C.S. § 1724(a)(1) which provides;

- (a) **Exclusive jurisdiction.** – The board shall have exclusive jurisdiction to arbitrate claims arising from all the following:
 - (1) A contract entered into by a Commonwealth agency in accordance with this part and filed with the board in accordance with section 1712.1 (relating to contract controversies).

Section 1712.1 sets forth not only the pre-litigation procedure for resolving disputes between contractor and a Commonwealth agency, but also the prerequisites for the assertion of the Board's jurisdiction over said disputes. It states:

1712.1. Contract controversies

- (a) **Right to claim.**- A contractor may file a claim with the contracting officer in writing for controversies arising from a contract entered into by the Commonwealth.
- (b) **Filing of a claim.**- A claim shall be filed with the contracting officer within six months of the date the claim accrues. If a contractor fails to file a claim or files an untimely claim, the contractor is deemed to have waived its right to assert a claim in any forum. Untimely filed claims shall be disregarded by the contracting officer.
- (c) **Contents of claim.**- A claim shall state all grounds upon which the contractor asserts a controversy exists.
- (d) **Determination.**- The contracting officer shall review and issue a final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by the consent of the contracting

officer and the contractor. If the contracting officer fails to issue a final determination within the 120 days unless extended by consent of the parties, the claim shall be deemed denied. The determination of the contracting officer shall be the final order of the purchasing agency.

- (e) **Statement of claim.-** Within 15 days of the mailing date of a final determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the contractor may file a statement of claim with the board.
- (f) **Applicability.-** The provisions of 2 Pa. C.S. (relating to administrative law and procedure) shall not apply to this section.

62 Pa. C.S. §§ 1712.1(a)-(f). (Emphasis added).

Compliance by the contractor/claimant with each step is necessary in order for the Board to assert jurisdiction over the claim. 62 Pa. C.S. §§ 1724(a)(1) and (c). If the Board lacks jurisdiction, the Complaint must be dismissed. See Buchart Horn, Inc. v. Dep't of Transportation, 1 A.3d 960, 965 (Pa. Cmwlth. 2010).

It is clear that Section 1712.1(b) requires, as a prerequisite to filing a claim with the Board, that a contractor initially file an administrative claim with the agency's officer "within six months of the date the claim accrues." 62 Pa. C.S. § 1712.1(b) (emphasis added). However, it is equally clear that Section 1712.1 contemplates that said claim must first accrue for the requirements and procedures of Section 1712.1 to even come into play. In order for a claim to "accrue" and commence the initial six-month period for a contractor to file a claim with the agency's contracting officer under Section 1712.1(b), two things must occur according to the test set forth by the Pennsylvania Supreme Court. That test provides:

[A] claim accrues when 1) a claimant is first able to litigate his or her claim, e.g., when the amount due under the claim is known and the claimant is capable of preparing a concise and specific written statement detailing the injury, and 2) the claimant is affirmatively notified that he or she will be paid by the Commonwealth.

Darien Capital Management, Inc. v. Public School Employees' Retirement System, 700 A.2d 395, 397 (Pa. 1997) (emphasis in original).

Both prongs of the test must be satisfied for a claim to be considered to have accrued, and only then will the limitations period to file Swank's administrative claim commence. Wayne Knorr, Inc. v. Department of Transportation, 973 A.2d 1061, 1088 (Pa. Cmwlth. 2009); Ferguson Elec. Co. v. Dep't of Gen. Servs., 3 A.3d 681, 686 (Pa. Cmwlth. 2010).

In the case before us, the jurisdictional issue confronting the Board is whether or not Swank's claim for breach of contract¹ has been filed here prematurely as it appears Swank's claim has not yet accrued. In order to be within the Board's jurisdiction, Swank must follow the procedures dictated by 62 Pa. C.S. § 1712.1 once a claim has accrued per Darien. For accrual to occur under Darien, Swank must first be reasonably able to assess the amount of its damages. (Darien, Prong #1). Once this is known, Swank must then make a demand for payment of these damages from the agency. Only after the agency has affirmatively and unequivocally denied payment will Swank's claim accrue. (Darien, Prong #2). Swank then will have six months to file a timely administrative claim with the PennDOT contracting officer. See 62 Pa. C.S. § 1712.1(b).

In its Complaint, Swank makes no allegation that it ever submitted a claim for payment of any specific amount to PennDOT and/or that PennDOT denied such an initial claim for payment. To the contrary, by its own admission, the amount of Swank's indemnity claim against PennDOT is presently not known. Moreover, it has not even been determined whether or not Swank will be

¹ Swank alleges that the parties' Contract contains a provision which requires PennDOT to defend Swank and hold it harmless from all liability in the litigation brought by the Scarboroughs. Cmpl. ¶¶ 24-27. Swank bases this claim on the language in the Contract's Specifications which provides, in part, "[T]he Contractor will be relieved of ...third party liability..." Cmpl. Ex. E, § 110.08, p. 5. Section 110.08 of the Contract's Specifications does not use the terms "indemnify," "defend," or "hold harmless." It is questionable whether or not this Contract language actually affords Swank a right to indemnification from PennDOT, but there is clearly no mention of a responsibility to provide a defense at the early stage of the proceedings in the tort action. Additionally, we note that the Board can only award money damages and cannot order parties to perform any act, such as provide a defense. See e.g. Ezy Parks v. Larson, 451 A.2d 928, 934-935 (Pa. 1982); Emergency Medical Servs. Council v. Dep't of Health, 451 A.2d 206, 209 (Pa. 1982); Indiana Univ. of Pennsylvania of the State Sys. of higher Education v. Prince. Et al., B.O.C. Docket No. 4128 (Opinion and Order issued June 28, 2016); Lockheed Martin Corp. Integrated Systems & Solutions v. Com. of Pennsylvania, Pennsylvania State Police, B.O.C. Docket 3917 (Opinion and Order issued February 28, 2008).

held liable in the Scarborough litigation noted in its claim filed here. These conclusions derive, inter alia, from Swank's own pleadings, including its administrative claim letter dated February 17, 2016 in which Swank states that because the litigation with the Scarborougs is ongoing, "the full value of Swank's claim against PennDOT is unknown" and "Swank's damages have not yet been calculated." Cmpl. Ex. A, p. 2. Based on the facts before us, it appears that Swank is not anywhere close to being able to calculate its damages as they relate to the claim before the Board. Clearly, Swank's claim has not accrued. See Darien, 700 A.2d at 397.

Because we find that Swank's claim has not accrued, the Board lacks jurisdiction over Swank's current Complaint against PennDOT. Because the Board lacks jurisdiction over the claim at this point, we do not reach the other issues raised by PennDOT in its preliminary objections.

ORDER

AND NOW, this 7th day of September, 2016, upon consideration of the preliminary objections filed by Defendant and the response thereto filed by Plaintiff, it is **ORDERED** and **DECREED** that the current Statement of Claim is **DISMISSED** for lack of jurisdiction.

BOARD OF CLAIMS

ORDER SIGNED

Jeffrey F. Smith
Chief Administrative Judge