

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

SHENANDOAH STEEL CORPORATION	: JULY TERM, 2001
v.	: No. 4184
FLETCHER-HARLEE CORPORATION	: (Commerce Program)
SHENANDOAH STEEL CORPORATION	: DECEMBER TERM, 2002
v.	: No. 3268
SAFECO INSURANCE COMPANY OF AMERICA	: Superior Court Docket Nos. 2415EDA2005, 2570EDA2005

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OPINION

Albert W. Sheppard, Jr., J.October 24, 2005

This Opinion is submitted relative to the cross-appeals of this court's Order of August 4, 2005 denying Motions for Post-Trial Relief filed by both plaintiff and defendants.

This court respectfully submits that its Order should be affirmed.

BACKGROUND

This matter involved a hard-fought, three-day bench trial concerning two construction contracts in Chester County.

Shenandoah Steel Corporation (“Shenandoah”), a steel contractor, entered into contracts with Fletcher-Harlee Corporation (“Fletcher-Harlee”), the contractor, to provide labor, material and services for the construction of an elementary school (“Unionville Project”) and a Municipal Building (“Towamencin Project”). Shenandoah sued complaining of: (1) Fletcher-Harlee’s failure to pay undisputed amounts owed for the Towamencin Project (\$19,193.00) and (2) its failure to pay amounts due for the Unionville Project (\$286,590.00). Shenandoah also sued Safeco Insurance Company of America (“Safeco”) on the pertinent bond. The cases were consolidated and tried together with counsel for Fletcher-Harlee also representing Safeco.

As to the Towamencin Project, at the conclusion of Shenandoah’s required performance under the contract, Fletcher-Harlee owed Shenandoah 10% retainage in the amount of \$19,193.00 for labor, materials and services provided. However, Fletcher-Harlee refused to pay, arguing that under the terms of the Towamencin Contract it was entitled to off-set this retainage against amounts owed by Shenandoah to Fletcher-Harlee due to the disputes arising at the Unionville Project. Shenandoah urged that a set-off was not permissible under the Contractor and Subcontractor Payment Act, 73 P.S. §501, *et seq.* (the “Act”).¹

The major disagreements related to the Unionville Project. In June 2000, Shenandoah contracted with Fletcher-Harlee to provide labor, material and services for the Unionville Project. The Unionville Project was scheduled to be built on the critical path method and the terms and price of the Contract were based on Shenandoah providing the labor, material and services according to the initial proposed construction schedule. Pursuant to the contract schedule, Shenandoah was to begin delivering steel to the site on September 20, 2000 and

¹ The Towamencin Project dispute did not constitute the primary issue. The amount owed (\$19,193.00) was not in dispute. The issue was whether Fletcher-Harlee could use it as an off-set on the Unionville Project.

erection was to begin on September 21, 2000. Unfortunately, serious delays were encountered due primarily to shortcomings attributable to the owner and the construction manager, Reynolds Construction. Shenandoah was finally directed to begin providing labor to the Project on January 29, 2001. Because of the delays, additional erectors were being hired by Reynolds Construction and Fletcher-Harlee and their costs were back-charged against the Shenandoah Contract. The Project turned into a real mess for both Shenandoah and Fletcher-Harlee. Work was delayed and increased costs were incurred due to improper site preparation and poor weather conditions. Although the Project was delayed, Shenandoah was required to deliver steel based on the Contract schedule which resulted in structural steel being delivered prematurely and unloaded for storage away from the areas it was to be used. This required it to be moved a second time when needed. It also exposed it to snow and freezing rain which had to be removed when the steel was eventually used. These circumstances added to the costs incurred by Shenandoah.

As a result of mistakes by other contractors and of design problems with the Project, additional and unforeseen design and engineering expenses were experienced by both parties in this litigation. It is not necessary here to set out all the difficulties experienced on the job. Suffice it to say there were significant inefficiencies, scheduling problems and additional costs to both Shenandoah and Fletcher-Harlee.

On or about June 22, 2001, Fletcher-Harlee barred Shenandoah's sub-contractor ("Keystone") from continuing work on the steel erection at the Project. Fletcher-Harlee has cross-claimed for the additional manpower it contends it was required to hire to complete the steel erection.

Fletcher-Harlee argues that, although Shenandoah claims to have been affected by the owner-created problems on the Project, it also failed to properly man the job and failed to coordinate or supervise Keystone, its sub-contractor for steel erection. As a result of off-sets for back charge damages, Fletcher-Harlee argues that Shenandoah was overpaid by \$19,926.97.²

The issues raised at trial and in this court's decision turned on two major lines of inquiry: (1) the numerous cost components of the additional work visited upon Shenandoah due to the delays and the alleged counter-productive conduct of the owner, the construction manager (Reynolds), and Fletcher-Harlee, and (2) the validity of and costs associated with a large number of back-charges claimed by Fletcher-Harlee.

This court entered a finding for Shenandoah and against Fletcher-Harlee in the amount of \$153,927.00 in damages due Shenandoah **less** \$86,830.00 in back charges in favor of Fletcher-Harlee on the Unionville Project **plus** \$19,193.00, the undisputed amount due on the Towamencin Project.

Both sides filed for post-trial relief. After a careful review of the record and oral argument, this court denied both motions for Post-Trial Relief by Order dated August 3, 2005 (and docketed August 4, 2005).

Both parties have now appealed this Order.

² Fletcher-Harlee unsuccessfully prosecuted a claim against the Project owner on a variety of issues. In that matter, which was resolved by arbitration pursuant to the Fletcher-Harlee/Unionville Contract, Fletcher-Harlee sought disbursements of its retainage plus damages for delays. Unionville defended the claim, alleging that it was not responsible for any delays on the Project and that Fletcher-Harlee caused delays. Fletcher-Harlee maintained that the "Fletcher-Harlee caused delays" were a direct result of the actions or omissions of Shenandoah or its subcontractor. At arbitration Fletcher-Harlee received payment of only one-half of the retainage claimed. This poor result, says Fletcher-Harlee, was caused by the shortcomings of Shenandoah.

DISCUSSION

The court found this a very difficult case to decide. As a threshold matter, this court concluded that significant portions of the additional unexpected costs sustained by both Shenandoah and Fletcher-Harlee were attributable to problems caused by the owner and Reynolds, the construction manager.

Although the court denied a number of the charges claimed by Shenandoah (notably, Trailer costs - \$1,800.00; Additional Administrative Management - \$1,200.00; excess Site Visits - \$9,600.00 Winter Premium - \$12,500.00; and Time for Pre-Erection Delivery \$5,000.00), Shenandoah's major assignment of error pertains to the valuation the court ascribed to operative charge-backs.

So too, Fletcher-Harlee urges that this court committed error in that it undervalued the charge-backs by an amount of \$65,931.00 (approximate).

During the construction two additional steel erectors were brought on to the job by the owner/Reynolds - - Steffi - - and by Fletcher-Harlee - - Powell. The work done by Shenandoah, Steffi and Powell became muddled and overlapping in places. It was virtually impossible to discern exactly who did what and what charges should be allocated for which specific work.

In sum, this court allocated the costs in a manner it deemed fair and supported by the record.

For purposes of this appeal, this court also submits and relies upon its Memorandum Opinion, dated March 18, 2005, attached to this Opinion as Appendix "A".

CONCLUSION

For the reasons discussed this court believes that its Order should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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FINDING
MEMORANDUM OPINION

Albert W. Sheppard, Jr., J. March 18, 2005

AND NOW, this 18th day of March 2005, upon consideration of all matters of record and after a three-day bench trial and review of the trial exhibits and consideration of trial and post-trial submissions of counsel, this court finds for the plaintiff, Shenandoah Steel Corporation and against the defendants, Fletcher-Harlee Corporation and Safeco Insurance Company of America, as follows:

1. \$19,193.00 Towamencin Contract, and
 2. \$67,097.00 Unionville Contract,
- for a total amount of \$86,290.00.

APPENDIX “A”

This court acknowledges that it had considerable difficulty arriving at a fair value for the liability of defendants. A brief exposition of the court’s rationale is provided to give counsel and the parties a basis to evaluate the court’s decision.

As to Towamencin, the amount of \$19,193.00 was deemed to be undisputed. As to Unionville, the starting point was the schedule submitted by counsel for Shenandoah by letter dated February 11, 2005. The court accepted the following items of claimed damage:

Cost of Steel	\$ 300,000.	
Erection – as billed and actually done	\$ 115,000.	
Change Orders	\$ 14,729.	(Decking)
	\$ 10,405.	
	\$ 4,162.	(Keystone x-18, x-19, x-10, x-11, x-12)
Shenandoah labor	\$ 3,192.	
Costs pre-erection - - storage and delivery		
Subtotal (1)	<u>\$ 448,303.</u>	

The claimed damages rejected by the court were: Trailer costs (\$1,800.), Keystone bill re: pre-delivery time costs³ (\$5,000.), Winter premium (\$12,500.), Administrative costs excessive management needs (\$12,000.) and Excessive site visits (\$9,600.)

From the subtotal shown above the court deducted the payments from Fletcher in the amount of \$294,376. Thus,

	\$ 448,303.
	<u>\$ 294,376.</u>
Subtotal (2)	\$ 153,927.

³ The court accepts Fletcher’s position that this cost should be subsumed in the basic Contract.

Next, the court tried to discern the appropriate value for the claimed backcharges. The court accepted that value set forth in the letter brief from counsel for Fletcher relative to those backcharges imposed against Fletcher by the owner for Section “C” erection work in the amount of \$56,830. The proper value for backcharges attendant to the work of Powell is, in the court’s view, very difficult to ascertain. It is submitted that the amount claimed by defendant is too high. Unfortunately, the contractor coming in at the conclusion of the project can charge more than would normally be acceptable.⁴ The testimony did not help in determining how much work, specifically, was left to be accomplished. In reviewing the documents, the court accepted plaintiff’s exhibit P-31 to be instructive. There, Mr. Hallal valued the incompleting work at approximately \$30,000.

Thus, taking the \$56,830. plus \$30,000. as the backcharges results in:

	\$ 153,927.	
	\$ <u>86,830.</u>	backcharges
or	\$ 67,097.	due and owing on the Unionville Contract

The court acknowledges the argument made by plaintiff’s counsel for the imposition of interest (penalty) and counsel fees pursuant to the statute. The court after considerable reflection denies those claims; however, it does not do so lightly or in a cavalier way. Fletcher likely overreached when it held the Towamencin funds hostage. But, when viewing the situation as a whole and given this court’s view that both parties to this litigation may be thought of as having sustained losses at the end of the day, it is submitted that it would not be provident to order the payment of a statutory penalty and counsel fees.

⁴ The court believes that neither Fletcher nor Shenandoah were treated fairly by the parties up-stream when viewing the project as a whole. Unfortunately, this court has been confronted with this kind of unfair situation in other construction cases. It leaves the court with an unwelcome feeling of impotency, unable to do the right thing no matter how badly the court wants to.

The court compliments counsel on their preparation and presentations and thanks counsel for their courtesies.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.