

Third Circuit Rules on Pennsylvania Prompt Payment Act, Affirms Penalty Interest and Attorney's Fees

Pennsylvania's Contractor and Subcontractor Payment Act (CASPA)¹ governs downstream payment obligations on private construction contracts in Pennsylvania. CASPA provides downstream parties with various protections to better ensure prompt payment for completed work. Among these protections are a downstream entity's ability to recover default interest, penalty interest, attorney's fees, and expenses when upstream contractors and owners wrongfully withhold payment.

In an unreported case captioned *C.J. Hughes Construction Company, Inc. v. EQM Gathering OPCO, LLC*,² the United States Court of Appeals for the Third Circuit recently addressed issues related to the application of CASPA and predicted how the Pennsylvania Supreme Court would address a contractual waiver of CASPA's penalty interest and whether bad faith is required to award statutory attorney's fees. In 2015, EQM awarded construction contracts to C.J. Hughes to construct two segments of a pipeline. After the work was complete, EQM paid C.J. Hughes the base price under the contract, but C.J. Hughes submitted demands for additional compensation to cover the costs of work performed beyond EQM's original projections. EQM refused to pay. C.J. Hughes sued EQM for breach of contract and sought penalty interest and attorney's fees under CASPA. A jury found that C.J. Hughes was owed an additional \$5.8 million for its work, and the Court awarded C.J. Hughes penalty interest and attorney's fees under CASPA. EQM appealed to the Third Circuit. In affirming the trial court, the Third Circuit issued three key holdings:

1. CASPA claims do not require the issuance of an invoice;
2. CASPA's penalty interest cannot be waived by contract, even in contracts entered into before the most recent CASPA amendment in 2018; and
3. CASPA does not require bad faith withholding to trigger recovery of attorneys' fees.

CASPA Claims Do Not Require an Invoice

EQM first argued that CASPA did not apply because C.J. Hughes never submitted an invoice for the additional compensation it sought. The Third Circuit disagreed, finding that while CASPA provides for a default invoicing process, if a contract does not specify the timing for payments, whether a final invoice issues has no bearing on CASPA's application.

The Right to Penalty Interest Cannot be Waived by Contract

EQM next argued that even if the claims fell within the scope of CASPA, the parties' contract expressly waived the right to recover penalty interest under Section 512(d)(a) of CASPA, which permits recovery of an additional penalty interest of one percent per month for the amount that was wrongfully withheld if arbitration or litigation is commenced to recover the amount withheld. Although the 2018 amendment to CASPA expressly prohibits waiver of any provision whose waiver is not expressly authorized under the Act for contracts entered into before October 10, 2018, CASPA was silent regarding whether parties could waive liability for penalty interest.

To predict how the Pennsylvania Supreme Court would decide this issue, the Third Circuit looked to two Pennsylvania Superior Court decisions for guidance: *John B. Conomos, Inc. v. Sun Co. (R&M)*³ and *E. Allen Reeves, Inc. v. Old York, LLC*.⁴ The Third Circuit interpreted *Conomos* and *Old York*⁵ as holding that even prior to CASPA's 2018 amendment, when a CASPA provision was silent, waiver was not permitted. The Court reasoned that the result was consistent with CASPA's purpose of ensuring broad protection for contractors and subcontractors and encouraging fair dealing among parties to a construction contract. The result also confirms that the rules regarding



Kenneth A. Cushing

Member

kcushing@cozen.com
Phone: (215) 665-4190
Fax: (215) 665-2013



Christopher Josten

Associate

cjosten@cozen.com
Phone: (215) 665-4691
Fax: (215) 665-2013

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waiver of penalty interest are the same for construction contracts entered into both before and after the 2018 CASPA amendment.⁶

CASPA Does Not Require Bad Faith Withholding to Trigger Attorney's Fees

Lastly, EQM argued that a good faith requirement must be read into Section 512(b) of CASPA, which permits recovery of attorney's fees and expenses to the substantially prevailing party. After reviewing two Pennsylvania Superior Court decisions on the issue, the Third Circuit predicted that the Pennsylvania Supreme Court would find that the plain text of CASPA provides no good-faith exception to the attorney's fee provision. Thus, C.J. Hughes was not required to demonstrate that EQM withheld payment without a good faith reason to recover attorney's fees under CASPA. Rather, C.J. Hughes was entitled to the fees as long as it was deemed to be the substantially prevailing party.

¹ 73 P.S. § 501 *et seq.*

² 2024 WL 1652341 (3d Cir. Apr. 17, 2024)

³ 831 A.2d 696 (Pa. Super. 2003).

⁴ 293 A.3d 284 (Pa. Super. 2023).

⁵ The Third Circuit was careful to point out that while *Conomos* had been decided at the time C.J. Hughes and EQM entered into their contract, *Old York* had not. However, the Court considered *Old York* to affirm the result in *Conomos*.

⁶ One judge dissented from this portion of the opinion and predicted that the Pennsylvania Supreme Court would read the silence on waiver of penalty interest in the pre-2018 version of CASPA as evidence that the penalty interest could be waived.
