

SLDF ANALYSIS MEMORANDUM

TO: SLDF Task Force

FROM: Eric Travers, Esq.

DATE: August 15, 2019

RE: *Snake Steel, Inc. v. Holladay Construction, Inc.*, Case No. M2019-00322-COA-R3-CV, In the Court of Appeals of Tennessee, Middle District at Nashville.

I. DISPUTE BACKGROUND.

This case involves an appeal of a trial court grant of summary judgment dismissing a subcontractor's claim for relief under the Tennessee Prompt Pay Act (at T.C.A. § 66-34-602(a)(4)). The trial court concluded that the Subcontractor's claim was time barred after (1) applying the one-year statute of limitations applicable to actions for statutory penalties under Tennessee Code Annotated 28-3-104; and (2) finding that the subcontractor's claim accrued when it billed for the retainage more than a year before filing suit.

The subcontractor is appealing the trial court decision.

A. Facts.

1. *The Project and Parties*

The dispute arose out of a \$15 Million construction Project (the "Project") entered into between Holladay Construction, Inc. ("General Contractor") and 2200 Charlotte Avenue, LLC ("Owner") for a single and multi-family residential project known as the "Sheds on Charlotte" project (the "Project") in Nashville, Tennessee. General Contractor executed a subcontract (the "Subcontract") with Snake Steel, Inc. ("Subcontractor") to perform certain of the Project's structural and miscellaneous steel, including Project stairs (the "Subcontract").

Among other things, the Subcontract authorized the General Contractor to withhold 5% of the Subcontract Sum (the maximum allowed by Tennessee law) as retainage.

2. *The Dispute*

By September 30, 2014, Subcontractor had completed its work.

On October 24, 2014, the General Contractor paid Subcontract all amounts owed under the Subcontract *except* roughly \$32,000 in disputed change order work and \$18,270.58 in retainage.

Though Subcontractor did not know it at the time, in discovery after litigation was filed it was revealed that on May 27, 2015 the Owner paid the entire Subcontract retainage of \$18,270.58 to the General Contractor. General Contractor, however, neither passed that retainage through to Subcontractor nor deposited the retainage in an escrow account, as required by Tennessee law.

In February 2016, Subcontractor invoiced General Contractor asking for payment for its remaining Contract balance, including the still unpaid change order and retainage claims.

On September 25, 2017, the still unpaid Subcontractor filed a complaint against the General Contractor seeking recovery of claims for breach of contract and alleged violations of Tennessee's prompt pay act due to the failure to pay retainage.

In December 2017, after negotiations between the parties, the General Contractor tendered, and Subcontractor accepted, payment of the entire \$51,200.59 Subcontractor had billed for in February 2016 to settle up the claims for changes and retainage.

Subcontractor, however, did not dismiss its claims for relief under the Tennessee Prompt Pay Act, which included claims for interest, attorneys fees plus \$300 a day, which was a statutory penalty to be paid to a party owed retainage *from* the holder of the retainage if the retainage holder failed to open an escrow account for retainage at the time of the initial withholding.

3. The Law

Tennessee's Prompt Pay Act (the "PPA") is found at T.C.A. § 66-34-101 *et seq.* and covers all public and private projects for the improvement of real property where the total value of the prime contract is \$500,000 or more. Unlike some state prompt pay acts, Tennessee's PPA only addresses claims for retainage. In that regard it:

- Limits retainage to no more than 5% of the amount of the contract. T.C.A. § 66-34-103(a);
- Requires that prime contractors "shall" pay all retainage due "any subcontractor within ten (10) days after receipt of the retainages from the owner." T.C.A. § 66-34-103(b);
- Obligates the party holding retainage to, upon the withholding of any retainage, establish "a separate interest-bearing account with a third party" into which all retainage "shall" be deposited. T.C.A. § 66-34-104(a);
- Provides that "as of the time of withholding" of retained funds, the "*funds shall become the sole and separate property of the ... contractor to whom they are owed, subject to the rights of the person withholding the retainage in the event the ... contractor otherwise entitled to the funds defaults on or does not complete its contract.*" T.C.A. § 66-34-104(b);
- Makes the party withholding the retained funds liable to the owner of the funds (i.e., the subcontractor or supplier) for "*an additional three hundred dollar (\$300) penalty for each and every day that such retained funds are not deposited into such escrow account.*" T.C.A. § 66-34-104(c);

- Requires, upon satisfactory completion of the contract, that “all funds accumulated in the escrow account together with all interest on the account shall be paid immediately to the ... contractor to whom the funds and interest are owed.” T.C.A. § 66-34-104(d).

4. *The Decision and Appeal*

After both parties filed competing Motions for Summary Judgment, the trial court granted the General Contractor’s Motion and dismissed Subcontractors PPA claims, holding that:

- 1) The claim was time barred by the one-year statute of limitations applicable to claims for “statutory penalties” under Tennessee Code Annotated § 28-3-104; and
- 2) The Subcontractor’s claim accrued “at the latest” on February 16, 2016, the date the Subcontractor submitted its pay application for the entire retainage amount and more than 17 months before it filed suit on September 25, 2017.

In a supplemental opinion further explaining its decision, the trial court rejected the Subcontractor’s claim that the applicable statute of limitations was the state’s six year statute governing breach of contract claims because the PPA statute in question was a “specialized remedy provided for by statute.” Thus, the special statutory one year limitation on causes of action for breach of contract applied.

The Subcontractor has appealed, and asked ASA to enter an amicus appearance supporting its position in asking the Tennessee Appeals Court to reverse the trial court decision.

B. *The Issue/Policy Interests.*

The Subcontractor’s primary issue on appeal is what the applicable statute of limitations is under the PPA: one year for contract penalties, or six years for breach of contract.

C. *Is the issue presented preserved for appeal? What is the certainty that the issues will be decided on appeal?*

The issue is preserved and there is substantial certainty it will be decided on the Appeal.

II. *Factors and Considerations for SLDF Involvement.*

A. *Generally.*

ASA’s Board of Directors requires the SLDF Task Force to consider the following factors, namely whether:

(a) *The issue(s) specifically interest construction Subcontractors and suppliers.*

Preservation and enforcement of Prompt Pay Act protections is a core issue for ASA members.

(b) *The issue is focused and clearly presented.*

The issue is focused and clearly presented.

(c) There is a consensus among ASA members on the issue(s).

There should be consensus among ASA members on the core issue of robust and common sense enforcement of subcontractor rights under state prompt pay laws.

(d) ASA could have a meaningful impact in the judicial proceedings.

ASA could have a meaningful impact on the proceedings by detailing for the appeals court the importance of prompt pay to subcontractors, and the legislative and policy importance of an interpretation of the prompt pay law that enhances the intent of the statute and provides a meaningful incentive to owners and contractors to comply with the law's requirements.

(e) Is the proceeding likely to result in setting favorable judicial precedent (or avoiding setting unfavorable judicial precedent) primarily in appellate level court proceedings or other reported formats.

Because this appeal is pending before the Tennessee Court of Appeals, it is not before the highest court in the state, but is a claim of first impression that will have strong persuasive impact in Tennessee. However, the fact specific nature of the dispute here, the state specific payment statute, and the relatively statute of limitations issue the Subcontractor is appealing on (e.g., whether the trial court incorrectly relied upon a state specific one year tort 'penalty' limitations statute) may limit the 'broader' impact beyond Tennessee borders.

(f) The issue or forum is of high visibility from a public relations standpoint.

Prompt Pay Act enforcement is high visibility.

(g) Whether a party seeking ASA's intervention has agreed to indemnify ASA for its expenses incurred should the case be settled prior to a final decision in the proceeding.

The Subcontractor has agreed to this.

B. Amicus Brief Deadline and Procedure.

The Contractor's Brief is due August 28, 2019, with the Subcontractor's Reply Brief due 15 days later (September 12, 2019). Subcontractor's counsel has indicated that he may ask for an extension, and if so that will push back the timing of any amicus brief.

Tennessee Rules of Appellate Procedure require that any amicus brief be filed only upon the granting of a motion for leave. Subcontractors' counsel has inquired at the Court of Appeals on preferred process and was told that typically they would recommend any amicus brief be filed conditionally with the Motion for Leave so if the Court grants the Motion the amicus brief will be deemed immediately filed.

If ASA approves filing a brief, it will ask amicus counsel to provide ASA's General Counsel with a draft of the brief for review, comment and approval at least three (3) business days before the brief is due.