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Court Reverses MSBCA on Timeliness of Claim

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When does the 30-day clock start running for a contractor to file a timely notice of claim? With apologies to Bob Dylan: “The answer, my friend, is blowin’ in the wind.” (<https://www.youtube.com/watch?v=vWwgrjjIMXA>). The Court of Special Appeals, however, answered that in the face of competing factual inferences, the MSBCA should not have determined when the clock started in ruling on a Motion for Summary Decision.

In *Manekin Construction, Inc. v. Md. Dep’t of General Services*, filed on June 28, 2017 (<http://www.mdcourts.gov/opinions/cosa/2017/0600s16.pdf>), the Court of Special Appeals reversed the MSBCA decision to make findings of fact in a hearing on a Motion for Summary Decision, without providing the contractor a plenary evidentiary hearing on all relevant facts. There was a genuine dispute of material fact as to when Manekin Construction, Inc. (“Manekin”), knew or should have known of the basis for its contract claim and disputed inferences to be drawn from underlying facts. Accordingly, the MSBCA erred in granting Summary Decision in favor of the Maryland Department of General Services (“DGS”) on whether the contractor failed timely to file its claim against DGS.

Facts

DGS awarded a contract to Manekin to build a two-story barracks and one-story garage for the Maryland State Police. Early in construction, Manekin submitted a proposed change order (“PCO”) requesting additional compensation for delays allegedly caused by DGS.

Manekin and DGS discussed the PCO at three progress meetings in January and February 2012. The PCO was designated as “void” in the meeting minutes and the PCO log. In the minutes of a January 2012 progress meeting, DGS referenced a need for a fragnet which might support Manekin’s claim. Significantly, there was a note to “leave discussion open.”

A year later, after substantial completion, Manekin formally requested an equitable settlement, again seeking compensation for the delays claimed in the PCO. DGS formally denied the request and, within 30 days, Manekin submitted its formal claim. DGS again denied the claim, finding that Manekin failed to submit its claim within thirty days of when Manekin knew or should have known of the basis of its claim.

Appeal to the MSBCA

Manekin appealed DGS's decision to the MSBCA, and DGS moved for Summary Decision on whether Manekin's claim was untimely. Manekin's project manager ("PM") was the only witness who testified at the MSBCA hearing. The PM testified that Manekin was asked to produce a fragnet to justify the request for compensation in the PCO, that Manekin did not receive a formal denial from DGS, and that the parties had ongoing discussions regarding the claim in the PCO.

The MSBCA acknowledged that although the meeting minutes designated the PCO as "void," there was also a note to "leave discussion open." However, during the PM's testimony, the MSBCA stopped the hearing and granted DGS's Motion for Summary Decision. The MSBCA found that Manekin knew or should have known the basis of its claim as of March 1, 2012 and that Manekin's notice of claim was filed one year late.

The Circuit Court for Howard County affirmed the MSBCA's decision and it ruled that substantial evidence in the record supported MSBCA's decision.

The Court of Special Appeals' Opinion

Manekin noted an appeal to the Court of Special Appeals, which reversed the MSBCA ruling. The court first noted that the Circuit Court's application of the substantial evidence test was inapplicable in the posture of the case before the MSBCA. On a Motion for Summary Decision, the only questions are whether there are undisputed material facts and whether, on the basis of those facts, the moving party is entitled to judgment as a matter of law. See COMAR 21.10.05.06.D. Application of the substantial evidence standard would have been appropriate only if it were appropriate for the MSBCA to make findings of fact on a Motion for Summary Decision.

The Court reasoned that in determining when Manekin knew or should have known the basis of its claim and whether Manekin's claim was timely, the MSBCA was required to determine whether Manekin had notice that there was an actual dispute between it and DGS on the basis for its claim more than thirty days before its notice of claim was filed. COMAR 21.07.02.05-1D provides that a contractor shall file a written notice of claim with the procurement officer "[w]ithin 30 days after contractor knows or should have known of the basis for a claim relating to [its] contract."

The only testimony before the MSBCA as to the meaning of the term "void" was the PM's testimony that he interpreted "void" to mean the issue would be left open to raise again at a later date and not until Manekin had submitted the additional information requested, *i.e.*, the fragnets. The MSBCA questioned why DGS continued to ask for fragnets while designating the PCO as void. Manekin did not concede that the parties established a deadline for

submission of fragnets.

COMAR 21.10.05.06.D(2)(a) requires that the MSBCA, in ruling on a Motion for Summary Decision “resolv[e] all [fact] inferences in favor of the party against who the Motion is asserted,” here, Manekin. The Court held that the MSBCA relied on notations in the Proposed Change Order log and meeting minutes to make two improper factual inferences against Manekin prior to a full hearing on the merits: (1) that Manekin knew or should have known that DGS rejected the PCO based on the notation of “void” in the meeting minutes; and (2) that Manekin had missed a fixed deadline in 2012 to give DGS the fragnets for the PCO. The Court, therefore, remanded the case to the MSBCA to answer – after a full evidentiary hearing – the question of when it can be said that Manekin knew or should have known the basis for its claim. As of now, the answer my friend is . . .