SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1984-20

CROWDERGULF, LLC,

Plaintiff-Respondent,

and

BIL-JIM CONSTRUCTION CO., INC., MAPLE LAKE, INC., JOSEPH PALMISANO, JAY HAJESKI, SEAN WALL, and WALTER EVERETT,

Plaintiffs/Intervenors-Respondents,

v.

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF PURCHASE AND PROPERTY, and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants-Appellants.

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Submitted January 24, 2022 – Decided April 22, 2022

Before Judges Accurso, Rose and Enright.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1855-18.

Andrew J. Bruck, Acting Attorney General, attorney for appellants (Melissa H. Raksa, Assistant Attorney General, of counsel; Kathrine Hunt, Lauren Elbaz, and Alison Keating, Deputy Attorneys General, on the briefs).

Chiesa, Shahinian & Giantomasi, PC, attorneys for respondent CrowderGulf, LLC (John F. Casey, on the brief).

Lowenstein Sandler LLP, attorneys for intervenor-respondents Bil-Jim Construction Company and Maple Lake, Inc. (Naomi D. Barrowclough, on the brief).

PER CURIAM

The State of New Jersey appeals, on our leave, from November 13, 2020 orders granting partial summary judgment on liability to plaintiff CrowderGulf, LLC, and its subcontractors, Bil-Jim Construction Co., Inc. and Maple Lake, Inc., holding the State liable to plaintiff "for any and all liability" imposed on it "by way of judgment or settlement" including costs of defense, in a Prevailing Wage Act case pending in federal court, Palmisano v. CrowderGulf, LLC, Docket No. 3:17-cv-09371-PGS-TJB (D.N.J. filed Oct. 25, 2017). We reverse.

Because the trial court granted CrowderGulf's motion on liability before discovery was complete, and indeed while the State's motion to compel discovery from CrowderGulf was pending, certain facts remain unresolved — most notably, whether this was a prevailing wage contract and whether CrowderGulf reasonably relied on the State's opinion it was not. With that caveat, this is what we know.

On January 11, 2013, less than three months after Superstorm Sandy tore through New Jersey, the Department of Treasury, Division of Purchase and Property posted a Request for Quotations on behalf of the Department of Environmental Protection for the award of a one-year contract to clear debris from the State's bays and tidal rivers and dredge, pump and screen the sand the storm had deposited in them, redistributing it on the coastal barrier islands. The State's Standard Terms and Conditions, incorporated in and made part of the RFQ, defined that contract as consisting "of these . . . Terms and Conditions, the Agency Request, the proposal submitted by the Contractor, the subsequent written document memorializing the agreement (if any), any amendments or modifications and any attachments, addenda or other supporting documents."

The Terms and Conditions notified bidders the Prevailing Wage Act, N.J.S.A. 34:11-56.25 to -56.47, was "part of every contract entered into on behalf of the State of New Jersey through the Division of Purchase and Property, except those contracts which are not within the contemplation of the Act," and that compliance was "mandatory and cannot be waived by the State, the Director, the Division or [DEP]." The bidder was further advised his "signature on the proposal is . . . his guarantee that he and any subcontractors he might employ to perform the work covered by this proposal will comply with the provisions of the Prevailing Wage and Public Works Contractor Registration Acts, where required." Finally, the Standard Terms and Conditions warned bidders "the State and [DEP] assume no obligation to indemnify or save harmless the Contractor, its agents, servants, employees or subcontractors for any claim which may arise out of its performance of the Contract," and that "[a]ll claims asserted against the State and/or [DEP] by the Contractor shall be subject to the New Jersey Tort Claims Act, N.J.S.A. 59:1-1, et seq., and the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1, et seq."

The Division accepted questions from bidders about the RFQ through January 14, posting its answers to all questions received the following day,

along with a revised RFQ, incorporating the questions and answers into the contract. Among the questions received was one from CrowderGulf inquiring, "Is this a prevailing wage contract? If so, please provide the wage rates." Based on its own prior analysis and consultations with New Jersey's Department of Labor, the Attorney General's Office and the Federal Emergency Management Agency over related contracts, the Division answered, "No, this is not a prevailing wage contract." The following month, the State awarded the central region contract covering the Navesink and Manasquan Rivers and Barnegat Bay to CrowderGulf, an Alabama company boasting nearly fifty-years' experience in disaster recovery, debris removal and coastal restoration. CrowderGulf subsequently subcontracted with Bil-Jim to perform the work. CrowderGulf, Bil-Jim and its affiliate, Maple Lake, completed the work, with CrowderGulf receiving in excess of $54 million on the contract. CrowderGulf has since averred it expended over $36 million in costs on the project, leaving it slightly more than $18 million in profits.

In October 2017, a few years after the completion of the work, several Bil-Jim employees filed the Palmisano suit, on behalf of themselves and a class of similarly situated workers, in federal court against CrowderGulf, claiming unpaid wages under the Prevailing Wage Act. CrowderGulf

thereafter submitted its notice of claim to the State under the Contractual Liability Act. In August 2018, it filed this action in the Law Division seeking indemnification from the State for any "liability imposed upon CrowderGulf in the federal court lawsuit" under a number of equitable theories, including indemnification, promissory estoppel, failure to turn square corners and unjust enrichment, as well as on a breach of contract theory. Bil-Jim and Maple Lake were permitted to intervene as plaintiffs.

After the State filed a motion against CrowderGulf seeking discovery as to its reliance on the State's representation that this was not a prevailing wage contract, including any analysis of the question CrowderGulf had undertaken, as well as its prior contracts for similar work in other states, CrowderGulf moved for partial summary judgment on liability, which Bil-Jim and Maple Lake joined. The trial court heard the motions together, granting CrowderGulf's motion on liability and deeming the State's discovery motion "withdrawn."

As to CrowderGulf's motion for indemnification, the judge found the contractor "completely without fault." He found it "submitted a proposal which took into account the fact that the RFQ was not . . . subject [to] prevailing wage, in direct reliance on the referenced statement by [the State]"

(emphasis added). CrowderGulf performed under the contract and then got sued for not paying the prevailing wage. The judge found "[t]here is no doubt and there's no ambiguity in terms of what the contract says[,] . . . [t]he questions and answers were incorporated into the final agency request." The judge concluded "the standard terms and conditions do not apply to the extent they are inconsistent with the more specific later contractual representation."

The judge opined "a claim for implied indemnification arises without agreement and by operation of law to prevent a result which is regarded as unjust or unsatisfactory." He found "no disputed issues of fact nor . . . any ambiguity in any of the contractual language that the [State] must indemnify [CrowderGulf] for any prevailing wages due in the federal lawsuit." He concluded "[s]o that means if the [Prevailing Wage Act] does apply, which will be determined in the federal lawsuit, there is no disputed issue of fact and it's clear as a matter of law that the [State] ha[s] breached the contract by failing to pay [CrowderGulf] for the appropriate wage."

The judge rejected the State's argument that CrowderGulf's claim was not ripe and its motion on liability premature because the federal court had not determined the Prevailing Wage Act applied, declaring "a decision on this motion is what should occur first." He found "there was no additional

discovery that would impact the pending application," "no legal impediment to the [trial court] deciding [its] motion first," and no "legal authority to say that th[e] [trial court] has to wait until the federal court issues its decision."

After the judge indicated his belief that his ruling on liability mooted the State's discovery motion, the State pointed out that CrowderGulf's claim was essentially an equitable one for lost profits, which the State continued to maintain were not recoverable here. Nevertheless, the State contended if the court disagreed, the State certainly was entitled to discovery both as to CrowderGulf's reasonable reliance on the alleged misrepresentation and the extent of its claimed lost profits.[1] Deeming the motion "not really ripe for the court to address," the judge determined to "see what happens in the federal action," after which discovery could be revisited if necessary. He also concluded CrowderGulf's and Bil-Jim's "profits do not have any relevance [as to] whether the State should be held liable for its affirmative contractual representation that the project was not subject to the Prevailing Wage Act."

[1] CrowderGulf also had a pending discovery motion against the State, seeking more specific answers to interrogatories geared to ascertaining its present opinion as to the applicability of the Prevailing Wage Act to the contract. It agreed with the court, however, that the ruling on liability rendered its motion moot.

Finally, the judge found CrowderGulf "entitled to all costs in defending the federal lawsuit, including attorney's fees." Relying on Central Motor Parts Corp. v. E.I. duPont deNemours & Co., Inc., 251 N.J. Super. 5 (App. Div. 1991), the judge found "a common law indemnitee forced to defend claims for which liability is only vicarious, is entitled not only to costs for any judgment or reasonable settlement, but also the costs of defense occasioned by the indemnitor's fault." The judge denied the State's motion for reconsideration.

The State appeals, arguing it cannot be found liable for an employer's prevailing wage violations absent a contractual basis for liability; the trial court disregarded the express provision of the contract barring indemnification and exposed the State to damages foreclosed by the Contractual Liability Act; the trial court's decision to hold the State liable for an "affirmative contractual representation" does not equate to a breach of contract; and the trial court erred by granting partial summary judgment on less than a full record. We agree the State's arguments have merit and that this judgment on liability cannot stand.

We, of course, review summary judgment de novo, applying the same standard as the trial court, Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021), without deference to interpretive conclusions of statutes or the common law we believe mistaken, Nicholas v. Mynster, 213 N.J. 463, 478

(2013), Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

CrowderGulf claims the trial court "held the State liable for its contractual misrepresentation." Frankly, we are unsure of the basis of the court's liability holding here. As the State points out, the court dismissed CrowderGulf's claim for negligent misrepresentation on the State's Rule 4:6-2 motion, and a contractual misstatement of law, if indeed there was one, is not the same thing as a breach of contract.

A prima facie case for breach of contract requires "a valid contract, defective performance by the defendant, and resulting damages." Coyle v. Englander's, 199 N.J. Super. 212, 223 (App. Div. 1985). CrowderGulf's breach of contract claim founders on both the second and third prongs. Leaving aside the State fully performed the contract by paying CrowderGulf the agreed price for the work, CrowderGulf has not even established the State made a contractual misrepresentation. It can't establish damages for the same reason — no court has ruled that this was a prevailing wage contract. The question isn't the amount of damages, as a ruling on liability would imply, it's whether the State breached or indeed made any misrepresentation and, if it did,

whether CrowderGulf suffered any damages. Accordingly, any ruling based on a breach of contract theory was, at best, premature.[2]

CrowderGulf's equitable claims fare no better, and perhaps worse. The State's Standard Terms and Conditions, made a part of the contract, state plainly that the State assumed no obligation to defend the contractor for claims arising out of the performance of the contract. They further provide the contract is covered by the Prevailing Wage Act to the extent the Act applied, that the State could not waive the Act's applicability, and that CrowderGulf guaranteed by its signature on the bid that it and its subcontractors would comply with the Act where required. The Contractual Liability Act expressly bars suit against the State "for claims based upon implied warranties or upon contracts implied in law." N.J.S.A. 59:13-3; see also Allen v. Fauver, 327 N.J.

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[2] We also note our disagreement with the trial court's finding that the contractual terms are clear, and that "the standard terms and conditions do not apply to the extent they are inconsistent with the more specific later contractual representation." The exculpatory provisions in the State's standard terms as to prevailing wage appear particularly robust, requiring any court faced with a contractor's claim based on an alleged misrepresentation as to the applicability of the Prevailing Wage Act to account for both the exculpatory clauses and the alleged misrepresentation — not reading out either — in divining the meaning and intent of the contract terms. See P.T. & L. Constr. Co. v. State, Dep't of Transp., 108 N.J. 539 (1987) (addressing the analysis of the State's liability for alleged misrepresented site conditions in contracts containing general exculpatory clauses disclaiming liability for differing site conditions).

Super. 14, 19 (App. Div. 1999); Major Tours, Inc. v. Colorel, 799 F. Supp. 2d 376, 408 (D.N.J. 2011) ("the Contractual Liability Act, N.J.S.A. 59:13-3, forecloses liability from being imposed upon the State for contracts implied-in-law").

As we held almost fifty years ago with regard to the Prevailing Wage Act, "[a]bsent some contractual provision as the basis for such liability, justification for finding a public body liable for a deficiency owing to employees under the act must be found in the provisions of the act itself." Male v. Ernest Renda Contracting Co., Inc., 122 N.J. Super. 526, 537 (App. Div. 1973), aff'd, 64 N.J. 199, cert. denied, 419 U.S. 839 (1974). We further found there was "no way that the act can be read to impose the sanctions or remedies expressly imposed on the employer on the public body" and disapproved a Chancery Division case, Male v. Pompton Lakes Borough Mun. Utils. Auth., 105 N.J. Super. 348, 359, 361 (Ch. Div. 1969), permitting indemnification of a contractor/employer by a municipal authority that violated the Act by failing to specify the prevailing wage rate in the contract. Id. at 537-38. To our knowledge, that holding has not since been questioned.

CrowderGulf attempts to distinguish Ernest Renda on the facts, noting our observation there that the Chancery judge found the municipal authority

"did not mislead Renda with respect to the application of the act to the work in question." Id. at 537. True, but CrowderGulf can point to no case or statute allowing indemnification from the State for prevailing wages, and its brief is remarkably silent as to those statutes, namely the Contractual Liability Act and the Prevailing Wage Act, which would appear to preclude it.

Further, assuming arguendo that CrowderGulf could recover on one of its multiple equitable theories, they all rest on the trial judge's finding that it relied on the State's opinion that this was not a prevailing wage contract, although the State vigorously contested the fact of CrowderGulf's reasonable reliance. The State's motion to compel discovery into CrowderGulf's reliance was pending when the judge entered judgment on liability and expressly rejected the relevance of CrowderGulf's $18 million net profit in seeking indemnification for an estimated $4 million in unpaid wages.

Although we are confident summary judgment on liability to CrowderGulf was improvidently granted, we decline the State's invitation to find the contractor's claims barred as a matter of law. It is abundantly clear to us that this matter is not ripe for ultimate resolution — not in the trial court

and not here.[3] "Ripeness is a justiciability doctrine designed to avoid premature adjudication of abstract disagreements." Garden State Equal. v. Dow, 434 N.J. Super. 163, 188 (Law Div.), certif. granted, 216 N.J. 1, stay denied, 216 N.J. 314 (2013). Without a determination of whether this was or was not a prevailing wage contract, the issues here are only academic ones that may never need to be reached. See Beadling v. Sirotta, 39 N.J. 34, 35 (1962). Although the question of liability might ultimately be decided as a matter of law, we remain mindful of the Court's admonition that important issues involving significant policy considerations that reach beyond a particular case should not ordinarily be decided on less than a full record. See Jackson v. Muhlenberg Hosp., 53 N.J. 138, 142 (1969).

While we have directed our comments primarily to CrowderGulf's claims, most apply with equal or greater force to those of Bil-Jim and Maple Lake. Those parties were permitted to intervene as plaintiffs, apparently on the theory that they were entitled to a portion of any recovery obtained by CrowderGulf in this action. Neither, however, briefed their entitlement to

[3] As the State notes, the trial court's premature ruling here, shifting CrowderGulf's liability for unpaid wages adjudicated in the federal action by judgment — or settlement — as well as defense costs to the State, effectively removed any incentive for CrowderGulf to mount a defense to the federal claims.

partial summary judgment on liability in the trial court; they simply "joined" in CrowderGulf's motion.[4] The trial court awarded partial summary judgment to both without any analysis. But Bil-Jim and Maple Lake are not in privity with the State, having no contractual relationship with it. Their claims obviously stand on a different footing than those of CrowderGulf, and it is unclear to us the basis for entry of partial summary judgment in their favor against the State on any theory of liability.

In sum, while we entertain some doubt as to whether CrowderGulf, or Bil-Jim and Maple Lake, could ultimately prevail on their claims against the State in light of the terms of the contract and the provisions of the Prevailing Wage and Contractual Liability Acts, we are not prepared to enter judgment dismissing their claims at this stage. Entry of judgment on liability against the State was error on both facts and law. Accordingly, we reverse the November 13, 2020 orders for partial summary judgment and remand to the trial court for further proceedings consistent with this opinion.

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[4] In their brief on appeal, Bil-Jim argues it's not correct that it didn't brief the motion, asserting it filed a "reply letter brief in further support" of that motion. As parties are prohibited from raising new issues in a reply brief, Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div. 2001), we are satisfied with the State's representation on this point.

Although any decision as to the State's liability to CrowderGulf and its subcontractors must await the result of the federal suit, the State must be accorded its right thereafter to full discovery on CrowderGulf's claim as to both liability and damages prior to entry of final judgment in this case. While we have expressed some doubt as to the viability of the claims asserted against the State here, we underscore we have done so on the basis of a very truncated record. We take no position regarding the outcome of the action on remand following conclusion of the federal action, and we do not intend anything we've said here to presage a particular result. We do not retain jurisdiction.

Reversed and remanded.